Chapter Eleven
Race and Redistricting in the 21st Century[1]

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In my view, it is impossible to make sense of the role that the search for racial equality plays in shaping redistricting practices except in the context of the legal standards involving other types of equal treatment: in particular, equal treatment of person, party, and place. Thus, I begin this essay with a brief discussion of these other legal aspects of redistricting (for fuller discussion see Grofman, 2004 forthcoming)[2] before going on to deal more specifically with redistricting issues related to race.[3] In that discussion of race-related redistricting, there will be three main foci: (1) how to operationalize what it means for a district to provide minorities with a "realistic opportunity to elect candidates of choice;" (2) the changing nature of the census racial categories and (3) the significance for racial and political representation of the decision not to compensate statistically for minority undercount in the 2000 census.

(1) Four aspects of equality in redistricting

(a) *equality of persons*

In the 1960s, equality among abstractified "persons" became of paramount concern to the U.S. Supreme Court, as it first found the failure to decennially reapportion to be a justiciable constitutional violation, and then enunciated and refined the doctrine of "one person, one vote." In the 1970s redistricting round, precise quantitative guidelines

for operationalizing the concept of one person, one vote, were laid down.[4]

Satisfying “one person, one vote” has become the paramount criterion for districting, yet there have been almost no real cases involving malapportionment in the 1980s, or since.[5] The reason that OPOV is so important yet so invisible is simple: the standards are so clear that satisfying them is now a near ”automatic” part of the redistricting process.

(b) *equal treatment of political parties*

The 1973 case of Gaffney v. Cummings, 412 U.S. 715 addressed the issue of representation in terms of ideas about partisan fairness.[6] In this case, plans that had been designed to treat equally the two major political parties, and which were passed with overwhelming bipartisan support, were found not to raise issues of equal protection. But it was not until the mid 1980s, in Davis v. Bandemer 478 U.S. 109 (1986), that we got a reversal of the Supreme Court's previous stance (see esp. Colegrove v. Green, 329 U.S. 828 (1946)) that political gerrymandering was nonjusticiable.

However, the specific Indiana upper and lower chamber legislative plans that were challenged in Bandemer were upheld as not rising to the level of a constitutional violation of equal protection. Moreover, cases heard subsequent to Bandemer make it clear that Lowenstein (1990) was probably correct that, at least with the present Supreme Court lineup, the test laid down in Bandemer set the bar so high -- seemingly requiring that a political party have been "excluded" from the political process -- that, for all practical purposes, no redistricting plan

would ever be struck down as an unconstitutional political gerrymander. Indeed, despite numerous efforts to put some teeth in the Bandemer decision, there has been only one case in which a plan (an at-large scheme for judicial elections) was struck down as a partisan gerrymander, and the facts in that case were so extreme as to make the case essentially *sui generis*.[7]

(c) *equality of place*

Equality of place continues to have a vital role in our constitutional jurisprudence. Consider, for example, the constitutionally embedded requirement that apportionments to the U.S. House of Representatives should be state-specific (i.e., that congressional districts not cross state borders). This rule has never had its legitimacy challenged, even though it leads to substantial discrepancies in the average size of congressional districts in different states (with the largest mean congressional district population in a state more than 1.7 time the smallest in the 1990s). Moreover, most states had and continue to have place-related criteria (e.g., compactness or preservation of political subunit boundaries) written into their state constitutions (Grofman, 1985) and/or into the language of redistricting bills, and the basic notion that districts be composed of geographically contiguous territory still reign supreme.

However, the set of cases in the 1960s, 1970s, 1980s, and then the 1990s, prioritizing first one person, one vote standards of population equality, and then the need to draw lines in such a fashion as to neither minimize nor cancel out the voting strength of (protected) minorities, has

dramatically reduced the importance of place considerations in redistricting. In particular, jurisdictions could no longer justify the way lines were drawn by saying that they had to preserve counties (or cities) intact. Such an argument could be trumped not only by the need for population equality, but also by findings of minority vote dilution in which the need to put together contiguous minority populations into districts in which they would constitute a majority would become a sufficient justification for drawing remedial districts which crossed the boundaries of existing political subunits.

(d) *equal protection of racial and other minority groups*

Cases involving claims of racial gerrymandering and closely related issues were heard as early as the 1960s (see esp. Gomillion v. Lightfoot, 364 U.S. 339 (1960), a case involving a municipal annexation held to have had an unlawful racial impact), and the 1970s saw some important cases involving the constitutionality of at-large and multimember district elections alleged to dilute minority voting strength (see esp. White v. Regester, 412 U.S. 855 (1973). However, it was in the 1980s round of redistricting that the focus of major redistricting litigation shifted almost entirely to matters involving race. It has been the effects-test based new language placed in 1982 in Section 2 of the Voting Rights Act of 1965 that has formed the basis of the bulk of redistricting lawsuits from the 1980s to the present.

i. Sections 2 and 5 of the Voting Rights Act

After the passage in 1982 of new language in Section 2 of the Voting Rights Act, most cases involving racial claims were brought under Section 2. Section 2 was

interpreted by the U.S. Supreme Court as allowing a violation of the Act to be established even in the absence of proof of intentional discrimination[8] if it could be shown that the jurisdiction was characterized by polarized voting[9] at a level that led to usual loss for minority candidates,[10] and that minority population/voting strength was sufficiently large[11] and sufficiently geographically concentrated[12] that there existed ways to remedy the previous/expected vote dilution with a new single member district plan. In the 1980s, and even more in the 1990s and in the current redistricting round, thanks to the combination of Section 2's universally applicable provisions and Section 5's application to the jurisdictions subject to DOJ pre-clearance of their redistricting plans,[13] the Voting Rights Act became what I have called a "brooding omnipresence" (Grofman, 1993a) in the redistricting arena.

