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DOES THE NEW VRA SECTION 5 OVERRULE *GEORGIA V. ASHCROFT*?

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INTRODUCTION

Following the 2000 census, the State of Georgia redrew its fifty-six state senate districts to comply with the one-person-one-vote rule.[1] At the time, Democrats held majorities in both chambers of the state legislature. Then-governor Roy Barnes, a Democrat himself, was leading the charge to construct a districting plan that would advantage his party in the upcoming 2002 elections, hoping to preserve Democratic control in the face of an expected Republican surge.[2]

The key to his plan was to "unpack" many of the heavily Democratic districts and distribute loyal Democratic voters to surrounding districts.[3] In particular, black voters were reallocated away from districts with either especially high or low levels of black voting-age population (BVAP) in order to create more districts in the 25–40%

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1. *See* Baker v. Carr, 369 U.S. 186, 209–10 (1962) (deciding that reapportionment issues present justiciable questions); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 730, 734 (1964) (requiring all districts to be substantially apportioned on a population basis); Reynolds v. Sims, 377 U.S. 533, 562–63 (1964) (ruling that state legislative districts had to be roughly equal in population).

2. The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats. For example, the Director of Georgia's Legislative Redistricting Office, Linda Meggers, testified that the Senate Black Caucus "wanted to maintain" the existing majority-minority districts and at the same time "not waste" votes.

Georgia v. Ashcroft, 539 U.S. 461, 469 (2003) (internal citation and quotation marks omitted).

3. The plan as designed by the Senate "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts. The new plan drew 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30% and 50%, and 4 other districts with a black voting age population of between 25% and 30%. According to the 2000 census, as compared to the benchmark plan, the new plan reduced by five the number of districts with a black voting age population in excess of 60%.

Id. at 470 (internal citation omitted).

BVAP range, so-called "influence districts."[4] This meant that some districts with black populations above 55% or even 60% were brought down close to the 50% mark. However, the total number of districts with BVAPs above 50% rose from twelve to thirteen.

As required by Section 5 of the 1965 Voting Rights Act (VRA),[5] Georgia submitted its plan directly to the District Court for the District of Columbia for preclearance,[6] and the Department of Justice (DOJ) indicated its intention to interpose objections to Senate districts 2, 12, and 26, in which the BVAPs were slated to fall from 60.6% to 50.3%, 55.4% to 50.7%, and 62.5% to 50.8%, respectively.[7] The State submitted evidence showing that the "point of equal opportunity"—the level of BVAP at which a minority-preferred candidate has a 50% probability of winning—was 44.3%, and it argued that each of these districts would therefore still offer black candidates a healthy chance of gaining office.[8] The DOJ contended that the lower levels of BVAP in the redrawn districts would result in minority-supported candidates having a more difficult time winning their elections, so consequently the State had not met its burden of proving that the proposed plan would not harm black voters.[9]

The district court agreed with the DOJ and refused to preclear the plan.[10] Georgia appealed, and the Supreme Court, in the case *Georgia v. Ashcroft*, ruled that the district court had not taken sufficiently into account the State's avowed objective of increasing "substantive representation"—the degree of influence that minority voters have on policy outcomes—even at a possible cost to "descriptive representation"—the number of minority candidates elected to

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4. *Id.* at 463.

5. 42 U.S.C. § 1973c (2000). The Voting Rights Act is codified in whole in §§ 1973 to 1973(aa)(6).

6. The VRA directs covered jurisdictions (those with historic patterns of racial discrimination) to obtain the permission of the federal government before enacting or enforcing new regulations that might affect minorities' voting rights. Although states have the option of submitting proposed changes in state or local law to the Justice Department or the D.C. District Court, the usual practice is to submit plans to the Justice Department first.

7. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 105 (D.D.C. 2002).

8. *Id.* at 80.

9. *Id.* at 72.

10. *Id.* at 97. Judge Sullivan, joined by Judge Edwards, concluded that Georgia had "not demonstrated by a preponderance of the evidence that the State Senate redistricting plan would not have a retrogressive effect on African American voters'" effective exercise of the electoral franchise. *Id.*

office.[11] In its decision, the Court relied heavily on the testimony of black state legislators, including civil rights leader and U.S. Representative John Lewis, who supported the plan as an attempt to maintain Democratic control of state government.[12]

The reaction to *Georgia v. Ashcroft* was swift and heated. Professor Pamela Karlan denounced the decision as a first step toward "gutting" Section 5 preclearance.[13] Another scholar argued that it "greatly weakened the enforcement provisions of Section 5."[14] An ACLU official expressed concern that the decision "may allow states to turn black and other minority voters into second-class voters, who can influence the election of white candidates but cannot elect candidates of their own race."[15] Others viewed the decision more favorably: Henry Louis Gates wrote that "[Descriptive representation] came at the cost of substantive representation—the likelihood that lawmakers, taken as a whole, would represent the group's sub-

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11. The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. First, while the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-minority districts to elect a candidate of their choice. In doing so, it paid inadequate attention to the support of legislators representing the benchmark majority-minority districts and the maintenance of the legislative influence of those representatives.

Georgia v. Ashcroft, 539 U.S. 461, 485–86 (2003). For a discussion of "substantive" and "descriptive" representation, see HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

12. Congressman Lewis testified that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made," and that the Senate plan "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive."

Ashcroft, 539 U.S. at 489. The Court also noted that the plan had passed with the concurrence of forty-three out of the forty-five black state legislators. *Id.* at 471.

13. Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 36 (2004).

14. Jocelyn Benson, *Turning Lemons into Lemonade: Making* Georgia v. Ashcroft *the* Mobile v. Bolden *of 2007*, 39 HARV. C.R.-C.L. L. REV., 485, 488–89 (2004).

15. Rhonda Cook, *Court: Georgia Can Spread Out Minority Voters*, ATLANTA J.-CONST., June 27, 2003, at A1 (quoting Laughlin McDonald, an attorney at the ACLU).

stantive interests. Blacks were winning battles but losing the war as conservative Republicans beat white moderate Democrats."[16]

The issue of whether states would be allowed to trade off descriptive and substantive representation when devising new districting plans seemed to be decided when groups that opposed the ruling were able to insert language into the 2006 VRA Renewal and Amendments Act[17] (VRARA) aiming to overrule *Georgia v. Ashcroft*. In particular, the new retrogression standard prevents covered jurisdictions from enacting or administering voting laws that "diminish[ ] the ability of [minority voters] . . . to elect their preferred candidates of choice."[18] The new Section 5 amendment language was widely known as the "*Ashcroft*-fix," and it was generally assumed that the effect of the amendments would be to return preclearance requirements to the pre-*Ashcroft* standards.[19]

However, in reality, re-adopting the old standard may prove far less a simple matter than a "quick fix." As recounted by Professor Nathaniel Persily, the tortuous path that the legislation took on its way to being signed into law resulted in a situation in which the exact meaning of the new Section 5 language was never made clear.[20] Indeed, all that the enacting majority could agree on was that the new standard was intended to overrule *Georgia v. Ashcroft*, not allowing jurisdictions to trade off districts where minorities have the ability to elect their preferred candidates—so-called "minority opportunity" districts—for mere "influence" districts.[21] But when we examine various alternatives for interpreting and putting this standard into practice, none is straightforward to implement

16. Henry Louis Gates, Jr., Op-Ed., *When Candidates Pick Voters*, N.Y. TIMES, Sept. 23, 2004, at A27.

17. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (VRARA), Pub. L. No. 109-246, 120 Stat. 577.

18. *Id.* § 5(3)(b), 120 Stat. at 580–81.

19. The House Report states that the bill emphasizes that "Congress partly rejects the Supreme Court's decision in *Georgia v. Ashcroft*." H.R. REP. NO. 109-478, at 94 (2006).

20. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007); *see also* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007) (describing changes made to the Act to clarify legislative intent).

