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IS VOTING-RIGHTS LAW NOW AT WAR WITH ITSELF? SOCIAL SCIENCE AND VOTING RIGHTS IN THE 2000s

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As the redistricting of the 2000s commences, voting-rights law is at a critical juncture. Changes in constitutional law during the 1990s, as well as shifts in voting behavior during that decade, raise novel and profound challenges to how the Voting Rights Act and the Constitution will be applied to the mix of race and politics in the current redistricting. In the 1990s, voting-rights law required the creation of "safe" majority-minority districts in which minority voters constituted an electoral majority. Social science evidence on the eve of the 2000 redistricting suggests instead that today, in many places, "coalitional" districts, in which minority voters constitute a third of voters or more, but not a majority, are now sufficient to ensure minority communities an equal opportunity to elect candidates of their choice. This has come about because white voters now appear willing, in many places, to vote for black candidates at higher levels than a decade ago. For constitutional purposes, there are now questions about whether the safe districts of the 1990s can survive strict scrutiny in the 2000s, if coalitional districts are sufficient to ensure equal electoral opportunity. For Voting Rights Act purposes, there are now questions about whether the Act either requires or permits such coalitional districts. This Article first explores the critical legal issues that will emerge in the 2000 redistricting process, in light of changes in the law and in voting behavior in the 1990s. The Article then questions whether the policies of the Voting Rights Act, which might be thought to favor coalitional districts where they are sufficient to ensure equal electoral opportunity, will nonetheless be in tension with judicial administration of the Act, which might continue to require safe minority election districts.

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* Professor of Law, New York University School of Law. This is an expanded version of comments originally given at the North Carolina Law Review's Symposium, *Democracy in a New America*, held February 17, 2001. *See* 79 N.C. L. REV. 1203 (2001). I am particularly indebted to Sam Hirsch, of Jenner & Block in Washington, D.C., for detailed readings and incisive comments, many of which have helped frame the issues discussed here. Richard Briffault, Bernie Grofman, Sam Issacharoff, and Heather Gerken also reshaped this piece through their substantive responses to earlier versions.

Law and social science are perhaps nowhere more mutually dependent than in the voting-rights field. Empirical studies in this area are not merely of evidential significance; nor is cutting-edge social-scientific research simply a relevant resource to which litigants and courts might turn as one potential tool for interpreting and applying the law. Instead, the critical elements of the cause of action that the Voting Rights Act ("VRA")[1] creates are defined in terms of legal concepts that necessarily must be given content through the kind of data that social-scientific analysis makes available. The VRA addresses the aggregate behavior, not of individual voters or state actors acting in isolation, but of groups of white and black (and other minority) voters whose combined patterns of voting behavior are the law's focal point. The critical legal question in most cases, particularly those involving redistricting, is whether group voting behavior is "racially polarized" in specific jurisdictions and if so, to what extent. Determining whether voting is "racially polarized" is the central element in establishing the key legal predicate of liability for whether election structures impermissibly dilute minority voting power.[2] If voting is racially polarized, jurisdictions become legally

1. 42 U.S.C. § 1973 (1994).

2. *See generally* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992) (chronicling the doctrinal developments by which the element of "racially polarized" voting came to be

obligated, within certain constraints, to design their political institutions in ways that counter this pattern of polarized voting. The resolution of these questions shapes the fundamental design of our basic representative institutions, from city councils to the United States Congress.

But voting-rights law depends directly upon social-scientific analysis for other reasons as well. Voting-rights law is also uniquely responsive to changes in empirical findings as new data become available. In this respect, voting rights law stands in sharp contrast to other areas of constitutional law in which empirical insights might be relevant to legal doctrine, but sporadically or contingently. In more conventional areas of constitutional law, once a court establishes principles of law based on empirical facts (or even assumptions about those facts), it is notoriously difficult to get the court to revisit the issue based on claims that new social-scientific work shows those facts and assumptions now to be faulty.[3] But constitutional principles require the redrawing of virtually every legislative election district, for every representative body in the country with "general governmental powers,"[4] every ten years. And to know whether those districts comply with both the statutory and constitutional constraints that now regulate the entire process, courts and others must act on the basis of current patterns of actual voting behavior among various groups of voters. As a result, in the voting-rights field, there is an automatic, constitutionally grounded trigger that requires a decade-by-decade updating of the law's application based on the most current social-scientific findings on such things as the extent of racially polarized voting patterns. This legal requirement also generates unique incentives for social scientists to re-examine the state of

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the central question in application of the Voting Rights Act during the 1980s). As Issacharoff points out, the concept of polarized voting, or racial bloc voting, had been central to the way social scientists operationalized the concept of vote dilution, but not to the legal definition of vote dilution until Congress amended the Voting Rights Act in 1982 and the Supreme Court then "fastened on the polarized voting inquiry as the heart of a vote dilution claim," *id.* at 1850, in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

3. For an exploration of the role of empirical facts in the development of constitutional rules, see generally Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988). Most areas of constitutional law do not have an "action forcing" mechanism, comparable to the requirement of decennial districting, that forces the law to re-examine rules based on empirical assumptions or facts that have changed since a rule or doctrine was initially established.

4. The Court extended the one-person, one-vote requirement to local governmental bodies that exercised "general governmental powers" or "important governmental functions" in *Hadley v. Junior College District*, 397 U.S. 50, 53–54 (1970), and *Avery v. Midland County*, 390 U.S. 474, 485–86 (1968).

knowledge regarding voting behavior at the start of each new decade of redistricting. Various actors in the redistricting process—politicians, independent redistricting commissioners, consultants, lawyers, and ultimately state and federal judges—then in turn become legally bound to take this new state of social-scientific knowledge in creating and evaluating the design of political institutions for the coming decade.

But if the domains of law and social science are interpenetrating in unique ways in the voting-rights field, these domains nonetheless also are motivated by distinct concerns and respond to distinct internal imperatives as well. Each domain is constituted by a set of internal, organizing purposes and constraints; these purposes and constraints can generate tension between law and social science, rather than conflict-free cohabitation. One difference is that social scientists tend to operate more directly through a model of social engineering; given a set of objectives the law defines, social scientists often seek the most functional way of realizing those objectives. Doing so might require urging courts to make highly contextual, case-specific judgments based on detailed immersion in the full factual complexities of the particular issue. But the law often, for justifiable reasons, declines these invitations. Law often operates with cruder tools than those of social science—not because law is less sophisticated, but because it responds to distinct institutional and other pressures. Courts must not just decide cases before them, but also generate legal rules that provide appropriate guidance for the hundreds of cases that might raise similar issues. Moreover, courts in voting-rights cases must construct a legal framework not just for lower courts, but for political and other actors who, in the first instance, must make decisions each decade about how to design representative institutions. Tension therefore arises—particularly in the voting-rights field—between the tendency of the law to seek bright-line, easily administrable, and therefore more formalistic rules, and the tendency of social scientists to seek a more functional, and less formal, model of optimal institutional design in each and every context.

In addition, in cases involving the raw distribution of political power, courts are particularly drawn to bright-line, formal rules precisely because rules of this sort might mitigate the tension between a necessary judicial role in this area and the risk that courts will appear to be partisan players in the most political act of all: designing representative institutions and allocating political power. Legal principles that allow for too great a functional, case-by-case analysis

run the risk of not seeming to detach courts enough from the intensely partisan struggles that the law seeks to moderate. After *Bush v. Gore*,[5] courts might feel even greater pressure to administer the law of politics through formal, bright-line rules that appear to distance the courts from underlying struggles over political power.

This tension between formal and functional considerations is likely to intensify during the 2000 round of redistricting and the predictable wake of litigation that will follow. Social scientists tend to emphasize accuracy of analysis in each individual context; in social science, a "rational" approach typically takes the form of a thoroughgoing functional analysis that examines how voters function in each specific context to which the law might apply. But legal "rationality" often includes a central role for more formal, bright-line, easily administered rules. Sociologist Arthur Stinchcombe defines formality as "abstractions that govern."[6] And although "formality" has become a term of indictment, perhaps because it has come regularly to be conceived and discussed in terms of its pathologies, Stinchcombe rightly recognizes that formality is central to law and can have a well-justified, functional role.[7] But that understandable formalism will bring legal results into tension with social-scientific prescriptions.

Furthermore, when social scientists interact with voting-rights law, they often isolate a discrete legal question and organize their inquiry around that particular question. Their data collection and analysis is oriented toward suggesting how that particular question, in light of the data, ought to be answered. This kind of work, again for understandable disciplinary reasons, rarely considers the web of legal issues surrounding the particular issue being isolated. Social scientists are unlikely to address the complex interrelation among legal issues; they might fail to appreciate that the way the law addresses one question might have implications for an array of other, related questions—and that these implications will reflect back on how courts are likely to approach any one particular isolated issue. This disciplinary tendency is evident in social science work on voting rights, particularly as voting-rights law has become more imbricated

5. 531 U.S. 98 (2000).

6. ARTHUR L. STINCHCOMBE, WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS 43 (2001).

7. *Id.* at 2 ("I argue that a clearer understanding of how formality works to accurately and usefully reflect substance will allow us to see . . . that at its best [formality] does better with the substance than we could do informally.").

and as any one issue has likely gravitational or direct effects on many others.

In light of both the promise social-scientific analysis already has had for voting-rights law, and the tension that nonetheless exists between law and social science, the aim of this Article is to explore the coming relationship, in the 2000s redistricting, between law and social science. During the 1990s, the constitutional law framework of redistricting changed dramatically with respect to the permissible role for racial considerations in that process. In addition, the more general constitutional law regarding race-conscious public policies also changed in ways that will bear on the coming redistricting. From the social-scientific side, the first systematic studies of voting patterns during the 1990s similarly reveal dramatic changes from the previous decade. The 1990s saw the real emergence of a robust, genuine two-party political system across most election contests in the South for the first time in over a century. Among the consequences are a Republican Party that has attracted a large percentage of white voters, a Democratic Party whose electorate in the South is increasingly black, and a significant percentage of white voters (roughly around one-third)[8] who regularly cast votes for black candidates running against white competitors.

How should these developments of the 1990s, legal and political, affect the design of democratic institutions over the next decade? This Article is designed to suggest some of the new legal questions that likely will emerge from the convergence of the legal developments and social-scientific findings of the 1990s. The legal issues I explore here center around the role of what I call "coalitional" versus "safe" minority election districts. "Safe districts" were the legally required strategy for complying with the VRA in the 1990s. Safe districts are those in which a majority of the voting-age population is made up of minority voters. By making a minority the actual majority in an election district, safe districting can ensure that minority voters control the outcome in such districts. Coalitional districts, instead, are those with a significant minority population and white voters who are willing to form interracial political coalitions in support of minority candidates. When coalitional districts exist or can be created, they can also elect minority candidates, but through interracial coalitions. The interesting legal issues to emerge in the current round of redistricting will be how the VRA and the U.S. Constitution ought to apply to the choice between coalitional and safe

8. For the specific data, see *infra* notes 33–34 and accompanying text.

districts in the 2000s. My aim is to identify these novel legal issues and reflect on the questions they raise.

Finally, this Article will step back from the legal and social-scientific questions to assess more broadly the kind of politics and political culture that voting-rights law might now generate. Ironically, the result might be that the way in which courts apply this law in the 2000s will undermine the very purposes that voting rights seeks to realize. The law's purposes, and the concrete constraints on actual judicial administration of doctrines designed to realize those purposes, might be in such tension that voting-rights law will be at war with itself in the first decade of the 2000s.

I. SOCIAL SCIENCE DEVELOPMENTS ON THE EVE OF REDISTRICTING 2000

A. 1990

The 1990s redistricting was the first to take place under the requirements of the major amendments to the VRA that Congress made in 1982. Those amendments established a "results" test for determining when the constitutional right to vote had been abridged.[9] According to the text of those amendments, a group's right to vote was illegally abridged "if, based on the totality of the circumstances, it is shown that... [members of a protected class of minority-group citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[10] As the Supreme Court soon construed the 1982 Amendments, they required jurisdictions to avoid redistricting plans that diluted the voting power of minority voters if those voters were politically cohesive, voting was regularly polarized along racial lines,

9. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (1982)). In light of recent decisions involving judicial enforcement of limitations on Congress's power to enforce the Fourteenth Amendment, *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997), the question of whether the results test of the 1982 Amendments is within Congress's powers to enforce the Fourteenth and Fifteenth Amendments has re-emerged as a serious constitutional issue. For discussion of lower court treatment of the constitutionality of the 1982 Amendments, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 741–45, 859–66 (2001). *See generally* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies after* Flores, 39 WM. & MARY L. REV. 725 (1998) (discussing the constitutional exercise of congressional power under sections 2 and 5 of the Voting Rights Act). The Supreme Court has not yet directly addressed the constitutionality of amended section 2.

10. 42 U.S.C. § 1973 (1994).

and the minority community was "sufficiently large and geographically compact" enough that an alternative redistricting plan could be drawn that countered the effects of this polarized voting.[11] "Racially polarized voting," as a Supreme Court plurality defined it, "refers only to the existence of a correlation between the race of voters and the selection of certain candidates,"[12] when that correlation is strong enough that white voters can regularly defeat the candidates that black voters prefer.[13] This definition, though not without controversy, remains the law.[14]

On the eve of a new decade's redistricting, the relevant data for whether voting is racially polarized necessarily will refer back to the prior decade's elections. When the 1990s redistricting commenced, election data from throughout the 1980s revealed that racially polarized voting, as the Court defined it, was a pervasive fact of political life. The most monumental study of these patterns, *Quiet Revolution in the South*, focused on the region ("the South") that had been the target of the original 1965 VRA's "special coverage" provisions.[15] As I have noted elsewhere:

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11. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). Justice Brennan delivered the Court's opinion, but only Justices Marshall, Blackmun, and Stevens joined this portion.

12. *Id.* at 74.

13. *Id.* at 48–49.

14. Under the prevailing definition of racially polarized voting, courts and statisticians do not inquire into the reasons for the divergent candidate preferences of black and white voters. In an important concurring opinion, Justice O'Connor argued that analysis of those reasons should be part of the legal inquiry into whether voting was polarized to a legally relevant extent: "I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Id.* at 100 (O'Connor, J., concurring). Thus, Justice O'Connor suggested that liability would exist if those reasons were shown to reflect racial animosity, but not if they reflected divergent political or partisan interests among racial groups. At least one lower court has taken up this suggestion and concluded that where the record "indisputably proves that partisan affiliation, not race" best explains what are otherwise racially divergent candidate preferences, the Voting Rights Act is not violated. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994). Given Justice O'Connor's current pivotal position on voting rights cases, it is certainly possible that the Court will revisit the concepts of racially polarized voting and impermissible vote dilution in the cases that emerge from the 2000 redistricting. This Article works with these legal concepts as they have been defined since *Gingles* and remain understood today.