In the 1990s round of redistricting, especially in the South (for blacks) and the southwest and west (for Hispanics), a confluence of factors led to the creation of many new majority-minority districts. These factors included (1)enhanced ability to easily create computer-drawn plans using block level data incorporating both racial and political information; (2) the presence in legislative bodies of many more minority members (almost all of whom had been elected from majority-minority districts created directly or indirectly as the result of voting rights lawsuits) who were anxious to assure additional minority gains,[14] (3) the position taken by party operatives associated with the Republican National Committee that it was in the interest of Republican legislators to ally with minority members to create as many majority-minority districts as possible, and their

assertion that there were no legal bars to the passage of plans that maximized minority representation; and (4) rigorous enforcement of Section 5 of the VRA by the Civil Rights Division of the Department of Justice in the sixteen states covered in whole party by that section, including, in effect, the incorporation of Section 2 standards into DOJ's Section 5 review (Grofman, 1993a; cf. Posner, 1998).

Most in the civil rights community took the view that geographic compactness was effectively a dead letter and that the jurisdiction could chose to disregard this criterion in the interest of providing present-day representation for minorities in any state against where there was a long history of previous discrimination and previous exclusion from the political process. Thus minority advocacy groups pushed for adoption of plans in which some of the minority districts had rather tortuous shapes. Also, in order to protect white incumbents, some of the new majority minority districts were often carved out in rather strange ways.

Moreover, the Department of Justice in its preclearance reviews did not see itself as having an obligation to monitor the shape of the districts being created in response to Section 5 concerns.[15] In the 1990s DOJ did not seek to require a jurisdiction to draw an additional majority-minority district unless it felt that such a district could reasonably be drawn, but if, for reasons of its own, the jurisdiction chose to draw the district in a contorted or amoeba-like fashion, that was regarded as none of DOJ's business as long as the district created a realistic opportunity to elect minority candidates of choice (Cf. Grofman, 1993a).[16] As a consequence of these factors, some of the many majority-

minority districts drawn in the 1990s were, to put it simply, simply ugly.[17]

ii. Shaw v. Reno and its progeny

Beginning in the early 1990s, there was a sea change in voting rights jurisprudence.[18] The backlash to the dramatic gains in minority representation realized in 1992 as a result of the 1990s round of redistricting (e.g., the gain of 12 additional black members of Congress from the South) became focused on the tortuous shapes of some of the majority-minority districts, and on the allegation that jurisdictions covered by Section 5 had been forced by an improper use of DOJ's pre-clearance authority to unlawfully maximize the number of majority-minority districts in their state.[19]

In Shaw v. Reno, 509 U.S. 630 (1993), the Supreme Court had chastised the Department of Justice for undue zeal in pursuing the goal of racial representation in its Section 5 enforcement and Justice O'Connor likened one of the two majority black 1990s North Carolina congressional districts to a form of "racial apartheid." While the Court in Shaw did not declare the North Carolina 12th unconstitutional, it remanded the case for further consideration under the view that strict scrutiny of the use of race as districting criteria was required and, more specifically, the Court majority enunciated a new constitutional test that race not be a sole or even preponderant factor in redistricting decisions. In particular, the Court majority suggested that traditional districting criteria needed to be taken into account when lines are drawn.[20]

The Shaw decision was regarded by most in the civil rights community as a major setback for minority voting rights. Shaw v. Reno, I was followed by several other Supreme Court decisions striking down plans as violative of the Shaw standard, including, eventually, a decision finding the original lines of the North Carolina 12th to be unconstitutional. In each, the remedy was the elimination of one or more majority-minority districts and their replacement by districts with substantial but not majority minority population.[21]

Shaw has the dubious distinction of being a prime candidate for being considered the Hollywood sequel king of redistricting.[22] After 1993, North Carolina congressional districting returns to repeatedly haunt the Court, with a congressional plan not being affirmed by the Supreme Court as passing constitutional muster until 2001! And, rather like the plots of "Freddie" movies and other sequels, the Court's decision in the latest incarnation of the original North Carolina challenge,[23] Hunt v. Cromartie , 532 U.S. 234 (2001), does not have a particularly comprehensible story line.

In Cromartie, the newest version of the North Carolina 12th was upheld as not violating the Shaw standard, with Justice Sandra Day O'Connnor's shift providing the 5-4 majority for distinguishing the new district from its rejected predecessors. The version of CD 12 upheld in Shaw v. Cromartie was one in which blacks made up less than a majority of the district's population, as well as one where district boundaries had been considerably liposuctioned and the total length of the district considerably shrunk. But the Supreme Court majority seemed to accept the plan as not violative of Shaw primarily on

the grounds that, while race was still being taken into account, blacks were being added or subtracted from particular districts based on their characteristics as extremely loyal Democrats rather than because of their race, *per se*. Because it held that political considerations predominated, the Cromartie majority found race not to be the preponderant motive.[24]

Although the Supreme Court denied *certiorari* to a Shaw-type challenge to a set of court-drawn plans in California, until Cromartie, subsequent cases made it hard to see what, if anything, would sustain a plan against a Shaw-type challenge, despite the fact that Justice O'Connor was insistent that there is no real conflict between the requirement of the Voting Rights Act that race be taken into account to avoid racial vote dilution and the proscription in Shaw of race being given to much importance. But uncertainty really has not been reduced that much after Cromartie. Four of the five justices in the Cromartie majority were in the minority in Shaw I, and there appear to be three or four justices on the opposite side who are inclined toward color-blind districting or something very much like it.

