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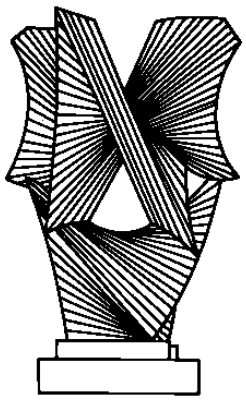

RECONSIDERING RACIAL AND PARTISAN GERRYMANDERING

Adam B. Cox and Richard T. Holden

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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Reconsidering Racial and Partisan Gerrymandering

Adam B. Cox† & Richard T. Holden††

In recent years, scholars have come to a general agreement about the relationship between partisan gerrymandering and racial redistricting. Drawing districts that contain a majority of minority voters, as is often required by the Voting Rights Act, is said to help minority voters in those districts but hurt the Democratic Party more broadly. This Article argues that this familiar claim is based on a mistaken assumption about how redistricters can best manipulate districts for partisan gain—an assumption grounded in the idea that all voters can be thought of as either Democrats or Republicans. Relaxing this assumption, and acknowledging that voters come in diverse ideological types, we highlight the fact that the optimal partisan gerrymandering strategy is quite different from the pack-and-crack strategy that is pervasive in the literature. Understanding this optimal strategy leads to a second insight—that the Voting Rights Act constrains Republicans' partisan ambitions, not Democrats', as is typically thought. We conclude by discussing some implications for the future of the Voting Rights Act and the next round of decennial redistricting.

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† Professor of Law, The University of Chicago Law School.
†† Assistant Professor of Economics and Neubauer Family Faculty Fellow, The University of Chicago Booth School of Business; Faculty Research Fellow, National Bureau of Economic Research.

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INTRODUCTION

Redistricting presents an immense opportunity for partisan advantage-seeking in American politics. Since the beginning of the reapportionment revolution nearly a half-century ago, it has also become a central tool used to advance the interests of minority voters. Both the Constitution and the Voting Rights Act of 1965[1] (VRA) have been read by courts to require that states draw electoral districts in ways that protect and promote the representation of minority voters. These twin features have left courts and commentators struggling for the past two decades with a core question: How do politics and race interact in the decennial redistricting process?

Recent events have given this question increased urgency. The next round of decennial redistricting is just kicking off. The 2010 census results are about to be released, triggering a constitutional requirement that states redraw virtually every congressional and state legislative district in the country. This new wave of redistricting will take place in a political and legal environment radically different from the one we saw a decade ago. First, Barack Obama's election as the forty-fourth President has led many to ask whether we are in a transformative period for racial politics in the United States.[2] Second, the Supreme Court has recently questioned the constitutionality of core VRA provisions that regulate the role of race in redistricting. Those four-decade-old provisions were reauthorized by Congress just a few years ago,[3] but in *NAMUDNO v Holder*[4] the Court suggested

1 Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1971 et seq.

2 See, for example, Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv L Rev 1385, 1386 (2010).

3 See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRA Reauthorization Act of 2006") § 5, Pub L No 109-246, 120 Stat 577, 580–81, codified at 42 USC § 1973c.

4 *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504 (2009) (*NAMUDNO*).

that they were relics of an earlier era.[5] Third, the growth of the Latino electorate in the United States raises the possibility that old ways of thinking about the intersection of race and partisanship in redistricting will translate poorly to new political contexts.

This Article argues that the way we have long thought about the relationship between partisan gerrymandering and racial redistricting is misguided. Consequently, there are currently widespread misunderstandings about the role of the VRA and the changes to American politics that might follow from the Act's invalidation or amendment—changes that could affect both the representational opportunities for minority voters and the egregiousness of partisan gerrymanders in coming years.

The existing literature has, after an initial period of disagreement, coalesced around a rough consensus about the interplay between race, partisanship, and the VRA. According to the now-familiar story, drawing districts that contain a majority of minority voters, as is often required by the VRA, helps minority voters in those districts but hurts the Democratic Party more broadly by packing Democratic supporters into too few districts.[6] This story has dominated popular accounts at least since the Republicans took over Congress in 1994. It has also figured prominently in recent reports of the political dynamics surrounding the reauthorization of a core provision of the VRA. Republicans in Congress supported that reauthorization overwhelmingly, and their support has been seen by

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5 See id at 2511–12. *NAMUDNO*, one of the most anticipated cases decided by the Supreme Court in recent years, concerned a challenge to the constitutionality of the newly reauthorized § 5 of the VRA—one of the Act's core enforcement provisions. The Supreme Court avoided the constitutional question by adopting a strained interpretation of the Act's statutory language. See id at 2513–19 (holding that the VRA allows bailout suits against a broader array of political subdivisions than the text appears to cover). But many prominent voting rights scholars and Court watchers have read the decision as a warning to Congress that the Court is prepared to strike down § 5 in a future lawsuit. See, for example, Richard H. Pildes, *A Warning to Congress*, NY Times Room for Debate (June 22, 2009), online at http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/#richard (visited Dec 23, 2010) ("Today's nearly unanimous opinion may be sending . . . a message to Congress."); Tom Goldstein, *Analysis: Supreme Court Invalidates Section 5's Coverage Scheme*, SCOTUSblog (June 22, 2009), online at http://www.scotusblog.com/2009/06/analysis-supreme-court-invalidates-section-5's-coverage-scheme-2/ (visited Dec 23, 2010) ("A failure by Congress to respond to the Court's opinion will be fatal to Section 5."). A few potential such suits are already on the horizon, and the next wave of redistricting will almost surely bring the Act's constitutionality squarely before the Court. See Linda Greenhouse, *Is Anyone Watching?*, NY Times Opinionator (Feb 23, 2011), online at http://opinionator.blogs.nytimes.com/2011/02/23/is-anyone-watching/ (visited Apr 3, 2011) (describing a new challenge to the VRA, filed by Shelby County, Alabama, that is currently making its way through the lower federal courts), discussing *Shelby County v Holder*, No 1:10-cv-00651 (DDC filed Apr 27, 2010).

6 See Part I.

many as strategic—a decision to back a rule that rigs the redistricting game in Republicans' favor.[7]

The difficulty is that this account suffers from some methodological shortcomings. In particular, it focuses on changes to individual districts and assumes that the politicians in charge of redistricting gain partisan advantage by pursuing a strategy of "cracking" and "packing" their opponents—lumping them into districts where they are either too few to win the district or so numerous as to waste many votes. This crack-and-pack theory of partisan advantage-seeking, which has been around since at least the turn of the twentieth century, imagines that there are only two types of voters: Democrats and Republicans. This may seem like a small simplification with little practical consequence. Nonetheless, relaxing this assumption and acknowledging that voters come in diverse ideological types changes dramatically the theoretical relationship among partisan gerrymandering, racial redistricting, and the VRA.

To unpack these relationships, we take a new approach that proceeds in three straightforward steps. First, we analyze the redistricting process to identify the optimal strategy for a redistricter trying to maximize partisan advantage in a world with diverse voter types. Second, we ask how a redistricting authority following the optimal strategy would allocate minority voters to districts. Third, we ask whether the VRA prevents the partisan redistricting authority from distributing minority voters in an optimal way and, if so, under what conditions. Put simply, we take the intuitive approach of asking what an unconstrained redistricter would do, then asking whether law actually constrains this preferred course of action.

Our approach demonstrates that, at least in areas where minority voters are predominantly African American, the VRA constrains Republicans more than Democrats in the pursuit of partisan advantage in the redistricting process. In other words, the Act comes with a built-in partisan bias in favor of the Democratic Party—just the opposite of what is commonly thought.

This conclusion raises a significant question about why Republicans supported, in overwhelming numbers, the recent reauthorization of central parts of the VRA. More broadly, our claim has important implications for the past and future of the Supreme Court's voting rights jurisprudence, as well as for longstanding disagreements about how best to protect and advance minority voting rights within the American political system. For example, it complicates the story about the Court's much-criticized racial

7 See text accompanying notes 130–36.

gerrymandering jurisprudence,[8] points to a potential path out of the quagmire in which partisan gerrymandering jurisprudence is currently stuck, and suggests that the debate about the relationship between descriptive and substantive minority representation may be proceeding from erroneous premises.[9] In short, our approach provides a new framework for thinking about these many other questions concerning minority representation within a redistricting regime controlled by partisan officials.

I. THE PACK-AND-CRACK CONSENSUS

This Part provides some background on the regulation of redistricting in the United States and briefly explains how courts and scholars arrived at the current consensus about the relationship between race and partisanship in redistricting.

Redistricting allocates voters to electoral districts. In the United States, where members of both state legislative assemblies and Congress are elected predominantly from single-member districts, the allocation of voters to districts plays a significant role in determining which candidates emerge and who ultimately wins each seat.[10] Redistricting thus presents whomever controls the process with a tremendous opportunity to shape political outcomes. This fact is not lost on the state legislative assemblies that, throughout most of the United States, have initial authority to draw both state legislative and congressional districts.[11] As far back as 1812, Elbridge Gerry's Democratic-Republican-controlled government in Massachusetts

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8 See *Shaw v Reno*, 509 US 630 (1993), and its progeny. See also notes 109–16.

9 In Hanna Pitkin's classic formulation, "descriptive" representation is concerned with representing the identity of a voter, while "substantive" representation is concerned with representing the interests of a voter. See Hanna Fenichel Pitkin, *The Concept of Representation* 60–61, 209 (California 1967).

10 See 2 USC § 2c (requiring that members of the House of Representatives be elected using single-member districts). See also Douglas J. Amy, *Behind the Ballot Box: A Citizen's Guide to Voting Systems* 55–56 (Praeger 2000) (noting that nearly all states use single-member districts to elect a large majority of their state legislators).

11 The Supreme Court has never been particularly explicit about which provision of the Constitution confers on states initial authority to draw federal congressional districts. While Article I, § 4's so-called Elections Clause is an obvious candidate, see US Const Art I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."), the Court does not appear to have explicitly relied upon it. See Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 NYU L Rev 751, 780–81 n 114 (2004) (describing ambiguity over the constitutional source of authority). Authority over state legislative districting is controlled by state constitutions and statutes. Most states treat redistricting as an ordinary legislative function. See Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 State Polit & Pol Q 371, 377 (2004) (stating that thirty-eight states use the ordinary legislative process for congressional redistricting and twenty-six states do so for state legislative redistricting).

drew contorted districts in an (ultimately unsuccessful) effort to fend off the Federalists.[12] Today, the Democratic and Republican parties fight for the partisan gain that comes with control over the decennial redistricting required by the release of each new census.[13]

Few legal rules restrict the partisan manipulation of district lines. The reapportionment revolution in the 1960s established the constitutional principle of "one person, one vote," which today generally requires that electoral districts have equal populations.[14] But the equipopulation requirement does little to curb partisan gerrymandering.[15] Ditto for the requirements of contiguity and compactness that many states formally impose on the redistricting process.[16] Moreover, while the Supreme Court has refused to rule out the possibility that egregious gerrymanders might themselves violate the Constitution, it has rejected every such claim that has come before it over the past twenty-five years.[17]

The VRA is perhaps the lone exception to this generally lax regulatory environment. Passed in the wake of Bloody Sunday to combat the widespread exclusion of African American voters from

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12 See Elmer Cummings Griffith, *The Rise and Development of the Gerrymander* 16–20 (Chicago 1907) (tracing the practice back to colonial times); Henry F. Griffin, *The Gerrymander*, Outlook 186, 187–89 (Jan 28, 1911) (claiming that early Revolutionary figures such as William Penn, Patrick Henry, and Thomas Jefferson used redistricting to gain partisan political advantage well before the term was coined).

13 See, for example, Chris Cillizza, *Democrats Look to Grab the Redistricting Reins*, Wash Post A2 (Mar 22, 2010); Nathan L. Gonzales and Lauren W. Whittington, *Parties Prepping for Redistricting Fight*, Roll Call (May 18, 2009), online at http://www.rollcall.com/issues/54_132/-34992-1.html (visited Feb 15, 2011).

14 See *Baker v Carr*, 369 US 186, 237 (1962); *Reynolds v Sims*, 377 US 533, 577 (1964) ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.").

15 See *Karcher v Daggett*, 462 US 725, 752 & n 10 (1983) (Stevens concurring) (noting that developments in computer technology have made gerrymandering easier); Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 829 (Foundation 3d ed 2007) ("[T]he one-person, one-vote rule at best inconvenienced would-be gerrymanderers.").

16 See Henry L. Chambers Jr, *Enclave Districting*, 8 Wm & Mary Bill Rts J 135, 144, 161–62 (1999).

17 In 1986, the Court held that partisan gerrymandering claims are justiciable under the Constitution, but the justices disagreed about how to identify unconstitutional partisan gerrymanders. See *Davis v Bandemer*, 478 US 109, 126–27 (1986). Compare id at 127–37 (White) (plurality) with id at 169–73 & n 7 (Powell concurring). See also text accompanying notes 150–53. Since then, a majority of the Court has repeatedly declined to overturn *Bandemer* and hold that gerrymander claims are nonjusticiable political questions. See *Vieth v Jubelirer*, 541 US 267, 306 (2004) (Kennedy concurring); id at 317 (Stevens dissenting); id at 343 (Souter dissenting, joined by Ginsburg); id at 355 (Breyer dissenting); *League of United Latin American Citizens v Perry*, 548 US 399, 413–14, 420, 423 (2006) (*LULAC*). Nonetheless, the Court has rejected every allegation of unconstitutional gerrymandering that has come before it. See *Vieth*, 541 US at 306; *LULAC*, 548 US at 413–14.

the polls,[18] the seminal civil rights statute does not directly regulate the partisan manipulation of district lines. Nonetheless, we explain in more detail below how the Act was interpreted to require redistricting authorities to draw, where possible, electoral districts that contain a majority of minority voters.[19] The rise of this legal obligation to create majority-minority districts raised the question of how the drawing of these districts influences efforts at partisan manipulation—and ultimately what these districts mean for the respective fortunes of Democrats and Republicans.

This question was thrust into the national spotlight in 1994, when the Republican Party reclaimed Congress for the first time in nearly half a century. A slew of journalists quickly blamed at least part of the Democratic Party's losses on the rise of majority-minority districts during the early 1990s.[20] In the following years, a flurry of work by political scientists, economists, and lawyers soon reached a general consensus: drawing majority-minority districts helped minority voters but hurt the Democratic Party.[21] While there are a few scholars who

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18 See Stephen Tuck, *Making the Voting Rights Act*, in Richard M. Valelly, ed, *The Voting Rights Act: Securing the Ballot* 77, 83–85 (CQ 2006).

19 See text accompanying notes 64–71.

20 See, for example, David Lublin, Letter to the Editor, *Cost of Gerrymandering*, NY Times A28 (Dec 13, 1994); Steven A. Holmes, *Did Racial Redistricting Undermine Democrats?*, NY Times A32 (Nov 13, 1994); Peter Applebome, *The Rising G.O.P. Tide Overwhelms the Democratic Levees in the South*, NY Times A27 (Nov 11, 1994); George F. Will, *Some Revolution*, Wash Post A21 (Sept 1, 1994). See also Daniel Hays Lowenstein, Richard L. Hasen, and Daniel P. Tokaji, *Election Law: Cases and Materials* 183–84 (Carolina 4th ed 2008).

