RACE AND REDISTRICTING IN THE 1990s

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VOTING RIGHTS IN THE 1990S: An Overview[1]

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IN THIS ESSAY WE WILL PROVIDE A BRIEF OVERVIEW OF CHANGES in voting rights case law in the 1990s. Because we have written extensively about voting rights in the past, our approach here will be a synoptic one, and we refer the reader to our earlier work for further details.[2] Our principal focus will be on issues related to race and redistricting. Thus, we will not cover, except in passing, legal issues related to one person, one vote or to partisan gerrymandering.

We may divide the modern voting rights era into five periods:

(1) In the period from 1962-1965, after *Baker v. Carr* but prior to the passage of the Voting Rights Act of 1965, one person, one vote issues are central (see Grofman, 1992b, c).

(2) From 1965-1970, the focus is on removing barriers to black registration and voting in the South (Alt, 1994).

(3) Beginning in the 1970s, and especially for legislative and congressional districting, the Section 5 powers of the U.S. Department of Justice are at the heart of voting rights jurisprudence (Grofman, Handley, and Niemi, 1992). Because the Department of Justice is concerned that multimember districts may operate to submerge black voting, by the mid-1980s, because of Justice Department preclearance denials (or threat of denial) the number of multimember districts used for legislative elections in the South is drastically reduced (Niemi, Hill, and Grofman, 1985).

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[2] See especially Grofman, 1985, 1992a; and Grofman, Handley, and Niemi, 1992 for voting rights case law prior to the 1990s; and Grofman and Handley, 1995a; and Grofman, 1997 for more recent developments. Portions of this essay were taken from Grofman and Handley, 1995a.

(4) In 1982, Section 2 of the Voting Rights Act is amended to assure that a finding of discriminatory purpose will not be needed before a districting plan can be held to violate the Voting Rights Act. Although this change was intended to restore a legal status quo ante (See Grofman, Handley, and Niemi, 1992), the new language of Section 2, especially as interpreted by the Supreme Court in 1986 in the landmark case of *Thornburg v. Gingles*, leads to a wave of successful challenges to local use of at-large elections throughout the South (see Davidson and Grofman, 1994). The Section 2 standard is also held to be applicable to single member district plans (Grofman and Handley, 1992).

For congressional and legislative districtings in the 1990s, a combination of Section 5 actions by the Department of Justice, and (to a much lesser extent) the threat of litigation under Section 2 of the Act, yielded major gains in minority representation. In states covered by Section 5, as a result of strong enforcement pressures from the Department and greater technical sophistication about map-drawing possibilities, the initial 1990s districtings gave rise to a huge increase in the number of black majority seats in Congress—far higher than in any previous decade. Also there were large, if not quite as startling, gains in the number of majority-minority seats in state legislatures in the South and Southwest (Handley, Grofman and Arden, this volume), especially in heavily black states like Georgia and Mississippi.[3] A very high proportion of the majority black districts that have been created have elected minority candidates of choice (Handley, Grofman, and Arden, this volume). There were gains in Hispanic representation as well, also coming largely from the newly drawn majority-minority seats (Handley, Grofman, and Arden, this volume).

(5) With its 1993 decision in *Shaw v. Reno,* the voting rights tide turns (somewhat unexpectedly) in a much more conservative direction. In districting, the Supreme Court majority in *Shaw* and subsequent cases finds an overemphasis on the racial characteristics of districts to the exclusion of other representational concerns to violate constitutionally protected rights. Unfortunately, however, the exact nature of the rights that are being violated is, to put it mildly, less than clear (see discussion in e.g., Karlan, 1993; McDonald, 1995; cf. Pildes and Niemi, 1993). The Court arguably leaves at least equally obscure the crucial operational question of how to determine when race is such a "preponderant" factor that a given plan must be struck down as unconstitutional, although peculiarities in district lines based on purely racial considerations are taken to be prima facie evidence for possible unconstitutionality (see Grofman, 1993a, Grofman and Handley, 1995a; Grofman, 1997).[4]

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[3] Deep south states have a long history of contesting any attempt to provide black representational gains through redistricting (see e.g., Parker, 1990).

