Washington University Journal of Law & Policy

Volume 42 *Privilege Revealed: Past, Present, & Future*

2013

Breaking Out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege

Joe Mitchell

Breaking Out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege

Joe Mitchell*

Racial discrimination remains a major problem in the United States.[1] Despite the end of slavery after the Civil War, the temporary establishment of inclusive Southern political systems during Reconstruction,[2] and the Civil Rights Movement of the 1960s, huge economic and political disparities remain between racial groups within the United States.[3] The election of Barack Obama suggests that the United States' racial climate has improved, but incarceration, education, and employment data all suggest that much more change is needed.[4] In order to bring about the improvement that is so plainly needed, political action must be taken.[5] In order for these political

* J.D. (2013), Washington University School of Law; B.A. (2010), University of Minnesota. Many thanks to Will Mitchell and Janet Mitchell for their help in this project; to professors Russell Osgood and Barbara Flagg for introducing much of this material to me; and to my parents and Anastasia Woodruff for their support.

1. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 173–85 (2010).

2. *See* W.E.B. Du Bois, *Reconstruction and Its Benefits*, 15 AM. HIST. REV. 781, 795 (1910).

3. *See* White v. Regester, 412 U.S. 755, 768 (1973) (noting continued existence of discriminatory treatment of Mexican Americans in education, employment, economics, health, and politics). *See also* Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U.L. REV. 469 (2001) (noting racial discrepancies in disenfranchisement rates in the 2000 election).

4. *See generally* Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010) (arguing that modern mass incarceration of racial minorities is backlash from the Civil Rights Movement); NATL. CTR. FOR ED. STATS., ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (2009), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2009455.pdf (documenting a large racial gap in both educational achievement and qualification for reduced-price lunch programs).

5. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (stating that "the political franchise of voting is . . . regarded as a fundamental political right, because preservative of all rights").

steps to take place, the voting public must first elect candidates who will support policies desired by minority communities.[6]

The best way to improve minority political representation within the current political framework[7] is to rework congressional districting schemes to make minority votes count. By integrating congressional districts, non-white voters would be able to influence a greater number of representatives, and white citizens would become more aware of the injustices that current legal systems impose on minority groups. This Note will proceed in five parts. Part I will discuss the history of minority voting rights. Part II will describe the history of non-white majority congressional districting schemes. Part III will evaluate the pros and cons of non-white majority schemes. Part IV criticizes the "crossover" district model proposed by some scholars. Lastly, Part V concludes that full integration of congressional districts might produce the best long-term political results for non-white communities.

I. A HISTORY OF MINORITY VOTING RIGHTS

Minority interests have always been excluded or marginalized in the American political system.[8] Voting rights were initially reserved to white land-owners.[9] As suffrage spread, exceptional steps were taken to prevent minority citizens from exercising meaningful political power.[10] After a brief period during Reconstruction when Black[11] votes and representatives were integral to Southern

6. *See* Christopher L. Eisgruber, *Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan*, 50 VAND. L. REV. 347 (1997) (describing necessity of legislative coalition-building to exert influence in a political system).

7. By "current political framework," I mean a first-past-the-post, two-party system with congressional representatives from geographical districts. Implementing instant run-off voting, parliamentary-style party list voting, or other significant voting reform present potential improvements not discussed in this Note.

8. *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993).

9. ALEXANDER KEYSSAR, RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5 (2000).

10. *See* Daniel P. Tokaji, *Representation and Raceblindness: The Story of* Shaw v. Reno, *in* RACE LAW STORIES 497, 502–03 (Rachel F. Moran & Devon W. Carbado eds., 2008).

11. "When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment:*

legislatures,[12] the Jim Crow era undid much of Reconstruction's racial progress.[13]

Congress passed no civil rights litigation between Reconstruction and 1957,[14] when an ineffectual bill was passed.[15] A second hollow bill was passed in 1960.[16] These bills were focused on providing the right to vote, but the Senate made sure that the bills, as passed, were toothless.[17]

In 1960, the U.S. Supreme Court decided *Gomillion v. Lightfoot*, a landmark voting rights case.[18] That decision heralded the opening of a decade that saw several positive changes in the law regarding minority political participation.[19] In *Gomillion*, the city of Tuskegee redrew its boundaries, originally square, to form a 28-sided figure to

---

Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

12. Tokaji, *supra* note 10, at 500. The Reconstruction period is notable for the considerable action taken in a short span of time. Du Bois credits "negro rule" with enacting democratic government, free public schooling, and social legislation. Du Bois, *supra* note 2, at 795. Du Bois concedes that the experiment of Black enfranchisement during Reconstruction produced the "worst imaginable" results, but concludes that the bad results were caused by the white community's choice to respond with a "Reign of Terror" instead of "a campaign of education." *Id.* at 788, 793.

13. *See* Tokaji, *supra* note 10, at 500–01 (stating that "as of 1940, only 3% of voting-age blacks in the South were even registered"). For a compelling description of the terror of the Jim Crow era, see Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).

14. Tokaji, *supra* note 10, at 504.

15. Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634. This act established the office of the Assistant Attorney General for Civil Rights.

16. Civil Rights Act of 1960, 86 Pub. L. 449, 74 Stat. 90. This act allowed federal courts to wrest oversight of elections if a "pattern or practice" of exclusion was found, but due to various factors, especially the reluctance of district judges to utilize the provision, the bill was a dead letter. *See also* Tokaji, *supra* note 10, at 505.