21 See David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* 2 (Chicago 1999); David Lublin, *The Republican South: Democratization and Partisan Change* 107, 132 (Princeton 2004); David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 112–14 (Princeton 1997); Carol M. Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* 205 (Harvard 1993); Kimball Brace, Bernard Grofman, and Lisa Handley, *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J Polit 169, 183 (1987); Charles Cameron, David Epstein, and Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 Am Polit Sci Rev 794, 794–95, 798 n 5 (1996); David Epstein, et al, *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J L, Econ, & Org 499, 499 (2007); David L. Epstein and Sharyn O'Halloran, *Trends in Minority Representation, 1974 to 2000*, in David L. Epstein, et al, eds, *The Future of the Voting Rights Act* 61, 77 (Russell Sage 2006); David Epstein and Sharyn O'Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 Am J Polit Sci 367, 368 (1999); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J Polit 384, 384 (1995); David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?,"* 93 Am Polit Sci Rev 183, 183 (1999); David Lublin and D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 Am J Polit Sci 792, 793 (2000); Daniel D. Polsby and Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering under the Voting Rights Act*, 92 Mich L Rev 652, 682 (1993). To be clear, these scholars are not interested only in the partisan consequences of minority-majority districts. They are also intensely

have questioned the existence or extent of pro-Republican bias,[22] this basic understanding has come to frame nearly all subsequent work on race and redistricting.

Perhaps the easiest way to get a sense of this is to read the leading casebooks in the field. Relying on the social scientists' conclusions, these casebooks quite understandably treat the supposed tradeoff between minority districting and Democratic losses as raising some of the thorniest and most important questions about the role of the VRA in American politics.[23] The Supreme Court has also picked up on the widespread agreement and has often assumed, at least implicitly, that the drawing of majority-minority districts comes at a cost for the Democratic Party.[24]

This broad consensus is in large part the product of a common way of thinking about the relationship between partisan advantage-seeking and racial redistricting. The approach is nicely synthesized by one of the field's canonical casebooks, *The Law of Democracy*:

> If, as a number of political scientists purport to find, the strategy of setting aside some number of districts to be controlled by African-American voters has, as a byproduct, the effect of making legislative bodies as a whole more Republican, then a purely partisan Republican legislature would prefer to create as many minority districts, with as large minority populations, as possible. The strategy of partisan gerrymandering includes

interested in these districts' consequences for different forms of minority representation. We return at the end of the Article to consider the consequences for minority representation of our central claims about the optimal structure of partisan gerrymandering.

22 See, for example, Richard L. Engstrom, *Race and Southern Politics: The Special Case of Congressional Districting*, in Robert P. Steed and Laurence W. Moreland, eds, *Writing Southern Politics: Contemporary Interpretations and Future Directions* 91, 110 (Kentucky 2006) (arguing that "the Republican Party would have controlled the House by 1995, or at latest by 1997, even without its southern gains"); Kenneth W. Shotts, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, 45 Am J Polit Sci 120, 121 (2001) (predicting that the effects of redistricting are not uniformly beneficial to Republicans); Lani Guinier, *Don't Scapegoat the Gerrymander*, NY Times Mag 36 (Jan 8, 1995) (claiming that Democrats lost control of Congress for at least three reasons other than the VRA).

23 See, for example, Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 756–59, 764–66, 782, 786–817 (cited in note 15).

24 See *Georgia v Ashcroft*, 539 US 461, 481 (2003). Moreover, many writers have contended that politicians hold the same view and that this belief has led Democrats sometimes to resist the creation of majority-minority districts and Republicans to embrace them. See, for example, Swain, *Black Faces* at 205 (cited in note 21) (observing that "Republican leaders have zealously urged the creation of the maximum number of 'safe' black and Hispanic districts" to drain their votes from districts represented by white Democrats); Lowenstein, Hasen, and Tokaji, *Election Law* at 182 (cited in note 20). It is sometimes unclear, however, whether statements about the beliefs of politicians and party officials are the product of direct evidence or are, instead, the product of using the general consensus about the partisan consequences of minority districting as a lens through which to interpret the motivations of these political actors.

> wasting as many votes of the other sides's partisans as possible by concentrating those voters into a few districts. . . . If there are no geographic constraints on the redistricting process, particularly where race is involved, Republicans would be less fettered in pursuit of their optimal partisan strategy, which would appear to include crafting as many districts (baroque or not) to concentrate as many African-American voters as possible.[25]

This description captures two central assumptions of nearly all contemporary thinking about the relationship between racial and partisan gerrymandering.[26] The first is about the strategy a redistricter should use in order to bias the resulting districts in favor of her political party. The intuition is that a political party can maximize its partisan advantage in a redistricting plan—that is, maximize its expected number of districts won—by "packing" and "cracking" voters of the other party.[27] For example, if the Republican Party controlled the redistricting process, it would first "pack" Democratic voters into supermajority districts that are essentially thrown away electorally. In these districts, the excess Democratic votes are wasted

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[25] Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 757 (cited in note 15). The other leading election law casebook captures the prevailing view in similar terms. See Lowenstein, Hasen, and Tokaji, *Election Law* at 182 (cited in note 20) (citation omitted):

> A majority-minority district will usually be an overwhelmingly Democratic district. The concentration of Democrats in a number of such districts is likely to leave a disproportionate number of Republican voters in the rest of the state or jurisdiction. Given typical patterns of political geography in the United States, a districting plan that has a high number of majority-minority districts is likely to be one that benefits Republicans in the jurisdiction as a whole.

[26] To be sure, the literature is not entirely monolithic. There is a smattering of other theories about why the creation of majority-minority districts would benefit Republicans. For example, a few scholars have argued that conservative white Democrats will flee to the Republican Party as minority participation increases within the Democratic Party—or at least that they will become more likely to vote for Republican candidates. See, for example, Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice* 104–05 (Praeger 2001); Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in Bernard Grofman and Chandler Davidson, eds, *Controversies in Minority Voting: The Voting Rights Act in Perspective* 66, 81 (Brookings 1992) ("Increased minority participation has in turn caused an exodus of conservative white Democrats to the Republican party."). This theory echoes a much older argument, made by V.O. Key and others in the middle part of the twentieth century, that white voters might begin to support more conservative policies and politicians as the percentage of black voters grows within a district—a sort of backlash argument. See V.O. Key Jr, *Southern Politics in State and Nation* 342–44 (Knopf 1949); William R. Keech, *The Impact of Negro Voting: The Role of the Vote in the Quest for Equality* 99–102 (Rand McNally 1968). See also *Shaw v Reno*, 509 US 630, 648 (1993) (suggesting that at least some majority-minority districts could exacerbate racial bloc voting). Nonetheless, the pack-and-crack theory we describe above dominates the literature on the relationship between partisan gerrymandering and minority districting.

[27] For a more detailed discussion of the sorts of political advantages that redistricting authorities might want to obtain, see text accompanying notes 35–38.

in the sense that they are not needed to win. Having used up these voters, the Republicans would then spread thin majorities of Republican voters over the remaining districts, giving them a high probability of winning those districts while wasting as few Republican votes as possible. Blocs of Democrats within those districts are "cracked," in the sense that they are broken down so as not to constitute a majority in any single district. The above quote captures this common understanding that Republicans can maximize their partisan advantage by packing (African American) Democratic voters to waste as many votes as possible.[28]

The second assumption is that one can best understand the interplay between race and party by focusing on individual districts, rather than an entire redistricting plan, as the unit of analysis. Discussion then homes in on the majority-minority district and the few districts immediately surrounding it.[29] This methodological approach takes the preexisting district scheme as the baseline from which to measure partisan consequences, and then asks what happens as minority voters are allocated from the immediately surrounding districts to the new majority-minority district (which is typically assumed already to contain a majority of Democratic voters).[30] Taking this approach leads logically to the conclusion that the shift increases the number of wasted Democratic votes in the newly minted majority-minority district. Hence the conclusion that drawing such districts benefits the Republican Party.

The next Part argues that both of the above premises are misguided. The idea that the pack-and-crack strategy of partisan gerrymandering is optimal has been formalized by economists and political scientists,[31] has been adopted by both courts and legal

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28 We should note that the pack-and-crack model of optimal gerrymandering, as well as the "matching slices" model we describe below, assumes that there are no geographic constraints on redistricting. We discuss the implications of this simplification below. See Part III.A.

29 See, for example, Lublin, *The Paradox of Representation* at 10 (cited in note 21):

> Creating new majority-minority districts requires shifting minorities out of adjoining majority white districts. Minorities gain control over the representative from the majority-minority district at the cost of losing influence over several representatives in majority white districts. . . .
>
> Democrats fear and Republicans hope that racial redistricting will produce exactly this result. Republicans think that packing liberal Democratic minority voters into a few districts made adjoining districts more conservative and Republican and helped them win control of the House in 1994.

30 Relatedly, by taking the preexisting districting scheme as the baseline, the existing approaches have a largely ex post focus. Our approach instead focuses on the ex ante effects of minority-districting requirements on the redistricting authority's overall districting strategy.

31 For a small sample of the contemporary economics and political science literature, see, for example, Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral*

scholars,[32] and dominates the literature on redistricting today.[33] But we will explain that it is not in fact the optimal strategy. Moreover, it makes little sense to focus on individual districts. Because the districts within a redistricting plan are all interrelated, the more intuitive way to think about the relationship between race and partisanship is to focus on the overall redistricting plan.[34] To know whether a legal mandate requiring majority-minority districts benefits one party or the other, the appropriate counterfactual is what the redistricting plan would look like without the legal rule—not what some arbitrarily chosen subset of the preexisting districting scheme looked like. Thus, Part II takes the

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Consequences of the Reapportionment Revolution 37–38 (Cambridge 2002); Stephen Coate and Brian Knight, *Socially Optimal Districting: A Theoretical and Empirical Exploration*, 122 Q J Econ 1409, 1411 (2007); Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 NIU L Rev 409, 417–18 (2007); Timothy Besley and Ian Preston, *Electoral Bias and Policy Choice: Theory and Evidence*, 122 Q J Econ 1473, 1473 (2007); Thomas W. Gilligan and John G. Matsusaka, *Public Choice Principles of Redistricting*, 129 Pub Choice 381, 385 (2006); Thomas W. Gilligan and John G. Matsusaka, *Structural Constraints on Partisan Bias under the Efficient Gerrymander*, 100 Pub Choice 65, 71 (1999); Katerina Sherstyuk, *How to Gerrymander: A Formal Analysis*, 95 Pub Choice 27, 27–28 (1998); Guillermo Owen and Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 Polit Geo Q 5, 15 (1988). Interestingly, the pack-and-crack intuition appears to go back at least to the turn of the twentieth century. See Griffin, *The Gerrymander*, Outlook at 187–89 (cited in note 12) ("Gerrymandering is the arranging of districts of representation by a political party in power so as to concentrate its opponents' majorities and scatter its own, thus giving itself small majorities in many districts and its opponents large majorities in a few districts.").

32 See, for example, *Vieth*, 541 US at 286 & n 7 (Scalia) (plurality); Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 832 (cited in note 15) (describing the pack-and-crack strategy); id at 757 ("The strategy of partisan gerrymandering includes wasting as many votes of the other sides's partisans as possible by concentrating those voters into a few districts."); Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U Pa L Rev 541, 551 (2004); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 S Ct Rev 245, 249–50.

33 One exception to the widespread focus on redistricting with only two types of voters is the important work done by Ken Shotts. This work, which has been largely overlooked in the legal literature, constructs a model with three types of voters: minorities, white Democrats, and Republicans. See Shotts, 45 Am J Polit Sci at 122 (cited in note 22) (deviating from the traditional model of Republicans and Democrats by making the "simplifying assumption" that minorities are a subset of Democrats). See also Gilligan and Matsusaka, 129 Pub Choice at 384–85 (cited in note 31) (employing a somewhat similar model). Shotts's model generally predicts that the VRA's majority-minority districting requirements have little consequence for either party. See Shotts, 45 Am J Polit Sci at 121 (cited in note 22). In limited cases where the mandate is very large, it can constrain the Republicans, see id at 130, but this is quite different from the present Article, in which we argue that minority redistricting requirements affect the Republicans' optimal strategy in essentially every case where such a district is required.

34 One recent empirical paper takes this plan-wide approach to measuring the effects of majority-minority districts and provides suggestive evidence that the creation of majority-minority districts did not benefit Republicans and may in fact have benefited Democrats. See Ebonya Washington, *Do Majority Black Districts Limit Blacks' Representation? The Case of the 1990 Redistricting* *1 (unpublished manuscript, Oct 2010), online at http://www.econ.yale.edu/faculty1/washington/washington_racebaseddistricting_oct2010.pdf (visited Dec 23, 2010). Thus, this emerging empirical work is supportive of the theoretical claims made in this Article.

straightforward approach of asking what an unconstrained redistricter would do to gain a partisan edge and then asking whether the VRA's minority-districting requirements actually constrain this course of action.

II. PARTISANSHIP, RACE, AND OPTIMAL REDISTRICTING

This Part clarifies the misunderstood relationship between partisan and racial gerrymanders. Part II.A argues that there is a strategy better than pack-and-crack for maximizing partisan advantage in redistricting. Part II.B then explains how a redistricter following this superior strategy would allocate minority voters to districts. Finally, Part II.C combines this insight with the legal requirements of the VRA, showing that the general consensus about the relationship between minority-districting requirements and partisan gerrymandering is misleading.

A. A Theory of Optimal Partisan Gerrymandering

Over the past several decades, scholars have worked to understand both (1) what *ends* political actors want to achieve when they redistrict, and (2) what *strategies* they adopt to accomplish those goals. The desires of individual legislators engaged in the redistricting process are complicated, but there is substantial evidence that the twin aims of partisan advantage and self-preservation dominate the process. That is, legislators would like to benefit their political parties and make their own seats as safe as possible.[35] These goals are sometimes in tension, and there is disagreement about how individual legislators—and, collectively, legislative assemblies—make tradeoffs between these two desires. Nonetheless, almost everyone agrees that redistricting authorities are centrally motivated by the desire for partisan advantage. For that reason, it is unsurprising that the common approach laid out in Part I focuses first on partisan gerrymandering when thinking about the way that redistricters might use race instrumentally in the redistricting process.

