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Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of *Georgia v. Ashcroft*: Social Science Perspectives on Minority Influence, Opportunity and Control

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In *Georgia v. Ashcroft*, 539 U. S. 461 (2003), by a 5-4 vote, the Supreme Court laid down a new interpretation of the meaning of the retrogression standard in Section 5 of the Voting Rights Act. Justice O'Connor's majority opinion replaces the exclusive focus in earlier Section 5 jurisprudence on reduction in the realistic opportunity of minority voters[1] to elect candidates of choice[2] with what is commonly described as a dualistic approach that allows jurisdictions to determine which of two variants of retrogression they wish to claim their plan avoids: (1) retrogression in ability of minorities to elect candidates of choice, or (2) retrogression in the magnitude of overall minority influence.[3]

Although the years prior to *Georgia v. Ashcroft* had already seen both important changes in how the Section 5 standard was legally defined and in how the U.S. Department

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The author did not participate in the *Georgia v. Ashcroft* case up to the time of the decision by the Supreme Court, but he later served as a consultant to the U.S. Department of Justice when it appeared that *Georgia v. Ashcroft* was going to be reviewed on remand, and he was also a consultant to the Special Master appointed to assist the federal court redrawing Georgia legislative lines in 2004 after the State's 2002 plan was found in *Larios v. Cox* (2004) to be in violation of the one person, one vote standard. The ideas in this article reflect work done prior to those employments.

[1] In our later discussion, for expository simplicity, we will usually focus on African-Americans to illustrate voting rights issues for all the various racially and linguistically defined minority groups covered by Section 5.

[2] Prior to *Georgia v. Ashcroft*, *Beer v. U.S.* was the governing interpretation of how the retrogression standard for Section 5 of the Voting Rights Act was to be operationalized. In *Beer*, at 141, the Supreme Court held that a reapportionment plan must not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." What is clear about this deceptively simple language is, first, that the new plan need not avoid vote dilution altogether, it must merely be no more dilutive than the plan it replaces; and, second, that retrogression is to be evaluated with respect to the plan as a whole (and not district by district). Before *Georgia v. Ashcroft*, most courts interpreted retrogression to mean simply that the new redistricting plan must not have the effect or purpose of providing minority voters with less "opportunity to elect candidates of choice" than did the previous plan. Moreover, since minority candidates of choices in biracial contests were usually, if not always, members of the minority community, in practice, the interpretation of the Section 5 retrogression test prior to *Georgia v. Ashcroft* was in terms of (expected versus previous) *descriptive* representation. For example, in *Holder v. Hall*, Justice Thomas' concurring opinion asserted that the Court has implicitly selected the number of elected minority officials as its indicator of minority electoral strength.

[3] In situations where there has been some retrogression in the number of minority candidates of choice expected to be elected, the Supreme Court in *Georgia v. Ashcroft* has indicated that a jurisdiction may avoid a finding of retrogression by demonstrating that various kinds of gains in minority influence compensate for a loss in minority ability to elect candidates of choice. "Section 5 gives States the flexibility to choose one theory of effective representation over the other" (481).

of Justice operationalized the Section 5 test,[4] *Georgia v. Ashcroft*'s shift from an exclusive focus on "ability to elect" to a more inclusive approach allowing considerations of "minority influence" is arguably the most dramatic single change ever made in Section 5 statutory interpretation. Indeed, *Georgia v. Ashcroft* has the potential to be more significant for voting rights jurisprudence than *Shaw v. Reno*, which has been viewed by virtually all commentators as the most important voting rights case decided by the U.S. Supreme Court in the 1990s. *Georgia v. Ashcroft* has implications that go far beyond Section 5, to issues of voting rights in general,[5] and it has political implications for the partisan balance in legislatures affected by court interventions into the redistricting process, as well as for the likelihood that Section 5 will be renewed in 2007.[6]

Most commentators, the present author included, have seen the *Georgia v. Ashcroft* opinion as poorly crafted. In particular, they have criticized as poorly defined the notion of "minority influence" that is central to the new Section 5 standard.[7] A key problem related to the way minority influence is dealt with in *Georgia v. Ashcroft* is the failure to specify how tradeoffs across different kinds of minority influence can be specified so as to produce a composite measure of overall influence. The only way in which the Court majority suggests how their new Section 5 standard of nonretrogression in overall minority influence might be implemented is via a "totality of circumstances" approach.[8] That approach, at least as exemplified in Section 2 jurisprudence prior to *Thornburg v. Gingles*, employs a laundry list of factors with no clear weights to be given each[9] and has been attacked by many voting rights attorneys as allowing considerable room for incoherence and inconsistency across courts in their application of evidentiary standards.[10]

Another critique of *Georgia v. Ashcroft* is that it is a *sub rosa* reversal of earlier Supreme Court precedents in a fashion that does not accurately reflect statutory language or congressional intent. In particular, in allowing the murky concept of "minority influence," to sometimes replace minority ability to "elect candidates of choice," it can be argued that the Supreme Court majority has dramatically weakened the protection of minority voting rights under Section 5 of the Act.[11] Indeed, at worst, as one reviewer of this essay suggested, it might be seen

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[4] After the passage in 1982 of new language in Section 2 of the Act, and following the suggestion of the Senate Report on the 1982 Renewal of the Act, the U.S. Department of Justice (henceforth referred to as DOJ) began to superimpose a Section 2 standard onto the *Beer v. U.S.* nonretrogression test. This change in administration of Section 5, along with other aspects of DOJ preclearance decision-making in the 1990s, triggered reactions by the U.S. Supreme Court that led to a substantial curtailment of DOJ's independence in interpreting the Act. In cases heard in the 1990s on appeal from preclearance decisions of the D. C. Court, the Supreme Court majority severely restricted the scope of DOJ's preclearance review, barring for example the use of preclearance authority in situations involving changes in the responsibilities of elected officials (*Presley v. Etowah County*) and, in two important cases, the Court specifically rejected the inclusion of Section 2 criteria in the Section 5 review process and interpreted the purpose language of Section 5 to apply only to purpose that was retrogressive in intent (*Reno v. Bossier Parish School Board* (Bossier I); *Reno v. Bossier Parish School Board* (Bossier II)). Supreme Court backlash to what was seen by the Court majority as overzealous DOJ enforcement of the Voting Rights Act is also evident in *Holder v. Hall*, and in cases stemming from *Shaw v. Reno*, such as *Miller v. Johnson*.

[5] For example, we already have evidence that the nature of the majority's reasoning in *Georgia v. Ashcroft* will influence lower court interpretations not just of Section 5 but also of Section 2 of the Voting Rights Act—thus making the reach of this decision nationwide. See especially the extensive discussion of *Georgia v. Ashcroft* in Judge Higginbotham's opinion in an important Section 2 redistricting case dealing with congressional *re*redistricting in Texas after the 2002 election, *Jackson v. Perry*.

[6] See Grofman and Brunell (2006 forthcoming); cf. Pitts (2004).

[7] See Karlan (2004); Bordoff, (2003), Brunell and Grofman (2007 forthcoming).

[8] The Court majority makes reference to the possibility of examining the totality of the circumstances in judging changes in overall minority influence in *Georgia v. Ashcroft*, pp. 479–480, 484–485.

[9] For a discussion of the "totality of circumstances" test prior to the introduction of the three-pronged *Thornburg v. Gingles* test in 1986, see Grofman, Migalski, and Noviello (1985).

[10] For example, the distinguished voting rights attorney, the late Frank Parker, once characterized the "totality of circumstances" test then in use in Section 2 litigation as "throw mud against the wall, and if enough of it sticks, you win." (personal communication to the author, ca. 1984). A. Wuffle (personal communication to the author, April 1, 2003), has further pointed out that, "in the totality of circumstances test, it is the trial judge who determines whether the wall against which the mud will be thrown will be coated with Teflon."

[11] See Karlan (2004); cf. discussion in Grofman, Handley, and Niemi (1992: 117–118), arguing that influence is hard to pin down, whereas ability to elect candidates of choice can be given a clear meaning.

as an abdication by the federal courts of responsibility for voting rights enforcement when confronted with a claim by a legislature of its benign intentions toward minorities. Moreover, unlike the constitutional test laid out in *Shaw v. Reno*, whose introduction might be justified by its intended role in correcting supposed U.S. Department of Justice (DOJ) "overreaching" in the 1990s round of redistricting that permitted or encouraged tortuously shaped majority-minority districts, we simply do not see evidence of DOJ overzealousness in enforcing Section 5 in the 2000 redistricting round, and thus see no need for an extreme judicial corrective such as the complete redefinition of retrogression.[12]

Georgia v. Ashcroft is a case that is clearly deserving of extensive analysis from both a legal and a social science perspective because it opens (or reopens) important issues about the meaning and measurement of retrogression, the concept of minority voting rights and, indeed, about the notion of representation itself. However, in this essay, we will neither seek to explore the long-run implications of *Georgia v. Ashcroft*, nor to criticize in any more detail than found in the paragraphs above the nature of the reasoning in the case, nor to consider the case's philosophical implications for the theory of democratic representation.[13] Our goal here is much more limited (and perhaps more practical). The central purposes of this essay are simply to elucidate the concept of minority influence from a social science perspective, with a concern to advise expert witnesses and courts how best to deal with this difficult to pin down concept; and to offer a specific three-pronged test of retrogression based on our attempt to operationalize the Court's ruling.

That this article is proposing ways to make the *Georgia v. Ashcroft* approach to the concept of minority influence more precise and more judicially manageable does not, however, mean that we believe that the court majority's approach is the best way to understand the concept of retrogression under Section 5 of the Voting Rights Act.[14] In this article the author writes as one who serves as an expert witness who must take the case law as given. We wish to bring to the law what social science can offer for evaluation of evidence on concepts such as minority influence and minority opportunity to elect candidates of choice. [15] Without the social science perspectives, we fear the concept of minority influence in *Georgia v. Ashcroft* will remain opaque and ill-defined at best, and devoid of any clear empirical moorings at worst.

Still, while we do believe that the ideas in this essay can contribute substantially to operationalizing the *Georgia v. Ashcroft* influence standard, we confess to more than a little doubt that anything we or anyone else suggests can fully rescue the Court's approach from its inherent internal contradictions. But, just as courts are obligated to seek to construe the text of legislation in ways that avoid constitutional problems, so, too, the social scientist whose task it eventually will be to convert legal standards into expert witness evaluations of concrete evidence must read what the Supreme Court has written about retrogression and minority influence in ways that presume internal consistency and foster the practical applicability of the test(s) the Court has proposed.

We begin our discussion by seeking to clarify two important aspects of the way in which minority influence is discussed in *Georgia v. Ashcroft*.

First, while we can and must distinguish minority opportunity to elect candidates of choice from minority influence *per se*, we must recognize that the ability to elect candidates of choice is itself a *very* strong form of influence. Thus, minority influence is certainly found in majority-minority districts where minorities are sufficiently numerous to control electoral outcomes if they are unified, and in districts in which minorities can expect to elect candidates of choice with the reliable aid of white crossover votes.

[12] See the somewhat more extended discussion of changes in DOJ Section 5 enforcement practices in the 2000 round of redistricting in Grofman and Brunell (2006 forthcoming), and the further elaboration of our views in Grofman and Handley (2006, work in progress).
[13] On these points see Grofman and Brunell (2006 forthcoming); Grofman and Handley (work in progress).
[14] In particular, we believe that *Georgia v. Ashcroft* wrongly takes us away from the sensible approach to retrogression found in *Beer v. U.S*.
[15] The views of the present author as a "citizen" are laid out in Grofman and Brunell (2006 forthcoming).

Second, while the *Georgia v. Ashcroft* court suggested two key potential indicia of minority influence—(1) an increase in the number of minority influence districts, and (2) a substantial increase in the likelihood that the party more closely associated with minority interests will control the legislature—it did not clearly distinguish the role each indicator might play in an overall judgment about minority influence. These two factors are indicators of conceptually quite different forms of minority influence. In particular, following ideas in Weissberg (1978), we regard the first as an indicator of "dyadic" influence, i.e., minority influence *at the district level*; and the second as an indicator of "collective" influence, i.e., minority influence *at the chamber level*. Retaining control of the legislature in the hands of those responsive to minority interests and increasing the number of minority influence districts are potentially distinct routes to minority influence. A plan might, for example, substantially increase the chances that interests favorable to the minority community retain control of the legislature, while at the same diminishing both the number of districts within which minorities have substantial electoral influence and those from which minority office-holders are likely to be elected. Thus, while *Georgia v. Ashcroft* is often portrayed as introducing an influence test into Section 5 jurisprudence, we prefer to say that it authorizes two conceptually distinct influence tests.

These two points are critical for our own three-pronged test to operationalize the Court's new retrogression concept. In line with the first point, when we consider influence at the district level we do so in a way that reflects a continuum of influence, with minority ability to elect candidates of choice on their own defining one pole of that continuum. Second, when we consider minority influence overall, we do so in terms of two difference types of minority influence: influence at the level of individual districts and influence on the legislature as a whole.