Despite nearly a decade of litigation, the exact meaning of the Shaw standard is unclear. It remains, in Pam Karlan's memorable tag line (Karlan, 1996), "still hazy after all these years." As yet (January 2003), there have been no cases heard from the 2000 round of redistricting that would give the Court a chance to explicate Shaw further. As this essay is written it appears clear that it is the views of Justice Sandra Day O'Connor that will determine which race-linked redistricting plans will pass Court muster under Shaw, and why.[25]

(2) Providing minorities with a realistic opportunity to elect candidates of choice

It is important to distinguish the size of the minority population required for the kind of remedy district that is, under current case law, a necessary condition for having grounds to bring a Voting Rights Section 2 lawsuit from the size of minority population sufficient to provide a realistic "opportunity to elect candidates of choice." The latter may sometimes be larger and sometimes be smaller than the former. Sometimes, e.g., in settings where minority registration and turnout is substantially depressed due to lingering effects of past discrimination and socioeconomic disparities, we may need more than a bare population majority (or even voting age or CVAP majority) to assure the minority community a realistic opportunity to elect candidates of its choice. On the other hand, if there is sufficient willingness of whites/Anglos to support the minority candidate, even if voting is clearly racially polarized, there can be districts drawn in which the minority voters are not a majority of the electorate but in which minority-supported candidates can nonetheless win, or even win easily.

(a) Three techniques for assessing the minority population needed for minorities to have a realistic opportunity to elect candidates of choice

There are three techniques used by social science experts for assessing the minority population proportion need to provide minorities with a realistic opportunity to elect candidates of choice: i. examination of the direct historical link between minority population proportion and minority electoral success; ii. use of turnout-corrected

estimates of minority voting strength to determine "effective voting equality; " and iii. for partisan contests, evaluation of the ability of the minority to elect candidates of choice in both primaries and generals taking into account plausible expectations of the level of white crossover support.

i. Examination of the direct historical link between minority population proportion and minority electoral success.

We may look at the past history of minority success. We may find, for example, that, once minority population hits a certain level (perhaps 50%, perhaps higher), the probability of minority success approaches near certainty. And we might also find that districts with minority population below a certain levels have virtually zero chance of electing minority candidates (see, for example, the data reported in Grofman and Handley, 1998).

Although it might appear that past history is the best evidence for projecting future minority success, there are three major problems with relying exclusively on this method. First, we need to be sensitive to potential confounding factors, such as the presence of an incumbent, and the race of that incumbent. Second, we may need to be cautious in generalizing from results in one part of a state to the results to be expected in another part of the state, and in applying data from previous elections to the present. Third, we may find that there is a range of variation in minority population for which we have little or no information on past voting outcomes. In the South, for example, in the 1980s, there were very few districts drawn with 40%-50% black population proportions. Thus, as we started the 1990s round, we knew that southern

congressional districts with 50% or higher black population always elected minorities (Grofman and Handley, 1998), but past electoral history alone might not really tell us how much lower we might be able to set black population without dramatically reducing the chances of minority electoral success.

ii. Calculation of effective voting equality.

By drawing on evidence on how a given population has voted in contests pitting minority against non-minority candidates (see review in Grofman, 2000; see also Grofman, 1993c), we can estimate levels of minority political participation relative to those of whites/Anglos. We can use that information to calculate what I have previously called the minority population needed for "effective voting equality." Based on an idea of James Loewen, my previous work (Brace, Grofman and Handley, 1988; Grofman, Handley and Niemi, 1992) has defined *effective voting equality* as the minority population that would equalize the turnout (for office) of minority and non-minority voters on election day. This definition is designed to take into account differences between minority and non-minority in terms of size of voting age population, citizenship rates among age-eligible voters, registration among potential voters, and turnout rates among registrants.

We might think of effective voting equality as implicitly treating the two groupings of minority and non-minority voters as having identical levels of cross-over support for candidates of the opposite group (one polar case of which is completely race-based voting). This is a most important limitation. In real life, *ceteris paribus*, groups may differ in their willingness to cross-over to

support candidates of other racial groups. Moreover, for two stage election processes (primary plus general), we must be careful to assess effective voting equality for both primary election and general elections. It will do a group little good to have effective voting equality at only one stage of a two-stage electoral process.

iii. Evaluation of the ability of the minority to elect candidates of choice in both primaries and generals by taking white crossover into account.

In the 1990s, as in the 1980s, few districts were initially drawn with black population in the 35% to 50% range. However, most of the post-Shaw liposuctioning of congressional districts resulted in the creation of districts in that range of black population. The majority-minority congressional districts in the South redrawn after Shaw challenges to have minority population in this range continued to reelect the black incumbents who had won in 1992.[26] And these districts continue to elect minority candidates. However, the exact interpretation to be given to this success is disputed. Some opponents of race-conscious districting regard minority success in the redrawn districts as showing that a reduction in levels of racial polarization means that we no longer require majority-minority districts in the South; while those in the civil rights community rejoinder that the success of the African-American candidates who won in the redrawn districts was not representative, since the winners were black incumbents who were running for reelection with the considerable advantages of incumbency behind them.

Grofman, Handley and Lublin (2001) look at this dispute. We argue that, as suggested earlier, to properly analyse realistic opportunities to elect candidates of

choice, we must view partisan elections as a two-stage processes, involving candidate selection first in party primaries and then in general elections.[27] And, we must pay attention not just to the racial composition of districts, but also to their party composition. Furthermore, as suggested above vis-à-vis the determination of effective voting equality, we must look beyond raw population data to try to examine actual voting strength at the polls.

Grofman, Handley and Lublin (2001) assert that, for partisan contests, and for African-American candidates who are the candidates of choice of the black community, the reason for their success in southern districts with less than 50% black population can usually be traced to the ability of African-American voters to control the Democratic primary and the ability of Democratic candidates who are African-American to then go on to win the general election because of support by other Democrats -- even when most whites are unwilling to support a black Democrat candidate in the general election.