If a political party with complete control over the redistricting process wants to draw districts to maximize its advantage within the resulting legislative assembly, how will it allocate voters across

[35] See Cox and Katz, *Elbridge Gerry's Salamander* at 18–44 (cited in note 31) (arguing that gerrymandering will be party-protecting if one party controls the line-drawing process, but it will be incumbent-protecting if neither party has unilateral control); Bruce E. Cain and Janet C. Campagna, *Predicting Partisan Redistricting Disputes*, 12 Legis Stud Q 265, 268 (1987) ("Partisan fights over redistricting usually center on two issues: incumbent displacement and partisan reconstruction of the seats.").

districts? In part, this depends on what sort of "advantage" the party cares about. Our discussion above of the conventional wisdom did not tackle this question directly, but it should be clear that the pack-and-crack model assumes that a party wants to maximize the expected number of districts that its candidates win so that it controls the largest possible seat share in the legislature.[36] This is a reasonable assumption, though of course it is unlikely that seat share is the only thing that a party will care about. A party will often care about winning (or maintaining) control of the legislature and thus will place a high value on getting above the 50 percent seat threshold. (For evidence of this, see the behavior of the Georgia state legislators during the 2000 round of redistricting.[37]) Or a party might be quite risk averse and care about reducing the uncertainty regarding the number of districts it will win. For our purposes, the precise objective is unimportant. The model of optimal gerrymandering we describe below holds across a variety of party objectives—even if a party cares simultaneously about things like seat share, legislative control, and reducing risk. Nonetheless, for ease of exposition, we assume that parties care exclusively about maximizing the expected number of seats they win, as this is the assumption that is most commonly made in the redistricting literature.[38]

As explained above, it is widely assumed that the way to maximize a party's seat share in redistricting is to pursue a strategy of packing and cracking voters who support the opposing party. The insights later in this Article about the VRA are driven by the fact that this model of partisan redistricting is misleading. Its logic depends crucially on a simplifying assumption: voters are either certain to vote

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36 For state legislative districting, the logic of this is straightforward. Things are a bit more complicated for congressional districting. States have primary control over federal congressional districting, but each state draws the districts only for its own congressional delegation. See note 11. A delegation is in some sense an arbitrary subunit of the House of Representatives; there is no direct connection between maximizing the seats won in a particular delegation and maximizing a party's seat share in Congress. See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 S Ct Rev 409, 412–18 (discussing the disaggregated nature of congressional redistricting and how it complicates both the strategies parties pursue and the judicial review of partisan gerrymandering). For a formal model of how a party's redistricting strategies differ in a system of disaggregated redistricting, see John N. Friedman and Richard T. Holden, *Optimal Gerrymandering in a Competitive Environment* *4–10 (unpublished manuscript, Mar 2010), online at http://faculty.chicagobooth.edu/appliedtheory/papers/2010-10.pdf (visited Dec 23, 2010).

37 See *Georgia v Ashcroft*, 539 US 461, 469–71 (2003).

38 Moreover, this assumption seems particularly appropriate with respect to congressional redistricting. In that context, the composition of an individual congressional delegation is not important; it is essentially irrelevant whether a party wins a particular state's congressional delegation (in part because any individual state is unlikely to be pivotal to control of Congress). See note 36. Accordingly, maximizing expected seats seems like an especially good assumption. To be clear, however, nothing significant turns on this assumption. See note 48 and accompanying text.

Republican or certain to vote Democrat. In reality, the electorate is much more complex. Some voters are indeed diehard Republicans and Democrats—people who with near certainty will never support a candidate from the other party. But many voters are not like this; their party loyalties are much less certain, and they regularly vote for candidates of different parties.[39] Moreover, many voters decline to identify at all with either party.[40]

Relaxing the simplifying assumption that scholars have made about voters and allowing for the possibility of more "types" might seem like a minor quibble unlikely to affect the basic pack-and-crack intuition. But this is not so. In a world with many voter types, the pack-and-crack logic breaks down and the optimal strategy—that is, the strategy that maximizes a party's expected number of seats—is very different.[41]

To see this, consider a more realistic assumption about voting behavior. Imagine that voters form a continuum from left to right. Those on the far left are extremely likely (but not absolutely certain) to vote Democrat (in a Democrat–Republican race), and those on the far right are extremely likely to vote Republican. In between are voters who favor Democrats or Republicans to varying degrees. A redistricter in this more realistic world faces two problems. First, the closer one moves to the middle of the distribution, the less certain one can be about a voter's behavior. Voters in the middle, for example, are equally likely to vote for a Democrat or a Republican. Second, it will be difficult for a redistricting authority to know exactly where any particular voter falls on this spectrum. After all, the redistricter can observe only an imperfect signal of the voter's type—a signal based on the voter's demographic characteristics, geographic location, and so on. These twin dilemmas are assumed away in existing accounts of partisan gerrymandering, which instead imagine that there are only

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39 Considerable work by political scientists—including the large body of literature on party identification and voter polarization—is concerned at least indirectly with the extent to which American voters' support for one party or the other at the polls can be reliably predicted. For a recent summary of some of this work, see generally Morris P. Fiorina and Samuel J. Abrams, *Political Polarization in the American Public*, 11 Ann Rev Polit Sci 563 (2008).

40 See Pew Research Center for the People and the Press, *Independents Take Center Stage in Obama Era: Trends in Political Values and Core Attitudes: 1987–2009* *2 (May 21, 2009), online at http://people-press.org/report/517/political-values-and-core-attitudes (visited Dec 23, 2010) (finding that 36 percent of registered voters were independents).

41 Indeed, even with just three voter types, pack-and-crack is suboptimal. See John N. Friedman and Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 Am Econ Rev 113, 113 (2008). In further work, Friedman and Holden show that this strategy also applies in a strategic setting where Democrats control the redistricting process in some states and Republicans in others. See Friedman and Holden, *Optimal Gerrymandering in a Competitive Environment* at *3–5 (cited in note 36).

two types of voters and that redistricters can identify voter type with certainty.

In other work, one of us has developed a formal model of districting in these circumstances.[42] Putting aside the technical details of the model, the central intuition is that the optimal strategy for a redistricter is to match slices of voters from opposite tails of the signal distribution. That is, a Republican would create districts by combining a bloc of strong supporters with a slightly smaller group of strong opponents, and then continuing this matching into the middle of the distribution of voters.

This "matching slices" strategy is optimal because it uses a party's diehard supporters most efficiently. There are two closely related ways to conceptualize the advantages of this strategy over the pack-and-crack strategy. First, it allows the redistricter to draw districts with thinner margins of victory in a world where there is uncertainty about voter behavior. The matching-slices strategy begins by drawing a district that matches voters at the two tails—the voters whose votes can be predicted most accurately. In contrast, the pack-and-crack strategy makes no effort to identify the most reliable voters; voters near the middle of the distribution are treated the same as voters at the far ends of the tails. This matters a lot, because a Republican redistricter can have more confidence in winning a district with 52 percent diehard Republicans than a district with 52 percent Republicans, some of whom are diehard supporters but many of whom are moderates. And thinner margins within districts translate into more districts won overall, because supporters can be distributed more broadly.

Second, the matching-slices strategy allows the Republican redistricter to ensure the election of more conservative legislators. Under the pack-and-crack approach, the most conservative Republicans would be spread over a large number of districts in which they are likely to be well to the right of the median voter. But by drawing districts starting with a slice in which every Republican is from the far right tail, the redistricter uses these votes *as the median voter*—and hence they become pivotal to election outcomes.

The formal model proves that "matching slices" dominates "pack and crack."[43] To see this, consider an extremely simple example in which a redistricter is drawing only two districts. To keep things as straightforward as possible:

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42 See Friedman and Holden, 98 Am Econ Rev at 121–28 (cited in note 41).

43 See id at 125–30 (demonstrating this dominance in Propositions 1 and 2 and a series of numerical examples that show that the difference in the expected number of seats won can be large).

- First, suppose that the redistricter observes a noisy signal about each voter's preference, and that these signals range from -1 to $1 + \varepsilon$. These signals are the best information available to the redistricter about voters' preferences. Suppose that each signal is equally likely—that, so far as the redistricter can tell, the voters are uniformly distributed across the spectrum.[44]
- Second, suppose that ε is positive but arbitrarily close to zero. One can think of ε as a measure of how many more Republican than Democratic supporters there are. Thus, for a very small ε, the population is divided almost fifty-fifty. We include ε to eliminate the possibility of ties, but for purposes of understanding the example one can chose simply to ignore it altogether in the exposition below.
- Third, suppose that the actual preference of a given voter ranges between her signal minus ½ and her signal plus ½. This reflects the fact that the redistricter does not have perfect information about the voter. So a voter whose signal was ½ might actually have a preference of 0, or 1, or something in between. Again, suppose that each of these possibilities is equally likely.

Imagine that our hypothetical redistricter is a Republican. The redistricter must draw districts of equal size, so under the pack-and-crack strategy he basically splits the distribution of voters in half. One district contains voters with signals between -1 and $0 + \varepsilon/2$; it is composed almost exclusively of voters who appear to be Democrats. The other district contains voters between $0 + \varepsilon/2$ and $1 + \varepsilon$; it contains voters who all appear to be Republicans.[45] Republicans expect to win approximately one district, because they are almost certain to win the district full of Republicans and to lose the district full of Democrats. Moreover, since the expected preference of the median voter in each of the two districts is symmetric, with one somewhat to the left of 0 and the other equally to the right, this strategy does not bias the median legislator in favor of Republicans. Figure 1 shows this districting arrangement.

Now consider the matching-slices strategy. The Republican redistricter can do much better than pack-and-crack by instead drawing the first district with slices of voters from opposite tails of the voter distribution. The optimal first district involves joining a slice of

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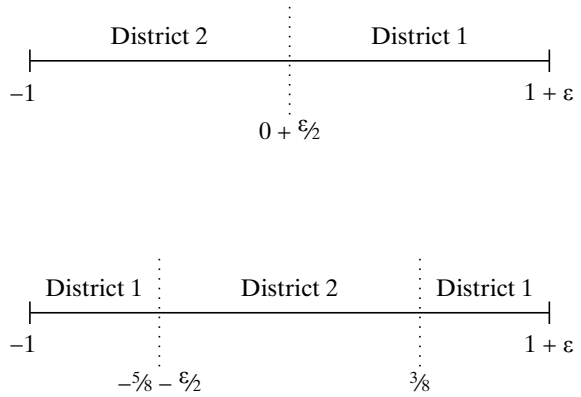
44 In the language of probability theory, the signals are uniformly distributed.

45 If one chooses to ignore ε, then one district contains voters with signals between -1 and 0, and the other contains voters with signals between 0 and 1.

voters from the far right with a slice from the far left. It can be shown formally that the slice on the right includes voters with signals between $\frac{3}{8}$ and $1 + \varepsilon$, while the slice on the left includes voters between -1 and $-\frac{5}{8} - \frac{\varepsilon}{2}$.[46] The second district contains the remaining voters, who are in the middle of the signal distribution. Figure 1 shows what this district looks like.

FIGURE 1. PACK-AND-CRACK VERSUS MATCHING SLICES



One way to think about the advantage of the matching slices arrangement is to focus on what it does to the identity of the median voter in each district. Under pack-and-crack, the median voters in the two districts are basically at $+\frac{1}{2}$ and $-\frac{1}{2}$; they essentially cancel each other out. Under matching slices, however, the median voter in District 1 is essentially at $\frac{3}{8}$, while the median voter in District 2 is essentially at $-\frac{1}{8}$. These median voters do not cancel each other out; combined, their average is well to the right of 0, which favors Republicans. And while it is slightly less intuitive, the formal model shows that this also increases the expected number of districts won by Republicans.[47] Matching slices allows the Republicans to win

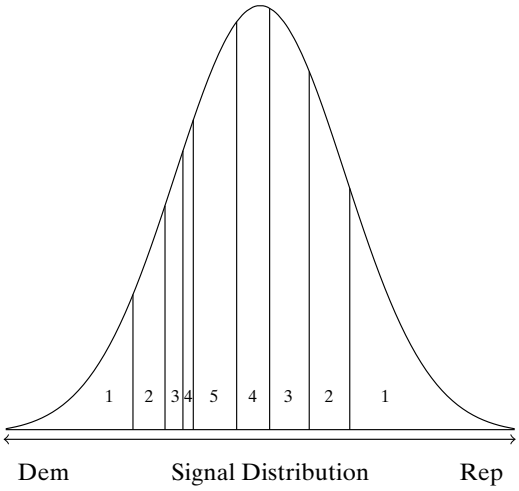
46 See Friedman and Holden, 98 Am Econ Rev at 120 (cited in note 41).

47 To see this intuition, consider the pack-and-crack plan again. Under that plan, Republicans are extremely likely to lose District 2, because almost all of the voters in the district appear to be Democrats, and the median voter in the district is well to the left of center. In the matching-slices example, however, District 2 contains a substantial fraction of Republicans as well as Democrats, and the median voter is very close to 0, the center of the voter distribution. This gives Republicans a much better shot of winning District 2. Moreover, while it is true that District 1 is slightly less secure for Republicans under matching slices than it is under pack-and-crack, the formal model shows that this minor loss in security is more than offset by the substantial increase in the likelihood of winning District 2.

approximately 1⅛ districts in expectation—more than a 10 percent improvement over the 1 they win under pack-and-crack.

To see how the matching-slices strategy translates to situations with larger numbers of districts, consider the five-district example illustrated in Figure 2 below. The horizontal axis represents the redistricter's signal about voting intention, with those on the left expected to be more and more likely to vote Democrat and those on the right Republican. The vertical axis represents the proportion of each type. Suppose that the redistricter is Republican. District 1 is formed by matching a slice of voters from the far left tail with a slightly larger mass of voters from the far right tail. The redistricter then works inward toward the middle, matching slices from opposite sides to create subsequent districts. The final district—District 5—is composed of the whole slice left over after the other districts are drawn.

FIGURE 2. MATCHING-SLICES STRATEGY



Source: Friedman and Holden, 98 Am Econ Rev at 126 (cited in note 41).

There are several features of this optimal slicing that follow from the formal model. First, District 2 involves relatively more voters from the right tail than the left, District 3 more still, and so on. This reflects the fact that when the redistricter is more certain about how someone will vote (as happens in the tails), she is able to "cut it finer," confident that her die-hard supporters will not defect. Second, if a gerrymanderer is risk averse, then matching slices is still optimal, but the relative width of the slices changes; the right-hand slice of District 1 will grow and the left-hand slice will shrink as the redistricter becomes more risk averse. In other words, she will cut the slices less finely. (Conversely, a risk-

taking gerrymanderer will cut the slices more finely.)[48] Third, District 1 is the district that the redistricter wins with the greatest probability, District 2 the next highest, and so on. She may still win District 5, but it is moderately unlikely (in the example depicted). Of course, if the redistricter were a Democrat, the strategy would be analogous, but with the larger slices coming from the left tail rather than the right.

Importantly, the technical dominance of the matching-slices strategy appears to translate into significant real world gains.[49] In earlier work, one of us analyzed the magnitude of the gain in the example in Figure 2, where the redistricter must draw five districts and the population is evenly divided between Republicans and Democrats. Random redistricting under these conditions would lead to Republicans winning 2.5 districts in expectation. Matching slices is far superior. If the redistricter can obtain a relatively good signal,[50] as she might by analyzing demographic information and past voting behavior, then matching slices enables the redistricter's party to win 3.46 districts in expectation (that is, 69.2 percent of the districts). By contrast, using the best possible version of pack-and-crack (which involves packing one district and cracking the other four), the redistricter wins 2.86 districts in expectation (that is, 57.2 percent of the districts). In California, which has 53 congressional districts, the difference between these strategies is roughly 6.5 districts, a difference of tremendous political importance.

