THE PARTISAN CONSEQUENCES OF THE VOTING RIGHTS ACT

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The future of the Voting Rights Act is in doubt. A growing chorus of critics have argued that the Act is out of date, and just this spring the Supreme Court called into question the constitutionality of a core provision of the Act. With the 2010 round of redistricting on the horizon, these trends raise important questions. What would be the partisan consequences of eliminating the Voting Right Act's legal requirements regulating redistricting? Would redistricting authorities eliminate majority-minority districts that have helped diversify Congress over the past few decades? We argue that conventional thinking is misguided about these and other important questions concerning the relationship between race-based and partisan redistricting. Existing accounts fail because they typically imagine only two types of voters: Democrats and Republicans. Relaxing this assumption, and acknowledging that voters come in diverse ideological types, changes dramatically the optimal strategy for partisan gerrymanderers. It also changes the role that majority-minority districts play within that strategy. Perhaps the most important consequence is that the Voting Rights Act turns out to constrain Republicans more than Democrats in their pursuit of partisan advantage in the redistricting process. This conclusion has important implications for the next round of redistricting, the future of the Voting Rights Act, and more broadly for all efforts to promote minority representation within a redistricting regime controlled by partisan officials.

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INTRODUCTION

The future of the Voting Rights Act is up for grabs. Congress reauthorized the core enforcement provisions of the Act just a few years ago.[1] But critics argue that the Act, passed in the 1960s to combat the widespread exclusion of African-American voters from the polls, is now hopelessly anachronistic.[2] Going further, the Supreme Court hinted a few months ago that parts of the Act may be unconstitutional.[3] Prominent supporters of the Act have suggested that Congress should respond to the Court's concerns by re-working the Act.

The timing of this flurry of activity is particularly important because the next round of decennial redistricting is just around the corner. Following the release of the 2010 census results, states will be required to redraw every congressional and state legislative district in the country. If the Voting Rights Act remains unchanged, it will place significant constraints on the way in which those districts are drawn. But if parts of the Act are struck down by the Court or amended by Congress, the redistricting regulatory landscape could look significantly different than it has in decades.

What would be the significance of eliminating the Voting Rights Act's redistricting requirements? Would doing so favor either Democrats or Republicans? Would redistricting authorities eliminate majority-minority

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[1] *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 5, 120 Stat. 577, 580, (codified at 42 U.S.C. § 1973(b) (2007)).

[2] *See, e.g.*, ABIGAIL THERNSTROM, VOTING RIGHTS--AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS (2009); Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* (American Enterprise Institute 2006); George F. Will, *Voting Rights Anachronism*, WASH. POST, Jan. 18, 2009, at B7. *Cf.* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

[3] *See* Northwest Austin Municipal Utility District No. 1 ("NAMUDNO") v. Holder, 129 S. Ct. 2504, 2511-13 (2009). NAMUDNO, one of the most anticipated cases decided by the Supreme Court this spring, concerned a challenge to the constitutionality of the newly reauthorized Section 5 of the Voting Rights Act—one of the Act's core enforcement provisions. The Supreme Court avoided the constitutional question by adopting a strained interpretation of the Act's statutory language. *Id.* at 2513-19. But many prominent voting rights scholars and Court watchers have read the decision as a warning to Congress that the Court is prepared to strike down Section 5 in a future lawsuit. *See, e.g.*, *Room for Debate: The Battle, Not the War, on Voting Rights*, N.Y. TIMES, June 22, 2009 (statement of Richard H. Pildes), *available at* http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/#richard; Tom Goldstein, *Analysis: Supreme Court Invalidates Section 5's Coverage Scheme*, SCOTUS BLOG, June 22, 2009, *available a*t http://www.scotusblog.com/wp/analysis-supreme-court-invalidates-section-5's-coverage-scheme-2/.

districts that have helped diversify Congress over the past few decades? This Article's central contribution is to show that conventional thinking is misguided about these and other important questions concerning the relationship between racial and partisan redistricting.

Commentators have long disagreed about the partisan consequences of the Act's redistricting requirements. Over time, however, the bulk of academic commentary has concluded that the Act benefits the Republican Party.[4] The conventional story is familiar: drawing districts that contain a majority of minority voters, as is often required by the Act, helps minority voters in those districts but hurts the Democratic Party more generally by packing Democratic supporters into too small a number of districts. This story has dominated popular accounts at least since the Republicans took over Congress in 1994. It also figured prominently in recent reports of the political dynamics surrounding the reauthorization of a core provision of the Voting Rights Act. Republicans in Congress supported that reauthorization overwhelmingly, and that support has been seen by many as strategic—a decision to support a rule that rigs the redistricting game in Republicans' favor.

The difficulty is that most of these existing accounts are plagued by various methodological problems. Perhaps the most pervasive is that they typically imagine only two types of voters: Democrats and Republicans. Relaxing this assumption, and acknowledging that voters come in diverse ideological types, changes dramatically the relationship between partisan gerrymandering, racial redistricting, and the Voting Rights Act. To unpack these relationships, we take a new approach that proceeds in three straightforward steps. First, we analyze the redistricting process to identify the optimal strategy for a partisan redistricting authority in a world with diverse voter types. Second, we ask how a redistricting authority following the optimal strategy would treat minority voters. Third, we ask whether the Voting Rights Act prevents the partisan redistricting authority from distributing minority voters in the way she prefers and, if so, under what conditions. Put simply, we take the intuitive approach of asking what an unconstrained redistricter would do, and then ask whether law actually constrains this preferred course of action.

As we will show, our approach demonstrates that, at least in areas where minority voters are predominantly African American, the Voting Rights Act constrains Republicans more than Democrats in their pursuit of partisan advantage in the redistricting process. In other words, the Act contains a partisan bias in favor of the Democratic Party.

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[4] *See infra* note 51 and accompanying text.

This conclusion raises a significant question about why Republicans supported, in overwhelming numbers, the recent reauthorization of central parts of the Voting Right Act. More broadly, our claim has important implications for the past and future of the Supreme Court's voting rights jurisprudence, as well as for longstanding disagreements about how to best protect and advance minority voting rights within the American political system. For example, it complicates the story about the Court's much criticized *Shaw* doctrine; it points to a potential path out of the quagmire in which partisan gerrymandering jurisprudence is currently stuck; and it suggests that the debate about the relationship between descriptive and substantive minority representation may be proceeding from erroneous premises.[5] In short, our approach provides a new framework for thinking about these many other questions about minority representation within a redistricting regime controlled by partisan officials.

I. PARTISANSHIP, RACE, AND OPTIMAL REDISTRICTING

This Part clarifies the misunderstood relationship between partisan and racial gerrymanders. We show that the conventional wisdom about partisan gerrymanders—that redistricting authorities maximize partisan advantage by "packing" and "cracking" voters who favor the opposing party—is wrong. This first insight leads to a second: that the general consensus about the relationship between partisan and racial gerrymanders is misleading.

A. *A Theory of Partisan Gerrymandering*

Redistricting allocates voters to electoral districts. In the United States, where members of both state legislative assemblies and Congress are elected predominantly from single member districts, the allocation of voters to districts plays a significant role in determining what candidates emerge and who ultimately wins each seat.[6] Redistricting thus presents whomever controls the process with a tremendous opportunity to shape political outcomes. This fact is not lost on the state legislative assemblies that, throughout most of the United Sates, have initial authority to draw both state legislative and

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[5] In Hannah Pitkin's classic formulation, "descriptive" representation is concerned with representing the identity of a voter while "substantive" representation is concerned with representing the interests of a voter. *See* HANNAH F. PITKIN, THE CONCEPT OF REPRESENTATION 60–61, 209 (1972).

[6] *See* 2 U.S.C. § 2c (2006) (requiring that members of the House of Representatives be elected using single member districts); *see also* DOUGLAS J. AMY, BEHIND THE BALLOT BOX 55 (2000) (noting that nearly all states use single-member districts to elect a large majority of their state legislators).

congressional districts.[7] As far back at 1812, Elbridge Gerry's Democratic-Republican Massachusetts government drew contorted districts in an (ultimately unsuccessful) effort to fend off the Federalists.[8] Today, the Democratic and Republican parties fight for the partisan gain that comes with control over the decennial redistricting required by the release of each new census.[9]

Over the past several decades, scholars have worked to understand both (1) what *ends* political actors want to achieve when they redistrict, and (2) what *strategies* they adopt to accomplish those goals. The desires of individual legislators engaged in the redistricting process are complicated, but there is substantial evidence that the twin aims of partisan advantage and self-preservation dominate the process. That is, legislators would like to benefit their political party and make their own seats as safe as possible.[10] These goals are sometimes in tension, and there is disagreement about how individual legislators—and, collectively, legislative assemblies—make trade-offs between these two desires. Nonetheless, almost everyone agrees that redistricting authorities are centrally motivated by the desire for partisan advantage. We thus focus on partisan gerrymandering in our effort to understand the redistricting process.

If a political party with complete control over the redistricting process wants to draw districts to maximize its advantage within the resulting

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[7] The Supreme Court has never been particularly explicit about which provision of the Constitution confers on states initial authority to draw federal congressional districts. While Article I, Section 4's so-called Elections Clause is an obvious candidate, the Court does not appear to have explicitly relied upon it. *See* U.S. CONST. art. I, sec. 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 780 n.114 (2004) (describing ambiguity over constitutional source of authority). Authority over state legislative districting is controlled by state constitutions and statutes. Most states treat redistricting as an ordinary legislative function. *See* Michael P. McDonald, *A Comparative Analysis of Redistricting in the United States, 2001-2002*, 4 ST. POL. & POL'Y Q. 371, 377 (2004) (stating that 38 states use the ordinary legislative process for congressional redistricting and 26 states do so for state legislative redistricting).

[8] *See* ELMER CUMMINGS GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 18 (1907) (tracing the practice back to colonial times); Henry F. Griffin, *The Gerrymander*, NEW OUTLOOK, Jan. 28, 1911, at 187-89.

[9] Nathan L. Gonzales & Lauren W. Whittington, *Parties Prepping for Redistricting Fight*, ROTHENBERG POLITICAL REP., May 20, 2009.