A numerical illustration can clarify how this might work. Consider a district which is 40% black Democrat, 30% white Democrat, and 30% white Republican in voting strength. A black candidate who will almost certainly be selected in the Democratic primary given the black preponderance among Democratic voters and the likelihood of voting in that primary being polarized along racial lines. If all of the blacks, just over one third of the white Democrats, and none of the white Republicans, vote in the general election for that black candidate s/he will go on to win the general election, even though only a little over one white voter in five voted for that candidate in the

general, and even though that candidate may have received little or no support from the whites who voted in the Democratic primary.

Grofman, Handley and Lublin (2001) provide empirical evidence for South Carolina to show that frequently, especially for congressional elections, districts which are heavily African-American in composition but still (slightly) less than majority black might be expected to elect an African-American candidate of choice with high probability. On the other hand, they also show that there are situations, especially for legislative elections, where even a 50% black population is unlikely to permit the election of candidates of choice of the African-American community.

They strongly emphasize that evaluation of the probability of minority electoral success in any redistrict requires a very detailed and very case-specific analysis. They also emphasize the importance of incumbency, but especially whether or not there is a white incumbent in place.[28] This newer work seeks to build in considerations of expected levels of white crossover into our definition of "realistic opportunity to elect," as well as taking into account factors such as differences between minority and non-minority turnout and incumbency effects.

(b) Legal issues related to realistic opportunity to elect

i. Which of the three tests for realistic opportunity to elect operationalizes the correct legal standard in Section 2 challenges?

For plaintiffs to prevail in a Section 2 voting rights challenge they must demonstrate, i.a., that a district that remedies the voting rights violation can be drawn. For defendants to succeed against a Section 2 challenge they will often wish to demonstrate that the districts already drawn are ones that provide minorities a realistic opportunity to elect candidates of choice. Above we have summarized the three most important approaches to determining, from a social science point of view, when a realistic opportunity to elect minority candidates exists.

The case law is still in flux on the standards for determining a realistic opportunity to elect, especially with respect to the issue of whether or not it is necessary to set the minority population large enough that the minority community has a realistic chance to control the outcome even if no support for the minority candidate were forthcoming from the non-minority community. As suggested above, an alternative approach is to rely on historical and projected estimates of white crossover support for the minority-backed candidate in estimating the prospects for minority success.

Some civil rights advocates believe that the former standard is the only appropriate one, since otherwise the success of the minority community's candidate of choice is contingent on that candidate receiving support from white/Anglo voters. However, in the 2001 New Jersey legislative case Page v. Bartels, 248 F. 3rd 175 (3rd Cir.

2001), districts with considerably less than 50% minority population were upheld against a Section 2 challenge from minority groups.[29] Critical to the decision in the case was expert witness evidence from the historian, Alan Lichtman, that, in partisan legislative elections in New Jersey, minority candidates who were able to win the Democratic primary could usually count on considerable white support in the general election, and that African-American candidates had previously been elected from districts with much less than black population majorities

ii. How do you properly define realistic opportunity to elect in the Section 5 non-retrogression context?

The meaning of realistic opportunity to elect is also relevant to Section 5 jurisprudence. In a case widely regarded by the civil rights community as one of their worst nightmares made flesh, in Reno v. Bossier Parish School Board, 520 U.S. 471 (1997), the Court limited DOJ Section 5 preclearance scrutiny to the single issue of whether or not there was retrogression in the number of minority districts[30] -- thus restricting DOJ's pre-clearance authority in the 16 states covered in whole in art by Section 5 to guaranteeing that there would be no backsliding in the 2000 round from the heights of minority electoral success in the 1990s.

Retrogression refers to plans which diminish the opportunity for the electoral success of minority candidates of choice, but because there have been few legal challenges to Section 5 preclearance denial, the case law on the precise operationalization of the non-retrogression test is thin. For example, it is not clear whether there has been retrogression only if there has been a decrease in the number of majority-minority districts, or if the non-

retrogression test also covers situations where the total probability of minority success may have been reduced even though the number of majority-minority districts has not been changed, e.g., situations in which minority population percentages in some previously heavily minority districts have been substantially reduced. In particular, are some reductions in minority population essentially *de minimis* when judged in terms of their effect on realistic opportunity to elect candidates of choice?

Another legal issue related to the non-retrogression test is in terms of appropriate baseline against which to determine retrogression. One key question has to do with population change. For example, what happens when the total population in a previously majority-minority district has shrunk relative to statewide population growth, so that the district needs to incorporate additional territory to comply with one person, one vote? In particular, even if all minority population in the old district is included in the new district, is it retrogression if the minority population percentage in the new district is lower than it was in the old? Would it matter if the minority population percentage was lowered, but the district could still be shown to be one in which the minority community had a realistic opportunity to elect a candidate of choice? What if the only minority population that could be added to bring the minority percentages up to what they had been before would require fingerlike protrusions to pick up distant pockets of minority voting strength?[31]

These are the kinds of questions that the Department of Justice has faced in its Section 5 retrogression evaluations. Voting rights specialists anticipate that some of the questions about the nature of the non-

retrogression test identified above will be resolved by the U.S. Supreme Court in 2003, since the Court has agreed to hear a Section 5 case, Georgia v. Ashcroft (on appeal from the District Court for the District of Columbia) in Spring of 2003.

(3) The role of the Census in defining racial groups

The 2000 Census form permitted individuals to check more than one race box on the census. This change from the practice on recent censuses of requiring a single race category to be checked was controversial in the civil rights community. Some African-American spokespersons were worried that such multi-racial coding would diminish the perceived size of the black population (already declining in size vis-à-vis Latinos). Also, it was thought that the multi-racial coding might cause some problems in identifying the ethnicity of candidates who were the candidates of choice of particular (minority) communities. Moreover, because multi-racial coding led to the designation of 57 varieties of multi-racial groups (plus 6 single-race categories), multi-racial codings were viewed as generating a confusing plethora of categories that were, in practice, impossible to work with.