21. *See* H.R. REP. NO. 109-478, at 94 (pointing out that the new law partly overrules *Ashcroft*); 152 CONG. REC. H5163 (daily ed. July 13, 2006) (statements of Reps. Sensenbrenner and Watt agreeing that the new retrogression standard reenacts *Beer v. United States*, 425 U.S. 130, 141 (1976), which determined the purpose of § 5 is to maintain effective minority exercise of the electoral franchise; see *infra* note 34 for further discussion).

and most would still allow the types of descriptive–substantive representation tradeoffs that the anti-*Ashcroft* forces so oppose.

It is our contention that Section 5 of the VRARA does not overrule *Ashcroft* in any meaningful way because, regardless of how it is interpreted, the VRARA either (a) allows a diminution of the overall probability that minorities are elected to office or (b) allows states to make exactly the types of tradeoffs in favor of influence districts that supporters of the new language sought to avoid. The problems of balancing race and representation therefore have not been eliminated by the VRARA, which should be seen, at best, as an *Ashcroft*-clarification rather than an *Ashcroft*-fix.

The next Part of this Article first recounts the legal interpretations of preclearance procedures under the VRA. It then provides a social science framework for understanding racial redistricting, emphasizing the fact that the pre-*Ashcroft* standards for determining retrogression are implementable only when voting is highly polarized. It then interprets the *Georgia v. Ashcroft* decision within this framework, arguing that the extra latitude it gave to states to include substantive representation considerations when redistricting was carefully circumscribed by the need to gain the support of the minority community for such a plan. Part II considers various candidates for implementing the new preclearance requirements, showing that none of them would actually prevent states from trading off substantive and descriptive representation when redistricting. Part III applies our analysis to the Georgia redistricting plan after the 2000 census that was at issue in *Georgia v. Ashcroft* and shows that the plan would have, in fact, significantly increased the substantive representation of minority interests at a slight cost to expressed descriptive representation. It concludes with some thoughts about the current state of race and representation in the United States and the implications of our findings for broader issues of minority representation in majoritarian political systems.

I.
GEORGIA V. ASHCROFT AND RETROGRESSION

A. The Structure of the Voting Rights Act

The VRA has two major provisions: Sections 2 and 5.[22] The former outlaws any voting arrangements that *dilute* the votes of minorities, giving them "less opportunity than other members of the electorate to participate in the political process and elect represent-

22. 42 U.S.C. § 1973 (2000) (Section 2); *id.* § 1973c (Section 5).

atives of their choice."[23] The classic example of a dilutive practice is at-large elections for a city council, in which all voters can cast a ballot for each council position. By this method, a white majority of, say, 60%, can capture 100% of the council seats, thus locking minority voters out of power altogether. Section 2 is permanent, nationwide, and relatively uncontroversial; under its aegis, for instance, many at-large voting systems have been changed to geographically defined districts.[24]

Section 5, on the other hand, addresses the prospective, rather than retrospective, impact of voting practices.[25] As of the 1960s, the history of pursuing equal voting rights in the South offered nothing but frustration: as soon as one method of disenfranchisement (such as the grandfather clause or the white primary) had been ruled unconstitutional after decades of arduous litigation,[26] Southern states would simply switch to a different method (such as poll taxes or literacy tests).[27] The VRA combated this history of discrimination in a two-step process: Section 4 prohibited all "tests and devices" that could limit minorities' ability to vote,[28] and Section 5 required "covered" jurisdictions—which included most Southern states and their sub-jurisdictions—to submit any proposed changes in voting practices to the Justice Department or Dis-

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23. *Id.* § 1973a.

24. *See generally* Lisa Handly and Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 335 (Chandler Davidson & Bernard Grofman eds., 1994) for a comprehensive account of how changes fostered by the aggressive application of Section 2 greatly increased black office-holding in the South.

25. *See, e.g.*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (VRARA), Pub. L. No. 109-246, § 5, 120 Stat. 577, 580 (2006).

26. "White primaries" restricted voting in primary elections to white voters only, while "grandfather clauses" restricted voting in all elections to those people whose grandfathers could legally vote. *See* Terry v. Adams, 345 U.S. 461 (1953) (outlawing the restriction of participation in primaries, or their functional equivalents, to white voters only); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Herndon, 273 U.S. 536 (1927); Guinn v. United States, 238 U.S. 347 (1915) (invalidating an Oklahoma statute—a grandfather clause—denying registration to anyone who could not vote as of January 1, 1866, or anyone lineally descended from such a person).

27. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1956–2007*, 86 TEX. L. REV. 667, 679 (2008).

28. 42 U.S.C. § 1973b.

trict Court for the District of Columbia for preclearance, without which the changes could not legally go into effect.[29]

By shifting the burden of proof from those challenging discriminatory state actions to the states themselves, Section 5 became a crucial element in the fight to provide minority voters with real access to the ballot box in the South for the first time since Reconstruction. Such restriction on state action, though, is unique in U.S. law, and so Section 5 has always been limited in both its geographic and temporal scope. It was initially passed with a five-year sunset provision.[30] After relatively short renewal periods of five years in 1970 and seven years in 1975, Section 5 was extended for a full twenty-five years in 1982.[31] Thus, it was scheduled to expire in 2007; but the VRARA extended it another twenty-five years from the date of passage, so Section 5 will now expire in 2031.[32]

Section 5 states that a change in voting practices submitted for preclearance should be allowed to take effect if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[33] Thus, states have to prove that their proposed changes neither are based on a discriminatory purpose nor have a discriminatory effect.

The standard for judging discriminatory effect was defined early on to be "retrogression"; that is, a new law could not make minorities worse off than they had been before.[34] The effects test,

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29. *Id.* § 1973c. Section 5 coverage was defined to include any state or political jurisdiction that had a test or device in operation as of November 1, 1964, and in which less than half the voting age population voted in the 1964 presidential election. *Id.* This definition included almost the entire South, including the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and certain counties of North Carolina. The current list of covered states and subdivisions is available at http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Mar. 10, 2008).

30. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438.

31. *See* Pub. L. No. 97-205, § 2, 96 Stat. 131, 133 (1982); Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (1975); Pub. L. No. 91-285, § 5, 84 Stat. 314, 315 (1970).

32. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (VRARA), Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (2006).

33. § 1973c.

34. The term "retrogression" was first applied to the VRA context in *Beer v. United States*. 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *see also* City of Lockhart v. United States, 460 U.S. 125, 134–35 (1983) (stating that a change that simply perpetuated the status quo was entitled to § 5 preclearance because "[a]lthough there may have been no improvement in their voting strength, there has been no retrogression either").

in essence, became an "anti-backsliding" provision; it would be violated, for instance, by a municipality's attempting to change from a district-based system back to one of at-large elections.

The requirements for determining discriminatory purpose, on the other hand, have received less judicial scrutiny, and a number of submissions were denied preclearance during the 1980s on the basis of the intent standard, even when no retrogression was apparent. In *Busbee v. Smith*,[35] for example, a Georgia congressional redistricting plan was denied preclearance even though it was actually ameliorative, rather than retrogressive.[36] The plan increased the black voting age population in the Fifth District—located in Atlanta, and which had previously elected a black congressman, Rep. Andrew Young—from 39% to 57%. Yet there was evidence that, even with such a BVAP increase, the district was designed specifically to avoid giving black voters *effective* control over election outcomes.[37] In *City of Pleasant Grove v. United States*,[38] the Alabama city of Pleasant Grove was enjoined from redrawing its boundaries in such a way as to annex the surrounding white suburbs but not the black suburbs, even though Pleasant Grove had no black residents at all at the time.[39] Here, the fact that suburbs with minority residents were consistently excluded from the redrawn city limits was taken by the DOJ to be evidence of discriminatory intent.[40] And the well-known litigation in *Shaw v. Reno*[41] was initiated after the DOJ objected to North Carolina's original redistricting plan on the basis of discriminatory intent, even though the plan maintained the previous number of majority-minority districts.[42]

But the Supreme Court began narrowing the scope of the intent standard during the 1990s. In *Reno v. Bossier Parish School Board* (*Bossier Parish I*),[43] the Court ruled that a Section 2 violation was not sufficient to establish discriminatory intent under Section 5.

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35. 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

36. *See id.* at 516, 518.

37. *See id.* at 499, 512–13. Congress was aware that even a BVAP of 57% would result in black voters' composing less than half of the total turnout. *See id.* at 513.