[10] *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 18-44 (2002); Bruce E. Cain & Janet C. Campagna, *Predicting Partisan Redistricting Disputes*, 12 LEG. STUD. Q. 265, 268 (1987).

legislative assembly, how will it allocate voters across districts? In part this depends on what sort of "advantage" the party cares about. Most obviously, a party may want to maximize the expected number of districts its candidates win, so that it controls the largest seat share possible in the legislature.[11] A party will often care about other values as well; it might care, for example, about winning control of the legislature and thus place a high value on getting over the 50% seat threshold. (For evidence of this, see the behavior of the Georgia state legislators during the 2000 round of redistricting.)[12] Or a party might be quite risk averse and care about reducing the uncertainty about how many districts it will win. For our purposes, the precise objective is unimportant. The model of optimal gerrymandering we will describe below holds across a variety of party objectives—even if a party cares simultaneously about things like seat share, legislative control, and risk aversion. For ease of exposition, however, we will assume that parties care exclusively about maximizing the expected number of seats they win. This is the assumption that is most commonly made in the redistricting literature.[13] But nothing significant turns on it.[14]

The standard intuition about partisan gerrymandering today is that a political party can maximize its partisan advantage in a redistricting plan—that is, maximize its expected number of districts won—by "packing" and "cracking" voters of the other party. For example, if the Republican Party controlled the redistricting process, it would first pack Democratic voters into

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[11] For state legislative districting the logic of this is straightforward. Things are a bit more complicated for congressional districting. States have primary control over federal congressional districting, but they draw the districts only for their congressional delegation. *See supra* note 7. A delegation is in some sense an arbitrary subunit of the House of Representatives; there is no direct connection between maximizing the seats won in a particular delegation and maximizing a party's seat share in Congress. *See* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (discussing the disaggregated nature of congressional redistricting and how it complicates both the strategies parties' pursue and the judicial review of partisan gerrymandering). For a formal model of how a party's redistricting strategies differ in a system of disaggregated redistricting, *see* John N. Friedman & Richard T. Holden, *Optimal Gerrymandering in a Competitive Environment* (MIT working paper 2009).

[12] *See Georgia v. Ashcroft*, 539 U.S. 431 (2003).

[13] Moreover, this assumption seems particular appropriate with respect to congressional redistricting. In that context, the composition of an individual congressional delegation is not important; it's essentially irrelevant whether a party win's a particular state's congressional delegation (in part because any individual state is unlikely to be pivotal to control of Congress). *See supra* note 11. Accordingly, maximizing expected seats seems like an especially good assumption.

[14] *See infra* note 28 and accompanying text.

supermajority districts that are essentially thrown-away electorally. Having used up these voters, the Republicans would then spread thin majorities of Republican voters over the remaining districts, giving them a high chance of winning those districts. Blocs of Democrats within those districts are "cracked" in the sense that they are broken down so as not to constitute a majority in any single district. This so-called pack-and-crack strategy has been formalized by economists and political scientists,[15] adopted by both courts and legal scholars,[16] and dominates the literature on redistricting today.[17]

The insights later in this Article about the Voting Rights Act are driven by the fact that this model of partisan redistricting is misleading. Its logic depends crucially on a simplifying assumption: that voters are either certain to vote Republican or Democrat. In reality, the electorate is much more complex. Many voters are independents who regularly vote for candidates of

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[15] For a small sample of the contemporary economics and political science literature in which pack-and-crack dominates, see, for example, COX & KATZ, *supra* note 10; Guillermo Owen & Bernard Groffman, *Optimal Partisan Gerrymandering*, 7 POL. GEO. Q. 5 (1988); Katerina Sherstyuk, *How to gerrymander: A formal analysis,* PUBLIC CHOICE 95 (1998); Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. ILL. U. L. REV. 409 (2007); Thomas Gilligan & John Matsusaka, *Structural Constraints on Partisan Bias Under the Efficient Gerrymander*, 100 PUBLIC CHOICE 65 (1999); Thomas Gilligan & John Matsusaka, *Public Choice Principles of Redistricting*, 129 PUBLIC CHOICE 381 (2005); Timothy Besley & Ian Preston, Electoral Bias and Policy Choices: Theory and Evidence (Institute for Fiscal Studies working paper 2007); Stephen Coate & Brian Knight, *Socially Optimal Districting: A Theoretical and Empirical Exploration*, 122 Q. J. ECON. 1409 (2007). Interestingly, the pack-and-crack intuition appears to go back at least to the turn of the twentieth century. *See* Henry F. Griffin, *The Gerrymander*, NEW OUTLOOK, Jan. 28, 1911, at 187-89.

[16] *See, e.g.*, Veith v. Jubelirer, 541 U.S. 267, 286 & n.7(2004); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 832 (3d ed. 2007) (describing the pack and crack strategy); *id.* at 757 ("The strategy of partisan gerrymandering includes wasting as many votes of the other sides's partisans as possible by concentrating those voters into a few districts."); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 PENN. L. REV. 541, 551 (2004); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 250.

[17] We should note that the pack-and-crack model of optimal gerrymandering, as well as the matching slices model we describe below, assume that there are no geographic constraints on redistricting. Obviously this is something of a simplification. Many states require that legislative districts be contiguous, and some states require that they be "compact." Nonetheless, these scattered compactness requirements are almost never enforced in any meaningful way by courts. *See, e.g.*, 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, 527-32 (1993). And there is widespread agreement that the contiguity requirement itself is not a meaningful constraint on district shape—as a quick glance at pretty much any redistricting plan drawn in recent decades will highlight. Thus, with perhaps one exception involving the constitutional law of racial redistricting that we will explore below, the formal existence of legal restrictions regarding district shape can be safely ignored.

different parties. Indeed, 39% of registered voters are independents.[18] Even registered Republicans and Democrats frequently cross party lines when they vote.[19]

Relaxing the simplifying assumption scholars have made about voters, and allowing for the possibility of more "types," might seem like a minor quibble unlikely to affect the basic pack-and-crack intuition. But this is not so. In a world with many voter types, the pack-and-crack logic breaks down and the optimal strategy—that is, the strategy that maximizes a party's expected number of seats—is very different.[20] To see this, consider a more realistic assumption about voting behavior. Imagine that voters form a continuum from left to right. Those on the far left are extremely likely (but not absolutely certain) to vote Democrat (in a Democrat-Republican race) and those on the far right are extremely likely to vote Republican. In between are voters who favor Democrats or Republicans to varying degrees. The closer one moves to the middle of the distribution, the less certain one is about a voters behavior. Voters in the middle are equally likely to vote for a Democrat or a Republican. Obviously it will be difficult for a redistricting authority to know exactly where any particular voter falls on this spectrum. This is an additional problem with existing accounts of optimal partisan gerrymandering: they assume that redistricters can identify voter types with certainty. Instead, we assume that the redistricter does not know which voters are which, but that she observes a signal of the voter's type—the voter's demographic characteristics, geographic location, and so on.

In other work, one of us has developed a formal model of districting under this situation.[21] Putting aside the technical details of the model, the central intuition is that the optimal strategy for a redistricter is to match slices

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[18] *See* Pew Research Center poll, *available at* http://people-press.org/report/517/political-values-and-core-attitudes.

[19] We should note that all existing models of gerrymandering assume that voting behavior (especially turnout) is independent of district composition, as does ours. There is a large political science literature studying the causes of voter turnout. A few scholars have looked specifically at whether turnout is affected by district-specific effects. Eboyna Washington, for example, has found that African-American candidates tend to increase turnout among both black and white voters—but that the difference in the change in turnout between groups is not statistically significant. *See* Eboyna Washington, *How Black Candidates Affect Turnout*, Q. J. ECON. 121 (2006).

[20] Indeed, even with just three voter types, pack-and-crack is suboptimal. *See* John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, But Never Crack*, 98 AM. ECON. REV. 1 (2008). In further work, Friedman & Holden show that this strategy also applies in a strategic setting where Democrats control the redistricting process in some states and Republicans in others. *See* Friedman & Holden, *supra* note 11.

[21] *See* Friedman & Holden, *supra* note 20.

of voters from opposite tails of the signal distribution. That is, a Republican would create districts by combining a block of strong supporters with a slightly smaller group of strong opponents, and then continuing this matching into the middle of the distribution of voters.

This "matching-slices" strategy is optimal because it uses a party's diehard supporters most efficiently. There are two closely related ways to conceptualize the advantages of this strategy over the pack-and-crack strategy. First, it allows the redistricter to draw districts with thinner margins of victory in a world where there is uncertainty about voter behavior. The matching-slices strategy begins by drawing a district that matches voters at the two tails—the voters whose votes can be predicted most accurately. In contrast, the pack-and-crack strategy makes no effort to identify the most reliable voters; voters near the middle of the distribution are treated the same as voters at the far ends of the tails. This matters a lot, because a Republican redistricter can have more confidence in winning a district with 52% die-hard Republicans than a district with 52% Republicans, some of whom are die hard supports but many of whom are moderates. Thinner margins within districts translates to winning more districts overall, because supporters can be distributed more broadly.

Second, the "matching slices" strategy allows the Republican redistricter to ensure the election of more conservative legislators. Under the pack-and-crack approach, the most conservative Republicans would be spread over a large number of districts where they are likely to be well to the right of the median voter. But by drawing districts starting with a slice in which every Republican is from the far right tail, the redistricter uses these votes *as the median voter*—and hence pivotal to election outcomes.

The formal model proves that "matching-slices" dominates "pack-and-crack."[22] To see this, consider an extremely simple example in which a redistricter is drawing only two districts. To keep things as straightforward as possible:

- First, suppose that the redistricter observes a noisy signal about voter preferences, and these signals range from -1 to 1+ε. This signal is the best information available to the redistricter about the voter's preferences. Suppose that each signal is equally likely—that, so far as the

[22] *See* Friedman & Holden, *supra* note 20, at 125-30 (demonstrating this dominance in Propositions 1 and 2, and a series of numerical examples which show that the difference is the expected number of seats won can be large).

redistricter can tell, the voters are uniformly distributed across the spectrum.[23]

- Second, suppose that ε is positive, but arbitrarily close to zero. One can think of ε as a measure of how many more Republican than Democratic supporters there are. Thus, for a very small ε, the population is divided almost 50:50. We include ε in order to eliminate the possibility of ties, but for purposes of understanding the example one can chose to simply ignore it altogether in the exposition below.
- Third, suppose that the actual preference of a given voter ranges between their signal minus 1/2 and their signal plus 1/2. This reflects the fact that the redistricter does not have perfect information about the voter. So a voter whose signal was 1/2 might actually have a preference of 0, or 1, or something in between. Again, suppose that each of these possibilities is equally likely.

Imagine that our hypothetical redistricter is a Republican. The redistricter must draw districts of equal size, so under the pack-and-crack strategy he basically splits the distribution of voters in half. One district contains voters with signals between -1 and 0+ε/2—that is, it is composed almost exclusively of voters who appear to be Democrats. The other district contains voters between 0+ε/2 and 1+ε—voters who all appear to be Republicans.[24] Republicans expect to win approximately one district, because they are almost certain to win the district full of Republicans and to lose the district full of Democrats. Moreover, since the expected preference of the median voter in each of the two districts is symmetric, with one somewhat to the left of 0 and the other equally to the right, this strategy does not bias the median legislator in favor of Republicans. Figure 1 shows this districting arrangement.