[4] For other perspectives on *Shaw v. Reno,* see e.g., Pildes and Niemi, 1993; Aleinikoff and Issacharoff, 1993; Karlan, 1995; Kousser, 1995b; McDonald, 1995; McKaskle, 1995; Issacharoff, 1996; and the various essays in McClain and Stewart, 1995; and Peacock, 1997.

1990S REDISTRICTING PRIOR TO *SHAW V. RENO*

Critical to the dramatic gains in minority representation that took place in the early 1990s have been a number of key factors, most of which are directly related to the Voting Rights Act,[5] including: (a) an insider rather than outsider position for minorities with respect to legislative and congressional districting in the 1990s in many states that reflects previous gains in minority representation (see e.g., Holmes, this volume; Hagens, this volume); (b) the computer revolution that made it possible for minority legislators and minority advocacy groups to generate a plethora of plans to be produced at the click of a mouse, and allowed for fine-tuning of variants;[6] (c) vigorous enforcement of Section 5 of the Act by the Voting Rights Section of the Department of Justice; [7] (d) until quite recently, remarkable continuity in voting rights case law, with the three-pronged test in *Thornburg v. Gingles* (1986) defining the parameters of minority vote dilution for jurisdictions not covered by Section 5; [8] and (e) a Republican strategy that resisted bipartisan agreements on districting plans and sought to use litigation under the provisions of the Act to force major changes in district lines, with the expectation that such changes would inevitably benefit the Republican minority by concentrating Democrats in heavily minority districts and, in the process, displacing a number of white Democratic incumbents.[9]

THE 1990S LEGAL BACKLASH TO VOTING RIGHTS ACT ENFORCEMENT

Shaw v. Reno and Its Progeny

The Voting Rights Act has long been seen as one of the most successful pieces of legislation of the post-WW II period, whose consequences include a dramatic growth in black registration and black voter turnout, especially in the period immediately after its passage (Alt, 1994), and even more dramatic long-run gains in the number of black (and to a lesser extent, Hispanic) elected officials.[10] Recently, however, it has come under increasing attack as having outlived its usefulness and having been perverted to purposes not intended by its framers.[11] The strange shape of some majority-minority districts helped trigger a scholarly and public backlash against the Voting Rights Act in the 1990s[12] and, arguably, is the direct antecedent to the Supreme Court's opinion in *Shaw v. Reno.*[13]

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[5] Grofman (1993a) notes that the Voting Rights Act is often most influential where its impact is least visible. By anticipating how courts and DOJ will interpret the Act, legislators frequently make changes they would not otherwise have made to reduce the likelihood of a plan being overturned. Consequently, even if a plan is overturned in court or denied preclearance, the difference between what was rejected and what eventually becomes law may not seem that large. Yet, without the influence of the Voting Rights Act, the proposed redistricting plan almost certainly would have looked quite different. Grofman (1993a: 1263) characterized the Act as a "brooding omnipresence" in redistricting decision making in the 90's.

[6] For example, Hagens (this volume) shows how the ready computer access of minority legislators and groups seeking to foster minority interests affected the redistricting bargaining process in Virginia.

While we can understand popular disgust at some of the lines drawn ostensibly in the name of fostering minority voting rights: (a) many of the more bizarre features of the legislative and congressional plans of the 1990s reflect partisan or incumbent protection calculations (just as in previous decades) and thus should not be blamed entirely on the Voting Rights Act; and (b) compactness is a criterion of limited importance.[14] Nonetheless, the shape of districts such as North Carolina's 12th CD suggested to the media, the public, and most importantly, to many members of the Supreme Court, that, in the 1990s, race had (except for population equality)[15] become the only real criterion governing redistricting, and that "maximizing" had replaced "equal opportunity" as the standard.[16]