38. 479 U.S. 462 (1987).

39. *Id.* at 464, 470.

40. The Court was forced into considerable legal gymnastics to uphold the DOJ's ruling here, as there were no actual minority voters residing in the city to suffer harm as a result of the proposed annexation. *See id.* at 470–72.

41. 509 U.S. 630 (1993).

42. *See* Shaw v. Barr, 808 F. Supp. 461, 463–64 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 509 U.S. 630 (1993).

43. 520 U.S. 471 (1997).

Then, in a later iteration of the same case,[44] the Court ruled that the effect and intent standards were in fact one and the same; in essence, the only relevant discriminatory intent for Section 5 preclearance was retrogressive intent.[45]

Section 5 preclearance has thus come to mean retrogression and nothing else, under both the intent and effect standards. This rule may be easily implementable in many policy areas—the change of a voting system or the annexation of surrounding suburbs, for instance—but the exact meaning of "retrogression" in the context of redistricting has always been a bit unclear. After all, voters excluded from one district do not simply disappear; they are reallocated to surrounding districts, where they have the potential to influence the selection of a different representative.

*B. Pre-*Ashcroft *Preclearance*

What, then, does it mean for one districting plan to retrogress in comparison with the pre-existing baseline plan? Three steps, we argue, are required: (1) specifying a standard by which to measure the electability of minority-preferred candidates; (2) applying this standard to both the baseline and proposed districting plans; and (3) translating this analysis into a conclusion about retrogression. We term these calculations a "retrogression assessment procedure."

This section first outlines the DOJ's pre-*Georgia v. Ashcroft* assessment procedure, which, we argue, is implementable in a straightforward manner only when voting is highly polarized along racial lines. We then show that, absent such polarization, these standards become less coherent, and that their implementation requires difficult tradeoffs among different types of districts. Finally, we review evidence that voting is, in fact, currently much less polarized than before, implying the need for a revised measure of descriptive representation.

Let us begin by dissecting the body of argumentation surrounding the Justice Department's pre-*Georgia v. Ashcroft* criteria for approving a redistricting plan. Up until the *Georgia v. Ashcroft* decision, the DOJ had measured retrogressive effect with respect to issues of descriptive representation alone:

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44. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320 (2000).

45. Why, the Court asked, should we worry about laws enacted with discriminatory intent if they don't actually impair the ability of minorities to effectively participate in the political process and are not dilutive? *Id.* at 329 (quoting Beer v. United States, 425 U.S. 130 (1976)).

> A proposed plan is retrogressive under the Section 5 "effect prong" if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice.[46]

To implement this electability-based standard for determining retrogression, with reference to the three steps in a retrogression assessment procedure outlined above, the DOJ used the following approach: (1) use historic patterns of voting rates and electoral outcomes to determine a crucial threshold necessary for minority voters to have effective control over elections[47]—this level of BVAP is P^*;[48] (2) calculate the number of districts with BVAPs at or above P^* in the baseline and proposed plans; call these N_b and N_p, respec-

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46. Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001) (internal citation omitted). This is consistent with the Court's declaration in *Bush v. Vera* that nonretrogression "mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." 517 U.S. 952, 983 (1996).

47. In *Saving Section 5*, one of the most thoughtful and informative articles written on the pre-*Georgia v. Ashcroft* preclearance procedures at the DOJ, a former official claims that the DOJ attempted to identify those districts in which minorities controlled electoral outcomes, as opposed to districts where they had either no control or uncertain control. David J. Becker, *Saving Section 5: Reflections on* Georgia v. Ashcroft *and Its Impact on the Reauthorization of the Voting Rights Act*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 223, 235–36 (Ana Henderson ed., 2007). The population thresholds necessary to assure minority control are often summarized as a single percentage of minority residents. At first, the rule of thumb was 65% total black population. More recently, the informal standard has been 50% BVAP, termed "majority-minority." *See* Becker, *supra*, at 235 & n.58. The DOJ has consistently maintained, though, that its criteria for assessing electability are much more nuanced than any single-number approach. *See, e.g.*, Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 66 Fed. Reg. at 5413 ("Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission."). Becker emphasizes this point. *See* Becker, *supra*, at 228–29.

48. Note that P^* may be different across geographic regions. For ease of discussion, we will refer mainly to BVAPs and black voters in this and the following sections. It should be understood that these arguments apply equally to Hispanic voters (HVAP) or any other community of interest protected by the VRA. We will, along the way, make special note of provisions that depend on there being a single community of interest, rather than multiple communities of interest.

tively; and (3) determine that the proposed plan is retrogressive if $N_p < N_b$; otherwise it is non-retrogressive.[49]

This algorithm is indeed simple, even mechanical, once P^* is determined, but it clearly rests on the assumption that P^* does in fact exist; that is, that there is some BVAP threshold below which minority-supported candidates have very little chance of gaining office and above which they are practically certain to win. This would be the case, for instance, if voting were highly polarized, with few ballots cast by white voters for minority candidates and vice-versa.

Figure 1a illustrates this polarized scenario with sample data, graphing the probability of electing a minority-supported representative as a function of percent black voting-age population. The key threshold P^*, as drawn in the figure, is 57.5% BVAP. Below this point minorities have almost no chance of controlling an election, while above it they are nearly assured of such control.[50] In this example, 57.5% BVAP also serves as the "point of equal opportunity"—the point at which minority-supported candidates have a fifty-fifty chance of winning. Thus minority control, electability, and equal opportunity coincide perfectly.

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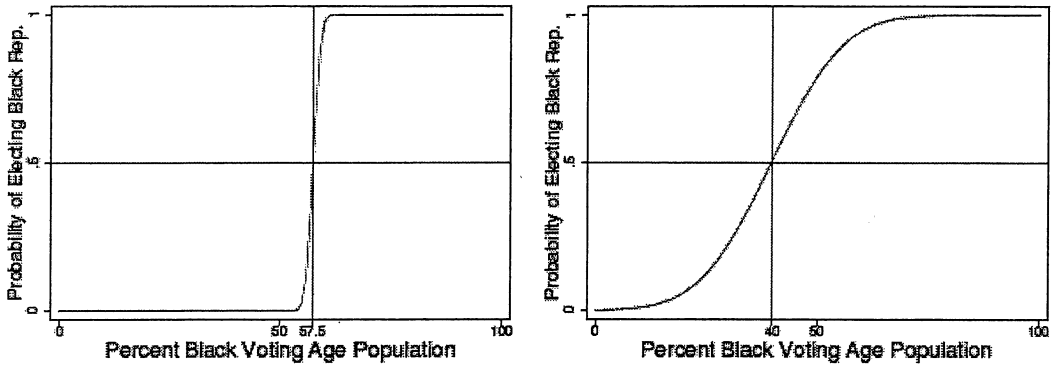
49. It has been claimed that, in the 1990s, the DOJ followed a "max-min" policy; that is, maximizing the number of minority-controlled districts in each state. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 924–25 (1994) ("Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts."). Call the maximum number of possible majority-minority districts N_{max}; then under this standard a plan should be denied preclearance unless $N_p = N_{max}$. The *Miller* Court noted that the Justice Department "disavows having had that policy" and that it "seems to concede its impropriety," but the majority opinion nevertheless relied on "the District Court's well-documented factual finding," implying that a min-max strategy was in fact being used. *Id.* (citing Johnson v. Miller, 864 F. Supp. 1354, 1360–69 (S.D. Ga. 1994)). Others have argued strongly that no such standard has ever been in effect. *See, e.g.*, Peyton McCrary, Christopher Seaman & Richard Vallely *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & L. 275, 296–98 (2006) (arguing that the number of intent-based objections has increased as the number of retrogression-based objections has decreased).

50. This number will be above 50% to the degree that black levels of citizen VAP registration, turnout, rollon (the percent of voters who turnout that actually vote for a given office), and/or co-ethnic voting are lower than the corresponding levels for white voters.