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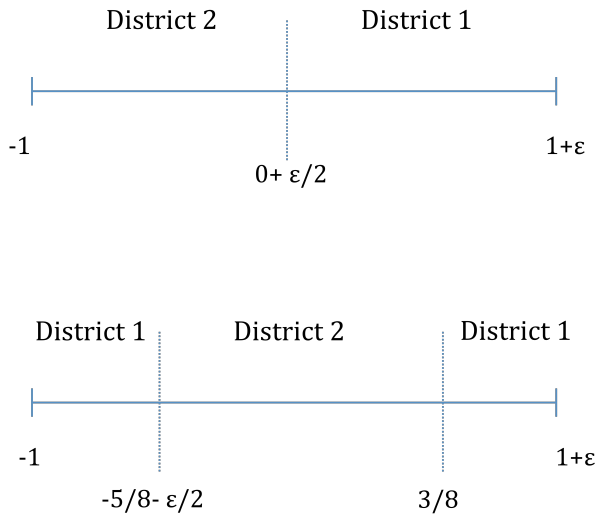
[23] In the language of probability theory, the signals are uniformly distributed.

[24] If one chooses to ignore ε, one district contains voters with signals between -1 and 0, and the other contains voters with signals between 0 and 1.

Figure 1: Pack-and-Crack vs. Matching-Slices



Now consider the matching-slices strategy. The Republican redistricter can do much better than pack-and-crack by instead drawing the first district with slices of voters from opposite tails of the voter distribution. The optimal first district involves joining a slice of voters from the far right with a slice from the far left. It can be shown formally that the slice on the right includes voters with signals between 3/8 and 1+ε, while the slice on the left includes voters between -1 and -5/8–ε/2.[25] Figure 1 shows what this district looks like. The second district contains the remaining voters, who are in the middle of the signal distribution. One way to think about the advantage of this arrangement is to focus on what it does to the median voters. Under pack-and-crack the median voters in the two districts are at -1/2 and +1/2; they essentially cancel each other out. Under matching slices, however, the median voter in district 1 is essentially at 3/8, while the median voter in district 2 is essentially at -1/8. This biases the median voter well to the right of 0, which favors Republicans. And while it is slightly less intuitive, the formal model shows that this also increases the expected number of districts won by Republicans.[26] Matching

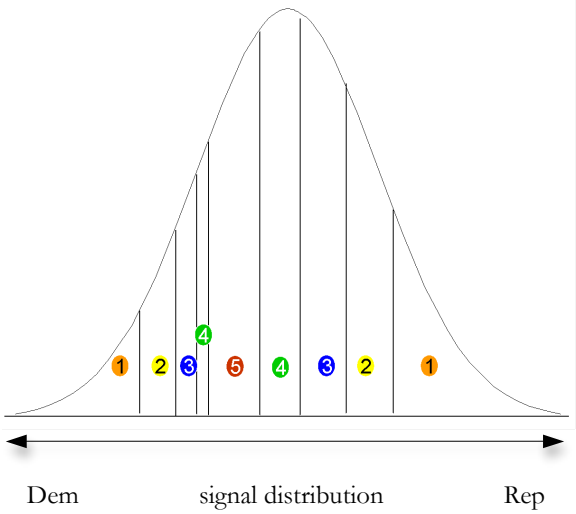
[25] *See* Friedman & Holden, *supra* note 20, at 120.

[26] To see this intuition, consider the pack-and-crack plan again. Under that plan Republicans are extremely likely to lose district 2, because almost all the voters in the district appear to be Democrats, and the median voter in the district is well left of center. In the matching-slices example, however, District 2 contains a substantial fraction of Republicans as well as Democrats, and the median voter is very close to 0, the center of the voter distribution. This gives Republicans a much better shot of winning District 2. Moreover, while it is true that District 1 is slightly less secure for Republicans under matching slices than it is under

slices allows the Republicans to win approximately $1^1/_8$ districts in expectation—more than a ten percent improvement over the 1 they win under pack-and-crack.

To see how the matching-slices strategy translates to situations with larger numbers of districts, consider the five district example illustrated in Figure 2, below.[27] The horizontal axis represents the redistricter's signal about voting intention, with those on the left expected to be more and more likely to vote Democrat, and those on the right Republican. The vertical axis represents the proportion of each type. Suppose that the redistricter is Republican. District 1 is formed by matching a slice of voters from the far left tail with a slightly larger mass of voters from the far right tail. The redistricter then works inward toward the middle, matching slices from opposite sides to create subsequent districts. The final district—district 5—is composed of the whole slice left over after the other districts are drawn.

Figure 2: Matching-Slices Strategy



There are several features of this optimal slicing that follow from the formal model. First, district 2 involves relatively more voters from the right tail than the left, districts 3 more still, and so on. This reflects the fact that when the redistricter is more certain about how someone will vote (as happens in the tails) she is able to "cut it finer," secure in the knowledge of how her

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pack-and-crack, the formal model shows that this minor loss in security is more than offset by the substantial increase in the likelihood of winning District 2.

[27] This figure is from Friedman & Holden, *supra* note 20, at 126.

supporters will vote. Second, if a gerrymanderer is risk averse then the matching-slices is still optimal, but the relative width of the slices changes; the right-hand slice of district 1 will grow, and the left-hand slice shrink, as the redistricter becomes more risk averse. In other words, she will cut the slices less finely. (Conversely, a risk taking gerrymanderer will cut the slices more finely.)[28] Third, district 1 is the district which the redistricter wins with greatest probability, district 2 the next highest, and so on. She may still win district 5, but it is moderately unlikely (in the example depicted). Of course, if the redistricter were a Democrat, the strategy would be analogous, but with the larger slices coming from the left tail, rather than the right.

Importantly, the technical dominance of the matching-slices strategy appears to translate into significant real world gains.[29] In earlier work, one of use analyzes the magnitude of the gain in the example in Figure 2, where the redistricter must draw 5 districts, and where the population is evenly divided between Republicans and Democrats. Random redistricting under these conditions would lead to Republicans winning 2½ districts in expectation. Matching slices is far superior. If the redistricter can obtain a relatively good signal,[30] as she might by analyzing demographic information and past voting behavior, matching slices enables the redistricter's party to win 3.46 districts in expectation (i.e. 69.2% of the districts). By contrast, using the best possible version of pack-and-crack (which involves packing one district and cracking the other four), the redistricter wins 2.86 districts in expectation (i.e. 57.2% of the districts). In California, with 53 Congressional districts, the difference between these strategies is roughly 6½ districts, a significant qualitative difference—particularly in the recent world of American politics where control of the House of Representatives is quite closely divided.

As we will explain in the balance of the paper, the fact that the model undermines the common pack-and-crack intuition turns out to have important implications for minority districting and the Voting Rights Act. Before proceeding, however, it is useful to note one other qualitative difference of the matching-slices strategy that will be important for our later discussion. When Republicans control redistricting they start by drawing an extremely polarized

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[28] Friedman and Holden show that matching-slices holds for *any* objective function which is strictly increasing in the number of seats won (even if some seats are valued more than others). *See supra* note 20, at 130-32. Basically, increasing the probability of winning any one district, holding others constant, has a linear impact on any such objective function. Assuming that the gerrymanderer cares only about the expected number of districts, which is what we do for purposes of exposition in this Part, imposes a linear impact directly.

[29] *See id.* at 128-30 (conducting computational analyses to test the differences between the two strategies).

[30] For an exact definition of this "relatively good signal," see *id.* at 129.

district, matching those on the far left with those on the far right—and such districts the *safest Republican districts*. This means that those most likely to vote Democrat do the worst. They are least likely to be able to elect a candidate of their choice, and the representative for their district will be selected by a very conservative median voter. The pack-and-crack strategy predicts the opposite fate for these die-hard Democrats. In that model many Democrats are packed into throw-away districts, so die-hard Democrats stand a good chance of residing in a quite liberal Democratic district.

B. *The Role of Race in Optimal Partisan Gerrymanders*

With a clear model of the optimal partisan strategy, we can add race to the mix to show how Democrats and Republicans would want to treat minority voters within the model. This depends, of course, on where minority voters fall in the distribution of voters. If minority voters were distributed evenly throughout the ideological spectrum, redistricting authorities motivated by partisanship would have no reason to pay attention to race. Of course, minority voters are not so evenly distributed. In particular, African American voters—the voters with whom the Voting Rights Act has historically been most concerned—have a strikingly different ideological distribution from white voters.[31] This, we argue, would lead a redistricting authority who is interested *only* in partisan advantage to treat African-American voters systematically differently than white voters when assembling electoral districts.

To simplify the analysis, we begin by assuming that there are only voters of two races—white and black. (We return at the end of the paper to consider the role of other racial minorities within our framework.)[32] To get a preliminary sense of how African-American voters are likely to vote, it is useful to understand voting patterns in Presidential elections. In the last 5 Presidential elections, more than 84% of African-American voters voted for the Democratic candidate; and in the last three Presidential election more than 89% have.[33] These results provide pretty strong support for the conclusion that African American voters are clustered on the far left tail of the voter distribution.

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[31] *See infra* text accompanying notes 42-48 (discussing history of the Voting Rights Act).

[32] Because our focus is principally on African-American voters, throughout the paper we often use the term "majority-minority" district interchangeably with "majority African-American" district.

[33] For various exit polls detailing historical voting patterns by race, see, for example, http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html.

The location of African-American voters has implications for both Democratic- and Republican-controlled partisan gerrymanders. Within the optimal gerrymandering model we laid out above, partisan redistricting authorities assemble electoral districts by joining vertical slices from opposite ends of the voter distribution. If we begin by assuming that African American voters are all located further down the tail that any white voters, it is easy to see what partisan redistricting authorities would optimally do with them. Democrats will create their first district by taking a slice of voters from the left tail and joining it with a slightly smaller slice from the right tail. If there are a sufficient number of African-American voters in the state, the district will contain only African-American Democrats and white Republicans. The African-American democrats will outnumber the white Republicans; in other words, the Democratic redistricting authority will create a majority-minority district for purely partisan reasons. But the Democrats would not create anything like a supermajority in this district. In fact, it would be the district with the thinnest margin between Democrats and Republicans, because it would include the parties' strongest signal voters—the part of the electorate whose voting behavior can be predicted with the greatest confidence. In that way, the district will contain the most "extreme" voters from each party.

The Democratic redistricting authorities would continue creating districts by slicing inward, creating majority-minority districts until it ran out of African-American voters. Thus, it would draw the maximum possible number of majority-minority districts in the state. And since the number of African-American voters would likely not divide evenly across optimal districts, the residual African-American voters would be joined in a slice with other white Democrats.

A pure Republican gerrymander would treat African-American voters differently. Like the Democrats, Republican redistricting authorities would assemble districts by joining together slices of voters from either end of the voter distribution. Unlike Democrats, however, each slice from the right end of the distribution would contain more voters than the left-tail slice with which it was joined. In other words, the Republican redistricting authority would also want to consolidate African-American voters, but, unlike Democrats, would create districts in which African-American voters remain just below fifty percent of the district. Slicing inward they would create a series of districts that looked like this—joining a slim majority of white Republicans with a large minority of African American voters—until the supply of African-American voters was exhausted.[34] And just like the districts drawn by Democrats, the

[34] As we explained above, district 2 would contain a slightly larger majority of Republicans than Democrats, district 3 a slightly larger majority than district 2, and so on.

most liberal African-American voters would be joined with the most conservative white voters.