In *Shaw v. Reno*, the Court created a new constitutional cause of challenge to a districting plan, namely that a plan had an impermissible racial motive—to segregate the races—allowing a plan to be struck down even if did not have impermissible consequences in terms of diluting the voting strength of any group. In *Shaw*, a five member majority on the Supreme Court viewed a North Carolina congressional district (the 12th North Carolina CD) that had been consciously drawn with a black majority as potentially violative of the Equal Protection Clause of the 14th Amendment because the nature of the startlingly irregularities in its shape suggested to them that the district could have no legitimate purpose other than to assure racial representation. A second Supreme Court decision, *Shaw v. Hunt,* struck down the plan, reversing the three-judge panel that had upheld its constitutionality (see Sellers, Canon, and Schousen, page 269 this volume). Because of the delay caused by the several rounds of litigation, a new congressional plan for North Carolina will not be put into place until the 1998 election.[17]

After *Shaw*, with the *Miller v. Johnson* decision, which overturned a Georgia

[7] One of the puzzles of voting rights enforcement is why the Department of Justice under Republican presidents such as Bush pursued a generally tough enforcement policy in the area of voting rights while regressing or retrenching in all other civil rights domains. One standard answer is that it is all a Republican plot. In this view, in the 1990s round of districting Republican officials under Bush ordered DOJ try to create as many highly concentrated minority districts as they could in order to pack Democrats. But, this is far too simplistic: there are a number of instances where DOJ actions under the Bush Administration (as in the Los Angeles County Board of Supervisors case) directly harmed Republican interests. As one of us has argued elsewhere (Grofman, 1993a), the civil service professionals at the Voting Rights section of DOJ seek to enforce the Act in a completely non-partisan fashion and they are highly competent (albeit overworked). While there is some interference from political appointees at DOJ, all in all, this interference is minimal.

Nonetheless, Republican belief that strict voting rights enforcement would in the long-run benefit Republican interests has acted to shield the Voting Rights Section from the conservative backlash that has crippled civil rights enforcement in other areas--permitting DOJ staff in the Voting Rights Section to, by and large, just do their job and enforce the Act as they see it, especially with respect to Section 5. When Clinton came into office, after his retreat on the Lani Guinier appointment there was an initial period when there was no Assistant Attorney General (AAG) for Civil Rights—conducive to a maintenance of previous enforcement policies—and when Deval Patrick was appointed AAG, he, too, was committed to vigorous enforcement of the Act. All in all, there has been remarkable continuity in DOJ voting rights policies from Bush to Clinton, with the present AAG vigorously defending the preclearance denials made by his Republican predecessor. See further discussion of these points in Grofman (1993a).

congressional district that was nowhere near as ill-compact as the North Carolina 12th, but whose creation could be laid almost entirely to insistence by the Department of Justice that Georgia go from one majority black congressional district in the 1980s redistricting round to three such districts in the 1990s (see Holmes, this volume), it is clear that the Supreme Court majority is anxious to put curbs on DOJ's use of its preclearance authority,[18] and it is also clear that ill-compactness is not a necessary condition for a district to be struck down as violative of *Shaw*.[19]

The *Shaw v. Reno* decision can be attacked on a variety of grounds. In particular, it creates a new constitutional standard that is hard to interpret and it places a burden of presumptive constitutional illegitimacy on tortuously shaped black majority districts that it does not place on similarly ugly white majority districts.[20] On the face of it, *Shaw*, *Miller*, and related subsequent decisions[21] might appear incompatible with the requirements of the Voting Rights Act for race-conscious districting to remedy vote dilution, and thus they appear to threaten the dramatic black (and Hispanic) gains in representation that have been brought about over the past several decades through the creation of majority-minority districts. Moreover, *Shaw* and subsequent decisions have already led to the voting rights bar being put on the defensive, defending *Shaw*-type claims, with few new voting rights challenges being brought; and to a greater unwillingness of those defendant jurisdictions faced with Section 2 lawsuits to agree to draw majority-minority districts as part of an out-of-court settlement, since they can take refuge in the claim that the remedial district(s) violates *Shaw*.[22] Nonetheless, we are not as concerned about the dangers of *Shaw* and its progeny as are some other voting rights specialists.