17. Tokaji, *supra* note 10, at 504–05. Strom Thurmond delivered a filibuster of more than twenty-four hours before the passage of the 1957 act, and a coalition of Southern senators filibustered the 1960 act. *See* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1027 (2011) (describing Thurmond's 1957 filibuster as the longest on record); Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 36 (Robert D. Loevy ed., 1997) (describing filibuster of 1960 act).

18. 364 U.S. 339 (1960).

19. *See infra* notes 22–36 and accompanying text.

exclude Blacks from city politics.[20] The Court ruled that Tuskegee's new lines were unconstitutional under the Fifteenth Amendment.[21]

Two years later, *Baker v. Carr* moved districting claims, which under *Gomillion* were litigated under the Fifteenth Amendment, to the Equal Protection Clause of the Fourteenth Amendment.[22] Six justices found that the state districting at issue was justiciable under the Equal Protection Clause, but the justices split three–three on how to apply the clause.[23] The analysis was left unclear until *Reynolds v. Sims*, decided in 1964.[24] In *Reynolds*, the Court held that state electoral districts that varied in population by up to a factor of forty-one were unconstitutional.[25] The Court stated that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[26] The opinion in *Reynolds* rang in a new era in which efforts were made to include minority voices in the political process.[27]

In 1965, Congress passed the Voting Rights Act.[28] This act, unlike its predecessors of 1957 and 1960, provided substantial support to minority voters' political rights.[29] Section 2 of the Voting Rights Act barred practices that infringed on minority vote participation, and Section 4 required certain states to cease using literacy tests.[30] Section 5 required certain states to pre-clear changes in voting procedures by obtaining a pre-clearance from the Department of Justice or an approving declaratory judgment from the D.C. Circuit Court.[31] The Voting Rights Act had a dramatic impact, and minority

20. 364 U.S. at 340.
21. *Id.* at 346.
22. 369 U.S. 186, 237 (1962).
23. *Id.* at 251 (Clark, J., concurring).
24. 377 U.S. 533 (1964).
25. *Id.* at 546–47 (Jefferson County, with a population of over 634,684, received the same representation as Lowndes County, with a population of 15,417).
26. *Id.* at 555.
27. *See infra* notes 28–36.
28. Pub. L. 89-110, 79 Stat. 437 (current version at 42 U.S.C. § 1973 (2011)).
29. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838 (1992).
30. *Id.*
31. Voting Rights Act of 1965, § 5, 79 Stat. at 439. The Attorney General was tasked to name states or subdivisions within states that would be required to obtain pre-clearance. Any

political participation rose dramatically following the Act's ratification.[32] The judicial system, at times, vigorously implemented the Act.[33] In 1969 in *Allen v. State Bd. of Elections*, the Court held that four different methods of undermining minority political participation were each independently illegal, finding that the Act was "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[34] In *White v. Regester*, the Court barred the use of multi-member electoral districts, finding the method to "enhance[] the opportunity for racial discrimination."[35] The Act and its early jurisprudence combined to be a successful first step towards incorporating long-repressed minority groups into the political life of the United States.[36]

As the momentum generated by the Civil Rights movement cooled, the Court's vigorous defense of the Act's provisions also lost ground.[37] In 1980, the Court considered *Mobile v. Bolden* and concluded that in order to disqualify a voting plan, plaintiffs must show both a racially disparate impact and racially discriminatory

---

state that had less than 50 percent of its eligible voters registered to vote on November 1, 1964 was automatically required to obtain authorization for any changes in electoral practice. 79 Stat. at 438.

32. Tokaji, *supra* note 10, at 507. Tokaji notes that the Act's impact was in large part due to the Section 5 pre-clearance requirement. North Carolina, unlike the rest of the South, was only partially required to gain pre-clearance. It went from having the highest minority voting rate before the Act's passage to the second-lowest rate after the Act's implementation. *Id.*

33. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

34. *Id.* at 565.

35. 412 U.S. 755, 766 (1973). The Court held that an election scheme was justiciable if the plaintiff could "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* The Court's opinion in *White* "failed to articulate the basis for its invalidation," leaving it to later cases. Issacharoff, *supra* note 29, at 1843. A standard was more clearly articulated in *Zimmer v. McKeithen*, in which the Court affirmed a "totality of the circumstances" evidentiary test. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd. sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976). *See* Issacharoff, *supra* note 29, at 1844 (noting that the Supreme Court gave no clear definition of "minority vote dilution" and noting that the opinions failed to identify what aspects of the challenged plans were unacceptable).

36. *See* Mark E. Rush, *The Hidden Costs of Electoral Reform*, *in* FAIR AND EFFECTIVE REPRESENTATION? DEBATING ELECTORAL REFORM AND MINORITY RIGHTS, 69, 92–93 (Mark E. Rush & Richard L. Engstrom eds., 2001).