In fact, what has happened is that, for reporting purposes, the 63 categories are being compressed into just a handful. The Office of Management and Budgeting, for most civil rights purposes, has come close to imposing recodings into the "pure" racial categories, by treating those who self-identify with two groups as minority if one of the two groups with which they label themselves is white. Moreover, while the separate coding of the Hispanic/Latino

category and the race category allows Hispanic/Latino respondents to be of any race,[32] increasingly, Hispanic/Latino is being coded as if it were a racial category, so that anyone who is a self-categorized Hispanic/Latino is placed into that category rather than into one of the racial groups, making 'white' a shorthand for 'non-Hispanic white.'[33] I do not know exactly how we came to have "57 varieties" of multi-racial Americans, but the symbolism here (whether intended or inadvertent),[34] ought to have sparked a public debate about the meaningfulness of racial categories in general - a debate which, at least so far as I can tell, has never happened.[35]

(4) Census adjustment for minority undercount

Not everyone residing in the U.S. is caught by census enumerators. On balance, there is an undercount. Moreover, generally, African-Americans and Hispanics are less likely to be counted than are others.[36] For the past several decades the issue of statistical adjustment of census data has been a recurrent issue in the courts and within the Bureau of the Census. During the 1990s, the Census conducted a variety of studies to help it decide about how best it might do statistical adjustments to deal with undercount issues in the 2000 Census.

Both Democrats and Republicans believed that the decision about whether to statistically adjust the Census to better cope with the problem of undercount would have major consequences for partisan representation, with Republicans by and large strongly opposing adjustment and Democrats favoring it, since the persons who would be expected to be added to the count after it had been statistically adjusted would be disproportionally minority

members who were likely to be Democratic voters. But, since the undercount is also generally greater in urban areas, sometimes, regardless of party, big city mayors often joined in suits to compel statistical adjustment.

Prior to the release of 2000 Census data, the Supreme Court held that the Census was prohibited by existing Congressional legislation from using statistical adjustment techniques to generate estimates of the statewide population counts used for purposes of congressional apportionment, but it left open the possibility that adjusted figures could be used for other purposes, including the drawing of constituency boundaries within a given state or local jurisdiction. After the 2000 Census, under a Democratic president, the Bureau was a planning on issuing two sets of numbers, one unadjusted, one "optimally" adjusted, with the latter set being the numbers whose accuracy the Bureau would vouch for. In fact, after the actual census data came in, the Bureau chose not to release adjusted census figures, a decision apparently reached by the staff for technical reasons having nothing to do with partisan considerations.[37]

The most common view of census adjustment among political actors is that the decision to adjust or not to adjust has major partisan consequences, and (at least prior to the Bureau's decision to reject adjustment on technical grounds) that the only reasons for opposing adjustment were partisan (or otherwise self-interested) in nature, in that there were no real statistical issues to be concerned about re the merits or demerits of proposed adjustment mechanisms. My own view is rather different.

Despite the fact that the census already makes use of some forms of statistical adjustment (e.g., imputations of

missing data based on other characteristics of the respondents), there are reasons to be concerned about statistical adjustment of the population counts themselves. Any statistical adjustment will be more accurate in some areas of the country than it is in other areas of the country. It will be virtually impossible to devise adjustment mechanisms that will uniformly improve the accuracy in every census bloc, or even every census tract, or even, possibly, every state. Similarly, any adjustment will have differential consequences for the undercount/overcount of particular racial and ethnic groups.

It is not a purely technical decision to decide what constitutes an optimal statistical adjustment. It is easy to construct formulae for adjustment. It is harder to judge among them. For example, should we be interested only in total accuracy, if, as may happen, the most accurate scheme actually results in greater relative discrepancies between minority and non-minority population in terms of the accuracy of the count? Almost certainly there will be adjustment mechanisms that will improve the accuracy for one group, while decreasing it for other groups. Similarly, is, say, overcount of minorities more important than undercount of non-minorities? Also, accuracies may differ depending upon what unit of census geography we analyse.

These problems are exacerbated by the desirability of picking the adjustment formula in advance of the actual census data to avoid any appearance of decisions designed to favor some groups over other groups or one part of the country over another. Yet, if we pick the adjustment formula in advance, almost certainly, once the data are

available, there will be other adjustment formulae that can be shown, by some plausible criteria, to be technically superior.

Having expressed my concerns about statistical adjustment of the census count, let me go on to say the importance of the adjustment decision has been much exaggerated. There are several straightforward reasons why census adjustment is not as important as some people think it is, at least in terms of partisan advantage

First, counting more people on the census has no effect on the number of voters who actually reside in any particular piece of census geography. Who you count doesn't affect who's really there. Census adjustment matters primarily insofar as it affects redistricting choices, such as the number of majority minority districts that can be drawn. Of course, there can also be spillover effects, but their magnitude is probably not going to be that big. If there are lots more Hispanics counted as residing in, say, East Los Angeles, after statistical adjustment of the census data than there were before, this may make it possible to allow "excess" Latino Democrats to be used to prop up Democratic candidates in marginal districts that are adjacent to East L.A. But if many of the bodies being counted are not in fact voting citizens, treating them as such will prove a misleading predictor of expected vote shares.

Second, and relatedly, geography matters. Much of the gains for any given group will be wasted because they are located in areas where they will make no difference in redistricting decisions and will have no real spillover effects.

Third, it is often forgotten that statistical adjustments that result in counting more people necessarily increase average district size, which means that you need more people of any given type to constitute a majority in the district.