These insights lead us to a three-pronged approach in which courts are asked to review the answer to three sets of questions. The first of the prongs looks at whether or not a realistic opportunity to elect candidates of choice has been preserved, the second looks at whether or not overall minority influence has been preserved at the level of the chamber as a whole, and the third looks at whether or not overall minority influence has been preserved at the level of individual districts. It is intended to be a relatively straightforward and judicially manageable test because the sub-parts of each of these three prongs involve empirical matters that can be answered in principle with a "yes" or a "no." The questions are as follows:

> 1(a) Has there been any diminution in the number of minority-control districts, and/or a reduction of minority population in some or all of the other districts where it might be said that minorities have a realistic opportunity to elect candidates of choice?[16]
>
> 1(b) If the answer to question 1(a) is yes, can it be shown that, nonetheless, the number of minority candidates of choice who can be expected to be elected is the same or higher in the proposed plan as in the baseline plan?
>
> 1(c) If the answer to question 1(a) is yes and the answer to question 1(b) is no, can the jurisdiction nonetheless demonstrate that the reduction in the expected success rate of minority candidates of choice was dictated by demographic changes in the jurisdiction? If the answer to question 1(a) is yes and to questions 1(b) and 1(c) is no, go on to Prong 2.
>
> 2(a) Can it be shown that the new plan substantially increases the likelihood that

[16] For convenience in exposition we use "minority" in a very general sense to mean whichever particular racial or linguistic group (or combination thereof) is under consideration in any given legal or administrative review of voting rights issues. Also, to avoid having to reference each of the groups protected under Section 5, without loss of generality, we will sometimes couch our subsequent discussions simply in terms of African-American voters, and often use "black" as a synonym for African-American. When we refer to "whites" in such a context, we are using white as a shorthand for "non-black." In other contexts, "white" may be taken as the equivalent of "*non*-minority."

the party associated with minority interests will maintain (or regain) control of the legislature as compared to what might be expected were the benchmark plan to be continued?

2(b) If the answer to question 2(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of substantially increasing the probability that the party associated with minority interests would maintain (or regain) control of the legislature? If the answer to *either* question 2(a) or 2(b) is no, go on to Prong 3.

3(a) Can it be shown that the increase in the total number of control plus opportunity plus influence districts was large enough to compensate (in terms of overall minority influence) for whatever reductions occurred in the number of control districts and the number of coalition/opportunity districts?

3(b) If the answer to question 3(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of increasing the number of minority influence districts?

In the next section we look at how the concept of levels of minority influence can be made more precise at the district level, and then at how to think about minority influence in the chamber as a whole. In the last section of the article we discuss each of the subparts of the three-pronged test we propose, and explain how burden of proof on each question should be applied to plaintiffs seeking to show that their plan is non-retrogressive.

CONCEPTUALIZING INFLUENCE

Defining and measuring distinct forms of minority influence at the level of individual districts

In *Georgia v. Ashcroft*, the Supreme Court majority distinguishes between three different types of districts: (a) districts where minorities can constitute a majority of the actual electorate—which we refer to as a *majority-minority control districts*;[17] (b) districts where, because of reliable cross-over votes from whites, minorities can be expected to customarily elect a minority candidate of choice—which the Court calls *coalition districts*, but which we prefer to label as *realistic opportunity to elect districts* or, simply, *opportunity districts*;[18] and (c) districts where neither of the above is true, but where minorities might be expected to have substantial influence on the actions of the elected representative—which we refer to as minority *influence districts.* The three types of districts (control, coalition/opportunity, and influence) identified by the Supreme Court in *Georgia v. Ashcroft* are logically distinct from one another.[19] Together with a fourth residual category, districts where minorities lack influence, we have what is, in principle, a four-fold mutually exclusive and logically exhaustive categorization scheme.[20]

Now we turn to elucidating some of the (often non-trivial) social science issues involved

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[17] Such districts are sometimes called *safe (minority) seats*.

[18] We prefer to use the term "realistic opportunity to elect districts" (or *opportunity* districts, for short), rather than the term "coalition district," since we regard the former term as more descriptive of the key feature of such districts, to wit, the realistic opportunity for minorities to elect candidates of choice even though minority voters are not a majority of the electorate. The use of the term "coalition" does not really do a good job of distinguishing "opportunity" districts from other districts. Even majority-minority control districts or majority-majority districts might, under certain circumstances, exhibit coalitions across racial/linguistic lines.

[19] As we will see there are important conceptual and methodological reasons to provide clear and operational definitions of each of these three types (leaving the fourth as a residual category). In particular, we do not wish to conflate mere influence with opportunity to elect.

[20] One reader of this article suggested a further breakdown of the category of (mere) influence district into two subcategories: districts where there is substantial minority influence, on the one hand, and districts where the influence of minority voters is essentially limited to the ability to elect candidates of the party more closely associated with minority interests, on the other. In the latter subcategory, the minority influence on the district representative would manifest itself largely or solely through organizational votes on matters such as the election of legislative leaders. However, as noted earlier, we prefer to deal with the aspect of minority influence that operates through party control of the legislature separately from that involving minority influence operating at the district level.

in correctly assigning districts to one and only one minority influence category.

Operationalizing the concept of "majority-minority control" district. First, we will define a majority-minority control district as one in which minority voters are a majority of the actual electorate in both the general election and in the primary of the party of the winner.[21]

Second, following *Georgia v. Ashcroft*, we wish to distinguish between such control districts (where, by voting cohesively, a minority community can elect its preferred candidate essentially regardless of the choices made by non-minority voters), and districts in which minorities can expect to elect candidates of choice with the help of reliable levels of white crossover voting for those candidates.[22]

Third, even what we are calling "control" districts are really districts in which minorities have only the *potential* for political control: a categorization that rests on "winnability" and not necessarily on "winning." That is, we have defined a majority-minority control district as one in which a minority group, based on its share of the electorate, could control both primary and the general election *if* it voted cohesively, rather than basing this definition on actual election outcomes. There might well be districts that we would still characterize as "control" districts in which the minority community failed to elect a minority candidate of choice.[23]

Fourth, the more data we have that show actual levels of minority and non-minority electoral participation, the more reliably we can judge the potential for minority control.[24] For example, if we know that minorities are a majority of the registrants, then that is more reliable information about minority opportunity to control outcomes in a district than knowing merely that minorities are a majority of the district's voting age population (VAP).[25] As a first cut, it is not unreasonable to assume that a district where a given minority is a majority of the registrants is a minority control district.[26] However, it must always be recognized that the classification of a district as a control district is very much a rebuttable claim, where the critical evidence is about the actual racial composition of the electorate in both the primary and the general election.

Operationalizing the concept of "coalition" district. Justice O'Connor in *Georgia v. Ashcroft* refers to a *coalition district* as one where minorities can be expected to elect minority candidates of choice by putting together a coalition that includes the cohesive support of minority voters and support from some white voters who can reliably be expected to engage in crossover voting. In such districts, minorities have a realistic opportunity to elect candidates of choice, but not necessarily a certainty of victory. As noted earlier we prefer to use the phrase *opportunity district* to refer to such a district. The difference between an opportunity district and what we have been calling a control district hinges on whether the minority does or does not constitute a majority of the actual voting electorate in both primary and general elections in the district.

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[21] The importance of looking at voting patterns in both primary elections and general elections was stressed in the present author's expert witness testimony in *Gingles v. Edmisten*, and is reflected in the lower court's extensive discussion of the case facts, as well as in Justice Brennan's opinion in *Thornburg v. Gingles*.

[22] To make the categories of majority-minority control district and coalition district mutually exclusive we take the latter districts to be ones in which minorities have a realistic opportunity to elect candidates of choice, but only with white support. Similarly, although control, opportunity, and influence districts are each ones in which minorities have influence, we make influence districts a logically distinct category from control and opportunity districts by defining them as districts in which minorities have influence, but which are neither control districts nor opportunity districts.

[23] For example, there might be a white incumbent who received overwhelming white support and some level of minority support against a primary challenge waged by a candidate of choice of the minority community, or whose presence (and campaign war chest) deterred viable minority challengers. Such districts might be expected to elect minority candidates of choice only after the present incumbent retired.

[24] See Brace, Grofman, Handley, and Niemi (1988).

[25] Sometimes, voting age population (VAP) may be misleading as an indicator of minority voting strength. For example, if there is a military base within a district with a primarily white voting age population, because many of the military personnel will be registered to vote elsewhere, the minority voting age population share of the district may understate the likely minority proportion of the actual electorate within the district.

[26] Recall that we are not claiming that such a district will always elect a minority candidate of choice. The minority community may be divided.

Identifying which districts fall into the coalition district/opportunity district category requires interpreting "realistic opportunity to elect candidates of choice" in ways not yet fully resolved in the case law. The questions include what is meant by "minority candidate of choice" and what is meant by "realistic opportunity to elect."

First, while it is implicit that a minority candidate of choice must be the preferred candidate of minority voters,[27] courts have differed as to whether it is also a necessary condition for a candidate to be identified as a minority candidate of choice that the candidate himself or herself be a member of the minority community. Our view is that, although there is nothing, in principle, to prevent a white candidate from being the candidate of choice of the minority community, we should be very careful in labeling such candidates as candidates of choice of the minority community.[28] The present-day reality is that, after centuries of slavery and discrimination, black and other minority voters tend to prefer candidates with whom they share both interests and a "commonality of fate" (Dawson, 1995; *cf*. Tate, 2003), if they are given the opportunity to vote for such a candidate.[29]

In our view, the best way to establish that a given white/Anglo candidate is a minority candidate of choice is to show that this white/Anglo candidate has won a majority of minority votes in a contest against a viable candidate who was himself or herself a member of the minority community. Absent such evidence, however, it still might be possible to demonstrate by clear and compelling evidence that a white/Anglo legislator was just as responsive to black interests as a candidate of choice from the minority community might be expected to be.[30] On the other hand, of course, we would also emphasize that we must be careful not to take as given that the mere fact of being a member of the minority community makes a candidate a candidate of choice of that community.[31]

Second, there is no "magic percentage" in terms of minority population to determine when a district offers minorities a realistic opportunity to elect candidates of choice. Rather it is necessary to examine the (expected) behavior both of minority voters and of non-minority voters, especially in biracial contests, and to take what we would describe as a "functional" approach that is tied to facts specific to a given jurisdiction. For example, while an absolute majority of the actual electorate for the office can be regarded as sufficient, in principle, for minority control, and thus sufficient, *ipso facto*, in providing a realistic opportunity to elect a minority candidate of choice, there are some districts where even less than a 50% minority population may be sufficient to assure minorities a realistic opportunity to elect candidates of choice. Districts where minorities are less than a majority of the overall electorate may nonetheless afford minorities a realistic opportunity to elect candidates of choice if the minority constitutes a majority of the electorate in the primary of the party most closely associated with the interests of that minority, and if there is also sufficient reliable white crossover voting in the general election for the vic-

[27] However, we would emphasize that a necessary condition for a candidate to be labeled a minority candidate of choice is that s/he receives minority support in *both* the primary and the general. Thus, for example, a white Democratic candidate who wins the Democratic primary against a black opponent strongly supported by black voters, and then goes on to win the general election with overwhelming support from black voters, would still, in our view, not properly be counted as a "minority candidate of choice" *for voting rights purposes* even though, quite clearly, that candidate was the candidate of choice among the minority voter *in the general election*. In this circumstance, the outcome of the primary denied to minority voters the opportunity to vote for a candidate of choice in the general election.

[28] See, in particular, our previous discussion of the need to look at outcomes in both primary elections and general elections. For example, as A. Wuffle (personal communication, April 1, 2001) once put it: "In the contemporary South, we would want to be very careful not to designate as a minority candidate of choice one whom many African-American voters might be viewing merely as 'the lesser of two weevils.'"

[29] Nonetheless, as we would operationalize that term, there have been white candidates who almost certainly were minority candidates of choice even in primary contests against a minority candidate of the same party (former member of Congress Peter Rodino of New Jersey comes to mind), but such candidates are relatively rare.

[30] For a discussion of how responsiveness might be operationalized, see discussion later in the article.

[31] For a discussion of the case law concerning the definition of minority candidates of choice see Grofman, Handley, and Niemi (1992, pp. 75–79). The cases reviewed therein still appear to remain the leading precedents.

tor in that primary to win the general election with near certainty.[32]

However, there is one important confusion to which we wish to call attention. On the one hand, we know that in most recent South Carolina legislative contests and in southern congressional contests, about one-third of whites have voted for the black nominee of the Democratic party in the general election (Grofman, Handley and Lublin, 2001: 1408). On the other hand, it is sometimes asserted that in the modern-day South, districts in which minority voters constitute as few as a third of voters are now sufficient to ensure minority voters the opportunity to elect candidates of their choice. It might seem that the second statement is an immediate consequence of the first since, if we imagine, say, that blacks make up about 1/3 of the electorate and give virtually all of their support to a black candidate, if 1/3 of the remaining 2/3rds of the electorate (the non-black part) also support the black candidate, then the black candidate will get over 50% of the vote and win election. As Grofman, Handley and Lublin (2001: 1409) note, however, there is a fatal flaw in this line of reasoning in that we have only accounted for the general election in our calculations. In order for voters to support a black Democratic candidate in the general election their must actually *be* a black Democratic candidate in the general election, and for this to occur requires that a black candidate win the Democratic primary. This means that we must be attentive to the racial composition of the Democratic party as well. The more white Democrats there are in the district, the harder it will be for a black candidate to become the nominee of the Democratic party, especially if there is a white incumbent already in place. Moreover, we must be sensitive to other district specific factors, including variations in white and black turnout rates. In fact, when we look at the deep South, we find, for the U.S. House of Representatives, that there are no African-Americans elected from districts that are less than 40% black in population, and it still takes districts which are more than 50% black in population to generate more than a 50% chance that an African-American candidate will be the House member (Brunell and Grofman, 2007 forthcoming).