37. *See infra* notes 38–39 and accompanying text (discussing *Mobile*).

intent.[38] This development weakened the Voting Rights Act greatly, because states could craft policies that had discriminatory effects, and ensure their approval by stating that traditional goals of districting motivated the plan.[39]

In response, Congress updated the Voting Rights Act in 1982.[40] The original Act of 1965 barred voting practices *intended* "to deny or abridge the right of any citizen of the United States to vote on account of race or color."[41] The amended act stated that any plan that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [violated the act]."[42] This change overruled *Mobile* and enabled courts to find a violation wherever a plan had a discriminatory effect, regardless of intent.[43] The Act requires courts to include in their analysis consideration of "whether minorities are able to elect candidates of their choice," though the Act does not mandate proportional representation.[44]

In 1986, the Supreme Court examined the 1982 amendment in *Thornburg v. Gingles*.[45] The amended legislation caused the Court to significantly alter its evidentiary inquiry, as it attempted to apply a standard of "functional" inequality.[46] The result was a three-pronged test: to state a claim under the Act, a plaintiff needed to show that (1) a minority is present in sufficient compactness to enable the minority group to dominate a single district; (2) the minority group is substantially "politically cohesive"; and (3) the minority group has been subjected to electoral defeat by majority candidates.[47] If the

38. 446 U.S. 55, 68–69 (1980) (plurality opinion). This opinion relied on precedent set by *Wright v. Rockefeller*, 376 U.S. 52 (1964), which held that a plaintiff's claims of vote dilution were rightfully dismissed when plaintiff was unable to show discriminatory intent. *Wright* was decided before the Voting Rights Act was passed, so *Mobile* adopted the *Wright* doctrine despite the intervening legislation. *See* 446 U.S. at 63.

39. Tokaji, *supra* note 10, at 509.

40. 96 Stat. 134 (codified as amended at 42 U.S.C. § 1971).

41. Rush, *supra* note 36, at 93.

42. *Id*.

43. Issacharoff, *supra* note 29, at 1846. *See also* S. REP. NO. 417, at 35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179 (reporting explicit legislative intent to eliminate the *Bolden* test in favor of a results-oriented test).

44. Tokaji, *supra* note 10, at 510.

45. 478 U.S. 30 (1986).

46. Issacharoff, *supra* note 29, at 1851.

47. 478 U.S. at 50–51; *see also* Issacharoff, *supra* note 29, at 1852.

plaintiff can meet those three tests, a majority non-white district[48] is created to allow the affected minority community to elect a candidate of its choosing.[49]

II. THE ADVENT OF NON-WHITE MAJORITY CONGRESSIONAL DISTRICTING PLANS

After *Gingles*, legislatures began to create non-white majority districts in many communities that met the *Gingles* three-part test.[50] The effects of the decision soon had an impact on the makeup of government.[51] "1992 was the pivotal year for black representation in Congress . . . . Overall, the number of blacks elected to the House from Southern states increased from five in 1990 to seventeen in 1992, 'solely as a consequence of the increase in the number of black majority congressional districts.'"[52] *Gingles*, decided in 1986, allowed Black congressional representation to more than triple in just one redistricting cycle.

After the redistricting process that followed the 1990 census, the racially charged politics of North Carolina begat a legal challenge to the districting scheme, which had created majority-Black districts.[53] The Democrats wanted to create fewer majority-Black districts so as to avoid "bleaching" and maintain strong demographic support in a greater number of districts, whereas Republicans hoped to create as many majority-Black districts as possible, in order to create more districts bleached of minority votes.[54] The redistricting committee,

48. Many articles refer to such districts as "majority-minority." In light of the fact that the white population will soon drop below 50 percent, I use "majority non-white." *Cf.* Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 FORDHAM L. REV. 2187 (2006).

49. 478 U.S. at 51.

50. *See* DAVID A. BOSITIS, REDISTRICTING AND MINORITY REPRESENTATION: LEARNING FROM THE PAST, PREPARING FOR THE FUTURE 4 (1998). Bositis wrote that "[i]n 1990 . . . one thing was quite clear—the federal courts, including the U.S. Supreme Court, were favorably disposed toward the creation of majority-minority districts," and adds that both Democrats and Republicans supported the change. *Id.*

51. Tokaji, *supra* note 10, at 508–09.

52. *Id.* at 508 (quoting Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 220 (1995)).

53. Tokaji, *supra* note 10, at 511.

54. *Id.* at 512.

"loaded with both Democrats and black legislators,"[55] proposed a plan that created one majority-Black district.[56] The Republicans countered with a plan that included "two majority-black districts . . . [but] would give Republicans the edge in seven of the remaining ten districts."[57] The Democrats' plan was denied pre-clearance, but instead of adopting a plan similar to the Republican plan, the Democrats created a second majority-Black district that was unusually convoluted: it connected Charlotte and Durham with a 160-mile stretch that consisted primarily of an interstate highway.[58] The plan was granted pre-clearance by the Department of Justice.[59]

After it was approved, Republicans immediately challenged the new districting scheme.[60] In *Shaw v. Barr*, a professor at Duke Law School, along with four other voters, challenged the districting plan on the grounds of race discrimination.[61] The three-judge district court panel rejected the complaint, though one judge dissented.[62] The Supreme Court accepted the case for briefing, renamed as *Shaw v. Reno*.[63] The single question to be argued was whether irrationally shaped boundary lines, crafted for racial purposes, amounted to an unconstitutional racial gerrymander.[64] Some worried that "the Court's decision could sound the [Voting Rights] Act's death knell."[65]

---

55. *Id.* at 513.

56. *Id.*

57. *Id.*

58. *Id.* at 514. This plan included eight safe Democratic districts with an additional swing district, of North Carolina's twelve districts. *Id.*

59. *Id.* at 515.