The treatment of African-American voters by Democratic and Republican gerrymanders diverges sharply from today's conventional wisdom about redistricting. The common view has long been that Republicans prefer to pack African-American voters into supermajority districts.[35] This view is almost certainly wrong. There is no plausible distribution of African-American voters under which Republican redistricting authorities would want to create districts in which African Americans make up a supermajority of voters. Within the model, packing one's opponents is never the optimal strategy. The only situation in which a partisan redistricting authority would create a district with a supermajority of its opponents is when it assembles the last, residual district. Because this district is simply made up of the left-overs, it is possible that it would contain a large supermajority of the redistricter's opponents. But it would also typically be made up of fairly moderate voters—voters from near the middle of the voter distribution. In light of the preliminary evidence above, it seems quite unlikely that these would be African American voters (such a result is likely conceivable only in a state in which African American voters make up a large fraction of the electorate and in which there are a tiny number of districts).[36]

A somewhat related (perhaps corollary) conventional wisdom is that Democrats—particularly Democrats today, in a world where racially polarized voting has decreased somewhat—will want to spread African-American voters across a larger number of districts in which they constitute a plurality but not a majority of voters.[37] This second bit of conventional wisdom is also likely

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[35] *See, e.g.*, ISSACHAROFF ET AL., *supra* note 16, at 712-18, 757 ("If, as a number of political scientists purport to find, the strategy of setting aside some number of districts to be controlled by African-American voters has, as a byproduct, the effect of making legislative bodies as a whole more Republican, then a purely partisan Republican legislature would prefer to create as many minority districts, with as large minority populations, as possible."); David Lublin, *Race, Representation, and Redistricting*, in CLASSIFYING BY RACE 111 (Paul Petersen ed. 1996); *infra* note 61 and accompanying text.

[36] Technically, there is one other situation in which Republican redistricting authorities would desire to draw a supermajority black district, but it seems even less plausible. If a state contained a substantial number of black voters who were extremely conservative Republicans, then it is possible that the optimal Republican gerrymander would include a district with (a) a majority of conservative Republicans, many of whom were black, joined with (b) a minority of liberal Democrats, nearly all of whom were black. This situation today defies political reality.

[37] *See, e.g.*, ISSACHAROFF ET AL., *supra* note 16. The relationship between majority-minority districts and plurality districts has been written about extensively in recent years. Initially, this work, by Rick Pildes and others, focused on the question whether plurality districts might do a better job than majority-minority districts of promoting the *interests* of minority voters. *See*

wrong, or at least seriously overstated. If African-American voters occupy the far-left tail of the voter distribution, Democrats will first want to draw districts in which these voters constitute a majority.[38] It is true, of course, that the actual distribution of Democratic voters is somewhat more complicated than we have described. There may be some African-American voters who are to the right of some white voters in the signal distribution. Such a situation would sometimes justify drawing plurality districts. But particularly in the South, where the bulk of such districts are drawn, this situation is not terribly common. The South is not populated by large numbers of very liberal white Democrats in the way that, say, Massachusetts is.[39]

As important, the situation we describe here that would favor plurality districting does not track the evidence other scholars have used to argue for the optimality of plurality districting. These scholars have focused principally on evidence that the level of racially polarized voting has decreased in some places in the South. But these reductions have not been caused by changes in the voting patterns of African-American voters; rather, they have been driven by changes in voting patterns by white Democrats, some of whom have become more willing to vote for African-American candidates.[40] The fact that some white Democrats are now more willing to vote for African-American candidates is not particularly good evidence that those voters have moved significantly to the left in the voter distribution, much less that they have moved to the left of African-American voters. After all, these white voters were presumably among the most conservative of white Democrats.

Richard H. Pildes, *Is the Voting Rights Act at War With Itself*, 80 N.C. L. REV. 1517 (2002). Over time, however, this discussion about the effect of plurality districts on minority interests led to the conclusion that plurality districting would also be preferred by Democrats for partisan reasons. This shift may be connected to accounts of what happened in Georgia during the 2000 round of redistricting, a story we discuss in more detail in Part II.

[38] It is true, of course, that eventually the party will run out of African-American voters to allocate to districts and thus will draw one plurality district, but this is not consistent with the claim that Democrats should prefer plurality districts in the first instance.

[39] Still, one might try to estimate the signal distribution for various states in order to help confirm this intuition about the voter distribution. It is possible to estimate the signal distribution by matching census characteristics to precinct-level voting returns, both of which are widely available.

[40] *See* Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 Emory L.J. 1209, 1240-41 (1999). *Cf.* Pildes, *supra* note 37, at 1529-30 (relying on similar evidence but focusing principally on minority representation rather than partisan gerrymandering).

C. *The Partisan Consequences of the VRA's Redistricting Requirements*

Understanding how the Democratic and Republican parties' optimal redistricting strategies interact with the Voting Rights Act requires a basic understanding of the Act's legal requirements that relate to redistricting. These requirements are exceedingly intricate.[41] Much of this detail is unnecessary for our basic argument, however, so we will begin with a somewhat simplified account and then return, in Part II, to consider the implications of some of the Act's complexities.

Enacted in 1965 to combat the widespread exclusion of African American voters from politics, the Voting Rights Act included two core enforcement mechanisms that today shape the redistricting process.[42] The first is embedded in Section 2 of the Act, which prohibits states from using any voting practice "in a manner which results in a denial or abridgement of" minority voting rights.[43] Section 2 created a private right of action to enforce this prohibition. And over time, the provision has been interpreted by courts to prohibit districting schemes that "dilute" the votes of minority voters. The concept of vote dilution is complex and contested.[44] But oversimplifying somewhat, the most important feature of the prohibition on vote dilution is that it sometimes requires redistricting authorities to draw electoral districts in which minority

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[41] For an overview of the Voting Rights Act's legal requirements, see ISSACHAROFF ET AL., *supra* note 16, at 459-526, 596-820.

[42] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 et seq. (2006)); RICHARD M. VALELLY, THE VOTING RIGHTS ACT: SECURING THE BALLOT ix, 258 (2006).

[43] *See* 42 U.S.C. § 1973. As initially enacted, the language of Section 2 more closely tracked the language of the Fifteenth Amendment. *Compare* Voting Rights Act of 1965 § 2, 79 Stat. at 437 (prohibiting states and political subdivisions from applying a voting rule "to deny or abridge the right of any citizen of the United States to vote on account of race or color"), *with* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). But after the Supreme Court held in *Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 required a showing of discriminatory purpose to make out a claim of vote dilution, Congress amended the provision to make clear that it embodies an effects test. *See* Voting Rights Act Amendments of 1982 § 3, 96 Stat. at 134 (codified at 42 U.S.C. § 1973); Adam B. Cox & Thomas J. Miles, *The Transformation of the Voting Rights Act*, 75 U. CHI. L. REV. 1493, 1497-1500 & n.25 (2008).

[44] For a careful account of the concept of vote dilution, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665 (2001).

voters constitute a majority of the district—districts that are typically referred to as "majority-minority districts."[45]

Section 5 of the Voting Rights Act contains the second enforcement provision crucial to redistricting. This part of the Act, added by Congress because of concern that private litigation would be insufficient to stamp out discriminatory practices, created a system of federal oversight for some jurisdictions' electoral practices.[46] It singled out some states and local governments and required those "covered" jurisdictions to seek preclearance from the Justice Department before making any changes to their election laws—including changes to their districting arrangements.[47] Under Section 5's rubric, the Justice Department would pre-clear a change only if the jurisdiction demonstrated that the legal change would not make minority voters worse off than they were under existing law. This requirement came to be known as the "nonretrogression" principle.[48]

Section 5 thus differs from Section 2 in three important respects: first, it covers only part of the country; second, it subjects those parts of the country to public oversight by the Justice Department in addition to Section 2's threat of private litigation; and third, it prohibits the retrogression of the position of minority voters, rather than prohibiting vote dilution. Despite these differences, as a practical matter Section 5 has often also required redistricting authorities to draw majority-minority districts. Therefore, we can productively begin by imagining a slightly simplified world in which the Voting Rights Act is understood simply to require the creation of majority-minority districts whenever possible.

A legal rule requiring the creation and maintenance of majority-minority districts does not, without more information, imply anything about the partisan consequences of the Voting Rights Act. But above we laid out the optimal strategy for redistricting authorities with purely partisan agendas. We are now in a position to compare that optimal strategy with (a simplified account of) the legal requirements of the Act. Does the requirement of

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[45] For a more detailed explanation of the development of Section 2 jurisprudence, see Cox & Miles, *supra* note 43, at 1496-1505.

[46] *See* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson, eds. 1992).

[47] *See* Voting Rights Act of 1965 §§ 4-5, 79 Stat. at 438–39 (codified as amended at 42 USC §§ 1973b–1973c) (setting up judicial and administrative procedures that covered jurisdictions are required to follow to ensure that new voting qualifications "will not have the effect of denying or abridging the right to vote on account of race or color").

[48] *See* Beer v. United States, 425 U.S. 130 (1976).

drawing majority-minority districts for African-American voters bind the parties in different ways?

As is likely already be clear from the above discussion, the Voting Rights Act has a differential impact on Democratic and Republican redistricting authorities. The Act's legal requirements align perfectly with the optimal partisan strategy for Democrats. Democrats in control of redistricting *want* to draw districts that contain slim majorities of African American voters, because such districts help maximize the partisan payoff of redistricting.

Things are very different for Republican redistricters. To be sure, they too want to consolidate African-American voters. They do not want to "crack" African-American voters, sprinkling them across a large number of districts, as some have suggested. But they do not want to combine African American voters to the point where those voters make up a majority of any single district. They want to cluster African-American voters into districts where conservative Republicans constitute slim majorities. Thus, a plan drawn by unconstrained Republicans would contain three features important for our discussion: it would contain districts with large fractions of African-American voters; those African-American voters would not constitute a majority of *any single* district; and those African-American voters would be paired with the most ideologically conservative voters in the state.

On our simplified account of the VRA's legal constraints, Republicans would be legally prohibited from pursuing this strategy. The Act would require them to give African-American voters majorities in districts wherever possible. This is the last things Republicans would want to do. And it shows that Republicans are constrained by the Act in ways that Democrats are not.

To get a sense of how material the constraints of the VRA might be on a Republican redistricter, consider again the 5 district example discussed above. If a Republican redistricter is constrained to create one pure minority district, this requires her to take one slice out of the left tail and make that a district. Then, having satisfied the constraint, she is free to pursue a matching-slices strategy for the remaining voters. When this is done optimally, a Republican redistricter wins approximately 2.9 districts in expectation; many fewer than the 3.5 Republicans can when they are unconstrained.[49] This stems from the fact that when a Republican redistricter is forced to create a district purely from the left-tail, Republicans win this district with very low probability (in this example less than 5%). So, despite the advantages that come from matching-slices, one district is basically lost. (The legal constraint thus makes the redistricting plan look much more like a pack-and-crack plan.)