As we explain in the balance of the Article, the fact that the model undermines the common pack-and-crack intuition turns out to have important implications for how scholars and courts should think about minority districting and the VRA. Before proceeding, however, it is useful to note one other qualitative difference of the matching-slices strategy that is important for our later discussion. When Republicans control redistricting, they start by drawing an extremely polarized district, matching those on the far left with those on the far right—and the resulting district is the *safest Republican district.* This means that those most likely to vote Democrat do the worst. They are

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48 John Friedman and Richard Holden show that matching slices holds for *any* objective function that is strictly increasing in the number of seats won (even if some seats are valued more than others). This means that the model excludes only objective functions according to which a redistricter would prefer to pick a plan that leads to a lower expected seat share for her party. See Friedman and Holden, 98 Am Econ Rev at 130–32 (cited in note 41). Basically, increasing the probability of winning any one district, holding others constant, has a linear impact on any such objective function. The assumption we employ for ease of exposition—that the gerrymanderer cares only about the expected number of districts—imposes a linear impact directly.

49 See id at 128–30 (conducting computational analyses to test the differences between the two strategies).

50 For an exact definition of this "relatively good signal," see id at 129.

least likely to be able to elect a candidate of their choice, and the representative for their district will be selected by a very conservative median voter. The pack-and-crack strategy predicts the opposite fate for these diehard Democrats. In that model, many Democrats are packed into throwaway districts, so diehard Democrats stand a good chance of residing in a quite liberal Democratic district.

B. The Role of Race in Optimal Partisan Gerrymanders

With a clear model of the optimal partisan strategy, we can add race to the mix to show how Democrats and Republicans would want to treat minority voters within the model. This depends, of course, on where minority voters fall in the distribution of voters. If minority voters were distributed evenly throughout the ideological spectrum, then redistricting authorities motivated by partisanship would have no reason to pay attention to race. Of course, minority voters are not so evenly distributed. In particular, African American voters—the voters with whom the VRA has historically been most concerned[51]—have a strikingly different ideological distribution from white voters. This, we argue, would lead a redistricting authority who is interested *only* in partisan advantage to treat African American voters differently from white voters when assembling electoral districts.

To simplify the analysis, we begin by assuming that there are voters of only two races—white and black.[52] (We return at the end of the Article to consider the role of other racial minorities within our framework.[53]) To get a preliminary sense of how African American voters are likely to vote, it is useful to understand voting patterns in presidential elections. In the last five presidential elections, more than 84 percent of African American voters voted for the Democratic candidate; and in the last three presidential elections, more than 89 percent did.[54] These results provide strong support for the

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51 See text accompanying notes 64–71.

52 Because our focus is principally on African American voters, throughout the Article we use the term "majority-minority district" interchangeably with "majority African American district."

53 See Part IV.B.3.

54 See CNN, *Election Center 2008: Exit Polls*, online at http://www.cnn.com/ELECTION/2008/results/polls/#USP00p1 (visited Apr 3, 2011); CNN, *America Votes 2004: Election Results*, online at http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (visited Apr 3, 2011); *ABC Exit Polls* (2000), online at http://abcnews.go.com/sections/politics/2000vote/general/exitpoll_hub.html (visited Apr 3, 2011); CNN, *The Vote '96: Presidential Election Exit Poll Results—Part 1*, online at http://www.cnn.com/ALLPOLITICS/1996/elections/natl.exit.poll/index1.html (visited Apr 3, 2011); Roper Center for Public Opinion Research, *US Elections: How Groups Voted in 1992*, online at http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_92.html (visited Apr 3, 2011). For various exit polls detailing voting patterns by race, see, for example, CNN, *America Votes 2004*. For an important analysis of those patterns in the 2008

conclusion that African American voters are clustered on the far left tail of the voter distribution.

The location of African American voters has implications for both Democratic- and Republican-controlled partisan gerrymanders. Within the optimal gerrymandering model we laid out above, partisan redistricting authorities assemble electoral districts by joining vertical slices from opposite ends of the voter distribution. If we begin by assuming that African American voters are all located further down the tail than any white voters, it is easy to see what partisan redistricting authorities would optimally do with them. Democrats would create their first district by taking a slice of voters from the left tail and joining it with a slightly smaller slice from the right tail. If there are a sufficient number of African American voters in the state, then the district will contain only African American Democrats and white Republicans. The African American Democrats will outnumber the white Republicans; in other words, the Democratic redistricting authority will create a majority-minority district for purely partisan reasons. But the Democrats would not create anything like a supermajority in this district. In fact, that first district would be the one with the thinnest margin between Democrats and Republicans, because it would include the parties' strongest-signal voters—the part of the electorate whose voting behavior can be predicted with the greatest confidence. In that sense, the district would contain the most "extreme" voters from each party.[55]

The Democratic redistricting authority would continue creating districts by slicing inward, creating majority-minority districts until it ran out of African American voters. Thus, it would draw the maximum possible number of majority-minority districts in the state. The residual African American voters would then be joined in a slice with other white Democrats.

A pure Republican gerrymander would treat African American voters differently. Like the Democrats, Republican redistricting authorities would assemble districts by joining together slices of voters from either end of the voter distribution. Unlike Democrats, however, each slice from the right end of the distribution would contain more

presidential election, see Ansolabehere, Persily, and Stewart, 123 Harv L Rev at 1411–24 (cited in note 2).

55 We should note that throughout the Article we use "voters" to mean those who actually vote in the relevant election. Imperfect turnout is easily incorporated into the model. If turnout is less than perfect but the same for all voters, essentially no changes are required. If turnout rates are different for different slices of the voter distribution, the model would simply require a lower turnout slice's thickness to be increased to compensate for the turnout differential. The only real difficulty arises if a voter's likelihood of turning out is influenced by the identities of other voters in the district. We touch on this potential complication below. See Part III.C.

voters than the left-tail slice with which it was joined. In other words, the Republican redistricting authority would also want to consolidate African American voters but, unlike Democrats, would want to create districts in which African American voters remain just below 50 percent of the district. Slicing inward, they would create a series of districts that looked like this—joining a slim majority of white Republicans with a large minority of African American voters—until the supply of African American voters was exhausted.[56] And just like the districts drawn by Democrats, the most liberal African American voters would be joined with the most conservative white voters.

The treatment of African American voters by Democratic and Republican redistricters diverges sharply from today's conventional wisdom about redistricting. As Part I explained, the common view is that Republicans' optimal strategy is to pack African American voters into supermajority districts.[57] In a world with diverse voter types, however, there is no plausible distribution of African American voters that would make it optimal for Republican redistricting authorities to create districts in which African Americans make up a supermajority of voters. Within the model, packing one's opponents is never the optimal strategy. The only situation in which a partisan redistricting authority would create a district with a supermajority of its opponents is when it assembles the last, residual district. Because this district is simply made up of the leftovers, it is possible that it would contain a large supermajority of the redistricter's opponents. But it would also typically be made up of fairly moderate voters—voters from near the middle of the voter distribution. In light of the preliminary evidence above, it seems quite unlikely that these would be African American voters. (Such a result is conceivable only in a state with very few districts where African American voters make up a large fraction of the electorate.[58])

A somewhat related (perhaps corollary) piece of conventional wisdom is that it is optimal for Democrats—particularly Democrats

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56 As we explained above, District 2 would contain a slightly larger majority of Republicans than Democrats, District 3 a slightly larger majority than District 2, and so on.

57 See notes 26–31 and accompanying text. See also David Ian Lublin, *Race, Representation, and Redistricting*, in Paul E. Peterson, ed, *Classifying by Race* 111, 124 (Princeton 1995) (arguing that "Republicans may substantially benefit" from the "inherent conflict between maximizing the number of black majority districts and the number of Democratic districts").

58 Technically, there is one other situation in which Republican redistricting authorities would desire to draw a supermajority black district, but it seems even less plausible. If a state contained a substantial number of black voters who were extremely conservative Republicans, then it is possible that the optimal Republican gerrymander would include a district with (1) a majority of conservative Republicans, many of whom were black, joined with (2) a minority of liberal Democrats, nearly all of whom were black. This situation defies contemporary political reality.

today, in a world where racially polarized voting has decreased somewhat—to spread African American voters across a larger number of districts in which they constitute a plurality, but not a majority, of voters.[59] But under matching slices, it is unlikely that this would ever be an optimal strategy. If African American voters occupy the far-left tail of the voter distribution, then Democrats would first want to draw districts in which these voters constitute a majority—not a plurality.[60] It is true, of course, that the actual distribution of Democratic voters is somewhat more complicated than we have described. There may be some African American voters who are to the right of some white voters in the signal distribution. Such a situation would sometimes justify drawing plurality districts. But, particularly in the South, where the bulk of such districts are drawn, this situation is not terribly common. The South is not populated by large numbers of very liberal white Democrats in the way that, say, Massachusetts is.[61]

Moreover, the situation we describe here that would favor plurality districting does not track the evidence that others have relied on to argue that plurality districting is best for Democrats. Existing accounts have focused principally on evidence that the level of racially polarized voting has decreased in some places in the South. But these reductions have not been caused by changes in the voting patterns of African Americans; rather, they have been driven largely by changes

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59 See, for example, Cameron, Epstein, and O'Halloran, 90 Am Polit Sci Rev at 794 (cited in note 21) (arguing that "minority candidates may have a substantial chance of being elected from districts with less than 50% minority voters"); Bernard Grofman, Lisa Handley, and David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 NC L Rev 1383, 1423 (2001). Richard Pildes summarizes the social scientists' conclusions about plurality districts as follows:

> Indeed, it is conceivable that minority politicians and Democrats would favor spreading out voters in a current safe district across two coalitional [that is, plurality] districts in a covered jurisdiction. . . . In particular, the Republican Party has come to recognize that the "safe districting" approach of the 1990s favors its partisan interests, while the Democratic Party has recognized the opposite. . . . There is nothing far fetched about this; the Republican Party is already pursuing precisely this strategy in seeking to have Georgia's 2000 redistricting plan, drawn by a Democratically controlled legislature, overturned on the grounds that it violates section 5 because the plan does not create enough majority-black congressional districts.

Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 NC L Rev 1517, 1558–59 & n 116 (2002).

60 It is true, of course, that eventually the party will run out of African American voters to allocate to districts and thus will draw one plurality district, but this is not consistent with the claim that Democrats should prefer plurality districts in the first instance.

61 Still, one might try to estimate the signal distribution for various states to help confirm this intuition about the voter distribution. It is possible to estimate the signal distribution by matching census characteristics to precinct-level voting returns, both of which are widely available.

in the voting patterns of white Democrats.[62] The fact that some white Democrats are now more willing to vote for African American candidates is not particularly good evidence that those voters have moved significantly to the left in the voter distribution, much less that they have moved to the left of African American voters. After all, these white voters were presumably among the most conservative of white Democrats.

C. The Partisan Implications of the VRA's Redistricting Requirements

Understanding how the Democratic and Republican parties' optimal redistricting strategies interact with the VRA requires a basic understanding of the Act's legal requirements as they relate to redistricting. These requirements are exceedingly intricate.[63] Much of this detail is unnecessary for our basic argument, however, so we begin with a somewhat simplified account and then return, in Part IV, to consider the implications of some of the Act's complexities.

Enacted in 1965 to combat the widespread exclusion of African American voters from politics, the VRA included two core enforcement mechanisms that today shape the redistricting process.[64] The first is embedded in § 2 of the Act, which prohibits states from using any voting practice "in a manner which results in a denial or abridgement of" minority voting rights.[65] Section 2 created a private right of action to enforce this prohibition. And, over time, the provision has been interpreted by courts to prohibit districting schemes that "dilute" the votes of minority voters.[66] The concept of

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62 See, for example, Charles S. Bullock III and Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 Emory L J 1209, 1240–41 (1999) (discussing changes in the behavior of white voters that have led to lower levels of racially polarized voting).

63 For an overview of the VRA's legal requirements, see Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 459–526, 595–820 (cited in note 15).

64 See VRA §§ 2, 5, 79 Stat at 437, 439. See also Valelly, ed, *The Voting Rights Act* at ix, 258 (cited in note 18) (discussing the impetus for the VRA).

65 42 USC § 1973. As initially enacted, the language of § 2 more closely tracked the language of the Fifteenth Amendment. Compare VRA § 2, 79 Stat at 437 (prohibiting states and political subdivisions from applying a voting rule "to deny or abridge the right of any citizen of the United States to vote on account of race or color"), with US Const Amend XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). But after the Supreme Court held in *City of Mobile v Bolden*, 446 US 55 (1980), that § 2 required a showing of discriminatory purpose to make out a claim of vote dilution, id at 69–70, Congress amended the provision to make clear that it embodies an effects test. See Voting Rights Act Amendments of 1982 ("VRA Amendments") § 3, Pub L No 97-205, 96 Stat 131, 134, codified at 42 USC § 1973; Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U Chi L Rev 1493, 1497–1500 & n 25 (2008).

66 See *Thornburg v Gingles*, 478 US 30, 47–49 (1986).

vote dilution is complex and contested.[67] But oversimplifying somewhat, the most important feature of the prohibition on vote dilution is that it sometimes requires redistricting authorities to draw electoral districts in which minority voters constitute a majority of the district—districts that are typically referred to as "majority-minority districts."[68]

Section 5 of the VRA contains the second enforcement provision crucial to redistricting. This part of the Act, added by Congress because of concern that private litigation would be insufficient to stamp out discriminatory practices, created a system of federal oversight for some jurisdictions.[69] It singled out some states and local governments and required those "covered" jurisdictions to seek preclearance from the Justice Department before making any changes to their election laws—including changes to their districting arrangements.[70] Under § 5's rubric, the Justice Department would preclear a change only if the jurisdiction demonstrated that the legal change would not make minority voters worse off than they were under existing law. This requirement came to be known as the "nonretrogression" principle.[71]

Section 5 thus differs from § 2 in three important respects: first, it covers only part of the country; second, it subjects those parts of the country to public oversight by the Justice Department in addition to § 2's threat of private litigation; and third, it prohibits the retrogression of the position of minority voters rather than prohibiting vote dilution. Despite these differences, as a practical matter § 5 has often also required redistricting authorities to draw majority-minority districts.[72] We can therefore begin by imagining a slightly simplified world in which the VRA is understood to require the creation of majority-minority districts whenever possible.

A legal rule requiring the creation and maintenance of majority-minority districts does not, without more information, imply anything about the partisan consequences of the VRA. But because we have

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67 For a careful account of the concept of vote dilution, see generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv L Rev 1663 (2001).

68 For a more detailed explanation of the development of § 2 jurisprudence, see Cox and Miles, 75 U Chi L Rev at 1496–1505 (cited in note 65).