60. *Id.* at 515. *See also* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (challenging the same districting plan not on racial but on political gerrymander grounds). In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court held that purely political gerrymanders did present a justiciable equal protection claim, but the plaintiffs in both *Davis* and *Pope* failed to present a sufficient showing of discriminatory vote dilution, and in both cases the challenged plan withstood judicial review.

61. 808 F. Supp. 461 (E.D.N.C. 1993). *See also* Tokaji, *supra* note 10, at 516.

62. *Shaw*, 808 F. Supp. at 473.

63. 509 U.S. 630 (1993).

64. *Id.* at 633–34. An earlier formulation of the issue was whether compliance with the pre-clearance provision of the Act immunized the state from districting litigation. That formulation left the Court with only one answer. "The intent to comply with the [any statute] . . . could not possibly immunize a plan from a *constitutional* challenge." Tokaji, *supra* note 10, at 521.

65. Tokaji, *supra* note 10, at 523. At oral argument, both parties acknowledged that the Voting Rights Act required some race-conscious action. Thus, some proponents of non-white

When it came down, the majority "concluded that taking account of race to *include* blacks was no less constitutionally suspect than using race to *exclude* them,"[66] though "the majority left some wiggle room for the deliberate creation of majority-minority districts."[67] The Court remanded the case to determine if the districting was racially motivated, and if so, if it met strict scrutiny analysis.[68] Subsequent appeals and re-litigation in adjoining districts caused the Court to hear four different challenges to North Carolina's congressional districting scheme.[69] The last of these resulted in a finding that the revised districting scheme was constitutional because it was motivated by political, not racial, concerns.[70]

After *Shaw*, congressional redistricting schemes were required to take race into account under the Voting Rights Act, because the 1982 Amendments require some degree of race-conscious districting.[71] However, the final *Shaw* decision subjected districts with bizarre shapes to strict scrutiny when race was the predominant motive in the district's creation.[72]

This contradiction—that race must be considered under the Act, but cannot be a predominant factor under *Shaw*—was examined by the Court in *League of United Latin American Citizens v. Perry* (*LULAC*).[73] In *LULAC*, the Court reaffirmed the *Gingles* test, and held that Texas's gerrymandered redistricting was constitutional except for a Latino-majority district, which had been altered by increasing the white population.[74] This decision upheld the Texas

majority districting schemes worried that the Supreme Court might hold that race-conscious districting was subject to strict scrutiny.

66. *Id.* at 525.

67. *Id.* at 528.

68. 509 U.S. at 658.

69. Tokaji, *supra* note 10, at 529–35.

70. Easley v. Cromartie, 532 U.S. 234, 257 (2001).

71. *See* Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1523–24, 1540–41 (2002).

72. Shaw v. Hunt, 517 U.S. 899, 907 (1996). For a discussion of challenges to "bizarre districts" after *Shaw v. Reno*, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

73. 548 U.S. 399 (2006).

74. The Court required that the district be redrawn to maintain a Latino majority. *Id.* at 447. The Court rephrased the *Gingles* test, stating that the creation of a non-white majority district is proper when "(1) the racial group is sufficiently large and geographically compact to

plan's destruction of a district in which a significant Black community had been able to elect its candidate of choice.[75] The Court held that because the Black community did not comprise a majority of the district's eligible voters, the destruction of the district did not violate the Act.[76] The decision created a legal distinction protecting groups with 50 percent of a district's population, but failing to protect groups that constitute only 49 percent.[77] This distinction is best described as "the Court's unwillingness to look at the political realities of each case."[78]

In 2009, the Court continued to limit its Act doctrine to districts with an absolute majority of minority voters in *Bartlett v. Strickland*.[79] In *Bartlett*, the Court considered North Carolina's district plan that eliminated a non-white majority district and replaced it with a "crossover" district.[80] A crossover district is one in which the minority makes up "less than a majority of the voting population," but is nonetheless "large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."[81] The Court held that the Act did not recognize crossover districts as an equivalent of a majority-minority district under the Act.[82] The Court noted that the specific community in question did not qualify under *Gingles*, and thereby excused the legislature from creating a majority

---

constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 425 (internal quotations omitted). By reaffirming the *Gingles* test, the Court gave greater judicial support to the creation of non-white majority congressional districts. The Court's focus on racial gerrymandering, in contrast with its tolerance of political gerrymandering, ignored the inseparable relationship between race and political affiliation. Franita Tolson, *Increasing the Quantity and the Quality of the African-American Vote: Lessons for 2008 and Beyond*, 10 BERKELEY J. AFR. AM. L. & POL'Y 313, 328 (2008).

75. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L. J. 734, 747 (2008).

76. *Id.*

77. *Id*. at 748.

78. Tolson, *supra* note 74, at 328.

79. 556 U.S. 1 (2009).

80. *Id*.

81. *Id.* at 13. Often these districts will be majority white and majority Democrat, but a majority of the Democrats will be non-white. The minority community can select its candidate of choice in the Democratic primary, and that candidate can be expected to win the general election. Pildes, *supra* note 71, at 1534.