Third, just as we indicated that we would label a district in which minorities made up a majority of the actual electorate in *both* the primary and the general as a minority control district regardless of whether or not there had been a minority winner from the district, in like manner, we would say that retrogression in realistic opportunity to elect should be defined in terms of "winnability," not merely in terms of "winning." Thus, a diminution in the number of districts where minority candidates of choice might realistically be expected to win should, in our view, count as retrogressive even if some of those districts did not actually elect minorities in the past.[33]

A fourth issue is whether districts in which minorities can be decisive in choosing between two white candidates, neither of whom is a minority candidate of choice, in both the primary and the general, should be counted as districts in which minorities have a realistic opportunity to elect candidates of choice. Our answer to this question is a clear no. While such districts might prove to be minority influence districts (see discussion below), districts in which minority members can elect candidates of choice, *but only as long as those candidates are white*, are not really districts in which minorities have a realistic opportunity to elect candidates of choice.

A fifth issue, and arguably the most important of all, is whether it is necessary to go beyond classifying districts dichotomously (i.e., as either being ones in which minorities have a realistic opportunity to elect candidates of choice, or ones in which they do not) to assigning probabilities (at least roughly) so as to consider the *likelihood* that a given district will elect minority candidates of choice. In this lat-

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[32] See Grofman, Handley, and Lublin, 2001; for earlier perspectives on this question see Grofman and Handley, 1989a, b, 1991; Handley, Grofman, and Arden, 1998; Lublin, 1997a, 1997b, 1999; cf. *Page v. Bartels*.

[33] For example, as noted earlier, districts that failed to elect minority candidates of choice only because of the presence of white incumbents might be expected do so after the incumbent retired. Thus, a redistricting which reduces the ability of minorities to elect candidates of choice in such districts would still be a reduction of the minority community's realistic opportunity to elect candidates of choice in the longer term.

ter approach, changes from, say, seats that were safe for the minority to ones where minority success is more problematic must be taken into account in judging retrogression. In particular, from this perspective, to judge retrogression in realistic opportunity to elect, one should compare plans not by counting up the number of districts classified as control or opportunity districts but by looking at the difference in the number of minority candidates of choice whom we would *expect* to be elected under the proposed and under the benchmark plan.[34]

Georgia v. Ashcroft supports the latter approach. Justice O'Connor makes it clear that we must look at the number of minority candidates whom we might expect to see elected, and not merely the number of districts from which minorities might realistically expect election. Moreover, even if, as we suggest below, in the deep South, the two calculations will often be virtually identical in practice, looking at the number of minority candidates whom we might expect to see elected is, we believe, the correct approach from a social science perspective.[35] Furthermore, not only is it the approach most consistent with the functional view of representation expressed in the majority opinion in *Georgia v. Ashcroft*, it is also a view consistent with the views of many of the lower courts that had previously interpreted *Beer*.[36]

Why is it necessary to go beyond dichotomous classifications of districts into those where elect minority candidates have a realistic opportunity to be elected and those where that statement is not true? Well, if , say, we merely count the number of districts in which it can be shown that the minority candidate of choice has at least a 50% chance of being elected, we can get nonsensical results about the meaning of retrogression. It would be absurd to treat a situation in which we went from, say, ten safe black seats to one with ten seats in which each black candidate of choice had a 50% chance of being elected, as anything other than retrogressive in terms of realistic opportunity to elect candidates of choice. In the first instance, we could expect the election of ten black candidates of choice; in the second, we could expect only five.[37]

However, we must also acknowledge that there are problems with counting *expected* number of minority successes. First, there is the key problem of how much predictive precision is plausible. Second, we must also be sensitive to a further point, raised by Karlan (2004: 33, footnote 103), that a 50% probability of electing candidates of choice in each of twenty districts is not the same as the near certainty of electing preferred representatives in ten districts because of the potential for risk aversion.

With respect to the first point: assigning a probability value to each district (or, at least to groupings of "similar" districts) that gives the likelihood that elections in it (or in the grouping) will result in the election of minority candidates of choice, and then generating an expected value for the plan as a whole by summing across all districts, is made easier by the fact that there are usually sharp threshold effects—at least when we focus on descriptive representation. For example, until the 1990s, for the U.S. House of Representatives, in the deep South, no black candidate who was the choice of the African-American community was ever elected from a district that was less than 50% black voting age population (Handley, Grofman, and Arden, 1998). As noted earlier, even today, in the deep South, congressional districts with less than 40% black voting age population never elect black candidates who are the first choices of the African-American community (Brunell and Grofman, 2007 forthcom-

[34] In this context, given the well known advantages that incumbents generally have, we must be careful to take into account the presence of both white and non-white incumbents in carrying out this analysis.

[35] It is, however, much easier to sort districts into two (or three) categories than to estimate a probability metric for opportunity to elect (i.e., *quantitative scaling* is harder to do than *nominal classification*).

[36] For example, before *Georgia v. Ashcroft* expanded the retrogression test to include an influence component, in *Ketchum v. Byrne*, "retrogression" is defined as "a decrease in the new districting plan or other voting scheme in the absolute number of representatives which a minority group has a fair chance to elect."

[37] Note that the same argument goes through regardless of where we put the threshold for classifying a district as one in which minorities have a realistic chance to elect candidates of choice, unless we are dealing with near certainties, in which case differences across districts in this category then become *de minimis*.

ing), and in parts of some southern states, for legislative elections, even a 50% black voting age population may not be sufficient to ensure the election of a minority candidate given the not insubstantial drop-offs from black VAP to black registration to black turnout (Grofman, Handley and Lublin, 2001). Thus, in practice, at least in the South today, because of sharp threshold effects, the "expected number of minority candidates whom we might expect to see elected" and the "number of districts from which minorities might realistically expect election" may be virtually identical (except, perhaps, for a handful of districts in the 40-50% range).

With respect to the second point: there are advantages for a given group's influence in having the near certainty of building up seniority for one's candidates of choice, while averages conceal the potential for considerable variability. For example, if the first election under a new plan occurs in a "bad year" for minority candidates of choice (which might, say, occur in the South in a presidential or gubernatorial year election in which a Republican is elected), then a 50% probability of electoral success over the course of the decade may turn out to be a chimera, since the actual election results that year may be zero minority successes in such 50-50 districts. Moreover, once there has been an election under a new plan, the well-known advantages of incumbency may then largely freeze such losing outcomes in the supposedly 50-50 districts over all or most of the course of the decade (at least in states where term limits are not in place, or where term limits are not that severe), leaving minority interests woefully underrepresented.

Operationalizing the concept of "minority influence" district. First, as previously emphasized, the three types of districts identified by Justice O'Connor's opinion in *Georgia v. Ashcroft* (control districts, opportunity to elect districts, and influence districts) are defined as mutually exclusive categories, and form what social scientists call an *ordinal scale* of minority influence. Measuring influence on an ordinal scale, we can rank order the three types vis-à-vis their level of minority influence. Just as minorities in districts where they can elect candidates of choice without regard to the preferences of other voters possess more influence on the political process than they do in districts in which their opportunity to elect a candidate of choice is conditional on the support of white crossover voters, so, analogously, do "opportunity" districts involve more minority influence than "influence" districts in which minorities do not have a realistic opportunity to elect a candidate of choice. Thus, it must be kept in mind that whenever we talk about minority influence districts (as the Supreme Court, and we, are using that term), we are talking about a category of districts in which minorities do possess some electoral influence, but not enough to control with their own votes which candidate will be elected. In such districts, minorities do not have enough electoral influence to be assured of electing candidates whom they prefer even in the presence of substantial white crossover voting. Hence, when we consider overall minority influence, and look at tradeoffs among creating different types of district in terms of their consequences for overall minority influence at the district level, we must recognize that so-called minority influence districts are the districts where minorities have the *least* influence among the three key types of minority districts. (Only the residual category, districts where minorities have essentially no influence, are lower in minority influence than what we are here calling influence districts.)

Second, there is no "magic number" such that a district with that level of black population (or VAP) automatically becomes, *ipso facto*, a district where there is minority influence. Identifying minority influence, to the extent that such an inherently murky concept can be given any meaning, depends not just on the raw numbers of the minority community, since even when we take into account levels of minority political participation, it also depends at least as much on (a) the political inclinations and voting behavior of the *other voters* in the district, and (b) on the electoral incentive structure facing the elected official in the district in terms of his or her actual and/or potential supporters.

The distinguished political scientist Richard Fenno has noted that, while legislators are con-

cerned about the characteristics of the voters in the constituency as a whole, it is the set of voters who are their actual supporters to whom they pay the most attention (Fenno, 1978). Certainly, we would also expect that a legislator's loyal supporters, especially those who have been substantial campaign contributors, would have greater access to the legislator. On the other side of the coin, there will be some voters whom a legislator cannot expect to support her. While the interests of these voters will, perhaps, not be completely neglected by the legislator, we should not expect that their concerns will receive the same weight as those of the legislator's most loyal supporters and campaign contributors.

We propose examining the relationship between racial demography and influence not simply by looking at the racial (or other) characteristics of the district population—i.e., in terms of what Fenno (1978) refers to as a legislator's *geographic constituency*—but also (and primarily) in terms of the nature of the winner's *electoral constituency*—where the term electoral constituency is used in the sense proposed by Fenno (1978) to refer to the set of voters who vote for the candidate in the primary and/or in the general election. Because the nature of electoral influence is strongly influenced by who a legislator's actual supporters are, we believe that minority influence can be better examined by looking at the proportion of the legislator's voting support (i.e., his/her electoral constituency) that comes from minority and non-minority voters than by simply looking at the minority proportion in the legislator's district (i.e., in his/her geographic constituency).

Moreover, even within this set of supporters, not all are equal. In particular, politicians must be concerned with maintaining the allegiance of what, in journalistic parlance, is commonly called their "base."[38] Failure to maintain the loyalty of one's political base can make it harder to generate campaign contributions and the enthusiasm of campaign volunteers, may lead some potential supporters to "sit out an election," and may even give rise to well-funded challenges in primaries by opponents who have the backing of disgruntled previous supporters.

Third, just as black population numbers (short of an absolute majority of the voting electorate) are not sufficient, *per se*, to prove minority influence, mere assertions by a representative that s/he is responsive to minority interests are neither sufficient nor even particularly probative of minority influence. It is important to distinguish sympathy from influence. A given legislator may, for reasons of his or her own, be sympathetic to the views of a given group. But if that group has neither an effective electoral carrot nor an effective electoral stick, we do not believe that the group can be said to have *electoral* influence in the sense arguably intended in *Georgia v. Ashcroft*.[39] In other words, if we view effective use of the electoral franchise from a social science perspective, unless a legislator has real potential *electoral consequences* to face if s/he fails to vote in accord with a group's wishes/interests, we cannot say that the group has *electoral* influence with the legislator.

Moreover, any approach to measuring minority influence that does not include an examination of electoral incentives is, in our view, virtually guaranteed to be so subjective as to be meaningless. Imagine, for example, trying to use as a measure of minority influence the number of legislators to be elected under a given plan who would be expected to possess substantial "sympathy" with black interests. How do we predict the true level of minority sympathy of not yet elected officials? In the post-Katrina era, how many candidates (or political parties) would dare claim to be unsympathetic to the interests of the minorities in their districts? Only by looking at the likely electoral incentives of elected representatives generated by the way particular districts (and the legislature as a whole) are constructed can

[38] For example, in his most recent work, Fenno (2003) concludes, based on his interviews with African-American House members over the course of many years, that these representatives are likely to see their black constituency as the "heart of their political support." But Fenno's other work makes it clear that the phenomenon of paying greater attention to loyal supporters is in no way limited to African-American legislators as opposed to, say, white or Hispanic legislators, nor is it something true only of Democrats or only of Republicans.

[39] We say "arguably intended," because it is only once that Justice O'Connor's opinion in this case uses the adjective 'electoral' before the word 'influence.'

we reasonably expect to develop predictive models of minority influence.

Fourth, and relatedly, and perhaps most controversially, we believe that, *ceteris paribus*, when it comes to racial minorities, if minority voters are not a *substantial part* of the support coalition of a winning legislator they cannot, in general, expect to have much influence with that legislator. This suggests a very simple check on likely minority influence by examining data on racially polarized voting. If, for a given district, blacks are less likely to vote for the winning candidate than for his/her losing opponent, we can immediately conclude that African-American voters are not a substantial proportion of the winner's support coalition, and thus unlikely to be influential.

It is sometimes argued, however, that all that is necessary for minority voters to possess influence is for their votes to be potentially "pivotal," i.e., such that, were they to desert a given candidate in large proportions (even merely by abstaining, without switching to vote for his opponent), that candidate would now be expected to lose. Or, if pivotal power is not enough, then surely pivotal power combined with close elections should be enough to give racial minorities influence on the winners, regardless of the size of the minority or whether or not the minority supported the winner. However, when the minority is a racial one, we are highly skeptical of this claim about pivotal power in close elections, at least for African-American voters in the deep South.[40]

Given the nature of the choices facing black voters it is unlikely that a threat to shift their votes from the Democratic candidate to the Republican candidate (or even, by abstaining, to make the chances of Republican victory near certain) is going to be perceived by white Democratic nominees in the deep South as a credible threat. Usually, in deep South constituencies, black voters are so far away from the issue positions advanced by Republicans that they have little choice but to vote for the Democrat if they vote at all.