69 See Drew S. Days III, *Section 5 and the Role of the Justice Department*, in Grofman and Davidson, eds, *Controversies in Minority Voting* 52, 53, 59 (cited in note 26). See also *South Carolina v Katzenbach*, 383 US 301, 313–15 (1966).

70 See VRA §§ 4–5, 79 Stat at 438–39, codified as amended at 42 USC §§ 1973b–c.

71 See *Beer v United States*, 425 US 130, 141 (1976).

72 See David M. Guinn, Christopher W. Chapman, and Kathryn S. Knetchel, *Redistricting in 2001 and Beyond: Navigating the Narrow Channel between the Equal Protection Clause and the Voting Rights Act*, 51 Baylor L Rev 225, 227–28 (1999).

laid out the optimal strategy for redistricting authorities with purely partisan agendas above, we are now in a position to compare that optimal strategy with (a simplified account of) the legal requirements of the Act. Doing so allows us to answer this Article's central question: Does the requirement of drawing majority-minority districts for African American voters bind the political parties in different ways?

As is likely already clear from the above discussion, the VRA imposes different constraints on Democratic and Republican redistricting authorities. The Act's legal requirements align perfectly with the optimal partisan strategy for Democrats. Purely partisan Democrats in control of redistricting should *want* to draw districts that contain slim majorities of African American voters, because such districts help maximize the partisan payoff of redistricting.

The Act's impact on purely partisan Republican redistricters is quite different. To be sure, they would also want to consolidate African American voters. They would not want to sprinkle African American voters across a large number of districts. But they also would not want to combine African American voters to the point where those voters make up a majority of any single district. Instead, they would want to cluster African American voters into districts where conservative Republicans constitute slim majorities. Thus, a plan drawn by unconstrained Republicans would contain three features that are important for our discussion: it would contain districts with large fractions of African American voters; those African American voters would not constitute a majority of *any single* district; and those African American voters would be paired with the most ideologically conservative voters in the state.

On our simplified account of the VRA's legal constraints, Republicans would be legally prohibited from pursuing this strategy. The Act would require them to give African American voters majorities in districts wherever possible. This is the last thing Republicans would want to do. Thus, our approach shows that Republicans are constrained by the Act in a way that Democrats are not.[73] This is the opposite of the conventional wisdom that has dominated the field for nearly two decades.[74] Far from benefiting Republicans, the VRA prevents them from pursuing an optimal partisan strategy.

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[73] By "constrained," we mean constrained in a meaningful way. Obviously Democrats and Republicans face the same *formal* legal constraints when they draw districts. But these formal constraints turn out to be functionally irrelevant if they coincide with the strategy that the redistricter would optimally like to pursue.

[74] See Part I.

To get a rough sense of how material the constraints of the VRA might be on a Republican redistricter, consider again the five-district example discussed above. If a Republican redistricter is constrained to create one pure minority district, then she is required to take one slice out of the left tail and make that a district. Then, having satisfied the constraint, she is free to pursue a matching-slices strategy for the remaining voters. When this is done optimally, a Republican redistricter wins approximately 2.8 districts in expectation.[75] This is significantly less than the approximately 3.5 districts that the same redistricter can win without the constraint—a more than 10 percent difference that is undoubtedly important in an era in which Congress and state legislatures are often very closely divided.

These Republican losses stem from the fact that when a Republican redistricter is forced to create a district purely from the left tail, Republicans win this district with very low probability (in this example, less than 5 percent). Thus, despite the advantages that come from matching slices, one district is basically lost. In that way, the legal constraint makes the redistricting plan look much more like a pack-and-crack plan. And gerrymandering the remaining four districts—even when the voters are more Republican-leaning—can compensate only so much. The key advantage of the matching-slices strategy is that it allows a redistricter to neutralize the power of her most ardent opponents. Constraining a Republican redistricter in the way the VRA does mutes this advantage.

III. SIMPLE MODELS AND THE COMPLEX REALITY OF REDISTRICTING

As we explained in Part I, existing accounts of the relationship between partisan gerrymandering and racial redistricting are based on the pack-and-crack model. Matching slices improves on that model for a simple reason: redistricting authorities who want to maximize partisan advantage would never want to throw away a large chunk of the information they have about voters and pretend that there are only two types of voters in American politics. Still, our approach does share a shortcoming of the traditional pack-and-crack account. Both models are built around a theory of optimal behavior. Identifying optimal behavior, however, is not the same thing as explaining actual behavior. This is a fact that has frequently been overlooked in discussions of partisan and racial gerrymandering. Those who have

[75] See Friedman and Holden, 98 Am Econ Rev at 129 (cited in note 41).

argued that pack-and-crack is optimal have typically assumed that redistricters followed the approach *because* it was optimal.

To be sure, rational-actor assumptions are much more plausible in the redistricting context than they are in other areas of life and law. Still, readers will have different intuitions about the plausibility that redistricting authorities either (1) are already engaging intuitively in something approximating matching slices, or (2) will begin using this strategy as soon as they realize that it is superior to pack-and-crack.[76] These questions about the connection between optimal behavior and actual behavior are ones we are pursuing in follow-up work. For present purposes, however, the important point is that our core claims do not depend on the answers to these questions. Existing claims about the partisan implications of the VRA have been based on a model of optimal behavior. Our central aim is to improve on those claims and show that a model that more closely matches reality leads to a different conclusion about the partisan bias built into the Act.

Both models could, of course, be improved along other dimensions, and we do not mean to claim that there is no further room for refinement. Even if one assumes that redistricting authorities behave in a rationally maximizing fashion, it is important to remember that our approach, like the pack-and-crack approach that preceded it, makes an important set of simplifying assumptions about how the redistricting process is constrained and about what constitutes rationally maximizing behavior. Matching slices captures reality better than pack-and-crack, and for that reason should be preferred—even by those generally skeptical of models—to the pack-and-crack approach. But there are several ways in which one might complicate both the crack-and-pack approach and the matching-slices model, and these complications suggest directions for future research.

A. Geography and Residential Segregation

As we noted above, both models assume that there are no geographic constraints on redistricting.[77] Redistricting is conceptualized as a problem of allocating voters to districts, but the spatial location of each voter is unmodeled. This is obviously a simplification. Voters' locations place at least some minimal constraints on their allocation to districts. Nearly all states require that legislative districts be contiguous,

[76] One way to speculate about these possibilities is to ask the following hypothetical question: If political actors were offered additional information about voters and were told that there was a mechanism that those actors could use to turn this additional information into greater partisan advantage in the redistricting process, would they be likely to turn down the information?

[77] See note 28. See also note 25 and accompanying text.

and some require that they be "compact."[78] Nonetheless, these formal constraints are widely regarded as practically unimportant. Contiguity can easily be satisfied, even by outlandishly shaped districts, and compactness requirements are almost never enforced in any meaningful way by courts.[79] A quick glance at the tortured shapes of electoral districts drawn in recent decades makes it unsurprising that most scholars conclude that shape is simply not a meaningful constraint on partisan manipulation.[80]

Despite this widespread agreement, it is important to be attentive to the fact that geography does, in theory, constrain matching slices more than pack-and-crack. Matching slices requires the redistricting authority to work with a smaller fraction of the state's voters when drawing any particular district. This can make the line-drawing problem more difficult. For example, joining right-tail Republicans with left-tail Democrats will in some cases be more difficult than just joining Democrats and Republicans.

The practical significance of this theoretical difference depends on both the political demography of a state and the extent to which oddly shaped districts are tolerated. There may be places where it is quite easy to join opposite-tail voters. In Texas, for example, the pie-shaped districts that radiate out of several cities, stretching far from liberal cores in places like Austin out to distant, die-hard Republican strongholds in more rural parts of the state,[81] suggest one strategy for drawing such districts. Other places may present considerably more challenges. Some states, like New Jersey, prohibit redistricting authorities from splitting counties (except in limited circumstances) when drawing districts,[82] which might impose greater restrictions on both the pack-and-crack and matching-slices approaches. Given the difficulty of making categorical claims about the effect of geography, we are exploring this question empirically in separate work.

Nonetheless, even if geography does under some conditions constrain matching slices more than pack-and-crack, today's

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78 See Frederick McBride and Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 Stan J CR & CL 327, 349–50 (2005) (reviewing the multiple definitions of "compactness" in the context of a broader overview of traditional redistricting principles).

79 See, for example, Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich L Rev 483, 527–32 (1993).

80 One possible exception, involving *Shaw v Reno*, 509 US 630 (1993), and its progeny, is explored below in Part IV.A.

81 See *Texas's Representatives—Congressional District Maps*, online at http://www.govtrack.us/congress/findyourreps.xpd?state=TX (visited Apr 8, 2011).

82 See NJ Const Art IV, § 2(3).

redistricting plans provide powerful evidence that geographic restrictions do not undermine the Article's core claims. To see this, consider a case in which the redistricting authority collects no information about the distribution of voters other than party affiliation and race. The formal model shows that even in this limited case—which stacks the deck against the matching-slices approach by throwing out a considerable amount of information on which redistricters could otherwise rely—matching slices is superior to pack-and-crack.[83] Yet even in this simplified information environment, our central claim about race and redistricting holds. Given the reality that most African American Democrats, particularly in the South, lie further down the left tail of the voter spectrum than do most white voters, it is still optimal for redistricters to pair large numbers of African American Democrats with Republican voters. The parties differ only about which group should constitute a majority of the district: a Democratic redistricter will want the African American Democrats to outnumber the Republicans, while a Republican redistricter will want just the opposite.

Many states appear to contain just these sorts of districts: they are today's majority-minority districts.[84] This shows that geographic constraints have not prevented redistricters from drawing the sort of districts that are part of an optimal matching-slices strategy. Nor does it matter that some of these districts may have been compelled by the VRA. For as the Supreme Court made clear throughout the 1990s, the geographic constraints on districts drawn to comply with the VRA are, if anything, greater than the constraints on districts in which race is not in play.[85] Thus, even if the VRA were struck down or repealed, these districts would still pass muster.

This specific example highlights a more general point about the robustness of the Article's central real-world implications: they do not depend on redistricters being able to pursue the matching-slices strategy to perfection. In some cases, redistricters will have relatively crude information about voters. In other cases, the spatial distribution of voters will force redistricters to dilute an opposite-tail district with some number of voters from the middle of the distribution.[86] These

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83 See note 41.

84 See, for example, notes 118–23. To be sure, some of these districts also contain a number of white Democrats, though in Georgia and elsewhere the trend during the last round of redistricting was to reduce the number of white Democrats in the districts in order to minimize wasted votes while maintaining the district's majority-minority status. See id.

85 See notes 115–17.

86 Majority-minority districts provide one good example of this. Where patterns of residential segregation are stark, it will be easiest to draw districts that contain African American Democrats, white Republicans, and very few white Democrats. Where there are

constraints will reduce somewhat the power of the matching-slices approach. But it will still be superior to pursuing pack-and-crack. Thus, on the margin, a rationally maximizing redistricter should never prefer to throw out information about voters and retreat to pack-and-crack.

B. A Redistricting Authority Is a They, Not an It

As we explained in Part I, redistricting authorities have complex motivations that extend well beyond simply maximizing a party's seat share in the legislature.[87] In part, this is because a "redistricting authority" is a they, not an it. Redistricting's decisionmaking structure involves a complex interplay between myriad actors—interactions that are mediated by the formal rules governing state legislative processes and the less formal rules structuring power within the state and national political parties. Pretending that the decision is made by a single actor therefore comes with some costs.

This simplification affects matching slices less than pack-and-crack, because the matching-slices theory is more agnostic about the goals of redistricting authorities.[88] Nonetheless, some goals are outside both models. One prominent example is the desire of incumbent legislators to increase their own chances of reelection, even at the cost of the party's expected seat share.[89] While the mechanisms of incumbency advantage are poorly understood, changes to a district's boundaries are sometimes thought to undermine the advantage. The more this logic leads individual legislators to place some value on preserving their existing districts, the more redistricting becomes a path-dependent process.[90] The boundaries of existing districts will

higher levels of integration, the spatial distribution of voters may make it more difficult to exclude some white voters who are on the left side of the voter distribution (hence, Democrats) but are less far down the tail than African American Democrats. Thus, there may be times when the best district that a Democratic redistricter can draw will actually contain less than 50 percent African American voters. But the goal of the redistricter would still be to eliminate as many white Democrats as possible. Moreover, the preference for a plurality district in this context is a product of the spatial distribution of voters. It is not a product of white voters being willing to cross over and support candidates preferred by African American voters—which is the usual justification given for the desirability of plurality districts.

87 See notes 36–38 and accompanying text.

88 See note 48.

89 This is because matching slices can incorporate only objective functions that are strictly increasing in seat share. In less technical terms, this means that matching slices cannot accommodate situations where a redistricter would prefer to pick a plan that leads to a lower expected seat share for her party. See id.

90 A legislator might also resist changes to her district because her identity as a successful candidate is partly endogenous to the structure of that district. We discuss redistricting's potential endogeneity below. See Part III.C.

limit the set of politically acceptable future districts.[91] Where the path dependency is powerful, it will limit the ability of redistricting authorities to pursue any optimal partisan gerrymandering strategy that requires disrupting district boundaries.[92]

In addition to highlighting contexts where implementing matching slices may be harder, the idea of path dependency also points to situations where it is likely to be easier—such as situations where strong term limits reduce the number of incumbents and shorten their time horizons, or where a large number of the minority party's districts can be significantly changed (which will often be the case when there is a change in party control over redistricting), or where a state has gained or lost significant numbers of congressional seats in the decennial reapportionment process. These contexts point to some promising areas of inquiry for future research.

C. Endogenous Voters and Parties

Both matching slices and pack-and-crack assume that voters have fixed political preferences that are unaffected by redistricting.[93] Pack-and-crack assumes that those preferences are dichotomous—everyone is either a Democrat or a Republican. Matching slices relaxes that constraint and allows for some voters to be more reliable party voters than others. While this is an improvement, it may still fail to capture important characteristics of voters. One important question is whether voter behavior is endogenous to the redistricting process.[94] Does the composition of an electoral district influence voters' decisions about where to live? Their decisions about whether to go to the polls? Their

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91 It may be more accurate to say "the boundaries of the majority party's districts" here, as the party in control of redistricting may in many instances place a value on disrupting, rather than preserving, the boundaries of districts held by minority-party members.

92 Note that high levels of path dependency should also lower considerably the political significance of a redistricting cycle. If not much is likely to change, then not much is at stake.

93 The assumption is likely the result of a host of intellectual developments over the last several decades, including the recent popularity of competition-based accounts of politics, the focus on voting-aggregation issues (such as redistricting) within election law scholarship, and the more general rise of rational-actor approaches within the social sciences. See, for example, Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan L Rev 643, 707 (1998) (urging scholars to turn to competition-based accounts of politics to better understand voting rights jurisprudence); Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 Va L Rev 361, 365–74 (2007) (describing the way in which voting rights issues are often conceptualized as aggregation problems).

94 For those who question whether it is a sufficient improvement to go from a dichotomous distribution of voters to a continuous one, there is also the question whether one might incorporate a multidimensional model of voter behavior or preferences into the theory.

underlying political preferences? While a few scholars have begun to explore these questions,[95] there is much room for future work.