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[49] *See* Friedman & Holden, *supra* note 20, at 129.

Gerrymandering the remaining 4 districts—even when the voters are more Republican-leaning—can only compensate so much. The key advantage of the matching-slices strategy is that it allows a redistricter to neutralize the power of her most ardent opponents. Constraining a Republican redistricter as the Voting Rights Act does mutes this advantage.

II. THE PAST AND FUTURE OF THE VOTING RIGHTS ACT

This Part explains the significance of our core conclusion. Perhaps most important is the simple fact that we provide a new and more accurate way to evaluate the Act's partisan consequences. Since at least the Republican take-over of Congress in 1994, there has been an ongoing debate about the Act's partisan consequences.[50] The bulk of this debate is dominated by scholars who argue, from a variety of methodological perspectives, that the Act's majority-minority districting requirements have benefited Republicans.[51]

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[50] Immediately after that election many political commentators argued that the Democrats had been hurt by a slew of majority African-American districts that had been drawn in the South during the 1990 round of redistricting. These districts were perhaps tangentially the product of Section 2 litigation, but they were more centrally the result of a concerted effort by the Department of Justice to coerce states, as part of the Section 5 preclearance process, to draw additional majority-minority districts. These districts, commentators argued, hurt Democrats by packing their supporters into too few districts. While the districts facilitated the election of African-American representatives to Congress in record numbers, commentators argued that it allowed Republicans to make large gains in other parts of those states.

[51] David Epstein, Sharyn O'Halloran, and their coauthors have written a series of papers formalizing this argument. *See* Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?* 90 AM POL. SCI. REV. 794 (1996); David Epstein & Sharyn O'Halloran, *Trends in Minority Representation*, in THE FUTURE OF THE VOTING RIGHTS ACT (2007); David Epstein & Sharyn O'Halloran, *Measuring the Impact of Majority-Minority Voting Districts* 43 AM. J. POL. SCI. 367 (1999); David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J. LAW, ECON & ORG. 499 (2007). David Lublin and David Canon have made similar claims using slightly less formal methods. *See* DAVID LUBLIN, THE REPUBLICAN SOUTH 107, 132 (2004); DAVID LUBLIN, THE PARADOX OF REPRESENTATION (1997); DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS (1999); David Lublin & D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 AM. J. POL. SCI. 792, 793 (2000); David Lublin, *Racial Redistricting and African-America Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"*, 93 AM. POL. SCI. REV. 183 (1999). Less empirically-oriented political scientists like Carol Swain have reached this position through other approaches. *See* CAROL SWAIN, BLACK FACES, BLACK INTERESTS (1993). To be clear, these scholars are not interested only in the partisan consequences of minority-majority districts. They are also intensely interested in the consequences for different forms of minority representation of drawing such districts. We return at the end of the Article to consider the consequences for

While there are a few scholars who have questioned the existence or the size of pro-Republican bias,[52] in the wider voting rights literature it has become essentially the consensus view that majority-minority districting benefits Republicans.[53]

One place where this conventional thinking was recently on display was in debates about the reauthorization of Section 5 of the Voting Rights Act. As we explained above, Section 5 was initially adopted in 1965 as a temporary measure that would expire after five years. But it has been re-authorized repeatedly by Congress, in 1970, 1975, 1982, and most recently in 2006.[54] The 2006 reauthorization extended Section 5's requirements for another 25 years.[55] And despite the fact that Section 5 has plenty of features that raise the hackles of conservative politicians—invasive federal oversight of state governments, redistricting requirements that some characterize as racial quotas, etc.—the extension passed Congress with little debate and overwhelming support from both Republicans in Democrats. In the Senate the vote was 98-0.[56] Observers have suggested several reasons for the striking bi-partisan support. Perhaps the most pat explanation is that Section 5 had become a sacred cow which no national politician could afford to oppose.[57] But this explanation has typically been bolstered by the claim that Republicans were content to reauthorize Section 5 because they believed they actually benefited from the Act's redistricting requirements.[58]

Our conclusion calls this explanation into question. It thus raises the question why Republicans would support legislation that constrained them more than it constrained Democrats. A full assessment of this question is

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minority representation of our central claims about the optimal structure of partisan gerrymandering.

[52] Kenneth Shotts, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, 45 AM. J. POL. SCI. 120 (2001); Richard Engstrom, *Race and Southern Politics: The Special Case of Congressional Districting*, in WRITING SOUTHERN POLITICS (Robert P. Steed & Lawrence W. Moreland eds., 2006).

[53] *See generally* ISSACHAROFF ET AL., *supra* note 16 (capturing this general consensus).

[54] *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 5, 120 Stat. 577, 580 (codified at 42 U.S.C. § 1973(b) (2007)).

[55] *See id.*

[56] *By a Vote of 98-0, Senate Approves 25-year Extension of Voting Rights Act*, N.Y. TIMES, July 21, 2006.

[57] *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L. J. 174 (2007) (describing the legislative dynamics of the 2006 reauthorization).

[58] *See id.* at 180; Ramesh Ponnuru, *The Longest "Emergency" – Congress Debates (Sort of) the Voting Rights Act of 1965*, NATIONAL REVIEW, July 17, 2006.

beyond the scope of this paper. It could be that Republican legislators simply did not understand that they were disadvantaged by the Act—though we are somewhat skeptical of this possibility. It seems more likely that they were politically constrained in some way, or that they considered Section 5's redistricting requirements to be sufficiently redundant with Section 2 of the Act to be not worth fighting about in a world where the repeal of Section 2 was an impossibility.[59] Still, our account suggests at least that we should be wary of the existing accounts about the political economy of the extension's passage. This is important because the congressional dynamics surrounding Section 5 are of far more than academic interest. Just this spring, the Supreme Court made clear in *NAMUDNO v. Holder* that the renewed Section 5 may be on shaky constitutional footing.[60] If the provision is ultimately invalidated, or the Supreme Court scales back substantially the scope of Section 2—both real possibilities in the next few years—Republicans may be much less receptive to legislative responses if the Supreme Court's actions actually benefit the Republican party.

Putting aside the political economy of the Voting Rights Act, our core descriptive claim can help us make progress on a host of other questions. First, it puts us in a better position to reinterpret some of the law and history of minority redistricting in America. Second, it has important implications going forward for the structure of the law of redistricting.

A. *Re-telling the History of Minority Districting*

The law and politics of minority redistricting is frequently told through a handful of salient episodes that have taken place in the last few decades. These episodes are typically seen to reinforce conventional conclusions about the role of race in redistricting and the relationship between partisan gerrymandering and racial representation. Our theory provides a new lens through which we can re-examine these episodes. The resulting pictures stand in stark contrast to conventional accounts. They also provide a deeper understanding of developments over the past few decades in the law of redistricting.

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[59] For one attempt to think about the extent to which Section 5 might be redundant with Section 2, see David Epstein & Sharyn O'Halloran, *A Strategic Dominance Argument for Retaining Section 5 of the VRA*, 5 ELEC. L. J. 283 (2006).

[60] *See* Northwest Austin Municipal Utility District No. 1 v. Holder, 129 S. Ct. 2504, 2511-13 (2009); *supra* note 3.

1. Equal protection and racial redistricting jurisprudence

Our account appears to be in tension with a common story about minority districting under the VRA in the early 1990s. After the release of the 1990 census, states were required to redraw their state legislative and congressional districts. Many southern states were covered by Section 5 of the Act and were therefore required to seek Justice Department approval for their plans. According to some accounts, the Department of Justice used its oversight authority under Section 5 to pressure these southern jurisdictions to create more majority-minority districts. The aggressive push—which some have suggested was engineered in part by Haley Barbour, a Republican strategist who became the chairman of the Republican National Committee in 1993—has been referred to as the "max black" agenda. Relatedly, outside the preclearance process Republicans formed an unusual political coalition with African American voters to sue for the creation of majority-minority districts under Section 2 of the Act.[61]

There are reasons to be somewhat skeptical of this story. If it were true, however, one might think that it undermines our central claim. The story makes it sound like Republicans believed majority-minority districting to be in their interest. Many scholars have said just this. Moreover, some go further, arguing that the story provides powerful evidence that the VRA's majority-minority districting requirements actually did benefit Republicans.[62] In other words, the fact that Republicans pursued this strategy leads some to conclude that the strategy *must* therefore have conferred some partisan advantage.

This view is mistaken. Most obviously, it is possible that the Republican Party did not understand what was in its partisan interest; it is also possible that they were interested in something other than pure partisan advantage in redistricting. But even if we assume that they were acting rationally to maximize their partisan gains, the above analysis is still infected with a mistake—one that highlights the way in which our approach differs from most earlier work on the partisan conveyances of the VRA. The problem with treating the story above as evidence of a pro-Republican tilt to the VRA is that the account implicitly assumes that majority-minority districting represents Republican's first-best strategy—the strategy they would pursue if they controlled the redistricting process and were unconstrained by the VRA. But

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[61] *See* MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE (2001); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999).

[62] *See, e.g.,* SWAIN, *supra* note 51, at 205-06, 229; Lublin, *supra* note 35, at 100, 107.

of course that was not the world they occupied. In a world where the courts were moving to require more majority-minority districts,[63] and where Republicans did not control the redistricting process in many of the states covered by Section 5,[64] packing African-American voters may have been a second-best strategy. To specify clearly the partisan consequences of the VRA, however, one must begin by explaining how a rationally maximizing party would behave if unconstrained. Only then can we sensibly ask who is more constrained by the legal requirements in the VRA. This is a methodological shortcoming of nearly all prior work on the question of the Act's partisan constraints.

In addition to calling into question this common story about 1990s redistricting, our conclusions point to a new interpretation of the Supreme Court's racial gerrymandering jurisprudence that arose out of this episode. Simplifying somewhat, we can trace the development of that jurisprudence across three periods. In the earliest period, cases raised the question whether the Equal Protection Clause of the Constitution might require the creation of majority-minority districts as a remedy for minority vote dilution.[65] After the Supreme Court held in *Mobile v. Bolden*[66] that unconstitutional minority vote dilution required a showing of discriminatory purpose,[67] Congress amended Section 2 of the Voting Rights Act and it became the principle vehicle for vote dilution claims.[68] As we explained, the statute was interpreted sometimes to *require* the creation of majority-minority districts. Finally, in the third period, cases raised the question whether the Equal Protection Clause would *prohibit* drawing majority-minority districts in some situations.

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[63] *See* Thornburg v. Gingles, 478 U.S. 30 (1986); *see also, e.g.*, United States v. Dallas County Com., 850 F.2d 1433 (11th Cir. 1988); Campos v. Baytown, 840 F.2d 1240 (5th Cir. 1988); McDaniels v. Mehfoud, 702 F. Supp. 588 (E.D. Va. 1988); Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989); Dillard v. Baldwin County Bd. Of Educ., 686 F. Supp. 1459 (E.D. Ala. 1988); Brown v. Board of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989).