Moreover while close elections will often push candidates closer to their base voters, for white legislators in the deep South, close elections may even work in the opposite direction if the winning candidate has a politically feasible option of broadening his/her appeal to whites at the expense of previous levels of minority support—the extreme case of which involves switching parties from the party most associated with the minority to the party more closely associated with white voters. Yes, when minority proportions in one's support coalition are high and the election is close, having even a small proportion of potential minority votes opt out of political participation may be enough to endanger a political career. But, to resuscitate a career placed in jeopardy due to close contests with Republicans in the general election, a white Democratic legislator in the south may see himself or herself as better off by reaching out to white voters rather than black ones.

Consider, for example, the four Democratic state Senators in Georgia who switched party after the 2002 election, changing the control of the Senate from Democratic to Republican hands. Black voting age population in these four districts averaged over 30%—with two in the neighborhood of 25% black VAP, and two closer to 35% black VAP, yet that did not deter these white legislators from becoming Republicans. Clearly, these legislators must have believed that they could make up in white votes what they lost in black votes in order to win as Republicans rather than as Democrats in subsequent elections.

Fifth, inferences about minority influence based on the racial majority in a legislator's actual (or expected) support coalition are potentially rebuttable. As suggested above, there are two potential errors in classification: districts that are thought to be minority influence districts that are not really such, and districts that are not regarded as influence districts that may in fact, be such. To be more precise about esti-

[40] It is important to emphasize that we are not claiming that pivotal power is never important. Indeed, sometimes it is. Rather, we are making the much more nuanced argument that, *in the contemporary deep South*, claims of pivotal power for *racial minorities* are much exaggerated. But also, as we argue elsewhere (Brunell and Grofman, 2005; Adams, Brunell, Grofman, and Merrill, 2006), properly specified neo-Downsian models of two-party competition can give rise to candidates in close contests moving closer to their base voters rather than in a centrist direction toward the median voter in the district.

mating minority influence at the district level than simply relying on inferences based on the minority proportion in the elected representative's support coalition, we can look at the relationship between the demographic characteristics of electoral support coalitions and the observed policy choices in the legislature that significantly affect minorities. Rather we are likely to see plans in Republican controlled states wasting Democratic votes by packing Democrats into seats safe for racial minorities. In such circumstances we would expect to see Republicans defending those plans against retrogression or vote dilution challenge by claiming that the districts in the plan with significant black populations are minority influence districts even when, in fact, such districts have substantial probabilities of electing Republicans.[41]

As a first cut to evaluate minority influence at the district level we could look at the representative's votes on bills that are (a) generally important, (b) reflect issues of major concern to minority voters, (c) involve cohesive patterns of voting by minority representatives in the legislature, and (d) are somewhat contentious,[42] and then seek to understand the links between a representative's level of support for minority interests and the demographic and other characteristics of that legislator's support base in the electorate.[43] By understanding the link, at the level of individual districts, between (likely) electoral constituency and (likely) support for minority interests, we would then be in a position to begin to evaluate minority electoral impact across different redistricting plans.

However, minority legislators provide forms of substantive representation to minority voters that are not at all well captured by simply examining roll-call voting patterns. Legislative behaviors that are not well captured by roll-call voting include many types of constituency service, and equally importantly, bill sponsorship, and critical legislative leadership (Hall, 1996).[44] This leadership role of black legislators often manifests itself on the issues of greatest concern to black voters, and on matters of symbolic politics that are seen to reflect the extent to which blacks are truly included in the polity (e.g., adoption of Martin Luther King, Jr. day as a state holiday; other symbolic "naming" issues; use of the Confederate flag, choice of language on Civil War memorials).[45]

Operationalizing the concept of minority influence requires a "functional" approach. In

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[41] This is what in our view occurred in the State of Georgia's Brief in the subsequently mooted remand of *Georgia v. Ashcroft* back to the D.C. District Court (Grofman and Handley, 2006 work in progress), since the State claimed that any Senate district between 25% and 50% black population was, *ipso facto*, a minority influence district.

[42] David Lublin (personal communication, March 2006) has observed, in the present-day South the circumstance of a Democratically controlled legislature trying to maintain Democratic power, as led to the 2001 Georgia Senate plan challenged in *Georgia v. Aschcroft*, is unlikely to recur. Rather we are likely to see plans in Republican controlled states wasting Democratic votes by packing Democrats into seats safe for racial minorities. In such circumstances we would expect to see Republicans defending those plans against retrogression or vote dilution) challenges by claiming that the districts in the plan with significant black populations are minority influence districts even when, in fact, such districts have substantial probabilities of electing Republicans. For example, after Georgia came under Republican control, in the State of Georgia's Brief in the subsequently mooted remand of *Georgia v. Ashcroft* back to the D.C. District Court (Grofman and Handley, 2006 work in progress), the State claimed that any Senate district between 25% and 50% black population was, *ipso facto*, a minority influence district.

[43] This approach to minority political influence combines ideas from the racial bloc voting element of the analysis of minority vote dilution (see e.g., the discussion of this topic in Grofman, Handley, and Niemi, 1992) with ideas from the mainstream political science literature on roll-call voting analysis (see e.g., Poole and Rosenthal, 1997). It is, as we discuss in the appendix, essentially the approach taken in Epstein and O'Halloran (2007 forthcoming); however, as also discussed in the appendix, in our view, these authors do not pay sufficient attention to the important caveats identified in the next paragraphs and footnotes.

[44] Because of the unique role of race in American politics, African-American legislators are called upon for help by African-American voters who do not reside in their district. The same minority protection/ombudsman role is likely to exist for legislators of other racial and linguistic groupings protected under the Voting Rights Act.

[45] Moreover, as Whitby (1997) notes, to the extent we look at roll-call voting patterns as our indicator of minority influence, votes on amendments are often more indicative of policy preferences than votes on final passage of a bill. In situations where the final package is likely to pass by a very considerable majority, even legislators who are not responsive to minority interests may vote yes, because they recognize that their vote will not be pivotal in affecting the outcome. In such situations, legislators may find it useful not to "stand out from the herd" and unnecessarily antagonize minority voters, since white voters will not blame them for voting in the same way as virtually everybody else.

general, the claim that any given district is an African-American (or Hispanic) influence district must be fully justified on the basis of district-specific evidence. Ideally, as discussed above, that evidence should include not just demographic and electoral characteristics of the district but also voting behavior of the representative as well as indicia of other relevant legislative behavior, such as bill sponsorship on issues on which the given minority community has taken a strong position, and the nature of constituency service to the minority community. Absent such evidence, the proportion of a given candidate's supporters who are from the minority community in *both* primary and general elections may, however, serve as a useful proxy for the role that legislator has played or might be expected to play on minority issues, but we must be cautious about relying on such evidence exclusively.

Fifth, and relatedly, in the contemporary American deep South, there is a strong empirically-based presumption that, regardless of the size of their black population, legislative districts with *Republican* office-holders will not be minority influence districts. That is because blacks are unlikely to be a substantial part of the electoral constituency of Republican legislators, and thus Republican legislators are unlikely to be responsive to black constituents, and because racial issues have long been more salient in the South than in most other parts of the country.

There is an important recent empirical literature examining the consequences of minority population (and changes in minority population) on the substantive representation of minority interests when we take party into account. In general, while there is not perfect agreement among all the studies, what is clear is that when we look at roll-call voting patterns in the U.S. House of Representatives, for any given level of black population in the district, Democrats are much more liberal/responsive to minority concerns than are Republicans. In general, within-party differences in the effects of district black population on legislative behavior are dwarfed by the between-party differences (Bullock, 1995), with white Republicans essentially unresponsive to the size of the black population in their district and white Democrats either unresponsive (Whitby, 1997),[46] or only slightly responsive (Overby and Cosgrove, 1996), but with African-American representatives elected from majority-minority districts more liberal than their fellow Democrats (Hurley and Kerr, 1997).[47]

Two of the most important recent papers analyzing roll-call voting are Grose (2001) and LeVeaux and Garand (2003), because they look at what happens to legislative responsiveness to minority concerns when there is a substantial *change* in black population in the district after a redistricting, with Grose focusing on eight southern states.

LeVeaux and Garand find that changes in racial demography produce little change in the voting behavior of Republican representatives, and that white Democrats become more conservative when the black population in their district decreases. However, when they restrict themselves to Southern constituencies, their work suggests that an increase in black voters actually makes Southern Republicans *less*, rather than more, responsive to minority concerns.

When Grose looks at votes of southern representatives on issues of special interest to African-Americans (bills identified as such by the Leadership Coalition on Civil Rights), while he finds no effects of black population change on the vote choices of white Democrats, he, too, finds that an increase in black population in the district actually leads Republican representatives to *reduce* their support on civil rights legislation. Grose's explanation for this result is that, when black population in the district increases, "Republicans become more conservative on civil rights . . . to appeal to conservative voter bases" in the face of potential primary challenges from moderate Republicans (Grose, 2001: 212).

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[46] Sharpe and Garand (2001) find evidence of effects when there are substantial (>10%) changes in black population, but this study does not examine Democrats and Republicans separately.

[47] For a useful review of recent literature on race and representation see McKee (2004) and Lublin and Segura (2007 forthcoming). See also Canon (1999), Whitby (1997), and Mendelberg (2001).

In like manner, there is also empirical evidence that Democratic legislators with substantial African-American populations in their districts who switch parties and are reelected as Republicans from the same district from which they were first elected as Democrats no longer are as responsive to black interests, but instead behave in accord with the wishes of the white Republicans who make up their new electoral support base. Karlan (2004) reviews the behavior of a U.S. Senator from Alabama, Richard C. Shelby, who switched parties. For Shelby, even though there was a reasonably high black proportion in his "district" (the State of Alabama), he was not that responsive to black voters even when he was elected as a Democrat (e.g., an ADA score of 30 in 1992 when he was still a Democrat), but he was even less responsive as a Republican (e.g., an ADA score of 0 in 2000 when he was a Republican). This pattern is characteristic of the handful of other recent congressional party switchers[48] from districts with high minority populations. For example, Rep. Billy Tauzin of Louisiana switched in August of 1995 from Democratic to Republican. Representing a district with a 22% black population, he had an ADA score as a Democrat in 1994 of only 15, but his ADA score as a Republican in 2000 was 0.[49]

Both Epstein and O'Halloran (2007, forthcoming) and Lublin (personal communication, March, 2006) have looked at roll-call voting patterns in the Georgia legislature. Consistent with the congressional findings, they find dramatic differences in roll-call voting patterns on issues of concern to black interests between Democratic and Republican legislators, even after controlling for black population proportions in the districts. However, if one looks only at roll-call votes, within party differences are small.

Thus, in sum, for a district to be characterized as one where minority influence exists at the district level it is necessary to require considerably more evidence about the characteristics of the district and its representative than either the mere showing that we can expect the election from that district of a member of whichever party is more closely tied to minority interests or the showing that the district has some given level, less than a majority of the electorate, of minority voters.[50] For a district to be classified as an influence district there should be clear evidence that the minority community exercised effective influence on the legislative behavior of the representative elected from that district via the minority community's exercise of the electoral franchise.

Defining and measuring minority influence at the legislative level

Consistent with *Georgia v. Ashcroft* and with common sense, when we consider how to operationalize the influence component of the retrogression test proposed in that case, we need to look both at minority influence at the district level and at the influence of minority groups in the legislative chamber as a whole. Moreover, just as we argued that taking party into account was important in understanding the dynamics of minority influence at the level of individual districts, so, too, is party important in understanding the nature of minority influence on the chamber as a whole.[51]

There are a number of important points to be made about the relevance of partisan control of the legislature to a Section 5 inquiry.

First, legislative control can be critical because it affects not only the outcomes of votes but also determines the shape of the legislative agenda, and which party controls the legislature determines which party holds positions of legislative authority in committees, subcommittees, and the chamber as a whole. To the extent that there are critical differences between

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[48] "Party Switchers Past and Present." CNN: Inside Politics website <http://edition.cnn.com/2001/ALLPOLITICS/05/23/switchers.list/>. Original Sources: U.S. Senate Historical Office, U.S. House Legislative Resource Center, *Congressional Quarterly*.

[49] Data taken from Barone and Ujifusa (1994, 1996, 2002).

[50] Our discussion has assumed partisan contests. Applying the *Georgia v. Ashcroft* standard to non-partisan contests raises new problems. In particular, the kind of evidence needed to identify minority influence at the district level is not trivial to accumulate, and appropriate voting records are less likely to be available from the lower levels of government such as cities or counties which mostly use non-partisan elections.

[51] As in our earlier discussion, we are focusing on legislatures where there is partisan-based competition. Modifying the *Georgia v. Ashcroft* standard to encompass non-partisan legislatures requires some additional thought.

the parties in the proportion of legislators from each party who are members of the minority community, then which party controls the legislature is likely to strongly affect the number of minorities serving in positions of legislative authority. To the extent that there are differences in the proportion of legislators of each party who are responsive to minority concerns because of the presence of large minority populations in their electoral support base, then which party controls the legislature is likely to affect the likelihood of substantial minority influence on policy.

Indeed, in many circumstances, change in party control of a legislature may be the factor that has the single greatest impact on overall minority influence. How important the factor of partisan control will be for overall minority influence is going to be linked to the expected magnitude of race-related policy differences between the parties; and this difference, in turn, is empirically linked to the magnitude of the differences in the proportion of legislators of each party who are minority candidates of choice.