The possibility that voters could be affected by the composition of individual districts, or by larger political dynamics spawned by redistricting, raises a series of additional questions about second-order concerns that might motivate partisan redistricters. For example, if high levels of intradistrict polarization depress (or augment) turnout, then that could provide a reason for redistricting authorities either to like or dislike the creation of such districts.

Relatedly, it raises the possibility that redistricting may produce long-term consequences quite different from its short-term effects. Consider, for example, the claim that conservative white Democrats will flee to the Republican Party as minority participation increases within the Democratic Party—perhaps in part because of the election of minority candidates from majority-minority districts. This claim is an extension of a prominent account of the Southern realignment in American politics.[96] To the extent it is true, it suggests that redistricters focused on short-term partisan gain may draw districts that have unintended long-term consequences.

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In short, while it is important not to overlook these additional complications, they are largely beyond the scope of this Article. For present purposes, the central point is that they remain issues for all prominent theories of redistricting. Our hope here is simply to make an important improvement to the existing state of the literature—to develop a model of the relationship between partisan gerrymandering and minority districting that captures central features of the redistricting process better than the pack-and-crack model that has dominated for so long.

IV. THE PAST AND FUTURE OF THE VRA

Part II showed that we can improve on the implicit model that nearly everyone has been using to make sense of the relationship

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95 Within the large political science literature on voter turnout, for example, some emerging work looks specifically at whether turnout is affected by district-specific effects. In a recent paper, Ebonya Washington found that African American Democratic candidates tend to increase turnout among both black and white voters—but that the difference in the change in turnout between groups is not statistically significant. See Ebonya Washington, *How Black Candidates Affect Voter Turnout*, 121 Q J Econ 973, 996 (2006) (finding that black voter turnout increases by 2.3 percent and white voter turnout by 2.2 percent for every black Democrat on the ballot).

96 See note 26.

between partisan gerrymandering and racial redistricting. This insight has important implications for how we think about both the past and future of the VRA.

A. Retelling the History of Minority Districting

The law and politics of minority redistricting is frequently told through a handful of salient episodes that have taken place during the last few decades. The facts of these episodes lend themselves to a whole host of interpretations, but for a long time they have been interpreted through the lens of the conventional wisdom we described in Part I.[97] This is, of course, perfectly understandable. It takes a theory to make sense of facts. But since the old theory turns out to be mistaken, it is worth revisiting the episodes to see if our new theory can suggest alternative explanations for the observed facts. In so doing, our theory can help provide a deeper understanding of some crucial recent developments in the law and politics of redistricting.

1. Equal protection and racial redistricting jurisprudence.

As we noted in Part I, the conventional account of the relationship between race and party in redistricting emerged from the early 1990s redistricting battles in the South.[98] During that round of redistricting, many Southern states were covered by § 5 of the VRA and were therefore required to seek Justice Department approval for their redistricting plans. The Department of Justice used its oversight authority to pressure these Southern jurisdictions to create more majority-minority districts. This pressure—which some have suggested was originally engineered in part by Haley Barbour, a Republican strategist who became the chairman of the Republican National Committee in 1993—has been referred to as the "max black" agenda.[99] At the same time, Republicans formed an unusual political coalition with African American voters to sue for the creation of majority-minority districts under § 2 of the VRA.[100]

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97 See text accompanying notes 18–30.

98 See notes 20–22 and accompanying text.

99 See Marta Rose, Recent Decisions, *Civil Rights—Race Obliviousness and the Invisibility of Whiteness: The Court's Construction of Race*—Miller v. Johnson*, 115 S. Ct. 2475 (1995)*, 69 Temple L Rev 1549, 1550 n 13 (1996); Howard Fineman, *Shifting Racial Lines*, Newsweek 38 (July 10, 1995).

100 For extended discussion of these events, see Cunningham, *Maximization, Whatever the Cost* at 104–10 (cited in note 26); J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 409–39 (North Carolina 1999).

The role of the Republican Party in advocating for majority-minority districts during this period has typically been described as follows:

> Why do Republicans care about the number and size of black districts?
>
> The answers would appear to be simple. It is in the Republican interest to want large black districts. To the extent that the black Democrats are concentrated in legislative districts, it is easier for Republican candidates to win more seats overall. The creation of a newly black district is likely to drain black voters from other districts, many of them represented by white Democrats. The more "lily-white" the districts so drained become, the easier it is for Republicans to win them.[101]

At first glance, this account appears to be in serious tension with our central claim. It argues that majority-minority districts benefit Republicans, and that this is why the Republican Party supported the drawing of such districts. But closer inspection reveals two important points. First, the claim that the districts benefited Republicans is the result of reading this episode through the lens of the pack-and-crack model. Second, this idea about the optimal strategy is assumed to explain the actual motivation of Republican Party officials.

Our new account of the relationship between the optimal partisan strategy and majority-minority districting highlights the shortcoming of the above approach. It is possible, of course, that Republicans did not understand which strategy was in their partisan interest. The pack-and-crack idea was sufficiently pervasive during this period that it might have motivated them even if the idea itself was mistaken.

But even if we assume that Republicans were acting rationally to maximize their partisan gains, the above analysis is still infected with a mistake—one that highlights the way in which our approach differs from most earlier work on the partisan consequences of the VRA. The problem with treating the story above as evidence of a pro-Republican tilt to the VRA is that the account implicitly assumes that majority-minority districting represents Republicans' first-best strategy—the strategy they would pursue if they controlled the redistricting process and were unconstrained by the VRA. But, of course, that was not the world they occupied. In a world where the

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[101] Swain, *Black Faces* at 205 (cited in note 21). See also id at 206; Gary King, John Bruce, and Andrew Gelman, *Racial Fairness in Legislative Redistricting*, in Peterson, ed, *Classifying by Race* 85, 100, 107 (cited in note 57).

courts were moving to require more majority-minority districts[102] and where Republicans did not control the redistricting process in many of the states covered by § 5,[103] packing African American voters may have been a second-best strategy. Thus, in this extremely limited sense, it may indeed have been "in the Republican interest" to support these districts. But it is a mistake to generalize from that possible second-best strategy to the claim that Republicans benefit from legally mandated majority-minority districts. To make this broader claim, one must begin by explaining how a rational redistricter would behave if unconstrained. Only then can we sensibly ask who is more constrained by the legal requirements in the VRA.

In addition to calling into question this common story about 1990s redistricting, our approach suggests a new interpretation of the Supreme Court's *Shaw* jurisprudence that arose out of this episode. Simplifying somewhat, we can trace the development of racial-redistricting jurisprudence across three periods. In the earliest period, cases raised the question whether the Equal Protection Clause of the Fourteenth Amendment might require the creation of majority-minority districts as a remedy for minority vote dilution.[104] After the Supreme Court held in *Mobile v Bolden*[105] that unconstitutional minority vote dilution required a showing of discriminatory purpose,[106] Congress amended § 2 of the VRA to eliminate the intent requirement, and it became the principal vehicle for vote dilution claims.[107] As we explained, during this second period the statute was interpreted sometimes to *require* the creation of majority-minority districts.[108] Finally, in the third period, cases raised the question

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102 See *Thornburg v Gingles*, 478 US 30, 48–49 (1986). See also, for example, *United States v Dallas County Commission*, 850 F2d 1433, 1440–41 (11th Cir 1988); *Campos v Baytown*, 840 F2d 1240, 1249–50 (5th Cir 1988); *Jeffers v Clinton*, 730 F Supp 196, 207–08 (ED Ark 1989); *Brown v Board of Commissioners*, 722 F Supp 380, 392 (ED Tenn 1989); *McDaniels v Mehfoud*, 702 F Supp 588, 592 (ED Va 1988); *Dillard v Baldwin County Board of Education*, 686 F Supp 1459, 1470 (ED Ala 1988).

103 In North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Texas, Democrats controlled both houses of the relevant state legislatures. See *State Elective Officials and the Legislatures 1991–92* 1–3, 25–28, 71–73, 103–05, 125–28, 134–37 (Council of State Governments 1991). While Democrats did not control the governorship in North Carolina, see id at 103, the North Carolina Constitution specifically denies the governor the power to veto redistricting plans drawn by the state legislature. See NC Const Art II, § 22, cl 5.

104 See *Whitcomb v Chavis*, 403 US 124, 161–62 (1971); *White v Regester*, 412 US 755, 769–70 (1973).

105 446 US 55 (1980).

106 Id at 66–68.

107 See VRA Amendments § 3, 96 Stat at 134. See also Cox and Miles, 75 U Chi L Rev at 1497–1500 & n 25 (cited in note 65).

108 See text accompanying note 68.

whether the Equal Protection Clause would *prohibit* drawing majority-minority districts in some situations.

In *Shaw v Reno*,[109] the Supreme Court concluded that the answer to this question is yes. *Shaw* arose in North Carolina and involved the congressional districting plan drawn in 1991, in part at the insistence of the Bush Justice Department. The state had initially drawn a plan with one majority African American district.[110] After the Justice Department pressed the state during the preclearance process to draw an additional majority-minority district, the state complied.[111] The resulting district was convoluted and snake-like, winding along Interstate 85 as it cut across the state. For much of its length, the district was no wider than the I-85 corridor itself.[112] The district was attacked by a group of white voters as an unconstitutional racial gerrymander. Writing for the Court, Justice Sandra Day O'Connor concluded that the district triggered strict scrutiny under the Equal Protection Clause.[113]

The analytic structure of Justice O'Connor's decision and the resulting *Shaw* jurisprudence has been widely criticized on a number of grounds—including grounds of incoherence.[114] For that reason, there is little use trying to explore fully the contours of the doctrine here. Nonetheless, one feature of the doctrine is that, in practice, it has sometimes prevented states from drawing extremely convoluted districts in order to assemble supermajorities of minorities within those districts. Some commentators have suggested that perhaps the doctrine should be understood as a prohibition on overpacking minority voters.[115]

If *Shaw* and its progeny make it hard to assemble districts with large supermajorities of African American voters, then those cases

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109 509 US 630 (1993).

110 See id at 634.

111 See id at 635.

112 See id at 635–36 (quoting one state legislator's remark that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district"). See also Brief *Amicus Curiae* of the Republican National Committee in Support of Appellants, *Shaw v Reno*, No 92-357, *14–15 (US filed Jan 21, 1993) (asserting that in one county "northbound drivers on I-85 would be in the twelfth congressional district, while southbound drivers would be in the sixth district").

113 See *Shaw*, 509 US at 642–44.

114 See, for example, Pamela S. Karlan and Daryl J. Levinson, *Why Voting Is Different*, 84 Cal L Rev 1201, 1202 (1996) ("We believe that the Court's attempt to integrate voting rights law into its more general approach to affirmative action is both misguided and incoherent.").

115 See, for example, Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 757–58 (cited in note 15) (suggesting that *Shaw* might be understood to "limit not only race-based geographic manipulations of districts, but also the excessive concentration of minority voters in numbers well beyond those needed to ensure minority voters have an equal opportunity to elect candidates of choice").

could suppress the second-best strategy that Republicans might try to pursue when the law requires majority-minority districts. Part II showed that, absent legal constraints, it is optimal for Republicans to group African American voters into districts where they constitute a large fraction—but not quite a majority—of the district.[116] Since the VRA often prohibits this and sets a floor requiring those minority voters to constitute a majority, a Republican redistricter would be forced to pursue a second-best strategy. That strategy, as we noted above, is to pack as many African American voters as possible into a single district. (In other words, we may observe the packing predicted by pack-and-crack theory, but only because the redistricter is prevented from employing her optimal strategy.) This is perhaps the clearest way to see the constraints the VRA imposes on rationally maximizing Republicans.

If a legal rule added a ceiling to the VRA's floor—that is, a prohibition against assembling districts with large supermajorities of minority voters—the ceiling could suppress the second-best strategy for Republicans of packing minority voters. Some might see this as a saving grace of the *Shaw* doctrine. Of course, if we are concerned principally about partisan bias, such a rule might seem particularly problematic. After all, Democrats are free under the legal regime to pursue their optimal partisan strategy. Republican redistricters, however, are already denied their first-best strategy by the legally mandated floor. Adding a ceiling to restrict access to their second-best strategy as well would further exacerbate partisan bias.

2. Majority districts, plurality districts, and the retrogression test.

If "bizarre" districting was the focus of the 1990s, then plurality districting was surely the central redistricting issue of the 2000s. Plurality districts are those in which minorities make up less than a majority—though often still a significant fraction.[117] As we noted in Part II, the idea that majority-minority districts were bad for Democrats was soon followed by the closely related idea that

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116 See text accompanying notes 56–57.

117 The voting rights literature and case law often distinguish between two types of submajority districts. The first, generally called "coalition districts," are defined as those districts where minority voters can still elect their preferred candidate because some fraction of white voters will "cross over" to support that candidate. The second type, "influence districts," are those where minority voters can influence the election but cannot elect their preferred candidate. Because we are not focused here on the differences between coalition and influence districts, we depart from convention a bit and use the term "plurality district" to refer to any district in which minority voters constitute less than a majority.

Democrats could benefit by converting those districts into a larger number of plurality districts.[118]

Discussions of plurality districts often center on Georgia's redistricting in 2001—a redistricting that led first to the Supreme Court's seminal decision in *Georgia v Ashcroft*[119] and then to Congress's legislative response to that decision. At the time of Georgia's redistricting, the state was trending toward the Republican Party but was still controlled by Democrats. The Democrats in both the state house and senate were, by all accounts, motivated by a desire to hold on to control of the legislature.[120] One way they tried to improve the existing districting arrangements was by unpacking a number of majority African American districts.

The decision to thin out a number of majority-minority districts prompted litigation over whether the state had violated § 5. Section 5 prohibits "retrogression"—that is, it prohibits states from making changes to voting regulations that worsen the existing position of minority voters.[121] A state's preexisting policies therefore provide the baseline against which legal harm is identified. When Georgia's proposed plan reached the Supreme Court, the justices disagreed sharply over whether the changes to the preexisting redistricting plan made minority voters worse off. Writing for the majority, Justice O'Connor concluded that there was no retrogression and emphasized that minority voters benefit from many forms of political influence. Minority voters, she concluded, might have gladly traded some of their power to win particular districts for broader influence within a legislature that remained in Democratic hands.[122] In contrast, the four dissenters concluded that Justice O'Connor's test was unadministrable and invited states to eliminate majority-minority districts to the detriment of minority voters.[123]

Congress sided with the dissent when it reauthorized § 5 in 2006. It added language to § 5 to overrule *Ashcroft* and reestablish the focus on the election of minority candidates of choice.[124] This language has

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118 See note 59 and accompanying text.

119 539 US 461 (2003).

120 See id 467–70; *Georgia v Ashcroft*, 195 F Supp 2d 25, 41–42 (DDC 2002); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 Harv L Rev 29, 89–90 (2004); Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 Election L J 21, 29–31 (2004).