82. 556 U.S. at 24–26 (Kennedy, J., plurality opinion).

non-white district,[83] but the effect of the decision was to deny influence districts the protection of the Act.[84] This decision, over four dissenters, effectively limited the protection of minority voting interests to the traditional *Gingles* majority non-white districts.[85] Justice Souter, in dissent, disapproved of the restriction on forming crossover districts: "[a] crossover is thus superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions."[86]

In *Northwest Austin Municipal Utilities District No. One v. Holder* (*NAMUDNO*),[87] also decided in 2009, the Court appeared to be ready to strike down Section 5 of the Act as unconstitutional.[88] Congress extended the Act in 2006 over some objection,[89] and commentators thought that the Court might declare that the conditions requiring the use of race-conscious districting had passed, removing the "rational purpose" required for race-based governmental action.[90] The Court declined to strike down the Act, finding that its protections might still be necessary.[91] However, the Court appears willing to rethink its holding in *NAMUDNO*: in February 2013, the Supreme Court heard oral arguments in *Shelby County v. Holder*, a case in which the sole question to be presented is whether Section 5 of the Act is constitutional.[92]

The Voting Rights Act has been an extremely effective method of improving minority groups' access to political power.[93] The Act has

83. *Id.* at 24.

84. *Id.* at 24–25. The Court noted that state bodies would remain free to create influence or crossover districts, but would not be required to by the Act.

85. *Id.* at 34–35 (Souter, J., dissenting).

86. *Id.*

87. 557 U.S. 193 (2009).

88. Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U.L. REV. 697, 702 (2009).

89. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 760 (2008).

90. *See* Fuentes-Rohwer, *supra* note 88, at 742–43.

91. 557 U.S. at 211.

92. Transcript of Oral Argument, Shelby Cnty. v. Holder, No. 12-96 (U.S. argued Feb. 27, 2013), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96 .pdf.

93. In *NAMUDNO*, the Court wrote:

enabled lawmakers to actively design districts with the intent to advance political interests of racial minority groups.[94] The Supreme Court's jurisprudence on the topic has favored the creation of majority non-white districts.[95] This is most clearly shown by the Court's refusal to allow minority groups to utilize crossover districts in order to gain more political representation.[96] Whether or not this preference for absolute majority districts is good for minority political interests is the topic of much debate.[97]

III. ARE MAJORITY NON-WHITE DISTRICTS GOOD FOR MINORITY REPRESENTATION?

Professor Eisgruber argues that the existence of long-standing political racial division allows for majoritarianism.[98] The best and only means of fighting majoritarianism is to ameliorate racial divisions; he argued that a congressional districting scheme should be designed to reduce racial divisions.[99] Whether majority non-white districting helps to reduce racial division is a contested question. The discussion has focused on two types of political representation: descriptive and substantive.[100] Descriptive representation is representation of a minority community by a member of that minority, whereas substantive representatives are those who prefer

> The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant and the registration of voting-age whites ran roughly 50 percentage points or more ahead of black registration in many covered States. Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites.

557 U.S. at 201 (internal quotation omitted).

94. Tolson, *supra* note 74, at 327 (stating that in *Shaw*, "the Court held that under the Fourteenth Amendment, majority-minority districts can be used to remedy the effects of past discrimination.").

95. *See LULAC*, 548 U.S. 399 (2006), *and Bartlett*, 556 U.S. 1 (2009).

96. *Bartlett*, 556 U.S. 1 (2009).

97. *See infra* notes 98–132 and accompanying text.

98. Eisgruber, *supra* note 6, at 355.

99. *Id*.

100. Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2226 (2003).

the same policies and hold the same values as the minority community, regardless of race.[101]

A. Arguments for Majority Non-White Districting

Many scholars have reviewed the Supreme Court's voting jurisprudence evolution with increasing trepidation.[102] The strict scrutiny analysis applied in *Shaw*[103] and the hesitance of many legislators to renew the Act in 2006 has alerted academics to the fact that many believe that the Act's disadvantages may outweigh its benefits.[104] Some of those academics have defended the Act and the traditional majority non-white districting pattern; this Section will discuss the arguments made in support of that position.

The most obvious advantage to the Act's creation of majority non-white congressional districts is that those districts produce descriptive representation.[105] Representatives of these districts are highly likely to be members of the dominant racial minority, which is in line with the Act's aims.[106] This descriptive representation can have a positive and empowering effect on members of the minority community.[107] In addition to psychological benefits, some argue that descriptive representation can have positive effects on minority political

101. *Id.* (noting that descriptive representation "operates on the assumption that someone of the same race . . . will be more sensitive to the needs and concerns of people who [are of the same race].").

102. *See* Thomas Brunell, David Lublin, Bernard Grofman & Lisa Handley, *Do We Still Need the VRA? In a Word: 'YES'*, CTR. FOR THE STUDY OF DEMOCRACY, U. CALIFORNIA-IRVINE (2007), http://escholarship.org/uc/item/3801w0n7.

103. *See supra* notes 63–70 and accompanying text.

104. Kousser, *supra* note 89, at 743–62 (discussing the viewpoints of legislators on how to amend and interpret sections 2 and 5 of the Act).

105. *See* Brunell et al., *supra* note 102, at 24 (noting that "minority districts remain[] the basis upon which most African-American and Latino officials gain election.").

106. Note, *supra* note 100, at 2227 (noting that "there is value simply in having elected officials who look like . . . those they represent."). *See also* Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911, 934 (1995) (dismissing the argument that Black candidates who advance positions contrary to prevailing Black opinion are inauthentically Black).