15. *See generally* QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994) (documenting polarized voting patterns in the South). Although this book was published after the 1990s redistricting, the data it synthesized in comprehensive form was consistent with the results in more narrowly drawn studies regarding elections in these jurisdictions during the 1980s. The seven states originally covered by the 1965 Act's triggering formula for special-coverage provisions were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia; twenty-

> [O]nly 1% of all Southern state legislative districts with White majorities elected a Black legislator .... The majority of Southern states did not elect a single Black state legislator from any majority-White district. In state and local elections in Georgia during the 1980s, an average of 86% of White voters voted for the White opponent of a Black candidate. In Mississippi, no Blacks were elected to city councils in districts with less than a 50% Black population; indeed, until Black populations in these districts reached at least 65%, Blacks remained dramatically underrepresented .... In South Carolina, a separate study of 130 elections between 1972 and 1985 at the county, state, and congressional levels [revealed that, where White and Black candidates competed,] Whites on average cast 90% of their votes for the White candidate, whereas Blacks cast 85% of their votes for the Black candidate.[16]

For congressional elections nationwide, it was similarly true that at most, 1% of majority-white congressional districts elected a black candidate to Congress.[17] From 1972 to 1992, the probability of a majority-white congressional district electing a black representative remained at this negligible level regardless of a district's median family income, its percentage of high school graduates, the region of the country, or the proportion of residents who were urban, elderly,

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six counties in North Carolina were also covered originally, as well as three in Arizona, one in Hawaii, and one in Idaho. As leading researchers put it in 1992, "[u]npalatable as it may be, the simple truth is that at the congressional and state legislative level, at least in the South, blacks are very unlikely to be elected from any districts that are not majority minority, and most majority-black legislative districts and all majority-black congressional districts now elect black officeholders." BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 134 (1992) (citation omitted). *See generally* Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111 (1991) (showing no decline in racially polarized voting in the South between 1965 and 1985).

16. Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1368–70 (1995) (book review) (citations omitted) (assembling in a more accessible form certain of the central findings of the individual state studies in QUIET REVOLUTION IN THE SOUTH, *supra* note 15). In the most important case of the 1980s, North Carolina elections for the state legislature were found to be characterized, on average, as ones in which "81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections." *Gingles*, 478 U.S. at 59 n.28. The difference between primary and general elections, in an era in which a higher percentage of the Democratic Party primary electorate was white than in the 2000s, illustrates what this Article will soon discuss: how much has changed in the 2000s now that black voters constitute a much higher percentage of the Democratic Party primary electorate in states like North Carolina.

17. *See* Pildes, *supra* note 16, at 1375.

foreign born, or residents of the relevant state for more than five years.[18] In the last congressional election before the 1990 redistricting, every majority black congressional district in the South (out of four) elected a black candidate to office; only one nonmajority black district in the South (out of 112) elected a black candidate.[19]

VRA liability requires proof that the *specific* jurisdiction at issue manifests systematic polarized voting along racial lines.[20] But these numbers were typical of the pattern in most election districts with significant black voting populations.[21] As a result of these polarized voting patterns, black voters effectively had to be a majority in most election districts in the country to be able to elect a black candidate to office.[22] But both social scientists and courts took the view that, as a functional matter, a mere black population majority was not enough

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18. DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 41–45 (1997).

19. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1391 n.32 (2001).

20. *See, e.g.*, *Gingles*, 478 U.S. at 78–79 (requiring "an intensely local appraisal" of electoral dynamics in particular jurisdictions to establish liability under the VRA).

21. For an apparent exception, see *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (unanimously rejecting a VRA complaint because plaintiffs had not proven racially polarized voting existed in the relevant areas of Ohio).

22. One of the many unresolved tensions in voting rights law is how courts ought to identify "candidates of choice," which the minority community prefers. Writing only for a plurality on this issue in *Gingles*, Justice Brennan took the view that the race of the candidate was not important to polarized voting analysis. *Gingles*, 478 U.S. at 67–70. Justice White strongly disagreed on this point, *id.* at 83 (White, J., concurring), along with Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger, *id.* at 101 (O'Connor, J., concurring). Most courts include all contests, but conclude that black versus white candidate races have greater "probative value." *See, e.g.*, Buchanan v. City of Jackson, 683 F. Supp. 1515, 1531 (W.D. Tenn. 1988). Several courts have rejected Justice Brennan's approach and looked only to races in which black candidates are pitted against white candidates. *See, e.g.*, Barnett v. Chicago, 141 F.3d 699, 703 (7th Cir. 1988) (holding that black versus white candidate contests must be used to assess polarized voting); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 502 (5th Cir. 1987). Yet some courts have concluded that examining only black-white election contests is itself a "species of racialism" and that no "legal rule should presuppose the inevitability of electoral apartheid." NAACP v. City of Niagara Falls, 65 F.3d 1002, 1015–16 (2d Cir. 1995). As a result, these courts consider white-black contests. *See, e.g.*, Jenkins v. Red Clay Consol. Sch. Dist., 4 F.3d 1103, 1129 (3d Cir. 1993); Sanchez v. Bond, 875 F.2d 1488, 1495 (10th Cir. 1989); *see also* Nipper v. Smith, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc) (plurality opinion of Tjoflat, C.J., joined by Anderson, J.) (finding that elections involving black candidates provide the greatest probative evidence for determining minority voting opportunities). The text refers to jurisdictions where voters are either black or non-Hispanic whites. When a district contained a substantial (non-Cuban) Hispanic population, in addition to a black population, Hispanic voters on the eve of the 1990s voted often enough with black voters that black populations of less than 50% were sufficient to elect black candidates. For more specific debate and data on the role of black-Hispanic coalitions in electing black candidates to office, see *infra* note 38.

in itself. For several reasons, which perhaps have different normative implications, black population figures are considerably higher than the percentage of black voters who actually cast a ballot on election day. First, black populations tend to be younger than white populations in most areas; black voting-age population is therefore relatively lower than actual black total population figures.[23] Second, black voters tended to register and turn out in lower rates than white voters when the 1990s redistricting took place.[24] For black voters effectively to constitute a majority on election day, then, their share of the district's total population had to be greater than 50%.

At the extreme, some commentators and courts suggested that the total black population in a district had to reach 65% to overcome racial bloc voting patterns.[25] But by 1990, the 65% rule was considered exceptional.[26] As one of the leading analyses concluded in the mid-1990s, districts with 55% black populations were generally sufficient to enable black voters to defeat racial bloc voting, while districts less than 45% black almost never elected black representatives.[27] These analyses were reflected in the redistricting that took place in 1990: Of the seventeen majority-black congressional districts drawn in the South, for example, the black population in only two was 65% to 70%; more than half these districts, nine, had black populations between 50% to 60% and six

23. *See, e.g.*, African Am. Voting Rights Legal Def. Fund, Inc. v. Villa, 54 F.3d 1345, 1348 n.4 (8th Cir. 1995) (stating that increasing the percentage of black voters in districts is required to compensate for lower black voter turnout rates, among other factors); Prosser v. Elections Bd., 793 F. Supp. 859, 869 (W.D. Wis. 1992) (same); *see also* Ketchum v. Byrne, 740 F.2d 1398, 1415 (7th Cir. 1984) (noting that 65% black population within a district is the generally accepted guideline to ensure black voters a reasonable opportunity to elect candidates of their choice); Kirksey v. Bd. of Supervisors, 554 F.2d 139, 149–50 (5th Cir. 1977) (en banc) (finding a bare majority black overall population insufficient to meet VRA requirements where the voting age population was less than 50%).

24. *See* sources *supra* note 23.

25. The strongest proponent of this "65%" rule in academic commentary was based on work in Mississippi. *See* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 199–205 (1990). For judicial decisions endorsing this view, see, for example, *Ketchum*, 740 F.2d at 1415–16; *Kirksey*, 554 F.2d at 149–50.

26. Some courts, however, continue to refer formulaically to 65% as a "rule of thumb" for the black population required to constitute a safe district, though without contemporary empirical evidence to support that reference. *See, e.g.*, *Barnett*, 141 F.3d at 702–03.

27. LUBLIN, *supra* note 18, at 46–47. This data was based on congressional districts; other elections would require their own analysis.

had black total populations between 60% to 65%.[28] Thus, a decade ago, social science and voting-rights law converged on several critical propositions: (1) that voting was pervasively and substantially polarized along racial lines; (2) that black-majority electorates were therefore required to enable black voters to overcome racial bloc voting; (3) that black political participation, even among eligible voters, was lower than among white voters, and that it was appropriate, indeed, required, for the law to take these differences into account;[29] and (4) as a result, that where voting was in fact racially polarized, election districts must have majority-black populations, roughly around 55%, to be "safe" havens for overcoming racial bloc voting. These principles were reflected nationwide, from city council wards to congressional districts, in the redistricting of the 1990s.

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28. Grofman et al., *supra* note 19, at 1395 (providing a table of election results in southern majority black districts from 1992–98). Grofman's compilation leaves out data on Hispanic populations in these districts.

29. In the important *Ketchum* decision, the Seventh Circuit made clear that once VRA liability was found, lower courts were required to take lower participation rates into account and to order the drawing of "super-majority" black districts to offset these lower rates:

> Just as minority groups have a younger-than-average population, they also generally have lower voter registration and turnout characteristics. This is not something which can be fully rectified by good motivation and organization, although the existence of these certainly helps. Some of the problems, at least, spring from circumstances of low income, low economic status, high unemployment, poor education and high mobility.

740 F.2d at 1413–16.

On the basis of these considerations, the Seventh Circuit reversed a district court that had relied only on voting-age population figures to determine what size minority population was required to meet the VRA for city council districts in Chicago once the court concluded that racially polarized voting existed. In light of constitutional developments in the 1990s, recent commentary challenges the continuing constitutionality of the standard practice of taking lower minority turnout rates into account in designing VRA-required districts, unless a jurisdiction can show that these lower turnout rates are the present effects of past discriminatory practices with respect to voting. Theane Evangelis, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, XX N.Y.U. L. REV. XX (forthcoming 2002). Given that black voter turnout rates have at times approached or exceeded white turnout rates in a number of jurisdictions during the 1990s, this commentary questions whether the constitutional standards that might now apply to race-conscious compensation for lower turnout rates can be met in these jurisdictions. *Id.* Judge Richard A. Posner has also raised questions about the "well entrenched" judicial approach of compensating for lower minority turnout rates, which he characterizes as rewarding "groups whose members do not bother to register or vote though eligible to do so." *Barnett*, 141 F.3d at 703.

B. 2000

At least three dramatic changes have taken place in partisan politics and racial patterns of voting on the eve of the redistricting of 2000. First, the 1990s saw the rise of genuine two-party competition throughout the South for the first time in the twentieth century.[30] Much voting-rights litigation emanates from the South, and this development has several consequences for patterns of group voting behavior. On one hand, many white voters who formerly voted in the Democratic Party now vote for Republican candidates. On the other hand, this has made black voters an increasingly dominant portion of the Democratic Party electorate. In Democratic primary elections, for example, black voters in the South play an increasingly critical role, as the Republican Party siphons off white voters. Second, primary elections take on new importance when genuine two-party competition exists; any analysis of group voting behavior and electoral outcomes therefore must integrate the primary-election stage into the analysis, given the influence primary outcomes can have on general election results. Third, while voting continues to show some degree of racial polarization, the degree of polarization nonetheless permits a meaningful level of white-black coalitional politics, and that crossover voting enables black candidates in many jurisdictions to be elected even in nonmajority-minority districts. Race of voters still correlates with race of candidates, but to a lesser degree, including in the South. We must first understand these developments before determining how they might affect the current redistricting in light of the legal changes in voting-rights law that also occurred in the 1990s.

Although only a few social-scientific studies of polarized voting patterns during the 1990s have emerged thus far, those that have appeared to point in similar directions. Of these, one of the most important was published recently in the North Carolina Law Review by Bernard Grofman, Lisa Handley, and David Lublin.[31] These authors include some of the political scientists upon whom federal courts, including the Supreme Court, placed greatest reliance during the previous decade's litigation.[32] Capturing its principal findings

30. This dramatic change is documented thoroughly, and put in historical context, in EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS (2002).

31. *See generally* Grofman et al., *supra* note 19.

32. Grofman was the central expert witness before the district court in the *Gingles* litigation, and the Supreme Court explicitly endorsed Grofman's conception of vote dilution and his technical means of determining polarized voting in *Thornburg v. Gingles*, 478 U.S. 30, 52–54 (1986). Eight other Supreme Court voting-rights cases have cited

with precision requires several qualifications, but put in dangerously general terms, this study concludes that about one-third of white voters regularly vote for black candidates in primary and general elections for Congress in the South, while nearly all black voters vote for these candidates.[33] A second important study, by Charles Bullock and Richard Dunn, likewise reaches similar conclusions about consistent one-third white crossover support for black congressional candidates in the South.[34] This level of white support for black Democratic candidates in congressional races in the South is comparable to the level of white support in the South that Bill Clinton received in his 1996 re-election bid (34.6%) and the level of support that black Senate candidate Harvey Gantt received (36%) in his hotly contested, losing election bid against Jesse Helms[35]—an election that many observers consider to have involved overt and subtle racialized appeals.[36] These figures might suggest that a reliable bloc of white voters in the South are voting consistently on the basis of party affiliation, rather than the race of a candidate.[37] At the same time that white crossover voting is nontrivial for black candidates,

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Grofman's work. *See* Abrams v. Johnson, 521 U.S. 74, 108 (1997); Bush v. Vera, 517 U.S. 952, 1040–41 (1996); Shaw v. Hunt, 517 U.S. 899, 912 (1996); Miller v. Johnson, 515 U.S. 900, 924 (1995); Johnson v. De Grandy, 512 U.S. 997, 1020 (1994); Holder v. Hall, 512 U.S. 874, 895 (1994); Shaw v. Reno, 509 U.S. 630, 636 (1993); Davis v. Bandemer, 478 U.S. 109, 135 n.18 (1986) (Powell, J., dissenting).

33. Grofman et al., *supra* note 19, at 1399–1400.

34. *See* Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1240–41 (1999). The authors concluded: "In general, we find that these [black congressional] incumbents attract about one-third of the white general election vote, a result that is in line with levels of white support for white Democratic candidates for other federal offices in the South." *Id.* at 1213. This is not to say that white voters appear indifferent to the race of a candidate; white Democrats on average, across different types of electoral scenarios (black incumbent, white incumbent, or open seat) have a roughly "ten point advantage" in attracting white votes in general elections than comparable black Democrats. *Id.* at 1250.

35. *Id.* at 1237. For a detailed analysis of white and black voting patterns in the primary and general elections in Gantt's first challenge to Helms in 1990, see Mac McCorkle, *Gantt Versus Helms: Toward the New Progressive Era?*, 1 RECONSTRUCTION No. 3, 1991, at 18, 23.

36. *See, e.g.*, KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 94–100 (1992) (discussing late-campaign tactics by Helms, including television ads linking Gantt to affirmative action).

37. Indeed, that was the conclusion of the state's expert, Dr. Alan Lichtman, in the New Jersey redistricting. *See infra* notes 42–44 and accompanying text. As the federal court summarized his testimony, Dr. Lichtman concluded that for the relevant state legislative district elections in New Jersey, "the most salient factor in determining the winner of these elections was not the race of the candidate, but the party of the candidate." Page v. Bartels, 144 F. Supp. 2d 346, 361 (D.N.J. 2001) (per curiam). This conclusion is particularly noteworthy because Dr. Lichtman testified regularly throughout the 1990s on behalf of plaintiffs in voting-rights litigation.

black crossover voting in contests pitting black and white candidates is almost nonexistent. For example, in Grofman's data for congressional elections in the 1990s in southern jurisdictions, black voters on average cast 98% of their votes for the black candidate.[38] Because *net* crossover voting among groups of voters determines the actual effects of group voting patterns, the level of consistent white support for black candidates in southern congressional elections in these studies during the 1990s, combined with the near-total cohesion among black voters, has important implications for how large black voter populations must be to enable minority voters to have an equal opportunity to elect candidates of their choice.