[64] In North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Texas, Democrats controlled both the houses of the relevant state legislatures. *See* The Council of State Governments, STATE ELECTIVE OFFICIALS AND THE LEGISLATURES 1991-1992 (1991). While Democrats did not control the governorship in North Carolina, *see* Lublin, *supra* note 26, the North Carolina Constitution specifically denies the governor to the power to veto redistricting plans drawn by the state legislature. *See* N.C. CONST. art. II, §22.

[65] *See* Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).

[66] 446 U.S. 55 (1980).

[67] *Id.* at 66-68.

[68] *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 1, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (2006)); *see also* Cox & Miles, *supra* note 43, at 1497-1500 & n.25.

In *Shaw v. Reno*,[69] the Supreme Court concluded that the answer to this question is yes. *Shaw* arose in North Carolina and involved the congressional districting plan drawn in 1991, in part at the insistence of the Bush Justice Department. The state had initially drawn a plan with one majority African-American district.[70] After the Justice Department pressed the state during the preclearance process to draw an additional majority-minority district, the state complied.[71] The resulting district was a convoluted and snake-like, winding its across the state down Interstate 85. For much of its length the district was no wider than the I-85 corridor itself.[72] It was attacked by a group of white voters as an unconstitutional racial gerrymander. Writing for the Court, Justice O'Connor concluded that the district triggered strict scrutiny under the Equal Protection Clause.[73]

The analytic structure of Justice O'Connor's decision and the resulting *Shaw* jurisprudence that followed has been widely criticized on a number of grounds—including grounds of incoherence. For that reason, there is little use trying to explore fully the contours of the doctrine here. Nonetheless, one feature of the doctrine is that, in practice, it has sometimes had the effect of preventing states from drawing extremely convoluted districts in order to assemble super-majorities of minority voters within those districts. Some commentators have suggested that perhaps the doctrine should be understood as a prohibition on over-packing minority voters.[74]

To the extent the *Shaw* doctrine operates in practice to make it difficult to assemble large supermajorities of African-American voters within districts, it could actually act as a sort of legal response to Republicans' second-best redistricting strategy in a world where majority-minority districts are legally required. Our analysis above of the Republican Party's optimal strategy shows that, absent legal constraints, it is likely to group African-American voters into districts where they constitute a large fraction—but not quite a majority—of the district. Since the VRA often prohibits this, setting a floor that requires

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[69] 509 U.S. 630 (1993).

[70] *See id.* at 634.

[71] *See id.* at 635.

[72] *See id.* at 635-36; *see also* Brief for Republican National Committee as Amicus Curiae 14-15, Shaw v. Reno, 509 U.S. 630 (noting that one state legislator remarked that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district").

[73] *See Shaw*, 509 U.S. at 641.

[74] *See*, *e.g.*, ISSACHAROFF ET AL., *supra* note 16, at 757-58 (suggesting that *Shaw* might be understood to "limit not only race-based geographic manipulations of districts, but also the excessive concentration of minority voters in numbers well beyond those needed to ensure minority voters have an equal opportunity to elect candidates of choice").

those minority votes to constitute a majority, a Republican redistricter would be forced to pursue a second-best strategy. That strategy, we note above, is to pack as many African-American voters into a single district as possible. (In other words, we may observe the packing predicted by pack-and-crack theory, but only because the redistricter is prevented from employing her optimal strategy.) This is perhaps the clearest way to see the constraints imposed on rationally-maximizing Republicans by the VRA—it leads them to a second-best strategy of packing which is clearly dominated by the matching-slices approach.[75]

If a legal rule added to the VRA's floor a ceiling—that is, a prohibition against assembling districts with large supermajorities of minority voters—the ceiling could suppress the second-best strategy for Republicans of packing minority voters.[76] In theory this might be a saving grace of the *Shaw* doctrine, if in fact it operated in practice as such a legal rule. Of course, if we are concerned principally about partisan bias such a rule might seem particularly problematic. After all, Democrats are free under the legal regime to pursue their optimal partisan strategy. Republican redistricters, however, are already denied their first-best strategy the floor created by the Voting Rights Act. Adding a ceiling to restrict access to their second-best strategy as well would just further exacerbate partisan bias.

2. Majority districts, plurality districts, and the retrogression test

The redistricting of Georgia's state legislature following the 2000 census is another salient moment in all recent accounts of redistricting law and theory. In 2001, the state was trending toward the Republican party but was still controlled by Democrats. The Democrats in both the state House and Senate were, by all accounts, motivated by a desire to hold onto control of the legislature.[77] According to the conventional account, one way they tried to improve the existing districting arrangements was by unpacking a number of

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[75] For an estimate of the cost of this second-best strategy, *see* text accompanying *supra* note 50.

[76] Interestingly, Issacharoff et al. also suggest that this understanding of *Shaw* would lead it to constrain Republicans more than Democrats. *See* ISSACHAROFF ET AL., *supra* note 16, at 757. But their conclusion depends on an assumption that Republicans' most-preferred strategy is to pack African-American voters into super-majority districts, while our approach shows that Republicans optimally prefer never to draw a majority-minority district at all in these contexts.

[77] *See* Georgia v. Ashcroft, 195 F. Supp. 2d 45 (D.D.C. 2002); Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2003); Pamela Karlan, *The Retrogression of Retrogression*, 3 ELEC. L. J. 21, 39-36 (2004).

majority African-American districts. The thought was that the party was wasting too many Democratic votes in these districts. To minimize wasted votes, the account goes, Democrats turned a number of majority-minority districts into plurality districts—lowering the fraction of African-American voters in those districts below the 50% threshold.[78]

Again this account, if correct, would be in at least some tension with our theory. If African American voters really occupied the far left tail of the voter distribution in Georgia during the redistricting period, then Democrats pursuing a purely partisan strategy would have wanted those voters to constitute a majority in their districts rather than only a plurality. Now it might be that the Democrats were not pursuing a purely partisan strategy—though there is plenty of evidence to suggest that they were focused almost exclusively on holding onto control of the state legislative assembly in a context where Republicans were gaining strength and threatened their majority status in the assembly. It is also possible that some white voters in Georgia are further down the left tail than our coarse assumption would predict,[79] or that the Democrats in the legislature simply did not understand what their optimal strategy looked like.

Here, however, we want to emphasize a different possibility: that the standard accounts of Georgia's redistricting mis-describe what happened—and that the legislature in fact did pursue a strategy consistent with our account. First, and perhaps most important, it *does not* appear that the legislature replaced any majority African-American districts with plurality districts. Instead, the central alterations appear to have been designed to change existing supermajority African-American districts into bare majority African-American districts. The legislature redrew three existing majority-minority districts. Under the Georgia plan, district 2 was to go from a black voting age population ("BVAP") of 60.58% to 50.31%; district 12 from 55.43% to 50.66%; and district 26 from 62.45% to 50.80%.[80] Also, there were 13 districts with BVAP of between 30% and 50%, and 4 more with BVAP between 25% and 30%. Overall, the plan actually ended up increasing the number of districts with BVAP greater than 50% by one (while leaving each with quite thin majorities), and increasing the number of districts with BVAP between 25% and 50% by four.

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[78] *See* Pildes, *supra* note 77. This story about Georgia is in part what bolsters the general idea that Democrats optimally prefer plurality districts to majority-minority districts. *See supra* text accompanying notes 37-39 (discussing this claim).

[79] *See supra* text accompanying note 40 (explaining why this is unlikely, at least in theory).

[80] Georgia v. Ashcroft, 539 U.S. at 472-73.

Our model can help explain why Democrats might have wanted to thin out their majority-minority districts without converting them into plurality districts. As we discussed above, the optimal strategy for a Democratic redistricter is to match slices of those likely to vote Democrat with smaller slices of those likely to vote Republican. The relative size of the upper and lower slices depends on a number of features, including the quality of the information the redistricter has about voters, the mean preference of voters, the spread of voter preferences, and the number of districts to be drawn.[81] Under the model, one possibility is that the existing districts had always contained majorities that were suboptimally large. A second possibility is that demographic changes in the years since the 1990 districts were first drawn had rendered them suboptimal. And in fact, the BVAP in all of the majority-minority districts had increased during the period between redistrictings.[82] Third, the model predicts that redistricters will cut slices more finely as they become more risk seeking. In Georgia, where Republicans were on the cusp of coming to power for the first time since the end of Reconstruction, it's quite conceivable that Democrats redistricters became much more risk-seeking than they previously had been.

Moreover, the increase in the number of plurality districts (the 4 additional districts with BVAP between 25% and 50%) is consistent with matching-slices. Having cut it finer in the majority-minority districts, those voters can be allocated to other districts, rather than "wasted."[83] The

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[81] *See* Friedman & Holden, *supra* note 11, at 127-128 (providing detailed comparative statics of the model). For example, as the proportion of the redistricter's supporters increases, it is optimal to cut districts finer, in the sense that the ratio of voters in the upper slice of a district to the lower slice (left versus right for a Democratic redistricter) decreases. The intuition behind this is that with more supporters a redistricter can increase the chance of winning districts originally less favorable to them (i.e. in the center of the distribution) by making the slices finer in the more favorable districts.

[82] In the 1990 decennial census, Georgia's population was 27.0% African-American, rising to 28.7% in 2000. During this period African-American voting age population increased from 24.46% to 26.64%. *See* U.S. Census Bureau, United States Census 2000, *available at* http://www.census.gov/main/www/cen2000.html. Moreover, the increase in BVAP was not evenly distributed across all districts. The increase in BVAP districts 2, 12, and 26 were larger than the statewide increase in BVAP, making the benchmark plan districts suboptimal, even if there was no statewide change in BVAP. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 45 (D.D.C. 2002) (detailing district-by-district changes in BVAP).

[83] There remains the question, of course, why Democrats would not have reassembled those plurality districts into a smaller number of majority-minority districts. One possibility is that not all the black voters were way out on the left tail—that is, that there are some white voters interspersed with them. Another is that their inability to reassemble the plurality districts into a smaller number of majority-minority districts was driven by *Shaw*'s constraints (real or

proposed Georgia plan is just what matching-slices dictates and runs completely contrary to pack-and-crack.

It is impossible to know, of course, whether Democrats were simply responding to demographic change, or becoming more risk-loving, or simply becoming more savvy about what the optimal partisan strategy looked like.[84] But it is hardly surprising, given our analysis, that 10 of 11 African-American state Senators (all Democrats) voted for the plan, and the director of Georgia's Legislative Redistricting Office testified that the Senate African-American Caucus wanted "not to waste votes" In the new plan.[85]

This re-telling of the Georgia redistricting also puts the recent fights about Section 5's legal requirements in a different light. As we explained above, Section 5 requires "nonretrogression"—that is, it prohibits states from making changes to voting regulations that worsen the existing position of minority voters.[86] A state's existing policies therefore provide the baseline against which legal harm is identified. In *Georgia v. Ashcroft*, members of the Court disagreed sharply over whether the changes to the existing redistricting plan made minority voters worse off. Writing for the majority, Justice O'Connor concluded that there was no retrogression, emphasizing that minority voters benefit from many forms of political influence and might have gladly traded some of their power to win particular districts for broader influence within a legislature that remained in Democratic hands.[87] In contrast, the four dissenters concluded that Justice O'Connor's test was unadministrable and an invitation to states to eliminate majority-minority districts to the detriment of minority voters.[88]

Congress sided with the dissent when it reauthorized Section 5 in 2006. In the reauthorization legislation it added language to Section 5 to overrule *Georgia v. Ashcroft* and reestablish the requirement that retrogression analysis

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perceived) against convoluted districts. If that is true, it would be an interesting example of *Shaw* constraining Democrats, rather than Republicans as we discussed above.