(a) High Polarization (b) Low Polarization

Figure 1

Note that this world view admits of no tradeoffs across districts; it would not be possible, for instance, to shift minority voters in such a way as to decrease the probability of electing a minority candidate from 85% to 75% in district x but raise the probability from 35% to 50% in district y. The distinction between districts with and without minority electoral control is, so to speak, black and white, and there is no question but that a representative elected from such a district is in fact a candidate of choice of the minority community.

But when polarization in the electorate is reduced, this neat binary division of districts begins to break down, and the single-threshold approach to retrogression becomes more arbitrary. Consider, for instance, the situation depicted in Figure 1b. Here the probability of electing minority-preferred candidates rises continuously with changes in district BVAP, rather than abruptly. The figure also illustrates the possibility that, when white crossover voting reaches a significant level, the point of equal opportunity could fall below 50% BVAP. In this illustration, it occurs at 40%.[51]

This scenario complicates the electability calculus enormously. The top and bottom halves of Figure 2 illustrate the key cut points in worlds with high and low polarization, respectively. In the high polarization example, the point of equal opportunity, labeled P^*, divides districts with and without minority control. As long as P^*—which was 57.5% in Figure 1a—remains above 50%, there is no conflict between electability and control.

51. The shallow slope of the curve reflects the fact that white crossover voting is more variable.

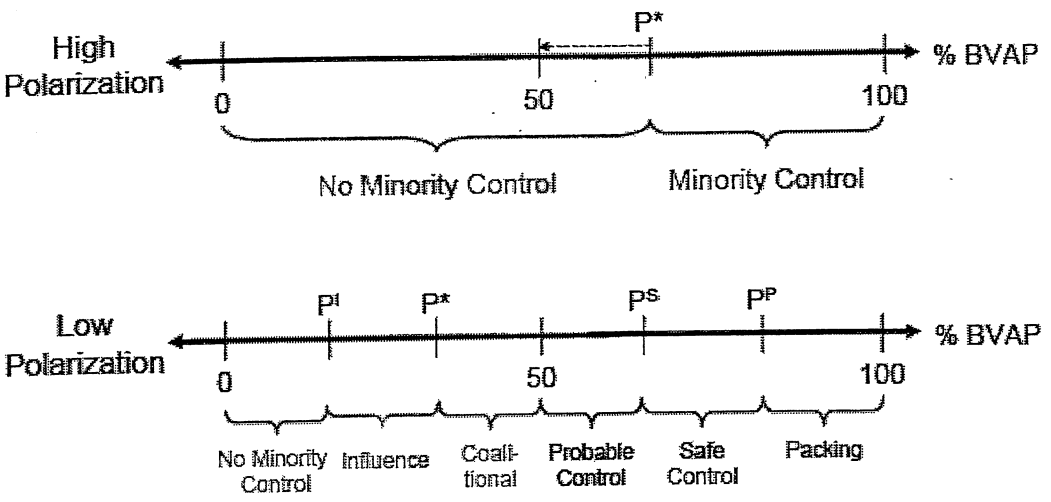


Figure 2

The lower half of the figure, though, illustrates a situation in which P^* slips below 50%. For districts with BVAPs under P^*, minority control is less likely, although if the situation illustrated in Figure 1b holds, electability will not suddenly plunge to a zero probability. This creates a range of districts between P^* and 50%, which Professor Richard Pildes terms "coalitional districts."[52] Here, it is relatively likely that minority-supported candidates will be elected, but they must rely on white crossover voting to do so. In this case, it might be argued, minority voters lack the degree of control they had with majority-minority districts, since their preferred candidate may have to accommodate the preferences of non-minority voters to some extent in order to gain office.

The situation was further complicated by introduction of the category of minority "safe districts" in *Georgia v. Ashcroft*.[53] Although the DOJ never defined this term precisely, it would seem to indicate a point at which the probability of minority candidates attaining office is considerably greater than 50%. In particular, the DOJ argued that the redistricting plan for the Georgia State Senate at issue in *Georgia v. Ashcroft* was retrogressive because it reduced the number of these safe districts.[54] And since the three districts that the DOJ objected to all had BVAPs just above 50%, we can assume that the "safety point," labeled P^S in the figure, is considera-

52. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 8 N.C. L. REV. 1517, 1539 (2002).

53. 539 U.S. 461, 480 (2003).

54. *Id.* at 472.

bly above the 50% mark.[55] Note that this introduces two more district categories: those between 50% and the safety point, and those above the safety point. In the figure, we term the former the region of "probable minority control" and the latter the region of "safe control."

We also include the point P^I to indicate the boundary of influence districts, those districts in which "a minority group has enough political heft to exert influence on the choice of candidate though not enough to determine that choice."[56] For concreteness, we propose to define this boundary as the point of "partisan equal opportunity"—the level of BVAP at which a candidate of the party supported by minority voters has an equal chance of winning the election.[57] A final division is suggested by the DOJ's statement in *Guidance Concerning Redistricting*: that they will reject plans in which "minorities are over-concentrated in one or more jurisdictions"[58]—in other words, "packing." The point over which districts are packed is labeled P^P in the figure, bringing the total number of possible district types up to six.

Such a menagerie of choices immediately raises difficult questions about tradeoffs. How many coalitional districts does one need to outweigh one safely controlled district? Perhaps some combination of coalitional and probable-control districts may outweigh one safe district? Or perhaps, as the DOJ argued, there is no combination of other district types that could possibly offset the loss of even one safe district. The latter position implies a "ratchet effect" in safe districts: their number can be increased from one decade to the next, but never decreased.

Overall, then, the low-polarization state of the world plays havoc with the DOJ's current retrogression assessment procedure. It is hard to specify a consistent, non-arbitrary standard by which to measure electability. It therefore becomes more difficult to apply any such standard to the baseline and proposed plans; and it follows that retrogression will be similarly problematic to assess. Note

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55. Pildes, *supra* note 52, at 1522. Writing prior to the DOJ's objections to Georgia's proposed plan, Pildes conflates the categories of majority-minority and safe districts. The DOJ clearly considers them to be distinct.

56. Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998) (Posner, J.).

57. This is consistent with Karlan's definition of influence districts as those in which "white candidates defeat black preferred candidates in the Democratic primary but in which the Democratic candidate wins the general election." Karlan, *supra* note 13, at 23; *see also infra* Part III.A (dealing with descriptive representation).

58. Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001).

that this objection applies even when the DOJ identifies districts in each category by investigating qualitative, location-specific factors rather than relying solely on numeric cutoff points. Identifying retrogression with the loss of minority-controlled districts now requires a much more detailed definition of what is meant by "minority control," and this concept becomes harder to measure when electability becomes less of a yes/no question and more a matter of degree. In such a world, the courts must also figure out how to deal with proposed districting plans that lower the minority populations in some districts that had previously elected candidates of choice to office, knowing that such a change will probably reduce the chance of electing candidates of choice in the future, not from 100% to 0%, but somewhere in between.

C. *The Essence of* Georgia v. Ashcroft

Enter *Georgia v. Ashcroft*,[59] the Court's initial foray into the realm of districting and *substantive* representation. This new concept would need to be reconciled with the Court's previous treatment of descriptive representation, which it had used both as an indicator of Section 2 dilution and a measure of Section 5 retrogression, under the theory that an "effective" vote is one that aids in the election of a minority-preferred representative.[60] The *Ashcroft* Court noted that, despite its importance in determining the extent of minority voting strength, descriptive representation has never been the *sole* metric by which to judge retrogression.[61] The 1982 amendments to Section 2 dictated that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[62]

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59. 539 U.S. 461 (2003).

60. In the past, this theory was implemented by "creating racially safe boroughs." United States v. Dallas County Comm'n, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring) (internal quotation marks omitted); *see also* Holder v. Hall, 512 U.S. 874, 895–903 (1994) (Thomas, J., concurring) (stating that the Court has tacitly selected the number of elected officials as its indicator of electoral strength).

61. *See Ashcroft*, 539 U.S. at 482 ("In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process.").

62. 42 U.S.C. § 1973a. (2000). This disclaimer was essential to the compromise that resulted in passage of the amendment. *See* S. Rep. No. 97-417, at 193–94 (1982) (additional views of Sen. Dole).