121 See note 71 and accompanying text.

122 See *Ashcroft*, 539 US at 479–85.

123 See id at 492–98 (Souter dissenting) (suggesting that the Court placed minority interests at the mercy of "sentiment on the part of politicians" by allowing states to trade minority-preferred candidates for influence).

124 See 42 USC § 1973c(b), (d) (emphasis added):

yet to be definitively interpreted by the Court, but in many circumstances it may require the maintenance of existing majority-minority districts.

How were opportunities for partisan gain affected by the Court's suggestion that majority-minority districts might legally be traded for plurality districts? Or by Congress's potential restriction of such trades? Under the old way of thinking, purely partisan Democrats should have applauded the Court and booed its reversal by Congress. But, as Part II makes clear, Democrats are best served by drawing districts in which minority voters continue to make up a majority.[125] Thus, Congress's amendment of § 5 largely aligns with this partisan strategy. And even if Justice O'Connor's rule had held, Democrats would optimally have ignored the invitation to create more plurality districts. In fact, while some may assume because of Justice O'Connor's reasoning that *Ashcroft* actually involved the unpacking of majority-minority districts into plurality districts, it did not. Indeed, the alterations made to the preexisting plan appear to have been designed principally to change existing supermajority African American districts into bare majority African American districts—a move that is consistent with the matching-slices approach.[126]

In practice, Congress's revision of § 5 may have more significance in Republican-controlled states. Had Congress not overturned the Court's greater relaxation of the rules for allocating minority voters, courts might have been poorly positioned to figure out which trades

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> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, *to elect their preferred candidates of choice* denies or abridges the right to vote within the meaning of subsection (a) of this section.

125 See text accompanying notes 54–55.

126 Georgia's plan increased the number of majority-minority districts by one while substantially thinning out some of those districts. The three districts to which the attorney general objected, for example, all retained their majority-minority status: District 2 went from a black voting age population (BVAP) of 60.58 percent to 50.31 percent, District 12 from 55.43 percent to 50.66 percent, and District 26 from 62.45 percent to 50.80 percent. See *Ashcroft*, 539 US at 470–73, 487–88. Furthermore, the matching-slices model can help explain why Democratic legislators might have been willing to cut the majority-minority districts so finely (so finely that, in a few cases, the BVAP was greater than 50 percent but the population of registered voters actually fell slightly below 50 percent). See id at 473. Under the model, the relative size of the upper and lower slices depends on a number of features, including the quality of the information the redistricter has about voters, the mean preference of voters, the spread of voter preferences, and the number of districts to be drawn. See Friedman and Holden, 98 Am Econ Rev at 127–29 (cited in note 41) (providing detailed comparative statistics of the model). One prediction is that redistricters will cut slices more finely as they become more risk-seeking. In Georgia, where Republicans were on the cusp of coming to power for the first time since the end of Reconstruction, it is quite conceivable that Democratic redistricters became much more risk-seeking than they previously had been.

would actually secure equal or better political opportunities for minority voters—a point emphasized by Justice David Souter in his *Ashcroft* dissent.[127] This would have freed Republican redistricters to draw sham plurality districts that appeared to satisfy Justice O'Connor's test but were in fact consistent with Republicans' optimal partisan strategy—districts in which minority voters were a large plurality but in which they would be paired with enough right-tail Republicans that the Republican candidate would win.[128]

Seen in this light, Congress's recent changes to § 5 restrict this possibility and return us to the status quo where Republicans cannot pursue their optimal strategy under the guise of complying with the VRA. How one should evaluate this change depends, of course, on the perspective one takes. If the pre-*Ashcroft* world is taken as the baseline, then Justice O'Connor's opinion appears to benefit Republicans, a benefit undone by the 2006 reauthorization legislation. If a world without the VRA is taken as the baseline, however, then the reauthorization actually *increased* the pro-Democratic tilt in the Act—a tilt that *Ashcroft* had reduced. Finally, if we focus on minority representation rather than partisanship, then Congress's amendment to § 5 appears to curb the drawing of districts that appear most worrisome to some commentators: districts in which large numbers of minority voters are consistently defeated by extremely conservative Republicans.

3. The political economy of § 5's reauthorization.

Putting aside the specifics of the retrogression test, our account of the relationship between minority districting and partisan gerrymandering also sheds new light on the politics of § 5's reauthorization. Section 5 was initially adopted in 1965 as a temporary measure that would expire after five years.[129] But it has been

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[127] See *Ashcroft*, 539 US at 496–97 (Souter dissenting) (arguing that the Court's rule equating unquantifiable influence with actual majority-minority power would eviscerate the protection offered by § 5).

[128] This concern is related to the concerns that Pam Karlan raised about Justice O'Connor's approach, though Karlan appears not to have been as focused on the asymmetric effect of the decision. Her concern appears to be that *both* the Democratic and Republican parties would sell out minority voters. See Karlan, 3 Election L J at 32 (cited in note 120) (suggesting that the Democrats' responsiveness toward black constituents depends on how much the black vote is needed to build a winning coalition, and that in a district where "the Republican alternative is so unpalatable," black support might be taken for granted). Note that she also expressed concern about African American incumbents selling out African American voters in order to preserve their own safe seats—a concern that goes to the question whether redistricting authorities are motivated more by partisan or incumbency protection. See id at 33–34.

[129] Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 567 (cited in note 15).

reauthorized repeatedly by Congress—in 1970, 1975, 1982, and, most recently, in 2006.[130] The 2006 reauthorization extended § 5's requirements for another twenty-five years.[131] And despite the fact that § 5 has plenty of features that raise the hackles of conservative politicians—invasive federal oversight of state governments, redistricting requirements that some characterize as racial quotas, and so on—the extension passed Congress with little debate and overwhelming support from both Republicans and Democrats. In fact, in the Senate the vote was 98–0.[132] Observers have suggested several reasons for the striking bipartisan support. Perhaps the most pat explanation is that § 5 had become a sacred cow that no national politician could afford to oppose.[133] But this explanation has typically been bolstered by the claim that Republicans were content to reauthorize § 5 because they believed they actually benefited from the Act's redistricting requirements.[134]

Once we stop using the pack-and-crack theory as a lens through which to interpret the partisan consequences of the VRA, it is no longer possible to conclude confidently that Republicans benefit from the Act's redistricting requirements. This suggests that the existing explanations of Republican support for reauthorization are incomplete, as these explanations have generally assumed that Republicans benefited from reauthorization and that the partisan benefit helps explain the votes of Republican members of Congress. To be sure, probing the motivations of these legislators is well beyond the scope of this Article. It could be that Republican legislators mistakenly believed that they benefited from the Act. Or perhaps Republican legislators considered § 5's redistricting requirements to be sufficiently redundant with § 2 that it was not worth fighting about § 5 unless the repeal of § 2 was also on the table.[135] Whatever the right answer, however, it is clear that more work is needed to understand the congressional dynamics surrounding § 5's reauthorization.

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130 See VRA Reauthorization Act of 2006 § 5, 120 Stat at 580–81.

131 See VRA Reauthorization Act of 2006 § 5, 120 Stat at 580–81.

132 Carl Hulse, *By a Vote of 98–0, Senate Approves 25-Year Extension of Voting Rights Act*, NY Times A16 (July 21, 2006).

133 See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L J 174, 176–92 (2007) (describing the legislative dynamics of the 2006 reauthorization).

134 See id at 180 (stating that Republicans thought the bill created "inefficient Democratic districts"); Ramesh Ponnuru, *The Longest "Emergency": Congress Debates (Sort of) the Voting Rights Act of 1965*, Natl Rev 22 (July 17, 2006) (noting that the concentration of large numbers of Democratic voters in majority-minority districts has reduced the overall number of Democratic-leaning districts).

135 For one attempt to think about the extent to which § 5 might be redundant with § 2, see generally David Epstein and Sharyn O'Halloran, *A Strategic Dominance Argument for Retaining Section 5 of the VRA*, 5 Election L J 283 (2006).

Moreover, the political economy of the VRA will likely be quite important in coming years. The Supreme Court made clear in *NAMUDNO* that the renewed § 5 is on shaky constitutional footing.[136] If the provision is ultimately invalidated, or if the Supreme Court scales back substantially the scope of § 2, then the central question will become whether Congress will respond. One cannot ignore the possibility that Republicans may be less likely to support a legislative response if the Supreme Court's actions actually benefit the party.

B. Implications for the Future of Redistricting Law and Policy

Our core conclusions also offer insight into a host of redistricting issues that are likely to be central during the upcoming 2010 round of redistricting—problems related to the polarization of American politics, the inability of courts to find manageable ways to regulate excessive partisan gerrymandering, and the difficulty of assuring minority representation within a system of districted elections.

1. Polarization and vote dilution doctrine.

Majority-minority districts were in part a response to high levels of racially polarized voting. In a world where white voters will not vote for a minority-preferred candidate, minority voters cannot elect a candidate of their choice unless they constitute a majority of an electoral district. Drawing majority-minority districts has thus helped secure victories for minority-preferred candidates. Over time, however, courts and commentators began to question the longer-term consequences of drawing these districts. Some judges, including Justice O'Connor, came to fear that these districts would entrench or exacerbate racially polarized voting. Because of the structure of the districting, voters would have fewer opportunities to build political coalitions across racial lines and would become more likely to organize their own political identities along racial lines.[137] The strongest advocates of this view have argued that majority-minority districting itself prevents American politics from reaching a point where race no longer matters.[138]

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[136] See *NAMUDNO*, 129 S Ct at 2511–13 (noting concerns about federalism and inconsistency across states).

[137] See *Shaw*, 509 US at 647–48, 657 (comparing voting blocs along racial lines to "political apartheid" that threatens to "balkanize us into competing racial factions"). See also *Johnson v De Grandy*, 512 US 997, 1019–21 (1994).

[138] See *Holder v Hall*, 512 US 874, 905–09 (1994) (Thomas concurring); *United Jewish Organizations, Inc v Carey*, 430 US 144, 186–87 (1977) (Burger dissenting).

In contrast, others have argued that majority-minority districting would help reduce the prevalence of racially polarized voting over time.[139] This account emphasizes the fact that these districts are often among the most racially integrated. This integration could promote the formation of interracial political coalitions. For example, Justice Souter reasoned that so long as such districts are not drawn too aggressively—in a way that always insulates minority voters from political competition—they may facilitate the transition to a more pluralistic politics in which minority districting may no longer be necessary.[140]

Our account complicates both of these theories. First, it makes clear that it is a mistake for proponents of these theories to make claims about the consequences of minority-districting strategies without considering the implications of the partisan motivations that inevitably shape the redistricting process. Second, and more concretely, our account provides a new tool for thinking about how easy or hard it might actually be to form cross-racial coalitions in majority-minority districts. Justices O'Connor and Souter expressed quite different views about this: Justice O'Connor worried that at least some such districts would make it hard to form these coalitions, while Justice Souter had a much more optimistic view. Understanding the optimal partisan distribution of voters within such districts should give us some reason for concern—at least with respect to African American voters. Both Democrats and Republicans pursuing optimal partisan gerrymanders will draw districts with majorities or near majorities of African American voters. But these districts will be extremely ideologically polarized. They will combine minority voters with very conservative white Republicans. Such ideologically polarized districts would likely make it more difficult to form interracial political coalitions.[141]

Note, however, that the above consequence is independent of the VRA's requirements. The districts described above are the ones that purely partisan Democrats and Republicans should prefer. Forcing

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139 See *Bush v Vera*, 517 US 952, 1074 (1996) (Souter dissenting) (arguing that majority-minority districting allows minority voters "to enter the mainstream of American politics," resulting not in "a state regime of ethnic apartheid, but ethnic participation and even a moderation of ethnicity's divisive effect in political practice").

140 See *De Grandy*, 512 US at 1019–21.

141 It is important to note that our focus here and in Part I is on the concept of intradistrict polarization—that is, on the polarization of the voter distribution within an electoral district. Redistricting can also produce interdistrict polarization—that is, polarization of the distribution of elected representatives within the legislative assembly. The distinction between intra- and interdistrict polarization is often elided in voting rights scholarship. Here, the theory of optimal partisan gerrymandering laid out in Part II unambiguously leads to high levels of intradistrict polarization within certain districts, but its consequences for legislative-level polarization are more complicated.

the creation of majority-minority districts might improve matters. It would not change anything for Democrats, because the legal obligation to draw majority-minority districts aligns with their optimal strategy. But Republicans constrained by the VRA would have an incentive to behave quite differently. When forced by the VRA to draw majority-minority districts, their second-best strategy has two crucial features: first, to pack as many minority voters as possible into the majority-minority districts; second, to fill out the balance of those districts with the weakest-signal Republicans—that is, the most moderate ones. These two aspects have ambiguous implications. To the extent the districts contain large supermajorities of minority voters, interracial coalitions seem less likely. Minority voters would simply have no need to form such coalitions, because they would have overwhelming control of the district. (Of course, the *Shaw* doctrine might mitigate this consequence if it operates in practice to prohibit such packing.[142]) On the other hand, pairing minority voters with moderate Republicans might facilitate coalitions across racial lines, because it will likely be easier for groups to bargain and compromise if they are closer ideologically.

Focusing more directly on intradistrict polarization also has implications for § 2 vote dilution doctrine. As we explained above, § 2 of the VRA has been interpreted by the Supreme Court since 1986 to require the creation of majority-minority districts under certain conditions.[143] What conditions warrant drawing such districts has been, of course, a subject of tremendous disagreement both in and out of court.[144] Despite this disagreement, however, it is possible to identify two features of districts that have become central to the analysis of vote dilution claims. First, the Supreme Court has concluded that the question whether a particular majority-minority district should be required depends in part on the composition of the other districts in the state. If African American voters constitute 20 percent of a state's electorate and already make up majorities of more than 20 percent of the state's districts, the existence of rough proportionality makes it less likely that the Court will require an additional district with a majority of African American voters.[145] Second, the Court has focused on the cohesion of minority voters within a disputed district. Recently,

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142 See text accompanying note 115.

143 See *Gingles*, 478 US at 48–49; text accompanying notes 63–71.

144 See *League of United Latin American Citizens v Perry*, 548 US 399, 431–34 (2006) (*LULAC*); *De Grandy*, 512 US at 1000; Gerken, 114 Harv L Rev at 1671–76 (cited in note 67).

145 See *LULAC*, 548 US at 436–38; *De Grandy*, 512 US at 1000. Until recently, the Court had left open the question whether this baseline should be measured at a statewide level or something smaller. See Cox, 2004 S Ct Rev at 417 (cited in note 36).

for example, Justice Anthony Kennedy refused to allow one majority-Latino district in Texas to be replaced by a different majority-Latino district. His reason was that the voters in the first district were more cohesive along some (vaguely specified) dimension than the voters in the second district.[146] In other words, courts implementing § 2 today police the relationship *across* districts (even though they sometimes try to disclaim doing so), and they police the relationship among minority voters that make up a putative majority bloc *within* individual districts.