Thus, Grofman reports that, for congressional races in the South during the 1990s, 33% to 39% of a district's registered voters generally had to be black for a black candidate to be elected, substantially below the majority-black voter registration level that had been thought necessary on the eve of the 1990s redistricting.[39] It

38. *See* Grofman et al., *supra* note 19, at 1402 (compiling a table of racial voting patterns for selected districts).

39. This directly conflicts with the bottom line found by some of these same authors in work based on elections as late as 1994. Professor Lublin had earlier concluded that 35% black districts had only a 1% chance of electing a black representative. David Lublin, *The Election of African Americans and Latinos to the U.S. House of Representatives, 1972–1994*, 25 AM. POL. Q. 269, 279 (1997) [hereinafter Lublin, *The Election of African Americans and Latinos*]. Others reached similar conclusions at the end of the 1980s. *See, e.g.*, Bernard Grofman & Lisa Handley, *Minority Population Proportion and Black and Hispanic Congressional Success in the 1970s and 1980s*, 17 AM. POL. Q. 436, 439 (1989) (finding that black candidates have almost a certain chance of election in districts with as low as a 45% black population). A study based on the 1992 elections for the 103rd Congress concluded that the black voting-age population required in a district to give black voters a fifty-fifty probability of electing a black officeholder was 40.3% in the South; 28.3% in the Northeast; and 47.3% in an area defined as the Northwest. Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 804 (1996). In contrast, other authors found in 1985 that the black voting-age population in southern congressional districts had to be 54.88%. David Epstein & Sharyn O'Halloran, *A Social Science Approach to Race, Redistricting, and Representation*, 93 AM. POL. SCI. REV. 187, 190 (1999). The difference between voting patterns in 1985 and 1995 suggests that safe districts might have been required in the 1990s, while coalitional districts would achieve the same ends in the 2000s. The Cameron analysis, *supra*, was criticized for its treatment of all nonblack voters as "whites," without distinguishing between whether those white voters were Hispanic voters, who are typically more willing to support black candidates, or non-Hispanic whites. *See* David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"*, 93 AM. POL. SCI. REV. 183, 183–84 (1999) [hereinafter Lublin, *Racial Redistricting*]. For a reply that revisits the data and asserts that disaggregating "whites" into Hispanic and non-Hispanic voters does not, for southern jurisdictions, change the results, see Epstein & O'Halloran, *supra*, at 187–88. For similar evidence of declining racial polarization at the local government level, a 1995 study of 2,400 cities with widely

is important to emphasize that this 33% to 39% level of white crossover support should not be taken as a talismanic figure; the precise patterns of polarized voting in any specific election jurisdiction requires analysis of that jurisdiction's particular patterns. But, contrary to another piece of conventional wisdom, this average level of white support in congressional races, at the 33% to 39% level, also does not appear to depend significantly on whether black congressional candidates run as incumbents (though it might depend on the *absence* of a white incumbent). In the 1992 elections, the first in which majority-black districts had been created in several of these states, a southern district had to have on average a 38.5% black registered-voter population to elect a black representative; by 1998, that average had become 35.6%.[40] Similarly, Bullock and Dunn conclude that the black-incumbent effect does not explain the consistent level of white crossover voting for these black congressional candidates after they were first elected in 1992. Bullock and Dunn note that white vote share increased for some of these black incumbents, but decreased for others, while the level of white crossover support across all races remained around one-third.[41]

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varying populations concludes that black candidates had become twice as likely, in at-large elections, to be elected in 1991 than they were in 1981, controlling for various potentially relevant variables. Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J.L. & ECON. 367, 389 (1995). Black voters still fared better, particularly in the South, in districted elections compared to at-large elections, but the gap had narrowed by 1991 to half of what it was in 1981. *See id.* This study concludes that these changes are due to a reduction in polarized voting patterns. *See id.* While there is therefore reason to believe that these patterns changed in the 1990s, there is also some reason to believe that the patterns now being documented in 2001 were in place in 1990 and that the districts created in the early 1990s were in fact overpacked with black voters. If political "elites" (potential candidates, donors, party leaders, journalists) had been willing to believe in the effectiveness of coalitional districts in the 1990s, black candidates might have been winning in such districts in the early 1990s. On this view, the real change in white willingness to vote for black candidates occurred before 1990. As one piece of evidence for this view, one might look to the fact that even in 1990, Harvey Gantt received 35% of the white vote in North Carolina in his racially charged contest with Jesse Helms. McCorkle, *supra* note 35, at 23.

40. *See* Grofman et al., *supra* note 19, at 1408 (incorporating cohesion and crossover in calculating the black population required for black candidate victory). In 1992, the four districts for which this table includes data and the candidates elected are the Third District of Florida (Rep. Brown), the Second District of Georgia (Rep. Bishop), the Eleventh District of Georgia (Rep. McKinney), and the Sixth District of South Carolina (Rep. Clyburn). The Grofman study does note, however, that for state legislative elections in South Carolina, black incumbents needed districts that were only 37% black to have an equal opportunity of victory, while black non-incumbent candidates needed 51% black voting-age population districts. *Id.* at 1422.

41. Bullock & Dunn, *supra* note 34, at 1235. Grofman's study similarly concludes that incumbent effects do not explain the levels of white support for these congressional

What little data exists for state elections thus far points, at least in some places, to a similar pattern. In the recent redistricting process in New Jersey, generated by a State Apportionment Commission and upheld by a three-judge federal court panel, the evidence showed that for certain critical state legislative contests during the 1990s, 85% of minority voters voted for the Democratic candidate, regardless of race, while these same Democratic candidates captured on average half the white vote (the data is for twelve legislative districts in which most of the state's minority residents reside).[42] When a black or Latino Democrat ran against a white Republican, the Democratic candidate never received less than 39% of the white vote (and typically received closer to half that vote). As a result, it is today

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candidates. Grofman et al., *supra* note 19, at 1398–1400. Others also conclude that incumbent effects are not sufficient to explain the mid-1990s elections of black southern congresspersons from reconfigured, majority-white, post-*Shaw* districts. Epstein & O'Halloran, *supra* note 39, at 188–89. On average, the incumbent advantage has been estimated as about 7%. *See, e.g., id.* at 188–89 (citing Gelman-King index for 1990, which shows 6.9% average advantage); Gary C. Jacobson, *The 1994 House Elections in Perspective, in* MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT 1, 1–20 (Philip A. Klinkner ed., 1996) (discussing the "Republican revolution"). This issue has been studied extensively for the 1996 elections of three black incumbents in southern congressional districts whose districts had to be reconfigured in the wake of *Shaw v. Reno*, 509 U.S. 630 (1993). *See* D. Stephen Voss & David Lublin, *Black Incumbents, White Districts: An Appraisal of the 1996 Congressional Elections*, 29 AM. POL. RES. 141, 166–72 (2001). The authors conclude that the incumbent effect does not appear to explain the success of these black candidates in newly configured districts that were, by 1996, no longer majority black election districts. For example, Representative Sanford Bishop of Georgia, a black congressman elected in 1992 from the then-black-majority Second District, outperformed all but one Democratic congressional candidate in the state in 1996 *among white voters. Id.* at 149. Georgia's 1996 congressional elections were held under a newly drawn map required after judicial invalidation of the 1990 districting plan. *See* Abrams v. Johnson, 521 U.S. 74, 101 (1997) (upholding newly drawn districts); Miller v. Johnson, 515 U.S. 900, 927 (1995) (invalidating districts). Representative Cynthia McKinney, elected in 1992 from the majority-black Eleventh District, won a higher percentage of votes from white voters in 1996 who were in new precincts that had been added to her redrawn district than from white voters in precincts that had been in her original district (even when these precincts are adjusted for their Democratic tendencies, as indicated by President Clinton's 1996 performance). Voss & Lublin, *supra*, at 170. This means that McKinney's white support came more from new white voters than from those for whom she was an incumbent.

These recent findings reflect a shift in view, even among individual social scientists, about the role of incumbency in the districts redrawn after *Shaw*; as recently as 1999, David Lublin, for example, asserted—before the data had been analyzed—that "the incumbency effect has helped entrench [black southern] representatives who otherwise might not have won." Lublin, *Racial Redistricting, supra* note 39, at 184.

42. For the court's findings, see *Page v. Bartels*, 144 F. Supp. 2d 346, 352–62 (D.N.J. 2001) (per curiam). For a thorough summary of this evidence and the litigation, see generally Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002).

"abundantly clear that districts with black populations well below the talismanic 50% mark [are] electing Democrats of all races in New Jersey;"[43] indeed, every three-member legislative district in New Jersey that is at least 22% black in voting-age population has elected at least one black representative.[44]

The rise of two-party competition in the 1990s ironically contributes significantly to explaining the greater success minority candidates are now projected to have in the South. As white voters have moved to the Republican Party in the South, black voters have become increasingly powerful in Democratic Party primaries.[45] As long as a district remains Democratic on general election day, black voters can effectively possess "an equal opportunity to elect;" if black voters have effective control of the primary election, those voters will determine who represents the district, even if black voters are not a majority of the district overall. If a district contains a hundred voters—thirty who are black, sixty voters in total who are Democrats, and forty Republicans—then 50% of the Democratic Party voters will be black, despite only 30% of the district's voters being black. Even if nearly one-quarter of the white *Democratic* voters (seven of thirty) will defect to a Republican on election day if the Democrats nominate a black candidate, that candidate will still gain 53% of the general election vote, if black voters largely remain unified[46] (as is the case in most contests when a black Democrat and a white Republican candidate run head to head). By contrast, before the 1990s when nearly all voters would have been registered Democrats in the South, white voters would have dominated black voters by two to one in the Democratic primary.

Are white Democratic voters willing to vote for black Democratic candidates in general elections? The comparative rate at which whites vote for black Democratic candidates compared to

43. Hirsch, *supra* note 42, at 21. New Jersey uses multimember election districts for some of its House seats.

44. The comparable level of minority-candidate success was reached in the 1980s in New Jersey when black voting-age population reached at least 28%. *See Page*, 144 F. Supp. 2d at 353.

45. This was true in some places, though not so well noticed, even in 1990. In the Democratic primary runoff election for U.S. Senate in North Carolina in 1990, for example, black voters constituted 30% of the voters who turned out despite black voters being only 19% of North Carolina's electorate. Harvey Gantt, the black candidate who won that primary, then narrowly lost the general election to Jesse Helms. McCorkle, *supra* note 35, at 20.

46. The example assumes that at least 93% of black voters (28 of 30) vote for the black candidate, a figure well in line with patterns revealed in actual election studies. *See* Grofman et. al, *supra* note 19, at 1402 tbl.3.

white Democratic candidates is the "falloff rate." For congressional elections during the 1990s in Georgia, North Carolina, and South Carolina, this falloff rate was 9%; in open-seat elections, the average white Democratic nominee received around 40% of the white vote, while a black Democratic nominee received 31%.[47] In the example above, if 9% fewer white voters will vote in the general election for a black Democratic nominee who emerges from the primaries than would vote for a white Democratic nominee, then the black candidate will still get at least seven white votes, which combined with thirty black votes, would give that candidate more than 57% support in the general election.[48] Thus, even with only a 30% black voting population and with some falloff in white Democratic support for black Democratic candidates, a black candidate would still be elected. In New Jersey, the falloff rate has been found to be only 2%: minority Democrats on average received only 2% less of the white vote than white Democrats.[49]

Until now, social-scientific analysis of racial voting patterns and judicial application of the VRA, largely focused on general elections, rather than the integrated primary-general election structure as a whole.[50] Grofman's article in the North Carolina Law Review is path-breaking in its detailed incorporation of the rise of two-party competition in the South, and the critical role of primary elections, into the overall effects of racial voting patterns on electoral outcomes today. The partisan affiliation of a district's white voters now can hold the key to minority voting opportunities. A district that is 35% black but 75% Democratic will elect a Democrat to office, but if white voters prefer a white Democratic candidate to a black one, that candidate might well prevail in the primary and then in the general

47. Bullock & Dunn, *supra* note 34, at 1250 tbl.9.

48. As Sam Hirsch points out, these numbers could reflect a general willingness of southern white voters to support black candidates of their same partisan affiliation or a process of adverse selection in which white voters unwilling to vote for black Democratic candidates have shifted to the Republican Party and are now unwilling to vote for any Democratic candidate. Hirsch, *supra* note 42, at 21 n.75.

49. In addition, even this small falloff was countered by another factor, which is that black voter cohesion *increased* 4% in New Jersey when black candidates ran, which more than offset the white falloff rate. *Id.* at 21; *see also Page*, 144 F. Supp. 2d at 36 (discussing falloff rates in New Jersey).

50. For an early academic emphasis on the importance of this integrated approach, see J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 578 (1993). For exceptions in case law that emphasize the importance of primary elections, see, for example, NAACP v. City of Niagara Falls, 65 F.3d 1002, 1018–19 (2d Cir. 1995); White v. Alabama, 867 F. Supp. 1519, 1554 (M.D. Ala. 1994), *vacated by*, 74 F.3d 1058, 1075 (11th Cir. 1996).

election. But if the district is 35% black and only 60% Democratic, the district might well nominate and then elect a black Democrat.

The margin of victory for candidates in the 1990s from majority-black election districts as compared to other districts provides another perspective on this point. In contested elections in the early 1990s, before *Shaw* forced the reconfiguration of half the black-majority election districts in the South, black representatives won office with an average vote of 78%. In contrast, in all contested congressional elections in that period, the candidate from the average district won with 64% of the vote.[51] Thus, "safe" minority-controlled districts in the early 1990s were considerably safer on general election day—by a large margin—than other districts. This suggests those black congressional candidates could have prevailed in districts less packed with supportive voters. Indeed, while it might seem paradoxical, making these noncompetitive districts more Republican might enhance minority influence over electoral politics. If Republican white voters replaced Democratic white voters, general elections might be closer, but minority voters would be an even larger share of Democratic primary voters. White congressional incumbents win about 90% of the time, but when they lose, they typically do so in general elections, not primaries. Black congressional incumbents virtually never lose general elections today; when they lose office, it is always because they have lost a Democratic primary.[52] By placing more Republican voters in minority districts in exchange for white Democratic voters, districting plans would move toward generating the same ratio of primary losses to general-election losses for incumbents of all races.[53]

Important qualifications must be considered, of course, in working with this data. First, whatever the realities, perceptions can play an important role in shaping political practices, particularly on the "supply side."[54] Even if black candidates can win in congressional

51. David Epstein & Sharyn O'Halloran, *Majority-Minority Districts and the New Politics of Congressional Elections*, *in* CONTINUITY AND CHANGE IN HOUSE ELECTIONS 87, 93 (David W. Brady et al. eds., 2000).

52. The last black incumbent House member to lose a general election appears to have been Katie Hall, from Indiana, in the 1980s.