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[8]Prior to *Shaw*, despite several opportunities to revisit the *Thornburg v. Gingles* decision and make it harder to prove a violation of Section 2 of the Act, the Court had reiterated that *Thornburg* defines the Section 2 test for minority vote dilution. Indeed, cases decided early in the 1990s applied the *Thornburg* test to judicial elections for the first time (albeit this was an interpretation that federal courts would subsequently backtrack from: see Karlan, 1997 forthcoming). While the decision in *Presley v. Etowah County* (1992) suggested that the Supreme court was not really prepared to advance voting rights case law to go beyond the issues covered in *Thornburg*, it did not really represent a retrenchment (see discussion of this case in Grofman and Handley, 1995). Similarly, the failure of federal courts to require a statistical adjustment for census minority undercount could also not be taken to be a retrenchment of previous voting rights standards. In general, the standards for operationalizing one person, one vote remained unchanged in the 1990s. Also, (with the partial exception of *Republican Party of North Carolina v. Hunt*) the potential for a districting plan to be held unconstitutional as a partisan gerrymander (Grofman, 1990) went unrealized in the 1990s (see discussion in Grofman and Handley, 1995a). Arguably, the closest thing to a genuine change in voting rights case law prior to *Shaw* was that the Supreme Court signaled to federal courts that they should defer more to state court jurisdiction in the initial phases of redistricting litigation than some federal courts had shown themselves wont to (Karlan, 1993). This was a minor course correction, with no direct implications for substantive doctrine.

[9] See further elaboration of this argument in Grofman (1993a).

[10]There has been a long history of bipartisan support for strong voting rights enforcement. Also, voting rights law was seen as fundamentally distinct in many ways from other areas of 14th Amendment jurisprudence, permitting even conservative justices to assent to color-conscious choices so as to safeguard fundamental rights (see further discussion of these points in Grofman, 1993a: 1243-1247; Grofman and Handley, 1995a).

While the 5-4 lineups in *Shaw* and *Miller v. Johnson*, and the intemperate tone of some of the opinions in these (and other) cases, suggest that the Court is strongly polarized around voting rights issues and that there are Justices on the Court who wish an almost total reversal of the current interpretation and implementation of the VRA, [23] there is every reason to expect that extreme anti-VRA views will remain in a minority on the Supreme Court, at least for the near future. Justice O'Connor, whose orientation is relatively case-specific and fact-specific, holds the pivotal vote (Grofman, 1997).

Moreover, if we look at the Supreme Court's 1995 *per curiam* affirmance of the California districting plans created under the auspices of the California Supreme Court in *DeWitt v. Wilson*, we see that majority-minority districts can be sustained, as long as it can also be shown that factors other than racial balance were important in the districting decision-making as to the number of and configuration of these majority-minority districts. Also, as yet (February 1998), *Thornburg* is far from dead, especially since there are ways to make *Thornburg* and *Shaw* compatible (Grofman, 1997).

Finally, as one of us has written elsewhere (Grofman, 1997), the most important implications of *Shaw* hold only at the level of congressional districting: "(G)iven the degree of residential segregation in the U.S., drawing relatively compact and clearly contiguous black districts at the local level (or even for most

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[11]In the 1980s we had already seen the beginnings of a backlash to the Act, especially among Republicans. In 1982 Republicans like Senator Orrin Hatch opposed the Act's extension, and initially so did Ronald Reagan. Opponents of the Act claimed that Section 5 had become an unreasonable intrusion of the federal government into state affairs and that the new language of Section 2 of the Act was tantamount to a quota system. Similarly, Abigail Thernstrom (1985, 1987), in work which received considerable scholarly attention, and others (e.g., Schuck, 1987), argued that the Act had been distorted beyond the intent of its framers and was being enforced by the Department of Justice in an inappropriately rigid and aggressive manner. Nonetheless, this point of view had little or no impact on Voting Rights Act enforcement in the 1990s round of districting.

[12]In addition, (white) Democrats have been concerned with the supposed partisan implications of drawing heavily minority districts that tend to soak up Democrats (see the previous chapter by Grofman and Handley, this volume).