Second, and relatedly, in the contemporary American South, plans that are likely to result in a switch from Democratic control of a legislature to Republican control of a legislature are almost certainly plans that reduce African-American influence. For at least the past forty years, African-Americans have been closely enmeshed with the Democratic party by virtue of providing overwhelming support for candidates of that party and by virtue of the fact that almost all African-American elected officials are Democrats.

On the other hand, in our view, maintenance or gain in the number of seats held by the party most closely associated with the minority community is relevant for a Section 5 inquiry *primarily to the extent that control of the legislature is at issue*. If, in the South, the claim is merely that a given plan would increase the number of Democrats elected, such a claim in our view is of limited direct relevance to a Section 5 inquiry even under the expanded totality of circumstances approach of *Georgia v. Ashcroft*. A mere increase in the expected number of Democrats should not alone sustain the claim that minority influence had been increased, especially if it was accompanied by some reduction in the number of minority control and opportunity to elect seats.

A PROPOSED NEW THREE-PRONGED TEST FOR SECTION 5 PRECLEARANCE REVIEW BASED ON THE *GEORGIA V. ASHCROFT* APPROACH TO RETROGRESSION

Now we set forth a proposed new three-pronged test for retrogression under Section 5. In this test, we build upon the conceptual distinctions we have made in a previous section among the three types of minority influence districts, and also draw upon the distinction made in Justice O'Connor's opinion between minority influence at the district level and minority influence at the chamber level.

We begin with a three-part question that forms prong one of the proposed test. This question deals with realistic opportunity to elect candidates of choice. Here, as in each of the three prongs, the sub questions are of the "yes or no" type.

Prong One: Realistic opportunity to elect candidates of choice

1(a) Is there a diminution in the number of minority-control districts, and/or a reduction of minority population in some or all of the other districts where it might be said that minorities have a realistic opportunity to elect candidates of choice? Here we would first count the number of districts in which minorities comprise a majority of the voting electorate (or are estimated to comprise a registration majority, if we did not have reliable information on the racial composition of the actual electorate in elections of the given type) in the new as compared to the benchmark plan. Then we would look closely at any changes in the demographic composition of the districts in which minority candidates had been elected or have come close to being elected, including ones in which the minority community does not comprise a majority of the electorate but in which minorities could be shown to have a realistic chance to elect candidates of choice due

to the presence of reliable cross-over voting. If there appeared to be *prima facie* evidence of a potentially significant reduction in black population from the benchmark to the new plan in some or all of the effective and potentially effective minority districts, then we would proceed to questions 1(b) and 1(c).

1(b) If the answer to question 1(a) is yes, can it be shown that, nonetheless, in evaluating the plan as a whole, the number of minority candidates of choice who can be expected to be elected is the same or higher in the proposed plan as in the baseline plan? It should be noted that there are two ways in which a yes answer to question 1(b) might be justified: the jurisdiction could demonstrate that the reductions in minority population in each of the districts in the benchmark where minority population has been decreased have *de minimis* effects on minority opportunities to elect candidates of choice; or the jurisdiction could demonstrate that increases in the probability of electing minority candidates of choice in some districts compensated for reductions in the probability of electing minority candidates of choice in other districts.[52]

If a jurisdiction failed to surmount this threshold hurdle it would need to offer a defense to this *prima facie* evidence of retrogression by providing compelling answers to the further questions given below.

1(c) If the answer to question 1(a) is yes and the answer to question 1(b) is no, can the jurisdiction nonetheless demonstrate that the reduction in the expected success rate of minority candidates of choice was dictated by demographic changes in the jurisdiction? There are two different ways in which the answer to this question could be yes:

i. The reductions in minority population in at least some of the districts where minority population has been decreased were unavoidable given the underpopulation in those districts and given the demographic nature of the surrounding populations which would need to be added to satisfy one person, one vote; or

ii. There was a sufficiently large reduction in the minority population in the jurisdiction as a whole that maintenance of the previous level of minority electoral success was no longer legally required, and the level of expected minority success in the new plan is appropriate for the changed demographic realities.

If the jurisdiction shows that a yes answer to *either* question 1(b) or question 1(c) above is deserved, then, in our view, we are done. The plan is *nonretrogressive* and deserves preclearance. However, if the answer to both these parts of Prong One is no, then we must proceed to answer a further set of questions involving minority influence in the plan overall. Prong Two of the three-pronged test evaluates the potential effect on partisan control of the legislature of the proposed changes in the racial composition of the districts; while Prong Three compares the number of influence districts that are not realistic opportunity to elect or major-

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[52] Attention should be called to an important special case: If there were no increase in the number of minority-control districts in the new plan as compared to the benchmark, *and* no increase of black population in *any* of the districts in the benchmark where it could be said that minorities have a realistic opportunity to elect candidates of choice, *and* at least some of the reductions in black population in those districts were not *de minimis* with respect to realistic opportunity to elect candidates of choice, then there is a key hurdle for a jurisdiction to surmount if it wished to claim that there has not been retrogression in the minority's realistic opportunity to elect candidates of choice. Under these three circumstances, *at minimum*, a jurisdiction would need to show that the sum of control and opportunity districts in the new plan was at least *one higher than* under the benchmark. This is something that would not be possible unless there were *other* districts converted from influence (or no influence) into opportunity to elect districts. Only then would it even be *mathematically possible* for the expected number of minority candidates of choice elected under the new plan to be the same or greater than under the benchmark. If we confine ourselves to the districts which previously provided minorities a realistic opportunity to elect candidates of choice, and there are some of these districts in which the election probability of a minority candidate of choice has gone down, and none in which it has gone up, then, mathematically, the only way in which the expected number of minority candidates of choice elected to office would not decrease is if some district from which there formerly had been essentially no chance of electing a minority candidate of choice now becomes a district which offers a real chance of minority electoral success.

ity-minority control districts between the old and new plans.

Prong Two: Overall minority influence in the legislature as a whole

2(a) Can it be shown that the new plan substantially increases the likelihood that the party associated with minority interests will maintain (or regain) control of the legislature as compared to what might be expected were the benchmark plan to be continued? If the answer to question 2(a) is no, then any defense against retrogression in realistic opportunity to elect based on a claim of a compensating gain in minority influence based on legislative control shows itself non-viable. If the answer to question 2(a) is yes, we have a *prima facie* influence-based defense against a retrogression claim. However, in my view such a defense could still be fully rebutted by a no answer to question 2(b).

2(b) If the answer to question 2(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of substantially increasing the probability that the party associated with minority interests would maintain (or regain) control of the legislature? To answer this question in a concrete way we would ask whether it was possible to construct some equal population variant of the benchmark plan which *i*. provides at least the same number of minority control districts and minority opportunity districts as in the benchmark plan, and *ii*. also gives rise to roughly the same expectation that the party associated with minority interests will maintain (or regain) control of the legislature as is the case for the new plan?

To not require a jurisdiction to demonstrate that the reduction in the number of minority control and opportunity to elect districts was *necessitated* to craft a plan that could assure control of the legislature would remain in hands sympathetic to minority interests would fly in the face of the three decades of Voting Rights enforcement under the 14th Amendment and under Section 2 of the VRA which has overturned numerous attempts by Southern legislatures to use black voters only as sandbags to shore up the reelection chances of white Democrats (see discussion of case law in Grofman, 1993). In the South, even if it can be shown that a plan can be expected to elect the same or a greater number of Democrats than in the baseline plan, and keep control of the legislature in the hands of the Democratic party, it must be demonstrated the reduction from the benchmark of the number of minority control or minority opportunity districts was necessary in order to preserve Democratic party control.[53] Otherwise we would have the bizarre result that, at the extreme, a plan could eliminate all districts likely to yield effective minority representation as long as it maintained expected Democratic control. That would be analogous to the infamous (and probably apocryphal) line attributed to a U.S. general during the Vietnam War: "We had to destroy the town in order to save it."[54] However, we recognize that this is a legal issue which will need to be resolved.

Prong Three: Tradeoffs at the district level in minority influence

We now turn to the final (two-part) prong, which must be considered if the second prong has been reached and either question 2(a) or 2(b) has been answered in the negative.

3(a) Can it be shown that the increase in the total number of control plus opportunity plus

[53] That maintaining the number of districts where minorities have a realistic opportunity to elect candidates of choice may conflict with maintaining control of the legislature in the hands more sympathetic to minority interests is well-known—but, in our view, many supposedly empirically-grounded claims about the fundamental incompatibility of the two goals are exaggerated (See esp. Brace, Grofman, Handley, 1987; Handley, Grofman, and Arden, 1998; Grofman and Brunell, 2005).

[54] We generally share Pamela Karlan's point (2004: 36) that *Georgia v. Ashcroft* suggests that the Voting Rights Act is becoming a victim of its own success in the manner suggested by Pildes (2002). As we see it, now that black (and other minority) representatives have been elected in reasonable numbers as a result of the creation of majority-minority seats, courts seem reluctant to recognize just how difficult this achievement was, and how bitterly resisted it was by incumbent politicians. They fail to give Section 5 (and Section 2) the credit they in fact deserve, but instead attribute minority electoral gains to the supposed racial goodwill of white politicians and the supposed reduced racial animus of white voters.

influence districts was large enough to compensate (in terms of overall minority influence) for whatever reductions occurred in the number of control districts and the number of opportunity districts? If the answer to question 3(a) above is no, then any defense against retrogression in realistic opportunity to elect based on a claim of a compensating gain in minority influence based on minority influence districts shows itself non-viable, since the categories of control districts, opportunity districts, and influence districts form an ordinal scale. If we have reached this prong and the answer to question 3(a) is no, then we should find the plan *retrogressive*. There simply cannot be a plausible claim that the new plan maintains or increases minority influence overall as compared to the baseline, since we have found it to be a plan that decreases either the expected number of majority-minority control districts or the number of opportunity districts, or both, and we have found that it neither compensates for this loss by increasing the minority's influence in the legislative chamber nor offsets the loss by a sufficient increase in influence districts.

On the other hand, if the answer to question 3(a) is yes, although we have a *prima facie* influence-based defense against a retrogression claim, then just as with question 2(a), our view is that an inquiry into minority influence is not done. Again we would have to move to the second part of the prong, here question 3(b).

But before we get to that point we must ask, "How do we determine whether the increase in the total number of control plus opportunity plus influence districts was large enough to compensate (in terms of overall minority influence) for whatever reductions may have occurred in the number of control districts and the number of coalition/opportunity districts?" Even if we can give a precise meaning to the concept of minority influence district (and the three-part distinction we have made between types of influence districts, and the dichotomy we have proposed between minority influence at the level of individual districts and minority influence in the chamber as a whole, makes at least some important first steps in that direction), the question remains of how to specify tradeoffs between gains in minority influence arising from increases in the number of minority influence districts and, say, losses of minority influence arising from reductions in the number of districts in which minorities have a realistic opportunity to elect candidates of choice or in the number of majority-minority control districts.

There is a real problem here of incommensurables, given that there is no clear metric (i.e., quantitative measurement dimension) along which minority influence can be precisely measured.[55] Moreover, this issue has not yet been dealt with by the trial courts directly because of the mooting of the 2004 remand of *Georgia v. Ashcroft*. The first case before the D. C. Court to consider the meaning of minority influence under Section 5 will have only limited guidance from the 2003 majority Supreme Court opinion, whose injunction to examine influence under the "totality of the circumstances" is of little practical help in crafting judicial tests; while the initial trial record in *Georgia v. Ashcroft* is essentially silent about the topic of overall minority influence, except to argue that electing Democrats advantages black voters in Georgia.[56]

Our approach to tradeoffs has four aspects.

First, because the concept of influence is so hard to quantify,[57] we have deliberately opted

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[55] Jason Bordoff's note in the *Harvard Law Review* dealing with *Georgia v. Ashcroft* as a leading case of the 2002 Supreme Court term makes the closely related point that while the Court majority does indicate some clues about what might be evidence for minority influence, e.g., gains in the likelihood that minority representatives would remain in positions of power within the legislature, it is silent about how precisely to combine disparate indicators when not all of them point in the same direction.

[56] In that trial, because change in the number of influence districts was not then viewed as a component of the *Beer* retrogression test, neither the defendant jurisdiction, nor DOJ, nor defendant-intervenors, addressed the question of whether the diminution in effectiveness in black voting strength in particular districts in the proposed 2001 state senate plan found by the trial court might be compensated for by an increase in minority influence elsewhere in the plan.

[57] The problem in quantifying minority influence is far greater than the problem of quantifying the minority community's realistic opportunity to elect candidates of choice, since usually, we have quite good evidence about the past success of minority candidates of choice in districts of different racial and partisan compositions that we can project into the future.

for an *ordinal scaling* of types of districts (involving a typology of districts that runs from those with most to those with least influence) rather than seeking to develop a complete *quantitative scale* of degree of influence. Nonetheless, because there is an ordinal level of scaling, simply counting the transitions from one type of district to another from the benchmark to the new plan can provide important insights about changes in overall minority influence at the district level. Second, we can provide such data in terms of what we will call a "change in influence" matrix. In this matrix we will designate the four types of districts (control, opportunity, influence, no influence) with the letters C, O, I and N, respectively.[58] This n × 16 matrix has one row for each of the n districts, and sixteen columns, representing each of the possible transitions from one type of district (in the benchmark plan) to another (in the proposed plan), i.e., (CC, CO, CI, CN, OC, OO, OI, ON, IC, IO, II, IN, NC, NO, NI, NN).[59] We illustrate the idea of a change in influence matrix with a hypothetical ten district example (n = 10) in which we begin with 4C, 20, 1I, and 3N in the benchmark plan, and end up with 2C, 4O,3I, and 1N in the proposed plan, in the fashion shown in Table 1a, and in compressed form in Table 1b.