53. I am indebted for this point to conversations with Sam Hirsch.

54. The question of how district design affects the incentives of candidates to run for office addresses what are called "supply-side" effects of district design. Most political science research has focused on the "demand" side: how the proportion of black voters in a district effects outcomes. The most extensive study of supply-side effects when it comes to racial redistricting is DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS (1999). Canon's principal finding, not directly relevant to the issues discussed

districts that are not majority black in voter registration, black candidates might not be willing to run in such districts until they are convinced they can win in less than majority-minority districts. Similarly, such districts might attract more experienced and better-funded white candidates than do current majority-black districts. Second, black voters and supportive white voters might not turn out in as high numbers if they do not perceive their preferred black candidate as having a chance to win because a district is not majority black. Most importantly, the presence of a white incumbent candidate might well play a major role in the willingness of white voters to support a black challenger. In the congressional contests of the 1990s in majority-black southern districts, only one race involved a white incumbent against a black challenger. Whatever normative significance incumbency ought to have in VRA legal analysis, as a descriptive matter there might be less white crossover support for black candidates in contests that involve white incumbents. Any assessment of district design, therefore, must take into account whether there is a white incumbent likely to run. Finally, as noted throughout, the central findings of these studies for congressional contests can only be suggestive of patterns for other races; the VRA requires jurisdiction-specific analysis, and patterns of polarized voting might well vary not only from place to place, but among types of elections as well.[55] Regional variations, in particular, must be taken into account—although recent data concludes that the patterns in the South and non-South are becoming increasingly similar, particularly for Congress.[56]

But for purposes of this Article, what matters is the intriguing possibility, suggested by the most current social-scientific data, that

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in this Article, is that the substantive political positions black candidates and officeholders take in majority-black districts depends not only upon the demand side (the percentage of black voters in the district) but on the racial composition of the candidates who run in the Democratic primary. If no white candidate runs, the more centrist black primary candidate tends to win, whereas if a white candidate runs in the primary, a more centrist black candidate will lose to a black candidate who emphasizes what Canon calls "a politics of difference"—meaning a candidate who emphasizes distinct racial interests and issues more than a centrist candidate. *Id.* at 128–29. Canon also concludes that three-fourths of the new black-majority congressional districts created in the 1990 redistricting elected centrist black candidates, rather than black candidates who "campaigned on the basis of a politics of difference." *Id.* at 139.

55. Grofman et al., *supra* note 19, at 1411.

56. Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, *in* RACE AND REDISTRICTING IN THE 1990S 13, 34 (Bernard Grofman ed., 1998).

black candidates can be elected to office, despite the presence of significantly polarized voting patterns, in at least some districts (including in the South) where the black voting-age population is 33% to 39% and the district is Democratic.[57] The most striking confirmation of these findings, perhaps, comes from the recent trial testimony of Georgia Representative John Lewis, one of the longest-serving black congressmen in the United States House of Representatives and a political leader in the "Bloody Sunday" march in Selma, Alabama, that was so instrumental in catalyzing enactment of the original VRA in 1965.[58] Defending Georgia's decision to reduce the black voting-age population in some districts in the 2000 plan, as compared to the "safe" majority-minority districts of the 1990 plan, Lewis testified,

> "[Georgia] is not the same state it was .... It's not the same state that it was in 1965 or in 1975 or even in 1980 or 1990. We have changed. We've come a great distance. It's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race."[59]

Thus, Lewis argued for a modification of the "safe districting" strategy of the 1990s on the grounds that such a strategy was no longer necessary to ensure black voters in Georgia of equal political opportunity.

Whether the emerging general social science findings hold up over time, or whether they are true for how many jurisdictions, for which elections, in which areas, or whether they must be qualified in certain ways, remains unclear. These findings at a minimum suggest several new, important, and theoretically challenging legal questions that voting-rights law will confront in this new decade. Those questions must also be assessed in the context of the dramatic changes in constitutional law that took place in the 1990s—changes that might influence the interpretation of the VRA in addition to whatever constitutional constraints they now impose on redistricting. If black-majority districts are not necessary to overcome polarized

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57. The social science literature operationalizes "can be elected" as the point at which a black candidate would be predicted to have a fifty-fifty probability of being elected based on past patterns of voter behavior. Less than 33% black voting-age population will likely also be sufficient to enable black candidates to be elected in some places with significant Hispanic voting-age populations.

58. *See generally* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978) (detailing the history of the Voting Rights Act).

59. Melanie Eversley, *Redistricting Map for Georgia Goes to Court in D.C.*, ATL. J. CONST., Feb. 4, 2002, at 1C (quoting Rep. Lewis).

voting, given current levels of white crossover voting support, what are the implications for the constitutional and statutory law of voting rights? And beyond law and social science, what kind of representative institutions should we want to construct in the 2000s, given what we are learning about patterns of racially polarized voting at the start of the new decade?

II. LEGAL ISSUES ON THE EVE OF REDISTRICTING 2000

This Article will assume for now, consistent with the emerging data, that black candidates can be regularly elected, at least in some places, from "coalitional" rather than "safe" majority-black districts. By "coalitional" districts, I mean ones in which the black registered voter population is less than 50% (typically 33%–39%) and the rest of the registered voters are non-Hispanic whites. I treat this as a distinct conceptual category of district, one that differs from safe districts and from "influence districts."[60] Influence districts, debated in the 1990s but not legally required, are ones "in which a minority group has enough political heft to exert significant influence on the choice of candidate though not enough to determine that choice."[61] The concept of influence is nebulous and difficult to quantify. In contrast, coalitional districts do not present these same difficulties. A coalitional district is defined in terms of actual electoral outcomes; such a district can be specified quantitatively as a district with a significant presence, though not a majority, of black voters, but that has a fifty-fifty probability of electing the preferred candidate of those

60. Influence districts were understood as those in which the minority population would constitute less than a majority of voters, but would still be able to "influence" the outcome of elections even if the minority were not capable in that district of electing a candidate of its choice. *See, e.g.*, Kousser, *supra* note 50, at 551. Commentary and court opinions debated whether the VRA entitled minorities to influence districts in contexts where they could not constitute a majority of voters. Most lower courts rejected this claim; the Supreme Court consistently sidestepped it. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1009 (1994) (avoiding the issue); Growe v. Emison, 507 U.S. 25, 41 n.5 (1993) (avoiding the issue); Latino Political Action Comm., Inc. v. City of Boston, 784 F.2d 409, 415 (1st Cir. 1986) (rejecting claim); DeBaca v. County of San Diego, 794 F. Supp. 990, 1000 (S.D. Cal. 1992), *aff'd*, 5 F.3d 535 (9th Cir. 1993); Hastert v. State Bd. of Elections, 777 F. Supp. 634, 661 (N.D. Ill. 1991); *see also* Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998) (reserving question of influence districts). *But see* Armour v. Ohio, 895 F.2d 1078 (6th Cir. 1990), *vacated and reh'g granted en banc*, 1990 U.S. App. LEXIS 7480 (6th Cir. May 4, 1990), *reh'g en banc*, 925 F.2d 987, 989 (6th Cir. 1991) (accepting influence district claim). A "coalitional" district is one in which minority voters, despite not being a voting majority, *can* elect candidates of their choice, given the levels of white crossover voting. *See, e.g.*, Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 852–53 (5th Cir. 1999).

61. *Barnett*, 141 F.3d at 703.

black voters. Coalitional districts require, by definition, interracial support to elect a candidate that the black community prefers. Safe districts differ on this front because voters of a single race—minority voters—constitute a voting-eligible majority. If the black community prefers a black candidate in such a district, that candidate can be elected without any white support.

The emerging data on coalitional districts raises several issues for voting-rights jurisprudence. Are states permitted under the VRA to draw coalitional rather than safe black districts? Or do they remain required, where they would have been in the 1990s, to draw safe districts? If states cannot draw a safe black district, because the black population is not concentrated enough to be made a majority in a reasonably compact district, are states now required to draw a coalitional district instead, if that can be attained through a reasonably compact district? On the other hand, if states choose to draw safe districts where coalitional districts could be drawn instead, does constitutional law prohibit states form doing so? After constitutional developments of the 1990s, virtually any move a state might make when it comes to race and redistricting—whether it ignores race, whether it takes race into account, how much it takes race into account—can implicate federal statutory and constitutional obligations as well as restrictions. Those legal questions become only more complex if we assume that black officials can regularly be elected from coalitional districts. I cannot purport to resolve all of those questions here, but I will suggest answers to the most important ones.

The most dramatic constitutional development of the 1990s in the voting-rights field was, of course, *Shaw v. Reno*.[62] *Shaw* will have significant effects on the appearance and shape of majority-minority districts in 2000, as it already had during the last half of the 1990s. I believe that, because the design of districts for one purpose influences the design of districts for other purposes, *Shaw* will have the more general effect, indirectly, of constraining the shapes of districts across the board.[63] But the effects of *Shaw* on the appearances of districts was discussed in academic commentary throughout the 1990s; though the formal law remains obscure, *Shaw* is already being implemented when it comes to the geographic design of districts. The new, potential question for this round of districting, not yet discussed at all,

62. 509 U.S. 630 (1993).

63. *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2516 (1997).

is whether *Shaw* will extend, not just to the geographic design of districts, where race is intentionally involved, but also to the voter *populations* of districts. In particular, if polarized voting patterns in a particular jurisdiction suggest that coalitional, rather than safe, districts are sufficient to enable black voters to have an equal opportunity "to participate in the political process and to elect representatives of their choice,"[64] will it be constitutional for a state nonetheless intentionally to design a safe—that is, majority-minority—election district?

A. Coalitional Versus Safe Districts: The Constitutional Dimension

Theoretical as well as practical issues of judicial administrability swirl around this complex question. The theoretical issues arise from the still uncertain meaning of *Shaw* and the cases that followed in its wake, as well as the more general constitutional law of race-conscious policymaking. I will consider those theoretical issues first; after that, I will turn to the judicial administrability considerations that, for special reasons, always play an unusually central role in voting-rights jurisprudence.

On one view, *Shaw* was fundamentally concerned with excessively contorted, racially designed districts because, as the Court put it, "reapportionment is one area in which appearances do matter."[65] Much of the language of Justice O'Connor's majority opinion in *Shaw* emphasizes concerns for the social perceptions the Court considered such districts to create. "The message that such districting sends" to voters and representatives alike, as the Court put it, "is equally pernicious."[66] As Justice O'Connor has gone out of her way to emphasize that, in her view, this message does not arise from the mere fact that state officials might have taken race into account in drawing districts in an effort to ensure a more representative set of elected officials. In this view, the mere intent of redistricters self-consciously to create safe minority districts, at least where the VRA requires it, does not trigger strict scrutiny or violate the Constitution. Under the original *Shaw* opinion, the constitutional concerns arose only when race-conscious districting resulted in a district whose appearance was "highly [and dramatically] irregular," "tortured," "bizarre," and "irrational on its face."[67]

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64. 42 U.S.C. § 1973 (1994).
65. *Shaw*, 509 U.S. at 647.
66. *Id.* at 648.
67. *Id. passim.*

In light of these articulated justifications, I labeled the *Shaw* doctrine as best understood to be based on a constitutional concern for "expressive harms."[68] The Court itself subsequently embraced that characterization of the constitutional injury that *Shaw* recognized.[69] Expressive harms differ from more conventional equal protection injuries in that they are not as focused on whether specific individuals have been uniquely injured by being the object of state-based racial classifications; individuals are not being denied a specific benefit, such as admission to a public educational institution, or a government contract, or an employment opportunity (or even equality of voting power), in *Shaw* cases. Instead, the constitutional harm is less individualized and more general; it resides in "the message expressed" about citizenship when political institutions are designed to be visibly and so dramatically race-based as the Court construed the district in *Shaw* to be.

If *Shaw* is based on these kinds of "expressive harms," the continued use of safe minority districts, where coalitional districts would be sufficient to ensure "equal opportunity of choice," might not violate the Equal Protection Clause. As long as safe minority districts are reasonably compact and otherwise drawn within the constraints that apply to conventional districting (few as those might be), they would not stand out as unique, specially created districts that subordinated all other values associated with conventional districting to the goal of creating a safe minority district. By being drawn consistently with other districts, safe minority districts might be viewed by the Court as genuinely remedial and integrative, in contrast to the districts of the 1990s that the Court judged to single out racial considerations so uniquely as to suggest a view of democratic citizenship that was partial and racialized.[70] Justice O'Connor has asserted that "*Shaw*'s basic objective [is] making

68. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993).

69. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 984 (1996) ("[W]e . . . know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available."); *id.* at 1053 (Souter, J., dissenting) ("This [*Shaw*] injury is probably best understood as an 'expressive harm' . . . .") (citation omitted).

70. I have suggested that the Court's concern with exceptionally contorted minority districts might be traceable to a view that a district of this sort "expresses a view of political identity inconsistent with democratic ideals [and] might have the consequentialist effect of encouraging citizens and representatives increasingly to come to experience and define their political identities and interests in partial terms." Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 121 (2000).

extreme instances of gerrymandering subject to meaningful judicial review."[71] If race-conscious safe districting does not result in exceptionally contorted districts, it therefore might well not be an "extreme instance" of gerrymandering. As a result, such districts might not implicate the concerns that underlie the *Shaw* doctrine. These districts might not trigger strict scrutiny at all.[72]

Yet even on the expressive harms view of *Shaw*, safe districts could be argued to implicate such harms when coalitional districts would be sufficient to secure an "equal opportunity to elect." Safe districts are, by definition, intentionally designed to have a majority of residents be, for example, black or Hispanic. Aspects of *Shaw* could be read to raise concerns about such districts, when coalitional districts would suffice, given levels of white crossover voting. Thus, *Shaw* asserts that "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[73] Coalitional districts necessarily require successful candidates to attract interracial support; safe districts do not.[74] Coalitional districts therefore intrinsically counter one of the additional concerns directly articulated in *Shaw* itself; to the extent these concerns play a powerful role in motivating and justifying the *Shaw* doctrine, the use of safe districts where coalitional ones would be sufficient could raise constitutional issues. Even Justice O'Connor, the most restrained endorser of *Shaw*, has described *Shaw* as designed to distinguish "the appropriate and reasonably necessary uses of race from its unjustified and excessive uses."[75] Though safe districts are already being used reflexively in the 2000 redistricting, because this was the method in the 1990s of ensuring equal opportunity in the face of polarized voting, courts could conceivably consider such districts "unjustified and excessive" when, but only when, the "appropriate and reasonably necessary" use

71. Miller v. Johnson, 515 U.S. 900, 929 (1995) (O'Connor, J., concurring).

72. Absent strict scrutiny, the use of race in such districts would not have to meet a narrow tailoring test; it is that test that would pose the greatest difficulties for safe districts where coalitional districts could be shown to secure an "equal opportunity to elect."

73. Shaw v. Reno, 509 U.S. 630, 648 (1993).

74. Recall that a coalitional district is intentionally designed to enable minority voters to have "an equal opportunity to elect" candidates of their choice; thus, these districts differ from majority-white districts with racial minorities where racially polarized voting is so extreme that no significant white crossover voting exists.

75. Bush v. Vera, 517 U.S. 952, 995 (1996) (O'Connor, J., concurring).

of race to counter polarized voting could be met by coalitional districts.

But the constitutional issue of safe districts becomes even more pointed when we turn to the second plausible way of understanding the principles of *Shaw* and its successors. Since *Shaw*, the Court has also shifted the discourse of the constitutional violation at issue toward a more formulaic, purpose-based mode of equal protection inquiry. In *Miller v. Johnson*, Justice Kennedy, writing for a five-member majority, held that strict scrutiny was required whenever racial considerations were "the predominant motive" for the design of a district (even if the district's design were not "bizarre" in shape).[76] Once strict scrutiny is triggered, a race-conscious district will be constitutional only if narrowly tailored to serve a compelling interest. And in the most recent application of *Shaw*, involving the newest incarnation of the North Carolina district that gave birth to the entire line of racial redistricting case law, the Court continued to apply this purpose-based doctrinal analysis. *Cromartie v. Hunt*[77] upheld the latest version of North Carolina's Twelfth Congressional District on the ground that its newest design predominantly reflected partisan, not racial, motivations. *Cromartie* will therefore encourage lower courts to approach the 2000 redistricting cases through the discourse of purpose-based analysis first suggested in *Miller*. On this view, the harms of excessive racial redistricting reside in the fact that state actors have engaged in racial classification, without sufficiently compelling justification—even if the districts otherwise respect all other conventional districting constraints.