Largely overlooked, however, is the relationship *between* the minority and nonminority voters in the district. To be sure, this relationship matters formally under the doctrinal framework the Supreme Court laid out in *Thornburg v Gingles*.[147] In that case, the Court held that minority voters could not make out a claim of unlawful vote dilution unless they could show that a hypothetical district could be drawn in which (1) minority voters were sufficiently numerous to constitute a majority of the hypothetical district, (2) minority voters were politically cohesive, and (3) white voters typically voted as a bloc to defeat minority-preferred candidates.[148] The third prong turns on the relationship between the white and minority voters. Nonetheless, even in this inquiry, both courts and scholars typically treat white voters as a largely undifferentiated mass whose identities are not particularly relevant; scholars have even taken to referring to these voters simply as "filler people."[149]

In contrast to courts' treatment of white voters as undifferentiated filler people, redistricting authorities pursuing optimal partisan gerrymanders will often draw minority voters into highly polarized districts—that is, districts that pair voters from opposite ends of the political spectrum. To the extent that courts are worried about whether the modern structure of electoral districts is likely to interfere with

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146 See *LULAC*, 548 US at 435, 440–42 (criticizing the state for breaking up a cohesive Latino district while replacing it with a district that contained two geographically disparate Latino groups). See also generally Adam B. Cox, *Self-Defeating Minimalism*, 105 Mich L Rev First Impressions 53 (2006) (discussing some problems with Justice Kennedy's approach).

147 478 US 30 (1985).

148 See id at 48–51 & n 17 (emphasizing that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice").

149 See T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich L Rev 588, 601 (1993) (introducing the concept of "filler people"). One exception to this involves efforts to incorporate into vote dilution analysis more information about crossover voting patterns by white voters. Even in this context, however, courts and experts tend to employ information about general trends in racially polarized voting in a particular state or region. They rarely if ever ask how *a particular group of white voters* would behave if placed in a district with a large fraction of minority voters.

interracial coalition formation, this is a concern. Addressing this possibility would lead to a new focus in vote dilution doctrine—a focus on the ideological spread between majority and minority voters within districts that contain sizeable fractions of minority voters.

2. Partisan gerrymandering and identification strategies.

The importance of ideological spread is not limited to vote dilution doctrine. Although our central interest is in the relationship between minority districting and partisan gerrymandering, we should note that the model of optimal gerrymandering also has implications for the judicial review of partisan gerrymanders. Over two decades ago, in *Davis v Bandemer*,[150] the Supreme Court concluded that challenges to such gerrymanders are cognizable under the Equal Protection Clause.[151] Yet since that time, the federal courts have never invalidated a redistricting plan (or any individual district) as an unconstitutional partisan gerrymander.[152] This is not because there has been little partisan manipulation in the past two decades. Instead, a central problem is that the Supreme Court has been unable to agree on any manageable test to identify the most egregious gerrymanders.[153]

The model of optimal districting points to an unexplored strategy for identifying egregious partisan gerrymanders: focusing on the level of ideological polarization among the electorate within individual districts. This strategy might be both easier to use and more palatable to courts than other proposed identification strategies. The Court has emphasized two problems with many proposed strategies. First, they operate in an ex post fashion, requiring reference to results from elections that occur some time after the districting scheme is implemented. Historically, the Court has been more comfortable intervening in redistricting contests where its doctrinal tools allow the legal injury to be identified on the basis of information available at the time the districts are drawn. (This is a key feature of the Court's one-person, one-vote jurisprudence, and the *Gingles* framework represents a similar effort to craft a largely ex ante legal test.)[154] Second, the Court has been reluctant to adopt a test for unlawful partisan gerrymanders that operates at the state level rather than the

150 478 US 109 (1986).

151 Id at 143.

152 See Cox, 79 NYU L Rev at 798 (cited in note 11).

153 See *Vieth v Jubelirer*, 541 US 267, 304 (2004) (Scalia) (plurality); *LULAC*, 548 US at 414.

154 See *Reynolds v Sims*, 377 US 533, 568 (1964) (holding that the Equal Protection Clause requires apportionment on the basis of population); *Gingles*, 478 US at 48–51. See also *Vieth*, 541 US at 291 (Scalia) (plurality) (describing this virtue of the one-person, one-vote doctrine).

district level.[155] This is in part because the Court has always been reluctant to acknowledge the inevitable reality of representational trades across districts.[156] It is also probably because the Court is concerned that it would appear much more interventionist to invalidate an entire statewide redistricting plan rather than just a small handful of districts.

While the Court's concerns may be misguided,[157] the reality is that the Court will be more likely to adopt an identification strategy that assuages these concerns. Focusing on intradistrict polarization levels could alleviate these concerns. First, this strategy operates at the district level. Second, it can rely exclusively on information available at the time of redistricting. This could give the approach a leg up over other strategies proposed by political scientists, such as the strategy proposed by a political scientist–authored amicus brief filed in the most recent partisan gerrymandering case to reach the Supreme Court.[158]

To be sure, other scholars have also focused recently on polarization levels. But they have been interested in interdistrict rather than intradistrict polarization. For example, Sam Issacharoff and Pam Karlan have suggested that interdistrict polarization is the product of incumbent-protecting gerrymanders and is harmful because it cripples the deliberative process in Congress.[159] Our suggestion is quite different. While it focuses on identifying districts that are extremely safe and extremely polarized, it does not require persuading the courts that they have to adopt a controversial normative position of being anti–incumbent protection, or anti–legislative polarization. Instead, the focus is on polarization within districts only because it can provide some evidence of partisan manipulation. Capitalizing on this sort of indirect way of identifying partisan

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155 See *Vieth*, 541 US at 282, 285 (Scalia) (plurality); id at 318 (Stevens dissenting); *Bandemer*, 478 US at 130–32.

156 For a discussion of this general reluctance, see Gerken, 114 Harv L Rev at 1709–10 (cited in note 67).

157 See Cox, 93 Va L Rev at 374–75 & n 45 (cited in note 93) (arguing that the district-level focus is misguided).

158 See Brief of *Amici Curiae* Professors Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz, in Support of Neither Party, *League of United Latin American Citizens v Perry*, No 05-204, *3–9 (US filed Jan 10, 2006) (available on Westlaw at 2006 WL 53994) (advocating the use of a symmetry standard requiring that "the electoral system treat similarly-situated political parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage").

159 See Issacharoff and Karlan, 153 U Pa L Rev at 572, 574 (cited in note 32) (arguing that a bipartisan gerrymander amounts to a "nonaggression pact" in favor of incumbents and "skews the distribution politically by driving the center out of elective office").

gerrymanders can be quite useful in a world where direct identification is extremely difficult.[160]

3. The impossibility of partisan-neutral minority districting?

Ultimately, Part II's explanation of the theoretical relationship between minority districting and partisan neutrality raises a deep question: Is it possible to draw electoral districts to benefit minority voters without simultaneously benefiting Democrats or Republicans? In an ideal world, redistricting rules (and electoral institutions more generally) would promote minority voting rights where necessary but avoid introducing partisan bias into the electoral arrangements. In theory, it is possible to choose a redistricting scheme that augments the power of minority voters while still maintaining a symmetrical relationship between votes and seat shares for the major parties. But it is not possible to do this in the current world, where partisan state legislatures have primary control over redistricting.

The impossibility of disentangling the relationship between minority representation and partisan gerrymandering stems from two features of the current system: first, African American voters—the group on which we have focused—are not symmetrically distributed within the voter distribution (being located instead almost exclusively at the left tail); second, partisan officials have principal responsibility for drawing electoral districts. Given these twin constraints, it is not possible to replace the VRA with some other legal rule that promotes African American electoral opportunities without introducing partisan bias.

Of course, neither of these conditions need hold in the long run. As for the first, the political demography of the United States is clearly changing. And, more immediately, the situation looks quite different for the relationship between race and partisanship for Latino voters, who are more and more frequently at the center of redistricting disputes involving the VRA. Latino voters do not appear to cluster at the left end of the voter distribution in the way that African American voters do.[161] If their signal distribution is more

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[160] For a general discussion of such indirect strategies, see Adam B. Cox, *Designing Redistricting Institutions*, 5 Election L J 412 (2006); Cox, 79 NYU L Rev at 763–89 (cited in note 11).

[161] Barack Obama won 67 percent of the Latino vote but 95 percent of the African American vote, and John Kerry won 53 percent of the Latino vote but around 88 percent of the African American vote. See CNN, *Election Center 2008* (cited in note 54); CNN, *America Votes 2004* (cited in note 54). See also Ansolabehere, Persily, and Stewart, 123 Harv L Rev at 1401, 1405, 1407–09, 1433–35 (cited in note 2) (noting that Latino voters have exhibited reserved support for Democratic presidential candidates more comparable to white voters than African American voters).

symmetrical than African American voters'—or, better yet, if their race is simply a relatively poor predictor of their location in the signal distribution in any particular election—then the VRA could help promote representational opportunities for Latino voters without introducing an advantage in favor of either Democrats or Republicans. Creating majority-Latino districts would not require redistricters to draw asymmetrically on one tail of the voter distribution. Or, to put it differently, redistricters have little reason to use race as a proxy for a voter's ideological location if race is a poor predictor of that fact. In such a world, a redistricter's own decisions would allow us to disentangle issues involving minority representation from issues of partisan gerrymandering.

The second condition need not hold either: it is possible that primary responsibility for redistricting could be taken away from partisan officials. Other democracies with electoral structures similar to ours did this quite some time ago.[162] A handful of American states have done so as well.[163] Most recently, for example, California adopted two constitutional amendments requiring that its state legislative and congressional districts be drawn by a bipartisan commission.[164]

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162 Australia, Canada, and the United Kingdom are perhaps the best examples. See Rodney Smith, *New South Wales*, in Jeremy Moon and Campbell Sharman, eds, *Australian Politics and Government: The Commonwealth, the States and the Territories* 41, 58–59 (Cambridge 2003) (noting Australia's "long tradition of independent electoral boundary drawing"); John Wanna, *Queensland*, in Moon and Sharman, eds, *Australian Politics and Government* 74, 80, 96 (same); John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* 94–121 (McGill-Queen's 2001) (finding that the "overwhelming majority [of redistricting bodies in Canada] have been non-partisan in membership, empowered . . . to design districts as they see fit . . . and free of statutory or administrative constraints"); Ron Johnston, Charles Pattie, and David Rossiter, *Electoral Distortion despite Redistricting by Independent Commissions: The British Case, 1950–2005*, in Lisa Handley and Bernard Grofman, eds, *Redistricting in Comparative Perspective* 205, 207–08 (Oxford 2008) (discussing independent redistricting commissions in the United Kingdom).

163 See Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, in Thomas E. Mann and Bruce E. Cain, eds, *Party Lines: Competition, Partisanship, and Congressional Redistricting* 92, 100–07 (Brookings 2005) (finding that independent commissions "are invested with first and final authority in congressional redistricting by six states" and discussing the structure and effectiveness of those commissions).

164 The first amendment, covering state legislative districting, passed in 2008 as Proposition 11. See James P. Sweeney, *Voters Catch on to Redistricting Reform: Backers See More Competitive State Senate, Assembly Races*, San Diego Union-Trib A1 (Nov 9, 2008). In 2010, two ballot propositions related to Proposition 11 qualified for the November ballot. One, Proposition 27, sought to repeal Proposition 11. See California Secretary of State, *Official Voter Information Guide: Prop 27*, online at http://www.voterguide.sos.ca.gov/propositions/27/ (visited Dec 23, 2010) (describing the effect of the initiative as eliminating the Citizens Redistricting Commission and returning this responsibility to the legislature). The other, Proposition 20, sought to extend Proposition 11 to cover congressional redistricting. See California Secretary of State, *Official Voter Information Guide: Prop 20*, online at http://www.voterguide.sos.ca.gov/propositions/20/ (visited Dec 23, 2010) (stating that the measure would remove authority to determine congressional districts from the legislature and place it in the hands of the Citizens Redistricting Commission).

Putting aside all of the difficult practical questions about how one designs an unbiased commission, our central thesis provides a new kind of theoretical argument in favor of such an arrangement. Historically, advocates for redistricting commissions have focused exclusively on concerns about partisan gerrymandering. They have argued that it is impossible to stamp out the practice of partisan gerrymandering without stripping partisan officials of redistricting authority. Of course, the question whether some other institutional-design route might also alleviate the problem of partisanship has always remained. One of us has argued, for example, that it sometimes will be possible to reduce partisan bias by constraining the redistricter's decisionmaking process in some way, rather than by taking power away from her entirely.[165] This Article shows that, given the political demography of the United States today, stripping partisan legislatures of redistricting power provides the only way to draw a redistricting plan that *both* secures partisan neutrality and promotes African American voting rights. At least in a situation in which one cares about both of these values, constraints on the redistricter's decisionmaking process alone cannot be a perfect substitute for changing her identity. This complicates the contemporary picture of the institutional design of redistricting. More important, it provides a new way of understanding the potential virtues of redistricting commissions.

CONCLUSION

We have shown that the conventional wisdom about the relationship between partisan gerrymandering and minority-promoting districting is misguided. For redistricters pursuing an optimal partisan strategy, the VRA operates as a greater constraint for Republicans than it does for Democrats. This does not mean, of course, that we should scrap the Act, or that Republicans were confused when they supported its reauthorization in 2006. The Act's majority-minority districting requirement can significantly increase the likelihood of electing minority legislators, and many have argued that promoting this sort of descriptive representation is important in a

Proposition 27 failed, but Proposition 20 passed. See California Secretary of State, *Votes for and against November 2, 2010, Statewide Ballot Measures*, online at http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf (visited Dec 23, 2010) (showing that Proposition 27 failed, with 40.5 percent of the vote in favor and 59.5 percent against, and showing that Proposition 20 passed, with 61.3 percent of the vote in favor and 38.7 percent against).

165 See Cox, 79 NYU L Rev at 769–70 & n 70 (cited in note 11) (arguing that a limitation on the frequency of redistricting would create a temporal veil of ignorance that could reduce partisan advantage-seeking); Cox, 5 Election L J at 412 (cited in note 160) (suggesting options for redistricting reform other than transferring authority over redistricting to new institutions).

country that long excluded minority voters from the polls. Nonetheless, our findings do make two things clear. First, the partisan consequences of the Act cannot be neutralized without abandoning the project of promoting descriptive representation. Second, even if we did abandon that project and repeal the VRA, it would not necessarily mean the end of majority-minority districts. Those districts serve the interests of the Democratic Party, and so would likely be drawn even in the absence of any legal requirement to do so. For that reason, opponents of majority-minority districting would likely have to go much further—to legally prohibit the drawing of these districts—in order to eliminate them from the contemporary political landscape.

Understanding these features of reapportionment law and politics is important for a slew of reasons: it has implications for the political economy of major legislation like the VRA, consequences for the way in which courts choose to intervene in the redistricting process, and lessons for the design of redistricting institutions. We cannot hope to think through all of these implications in this Article. But our hope is that we have provided a new framework for future conversations about these issues.

Readers with comments should address them to:

Professor Adam B. Cox
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
adambcox@law.uchicago.edu

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