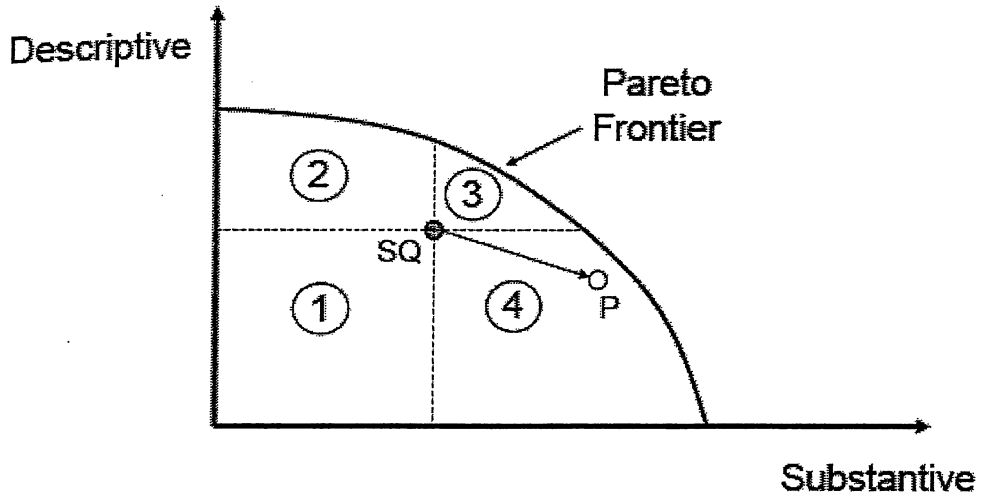
The Court had stated that "[n]o single statistic provides courts with a shortcut to determine whether" a change in voting laws retrogresses from the benchmark.[63] Justice O'Connor's concurrence in *Thornburg v. Gingles* also leaves open the possibility that an effective vote might accomplish other goals than the election of minority representatives: "Is the 'voting strength' of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group?"[64]

On this groundwork, the *Ashcroft* Court made explicit the notion that legislatures may legitimately pursue substantive representation as their goal in redistricting:

> In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.[65]

To understand the relation between descriptive and substantive representation and the *Georgia v. Ashcroft* decision, Figure 3 shows a two-dimensional graph, with substantive representation on the horizontal axis and descriptive representation on the vertical axis. The degree of substantive and descriptive representation associated with a particular districting plan, then, corresponds to a point on the graph.

63. Johnson v. De Grandy, 512 U.S. 997, 1020–21 (1993).
64. 478 U.S. 30, 87–88 (1986) (O'Connor, J., concurring).
65. 539 U.S. at 480 (citation omitted).



Pre-*Ashcroft*: Areas 2 and 3 were permissible → proposal P is retrogressive
Post-*Ashcroft*: Areas 2, 3, and 4 are permissible → P is non-retrogressive

Figure 3

Assuming, as argued above, that a tradeoff between these two objectives exists, there will be a "Pareto frontier," an economics term to describe the maximum possible combination of each type of representation. Starting from any point on the frontier, that is, there is no other achievable point that is better in both dimensions. Equivalently, any increase in one quantity necessarily requires a decrease in the other.

There are, of course, points inside the frontier, one of which is labeled "SQ" in the figure, indicating that it is the status quo state of affairs. The lines drawn through SQ, parallel to the horizontal and vertical axes, divide the Pareto region into four quadrants. Moves from SQ to region 3 improve both substantive and descriptive representation and are termed "Pareto improving." Conversely, movements into quadrant 1 are worse in each dimension. And regions 2 and 4 represent improvements in one dimension at the cost of decreases in the other. For example, the point labeled P in the figure, representing a proposed change from the status quo to region 4, would increase substantive representation at the cost of descriptive representation.

It is tempting to conclude that jurisdictions should be required to move to the Pareto frontier whenever possible, but we reject such a strong interpretation of the diagram. First of all, the exact districting schemes needed to move to the frontier could be very difficult to devise, and they may well violate other traditional redistricting criteria such as compactness and regard for preexist-

ing political subdivisions.[66] Second, while theoretically attractive, there may be some points on the Pareto frontier that are normatively suspect. The point that maximizes descriptive representation, for example, might give minority voters a share of legislative seats greater than their population proportion.[67] Similarly, the point that maximizes substantive representation might well result in electing no minorities at all to office; this outcome would undoubtedly represent a major step backward in minority voting rights, whatever positive policy implications it might have.

Note that when voting in both the electorate and legislature is polarized, increases (and decreases) in substantive and descriptive representation go hand-in-hand. That is, when the only candidates who will represent minority policy interests are elected in minority-controlled elections, the only districting plans that can increase substantive representation must increase descriptive representation. With reference to the figure, this scenario would translate into the statement that regions 2 and 4 do not exist, so the only possible moves are into regions 1 and 3. But, as explained above, current research shows that these tradeoffs do now exist; in fact, the redistricting plan passed by the Georgia state legislature was intended to be a move into region 4.[68]

How do these regions translate into decision rules regarding retrogression and preclearance? In a regime in which retrogression is measured by changes in descriptive representation alone, the only question is whether the proposed plan lies above or below the status quo on the vertical axis. Moves from SQ to regions 2 or 3, that is, would be permissible, while moves to regions 1 and 4 would be retrogressive.

Georgia v. Ashcroft, however, declared that legislatures may enact plans that they expect to increase substantive representation, even at a possible small cost to descriptive representation.[69] In our framework, the *Ashcroft* decision can be simply summarized as allowing moves to region 4 as well as regions 2 and 3, leaving only the Pareto inferior moves to region 1 as retrogressive. This maneuver provided the courts with a means of avoiding the difficult problems of defining retrogression in descriptive representation discussed

66. *See* Bush v. Vera, 517 U.S. 952, 959–60 (2006) (citing Vera v. Richards, 861 F. Supp 1304, 1331 (S.D. Tex. 1994)).

67. In first-past-the-post elections (that is, the candidate with the most votes, wins), a minority group that constitutes x percent of the population could theoretically control up to $2x$ percent of the legislature.

68. See discussion *infra* Part III.

69. 539 U.S. at 481.

above. Rather than deciding whether a change from safe control to probable control or a coalitional district constituted retrogression, the court was able to rule that any such changes, if adopted with the support of minorities themselves and in pursuit of greater substantive representation, were permissible under Section 5.

II.
THE NEW SECTION 5

The ruling in *Georgia v. Ashcroft*, then, granted states greater flexibility when devising districting plans; namely, states could enact plans that reduced descriptive representation, to some extent, if these plans also increased substantive representation[70] and had the support of minority legislators themselves.[71] Given this definition, does the new Section 5 standard, in fact, overturn the ruling? The answer turns on the interpretation given to the requirement that new districting plans not diminish minority voters' ability to elect their preferred candidates of choice. We review the three leading candidate interpretations and show that, under each of them, states would still be able to trade off substantive and descriptive representation, as discussed in *Georgia v. Ashcroft*.

A. Naturally Occurring Majority-Minority Districts

Perhaps the least compelling interpretation is that the new standard protects only "naturally occurring majority-minority districts"—presumably referring to districts drawn in urban areas with high concentrations of minority voters—as claimed in a Senate Report that was actually filed *after* the bill had already been passed by Congress.[72] This phrase seems to have originated with Republican attorney Anne Lewis's House testimony on the VRARA, as it does not appear in previous case law.[73] But a number of Republican senators—namely, Senator Hatch, Senator McConnell, and Senator Specter—used this phrase during floor debate.[74]

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70. *Id.* at 480 ("Section 5 does not dictate that a State must pick one of these methods of redistricting over another.").

71. *Id.* at 484 ("And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan.").

72. S. REP. NO. 109-295, at 21 (2006).

73. *See Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 34 (2006) (statement of Anne Lewis, Attorney, Strickland Brockington Lewis LLP).

74. 152 CONG. REC. S7949, S7979 (daily ed. July 20, 2006) (statements of Sen. McConnell and Sen. Hatch), S8010 (statement of Sen. Specter).