In other works, I have questioned whether this changed discourse actually describes a genuine shift in how the *Shaw* doctrine is applied in practice, as opposed to justified in formal doctrinal terms.[78] But if this purpose-based formula does reign over the 2000

76. *Miller*, 515 U.S. at 916 ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.").

77. 532 U.S. 234 (2001).

78. *See* Pildes, *supra* note 63, at 2537–47 (1997) (analyzing "failings of the motive-based approach" to *Shaw* claims). Since *Miller*, the Court has upheld two plans in which those in charge of districting have openly acknowledged that "racial fairness" had motivated the design of the challenged districts. *See* Lawyer v. Dep't of Justice, 521 U.S. 567, 582 (1997); DeWitt v. Wilson, 515 U.S. 1170 (1995), *summarily aff'g*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (three-judge court). In *Cromartie*, 532 U.S. at 257, which also upheld a district against a *Shaw* challenge, state officials argued that partisan, not racial, motivations had been dominant. That there are two ways of interpreting the *Shaw* line of cases, and continuing uncertainty about its precise meaning, reflects an apparent internal division within the *Shaw* majority itself. Justice O'Connor conceives the doctrine as a

redistricting process, the use of safe districts when coalitional districts suffice might well be thought to raise serious constitutional issues. In theory, whenever the predominant motive for the design of a safe minority district is race based, *Miller* will require that district to be justified under strict scrutiny. Even if overcoming polarized voting and complying with the VRA is a compelling state interest in principle, the districts created will still have to meet constitutional standards requiring the narrowly tailored use of racial classifications. As one influential circuit court of appeals has already determined, *Shaw* requires that "a tailored response to a found violation must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the wrong."[79] If polarized voting is the wrong, and can be overcome with a coalitional district, will a safe, majority-minority district be narrowly enough calibrated to achieve the compelling purpose that, in principle, permits some degree of race-conscious line drawing?

Considering other constitutional developments outside the voting area during the 1990s, this question becomes only more pressing. The current constitutional framework imposes, in general, a strong burden on state actors to justify any use of racial classifications—a requirement often enforced through judicial insistence that such classifications be tightly calibrated to the limited, remedial purposes now constitutionally demanded of such classifications.[80] Even in the educational context, where state institutions might continue to have the widest latitude to adopt affirmative action plans, race-conscious admissions programs have been increasingly difficult to sustain as they come under lower federal court scrutiny. Thus, while there is currently considerable legal

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means of policing against the "expressive harms" noted above, while the other supporting Justices conceive racial classification itself to be the relevant harm. The *Shaw* majority has itself intimated divisions over the meaning of the Court's summary affirmance in *DeWitt*. *Compare Bush*, 517 U.S. at 958 (plurality opinion by Justice O'Connor) (citing *DeWitt* for proposition that not all cases of intentional creation of minority districts triggers strict scrutiny), *with id.* at 996 (Kennedy, J., concurring) (asserting that this issue was not addressed by the summary affirmance in *DeWitt*). As Professor Heather Gerken has recently suggested: *"Shaw* is simply the product of a seriously divided Court engaged in ad hoc judging as it tries to feel its way to a coherent rationale and a manageable judicial standard." Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298, 1330 (2001).

79. Clark v. Calhoun County, 88 F.3d 1393, 1406 (5th Cir. 1996).

80. In the 1990s outside the racial redistricting context, the Court also tightened the constitutional demands required of race-conscious public programs in cases such as *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995), and *Missouri v. Jenkins*, 515 U.S. 70 (1995).

uncertainty as to whether the future-looking rationale of educational diversity remains a constitutionally permissible objective, even some lower court judges prepared to accept the continuing vitality of this rationale have nonetheless found educational affirmative action admissions to be unconstitutional.[81] These judgments result from the fact that federal judges, following the Supreme Court, have been more demanding throughout the 1990s in insisting that race-conscious programs not only be justified in constitutional principle, but that the specific structure of such programs be tightly fitted to that justification.

As a matter of doctrinal principle, then, the issue of coalitional districts will pose a test to the Court's articulated commitment to applying *Shaw* like any other purpose-based equal protection doctrine.[82] If strict scrutiny, with the often decisive concomitant of narrow tailoring, is genuinely to be applied any time race plays a predominant motivating role in the design of a district—regardless of a district's shape or other features—then states will, it seems, be required to show that safe districts are demonstrably necessary to ensure "an equal opportunity to elect." But if coalitional districts are sufficient for this purpose, how will states manage to demonstrate the constitutional necessity of safe districts? Perhaps one of the key provisions of the VRA will be judicially construed to require the continuing use of such districts, either throughout the country (under section 2 of the VRA) or to avoid "retrogression" of minority voting power in those geographic areas under a distinct obligation to avoid such retrogression (under section 5 of the VRA). Questions concerning the role of safe versus coalitional districts under the VRA are considered in the next section of this Article. But if no provision of the VRA requires such districts, a purpose-based interpretation of *Shaw* would seem to pose serious challenges to intentionally designed

81. *See, e.g.*, Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1270 (11th Cir. 2001); Wessmann v. Gittens, 160 F.3d 790, 809 (1st Cir. 1998); Hopwood v. Texas, 78 F.3d 932, 966 (5th Cir. 1996) (Wiener, J., specially concurring); Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994); Grutter v. Bollinger, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001), *rev'd*, 2002 U.S. App. LEXIS 9126 (6th Cir. May 14, 2002).

82. In *Miller v. Johnson*, in which the Court established the "predominant motive test" for judging racial redistricting, 515 U.S. 900, 934 (1995), the Court cited many of the central purpose-based equal protection precedents that work out the mechanics of purpose-based analysis. *See id.* at 913 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886)); *see also* Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996) (describing the Court's effort to "merge the analysis governing race-conscious districting back into general-purpose equal protection doctrine").

safe districts, given the Court's stated principles, in contexts in which coalitional districts would suffice.[83] None of the first major 2000 redistricting challenges to raise this issue, the trial court in Virginia held the state's legislative districts unconstitutional on this basis.[84]

As a separate matter, it is also worth considering how *Shaw* might apply—if at all—to coalitional districts. Whether *Shaw* will or should apply to coalitional districts is an intriguing question in light of the harms with which *Shaw* is concerned.[85] The Court has not, in practice, invalidated under *Shaw* any district that was not a majority black or Hispanic district. In at least four cases potentially implicating *Shaw*, but in which the minority population was less than 50%, the Court has upheld the challenged districts (albeit not on grounds that such districts are immune from *Shaw* challenges).[86] One might well think that the harms which animate *Shaw* do not arise when districts are coalitional, and by definition require interracial support, for a minority candidate to be elected. In these circumstances, minorities must "pull, haul, and trade"[87] to elect their candidate of choice, a process the Court has endorsed. In contrast to the Court's concerns with bizarrely designed safe districts, it is hard to see how coalitional districts could "convey the message that political identity is, or should be, predominantly racial."[88] It is also hard to understand how coalitional districts could suggest to elected representatives "that their primary obligation is to represent only the

83. Professor Peter Rubin reaches a similar conclusion in a recent comprehensive overview of the Court's current jurisprudence on racial classifications and strict scrutiny. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 137 (2000) ("If, indeed, the black-majority districts that were created ... contained a greater percentage of black voters than was necessary for compliance with the [Voting Rights] Act, such districting plans—which would amount to packing black voters into districts—could not be found to be narrowly tailored to serve the purpose of preventing vote dilution.").

84. West v. Gilmore, No. CL01-84, 2002 Va. Cir. LEXIS 37 (Va. Cir. Mar. 10, 2002).

85. The arguments in this paragraph have been assisted by an amici curiae brief that pressed these points before the Court, though the Court did not address the points on the merits. *See* Brief of Amici Curiae Congresswoman Corrine Brown et al. at 6–10, Hunt v. Cromartie, 526 U.S. 541 (1999) (No. 98-85).

86. *See* Cromartie v. Hunt, 532 U.S. 234, 258 (2001); Quilter v. Voinovich, 523 U.S. 1043 (1998), *summarily aff'g*, 981 F. Supp. 1032, 1035 (N.D. Ohio 1997) (three-judge court) (declining to apply strict scrutiny to four districts where minority voters did not constitute a majority); Lawyer v. Dep't of Justice, 521 U.S. 567, 582 (1997) (upholding district in part because it was not a majority-minority district); DeWitt v. Wilson, 515 U.S. 1170 (1995), *summarily aff'g*, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994) (three-judge court) (declining to apply strict scrutiny to California's fifty-two congressional districts, seventeen of which were majority-white districts with a minority population greater than 35%).

87. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

88. Bush v. Vera, 517 U.S. 952, 980 (1996).

members of [the racial minority that controls the district], rather than their constituency as a whole."[89] The expressive harms with which *Shaw* itself was concerned might not be thought even potentially present when districts are designed on the empirically grounded assumption that interracial political coalitions are likely to result. Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution. Even if such coalitional districts departed from traditional districting principles, then, there are reasons rooted in the very theory of *Shaw* itself that *Shaw* might not apply to coalitional districts at all.[90] Unless the Court is prepared to adopt general constitutional constraints on the shape of election districts regardless of the predominant purposes for those shapes, *Shaw*—a doctrine to address "extreme instances of gerrymandering"[91]—might not apply. But the intentional design of coalitional districts still involves race-conscious districting, and that alone might lead the Court to apply *Shaw* even to coalitional districts. Given the uncertainty about the essential principles of the *Shaw* line of cases, there is even more uncertainty about exactly how *Shaw* will apply, if at all, to coalitional districts.

With respect to the constitutional implications of the more fundamental choice between safe and coalitional districts, I have explored two dominant interpretations of the constraints on racial districting that emerged in the 1990s. If the "expressive harms" reading of *Shaw* is correct, safe districts might not raise serious constitutional issues, though even on this reading, one can see

89. Shaw v. Reno, 509 U.S. 630, 648 (1993).

90. This is most certainly not to suggest that majority-white districts should be treated differently than majority-minority districts. *Shaw*'s principles must be applied the same way, of course, to majority-white and majority-minority districts, as Justices themselves have directly indicated. *See* Miller v. Johnson, 515 U.S. 900, 928–29 (1995) (O'Connor, J., concurring) (noting that *Shaw* does not impose a racial double standard on districts). If a state made a deliberate effort to form a white majority district for the predominant purpose of making that district majority white, then if the effect of such a district was to dilute the voting power of minorities, that district would violate both the Constitution and the VRA. Even if that district did not dilute minority voting power, it would still violate *Shaw*; anytime the predominant purpose behind the design of a district is to give one race effective control of the district, and the VRA does not require such a district as a remedy for polarized voting, *Shaw* is implicated. That is true whether a district is majority white or majority black. But properly designed coalitional districts would, in most contexts, be designed where the VRA would otherwise require safe districts to remedy polarized voting, and coalitional districts would not be designed for the predominant purpose of making the district majority white.

91. *Miller*, 515 U.S. at 929 (O'Connor, J., concurring).

arguments as to why such districts might. If the purpose-based reading of *Shaw* is to govern, safe districts would seem in greater constitutional jeopardy. But at the end of the day, these constitutional issues might not be resolved solely on the basis of doctrinal or jurisprudential consistency with *Shaw*.

In dealing with legal issues involving judicial oversight of political processes, courts have also frequently been driven by the perceived institutional imperatives of this extremely sensitive judicial role. From the time that courts first became centrally involved in cases involving the design of political institutions, they have been warned, most notably by dissenting Justices, that this involvement risks jeopardizing the separation of law from partisan politics, a separation argued to require "the Court's complete detachment, in fact and in appearance, from political entanglements."[92] Although these dissenting Justices lost their principal battle when the Court agreed to address claims involving "political rights," their concerns continue to play a role in the Court's obvious and continual search throughout this field for simple, bright-line rules that enable judicial administration in this area to minimize (or appear to minimize) the Court's deeper immersion into questions that might appear to implicate the Court in the distribution of political power. The remarkable simplicity of the one-person, one-vote rule, as a ready answer to *every* complex question about the appropriate structure of multichambered representative institutions, is the best known example of this tendency.[93] But as Professor Heather Gerken has recently noted in the North Carolina Law Review, throughout the voting-rights field, the Court has gravitated toward mechanical, bright-line rules that only generally track the underlying functional justifications that sustain various doctrines.[94] As Professor Gerken argues, the "salience of political structures and group dynamics ... makes the Court uncomfortable" with rules that turn on fact-specific,

92. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

93. As John Hart Ely observed long ago about the Court's doctrinal approach to reapportionment cases, the equipopulation rule "is certainly administrable. In fact, administrability is its long suit, and the more troublesome question is what else it has to recommend it." JOHN HART ELY, DEMOCRACY AND DISTRUST 121 (1980). Other examples might include the Court's bright-line rule that internal allocations of governmental power do not implicate the VRA under any circumstances, Presley v. Etowah County Comm'n, 502 U.S. 491, 503 (1992), or the Court's reduction of the complex statutory conception of vote dilution into a far more manageable three-prong test in *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

94. Heather K. Gerken, *The Costs and Causes of Minimalism:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1415 (2002).

functional inquiries about actual political processes.[95] While constitutional doctrine in many other fields in modern times has frequently taken the form of nebulous, multifactored "balancing tests," distinct institutional pressures in the voting-rights field have regularly inclined the Court to "simple rules for a complex world."[96]

These pressures might well trump any doctrinal or theoretical issues concerning the consistency of safe districts with *Shaw*. Consider the prospect of constitutionalizing the percentage of minority voting population both necessary and sufficient to counter racially polarized voting in a district. First, any empirical judgment on this question will necessarily be induced from prior election results, which means at best such judgment is an inductive prediction. But political dynamics might remain in flux, and how accurate will these predictions turn out to be—especially over the course of a decade, the time scale on which these predictions most roughly hold up? Judges might fear that social scientists' predictions about the behavior of coalitional districts will turn out to be overly optimistic about white crossover voting patterns. That fear could readily take the form of resistance to constitutionalizing the "optimal" level of minority populations that states are permitted intentionally to place into districts. Perhaps some margin of error should be built into these numbers to guard against that fear; but how much of a margin? Second, the size of this optimal population will vary from district to district, even if it is generally true that in southern jurisdictions 33% to 39% of white voters regularly now vote for black candidates. To constitutionalize a requirement that minority populations be no larger than necessary to ensure "an equal opportunity to elect" would not only subject every safe district in the country to the prospect of litigation, but would also make the constitutionality of districts vary in different areas depending on detailed analysis and predictions of racial group voting patterns. Although the VRA already requires courts to make these kinds of functional inquiries, judges might perceive the costs of doing so quite differently when the obligation would be judicially created through constitutional law rather than legislatively imposed. Third, courts appear reluctant, as a general matter, to make the application of constitutional principles dependent on overtly quantitative foundations. The sense of authority is always

95. *Id.* at 1445.