107. Lenore Look, *My Mother's Vote*, PRINCETON ALUMNI WKLY., Mar. 19, 1997, at 56 (describing the political empowerment of an immigrant who chose to vote for the first time because a candidate from the same racial background was running for office).

participation.[108] Some studies have concluded that majority non-white congressional districts enhance minority voter turnout.[109]

Descriptive representation also ensures that elected officials will have personal knowledge of the minority group's experience, which should enable the representative to combat political problems more effectively.[110] Lastly, some argue that descriptive representation can facilitate cross-racial discussion, because representatives from majority non-white districts can gain national media audiences and spark discussion of racial issues on a national level.[111]

Majority non-white districts are an excellent vehicle to create descriptive representation.[112] Some argue that these districts also produce better substantive non-white representation,[113] though others disagree.[114] Proponents of majority non-white districts argue that majority non-white districts provide a unique opportunity for minority communities to participate in the political process.[115] The proponents claim that majority non-white districts can create a congressional coalition equal to or larger than other successful coalitions, implying that the size of the coalition is the key to meaningful political power.[116]

---

108. *Id. See also* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 5 (1993).

109. *See* Matt A. Barreto, Gary M. Segura & Nathan D. Woods, *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) ("Latinos vote more when in a majority-Latino district."); Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 387 (1990) ("Where Blacks hold positions of political power, they are more [politically] active."). *But see* Tolson, *supra* note 74, and *infra* note 125 and accompanying text.

110. Mari J. Matsuda, *Looking to the Bottom, Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that those who are subjected to the most oppression are best positioned to formulate effective solutions).

111. Kang, *supra* note 75, at 787–88.

112. *See* Brunell et al., *supra* note 102.

113. *See infra* notes 116–23 and accompanying text.

114. "[A]n increase in descriptive representation . . . often results in a decline in substantive representation. The reason is that increases in descriptive representation are accomplished by creating majority-minority districts, which involves placing most of a state's black voters together in a relatively small number of districts." Note, *supra* note 100, at 2226.

115. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of the Century*, 50 VAND. L. REV. 291, 300 (1997) (stating that "insular, well-organized constituencies often enjoy disproportionate influence relative to diffuse groups").

116. *Id.* Critics say that this argument wrongly assumes that minority representatives are able to effectively participate in coalition-building just like any other specialized interest group. Eisgruber, *supra* note 6, at 355. Some go so far as to say that this framework "encourages the

Michael Kang presents a second argument for why majority non-white districts are good for minority substantive representation.[117] Kang argues that splitting minority communities into many different districts would force minority voters to engage in bloc voting out of necessity.[118] By isolating minority groups into a district under complete minority control, majority non-white districts allow "members who once banded together defensively against the white majority" to "consider nuanced differences among them," facilitating a more dynamic, competitive, and pluralist political community.[119] By creating districts in which "only black ballots are meant to count,"[120] Black voters can be "relieve[d] [of] the pressures inherent in racial polarization"[121] while simultaneously "mitigat[ing] the damaging effects of racial polarization on political discourse."[122]

B. Arguments Against Majority Non-White Districting

Critics of majority non-white districting concede that such districts do produce descriptive representation.[123] These critics argue that majority non-white districts inhibit minority substantive representation.[124] First, some disagree with the proposition that minority non-white districts produce higher voter turnout.[125] Second, these scholars state that Professor Kang's hope that majority non-

white majority to see minorities as an interest group like the oil industry or gun companies," further reducing minority representatives' ability to influence policy. Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 139, 177 (2011).

117. Kang, *supra* note 75.

118. *Id.* at 781.

119. *Id.* at 781–82.

120. Thernstrom, *supra* note 106, at 917.

121. Kang, *supra* note 75, at 787.

122. *Id.* at 788.

123. Pildes, *supra* note 71, at 1562 (stating that "a genuine tradeoff exists between descriptive and substantive representation").

124. Critics of majority non-white districts recognize that efforts to eliminate such districts "ask[] blacks to give up sure gains (more black people in elite positions) plus speculative future improvements in exchange for nothing but speculative future improvements." Eisgruber, *supra* note 6, at 359. Despite the risk, Eisgruber believes that "majority-black districts may do more harm than good." *Id.*

125. Tolson, *supra* note 74, at 336 (noting that majority non-white districts improved voter turnout initially, but stating that such districts now inhibit voter turnout). *But see* Barreto, Segura & Woods, *supra* note 109.

white districting can produce positive intra-group political competition has not been realized.[126]

Despite the greater descriptive representation created by majority non-white congressional districts, many scholars believe that eliminating such districts would improve the substantive representation of minority communities.[127] Majority non-white districts are alleged to "reward racially polarizing candidates, handicap minorities from winning politically powerful statewide races, and reproduce race as an organizing principle of American society."[128]

The current scheme of non-white majority districts rewards racially polarizing candidates both in and out of the districts, by encouraging candidates to appeal to their relatively monochromatic electorate with racially coded language.[129] The current scheme also negatively impacts the party that most minority voters prefer: the establishment of non-white majority districts has "cost the Democrats a total of seventeen seats" in Congress.[130]