None of the speakers using this phrase made an argument as to why retrogression applies only to naturally occurring majority-minority districts, or why minority voters living in urban areas should be afforded more protection than minority voters elsewhere in the state—hence our contention that it is the least serious of the possible interpretations. Its partisan basis is clear, though, and runs parallel to partisan interests that we shall analyze below; so we take a moment to clearly delineate the implication this standard would have for redistricting plans drawn for partisan purposes.

Republicans maximize their seats by "wasting" as many Democratic votes as possible. This creation of districts with high concentrations of minority voters, and likely other Democratic voters living nearby, can help elect Republicans in the surrounding districts. Thus they would tend to favor the protection of districts drawn in urban areas, where housing patterns often lead to high concentrations of minorities, rather than in rural areas, where such districts would often have only a bare minimum of minority voters, if they can be constructed at all. The proposed standard, then, would diminish Democratic redistricters' ability to unpack heavily minority districts and spread these voters to nearby districts.

Although the "naturally occurring" interpretation does further Republican aims, it does little to overrule *Georgia v. Ashcroft*. Redistricting plans could leave those majority-minority districts in urban areas untouched but still reduce the concentration of minorities in other districts (even non-urban majority-minority districts) for whatever purposes they might have, including the creation of influence districts. It seems clear that this standard would not even meet the requirements of the retrogression test as understood pre-*Georgia v. Ashcroft*, as districts that elected minority candidates of choice outside of urban areas—such as Georgia's Second District in the southwest, which elected a black candidate, Rep. Sanford Bishop—could be dismantled with no compensation whatsoever. It is unlikely that the majority of those who proposed and voted for the VRARA meant it to curb minorities' ability to maintain political influence in such a drastic manner.

B. Rolling Back the Clock

The second, and probably leading, interpretation is that the VRARA returns retrogression analysis to its pre-*Georgia v. Ashcroft* state, as if the Supreme Court had never taken the case.[75] Then the

75. *See, e.g.*, Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007).

DOJ need only use its previous procedure for determining retrogression. This line of reasoning still has two possible problems, the first of which was pointed out in the previous section. Namely, with increased crossover voting in elections and growing partisan (as opposed to racial) divisions in political behavior, the electability of minority voters' candidates of choice becomes more a matter of degree than a sharp break.[76]

But let us put those matters aside, for the moment, and assume that the DOJ can determine with a high degree of certainty which districts will allow minority voters effective control and which will not. Then retrogression would be measured by the requirement that the number of minority opportunity districts cannot be decreased from one districting plan to the next. Indeed, Becker claims that this is exactly the standard the DOJ was attempting to use.[77]

To be consistent, this would require that there be no "magic number" below which a district's black population could not fall; instead, a district that had been above the threshold of electability prior to redistricting must remain above the threshold afterwards. Indeed, Senator Kennedy, speaking on the Senate floor, emphasized as much:

> Contrary to the suggestions of Senator Cornyn and Senator Kyl on the floor, while the standard rejects the notion that "ability-to-elect" districts can be traded for "influence" districts, it also recognizes that minority voters may be able to elect candidates of their choice with reliable crossover support and, thus, does not mandate the creation and maintenance of majority-minority districts in all circumstances. The test is fact-specific, and turns on the particular circumstances of each case.[78]

So majority-minority districts, per se, are not protected under this interpretation of the standard; if sufficient numbers of non-minority voters reliably cross over to vote for the minority community's candidates of choice, then districts with less than 50% black voting age population, so-called "coalition districts," could be sufficient for a state to meet its Section 5 burden.[79]

Under this regime, though, states would still have some latitude to trade off substantive and descriptive representation. For

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76. *See supra* text accompanying notes 58–59.

77. *See* Becker, *supra* note 47, at 236 & n.61.

78. 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy); *see also id.* at S8005 (Statement of Sen. Leahy).

79. *See* Becker, *supra* note 47, at 235–36, 236 n.61. Indeed, Becker advocates "discarding the term 'majority-minority' district altogether." *Id.* at 235.

every minority opportunity district in place at the time of the redistricting, they have the option of reducing the minority population up until the point at which the district is just barely over the limit. These voters can then be reallocated to other districts without fear of retrogression. Let us consider three ways in which this reallocation might work.

First, the voters could be reallocated to create additional minority opportunity districts. In this case, there is no hint of retrogression, but such situations will likely be fairly rare. Second, the voters could be reallocated to create influence districts—exactly the strategy pursued by Georgia after the 2000 districting, the legitimacy of which has been in question ever since. Third, these voters might simply be allocated to heavily Republican districts, in which case they will most likely cease to be represented by a candidate of their choice. Under other circumstances this might be seen as a diminution of minority voting rights, but it would be unassailable under this proposed rule.

Thus, under this "back-to-the-future" scenario, the DOJ would in fact preclear plans that look almost identical to the plan they rejected in *Georgia v. Ashcroft*. In fact, we know already that the DOJ has been willing to preclear plans of this type, because they raised no objections to the Georgia State House plan that accompanied the State Senate plan, which was later the subject of *Georgia v. Ashcroft*.[80] The House plan, like the Senate plan, reduced the minority population of a number of majority-minority districts and used these voters to create influence districts.[81] The only difference is that the DOJ judged that all of these reformulated minority opportunity districts nonetheless provided a sufficient chance for candidates of choice to win office.[82] Of course, the state believed that the three Senate districts that were at issue in *Georgia v. Ashcroft*—Districts Two, Twelve and Twenty-Six—were still minority opportunity districts, and though the district court agreed with the DOJ that the State had not provided persuasive evidence to the contrary, the Supreme Court did not rule directly on this issue.[83]

So this approach to the issue could best be termed an "*Ashcroft*-clarification," rather than an "*Ashcroft*-fix." States could reduce minority populations in some districts and use them for whatever purposes they like, including the construction of influence districts, as long as they do not diminish the number of minority opportunity

80. *See* Georgia v. Ashcroft, 539 U.S. 461, 472 (2003).
81. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 46 (D.D.C. 2002).
82. *See id.* at 37.
83. *See Ashcroft*, 539 U.S. at 461.

districts. The minority population of these districts could go under 50% as long as sufficient numbers of white voters reliably cross over to vote for the minority community's preferred candidate.

The major problem with this standard is the difficulty in determining which districts offer an opportunity for minority voters to elect candidates of their choice. Becker, for instance, suggests three categories of districts: (1) those where minorities control electoral outcomes; (2) those where whites have control; and (3) everything else in between, which he terms "tossup districts."[84] He defines the latter category as those districts "in which minority voters sometimes, but not consistently, have the ability to elect their candidates of choice, or nearly demonstrate such an ability."[85] This is a rather vague standard; at least the old 50% mark was objectively measurable. The worry is that without clear guidelines, acceptable minority-control districts will be in the eye of the beholder, with the DOJ being the sole final arbiter. States could either allow the DOJ to tell them what was acceptable and what was not, or create districting schemes so conservative that they would clearly be nonretrogressive.

There is perhaps one objective method to implement Becker's recommendation. After deriving S-curves such as those in Figure 1, one could employ a "90–10 rule." Safe control means that a given racial group has at least a 90% chance of winning the seat, and tossup districts comprise everything in between. In Figure 1a, this would still capture only districts right around 57.5% BVAP, but in Figure 1b tossup districts would include all those from about 30% to 55% BVAP.

C. Maintaining Overall Descriptive Representation

But at the point we allow ourselves to rely on a technique that involves estimating probabilities of minority-preferred candidates' winning office, why not go the final step—do away with categories altogether and simply estimate the overall probability that candidates of choice are elected to office? That is, why not use the analysis detailed above to estimate the probability, in each district, that a candidate of choice is elected, and then add these probabilities across all districts? This is the course advocated by Persily and is consistent with our previous work on the subject.[86]

84. Becker, *supra* note 47, at 249–53.

85. *Id.* at 251.