96. With apologies to RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

central to law,[97] and perhaps judges believe that the authority of constitutional law is compromised when expressed through numbers—numbers that vary, in addition, from place to place.

For these institutional reasons, a simple rule that, where race-conscious districting itself is constitutional, it is always also constitutional to create a district in which protected minorities form an absolute majority, is likely to be attractive to courts. That could remain so even if contemporary social science convincingly concludes that coalitional districts would be sufficient. It could also remain so regardless of what the doctrinal or philosophical underpinnings of *Shaw* might best be understood to be. No matter how powerful the current Court's jurisprudential resistance to excessively race-conscious public policy, the practical judicial resistance to the reality and the appearance of entanglement in the dynamics of race and politics might turn out to be even greater.

If courts are drawn to bright-line rules in applying constitutional constraints on racial redistricting, that might hearten those who are critical of *Shaw* itself, for mechanical rules here would limit the reach of *Shaw*. But courts might similarly be drawn to bright-line rules—indeed, the same bright-line rule—in administering the VRA. The effect there would likely disappoint VRA proponents. The next section turns to these issues, as well as the intricate variation on them that the new round of social-scientific studies of voting behavior will raise under the VRA. After those issues are addressed, we will step back and look at the overall system of race and politics that the law as a whole might construct in the current round of redistricting. That construction, it turns out, might have several ironic aspects.

B. Coalitional Versus Safe Districts: The Voting Rights Act

The legal role of reasonably compact coalitional districts under the VRA will arise in a dizzying array of forms. Are such districts now *required*, where voting is polarized, if redistricters cannot draw safe districts because minority voters are not sufficiently concentrated geographically? Are such coalitional districts now *permitted*, if redistricting authorities choose to create them instead of creating safe districts? Are safe districts now *prohibited*, because they excessively concentrate minority voters in a way tantamount to illegal "packing" of minority voters? In areas of the country to which the VRA attaches special coverage requirements that prohibit "retrogression"

97. *See generally* JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986).

in minority voting power, is it impermissible retrogression to replace a safe district of the 1990s with a coalitional district in the 2000s?

I will address the most pressing of these questions. But each potential deployment of the VRA is almost sure to be invoked by one set of actors or another. As Professor Samuel Issacharoff has observed recently, the fact that courts do not meaningfully police political gerrymandering, but do enforce the VRA and *Shaw*, virtually invites disappointed partisan actors to turn to the VRA and *Shaw* as stalking horses for pursuit of judicial forms of partisan advantage denied in the legislative struggle over redistricting.[98] This will be more true now than in the 1990s, for partisan actors became more convinced during that decade, as the 1982 Amendments to the VRA took effect, that the overall partisan consequences of redistricting can be altered by whether, where, and how many safe minority-controlled districts are created. Yet the very fact that courts will be assaulted from every direction will create further incentives for courts to resort to simple, bright-line rules when applying the VRA, as well as the Constitution.

1. Does Section 2 Require Coalitional Districts?

As *Shaw* tightens the constraints on racial redistricting, the question of whether section 2 of the VRA requires coalitional districts will rise to the surface. *Shaw* closes off the principal means used at the start of the 1990s for enhancing minority representation for geographically dispersed minority voters: similarly dispersed districts are now constitutionally proscribed. As a result, more minority voters will be unable to be located in a constitutionally constructed district, even if voting is racially polarized, in the 2000s than the 1990s. By definition, these voters are not numerous enough to comprise a safe, reasonably compact, majority-minority district. But in many places, they will be large enough to be a third or so of an election district; if white crossover voting is high enough, on primary and general election day, these minority voters could be afforded "an equal opportunity to elect" in a coalitional district. In light of social science data supporting this possibility, does section 2 of the VRA, in these circumstances, now require such a district?

The answer is yes to the social scientists who have documented the possibilities of coalitional districts.[99] As social scientists, they

98. Samuel Issacharoff, *Gerrymandering and Political Cartels*, XX HARV. L. REV. XX (forthcoming 2002).

99. *See* Grofman, *supra* note 19, at 1423.

understandably take a purely functional approach to the VRA; and their work suggests that coalitional districts can indeed serve the same function that legally justified safe districts served in the 1990s, the function of ensuring "an equal opportunity to elect." If voting is racially polarized to the extent that minority voters consistently are unable to elect candidates of their choice, the VRA (as judicially interpreted) requires the creation of safe minority districts. The point of those districts is to counter polarized voting by enabling a concentrated minority community to elect its preferred candidates. But if such a district cannot be created, and voting is still substantially polarized, a coalitional district would achieve the same aim, as long as enough white voters are willing to cross over. What should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional "safe" district can be created? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates? By what reasoning could the law then treat such districts differently; if the VRA requires a safe district, but none can be created, why should the VRA not require a coalitional district instead?[100]

Once again, if we focus purely on doctrinal and theoretical principles, there is much to support this view. The Court has said that the 1982 Amendments to the VRA require a " 'functional' view of the political process"[101] in determining whether impermissible vote dilution occurs. Nothing in this functional approach would directly argue in favor of ignoring the creation of a coalitional district, where voting is polarized, if a safe district cannot be designed. As the Court has explained this functional view, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."[102] But minority voters *can* possess that potential in a coalitional district; nothing in this pragmatic analysis requires that minority voters be able to make up a majority in a district. If minorities possess the *potential* to elect, despite polarized voting, in a coalitional district, then the failure to create this district

100. There is a question whether jurisdictions in which coalitional districts are possible should be understood still to be characterized as exhibiting "racially polarized voting," the key predicate to VRA liability, if one-third of white voters regularly vote for black Democratic candidates and do so at close to the same rate at which those voters vote for white Democratic candidates. For a fuller analysis of this question, see *infra* Part III.

101. *See* Thornburg v. Gingles, 478 U.S. 30, 45, 57, 66 (1986); *see also* Johnson v. De Grandy, 512 U.S. 997, 1013–24 (1994).

102. *Gingles*, 478 U.S. at 50 n.17.

would seem to create or perpetuate precisely the functional injury to which the Court refers.

It is true—and has been much quoted by lower courts—that in the Court's first confrontation with the 1982 Amendments, *Gingles* said that vote dilution typically demands that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[103] Read literally and acontextually, this could be taken to mean that no vote dilution that the VRA recognizes can occur unless a safe district can be created in response. But *Gingles* immediately went on to explain the reasons it adopted this "majority" requirement: unless a safe district can be created, the "*multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates."[104] But the failure to create a coalitional district *is* responsible for minority voters' inability to elect, when voting is polarized, if such a district would give those voters an equal opportunity to elect. Thus, the general functional analysis the Act requires, in addition to the specific contextual reasons the Court gave for requiring safe districts in the typical case of the 1980s, argue in favor of reading the Act to require coalitional districts, at least where safe ones cannot be created, to overcome polarized voting.[105] This is indeed the position the Solicitor General's Office has taken.[106]

Yet the courts of appeals have rejected this position to date.[107] The reasons they articulate are indirect and fail to address the issue substantively. Often, these courts simply point to the quoted

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103. *Id.* at 50.

104. *Id.*

105. Indeed, *Gingles* was at such an early stage of analysis of the VRA, compared to the present, that its comments arise in the context of then-common challenges to multimember districts. Today, the more common challenge is to the design of individual districts within a single-member districting plan. This makes all the more acontextual treating safe districts as a talismanic requirement for liability under the VRA, rather than as one example of the kind of circumstances in which vote dilution should be found. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographical Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989).

106. *See, e.g.*, Brief of Amicus Curiae United States at 11, Valdespino v. Alamo Heights Indep. Sch. Dist., 528 U.S. 1114 (2000) (No. 98-1987) (arguing that even if voting is polarized by race, crossover voting by the majority may give minority votes the potential to elect their representative of choice in districts in which minority voters are less than a majority).

107. *See* Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 852–53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368, 371–73 (5th Cir. 1999); *see also* Negron v. City of Miami Beach, 113 F.3d 1563, 1571 (11th Cir. 1997) (finding no section 2 violation when minority community is just below 50% of citizen voting-age population).

language from *Gingles* and leave it at that—treating the Court as having imposed the talismanic requirement, divorced from any underlying functional reasons, that unless a minority can be made a numerical majority in a safe district, the VRA requires nothing further. The other reason lower courts offer is that most courts already rejected claims in the 1990s that the VRA requires "influence" districts. Yet as I have noted above, this reasoning confuses the concept of an "influence district" with that of a "coalitional district." The two raise significantly different issues; to dismiss claims for coalitional districts by conflating them with influence districts is to confuse the issue, not answer it, even if that confusion is understandable.

But that is not to say that the functional approach, requiring coalitional districts, should or will prevail. Merely because the lower courts fail to articulate sound reasons is not to say that such reasons could not motivate, or justify, their conclusions (less good reasons could also, of course, motivate these results).[108] Most of the same reasons that might draw courts toward a formal, bright-line, administrable rule in the *Shaw* context would also apply in the section 2 context. That these issues arise in a statutory context, rather than a constitutional one, would perhaps make courts more willing to engage in a thoroughly functional analysis. But thus far, that is not the way judges have behaved; lower courts have resisted this functional approach. Opening up the possibility that coalitional districts are required would open up nearly all the same questions as would opening strict scrutiny of district populations under *Shaw*—and additional questions to boot. Exactly how large must a minority population be, for primary and general elections, to have what probability of success, before a coalitional district is required? And if courts go down the road of such a thoroughly functional analysis of this question under section 2, they will undoubtedly face demands to take a similarly functional analysis of many other issues under section 2. Of course, courts do that to a significant extent already, but the issue of requiring coalitional districts would involve courts at a still further, yet more microscopic level, in the design of political institutions. Moreover, what is a "formal" rule from the perspective of judicial decision making is a clear, safe harbor from the perspective

108. Among the less good reasons, I would include exhaustion with the project of administering the VRA, as the issues become more complex, and hence a desire for crude rules just to make more cases go away—or even resistance to the VRA itself, so that rules that decline to extend the VRA along directions toward which its functional purposes point are resisted for that reason alone.

of a redistricting body. The uncertainty that would be created by a rule requiring coalitional districts, even *ex ante*, would be considerable, let alone were courts to impose such a rule *ex post*. As many commentators have pointed out, redistricting is already the most Hobbesian of all legislative tasks, and one of the most incendiary, when race is part of the mix; this context cries out for any legal oversight to take the form of clear, readily-followable rules. For any legal uncertainty here will become merely another intensely charged battle site.[109]

Once again, then, despite powerful arguments urging a functional interpretation of section 2, courts might reject doing so in favor of "talismanic" rules that switch section 2 liability on or off depending on the formal fact of whether minority voters can be made a numerical majority in a district. And in considering whether to reason functionally on this specific issue under section 2, courts might consider whether they can open a functional window on this question without opening exactly the same functional window on many other issues under the Act.[110]

2. Does Section 5 Permit Coalitional Districts to Avoid Retrogression?

One of those issues will be whether section 5 of the VRA should also be read functionally. Section 5 imposes unique obligations on jurisdictions that fall under the VRA's special coverage provisions. A jurisdiction is brought under section 5's obligations if it imposed various barriers to voting, as of certain dates, and had turnout below certain levels.[111] These provisions require that these jurisdictions not enact any new voting practice, such as a redistricting plan, if that new

109. *See* Pildes, *supra* note 63, at 2550 (discussing the compelling need in voting rights for clear rules, given that "these cases are exceptionally charged politically, racially, and ethnically").

110. For an explicit judicial articulation of the importance of "bright-line rules," even if over and underinclusive, in voting rights law, as opposed to more "malleable" and "subjective" inquiries, see *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1018–19 (2d Cir. 1995). As another court of appeals has put it: "The Voting Rights Act is a crucially important piece of national legislation, but it is subject to the same considerations of effective administration as other similar statutes." McNeil v. Springfield Park Dist., 851 F.2d 937, 943 (7th Cir. 1988) (citations omitted).

111. *See* 42 U.S.C. § 1973 (1994). Under the current version of the VRA, which uses triggering dates in 1964, 1968, and 1972, nine whole states, fifty-seven counties (including forty in North Carolina), and twelve municipalities or townships are covered. *See* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended, 28 C.F.R. pt. 51, App. (2001) (listing covered jurisdictions).

practice will have a "retrogressive purpose or effect."[112] The effects prong of section 5 has been the critical enforcement provision, and an impermissible "retrogressive" effect occurs when a new voting practice "will make members of [a protected minority group] worse off than they would have been before the change with respect to their opportunity to exercise the electoral franchise effectively."[113]

Covered jurisdictions, like other jurisdictions, used safe districts, where voting was racially polarized, in the 1990s. But section 5 makes it more difficult for a covered jurisdiction to reverse a policy with respect to voting. Suppose such a state now wants to replace a safe district with a coalitional district. The state seeks to establish, we assume, that a coalitional district will now, in the 2000s, satisfy the statutory standard of an "equal opportunity to participate and elect." Moreover, if the now "extra" minority voters are added to a different district, the state will perhaps be able to create a second coalitional district, or failing that, a district in which the minority population has been enhanced considerably and is therefore likely to be more influential than before in the second district's elections. Dismantling a safe district might enable the creation of not one, but two coalitional districts. If a state carries its burden of factual proof, will the courts construe section 5 to permit replacement of a safe district with a coalitional one?

The issues are much the same here as those that arise under section 2, with one possible exception. The Court has defined the nonretrogression rule to mean that "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5."[114] A plan that replaces a safe district with two "minimally" coalitional ones would be one in which a cohesive minority community formerly had assurance of electing its representative of choice in one district and would now have a fifty-fifty probability of electing such a representative in two districts. But these new districts can also be designed to be more than "minimally coalitional;" suppose they each create a 55% probability that the minority communities' preferred candidates will be elected, based on expert analyses of voting patterns. These analyses of course are all

112. The ban on retrogressive effects was established in *Beer v. United States*, 425 U.S. 130, 141 (1976); the ban on retrogressive purpose was established in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 341 (2000).

113. 28 C.F.R. § 51.54(a) (2001); *see Beer*, 425 U.S. at 140–42.

114. *Beer*, 425 U.S. at 141.

predictive and depend on actual turnout levels and cohesiveness of voting patterns. But taking that as given, should a plan that creates a relative certainty of electing one minority-preferred candidate be preferred to a plan that creates a 55% probability of two such candidates being elected? Functionally, the second plan might plausibly be thought, not retrogressive, but progressive; arguably, the second plan "enhances the position of racial minorities" with respect to the vote compared to the original plan.