---

126. Tolson, *supra* note 74, at 314 ("African-Americans should focus less on . . . creat[ing] majority-minority districts because these districts . . . have the effect of depressing voter turnout."). In the 2010 congressional elections, fifteen candidates in contested elections won at least 84 percent of the vote. Twelve of those candidates were from majority non-white districts. Thirty-two candidates in contested elections won 80 percent of the vote; nineteen of those were from majority non-white districts. Spreadsheet on file with author. This data suggests that despite Professor Kang's theory, meaningful electoral competition is absent in general elections in majority non-white districts. *See* Rathod, *supra* note 116, at 191–92 ("majority-minority districts do not liberate voters from engaging in racial politics as Professor Kang asserts. Instead, they create environments obsessed with race in which polarizing candidates win by engaging in rhetoric of excess."). *But see* Angela Onwauchi-Willig, *Just Another Brother on the SCT? What Justice Clarence Thomas Teaches Us about the Influence of Racial Identity*, 90 IOWA L. REV. 931, 1008–09 (2005) (noting a lack of communication between Black liberals and conservatives, and calling for improved dialogue between the groups).

127. "What is [more important than descriptive representation] is the desire and need that African-Americans have for substantive representation, which requires more than simply descriptive representation." Tolson, *supra* note 74, at 318. *See also infra* notes 131–47.

128. Rathod, *supra* note 116, at 140.

129. *See id.* at 182 (explaining Jesse Jackson's opposition to Barack Obama's 2008 campaign as a response to the threat Obama posed to the racially divisive political climate in which Jackson thrived); *id.* at 168 (noting that in white communities, "shameless politicians appeal[ed] to a racialized law-and-order vote").

130. Karlan, *supra* note 115, at 303 n.32 (quoting Jeffrey Rosen, *Southern Comfort*, NEW REPUBLIC 4 (Jan. 8 & 15, 1996). *See also* Ari Berman, *How the GOP is Resegregating the South*, THE NATION, Jan. 31, 2012. The current districting scheme strongly favors Republicans: Democratic House candidates could win the popular aggregate vote by up to 5 percent and still

The arguments against majority non-white districting appear to be gaining broader acceptance.[131] Black leaders are abandoning their "unholy alliance" with Republicans for more majority non-white districts, in large part because those districts are now clearly harming Democratic political representation.[132]

C. Crossover Districting: The Consensus Alternative to Majority Non-White Districting

The growing chorus of activists dissatisfied with majority non-white districting are unifying behind one idea: crossover districting.[133] These studies suggest that instead of focusing on the creation of districts with an absolute non-white majority, advocates should work for districts with a sufficient minority population to make minority control of electoral outcomes extremely likely.[134]

Replacing majority non-white districts with crossover districts would represent a significant victory for minority political representation. Most obviously, it would enable non-white voters to influence a greater number of districts.[135] Less obviously, a crossover district would require "winning candidates to appeal to civic nationalism. They encourage citizens to build coalitions across the

---

be in the minority in the House. Sam Wang, *The House—New, With Less Democracy!*, PRINCETON ELECTION CONSORTIUM (Nov. 9, 2012, 2:00 PM), http://election.princeton.edu/2012/11/09/the-new-house-with-less-democracy/.

131. *See* Berman, *supra* note 130.

132. *Id.* (quoting Stacey Abrams, the first Black leader of the Georgia House: "Republicans intentionally targeted white Democrats, thinking that as an African-American leader I wouldn't fight against these maps because I got an extra number of black seats . . . . I'm not the chair of the 'black caucus.' I'm the leader of the Democratic caucus. And the Democratic caucus has to be racially integrated in order to be reflective of the state.").

133. *See supra* notes 79–86 and accompanying text. *See also* Rathod, *supra* note 116, at 144 ("Congress should codify an approach to vote dilution that will maximize the number of crossover districts and minimize the number of majority-minority districts."); Tolson, *supra* note 74, at 347–48; Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 965 (2011) ("advocates should embrace . . . crossover and influence districts.").

134. According to one study, the optimal minority makeup of a district in North Carolina is 38.37 percent. Rathod, *supra* note 116, at 196. In other states, optimal percentages range from 35 percent to greater than 46 percent. Note, *supra* note 100, at 2218. Districts where more whites are willing to vote for a non-white candidate require smaller non-white populations. *Id.*

135. Rathod, *supra* note 116, at 198 ("as a matter of simple math, states can draw more crossover districts than majority-minority districts").

color line and 'pull, haul, and trade to find common political ground.'"[136]

IV. DO CROSSOVER DISTRICTS LEAVE TOO MANY WHITES OUT OF THE LOOP?

A political system in which citizens "pull, haul, and trade" would have significant effects on both non-white and white communities. Since white voters control most political power in the country, support from a significant number of white voters will be needed to pass any legislation sought by minority groups.[137] Accordingly, the most important feature of a congressional districting proposal is the scheme's ability to transform white voters into citizens working against continued racial oppression. This Note argues that creating racially integrated congressional districts could efficiently expose white voters to minority political concerns.[138] Only citizens who are aware of the continued oppression of minorities will undertake political action to end the oppression.[139] Eliminating majority non-white districts would increase cross-racial political contact and detract from race's central role in political identity.[140] Crossover

136. *Id.* (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994)).