[13]The current negative reaction to the VRA also cannot be understood without taking into account constitutional and normative arguments about ideas about equality and competing individualistic and group-oriented conceptions of rights. For critics of the Act, such as George Will or Abigail Thernstrom, the VRA has come to embody an idea of tribalistic representation that is incompatible with a commitment to a color-blind society, and thus incompatible with the "proper" interpretation of the fourteenth amendment's "equal protection" clause. As Will (1995) puts it: "The creation of 'majority-minority' districts expresses the ideology of 'identity politics': you are whatever your racial or ethnic group is. But that ideology, promulgated by political entrepreneurs with a stake in the racial and ethnic spoils system, is false regarding the facts of human differences, and bad as an aspiration and an exhortation." For discussion of the normative debate about voting rights in this essay see, e.g., Davidson and Grofman, 1994 (esp. Grofman and Davidson, 1992b); Grofman, 1993a.

[14]See further discussion of the compactness issue in Grofman (1993a). Also see Niemi, Grofman, Carlucci and Hofeller (1990) and Pildes and Niemi (1993).

[15]We might also note in passing that, in our view, an overemphasis on strict population equality has often been carried to the point of absurdity and led to disregard for preserving political subunit boundaries or creating districts that mapped onto (re)cognizable communities of interest. See e.g., Stokes (1993: 22), Grofman (1992c: 786-788).

state legislatures) is not that difficult." Moreover, even at the congressional level, the results of elections in 1996 suggest that, with the strong advantage given by incumbency,[24] black candidates can continue to win in reconfigured districts (such as those in Georgia and Texas) when those districts remain very heavily black in population, even if not majority black (see e.g. the discussion of the 1996 congressional results in Georgia in the concluding epilogue in Holmes, this volume).

LULAC v. Clements and the Definition of Racially Polarized Voting

Important as *Shaw* is as a brake on further gains in descriptive minority representation, and certain as *Shaw*-related litigation is to lead to the defeat of some minority officeholders when districts become reconfigured,[25] in our view, the greatest potential for a major setback in minority representation lies not in *Shaw* and its progeny, but in the potential consequences of another much less visible case, *LULAC v. Clements*.[26] In *LULAC*, a majority of the 5th circuit, in an *en banc* ruling, reinterpreted the definition of racial bloc voting in a fashion that we see as incompatible with the descriptive approach to the presence or absence of racial bloc voting taken in Thornburg. The *LULAC* court moved away from the straightforward question of whether or not minority candidates of choice regularly lose because of white bloc voting into a consideration of whether or not other factors, such as straight party-line voting, could explain the racial differences in voting patterns. The *LULAC* line

[16] Elsewhere, one of us has argued that this is a mischaracterization of 1990s case law and DOJ enforcement practices (Grofman, 1993a). See esp. Posner (this volume) and the discussion in *Moon v. Harris* (1997) of the DOJ stance in Virginia. The three judge court in *Moon* observes (1997 WL 57432, 8) that "the record reflects no indication that the Department of Justice advocated a 'maximization' policy for Congressional districts in Virginia. Indeed, the acting head of the Voting Rights Section of the Department of Justice spoke in Richmond prior to the redistricting process and stated that the Department did not read the VRA to require that, if a majority black district could be created, it must be."

[17] At the time of writing (February 1998), it is not clear whether this plan will be a legislative one or one drawn by the courts.

[18] For example, the three judge court in *Diaz v. Silver* (1997), the New York congressional voting case, asserts that "The Supreme Court had found that DOJ had unlawfully interpreted the VRA to require the maximization of majority-minority districts." (slip op. at p. 61; cf. the totally different, and we believe far more accurate, interpretation of the DOJ position with respect to maximization set forth in 1997 by the three judge court in *Moon v. Harris* quoted in an earlier footnote).

[19] For example, the three judge court in *Diaz v. Silver* (1997) asserts that "the fact that a district is compact does not immunize it from scrutiny. Compactness or its absence would not itself excuse racially motivated districting" (slip op. at p. 78).