[84] Another possibility is the Democrats believed that plurality districts were actually superior but felt unable for some other reason to convert the existing majority-minority districts into plurality districts. Such a constraint might have come from African-American legislators elected from those districts. It might also have come from a concern that dismantling these districts would be more likely to lead to liability under the Voting Rights Act.

[85] *Id.* at 469 (quoting the testimony of Linda Meggers, describing the goals of the Georgia Congressional Black Caucus, in *Georgia v. Ashcroft*, 195 F. Supp. 2d 45 (D.D.C. 2002)).

[86] *See supra* note 48 and accompanying text.

[87] *See* Georgia v. Ashcroft, 539 U.S. at 477-85.

[88] *See id.* at 492-98.

focus on the election of minority candidates of choice.[89] This language has been widely understood to require the maintenance of existing majority-minority districts, and to prevent states from unpacking them into plurality districts.[90] Some voting rights scholars cheered this development, while others lamented it.

Our reinterpretation of *Georgia v. Ashcroft* shows that all sides misinterpreted the significance of Congress's legal change to the retrogression standard. With respect to the underlying facts in *Georgia v. Ashcroft* itself the change has no legal effect, because the state did not in fact disassemble any existing majority-minority districts. More generally, the change may be unlikely to change the redistricting strategies in states controlled by Democrats. If Democrats in those states want to maximize their partisan advantage in redistricting they should generally prefer majority-minority districts. In that way, the optimal partisan strategy aligns with the legal requirement re-established by Section 5's reauthorization legislation.

In practice, Justice O'Connor's holding in *Georgia v. Ashcroft* could have mattered most in states where the Republican party controlled redistricting. If Section 5 permitted majority-minority districts to be traded off against plurality districts, courts might have been poorly positioned to figure out which trades would actually secure equal or better political opportunities for minority voters—a point emphasized by Justice Souter in his *Georgia v. Ashcroft* dissent.[91] This would have freed Republican redistricters to draw sham plurality districts that appeared to satisfy Justice O'Connor's test but were in fact consistent with the optimal partisan strategy for Republicans: districts in which minority voters were a large plurality but in which they would be paired with enough right-tail Republicans that the Republican candidate would win.[92]

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[89] *See* 42 U.S.C. § 1973c(b), (d) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, *to elect their preferred candidates of choice* denies or abridges the right to vote within the meaning of subsection (a) of this section." (emphasis added)).

[90] *See* Persily, *supra,* note 57, at 217.

[91] *See* 539 U.S. at 496-97.

[92] This concern is related to the concerns that Pam Karlan raised about Justice O'Connor's approach, though Karlan appears not to have been as focused on the asymmetric effect of the decision. Her concern appears to be that *both* the Democratic and Republican parties would sell out minority voters. *See* Pamela Karlan, *The Retrogression of Retrogression*, 3 ELEC. L. J. 21, 39-36 (2004). Note that she also expressed concern about African-American incumbents selling out African-American voters in order to preserve their own safe seats—a concern that goes to the question whether redistricting authorities are motivated more by partisan or incumbency protection.

Seen in this light, Congress's recent changes to Section 5 roll back this possibility and return us to the status quo where Republicans can't pursue their optimal strategy under the guise of complying with the Voting Rights Act. How one should evaluate this change depends, of course, on the perspective one takes. If the pre-*Georgia v. Ashcroft* world is taken as the baseline, then Justice O'Connor's opinion appears to benefit Republicans, a benefit undone by the 2006 reauthorization legislation. If a world without the VRA is taken as the baseline, however, then the reauthorization actually *increased* the pro-Democratic tilt in the Act—a tilt which *Georgia v. Ashcroft* had reduced. Finally, if we focus on minority representation rather than partisanship, Congress's amendment to Section 5 appears to curb the drawing of districts that appear to most worry some commentators: districts in which large numbers minority voters are consistently defeated by extremely conservative Republicans.

B. *Implications for the Future of Redistricting Law and Policy*

1. Polarization and vote dilution doctrine

Our conclusion has important implications for how we think about minority representation and racial voting patterns over time. Majority-minority districts were in part a response to high levels of racially polarized voting. In a world where white voters will not vote for a minority-preferred candidate, minority voters cannot elect a candidate of their choice unless they constitute a majority of an electoral district. Drawing majority-minority districts thus helped secure victories for minority-preferred candidates. Over time, however, courts and commentators began to question the longer-term consequences of drawing these districts. Some judges, including Justice O'Connor, came to fear that these districts would entrench or exacerbate racially polarized voting. Voters would, because of the structure of districting, have fewer opportunities to build political coalitions across racial lines, and they would become more likely to see their own political identities along racial lines.[93] The strongest advocates of this view argued that majority-minority districting would itself prevent American politics from reaching a point where race no longer mattered.[94]

In contrast, others argued that majority-minority districting would help reduce the prevalence of racially polarized voting over time.[95] This account

[93] *See* Shaw v. Reno, 509 U.S. 630, 647-48, 657 (1993) (O'Connor, J.); *see also* Johnson v. De Grandy, 512 U.S. 997, 1019-21 (1994) (Souter, J.,).

[94] *See* Holder v. Hall, 512 U.S. 874, 905-09 (1994) (Thomas, J., dissenting); United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 186-87 (1977) (Burger, C.J., dissenting).

[95] *See* Bush v. Vera, 517 U.S. 952, 1072-77 (1996) (Souter, J., dissenting).

emphasized the fact that the districts were often among the most racially integrated. This integration could promote the formation of inter-racial political coalitions. For example, Justice Souter thought that so long as such districts were not drawn too aggressively, in a way that always insulated minority voters from political competition, they would facilitate the transition to a more pluralistic politics in which minority districting would no longer be necessary.[96]

Our account complicates both of these competing theories. First, it highlights a basic shortcoming of both: they make claims about the consequences of minority districting strategies without considering the implications of partisan motivations that inevitably shape the redistricting process. This is a serious shortcoming. Second, and more concretely, our account provides some evidence about how easy or hard it will be to form cross-racial coalitions in majority-minority districts. Justices O'Connor and Souter implicitly have taken quite different views about this: O'Connor worried that at least some such districts would make it hard to form these coalitions; Souter had a much more optimistic view. Understanding the optimal partisan distribution of voters within such districts should give us some reason for concern—at least with respect to African-American voters. Democrats or Republicans pursuing optimal partisan gerrymanders will draw districts with majorities or near-majorities of African-American voters. But these districts will be extremely ideologically polarized. They will combine minority voters with very conservative white Republicans. Such ideologically polarized districts would likely make it more difficult to form interracial political coalitions.

Note, however, that the consequence above is independent of the Voting Rights Act's requirements. It describes the districts Democrats and Republicans would prefer to draw in the absence of any legal restraints. Forcing the creation of majority-minority districts might improve matters. As we explained above, the Act changes little for Democrats, because it aligns with their preferred strategy. They would, therefore, likely continue to draw highly polarized majority-minority districts. Republicans, however, have no desire to do this. When forced to by the VRA, their second best strategy would likely involve two features. First, they would try to pack as many minority voters as possible into the majority-minority districts. Second, they would prefer to fill out the balance of those districts with the weakest signal Republicans—that is, the most moderate ones. These two aspects have ambiguous implications. To the extent the districts contain large super-majorities of minority voters, interracial coalitions seem less likely. Minority

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[96] *See De Grandy*, 512 U.S. at 1019-21.

voters would simply have no need to form such coalitions, because they would have overwhelming control of the district. (Of course, the Shaw *doctrine* might mitigate this consequence if it operates in practice to prohibit such packing.)[97] On the other hand, pairing minority voters with moderate Republicans might facilitate coalitions across racial lines, because it will likely be easier for groups to bargain and compromise if they are closer ideologically.

Focusing more directly on intra-district polarization also has implications for Section 2 vote dilution doctrine. As we explained above, Section 2 of the Voting Rights Act has been interpreted by the Supreme Court since 1986 to require the creation of majority-minority districts under certain conditions.[98] What conditions warrant drawing such districts has been, of course, a subject of tremendous disagreement both in and out of court.[99] Despite this disagreement, however, it is possible to identify two features of districts that have become central to the analysis of vote dilution claims. First, the Supreme Court has concluded that the question whether a particular majority-minority district should be required depends in part on the composition of the other districts in the state. If African-American voters constitute 20% of a state's electorate and already make up majorities of more than 20% of the state's districts, the existence of rough proportionality makes it less likely that the Court will require an additional district with a majority of African-American voters.[100] Second, the Court has focused on the cohesion of minority voters within a disputed district. Recently, for example, Justice Kennedy refused to allow one majority-Latino district in Texas to be replaced by a different majority-Latino district. His reason was that the voters in the first district were more cohesive along some dimension than the voters in the second district.[101] In other words, courts implementing Section 2 today police the relationship *across* districts (even though they sometimes try to disclaim doing so), and they police, *within* individual districts, the relationship among minority voters that make up a putative majority bloc.

Largely overlooked, however, is the relationship *between* the minority and nonminority voters in the district. To be sure, this relationship matters formally under the doctrinal framework the Supreme Court laid out in

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[97] *See supra* text accompanying notes 74-76 (discussing this possible implication of the *Shaw* doctrine).

[98] *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

[99] *See* LULAC v. Perry, 548 U.S. 399 (2006); Johnson v. De Grandy, 512 U.S. 997 (1994); Gerken, *supra* note 44.

[100] *See LULAC*, 548 U.S. at 436-38; *De Grandy*, 512 U.S. at 1000.

[101] *See LULAC*, 548 U.S. at 435, 440-42. *See generally* Adam B. Cox, *Self-Defeating Minimalism*, 105 *Mich. L. Rev. First Impressions* 53 (2006).

Thornberg v. Gingles. In that case, the Court held that minority voters could not make out a claim of unlawful vote dilution unless they could show that a hypothetical district could be draw in which (1) minority voters were sufficiently numerous to constitute a majority of the hypothetical district; (2) minority voters were politically cohesive; and (3) white voters typically voted as a bloc to defeat minority-preferred candidates.[102] The third prong turns on the relationship between the white and minority voters. Nonetheless, even in this inquiry both courts and scholars typically treat white voters as a largely undifferentiated mass whose identities are not particularly relevant; scholars have even taken to referring to these voters simply as "filler people."[103]

We can now see that courts' treatment of white voters as undifferentiated filler people belies the reality of redistricting practice. Majority-minority districts may often be deliberately drawn to be highly polarized—that is, to pair voters from opposite ends of the political spectrum. To the extent that courts are concerned about whether the modern structure of electoral districts are likely to interfere with interracial coalition formation, this is a concern. Addressing this concern would lead to a new focus in vote dilution doctrine—a focus on the ideological spread between majority and minority voters within districts that contain sizeable fractions of minority voters.