137. Derrick Bell, *Wanted: A White Leader Able to Free Whites of Racism*, 33 U.C. DAVIS L. REV. 527, 535 (2000).

138. If white voters are exposed to campaign material emphasizing minority concerns, the message will get through: "Campaign messages do appear to increase voter information." Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 152–53 (2010). Other methods of spreading knowledge about white privilege have failed to gain traction; one conference on white privilege was described in a major newspaper as a "white guilt festival" designed "for navel-gazing or self-flagellation." Katherine Kersten, *Always Room in the Budget for White Guilt*, MINNEAPOLIS STAR-TRIBUNE, Apr. 10, 2011, at OP3.

139. *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 404 (1982–83) (describing white juror who, upon hearing "black rage" criminal defense, "opened her eyes to the life of black America").

140. Rathod, *supra* note 116, at 178–79 (eliminating majority non-white districting would "destabiliz[e] primordial conceptions of race premised on the ascription of identities corresponding to the ethno-racial pentagon, and [would] cultivat[e] conceptions in which affiliation with provincial communities, descent-oriented and otherwise, is voluntary."). *But see* Karlan, *supra* note 115, at 320–21 (predicting that desegregated congressional districts would encourage race-baiting by white politicians: "You might beseech a Southern white tenant to listen to you upon questions of finance, taxation, and transportation . . . but if . . . the town

districts move towards that end.[141] I submit that it is possible that crossover districting, while an improvement over majority non-white districting, may not be superior to full integration.

Crossover districting schemes require districts to have substantial minority populations, between 35 and 46 percent.[142] According to the 2010 census, 63.7 percent of the U.S. population was white and not Hispanic or Latino.[143] Many states have even whiter populations, so there are necessarily many political communities where a non-white population of 35 percent or greater is statistically impossible.[144] A community that cannot reach the 35 percent threshold should not remain entirely segregated. As long as a sufficient number of minorities are present in a district to encourage at least one major candidate to court minority votes, the inclusion of minority voters will help spread political information about the issues facing non-white citizens.[145]

The isolation of white voters in bleached districts adversely affects minority political interests.[146] Conservative white voters who are opposed to welfare are highly likely to be misinformed about racially divisive issues such as welfare, yet these voters have extremely high confidence in their incorrect beliefs.[147] To fight such misconceptions, direct contact is required: "we respond more strongly to in-person appeals than impersonal, mass appeals."[148] Including minority communities in as many districts as possible will ensure that one or both main party candidates include a discussion of

---

politician . . . came along and cried 'Negro rule!' the entire fabric of reason and common sense . . . would fall.").

141. *See supra* notes 127–32 and accompanying text.

142. *See supra* note 134.

143. Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, UNITED STATES CENSUS BUREAU, at 4 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

144. *Id.*

145. Rathod, *supra* note 116, at 189 ("schemes that require cross-racial support for victory advance interracial conciliation").

146. *See supra* notes 124–32 and accompanying text.

147. James H. Kuklinski, Paul J. Quirk, Jennifer Jerit, David Schwieder & Robert Rich, *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 798 (2000) ("Most respondents . . . hold mistaken beliefs that reinforce each other and thus have a cumulative anti-welfare effect . . . . [T]hose holding the least accurate beliefs perversely expressed the highest confidence in them.").

148. Sheff, *supra* note 138, at 158.

minority interests in their campaigns, thus directly exposing a maximum number of white citizens to non-white political interests.

Crossover districts cap the integration of political communities. If the end goal of districting is to create districts with 35 to 45 percent non-white populations, then there will remain a significant number of bleached districts. While crossover districts appear at first glance to allow minority communities to have their cake and eat it too,[149] such a scheme may backfire because it leaves many white citizens untouched by minority concerns. Full integration would mean that minority voters would represent a smaller voting population within each district, but more white voters would participate in a political system that included discussion of minority voter concerns. Because I believe that the political support of white citizens is a necessary prerequisite to fix the United States' racial problems, I suspect that a solution will come faster if congressional districts are designed primarily to expose white voters to political issues of racial injustice. I concede that this may come at some cost to short-term minority representation.[150]

V. A PERSONAL CONCLUSION

Several years ago, my grandmother's church celebrated the fiftieth anniversary of its integration. After the festivities, my grandmother remarked to me: "I remember being proud on that day, that we were integrating. But I saw a black man sitting with a white woman, and I remember thinking 'that is wrong.' The memory of that thought has embarrassed me now for a long time." There was nothing inevitable about my grandmother's transformation on interracial relationships. She changed her mind, in part, due to her involvement in an integrated community. Without restructuring our congressional

149. In a crossover district, the minority community is able to select a candidate in both the primary and general election, giving both descriptive and substantive representation.

150. This suggestion is certainly vulnerable to criticism. My proposed solution to a lack of minority political power appears to give even more power to white voters. Nonetheless, I believe that "[t]he racial problem in this country is not people of color but whites." Bell, *supra* note 137, at 532. Bell doubts that descriptive representation is of any particular use: "When dealing directly with race, however, any black's message will be dismissed at best as special pleading and at worst as racial condemnation." *Id.* Because systems of racism and privilege are maintained and built by whites, I believe that they must be destroyed by whites.

districts, white voters will not become aware of, or reject, structural racism. Integrating electoral districts would cause white voters to become more aware of the political challenges faced by minority communities, thereby improving substantive minority representation. Too few whites are exposed to the problems caused by white privilege in the United States. Too many political communities and voting districts are almost exclusively white. It's time we break the mold.