Fourth, in evaluating the effects of statistical adjustments you need to pay attention to relative gains for racial and ethnic groups not just absolute gains.

Finally, even if statistically adjusted numbers were to be used for apportioning seats to the U.S. House of Representatives, and even if adjustment resulted to a greater extent in higher counts for blacks and Latinos (heavily Democratic groups) than for others, it is far from obvious that this would translate in to more House seats won by Democrats, since not all of the states with high minority populations are controlled by Democrats, and since apportionments turn on the peculiarities of mathematical rounding rules, and the states that gain in population share with adjusted as opposed to unadjusted census numbers need be not be the states which gained the most in terms of additional seats (*cf.* Balinski and Young, 1982; Saari, 1995).

Now that a Freedom of Information lawsuit has forced the Census to release the adjusted Census data to the public, we can expect to learn whether the views I have expressed above about the limited consequences of shifting to adjusted numbers are supported by the evidence.

II. Discussion

Let me end with four predictions I made about the 2000 round of redistricting in oral remarks before the National Conference of State Legislatures in 2001 and 2002. Two of them can already be checked against events -- and I am batting .500; for the third and fourth predictions we will have to wait and see what the Supreme Court does.

First, knowing that, in the 1990s redistricting round, well over 80% of the states faced legal challenges to either their legislative or congressional plans (and frequently to both), I predicted that there would be at least as many lawsuits in the 2000 round of redistricting as there were in the 1990s round. I turned out to be wrong Lawsuits were minimized because there were so many "sweetheart deals" across party lines protecting incumbents, including minority incumbents.

Second, I predicted that the Department of Justice would make use of a functional test for non-retrogression, i.e., looking to see whether the state had met its burden of showing the lack of a regressive effect on minority representation by looking at whether the new districts, in sum and substance, continued to provide the same realistic opportunity to elect candidates of choice as was present in the previous plan. Here, I turned out more or less right on the money. In Georgia, for example, DOJ precleared numerous districts in the State House and State Senate and even for Congress in which the minority population proportion had gone down somewhat relative to the 1990s percentages, but only in situations where DOJ could be convinced that the effects of slight reductions in minority

population did not harm minorities realistic opportunities to elect a candidate of choice.[38]

Third, I predicted that, at least as long as Sandra Day O'Connor is a sitting justice, the Supreme Court will not use Shaw to completely abrogate the Section 2 jurisprudence of Thornburg v. Gingles by requiring completely "color-blind" districting.

Fourth, I predicted that, in the post-2000 census round of redistricting litigation, districts that are not majority-minority will find a much easier time surviving Shaw-type challenges than ones that are. But that, in any case, districts that pay at least lip service to traditional districting criteria, especially ones that use relatively large units of census geography as their building blocks, will probably pass muster under Shaw.

On these last two predictions, we must wait and see.

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[1] I am indebted to my secretary, Clover Behrend, for her invaluable help in preparing the bibliography for this paper, and to Chandler Davidson and Lisa Handley and others too numerous to mention for many helpful conversations over the years about race and redistricting.

[2] In addition, a fifth interest, the concern of incumbents for their future prospects, strongly comes into play in most redistrictings, but incumbents, *per se*, have no rights to equal treatment since they have no rights to office; equal treatment of incumbents is best subsumed under the topic of equal treatment of parties (see the discussion of indicia of partisan gerrymandering in Grofman, 1985).

[3] This essay is written in January 2003, before most cases from the 2000 round of redistricting have worked their way up to the Supreme Court.

[4] The Supreme Court took a two-forked approach, with total deviation of 10% or less treated as making a prima facie case for the constitutionality of plans involving state legislative seats or local level redistricting, but a total deviation as close as possible to zero as practicable required for congressional districting (Grofman, 1992).

[5] The only (partial) exceptions were cases challenging the failure to reapportion in a timely fashion, cases likely to be mooted by subsequent events. Most such cases were brought as judge-shopping exercises, i.e., with the idea of that the first to file a redistricting challenge might hope to have later (and often more meaningful) cases consolidated with that challenge, thus avoiding having cases decided in court venues that might be less to one's liking.

[6] For a discussion of the various meanings of proportionality and fairness in seats-votes relationships see Grofman (1983).

[7] The only partisan gerrymandering case in which plaintiffs prevailed was a North Carolina case involving a challenge to at-large (statewide) voting for state judges, Republican State Party of North Carolina v. Hunt, No. 94-2410, 1996 U.S. Appeals for the Fourth Circuit, LEXIS 2029; Reported in Table Case format, 77 F. 3d 470 (1996). At the time the case was decided, no judge running on the Republican label had won at-large statewide judicial office since just after the Civil War. Case facts this extreme involving partisan representation are not likely to be found again! Indeed, not that long after the case was decided, as a result of an ongoing realignment in the deep South, the ultimate magnitude of which had been difficult to predict, the Republican party became competitive/victorious for all statewide offices in North Carolina.

[8] See esp. Thornburg v. Gingles 487 U.S. 30 (1986). The new language of Section 2 was intended by Congress to force the Supreme Court to use an effects-based standard for statutory violations to sidestep the Court's decision in Mobile v. Bolden 446 U.S. 55 (1980) that the appropriate constitutional standard for voting rights claims required a showing of intentional discrimination. An effects-based standard can make it easier for minority plaintiffs to prevail than a standard that requires showing of intentional discrination. (We might note that, on remand, the district court in the Bolden case did find evidence of intent to

discriminate in the historical record -- a fact that is often forgotten. Also, we should point out that when the Supreme Court spelled out the operationalization of the Bolden standard in Rogers v. Lodge, 459 U.S. 899 (1982), the test used was not that different from the "totality of the circumstances" test that had previously been enunciated as an effects-based standard (see various essays in Grofman and Davidson, 1992).)