2. *Partisan gerrymandering and identification strategies*

The importance of ideological spread is not limited to vote dilution doctrine. Although our central interest is in the partisan consequences of the Voting Rights Act, we should note that the model of optimal gerrymandering also has implications for the judicial review of partisan gerrymanders. Over two decades ago, in *Davis v. Bandemer*,[104] the Supreme Court concluded that challenges to such gerrymanders are cognizable under the Equal Protection Clause. Yet since that time the federal courts have never invalidated a redistricting plan (or any individual district) as an unconstitutional partisan gerrymander.[105] This is not because there has been little partisan manipulation

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[102] *See Gingles*, 478 U.S. at 48-51.

[103] *See* T. Alex Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 93 MICH. L. REV. 588, 601 (1993) (introducing the concept of "filler people"). One exception to this involves efforts to incorporate more information about cross-over voting patterns by white voters into vote dilution analysis. Even in this context, however, courts and experts tend to employ information about general trends in racially polarized voting in a particular state or region. They rarely if ever as the question "how would *this particular group of white voters* behave if placed in a district with a large fraction of minority voters."

[104] 478 U.S. 109 (1986).

[105] *See* Cox, *supra* note 7, at 798.

in the past two decades. To the contrary. Instead, a central problem is that the Supreme Court has been unable to agree on any manageable tests it might use to identify the most egregious gerrymanders.[106]

The model of optimal districting points to an unexplored strategy for identifying egregious partisan gerrymanders: focusing on the level of ideological polarization among the electorate within individual districts. This strategy might be both easier to use and more palatable to courts than other identification strategies that have been proposed. The Court has emphasized two problems with many proposed strategies. First, operate in an *ex post* fashion—requiring reference to results from elections that occur some time after the districting scheme is implemented. Historically, the Court has been more comfortable intervening in redistricting contests where its doctrinal tools allowed the legal injury to be identified on the basis of information available at the time the districts were drawn. (This is a key feature of the Court's one person, one vote jurisprudence, and you can see in the *Gingles* framework a similar effort to craft a largely ex ante legal test.)[107] Second, the Court has been reluctant to adopt a test for unlawful partisan gerrymanders that operates at the state level rather than the district level.[108] This is in part because the Court has always been reluctant to acknowledge the inevitable reality of representational trades across districts.[109] It is also probably because the Court is concerned that it would appear much more interventionist to invalidate every district in a state rather than just one or two districts within a state.

While the Court may be wrong to have these concerns (and one of us has argued just that),[110] the reality is that the Court will be more likely to adopt an identification strategy that assuages these concerns. Focusing on intra-district polarization levels could go some way to alleviating these concerns. First, it operates at the district level. Second, it can rely exclusively on information available at the time of redistricting. This could give the approach a leg up over other strategies proposed by political scientists, such as the strategy proposed by a political-scientist-authored amicus brief filed in the most recent partisan gerrymandering case to reach the Supreme Court.

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[106] *See* Vieth v. Jubelirer, 541 U.S. 267 (2004); LULAC v. Perry, 548 U.S. 399 (2006).

[107] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Thornburg v. Gingles, 478 U.S. 30 (1986); *see also Vieth*, 541 U.S. at 291 (plurality opinion) (describing this virtue of the one-person, one-vote doctrine).

[108] *See Vieth*, 541 U.S. at 282, 285 (plurality opinion); *id.* at 318 (Stevens, J., dissenting); *Bandemer*, 478 U.S. at 143.

[109] For a discussion of this general reluctance, see Gerken, *supra* note 44.

[110] *See* Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2006).

Moreover, while some other scholars have recently focused on polarization levels, they do so for quite different reasons. Sam Issacharoff and Pam Karlan have suggested that polarization is the product of incumbent-protecting gerrymanders and is harmful because it cripples the deliberative process in Congress.[111] Our suggestion is quite different. While it focuses on identifying districts that are extremely safe and extremely polarized, it does not require persuading the courts that they have to adopt a controversial normative position of being anti-incumbent-protecting, or anti-polarization, the way Issacharoff's and Karlan's argument would require. Instead the focus is on these features of districts only because we can now say that polarization provides some evidence of partisan manipulation. It is thus an example of a strategy of identifying partisan gerrymanders through indirect strategies in a world where direct identification is extremely difficult.[112]

3. The impossibility of partisan-neutral minority districting?

Ultimately, our approach raises a deep question about the relationship between minority districting and partisan neutrality. Is it possible to draw electoral districts to benefit minority voters without simultaneously benefiting Democrats or Republicans? Ideally redistricting rules (and electoral institutions more generally) would promote minority voting rights where necessary but avoid introducing partisan bias into the electoral arrangements. In theory it is possible to choose a redistricting scheme that augments the power of minority voters while still maintaining a symmetrical relationship between votes and seat shares for the major parties. But it is not possible to do this in the current world where partisan state legislatures have primary control over redistricting.

The impossibility of disentangling the relationship between minority representation and partisan gerrymandering stems from two features of the current system: first, the fact that African-American voters—the group on which we have focused—are not symmetrically distributed within the voters' distribution (being located instead almost exclusively at the left tail); second, the fact that partisan officials have principal responsibility to draw electoral districts. Given these twin constraints, it is not possible to replace the Voting Rights Act with some other legal rule that promotes African-American electoral opportunities without introducing partisan bias.

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[111] *See* Issacharoff & Karlan, *supra* note 16.

[112] For a general discussion of such indirect strategies, *see* Adam B. Cox, *Designing Redistricting Institutions*, 5 ELEC. L. J. 412 (2006); Cox, *supra* note 7.

Of course, neither of these conditions need hold in the long run. The political demography of the United States is clearly changing. And more immediately, the situation looks quite different for the relationship between race and partisanship for Latino voters—who are more and more frequently at the center of redistricting disputes involving the Voting Rights Act. Latino voters do not appear to cluster at the left end of the voter distribution in the way that African-American voters do.[113] If their signal distribution is more symmetrical than African-American voters—or better yet if their race is simply a relatively poor predictor for their location in the signal distribution in any particular election—then the Voting Rights Act could help promote representational opportunities for Latino voters without introducing an advantage in favor of either Democrats or Republicans. Creating majority-Latino districts would not require redistricters to draw asymmetrically on one tail of the voter distribution. Or, to put it differently, redistricters have little reason to use race as a proxy for a voter's ideological location if race is poor predictor of that fact. In such a world, redistricter's own decisions would allow us to disentangle issues involving minority representation from issues of partisan gerrymandering.

The second condition need not hold either: it is possible that primary responsibility for redistricting could be taken away from partisan officials. Other democracies with electoral structures similar to ours did this quite some time ago.[114] A handful of American states have done so as well.[115] Most recently, for example, California adopted a constitutional amendment requiring that its state legislative and congressional districts be drawn by a bi-partisan commission.[116]

Putting aside all of the difficult practical questions about how one designs an unbiased commission, our central thesis provides a new kind of theoretical

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[113] Barack Obama won 67% of the Hispanic vote but 95% of the African-American vote, and John Kerry won 53% of the Hispanic vote but around 88% of the African-American vote. see, for example, exit polls cited on the following website: http://www.cbsnews.com/sections/politics/horserace/main502163.shtml?keyword=Exit+Polls.

[114] Australia, Canada, and the United Kingdom are perhaps the best examples. *See* AUSTRALIAN POLITICS AND GOVERNMENT: THE COMMONWEALTH, THE STATES, AND THE TERRITORIES (Jeremy Moon & Campbell Sharman eds. 2003); JOHN C. COURTNEY, COMMISSIONED RIDINGS: DESIGNING CANADA'S ELECTORAL DISTRICTS (2001); REDISTRICTING IN COMPARATIVE PERSPECTIVE (Lisa Handley & Bernard Grofman, eds. 2008).

[115] *See* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING (Thomas Mann & Bruce E. Cain, eds. 2005).

[116] *See* James P. Sweeney, *Voters Catch on the Redistricting Reform*, SAN DIEGO UNION-TRIB., Nov. 9, 2008, at A-1 (discussing passage of Proposition 11).

argument in favor of such an arrangement. Historically, advocates for redistricting commissions have focused exclusively on concerns about partisan gerrymandering. They have argued that it is impossible to stamp out the practice of partisan gerrymandering without stripping partisan officials of redistricting authority. Of course, the question always remained whether some other institutional design route might also alleviate the problem of partisanship. One of us has argued, for example, that it sometimes will be possible to reduce partisan bias by constraining the redistricter's decision-making process in some way, rather than by changing the redistricter's identity.[117] This Article shows that, given the political demography of the United States today, stripping partisan legislatures of redistricting power provides the only way to draw a redistricting plan that is *both* partisan neutral and that promotes African-American voting rights. At least in a situation where one cares about both of these values, constraints on the redistricter's decision-making process alone cannot be a perfect substitute for changing her identity. This complicates the contemporary picture about the institutional design of redistricting. More important, it provides a new way of understanding the potential virtues of redistricting commissions.

CONCLUSION

We have shown that the conventional wisdom about the relationship between partisan gerrymandering and minority-promoting districting is misguided. For redistricters pursuing partisan advantage, the Voting Rights Act operates as a greater constraint for Republicans than it does Democrats. This does not mean, of course, that we should scrap the Act, or that Republicans were confused when they supported its reauthorization in 2006. The Act's majority-minority districting requirement can significantly increase the likelihood of electing minority legislators, and many have argued that promoting this sort of descriptive representation is important in a country that long excluded minority voters from the polls. Nonetheless, our findings do make two things clear. First, the partisan consequences of the Act cannot be neutralized without abandoning the project of promoting descriptive representation. Second, even if we did abandon that project and repealed the Voting Rights Act, it would not mean the end of majority-minority districts. Those districts serve the interests of the Democratic Party, and so would likely be drawn even in the absence of any legal requirement to do so. For that reason, opponents of majority-minority districting would have to go much

[117] *See* Cox, *supra* note 7 (arguing that a limitation on the frequency of redistricting would create a temporal veil of ignorance that could reduce partisan advantage-seeking); Cox, *supra* note 112.

further—to legally prohibit the drawing of these districts—in order to eliminate them from the contemporary political landscape.

Understanding these features of reapportionment law and politics is important for a slew of reasons: it has implications for the political economy of major legislation like the Voting Rights Act, consequences for the way in which courts choose to intervene in the redistricting process, and lessons for design of redistricting institutions. We cannot hope to think through all of these implications in this Article. But our hope is that we have provided a new framework for future conversations about these issues.