86. Persily, *supra* note 20, at 229–31; *see also* DAVID EPSTEIN & SHARYN O'HALLORAN, THE FUTURE OF THE VOTING RIGHTS ACT 61 (2006); Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize*

This is no doubt the "cleanest" approach to the problem, mathematically precise and intuitively clear. It emphasizes the fact that retrogression is a standard applied to plans, not districts, and makes obvious the requirement that diminutions in the ability to elect in some districts must be offset by equal or greater gains elsewhere. It would, however, allow tradeoffs such as dismantling one district where a minority-supported candidate was sure to win for three districts with a one-third probability each. This "gambling" of some safe seats makes some observers queasy.[87] On the other hand, with favorable electoral results, this strategy could increase overall minority office-holding by generating more minority wins than would occur with just safe seats.

Unlike the previous two proposed interpretations, this method would, by definition, not allow states to decrease the overall expected number of minority representatives elected. So in terms of Figure 3, it would disallow moves into quadrant number 4. In this sense it would be a true *Ashcroft*-fix in that plans like the Georgia House and Senate proposals would not be allowed. On the other hand, it would allow states to trade off minority control districts for those with only probabilistic chances of winning, including influence districts. So in these terms, the essence of *Georgia v. Ashcroft* would not be overruled.

III.
APPLICATION: GEORGIA'S PLAN FOR THE STATE SENATE

We apply these techniques to the analysis of the districting plan at issue in the *Georgia v. Ashcroft* case: Georgia's original plan for its state senate. We evaluate the plan both with respect to descriptive and substantive representation, and then summarize its status with respect to the *Georgia v. Ashcroft* standard.

A. Descriptive Representation

A summary of Georgia's proposed senate plan compared with the baseline 1997 plan is given in Figure 4. This shows the result of taking the BVAPs in each plan, ordering them from greatest to least, and taking the differences between corresponding entries. The graph clearly shows a reallocation of minority voters from the

Substantive Black Representation in Congress?, 90 AM. POL. SCI. REV. 794, 795 (1996); David Epstein & Sharyn O'Halloran, *A Social Science Approach to Race, Redistricting, and Representation*, 93 AM. POL. SCI. REV. 187, 187 (1999).

87. *See, e.g.*, Karlan, *supra* note 13, at 22.

upper and lower ends of the spectrum towards the middle, influence district region.

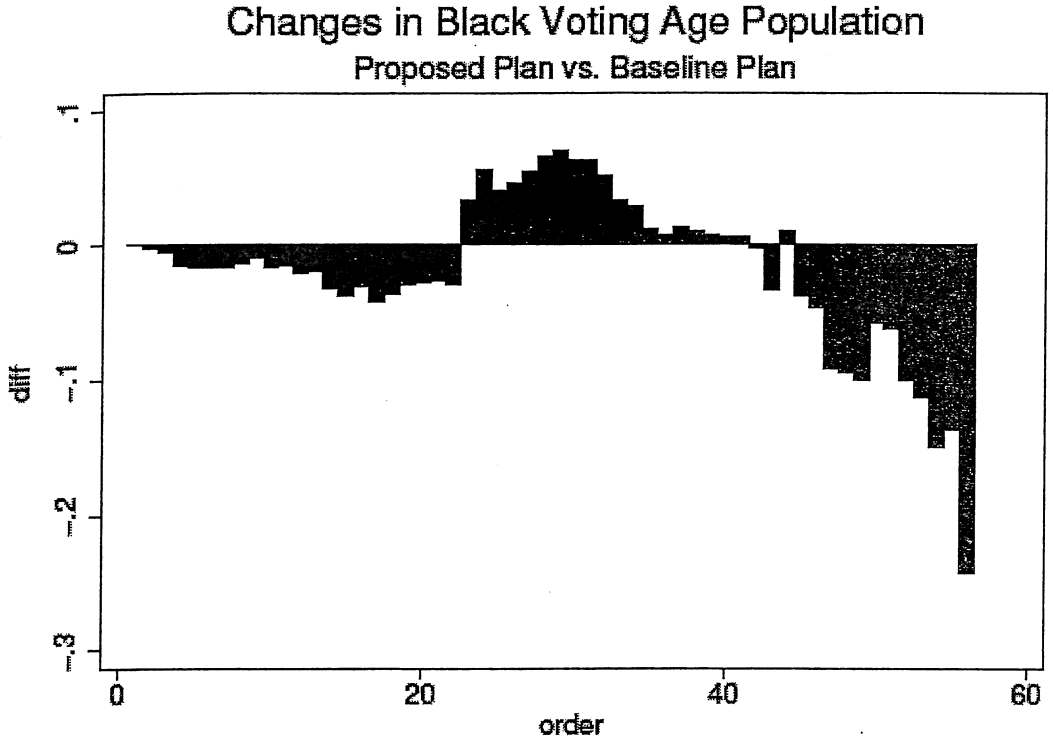

Figure 4

To estimate the relation between percent black voters and electoral outcomes, we analyze all 1,258 elections to the U.S. House and the Georgia state legislature between 1991 and 2001. Of these, 1,235 were regular elections to the 11 U.S. House, 180 Georgia House seats, and 56 Georgia Senate seats in years 1992, 1994, 1996, 1998, and 2000, while the other 23 were special elections to fill vacancies. We combined the results from all the races into a single analysis. All legislative elections occur every two years, and voting patterns on legislative races are generally similar from one body to another. For each election, we noted the race and party of the winner, whether an incumbent participated in the election, and the BVAP of the district at the time of the election.

The results are illustrated in Figure 5, which gives the probability of electing different types of representatives—Republicans, white Democrats, and black Democrats—as a function of district BVAP. As shown, the point of equal opportunity for electing a black Democrat is under 50% BVAP, and the chances of electing a white Democrat peak at just over 25% BVAP.

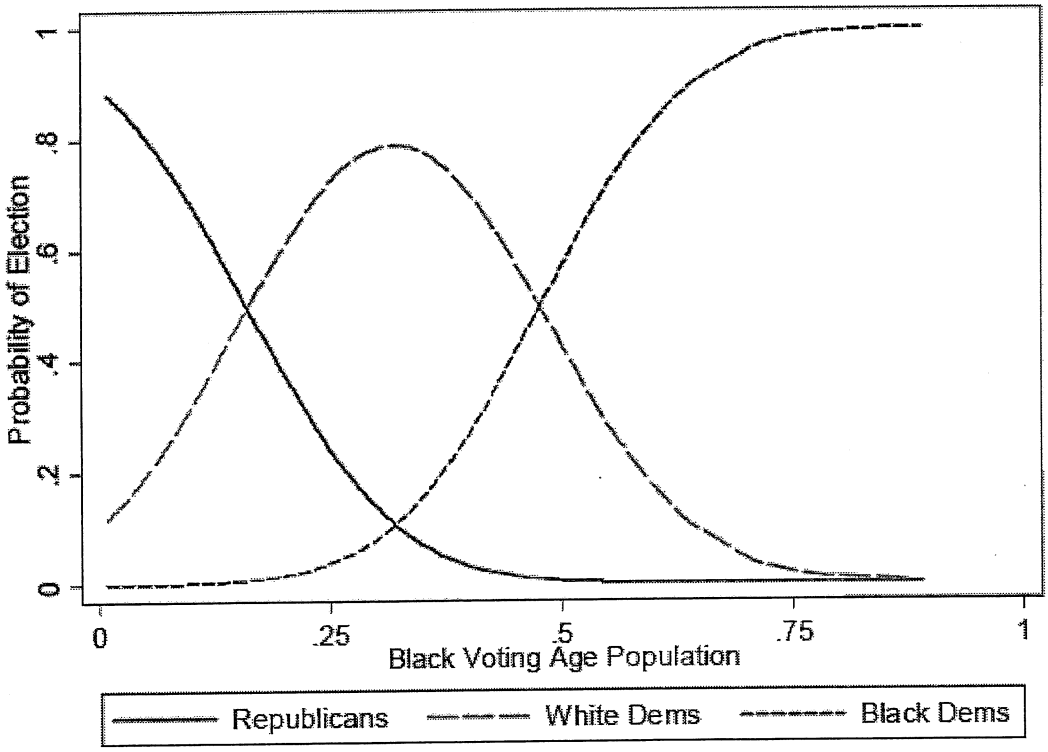

Figure 5

B. Substantive Representation

We now compare expected overall minority policy influence in the 2001 plan to that in the baseline plan. Since the 2001 plan increased the number of influence districts, we investigate the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account, rather than simply assume that non-candidate-of-choice white Democrats will represent minority interests.