[9] However, some opponents of present Section 2 voting rights jurisprudence would argue that the definition of racial polarization in Thornburg v. Gingles is not an appropriate one, and that "true" racial polarization would require that African-Americans lose in some areas not simply because they are running as Democrats, but because of animus on the part of white voters toward black candidates, *per se*. This argument has largely been accepted by the Fifth Circuit in LULAC v. Clements 999 F. 2nd 831 (1993). In my view, the LULAC court failed to consider the degree to which voting was polarized along racial and ethnic lines in the Democratic primary, and it also failed to pay sufficient deference to the view of racially polarized voting set forth by Justice Brennan in Thornburg, in which the reason for reason polarization was not relevant, only the presence or absence of differences in voting support for minority candidates by whites and blacks (see Grofman and Handley, 1995). Here I would also not that, when blacks are seen as comprising the core Democratic constituency, white votes against even white Democrats may also be linked to race (cf. Grofman, 1991).

[10] There is substantial empirical evidence that, in biracial/bi-ethnic contests, when black (Hispanic) voters are given a meaningful choice, they will choose candidates who are themselves black (Hispanic). Evidence on contests involving candidates of more than once race/ethnicity are generally regarded by courts as critical in determining levels of racially polarized voting (see discussion of the case law on this point in Grofman, Handley, and Niemi (1992).

[11] Sometimes majority is interpreted as a simple population majority, but, more commonly, potential voting strength has been interpreted in terms of voting age population. However. in at least one circuit, a U.S. Court of Appeal has held that the appropriate standard for determining the minority population needed to constitute a majority for purposes of the remedial prong of the Thornburg test is minority share of the citizen voting age population (CVAP) in the district. For Hispanics, or for Asian-Americans, or other groups with high non-citizen proportions, the two measures can differ substantially. Unfortunately, a fact that judges seems to have missed is that data on race and Hispanicity that is broken down not just by age (voting age/non-voting age) but also by citizenship -- with CVAP estimates based on a population sample-- has not been available from the Census Bureau for the levels of census geography used to craft legislative lines until well after the deadlines for drawing legislative and congressional plans. Thus a CVAP-based standard is virtually impossible to apply at the time when redistricting plans are being drawn. We might also note that tabulations of another “discounting” factor that also disproportionately affects minorities, felony vote disqualifications, are not presently available for any unit of census geography below the state level.

[12] However, in the 1990s round of redistricting, many advocates for additional minority representation tended to see the language in

Thornburg v. Gingles, 478 U.S. 30 (1986) about the need to show as a part of a Section 2 claim that there existed a remedial plan in which the minority population was not just sufficiently large but also sufficiently geographically compact as having little force. Similarly, provisions requiring compactness or preservation of political boundaries specifically embedded in state constitutional or state statutory language were regarded by many voting rights advocates as being overridden by equal protection claims brought under the federal constitution or the Voting Rights Act. Shaw v. Reno proved them poor crystal ball gazers on this point (cf. Karlan, 1989).

[13] Section 5 preclearance denial decisions made by DOJ can be appealed by the affected jurisdiction to the federal district court in the District of Columbia, which hears such appeals directly. Such challenges to DOJ decisions were rare because, until the sea change in Supreme Court voting rights policies that took place in the early 1990s, DOJ maintained an unbeaten record in such challenges, and also because such challenges risked delaying elections past their regular scheduled dates -- forcing the jurisdiction to bear considerable costs in running special elections, and also creating uncertainty as to district boundaries that disrupted candidate decision-making. An important Section 5 case, Georgia v. Ashcroft, in which district court upheld the DOJ preclearance rejections of three legislative districts, has been scheduled for a hearing by the U.S. Supreme Court in Spring 2003.

[14] See Grofman and Davidson (1994) and the various other essays in Davidson and Grofman (1994).

[15] It has been suggested that the decision to push for aggressive Section 5 enforcement in the 1990s redistricting round was largely a Republican plot by Bush's political appointees in the Department of Justice to destroy Democratic dominance in the South once and for all. I regard that view as quite mistaken (see esp. Grofman 1993b). It has also been suggested that the VRA is responsible for Democratic Party decline in the South. I also reject that claim (see esp. Grofman and Handley,1998; Grofman, 2001).

[16] In the 2000 round, DOJ was again not worrying about compactness in its Section 5 reviews. Following two Supreme Court cases that limited the scope of preclearance review, the Voting Rights Sectionof DOJ has been focusing on the non-retrogression test.

[17] Of course, jurisdictions had always felt free to disregard "place" related factors when it came to fine-tuning districts for incumbency reelection success or partisan advantage, but arguably, some of the new majority-minority districts were considerably more bizarre than the districts of the past and other districts of the present (Pildes and Niemi, 1993). (Moreover, some districts that directly bordered tortuously constructed majority-minority districts necessarily shared in some of their stranger features.)

[18] In Holder v. Hall, 512 U.S. 874 (1994), for the first time the Supreme Court overrode a DOJ preclearance denial. In Shaw v. Reno the Court provided a new bar to the drawing of minority districts by requiring that race not be a preponderant motive in the line-drawing process (see further discussion below). In several of the subsequent Shaw-related cases the Court majority used the Voting Rights Section of the Department of Justice as a punching bag. These cases were usually decided by 5-4 votes. For views critical of the Shaw line of jurisprudence see e.g., Grofman (1997) and Karlan (1996)

[19] In the 1990s round of redistricting, in the South, it has been argued that the Voting Rights Section of the Department of Justice used Section 5 of the VRA to force jurisdictions to draw the maximum number of black majority districts possible, a "max-black" strategy. In this view, Shaw v. Reno was necessary to rein in an otherwise out of control DOJ and a VRA that had been extended well beyond its original aims. I do not share this view.