[20] *Shaw* is jurisprudentially excessive because it creates a new constitutional violation when it could have addressed the perceived problem in a more efficient and focused manner merely by correcting legislative misinterpretations of Section 2 (and Section 5). The Supreme Court failed to appreciate the political/legal dynamic that led to the creation of majority-minority districts. Thus, it crafted an overbroad remedy, when it could, in our view, have achieved the same end with far less travail by choosing a different case to send a message to legislatures (and to lower courts and the Department of Justice) about how better to interpret the geographical compactness element of *Thornburg*'s three-pronged test for Section 2 vote dilution and/or the Section 5 preclearance denial standard.

[21] See, e.g., Engstrom and Kirksey, this volume, for discussion of the various *Hays* decisions, the *Shaw*-related litigation in Louisiana.

of argument has now been taken up by other circuits,[27] and is likely to be a major source of contention in future voting rights cases, despite the fact that, arguably, it flies in the face of Justice Brennan's position in *Thornburg* that only the fact of racial polarization, not evidence as to the reasons for the existence of that polarization, is needed to demonstrate a dilutive impact. [28]

According to Judge Higginbotham, who wrote the *LULAC* majority opinion, in partisan elections, racially polarized voting occurs only "where Democrats lose because they are black, not where blacks lose because they are Democrats." Thus, *LULAC* stands for the proposition that, even if minority voters support the minority candidate in overwhelming numbers and non-minority voters oppose the minority candidate in overwhelming numbers, if it can be demonstrated that minority voters supported the minority candidate not only because s/he was black/Hispanic but because he was a Democrat, while non-minority voters opposed that candidate not only because s/he was minority but because that candidate was a Democrat (and thus not a Republican), then voting is not racially polarized.

If we accept this definition of polarized voting, in general elections where candidates run on party labels, polarized voting will be roughly as scarce as hen's teeth, since blacks (and Mexican-Americans) vote overwhelmingly Democratic, while a majority of whites in most areas of the South now support Republican.[29] Thus *LULAC* represents the possibility of a total turnaround in voting rights case law, since proving polarization in voting patterns is the linchpin of minority voting rights claims with respect to districting.

However, even if we grant Judge Higginbotham's premise that the simple descriptive fact of polarized voting is not enough to show that voting is polarized in a legally relevant way (which conflicts with Justice Brennan's views in

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[22] Moreover, in the redistricting taking place next century, it seems likely that jurisdictions covered under Section 5 of the Act will be much more likely to challenge the Department of Justice's Section 5 preclearance denials in D.C. court by arguing that no constitutional remedy is possible because any remedy plan would require ill-shaped districts.

[23] For example, *Hall v. Holder* (1994), is important not for its decision, a relatively narrow holding that legislative size was not litigable under the VRA because there were no clear standards as to how large a legislature should be, but because the concurring opinion by Justice Thomas (joined by Justice Scalia) is a complete repudiation of the past several decades of voting rights jurisprudence. Their opinion claims that earlier court decisions were wrong in accepting the fact that the VRA applied to issues of vote dilution, and it also makes a strong normative argument against the creation of what they call racial "safe boroughs."

[24] Various students of congressional elections have found the advantages of incumbency (e.g., name recognition, better access to campaign funding) to be worth from 6 to 10 percentage points of vote share in a general election over what a candidate of the same party running when the seat is open could be expected to achieve.

[25] See, for example, Engstrom and Kirksey (this volume) for a discussion of what happened when Louisiana congressional lines were redrawn after a successful *Shaw*-type challenge.

[26] *LULAC v. Clements*, 999 F. 2d 831(5th Cir. 1993), cert denied 114 S. Ct. 878 (1994). *LULAC* also breaks new ground in upholding the applicability of Section 2 of the Voting Rights Act to judges. We will not discuss that aspect of the case here, since subsequent cases have led to a backsliding from the practical import of that aspect of the opinion (see Karlan, 1997 forthcoming).