Third, even if we take the case for minority influence in so called minority influence districts to be as strong as possible, it seems highly plausible that it would take *at least* the creation of *one new* influence district to compensate for the demotion of a seat where minorities previously had control with no need for allies, to one where their ability to elect a candidate of choice depended upon white voters. Thus, for example, if we observe a net reduction of one in the number of control districts from the benchmark to the new plan, and that former control district (or its equivalent) is, say, reduced to an opportunity district, then the *minimum* change that could possibly compensate for this reduction in minority influence would either be one in which another district which had been in the "no influence" category was now "upgraded" to the level of an "influence" district, or one in which some "influence" district was changed in such a way that it was "upgraded" to the category of "realistic opportunity to elect" district. Moreover, if we reduce a control district to a mere influence district, a loss of two steps on the ordinal scale, then, in our view, the minimum change elsewhere in the plan that could possibly compensate for this severe loss in minority influence would be to either turn two influence districts into opportunity districts, or to turn two districts where minorities lacked influence into influence districts, or to accomplish one "upgrade" of each type.

The "accounting" scheme above represents the common-sense view that, if overall minority influence is to be preserved then any losses in minority influence in a portion of the plan must be compensated for by at least *comparable* increases in minority influence elsewhere. Of course, in any real situation, the nature of the exact tradeoff across ordinal categories is a matter that would need to be developed in expert witness testimony, but we view it as a reasonable threshold rule that, if a jurisdiction *fails to show* that they have increased minority influence *even under a one-to-one conversion rate* across the four different ordinal levels of minority influence, that constitutes a *prima facie* showing that they failed to provide a case for maintenance of minority influence at the district level.

We can show how specifically these proposed tradeoffs can be assessed in the fashion suggested above by collapsing the n × 16 matrix shown in Table 1 into an n × 7 matrix, by combining columns that represent the same magnitude of ordinal transition, e.g., −3 (CN), −2 (CI, ON), −1 (CO, OI, IN), 0 (CC, OO, II, NN), +1 (OC, IO, NI), +2 (IC, NO), and +3 (NC), to obtain the results shown in Table 2 below.

Now we can sum up total change in influence by summing each row and multiplying by the ordinal value. We get 1 * (−2) + 2 * (−1) +

[58] The mnemonic, COIN, will also help the reader remember both the names of the four types of districts and the fact that they are ordered in a given way with respect to levels of minority influence.

[59] If there is a change in the number of districts between one redistricting and the next, it is straightforward but tedious to amend the description of the algorithm proposed to tally overall change in minority influence to reflect that fact, but we will not bother to do so here.

Table 1a. Illustrative Basic n × 16 Change in Influence Matrix

	CC	*CO*	*CI*	*CN*	*OC*	*OO*	*OI*	*ON*	*IC*	*IO*	*II*	*IN*	*NC*	*NO*	*NI*	*NN*
1			1													
2										1						
3		1														
4					1											
5																1
6						1										
7	1															
8		1														
9															1	
10															1	

Table 1b. Compressed Form of Illustrative 16 Category Change in Influence Matrix

	CC	*CO*	*CI*	*CN*	*OC*	*OO*	*OI*	*ON*	*IC*	*IO*	*II*	*IN*	*NC*	*NO*	*NI*	*NN*
1	7	3	1		4	6				2					9	5
2		8													10	

3 * (0) + 4 * (+1) = 0, as shown in Table 3 below, which provides the key summary of our change in influence transition data.

Looking at Table 2 we see that, in net terms, 4C in the benchmark plan went to 2C in the proposed plan, thus decreasing minority influence; while 20 went to 4O, 1I went to 3I, and 3N went to 1N, thus increasing influence. The question is how to assess the cumulative impact of these net positive and negative changes in minority influence. If we assess tradeoffs across ordinal categories on a one-for-one basis, i.e., according to the accounting rule shown in Table 2, the latter changes might be said to compensate for the loss of two control districts, since 4 *1 + 1 * −2 + 2 * −1 = 0. Thus, according to the proposed threshold standard rule, the evidence in Table 2 supports a *prima facie* showing that influence has been maintained.

The showing in Table 2 only surmounts the initial threshold hurdle of a showing that the gains in influence at the district level compensates for reductions in the number of control or realistic opportunity to elect districts in the plan *under the scenario most favorable to the defendant jurisdiction* (i.e., a one-to-one tradeoff across types of changes in influence). Thus such a showing is, in principle, rebuttable, by evidence about legislative behavior demonstrating that tradeoffs that are *more than* one-to-one are needed to compensate for the loss in minority influence caused by reductions in the number of control or influence districts. On the other hand, had the summation in Table 2 been negative, this would have meant that the jurisdiction had failed to meet its burden to make at least a *prima facie* showing that other changes in the plan might have compensated for loss of minority influence in the categories of control districts and opportunity to elect districts, and this determination, in our view, should have effectively *ended* the inquiry into this prong of the proposed test.

TABLE 2A. ILLUSTRATIVE COLLAPSED N × 7 CHANGES IN INFLUENCE MATRIX

	−3 (CN)	−2 (CI, ON)	−1 (CO, OI, IN)	0 (CC, OO, II, NN)	+1 (OC, IO, NI)	+2 (IC, NO)	+3 (NC)
1		1					
2					1		
3			1				
4					1		
5				1			
6				1			
7				1			
8			1				
9					1		
10					1		

TABLE 2B. COMPRESSED FORM OF ILLUSTRATIVE COLLAPSED 7 CATEGORY CHANGE IN INFLUENCE MATRIX

	−3 (CN)	−2 (CI, ON)	−1 (CO, OI, IN)	0 (CC, OO, II, NN)	+1 (OC, IO, NI)	+2 (IC, NO)	+3 (NC)
1		1	3	5	2		
2			8	6	4		
3				7	9		
4					10		

Once different types of districts have been operationalized in the ways suggested, entries in the two matrices above can be specified[60] and calculations of the sort done for this illustrative districting comparison can be undertaken in a straightforward manner. While the fourfold classification of district changes and the seven weighting categories we base such calculations on are certainly not perfect, the approach offered is, we believe, both plausible and workable—in a way that attempts to more precisely quantify tradeoffs among the four levels of influence identified in *Georgia v. Ashcroft*.

What is critical to this approach is that we can specify an initial threshold hurdle for a claim for gains or status quo maintenance with respect to minority influence at the district level that a jurisdiction must be able to surmount before a court would require the need for more detailed evidence on changes in minority influence at the district level. For example, if we observe that the number of *new* influence or upgrades to control or opportunity districts is *not at least as large as* the number of districts *reduced from* control to opportunity *plus* those *reduced from* opportunity to influence then, in terms of minority influence at the district level, the plan must be retrogressive.[61]

[60] Of course, there may still be disagreement on how to categorize districts. (See discussion in the companion paper, Grofman and Handley, 2006 work in progress, about the data available to make these classifications for the 2001 Senate plan in Georgia.)

[61] We would again emphasize that, in the context of the totality of the circumstances, the conclusions reached on the basis of a summary table such as Table 3 are, in principle, always rebuttable—but only with detailed and district-specific evidence on which inferences about changes in minority influence might be based.

TABLE 3. SUMMARY CHANGE IN INFLUENCE MATRIX

Transition	*CN*	*CI, ON*	*CO, OI, IN*	*CC, OO, II, NN*	*OC, IO, NI*	*IC, NO*	*NC*	*TOTAL*
Number of districts	0	1	2	3	4	0	0	
Value	−3	−2	−1	0	+1	+2	+3	
Product	0	−2	−2	0	4	0	0	**0**

Finally, because districts in which minorities have a realistic opportunity to elect candidates of choice are, *ipso facto*, districts in which minorities have influence, retrogression in the ability of minorities to elect candidates of choice is, *ipso facto*, retrogression in minority's effective exercise of the electoral franchise, and thus retrogression in influence in the sense that the term was used in *Georgia v. Ashcroft*. Thus, if a district is found to be retrogressive under the *Beer* test, it must, *ipso facto*, be found to be retrogressive under the broader concept of minority influence used in *Georgia v. Ashcroft* in 2003.[62] What this means in practice is that a finding of retrogression in, say, the number of districts in which minorities had a realistic opportunity to elect, would now need to be supplemented by a further classification of the redrawn districts in terms of the transitions shown in the matrices above.

Now we turn to the second and final element of the third prong of our proposed three-pronged test.

3(b) If the answer to question 3(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of increasing the number of minority influence districts? In our view, a defense to retrogression based on a yes answer to question 3(a) could be fully rebutted, in the perspective of the totality of the circumstances, by a no answer to question 3(b). To determine an answer to question 3(b) in a concrete way, we would ask whether it was possible to construct some equal population variant of the baseline plan which *i*. provides more minority control districts and/or minority opportunity districts than in the new plan, *and ii*. also gives rise to the same number of control plus opportunity plus influence districts as in the new plan?[63] If no such plan could be presented, then the answer to question 3(b) would be yes. If such a plan could be presented then the answer to question 3(b) would be no.

If a plan increases the number of minority influence districts at an unnecessary cost in reducing the number of opportunity or control districts, it seems hard to justify this plan as nonretrogressive, despite the language in Justice O'Connor's opinion in *Georgia v. Ashcroft* that would give the State leeway either to concern itself with influence or with opportunity to elect in defending against a retrogression claim. However, this is clearly an issue that will need legal resolution.

Thus, by looking at the evidence bearing on each of the three (multi-part) prongs in sequence—stopping whenever we had already gained enough information to definitively decide the issue of retrogression—we can operationalize the notion of minority influence found in the majority opinion in *Georgia v. Ashcroft*.

SUMMARY AND DISCUSSION

The central purposes of this article have been to elucidate the concept of minority influence

[62] Hence, in measuring retrogression in minority influence, it is necessary to initially determine if there was retrogression in the opportunity to elect minority candidates of choice in the districts that either had elected them in the past or had realistic prospects of doing so in the future, i.e., in applying *Georgia v. Ashcroft*, we must *first* apply the *Beer* retrogression test (as that test had most commonly been operationalized prior to 2003) before we proceed further. And that is why we have placed what is essentially the *Beer* test as the first prong of our proposed three-pronged operationalization of the *Georgia v. Ashcroft* standard.

[63] It is possible that courts may determine that question 3(b) (and perhaps even question 2(b)) is not appropriately part of a Section 5 test. Even if that proves to be the case, it would seem to be straightforward that, if, in the future, influence were to be incorporated in some fashion in the Section 2 context, these two questions should then become critical elements of a broadened Section 2 inquiry.

from a social science perspective and to propose a new three-pronged test of retrogression that reflects the majority views in *Georgia v. Ashcroft*.

We wish to address one criticism of the approach to *Georgia v. Ashcroft* proposed in this article, namely that it guts that opinion by proposing standards for minority influence that are essentially unrealizable. We do not agree. First and foremost in a situation where two parties are, statewide, politically competitive, and in which there are a substantial number of districts which are majority-minority in their population (such as was found in the Georgia legislature at the beginning of this decade), it is realistically possible that different distributions of minority voters across districts could substantially affect the likelihood of a given party controlling a given branch of the legislature. Thus, Prong Two of the test might very well be satisfied in such cases. (On the other hand, since Prong Two only is relevant where partisan control is at stake, courts need not waste their time with irrelevant debate about this prong in legislatures where partisan control is clearly not at issue—aiding courts and DOJ with manageability of the retrogression test.) Second, Prong One is simply a somewhat more precise way to state the old *Beer* test. Third and finally, with respect to minority influence districts, these are certainly not an empty set. But, as we argued above, the existence of minority electoral influence cannot simply be inferred automatically given some level of (less than majority) minority population in a district. It must be demonstrated with hard evidence. The proposed test, appropriately in the context of Section 5, puts the burden on the state to come up with such evidence at a district-specific level. This is going to be a very high burden, but not an insuperable one—*if* minority influence is really being reflected in the behavior of non-minority representatives. Moreover, our insistence that minority influence be demonstrated in terms of *electoral* influence, while it may seem unduly rigid, has the property of safeguarding against a "mushification" of the *Georgia v. Ashcroft* influence test that would allow states to make essentially unproveable claims of minority influence on the members of their legislature. After all, what legislator would dare to say that she was not being influenced by the views of the voters of her district, whether minority voters or not, no matter the size of the various voting blocs in the district?

We would also understand if the reader reacted to the three-pronged test above with a sigh, and an assertion that the approach we offer is simply too complicated to be applied by courts. If that is the response, our rejoinder is simply that, complicated it may be, but no more complicated than what is required by the complexities of the multi-tiered approach put forth in *Georgia v. Ashcroft*. As we said at the beginning, minority influence is a very murky concept, and it becomes even more so when we must, as the *Georgia v. Ashcroft* court instructs us, distinguish minority influence at the level of individual districts from minority influence in the legislature as a whole. If someone can propose a cleaner and simpler way to operationalize minority influence at both district and legislative levels, and to combine a standard involving these two types of minority influence with a test involving realistic power to elect, more power to them. Till then, we view the approach given above as, at worst, a very useful beginning. Moreover, the Section 5 "road map" proposed above has a number of desirable characteristics.