First, Voting Rights Act enforcement in the 1990s by the U.S. Department of Justice did not really follow a max-black strategy (Posner, 1998; *cf.* Grofman, 1993a), even though in a few states (e.g., Georgia), at least at the congressional level, it was hard to call it anything else. Second, as noted above, Shaw v. Reno and subsequent cases have not yet provided manageable standards to determine when a violation of the Shaw test occurs. Third, the problem addressed by Shaw, tortuously constructed districts, could much more simply have been addressed by the Supreme Court by clarifying the standards for remedial districts under the Thornburg Section 2 test, since it was the incorporation of that Section 2 standard by the Department of Justice into its 1990s Section 5 pre-clearance decisions, and DOJ's interpretation of that standard, that led DOJ to ask for the creation of most of the additional majority-minority districts that it demanded the states provide before pre-clearance would be given.

[20] Such criteria are generally thought to include contiguity, respecting natural geographic barriers, respecting previous political boundaries, preserving communities of interest, and drawing compact districts. Most (if not all) of the so-called traditional districting criteria are in one way or another linked to ideas of "place." See discussion in Grofman (1985).

[21] A Wuffle (personal communication, April 1, 1994) has coined the term ”liposuctioning” to desacribe what happened to the original shapes of the districts after they were redrawn to satisfy Shaw.

[22] A set of challenges to legislative lines in Mississippi in the 1980s is the other top contender for this title.

[23] This is arguably the fourth incarnation of Shaw, but there is some question as to how to count, since there have been cases involving North Carolina brought before the Court that did not deal with the main substantive issues.

[24] Despite a finding of partisan motives, because the threshold of a finding of unconstitutional partisan gerrymandering was set so high, and the Supreme Court in Bandemer took for granted that, if a political party were in control of the line drawing process it would seek partisan advantage, the Cromartie Court did not reject the plan before it as an unconstitutional partisan gerrymander.

[25] Indeed, after Cromartie, my long time associate, A Wuffle (personal communication, 2001), characterized a Shaw violation as "you'll know it when Sandra Day O'Connor sees it." He went on to say: "As long as Justice O'Connor is on the Court we will not be sure what Shaw means until after we see how she votes; and if Justice O'Connor leaves the Court we will not be sure what Shaw means until we see how her successor votes -- and probably not even then.”

[26] In Louisiana, where the redrawn district had black population dropped from about 55% to about 28% after the 1994 election, anticipating defeat, the black Democratic incumbent, Cleo Fields, chose not to run again in the district after he had waged an unsuccessful pursuit of the governorship in 1995. Louisiana's 4th district is currently held by a

Republican, who has won easily since the lines were redrawn for the 1996 election (having, indeed, run unopposed in 1998).

[27] This notion of viewing elections as a two-stage process is one I have long espoused, beginning with my expert witness testimony in Gingles v. Edmisten, heard *sub nom*. Thornburg v. Gingles, 487 U.S. 30 (1986).

[28] There are a variety of ways to develop predictive equations building factors such as turnout and incumbency into account.

[29] In this context, it is also useful to note that, as I suggested earlier, it will generally be easier to defend districts that are not majority-minority against Shaw-type challenges.

[30] Previously DOJ used its Section 5 authority to review plans to see if they would pass Section 2 muster and to determine if the plan showed evidence of unconstitutional racial purpose and/or of retrogression.

[31] It is also important to point out that the Department of Justice did not and does not see itself as having an obligation to monitor the shape of the districts being created in response to Section 5 concerns. DOJ would not seek to require a jurisdiction to draw an additional majority-minority district unless it felt that such a district could reasonably be drawn, but if, for reasons of its own, the jurisdiction chose to draw the district in a contorted or amoeba-like fashion, that is regarded as none of DOJ's business as long as the district created a realistic opportunity to elect minority candidates of choice. For example, DOJ cannot be blamed for the peculiar configuration of the North Carolina 12th Congressional district; much of the irregularities were due to concerns to protect the seat of a white Democratic incumbent in a neighboring district (Grofman, 1993a).

[32] How we handle individuals who check a multi-racial category for purposes of voting rights does not have to be the same way we handle such individuals for purposes, say, of employment discrimination. When we are dealing with individuals in employment or other situations, for example, we can ask individuals what (racial) group they most identify with; if there is litigation, we can often seek to determine how those around them perceived specific individuals in racial and cultural terms; and if there is litigation, we can look specifically at evidence on how particular categories of people were treated.

[33] Thus the idea of a racial "rainbow" with Hispanics as a separate category (in effect, "brown") is being reinforced.

[34] Symbolism, that is, for those of us old enough to remember the Heinz Food Company "57 varieties" ads.

[35] It would be nice to get the public better educated about what modern biology and genetics tell us of about how much in common all members of the human species have with one another.

[36] This has been true to a greater or lesser extent in all recent censuses.

[37] Because the return rate of census forms was higher than anticipated and thus the census count was more accurate than anticipated, and because the attempt to check census data against other sources (such as birth and death records, and data on immigration) revealed that there appeared to be a substantial overcount that partly counterbalanced the undercount, the staff at the Bureau could not be sure, given the time constraints it was facing, that the best statistical adjustments they could perform would actually improve the accuracy of the census data. The census debate in the popular press has focused largely or entirely

on undervotes, yet the Census Bureau staff found that having individuals counted more than once in the 2000 Census generated non-trivial effects on the accuracy of the census enumeration.

[38] I should also note that, even with one hand (Section 2) tied behind its back, the DOJ was still a powerful (even if often hidden) presence in 2000s redistricting, because there were so many majority-minority districts created in the 1990s round in jurisdictions whose continued existence was guaranteed in the states subject to Section 5 pre-clearance review