[27] See esp. *Lewis v. Alamance County*, 99 F 3rd 600 (4th Cir. November 4, 1996).

Thornburg), for the Higginbotham argument to make sense we must be able to treat party and race as independent factors and to statistically separate out their effects. The latter is very difficult to do, and if we try to do so using cross-sectional data, we would be mistaking the true causal link between race, partisanship and voting behavior. It can readily be shown that the affiliations of white voters in the South and black voters in the South have fluctuated directly with the nature of the racial policies espoused by the Democratic and Republican parties.[30] Moreover, the political affiliations of white voters in the South can be directly related to the racial context in which they find themselves, with whites in the most heavily black areas having deserted the Democratic party almost entirely (Grofman and Handley, 1995b; Huckfeldt and Kohfeld, 1989; cf. Carmines and Stimson, 1989).[31]

DISCUSSION

While decisions such as *Shaw* would probably have turned out the same even if the Justices in the majority had been persuaded to change their minds about certain important and mistaken factual claims about the supposed present-day irrelevance of race in American politics and American society,[32] it seems plausible to believe that normative/constitutional judgments are shaped at least in part by views about consequences, and thus by views about social facts.[33] In this light, we would like

[28] The definition of polarized voting used by the Supreme Court in *Beer v. U.S.* and elaborated in *Thornburg*, is simply that whites and blacks vote for different candidates, and, in particular, that whites regularly oppose black candidates who have the support of the black community. If the standard definition of racially polarized voting is used, then, at least in the South, the evidence for racially polarized voting is considerable, although there are not many examples of blacks losing in white majority seats because black candidates are discouraged from ever seeking election in such constituencies. *LULAC* sneaks an intent requirement back into Section 2 jurisprudence because it moves from the test for racially polarized voting based simply on the presence or absence of differences in the support levels of black and white (or Hispanic and non-Hispanic) voters vis a vis the minority candidate(s) of choice that is specified in *Thornburg* to a test that requires consideration of the factors that determine how voters voted, and thus to a test of whether or not the intent lying behind the decision of white/Anglo voters to not support the minority candidate could be regarded as racial in motivation. We regard the 5th circuit reinterpretation of the definition of racially polarized voting as incompatible with the test for bloc voting used in *Thornburg*.

[29] In our view, however, it is also critical to understand what happens in party primaries, where polarized voting patterns may also be found. If voting is polarized in the primaries of one or both parties, whether or not it is also polarized in the general may be irrelevant to a determination that minority voting strength has been diluted through the presence of polarized voting.

[30] The first cracks in the Democratic solid South, white desertions by the droves, came in 1948 in response to Truman's desegregation stance, and the pattern was repeated in 1964, in response to Lyndon Johnson's civil rights policies. Blacks finally deserted the party of Lincoln, to vote for Lyndon Johnson and succeeding Democratic presidential nominees in proportions above 90 percent, only after passage of the Civil Rights Act of 1964. Today, the two major parties stand for very different positions with respect to civil rights, and, as we tend to forget, which party is on which side has flip-flopped over the past 30 years.

[31] A considerably more detailed discussion of the problems with the *LULAC* decision, one from which much of the material above has been drawn, is found in Grofman and Handley (1995a). Also, see Grofman (1985; 1991a; 1991b; 1993b; 1993c; 1995) for a general discussion of how to measure racially polarized voting and other related issues.

to believe that the Supreme Court majority in cases such as *Shaw* would not have been quite so fervent in their denunciation of the evils of black majority seats and in their likening of such seats to racial apartheid if they had been better grounded in empirical reality about the continuing existence of barriers to minority electoral success from non majority-minority districts,[34] or the fact that (because of racial discrimination) blacks do perceive important political interests in common with one another simply because they are black,[35] or recognized the limited truth to the claim that a focus on descriptive representation, on balance, harms minority interests by helping conservative Republicans to get elected.[36]