Indeed, it is conceivable that minority politicians and Democrats would favor spreading out voters in a current safe district across two coalitional districts in a covered jurisdiction, like Alabama or Georgia, in which safe districting is considered to have cost Democrats critical congressional seats in the 1990s.[115] But if a jurisdiction does that, other partisan interests will lose out in this zero-sum game, given that a fixed number of seats are to be allocated. In particular, the Republican Party has come to recognize that the "safe districting" approach of the 1990s favors its partisan interests, while the Democratic Party has recognized the opposite. Concentrating black voters into safe majorities tends to hurt the Democratic Party across a state as a whole because too many of the party's most loyal voters have been safely confined to one district. We can imagine, therefore, that the Republican Party will insist on safe districts in the 2000 round of redistricting, and that if a covered jurisdiction replaces a safe district with two coalitional ones, with support from minority political leaders and organizations, the Republican Party will turn to section 5 to prevent this change. As long as the Republican Party can find willing plaintiffs who have standing, section 5 can be deployed as a vehicle for partisan political interests that would benefit from continued preservation of safe minority districts, even if those districts in the 2000s would diminish the overall electoral opportunities of minorities. There is nothing far fetched about this; the Republican Party is already pursuing precisely this strategy in seeking to have Georgia's 2000 redistricting plan, drawn by a Democratically controlled legislature, overturned on the

115. For a concrete case study of how this tradeoff occurred in Alabama, see ISSACHAROFF, KARLAN, & PILDES, *supra* note 9, at 920–24. A robust debate has taken place in the academic literature, as in political discourse, over how many House seats might have shifted from Democratic to Republican control in the 1990s as a result of increases in the number of majority-minority districts. For some of the important contributions, see LUBLIN, *supra* note 18, at 114; Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 263–65 (1995); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POL. 384, 392 (1995).

grounds that it violates section 5 because the plan does not create enough majority-black congressional districts.[116] The Republican Party pursued a similar strategy in seeking to overturn New Jersey's state legislative districting plan as a violation of section 2 of the VRA, though that effort proved unsuccessful.[117]

This potential use of section 5 for partisan advantage might be thought to make the functional interpretation of section 5 all the more compelling. Various interests and actors will organize themselves around different positions on section 5 for a multitude of reasons having little to do with the actual purposes of section 5. To avoid becoming the instruments of these interests, are courts not best off focusing on a purely functional analysis of section 5? Indeed, is that analysis not required by section 5 itself, which emphasizes the actual "effect" of voting schemes, and by Supreme Court case law on section 5, which seems to treat retrogression as a functional concept? To be sure, a functional analysis under section 5 could be applied in a risk-averse way; one can argue that the relative greater certainty that safe districts will enable a minority community to elect one representative should be given greater weight than the probabilities associated with coalitional districts. But in the face of strong evidence that coalitional districts would enhance minority electoral access over

116. At the time this Article goes to press, this precise scenario has emerged in Georgia, where a Democratically dominated redistricting process (both the state legislature and the Governor's office are in Democratic hands) was challenged by a coalition of four black plaintiffs, represented by a lawyer with strong Republican Party connections. The challenge argued that Georgia's creation of certain coalitional districts, rather than safe districts, made Georgia's congressional redistricting plan for the 2000s "retrogressive" and therefore a violation of section 5 of the VRA. *See* Eversley, *supra* note 59; Walter C. Jones, *Statistics Rule Redisricting [sic] Trial Testimony*, FLA.-TIMES UNION (Ga. edition), Feb. 6, 2002, at A1, 2002 WL 5956890. In the peculiar rhetorical reversals that reveal how much issues of race are intertwined with those of partisan politics, Republican legislators in Georgia attacked the state's failure to draw more black-majority congressional districts as a manipulative use of the VRA; Republicans argued that the VRA "was passed to prevent the exact thing your bill is trying to do. (It was passed) to stop using minority voters to maintain power for the majority race." Michael Finn, *Remap Discussions Focus on Black Voters*, CHATTANOOGA TIMES, Sept. 8, 2001, at B2, LEXIS (quoting comments of Senate Minority Leader Eric Johnson). Meanwhile, Democrats and black congressional representatives from Georgia are arguing for fewer "safe" majority-black districts and more coalitional districts. In the state senate, the congressional districting plan passed on a virtually straight party-line vote.

117. For an account of the partisan political dynamics behind the Republican-led challenge to New Jersey's 2000 redistricting for the state legislature, see Hirsch, *supra* note 42, at 23 ("Republicans attempted to champion an outmoded conception of minority voting rights, in which success is measured solely by the number of *majority*-black districts and *majority*-Latino districts, without regard to broader issues of effectiveness or political empowerment.").

a safe district, should section 5 really *require* the use of safe districts instead?

Yet once again, these functional issues might well be trumped by the preference of legal actors, such as judges or Justice Department enforcement officials, for voting-rights rules that have a more formal, bright-line structure. That preference is likely to be at its strongest, in fact, in section 5 cases. The law itself established a baseline in the 1990s of safe districting; that baseline is the measure against which new plans will be assessed to determine if they retrogress. For courts to hold that districts they required in the 1990s are now impermissibly retrogressive, which would be required, in effect, to permit coalitional districts to replace safe districts, seems unlikely. Moreover, in covered jurisdictions, in which every change in voting practices requires federal approval, safe districts will surely be an appealing safe harbor of certainty in a sea of complexity. This is so not just for courts, but for all the actors who must enforce and comply with section 5. Redistricting officials must judge, in the first instance, what section 5 requires of them, and the Justice Department enforces section 5 through informal preclearance proceedings.

This conflict between formal and functional approaches has already begun to emerge in section 5 litigation. After its protracted struggle during the 1990s with the implications of *Shaw v. Reno*, Georgia ended up with a court-drawn redistricting plan that contained one black-majority congressional district, which had a black voting-age population of 57%.[118] In the 2000 redistricting—with support from the Democratic Party and leading black elected officials—Georgia is seeking to reduce the black voting-age population of its one majority-black congressional district to 52%.[119] In a formal sense, this five percentage-point drop in the black voting-age population of the State's one "safe" minority district might be considered to constitute the kind of impermissible retrogression that section 5 prohibits. Yet minority elected officials, including the long-serving black congressman who represents this district, defend making this district less of the conventional "safe" district of the

118. *See* Johnson v. Miller, 922 F. Supp. 1556, 1571 (S.D. Ga. 1995) (three-judge court), *aff'd*, Abrams v. Johnson, 521 U.S. 74 (1997).

119. For the data on the current districts, see http://www.thinkmajority.com/maps/stats/confcong.pdf (last visited on Feb. 16, 2002) (on file with the North Carolina Law Review). For the challenge under section 5 to this reduction in population, see Memorandum Containing Statement and Points of Authorities In Support of Renewed Motion to Intervene, Georgia v. Ashcroft, No. 01-2111-EGS (D.C. filed Nov. 16, 2001), *available at* http://www.thinkmajority.com/reapportionment/litigation/renewedpointsandauthorities.1.5.02.pdf (last visited on Feb. 16, 2002) (on file with the North Carolina Law Review).

1990s on the grounds that minority voters will still have an effective opportunity to elect candidates of choice even though more white voters would now be in the district. But some minority voters (represented by lawyers associated with the Republican Party) assert that this reduction in black voting population does violate section 5. Thus, courts will have to decide whether section 5 permits any formal reduction in the minority populations of "safe" districts from the 1990s if these new, lower population districts are functionally as effective as the prior decade's safe districts.

Much in partisan politics and issues of race and politics will turn on the outcome of this clash between form and function in those jurisdictions to which section 5 applies—many of them southern jurisdictions with substantial minority populations. Beyond the issues already raised out of Georgia, the next question would be whether reducing a safe district of the 1990s to a coalitional district in the 2000s (meaning a drop in the black voting-age population below the magic 50% mark) would be permissible under section 5. If this issue does not arise, because no jurisdiction is willing to pursue and no plaintiff is willing to challenge such a strategy, its absence would testify to the power that bright-line, formal rules hold—even when functional considerations point the other way—for numerous actors in the redistricting process.

3. Does Section 2 Permit, if not Require, Coalitional Districts?

Even if the Act does not require coalitional districts, there is still an important legal question of whether section 2 will *permit* such districts in circumstances in which the law would have required safe districts instead in the 1990s. One way the new social science findings might affect redistricting is for front-line redistricting authorities themselves to take account of these emerging results, in response to various parties pressing for that. Courts might accept coalitional districts that arise in this way, for in this context, courts would merely have to defer to the judgments of political institutions, rather than to impose and enforce functionally-oriented legal requirements on the redistricting system. Indeed, one major three-judge court decision, *Page v. Bartels*,[120] has already permitted coalitional districts to be used in place of safe, majority-minority districts.

How freely courts might permit coalitional districts, even if they are not required, will have to be worked out. In *Page*, the court did not rely only on expert testimony and quantitative, functional analysis

120. 144 F. Supp. 2d 346 (D.N.J. 2001) (per curiam) (three-judge court).

of actual voting behavior. The court also invoked qualitative insight into likely effects of coalitional districts, based on the testimony of minority political officials who endorsed the coalitional districts.[121] In addition, the relevant plan included a number of conventional safe districts; the coalitional districts therefore did not replace all safe districts, only a few.[122] The inevitable litigation that usually results from the creation of such districts will have to resolve the question of whether all these factors or only some must be present before courts will permit coalitional districts—at least until a settled legal approach emerges.

The practice of creating coalitional districts, in Democratically controlled redistricting processes, is likely to be pressed in the 2000 round. As Democrats and minority officials learned the lessons of the 1990s redistricting, many came to accept that a genuine tradeoff exists between descriptive and substantive representation:[123] packing minority voters into overly safe congressional districts in a state, for example, diminishes the overall Democratic prospects for the state's congressional delegation as a whole. Coalitional districts, where possible, offer a way out of this tension. If black candidates can be elected in districts that have a 35% rather than 55% black voting-age population, and black candidates can be elected with 60% rather than 78% of the vote on general election day, there are more black and more Democratic voters to go around. Coalitional districts can be jointly supported by both minority voters and Democratic partisans—and jointly preferred to safe districts, in the right contexts. Democratic redistricting bodies are therefore likely to turn to such districts, just as Republicans are likely then to turn to courts and argue that such coalitional districts should not be permitted.

But even if coalitional districts emerge voluntarily in certain states, and even if courts permit these districts under section 2 and defer to the process that generates them, there are many contexts, some explored above, in which the Constitution and the Act will still require courts to choose whether the law continues to require and permit the safe, majority-minority districts of the 1990s. Those contexts will not permit courts to defer to actions of others, but will require first-order decisions about a functional or formal approach to voting-rights issues. No choice is easy, as this Article has tried to suggest, but the choice will nonetheless have broad effects on the way

121. *Id.* at 356–57, 366.
122. *Id.*
123. For analysis of the data on this tradeoff, see generally Pildes, *supra* note 16.

race affects political campaigns, candidacies, partisan politics, and representative institutions.

III. COALITIONAL DISTRICTS: THE CHALLENGE TO CONTINUED APPLICATION OF THE VOTING RIGHTS ACT

When eight-term Congressman John Lewis of Atlanta, who risked his life to help get the VRA enacted, testifies in court that Georgia and the South have "come a great distance" even since 1990 in the willingness of whites to vote across racial lines—and that the South is "preparing to lay down the burden of race"[124]—the question arises as to what the continuing role of the VRA ought to be. The new possibility of coalitional districts brings to the forefront a deeper issue, not merely of how the VRA should be applied in the 2000s, but of whether, in some places at least, the VRA should be understood to have realized its purposes. The law will continue to ban discrimination in voting, of course, but the question is whether the kind of vote dilution to which the 1982 Amendments were a response should be viewed as absent in jurisdictions where coalitional districts are viable. Put in other terms, the VRA has long been justified as a necessary response to a specific set of circumstances; the hope was that the VRA would help break down polarized voting and change those circumstances. Perhaps the possibility now of coalitional districts, in at least some places, shows that the VRA has succeeded in its specific, albeit limited, goal of diminishing polarized voting (or culture and politics have brought about the changes to which the VRA aspired). If one-third of white voters regularly are willing to vote for black candidates, and if those white voters vote at close to the same rate for black Democrats as they do for white Democrats,[125] should this be understood to mean that voting behavior has changed sufficiently so that the VRA has largely achieved its purposes? The question forces consideration of what those purposes, precisely, should be understood to mean.

Doctrinally, these issues would be presented in terms of whether "racially polarized voting," the key predicate for VRA liability, exists even when one-third of white voters are willing to vote regularly for black candidates. The Supreme Court has not yet had to specify what precise levels of white support for minority-preferred candidates defines the boundary between polarized and nonpolarized voting. If half of white voters vote for candidates that minority voters favor,

124. Eversley, *supra* note 59.

125. *See* notes 33–34 and accompanying text.

could voting be considered racially polarized? How, then, should we think about the matter when one third of white voters vote regularly for minority-preferred candidates—and when those preferences are not significantly different when same-party white Democratic candidates run? The concept of polarized voting was developed in circumstances in which white candidates could be elected without paying any attention to black voters or their interests; a solid, hostile, bloc-voting white majority was overwhelmingly unified in its resistance to black candidates. Once the white community's preferences are significantly diverse, however, how should the concept of racial polarization be understood? Justice O'Connor has long argued, for example, that the VRA should recognize distinctions between circumstances in which "indirect avenues of . . . influence"[126] are likely to be open to minority communities from circumstances in which they are not. The political dynamics of influence are likely to be significantly different in areas where black voters and one-third of whites vote for black candidates, as compared to areas where 90% of whites consistently vote against such candidates.[127]

Supreme Court doctrine can be looked to for a partial answer on these profound underlying questions. The "functional analysis" required to implement the VRA since *Gingles* has focused on the bottom-line ability to elect candidates of choice. If voting patterns are such that minority voters consistently cannot elect their preferred candidates, despite one-third white support, we might conclude that voting should still be considered racially polarized. The concept of polarized voting, on this view, should derive from a functional analysis in which candidate election remains the touchstone of that analysis. On this view, if minority-preferred candidates are not being elected, voting is racially polarized—by definition.[128]

126. Thornburg v. Gingles, 478 U.S. 30, 100 (1986) (O'Connor, J., concurring).

127. *Cf. id.* (O'Connor, J., concurring) ("I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge.").

128. *See id.* at 48 ("The theoretical basis of this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters."); *id.* at 56 ("[I]n general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting.").

But this is a partial answer because it obscures more difficult, deeper, theoretical questions. At what point, if at all, should voting-rights law examine the reasons that white and black voters have differing candidate preferences—particularly if those reasons seem to reflect partisan political differences, rather than racial resistance to black candidates? If white voters in the South vote for white and black Democratic candidates at nearly the same rate, but most white voters vote for Republicans over either of these options, should black candidate defeats be viewed as a product of racially polarized voting—or the kind of ordinary partisan loss that occurs when a jurisdiction's voters prefer one party over the other?

These issues are perplexing and perhaps, at a theoretical level, intractable, though the law nonetheless must make a choice. On the one hand, it is easy to understand the argument that, in a two-party system, if party *A* (the Democratic Party) is systematically supported by minority voters, because those voters believe party *A* better serves their interests, then white voters can support party *B* out of hostility to the interests of minority voters (or out of indifference or genuine differences over desirable policy). Even outright racial animus could easily hide behind a partisan preference for party *B* candidates. Regardless of the reasons white voters support party *B*, if those voters are a dominant majority and can elect consistently party *B* officeholders, the substantive political interests of minority voters (as they perceive those interests) will be defeated.[129] Can the VRA be indifferent to these consequences, even if it looks as if white voters always reject party *A* candidates (black or white) for partisan, rather than racial, reasons?

On the other hand, the VRA cannot be an entitlement to guarantee the Democratic Party as such a certain number of seats. Yet that is close to what it would mean to say that if a majority of voters prefer Republicans, but a coalition of black and white voters prefer Democrats, and Democrats (white or black) consistently lose, then the Act requires that districts be redesigned so that the white-black coalition be able to elect its candidates. If the concept of polarized voting means no more than that minority-preferred candidates regularly fail to win, regardless of the reasons for that failure, then minority-preferred candidates possess a statutory sinecure. Even if Democrats are losing because they are Democrats and cannot attract enough political support, those candidates would be entitled to office, as long as the minority community supported

129. This viewpoint is developed in Karlan & Levinson, *supra* note 82.

them. A statute aimed at counteracting discrimination in voting would thus be transformed into a substantive, partisan entitlement to office. Can the VRA be indifferent to the reasons whites vote against the candidates blacks prefer, even if that indifference means treating black candidates who lose for racial reasons the same as those who lose for partisan political reasons?