First, it directly draws on the Supreme Court opinion in *Georgia v. Ashcroft* in a number of different ways, most importantly by distinguishing two distinct types of retrogression defenses. In one line of defense, the jurisdiction would argue that its plan has not decreased *the minority's realistic opportunity to elect minority candidates of choice* compared to the benchmark plan. In the other line of defense, the jurisdiction would argue that, even if the court (or DOJ) were to find that its plan has decreased the minority's realistic opportunity to elect minority candidates of choice compared to the benchmark plan, this fact would not require preclearance denial, because such retrogression was necessary in order to keep *overall minority electoral influence* at or above the level found in the benchmark plan. If *either* of these lines of defense were found convincing then the plan would be precleared.

Second, in judging whether or not minority overall electoral influence has been maintained,

in comparing a proposed plan with the benchmark plan, we place particular weight on two important and non-overlapping indicators of minority influence identified by the Supreme Court majority opinion: (1) *differences in the number of minority influence districts of each of the three basic types* (majority-minority control districts, realistic opportunity to elect districts, and influence districts); and (2) *substantial differences in the probability that the political party receiving the most minority support* and with which most elected minority office-holders are affiliated *would control the chamber*.[64]

Third, this three-pronged approach is clearly linked to empirical indicators that can be operationalized in a relatively unambiguous fashion. As such, we believe it is an important improvement over an exclusive reliance on a "totality of the circumstances" approach. Because it asks relatively precise questions in a yes-no form, it allows courts to make focused use of appropriate expert witness testimony.

Fourth, the proposed approach is laid out in flowchart fashion so that, although later stages of the process involve increasingly complex issues, it may often be possible for a court (or the Department of Justice) to reach a judgment about retrogression without the need to ever address the most difficult to resolve issues, e.g., precisely specifying tradeoffs among districts allegedly manifesting different levels of minority influence—thus minimizing the burden on the parties and on the courts. On the one hand, if a jurisdiction can make a persuasive case with respect to Prong One of the proposed test, then that ends the matter, i.e., the plan can be held to be nonretrogressive, and we can skip Prongs Two and Three. On the other hand, with respect to some elements of our proposed test, we can identify certain thresholds such that a failure to meet an evidentiary showing about that threshold would create a *prima facie* presumption that the plan was retrogressive.

Fifth, if a jurisdiction wants to claim that it had concerns for both descriptive and substantive representation, as well it might, the approach taken here permits it to do so by allowing the jurisdiction to proceed with multiple lines of potential defense to a charge of retrogression. If *any* of them succeed then the jurisdiction is vindicated.[65]

Sixth and relatedly, this proposed test for Section 5 is intended to stand to the totality of circumstances approach to Section 5 of the VRA suggested in *Georgia v. Ashcroft* as the three-pronged test in *Thornburg v. Gingles* stands to the totality of circumstances approach to Section 2 of the VRA. This three-pronged approach, like that in *Thornburg*, arguably specifies clear and manageable standards to begin and to structure any legal analysis, and often its findings will be suffi-

[64] The majority opinion in *Georgia v. Ashcroft* also talks about the relevance of the views of minority legislators about whether or not the new plan preserves minority influence, and suggests, in particular, that minority support for a new plan should be taken very seriously. However, we take these comments to be ones about the weight of the evidence for or against retrogression. Support of a plan by minority legislators is not legally important, *per se* (since minority legislators cannot abrogate the rights possessed by minority voters), but for what we might infer from it about the likelihood that the plan preserves overall minority influence. It is a form of testimony from people in a good position to know. As such it may bear on any or all of the three empirical questions we have identified: i.e., minority legislators may be supporting a plan because they have reason to believe that, given demographic and political realities, it maintains or increases the number of districts from which minorities (or minority candidates of choice) might be elected; because they believe that any reductions in the number of districts from which minorities can be elected (or which can elect minority candidates of choice) are both desirable and necessary for partisan purposes of maintaining legislative control; or because they believe that any reductions in the number of districts from which minorities can be elected (or which can elect minority candidates of choice) are fully compensated for in terms of increases in the number of additional influence districts gained. Moreover, to the extent that minority legislators defend a plan that others claim will reduce the reelection chances of those same minority legislators, the empirical credibility of that latter claim is diminished. Of course, minority legislators, like any one else, may well be wrong in some or all of their beliefs about a plan's likely consequences for racial and partisan representation. For example, Grofman and Handley (2006, work in progress) refer to the D.C. trial court record to illustrate that, with the advantage of hindsight, it is apparent that some minority legislators in Georgia appeared unduly Pollyannish about the effects of the 2001 State Senate plan on both black descriptive representation in the Georgia Senate and the ability of the Democrats to keep control of the chamber.

[65] The approach we offer also has the merits of sidestepping the problem of indirectly making an evaluation of purpose an inextricable part of Section 5 jurisprudence.

cient in and of themselves to reach a definitive legal judgment.[66]

Finally, even if not determinative, the evidence generated by answering the three multipart questions listed above will provide to courts a specification of all of the key aspects of minority influence and realistic opportunity to elect minority candidates of choice, and thus should prove highly informative in any totality of the circumstances approach to retrogression.

APPENDIX: COMPARISONS WITH EPSTEIN AND O'HALLORAN (2007)

As of the writing of this article there is only one other competing social-science-based framework for making sense of *Georgia v. Ashcroft* of which we are aware, that of Epstein and O'Halloran (2007 forthcoming). We will illustrate (and criticize) their ideas for the case of African-American representation.

What Epstein and O'Halloran propose to do is to look at historical evidence about three types of districts classified in terms of who holds them: Republicans, white Democrats, or black Democrats.[67] For the legislature at issue, they ascertain data about the support levels of the legislators of each type in each district for bills supported by black legislators, and they also estimate the likelihood of electing each of the three types of legislators as a function of the black voting age population in the district. They regress black support scores on black voting age population to estimate the black support scores for a given black VAP level. They then calculate expected mean (and median) racial support scores for the legislators expected to be elected from any given plan based on the distribution of black voting age population in the plan.[68] In this way, they propose to check for retrogression by estimating the expected level of legislative support for legislation expected to be of concern for black voters in a given plan as compared to that same value for the baseline plan.

The Epstein and O'Halloran work and ours have strong similarities. In particular, we both see the potential for tradeoffs between minority electoral influence and descriptive minority representation of the sort earlier elucidated by Brace, Grofman and Handley (1987) and Grofman, Griffin and Glazer (1992).[69] And we both see important historical changes in the nature of the tradeoffs between descriptive and substantive representation in that we both agree that, until perhaps very recently, African-Americans in the South could actually gain simultaneously in both descriptive and substantive representation from plans that shifted African-American population in a more concentrated fashion. But the remainder of this Appendix will emphasize some key points of difference and point out some crucial mistakes they make in the calculations they report in their paper.

Based on their analyses of statewide data for the Georgia legislature Epstein and O'Halloran assert that "roughly two influence districts [with black voting age population of around 25%] would, on average, compensate for the loss of one majority-minority district [with black voting age population around 50%]." (typescript p. 39). The justification for this claim (typescript p. 39) is that their expected [racial] support score "for a 50% BVAP district is about 90%, while for a 25% district it is about 50%." Unfortunately, even if we accept their method-

[66] We also remind the reader that, as noted earlier, in a follow-up paper (joint with Lisa Handley) we intend to illustrate how this three-pronged test can be applied to data on the Georgia State Senate redistricting plan(s) proposed in the 2000 round of redistricting.

[67] For the data set they examine (from Georgia) they do not bother to distinguish white Republicans from black Republicans since the latter are an empty set. But, in general, to determine whether that further breakdown was needed, they would need to look to see if there were any black Republicans and, if so, whether or not any of the black Republicans was elected with the majority support of black voters.

[68] They, in effect, assume that the behavior of legislators of each type in the future will mirror that of past legislators of that same type from districts of that black voting age population. Later we comment on the realism of that assumption.

[69] See also Grofman and Handley (1998), Handley, Grofman, and Arden (1998), Grofman and Brunell (2006 forthcoming, esp. Table 2), and Lublin (1997a, b, 1999). It is, however, a bit bothersome that Epstein and O'Halloran seem to be unaware of earlier work dealing with the same questions about tradeoffs they address, especially since, as will be shown, there are flaws in their work that attention to the earlier literature might have in part avoided.

ology for calculating racial support scores, there are fatal problems with both their arithmetic and their algebra in arriving at this result!

Presumably, we need to compare apples with apples, i.e., two districts with two districts, not two districts with one district. Thus, since we have two districts with 25% BVAP, we need to look at the "corresponding" two districts in the alternative distribution of black voting age population across districts. If we have one district with 50% black VAP, the complementary "second" district would be one with 0% black VAP, since that's what it takes to keep the total black voting age population at 50% ($= 2 \times 25\%$). We need to think about how many votes a given bill supported by blacks would get under the two different configurations.

If there are two (independent) legislators each of whom has a 50% chance support for a bill supported by most black legislators, then the likelihood of getting exactly one vote for that bill from two 25% BVAP districts is, according to the numbers they give in the text, 50%, while the probability of exactly two votes for the bill from these districts is 25%, and the probability of zero votes for the bill from these districts is also 25%. This gives us an expected support for black interests from the two 25% BVAP districts of one vote. For the 50% black district standing alone, we would have an expected support of 0.9 votes, a roughly comparable number. That comparability is apparently what leads Epstein and O'Halloran to conclude that two "twenty-fives" roughly equals one "fifty." But that calculation misstates what is the appropriate comparison, namely that of two 25% BVAP districts with one 50% BVAP district plus one 0% BVAP district. Somehow, Epstein and O'Halloran don't seem to notice that they forgot about this 0% BVAP district when they did their comparisons.

Interestingly, too, if we look at their Figure 8 in which they report the raw data they use to derive their 50% racial support score for the 25% BVAP district, it turns out that the only way that 50% support score they give could be the correct number is if they are looking only at the *Republican* districts with a 25% BVAP. But, then, it would seem clear that to (at least partially) correct their analysis we should add in the expected racial support percentage for a *Republican* legislator in a district with 0% BVAP. We can read that number from Figure 8 as well over 45%. But then the expected number of votes in support of black interests coming jointly from the 50% BVAP and the 0% BVAP district is over 1.35. So contrary to the flawed arithmetic of Epstein and O'Halloran, but using the numbers reported in their own graph, we see that reducing the concentration of black voters by going from a plan with a 50% black VAP district and a 0% BVAP district to one with two Republican electing districts of 25% black voting age population clearly makes black voters worse off (going from at least 1.35 votes for black interests to only 1 vote for those interests)! Thus, even accepting all of Epstein and O'Halloran's (rather heroic and, in our view, often misleading, assumptions) such a change would be retrogressive under the *Georgia v. Ashcroft* influence test.

But failing to take into account the 0% BVAP district is not the only problem with the numbers Epstein and O'Halloran use to justify their conclusions about tradeoffs. In the calculations reported on p. 29 (typescript) Epstein and O'Halloran do not actually do what they say they are going to do, namely take into account the likelihood of electing representatives of each of the three types. Rather, as noted immediately above, to get the numbers they report on typescript p. 39, they appear to be comparing the average behavior of Democrats from 50% BVAP districts with the average behavior of Republicans from 25% BVAP districts. But this is, in effect, assuming the worst case scenario—one in which we have reduced by one the number of Democrats by splitting the black population into two districts of 25% BVAP rather than one 50% and one 0% district. In that case, as we have shown, contrary to what Epstein and O'Halloran claim, it is unquestionably retrogressive for black influence to make such a change.

Would we get such negative results if we took into account the likelihood of electing Democrats from these 25% BVAP districts? If we use Figure 8 to estimate these likelihoods, we discover that, as best we can read the data points shown in the figure, districts with 25%

BVAP always elect white Democrats and districts around 50% BVAP have around a 50% chance of electing a white Democrat and a 50% chance of electing a black Democrat, while districts around 0% BVAP have something like a 50% chance of electing a white Democrat and a 50% chance of electing a Republican. For illustrative purposes let us use those numbers for our calculations.

Thus, we would be comparing a situation with an expectation of two white Democrats (what we supposedly get with two 25% BVAP districts) with a situation with an expectation of 1 white Democrat, 0.5 black Democrats, and 0.5 Republicans (what we would supposedly expect with one 50% BVAP district and one 0% BVAP district). But, according to the regression line shown in their Figure 8, white Democrats and black Democrats elected from districts with less than 60% or so BVAP have essentially *identical* racial support scores. So if we take the Epstein and O'Halloran analysis seriously, since white Democrats and black Democrats are claimed to be interchangeable in terms of how well they serve black interests, simultaneously reducing by 0.5 the expected number of black Democrats and reducing by 0.5 the expected number of Republicans, while increasing by one the expected number of white Democrats, will, according to their analyses (when we correct their arithmetic mistakes) *always* improve things for African-American interests![70]

However, we would place far more weight than Epstein and O'Halloran on the role of descriptive representation in assuring substantive representation They arrive at their tradeoff figures entirely on the basis of roll-call votes (along with estimated probabilities of party success in districts with differing levels of minority population). As noted above, if we examine the data shown in Figure 8 of Epstein and O'Halloran, the regressions shown in the figure appear to show voting behavior for both white and black Democrats which is virtually the same, and which also is almost insensitive to the size of the black voting age population in the district—even though it does show dramatic differences between Republican and Democratic representatives in districts with identical minority population.[71] Yet, as we elaborated in our earlier discussion in the main text, minority representatives can serve the minority community in critical ways that are simply not captured in final roll call votes. Thus, the Epstein and O'Halloran estimate of the costs of trading a reduced number of districts with minority representation for an increased number of districts with some potential for electing white Democrats (and some danger of electing white Republicans) is, in our view, necessarily an underestimate, because differences in roll call voting between white and black representatives fail to fully capture the ways in which minority representation enhances minority influence.