Justice O'Connor's opinion in Shaw seeks a moral high ground by attacking districts for whites and districts for blacks (or other minorities) as tantamount to *Shaw* apartheid. However, if (at least in the absence of minority incumbents) voting is heavily polarized along racial lines (in primaries and/or general elections), and minority candidates usually lose, then drawing districts with no attention to their demography may mean that only (non-Hispanic) whites can be expected to win election. We must be careful that a zeal to end overreliance on racial considerations in the districting process not retard the integration of the halls of our legislatures. While most of us would prefer to live in a color-blind society, we live in a "'second-best' world where color conscious problems require color-conscious remedies" (Grofman and Davidson, 1992b), even if that merely means being attentive to the continuing massive residential segregation of minority groups (Massey and Denton, 1993).[37]

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[32]In his dissenting opinion in Miller, Justice Stevens (joined by Justice Ginsburg) approvingly quotes various social scientists about the continuing significance of racial and ethnic divisions in American life. Unfortunately, most of the works quoted by Justices Stevens and Ginsburg are twenty or more years old. However, more current works making the same point are easily found (see below).

[33]Like a number of other social scientists (see esp. Kousser, 1995b: 18-19), we are bothered by the remarkably casual way in which Supreme Court Justices throw out empirical assertions that lack factual grounding as if they were simply so obvious as to not need supporting justification. For example, Shaw is misguided in its views that the majority-minority districts that have been created can be directly analogized to "racial apartheid." Usually these districts are the most racially balanced districts in a state.

[34]See Handley, Grofman, and Arden (this volume).

[35]If we look at the similarities between white and black attitudes on a large variety of issues, from foreign policy to abortion, it is possible to argue that blacks and whites are really not that different in attitudes, but such an analysis is quite misleading about things that matter most. When it comes to attitudes and beliefs linked to race, the empirical evidence is overwhelming that the gap between whites and blacks remains huge. As Kousser (1995b) summarizes the evidence: "(W)hites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and government at all levels should act to remedy this serious plight" (Kousser, 1995b: 35). Related arguments and evidence is found in other recent sources such as Welch, 1991; Tate, 1993; and Dawson, 1994. Dawson (1994), for example argues that, for blacks, race is more important than class (or other factors) in defining self-identity (or having it defined for one by others).

[36] For evaluation of this claim see the previous chapter by Grofman and Handley (this volume) and references therein.

[37] The Voting Rights Act may be far from perfect, but the need for it remains. As Maurice Chevalier responded when asked how he liked being old: "Consider the alternative."

Despite *Shaw v. Reno* and its progeny, we prefer to end this essay on a reasonably hopeful note. As we argued above, we see *Shaw* as limited in its probable impact.[38] We would prefer to emphasize how far we have come since the passage of the Voting Rights Act.[39] In large part because of the Voting Rights Act, the 1990s round of redistricting, like that in previous decades, led to substantial growth in the number of minority officials in Congress and in state legislatures.[40] Even though more majority-minority districts will fall to *Shaw*-type challenges,[41] not all (or even most) districts will be (successfully) challenged, and the incumbents in many redrawn districts will continue to be reelected even though minority population in the district will be reduced somewhat below a majority.

[38]Also, even though we are both highly skeptical about taking compactness too seriously, especially as compared to other factors such as preserving communities of interest, we do believe that contiguity of district boundaries is, in general, desirable, and one of the present authors testified against the North Carolina 12th congressional district on the grounds that the plan in which was embedded was a patchwork crazy quilt lacking rational state purpose (Grofman, 1992a). In his testimony, however, Grofman indicated that the North Carolina plan was very nearly *sui generis* in its bizarreness (also see Grofman, 1993a: 1260-1263.

[39]Indeed, even in the worst case scenario, to the extent that we do go backwards in minority electoral success, it will be toward the status quo circa 1980, not that circa 1890.

[40]Also, some additional districts in which minorities have a realistic opportunity to elect candidates of choice will be created by new Section 2 challenges to at-large systems at the local level.

[41]For example, congressional districts in Virginia and New York were struck down by three-judge federal courts as unconstitutional under *Shaw*, and even the substantially redrawn North Carolina congressional districts were struck down in March 1998.