Perhaps because these issues are so difficult, the law has been unsettled on this debate essentially since constitutional doctrine and the VRA began to address the very problem of vote dilution. In the first constitutional cases, the Court asserted that vote dilution occurred only when there was a "built-in bias" against black voters, as opposed to a situation in which those voters were simply supporting losing candidates along with losing white voters.[130] The "theme" of these original cases, as their principal author put it, was that "it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned."[131] Justice Marshall distinguished between lack of electoral success for minority voters that was "the result of partisan politics" from that which was the result of "racial vote dilution."[132] When Congress amended the VRA in 1982, it endorsed the line these prior cases had drawn.[133] The Supreme Court's key engagement with these amendments reflects deep divisions on whether separating racial from partisan reasons for differences in preferences between black and white voters is appropriate. Justice Brennan, writing for a plurality of Justices, concluded that the mere difference in preference, regardless of reason, was sufficient to establish polarized voting.[134] Justice White argued that this approach confused "interest-group politics" with "a rule hedging against racial discrimination."[135] Justice O'Connor agreed with Justice White, as did other Justices who refused to join Justice Brennan's plurality opinion on this point.[136] As one lower court has observed, the differences among these views "cuts deep,

130. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

131. Shaw v. Reno, 509 U.S. 630, 661 (1993) (White, J., dissenting).

132. Mobile v. Bolden, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting).

133. *See, e.g.*, S. REP. NO. 97-417, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 211. This important Senate report accompanying the 1982 Amendments cited these earlier cases and noted that the Court required a distinction "between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not."

134. Thornburg v. Gingles, 478 U.S. 30, 60–61 (1986) (plurality opinion of Brennan, J.) (finding that the district court's approach, which tested data from three election years in each district, satisfied the proper legal standard).

135. *Id.* at 83 (White, J., concurring).

136. *Id.* at 100–01 (O'Connor, J., concurring).

reflecting quite different visions of voting rights and their statutory treatment."[137] The lower courts for a time followed Justice Brennan's approach, but have since fragmented.[138]

The voting patterns that make coalitional districts possible also might mean that the courts will no longer be able to avoid confronting these fundamental normative questions. As whites vote in less unified ways, and as black candidates lose when Democrats lose and win when they win, the relationship of partisan preferences to the concept of polarized voting will become more pressing. This Article assumes that voting should still be considered racially polarized, within the meaning of the VRA. But the rise of coalitional district possibilities also raises the prior, more profound question of whether the VRA should apply—whether its predicate of polarized voting should be understood to be present—in places where one-third of whites cross racial lines and vote for black candidates at nearly the same rate as white Democratic candidates. Districts could still be designed in such places that encouraged coalitions across racial lines, but these districts would result from legislative choice, not VRA obligation.[139]

IV. IS VOTING-RIGHTS LAW AT WAR WITH ITSELF?

Voting-rights law in the 2000s might respond in one of two ways to the emergence of social-scientific findings that suggest that in some contexts, coalitional districts, rather than safe ones, now enable minority voters equal electoral opportunities. The law might move toward an intensively functional, context-specific approach. That is the approach that the Supreme Court itself has endorsed in its leading precedent under the VRA, and it is the approach most academic commentators have long encouraged.[140] In that case, the VRA might be understood to require state and local governments to draw coalitional districts, when voting is polarized, even if safe districts cannot be drawn. The effect would be to increase the descriptive representation of minorities in political bodies, assuming social

137. League of United Latin Am. Citizens (LULAC) v. Clements, 999 F.2d 831, 857 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994).

138. Most lower courts followed Justice Brennan's approach, but in *LULAC*, the Fifth Circuit held that VRA plaintiffs must disprove partisan politics as the explanation for racially divergent candidate preferences. *Id.* at 859–61.

139. Complicated constitutional questions might be raised about whether race-conscious districting, even to produce districts designed to require interracial coalitions to elect candidates, meet the Court's current standards for race-conscious state action.

140. *See, e.g.*, GROFMAN ET AL., *supra* note 15, at 82–109.

scientists are right in projecting the dynamics of racial voting patterns. At the same time, that functional approach might suggest that there is no impermissible "retrogression" under section 5 of the VRA if a jurisdiction recasts a safe district of the 1990s into a coalitional district in the 2000s, as long as the evidence shows that the coalitional district will afford an equal opportunity to elect. In addition, on the constitutional side, this functional approach to *Shaw* could lead courts to find safe districts insufficiently narrowly tailored where coalitional districts would suffice. Thus, this functional approach would, on the one hand, legally require jurisdictions to draw more coalitional districts, while at the same time it would permit covered jurisdictions more flexibility in moving away from safe districts and, perhaps, constitutionally prohibit jurisdictions in general from intentionally designing safe districts where coalitional districts would suffice.

What would the net political effects of a consistent functional approach to the law be? In essence there would be a renaissance of a form of election district that all but disappeared, under legal command, in the 1990s: districts in which minority voters were a third of the voting population and white voters were two thirds. The elimination of these districts in the 1990s redistricting was precipitous, intended, and the direct consequence of legal obligation. In the South, for example, between 1990 and 1992, when new plans went into effect, there were eighteen fewer congressional districts, ninety fewer state house districts, and twenty-two fewer state senate districts with black populations between 30% and 50%.[141] Indeed, after the 1990 redistricting, only *two* congressional districts in the South had 30% to 50% black voting-age populations (and non-Hispanic whites filling out the district).[142] If coalitional districts become a partial substitute for some safe districts in the 2000s, this decade might see a revival of this recently-lost form of district; if new coalitional districts were created where safe districts had not existed before, the 2000 redistricting process would yield many more coalitional districts than

141. Handley et al., *supra* note 56, at 33. These districts were replaced, on the one hand, with majority-minority districts, and on the other, with districts from which nearly all black voters had been removed. There was also a precipitous increase in districts with less than a 10% black population after the 1990s redistricting; in the South, there were nineteen more of these nearly all white districts for Congress, thirty-seven more for state senates, and sixty-nine more for state houses. Outside the South, there were two more such less-than 10% black districts for Congress, forty more for state senates, and twenty-four more for state houses. *Id.* at 32.

142. After the initial 1990 redistricting, four congressional districts in the South had a 30% to 50% black voting-age population, but in two of these, black and Hispanic voters jointly constituted a majority. Lublin, *Racial Redistricting*, *supra* note 39, at 184.

the number of safe districts that existed in the 1990s. In terms of political effects, this functionally-oriented legal framework ought to increase the descriptive representation of minorities—despite the appearance that "dismantling" safe districts would have and the possible outcry it might initially provoke.[143] If the social-scientific analyses are correct, coalitional districts, in the appropriate circumstances, will generate an equal opportunity for minority communities to elect candidates of choice. Safe districts currently do so as well, of course, but if safe districts are replaced with coalitional ones, and new coalitional districts are increased on top of that, the net effect would be—assuming the data are correct—to increase meaningful political opportunities for minority communities.

If courts take a functional approach to one set of these issues, the always-insistent legal pressure for "consistency" and "congruence"[144] will incline courts toward this functional approach across the board. Agenda-sequencing issues might present these issues in any number of different orders to the courts, and temporarily, a disequilibrium might emerge; some issues might be treated functionally, others not. But over time, it seems likely that congruent legal treatment of coalitional districts would emerge. Proponents of reading section 2 of the VRA to require coalitional districts—such as the social scientists whose work I discuss in this Article—would have to accept that safe districts might not be required to avoid retrogression under section 5 and might be unconstitutional under *Shaw*. Conversely, those who would argue that *Shaw* should permit continued use of the safe-districting strategy will face difficulties in convincing courts to adopt a functional approach to section 2 of the VRA in isolation; as a result, this stance will make it unlikely courts will read section 2 to require coalitional districts.

But as all the issues raised above suggests, the functional approach would also be deeply destabilizing. By the end of the 1990s, a settlement seemed to have emerged around at least one issue in the

143. In the recent New Jersey state redistricting battle, national civil rights organizations initially objected to the Reapportionment Commission's decision to create some coalitional districts where safe districts could have been created, but these organizations quickly turned around and withdrew their objections, presumably after being convinced by local political officials and others that these coalitional districts were in the interest of minority voters. *See* Page v. Bartels, 144 F. Supp. 2d 346, 355 (D.N.J. 2001) (holding that the redistricting plan would not impair or prevent minorities from electing their chosen representatives and did not violate the VRA).

144. Adarand Constr., Inc. v. Pena, 515 U.S. 200, 223–24 (1995) (emphasizing skepticism, consistency, and congruity as the Court's three established general principles with respect to governmental racial classifications).

contentious voting-rights field: safe districts were required where other elements of the VRA were established and safe districts were constitutionally permitted, subject to constraints not centered on the population sizes of such districts. Given all the other freighted and complex issues that will be up for grabs already in the 2000s, are courts going to be willing to create further uncertainty by putting the issue of coalitional versus safe districts up for grabs as well—whatever the findings of social science show? Redistricting is currently proceeding on the taken-for-granted assumption that the safe districting strategy of the 1990s remains, from a legal point of view, secure. If courts start taking a functional approach to these issues, much of that redistricting, in areas with significant minority populations, will be put in jeopardy. Beyond the other legal issues that will already draw courts into extensive oversight of much of this redistricting, will courts destabilize the redistricting process even further, and involve themselves even more extensively, by unscrambling the safe districting approach and requiring re-redistricting for a second round in the 2000s? The Supreme Court itself does not appear anxious to become more deeply involved in voting-rights issues; the Court regularly denies certiorari or summarily affirms in cases that raise important issues.[145] Lower courts might be similarly exhausted with the complexity of voting-rights issues and resist major new issues that would require continual judicial involvement with factually complex matters that an even more concertedly functional approach would require.

The second way, therefore, in which courts might respond to emerging patterns of racial dynamics in voting is, in essence, to ignore them. Instead of a functional approach, courts might well take a not-readily dismissed formal approach; here too, the same reasons suggest that courts will do so across the board if they do with respect to any one legal issue concerning coalitional districts. This formal approach would entail refusing to look below the surface of safe districts to determine if other districts perform the same functions. Thus, states would continue to be permitted, and probably *required*, to use safe districts to avoid retrogression under section 5. *Shaw* would continue to permit safe districts to be used constitutionally. And section 2 of the VRA would apply only when safe districts, in which minorities are truly a majority of the voting-age population, could be constructed; the VRA would impose no obligation to create coalitional districts.

145. *See, e.g.*, King v. State Bd. of Elections, 979 F. Supp. 619, 621 (N.D. Ill. 1997), *aff'd without opinion*, 522 U.S. 1087 (1998).

Given all the reasons that press courts toward bright-line, easily administered rules in this area, experience suggests courts will find this formal approach attractive. Such an approach would also not destabilize the precarious legal status quo of the late 1990s, despite newly emergent insights into actual voting behavior that challenge the premises on which that status quo was constructed.

But when we step back from the intricate legal issues that constitute voting-rights law to ask where we now stand,[146] what will emerge from the 2000 process might be distressingly ironic. If courts and other actors do indeed adopt the formal approach, the law will have frozen us into a politics of "safe" districting, in which minority voters are concentrated into some districts in which they make up a majority and, to achieve that end, are present only in small numbers in all other districts. To achieve more descriptive representation in legislative bodies, given polarized voting, we would have created districts in which candidates can get elected without significant support across racial lines. The 1990s saw the virtual elimination, under legal compulsion, of election districts in which black voters constituted 30% to 50% of the population.[147] That might have been a necessary response in an era in which polarized voting would otherwise have had the consequence of electing no more than 1% minority officeholders. But if the social scientists are correct that coalitional districts—the very 30% to 50% minority districts eliminated in the 1990s—now do enable minority voters to have equal opportunity at electoral politics, then such districts offer the prospect of integrated polities electing candidates across racial lines with biracial support.

The vision of this kind of polity, at the microlevel of individual districts or the macrolevel of the political community as a whole, has long been thought the appropriate animating goal of the VRA. This view of ultimate aims has been shared across the conventionally defined political spectrum. Among the strongest proponents of the interpretation of the VRA that prevailed before *Shaw*, single-race controlled safe districts were justified as "admittedly the 'politics of the second best' "—a "necessary evil in a color-conscious world."[148] Among those most concerned about race-conscious design of democratic institutions, including the Justices who developed the

146. The issues raised here largely originate in the 1982 Amendments to the VRA and reflect 20 years of experimentation since federal law banned vote dilution. The issues do not go to the implementation of the original 1965 VRA.

147. *See supra* note 141 and accompanying text.

148. GROFMAN ET AL., *supra* note 15, at 136.

Shaw constraints on racial districting, the articulated concern has been that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions;" it is for that reason that "race-based districting by our state legislatures demands close judicial scrutiny."[149] A decade after these statements, coalitional districts might offer the prospect of a more integrated, cross-racial set of political alliances that would ensure minority representation—perhaps at even higher levels than at present—without requiring resort any longer to the "politics of the second best." Proponents of the VRA might be heartened by that development. Proponents of *Shaw* might similarly be pleased if integrated, rather than single-race controlled, districts are now sufficient.

Indeed, if there is anything a Supreme Court that is usually divided on voting-rights issues agrees on, it appears to be these principles. Thus, in writing for an unanimous Court, Justice Souter recently expressed these points forcefully:

> It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the "politics of the second best." If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates might not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.[150]

But the irony is that voting-rights law itself might now stand in the way of that transformation. If courts continue to view safe districts as both required statutorily and immune from constitutional challenge (on population grounds), redistricting officials will understandably consider such districts to be safe harbors protecting their plans from legal challenge. If courts view the judicial role as necessitating administration of voting rights through bright-line

149. Shaw v. Reno, 509 U.S. 630, 657 (1993).
150. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (citations omitted).

rules—the rule that safe districts are required and permitted—this formal approach will lock "safe districting" into place in the 2000s, despite apparent evidence that such districts might no longer, at least in all places, be necessary. In this way, voting-rights law would turn out to be at war with itself: the substantive principles of the VRA and the Constitution would insist that the law reflect current functional realities regarding actual voting behavior along racial lines, while the judicial imperatives of easily administered, bright-line rules and avoidance of dramatically destabilizing new doctrines, would compel a more formal approach. The latter would result in bypassing effective, integrated, coalitional districts for continued reliance on safe districts no longer tied to the substantive purposes of either the VRA or the constraints of *Shaw*.

Courts will therefore face complex choices, ones in which serious costs accompany any decision, as they assess the new decade's representative institutions. At one extreme, they can adopt a functional approach to voting rights; the result could be reopening many districting plans now being drawn and constant judicial entanglement with issues of race and politics throughout much of the next decade. At the other extreme, courts can adopt a formal approach; the result could be to entrench a now crude structure for ensuring fair representation that abandons integrated electoral politics, even where effective, in favor of a system of monoracial dominated electoral politics, where the race that dominates in some places is white, in some black. On the eve of the new decade of redistricting, the way courts make that choice will shape not just the relation between law and social science, but the kind of electoral politics and political culture we have, on the difficult issue of race and politics, in the first decade of the 2000s.