But, now the absurdity of the Epstein and O'Halloran analysis should be apparent. If the way in which you analyze data leads you to the conclusion that there is no reason to have black representatives as long as you can substitute white Democrats for black Democrats one for one, then, not surprisingly, the upshot of such an analysis is that you are going to find virtually every situation non-retrogressive—including situations that analyses more in accord with the purposes of the Voting Rights Act would see as reducing black influence and being highly detrimental to black interests. Indeed, if we judge directly by the numbers graphed by Epstein and O'Halloran in Figure 8, rather than by what they say about those numbers in their text, it would seem that even if the effects of a redistricting were to replace *every* black Democrat in the Georgia legislature with a white Democrat, the Supreme Court should hold that

[70] We probably should see this second case as a "best case" scenario for minority influence, since we have posited, based on the numbers they report, that the 25% BVAP districts have a 100% chance of electing a Democrat.

[71] However, their roll-call voting score calculations apparently include some bills where there is virtually no opposition. As noted earlier, this artificially inflates the degree of similarity in voting patterns between black and other (especially Republican) legislators, thus understating the negative consequences for minority interests were Republicans to replace Democrats. Also, examination of their data suggests a wide variance in roll-call behavior among white Democrats which their focus on averages conceals, and which would need to be dealt with in any district-specific analysis of likely retrogression in minority success in achieving desired policies.

redistricting to be non-retrogressive![72] While this conclusion might lead some to applaud how much the South has changed, we find it instead indicative of the deep flaws in the Epstein and O'Halloran approach to operationalizing minority electoral influence.

There is one further important observation to make about the generalizability of the Epstein and O'Halloran roll-call analyses, namely that as the election of Republicans from seats whose minority population is not enough to elect black Democrats becomes more likely, the attractiveness of maintaining descriptive representation for African-Americans is likely to increase—and that is true even if we accept the empirically implausible results of the Epstein and O'Halloran approach that black Democrats and white Democrats provide identical representation for black voters. What we know from empirical studies is that in the South in general over the past several decades, for any given black population percentage under 50%, the likelihood of electing a Democrat has been declining, sometimes quite dramatically.[73] One implication of this fact is that were we to have evaluated plans around 2004 from the perspective of the aggregate electoral success of Democrats, even an "optimal" deployment of black voters across congressional and other districts in the South would not change by much the number of Democrats elected. Lublin (2004) provides the most complete empirical support for the obvious conclusion that it is shifts in white voting, and only incidentally (or indirectly) how the lines were drawn, that has been causing GOP legislative and congressional gains in the South.[74]

A second and related flaw in the Epstein and O'Halloran calculations has to do with how they make use of party. While both they and we are attentive to the role of party, we are far more concerned than Epstein and O'Halloran about the question of *partisan control of the legislature*. Indeed, they explicitly eschew dealing with party control. To the contrary, we believe that at least in the contemporary deep South, minority influence cannot be understood independent of which party is going to control a legislature. For example, as recent work looking at African-American committee chairs in state legislatures has shown: "[I]n the contemporary state legislative political environment black legislators have become key caucuses within the Democratic party; as a result, whenever the party holds a majority and its black members hold sufficient seats, a sizeable per-

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[72] Epstein and O'Halloran rule out this possibility by asserting that the Supreme Court plurality placed great weight on the willingness of black legislators to support the Senate plan at issue in *Georgia v. Ashcroft*, and the fact that we would not expect black legislators to tamely agree to their own extinction. But, we regard the emphasis on black legislative support for the plan as a central reason to hold it non-retrogressive as a mere *dictum*. In the progeny of *Shaw v. Reno* proving the non-compactness of districts turned out not to be that important, as the heart of the inquiry became almost entirely the nature of legislator motivations. In like manner, there is a good chance that future decisions about retrogression in the footsteps of *Georgia v. Ashcroft* will not be affected much by the views about the plan among incumbent black legislators, or even by what fate those legislators might suffer under the plan but, rather, will turn simply on tallies of the numbers of purported minority influence districts in the new plan as compared to the baseline plan.

[73] Epstein and O'Halloran base their estimates of the relationship between black VAP and Democratic success on previous election results. However, in the Georgia Senate, if we compare elections under the 1997 plan with elections under the new plan in 2002, it took a higher proportion of minorities to maintain any given probability of electing a Democrat from a seat (David Lublin, personal communication, March 6, 2006; Grofman and Handley, 2006, work in progress) in the later election. Similarly, Grofman and Brunell (2006, forthcoming) show (Table 2) how the relationship between black population and the probability of electing a Democrat has dramatically changed for congressional seats in the South over the period 1960–2002.

[74] Similarly, in our own earlier work we stated: "Almost all the Democratic congressional loss in the South from 1992 to 1994 could be attributed to one simple fact: namely, Republican candidates made substantial vote gains in virtually all districts" (Grofman and Handley, 1998: 67). However in that essay (62–63), we also identify some important indirect consequences of redistricting for Democratic party success in terms of the second two components of what we call the "triple whammy," in which, on the one hand, growing minority electoral success puts a "colored" face on the Democratic party, leading to more white flight (e.g., to a situation like that in Georgia in the late 1990s, where the only Democrats in the U.S. House of Representatives were black) and, on the other hand, Republican electoral successes will only breed more Republican successes as Democratic monopolies come undone and conservative office-seeking politicians who would otherwise have remained Democrats now see realistic prospects for victory if they run as Republicans.

centage of legislative chairs is virtually assured, regardless of other institutional or political factors. Conversely, however, the other side of the proverbial coin is that absent the confluence of relatively large numbers and Democratic partisan control the prospects for African-American committee chairs are bleak indeed" (Orey, Overby, and Larimer, 2006: 21). Also, it is important to recognize the endogeneity of the bills a legislature votes on. We would simply not expect the same set of bills to go up for floor vote in a legislature fully controlled by Republicans as in one fully controlled by Democrats (including black Democrats who hold committee chairmanships). In the former situation we would expect fewer pieces of legislation favorable to black interests to be reported out of committee for vote on the floor.

But by a parallel logic, whatever may be the benefits of trading off some descriptive representation in order to increase the number of sympathetic white representatives in a bid to maintain control of a legislature in the hands of the political party in which minorities are more influential, once a racial minority is doomed to be associated with the losing side in a legislature, we believe that they are almost certainly better off hanging on to their descriptive representation. If a racial group is a permanent minority in both racial *and* partisan terms, minority representation from that group is likely to be critical in a legislature in sounding the alarm and providing vocal and potentially embarrassing protests against attempts to harm minority interests.

Third, we disagree with Epstein and O'Halloran about the relative manageability of the *Beer v. U.S*. standard and the *Georgia v. Ashcroft* standard. They argue that the *Beer* standard can only be implemented if voting is highly polarized. In fact, in the 2000 round of redistricting, the Department of Justice has implemented that standard on a case by case and district by district basis by looking at realistic opportunity to elect candidates of choice *in the light of levels of reliable white crossover*. In other words, DOJ has looked for the maintenance of what we have called "opportunity to elect" districts, and not insisted that only "control" districts satisfy *Beer*.[75] Moreover, contrary to what they claim, "influence" is certainly a fuzzier concept than "electability."[76] For example, in the Georgia Senate in 2004, once overall Republican control of the state became possible, some incumbent white legislators from districts which Georgia Democrats had previously identified as minority influence districts (in their brief on the mooted remand to the D.C. Court in *Georgia v. Aschroft*) shifted party. If those districts (some with minority population over 30%) had ever been minority influence districts, after this party switch by their incumbents clearly they were no longer such. Given willingness of these white Democratic incumbents to switch parties despite the high minority populations in their districts, it is hard to think that African-Americans ever really had that much influence with these legislators. But, it would have been very hard, *ex ante*, to distinguish these districts without much minority influence from other "similar" districts in which minorities did have influence.

Fourth, while Epstein and O'Halloran are correct that, in general, the proportion of minority population needed to elect a minority candidate of choice has decreased in the deep South from what it had been in earlier decades (see Grofman, Handley and Lublin, 2001), they are far too cavalier in their claim that the likelihood of black electoral success is a smoothly increasing function of black voting age popu-

[75] We base this assertion about DOJ preclearance enforcement in the 2000 round on private conversations with past staff in the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice conducted during the period 2001–2006. From personal knowledge, as a past consultant to DOJ, I can attest that leaders of the Voting Rights Section were fully aware of the kind of rethinking of the determinants of minority electoral success in terms of reliable white crossover that is laid out in Grofman, Handley, and Lublin (2001), well before any preclearance decisions were made in the 2000 round.

[76] The ways in which both we and Epstein and O'Halloran propose to measure "minority influence" can require an investment of highly specialized expert witness time in studying legislative behavior that is comparable to (and will normally be in addition to) what is required for determining "opportunity to elect minority candidates of choice." We also remind the reader of a point made earlier that examining roll call voting differences across different types of districts requires information of a kind that may not be available for non-partisan legislatures, especially those in small jurisdictions.

lation (of the form shown in their Figure 1(b)), rather than a near step function (of the form shown in their Figure 1(a)). For example, in the South, for Congress, there are at present no black representatives from districts which are less than 40% black, and it is still the case that the vast bulk of African-American representatives from the South, both for Congress and for the various state legislatures, are elected from majority-minority districts (see Table 1, Grofman and Brunell, 2006 forthcoming). For deep South state legislatures, when we plot real data for a curve like that hypothetically illustrated by Epstein and O'Halloran in their Figure 1, we find something closer to a step function than to a smooth curve—with the below 40% black population generating near zero black representation and the above 50% black population generating black representation near one, albeit with the area between 40% and 50% black voting age population now admitting a substantial possibility of minority electoral success in a number of southern states.[77]

Fifth, in our view, Epstein and O'Halloran are not sufficiently attentive to the need to do district-specific analysis. They tend to present results in terms of linear or non-linear regressions performed on state-wide data. While sometimes these may be the only types of analyses possible, they can result in estimates that are misleading (as to influence, or electability) in that they do not take into account differences across a state, or in that they may smoothly interpolate estimates for a portion of a curve for which there are few if any data points. The former problem, for example, is visible in the left hand upper regression line fitted to the data in Figure 8 in Epstein and O'Halloran. Even with similar black population percentages in their districts, there is a great deal of variation in voting scores among Democratic representatives elected from the non-majority minority districts.[78]

Finally, Epstein and O'Halloran claim that voting in the U.S., at least in the South, is now much less racially polarized than before. But they do not really present direct evidence on this point. Rather they focus on gains in minority success. Here, they seem to believe that a key reason that can explain why far more minorities are being elected than previously is that white voters are now more willing to vote for minorities. But that assertion is potentially flawed in at least three ways. First, as they acknowledge, the racial demography of the districts matters. Racial bloc voting could be constant, yet minority success rising dramatically, if the new redistricting plans concentrated minorities into more districts in which they could elect candidates of choice. Second, the changing partisan composition of the South matters. As there are fewer white Democrats, for a fixed minority percentage, it becomes easier for a minority of that size to win the Democratic primary for a candidate of its choice even if racial polarization is unchanged. Now, if enough of the white Democrats left are willing to vote for the winner of the Democratic primary, and there are enough African-Americans in the district, an African-American candidate of choice can still win the general. What has changed in this scenario is not the level of racial polarization, but rather the ability of black candidates to win the Democratic party primary. Indeed, once we realize the importance of this two stage electoral process, we can create scenarios in which racial polarization has actually increased and yet black success goes up. Third, there may be turnout effects, such that black turnout levels have been increasing over time relative to white turnout levels. Changes in relative turnout, too, can produce some black electoral gains without requiring any changes in level of racially polarized voting. Thus, since it does not provide direct evidence about polarization itself, nothing in the discussion in Epstein or O'Halloran (or the sources to which they cite) is persuasive about their claim that racially polarized voting in the South is now declining. Moreover, just using common sense, it is hard

[77] These data are reported in unpublished work by David Lublin, Lisa Handley, Thomas Brunell, and the present author. Some of the data used in that work in progress are found at Professor Lublin's website <http://www.american.edu/dlublin/redistricting/index.html>.

[78] In the U.S. District Court for the District of Columbia, in the first iteration of the *Georgia v. Ashcroft* case, David Epstein's expert witness report in the case (for the State of Georgia) was subject to severe technical criticisms by another expert witness, Jonathan Katz, a political scientist at the California Institute of Technology. Katz accused Epstein of neglecting both of these problems.

to see why the proportion of southern whites willing to vote for African-American candidates in general elections should be going up, since southern whites have been steadily deserting the Democratic party, and African-Americans are running as Democrats.[79]

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[79] As noted previously, it seems more likely that we should attribute the recent success of African-American candidates in the South as almost entirely due to the creation (largely as a result of voting rights lawsuits or threats thereof) of new districts with substantial minority population, and the fact that Republican registration gains have stripped Democratic primary electorates of many white voters.

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