For the substantive representation calculations, we began with all 892 non-unanimous recorded roll call votes cast in the State Senate between 1999 and 2002 reported on the Senate's web site.[88] We then calculated for each roll call whether the majority of black representatives voted "Aye" or "Nay" and scored each senator for each roll call, assigning them a score of 1 if they voted with the black majority, 0 if they voted in opposition, and a missing value otherwise. Finally, we averaged these scores by district and year to get that legislator's "Black Support Score."

The results are illustrated in Figure 6, which provides the Support Scores for each of the three types of representatives and a sum-

88. *See generally* Senate.gov, Legislation and Records, http://www.senate.gov/pagelayout/legislative/a_three_sections_with_teasers/votes.htm (last visited March 19, 2008).

mary linear regression line for each group. The average Support Score for Republicans was 50.2%, for white Democrats it was 92.0%, and for black Democrats it was 94.6%. Thus, while white Democrats do not always vote in favor of minority-supported positions on roll calls, they do so far more often than do Republicans.

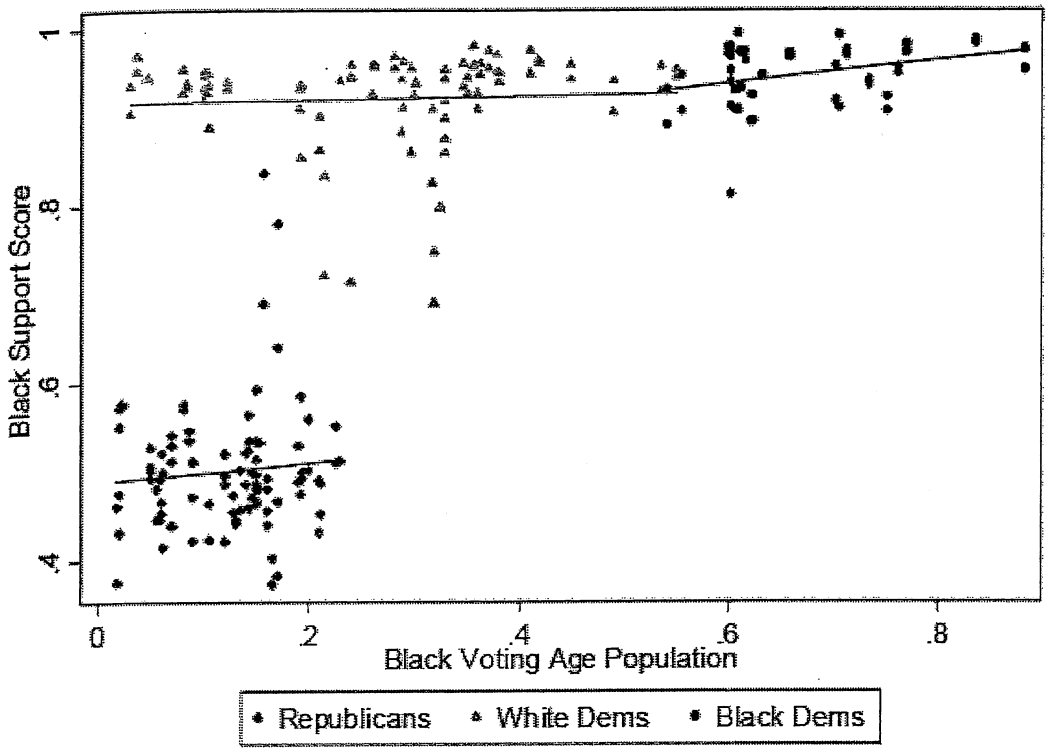

Figure 6

Thus we can estimate the relation between district characteristics and support for minorities in roll call votes. In fact, these results allow us to calculate the implied tradeoff between majority-minority and influence districts. For instance, the expected Support Score for a 50% BVAP district is about 90%, while for a 25% district it is about 50%. By this measure, roughly two influence districts would, on average, compensate for the loss of one majority-minority district.

Furthermore, blacks form legislative coalitions with Republicans far less often than they do with their white Democrat counterparts. There were a total of only 12 votes out of 892 in the sample in which a majority of black representatives and Republicans voted in one direction against a majority of white Democrats, as opposed to 297 votes in which a majority of white and black Democrats voted together against Republicans.

C. Comparison of Plans

We now compare the baseline, interim, and proposed plans in terms of both descriptive and substantive representation.[89] First, one can count the number of majority-minority, coalitional, and influence districts in each plan. The results of this analysis are shown in Table 1: the proposed plan had thirteen majority-minority districts as opposed to twelve in the baseline plan; no coalitional districts as opposed to one in the baseline plan; and seventeen influence districts, as opposed to twelve in the baseline plan. If one takes the 1990 census data as the baseline, the results are even more pronounced: five more influence districts and three more majority-minority districts. Thus the proposed plan had both more majority-minority and more influence districts than did the baseline plan. The total number of expected candidates of choice elected did fall, though, from 13.6 to 12.5.[90]

Plan	Influence	Coalition	Maj-Min	E(CoC)
Baseline (1990 Census)	12	1	10	11.2
Baseline (2000 Census)	12	1	12	13.6
Proposed	17	0	13	12.5
Interim (2002)	17	0	13	12.9

Table 1: Comparison of Alternative Plans be the Expected Number of Influence, Coalition, and Majority-Minority Districts Created, and Expected Candidates of Choice

We can now use the relation between black voting-age population and Support Scores shown in Figure 6 to estimate which plan would yield the highest average and median Support Score. The method employed uses smoothing splines[91] to approximate the nonlinear curve shown in the figure, and then uses the resulting parametric function to score each district in the baseline and proposed plans.

The results in Table 2 show that the proposed plan has an average Support Score of 66.6%, as opposed to 62.3% in the baseline

89. The interim plan was passed by the state legislature after the original plan was denied preclearance and was in effect for the 2002 senate elections. *See* Georgia v. Ashcroft, 204 F. Supp. 2d 4, 5–6 (D.D.C. 2002).

90. Part of this drop was inevitable, given the fact that as of the 2000 census the existing senate districts were malapportioned in blacks' favor. The average BVAP in the baseline senate districts was, in fact, 29.7%, even though blacks comprised only 27.6% of the statewide population.

91. Splines approximate a curve through a series of straight lines, joined together at intersection points.

plan as of the 2000 census, 59.0% in the baseline plan as of the 1990 Census, and 65.9% in the interim plan, for an increase of 6.3%. When looking at medians, the increase is even more dramatic: 75.9% in the proposed plan, as compared with 50.2% in the baseline, for an increase of 51.2%.

Plan	Mean	Median
Baseline (1990 Census)	59.0%	46.1%
Baseline (2000 Census)	62.3%	50.2%
Proposed	66.6%	75.9%
Interim (2002)	65.9%	69.2%

Table 2: Mean and Median Support Score, For Each Districting Plan

Taken as a whole, these results show that Georgia's state senate redistricting plan did trade off a slight decrease in descriptive representation for an increase in substantive representation. In terms of Figure 3, they attempted to move into region 4. As the plan did have the overwhelming support of the minority representatives, it should have been able to obtain preclearance under the Court's *Georgia v. Ashcroft* standard.

CONCLUSION

The renewal of Section 5 provided an opportune time to rethink the relation between race and redistricting. Changes in voting patterns—decreased polarization and the Republican resurgence in the South—have made the current retrogression assessment procedure all but obsolete. The inherent tensions created by the DOJ's insistence on majority-minority districts at any expense were laid bare in the *Georgia v. Ashcroft* case: Why would the federal government know better than minority voters themselves how best to advance minority interests in the political sphere?

The question is how to implement the new preclearance standards. In this Article, we show that any reasonable interpretation would still allow states some degree of flexibility in trading off descriptive and substantive representation. Which option is ultimately chosen will be revealed in time, but as of now, no matter how one interprets the VRARA, *Georgia v. Ashcroft* has not been overruled.