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MINORITY VOTE DILUTION IN THE AGE OF OBAMA

Dale Ho *

INTRODUCTION

The conventional wisdom after the 2012 presidential election is that Barack Obama won re-election by riding a wave of surging minority voting power.¹ Exit polls conducted by the Pew Research Center indicated that non-white voters made up 28% of all voters,² up from the previous record high³ of 26% during the 2008 presidential election.⁴ President Obama won decisive majorities among minority voters, winning 80% of non-white voters overall.⁵

Although some of the record turnout among minority voters during the 2012 presidential election may be attributed to ongoing excitement about the first non-white president in American

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1. See, e.g., Thomas Beaumont, *2012 Votes Tilt for Obama Like 2008*, THE STAR PHOENIX, Nov. 8, 2012, at C4; Allysia Finley, *The GOP's Minority Rapport*, WALL ST. J. (Nov. 27, 2012), <http://online.wsj.com/article/SB10001424127887324469304578143600668081108.html> ("Obama won by running up his margins among minority voters, which offset his decline in support among whites.").

2. *Changing Face of America Helps Assure Obama Victory*, PEW RESEARCH CTR. (Nov. 7, 2012), <http://www.people-press.org/2012/11/07/changing-face-of-america-helps-assure-ob-ama-victory/>.

3. See NAACP LEGAL DEF. & EDUC. FUND, *DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING 7* (2011) (citing MARK HUGO LOPEZ & PAUL TAYLOR, PEW RESEARCH CTR., *DISSECTING THE 2008 ELECTORATE: MOST DIVERSE IN U.S. HISTORY 1* (2009)), available at http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf.

4. See *Changing Face of America Helps Assure Obama Victory*, *supra* note 2. Turnout among minority voters appears to have been particularly critical in closely contested battleground states: in Ohio, African Americans were 15% of all voters, significantly up from 11% in 2008, while in Florida, Latinos were 17% of all voters, up from 14% in 2008. *Id.*

5. *Id.* Obama won over 90% of African American voters and 70% of Latino and Asian American voters, improving on his margins among those two groups from his showing in 2008. *Id.*; see Susan Page, *A Nation Moving Further Apart*, USA TODAY, Nov. 7, 2012, at A1. Compare *2012 Fox News Exit Polls*, FOXNEWS, <http://www.foxnews.com/politics/elections/2012-exit-poll> (last visited Feb. 18, 2013), with *Fox News Exit Poll: Results for the 2008 General Election*, FOXNEWS, <http://www.foxnews.com/politics/elections/2008-exit-poll> (last visited Feb. 18, 2013).

history, that enthusiasm cannot tell the whole story, which is only clear in light of the substantial demographic changes that the country has undergone in recent years.⁶ It is a banal truism to observe that the country is becoming more diverse, but the results of the 2012 election seem to have validated earlier predictions that minority voters will exercise ever greater influence on Election Day.⁷

Indeed, some viewed Obama's advantages among minority groups as outcome-determinative, overwhelming economic factors that are usually considered decisive in presidential elections.⁸ Strikingly, Mitt Romney will go down in history as the candidate who "won the biggest majority of the white vote of any presidential candidate in U.S. history who then failed to win the White

6. See, e.g., Finley, *supra* note 1; Paul Taylor & D'Vera Cohn, *A Milestone En Route to a Majority Minority Nation*, PEW RESEARCH CTR. (Nov. 7, 2012), <http://www.pewsocialtrends.org/2012/11/07/a-milestone-en-route-to-a-majority-minority-nation/>.

7. See, e.g., William H. Frey, *Why Minorities Will Decide the 2012 U.S. Election*, BROOKINGS INST. (May 2012), <http://www.brookings.edu/research/opinions/2012/05/01-race-elections-frey>. As early as 2002, John Judis and Ruy Teixeira predicted that demographic changes would be decisive in electoral outcomes. See JOHN B. JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* 35 (2002).

8. See Thomas Fitzgerald, *President Obama Wins Reelection*, PHILA. INQUIRER, Nov. 7, 2012, at A01 (noting that no incumbent had been reelected since Franklin Delano Roosevelt with an unemployment rate higher than 7.2%); Dick Morris, *Dick Morris Explains—Why I Was Wrong About The 2012 Election*, FOXNEWS (Nov. 7, 2012), <http://www.foxnews.com/opinion/2012/11/07/dick-morris-explains-why-was-wrong-about-2012-election/> ("This is not your father's United States and the Republican tilt toward white middle aged and older voters is ghettoizing the party so that even bad economic times are not enough to sway the election."). In the aftermath of the election, a number of commentators have argued that, given that minority voters will only become a larger share of the electorate in the future, the Republican Party will not find success in future presidential elections unless it finds a way to reduce margins among minority voters. See, e.g., Beaumont, *supra* note 1 ("The outcome revealed a stark problem for Republicans: If they don't broaden their tent, they won't move forward."); Finley, *supra* note 1 ("[Given the] demographic headwinds Republicans face . . . [t]he grim news for Republicans is that the strong minority turnout this year wasn't an aberration."); Neil King, Jr. & Victoria McGrane, *Activists Urge New GOP Tone*, WALL ST. J., Nov. 26, 2012, at A5 ("Mr. Romney's lopsided loss among the country's expanding universe of minority voters has fanned fears within the party that its main challenge is demographic, though others dismiss that worry as secondary."); Kenneth Warren, *Republicans Must Adjust To Changing Demographics*, ST. LOUIS POST-DISPATCH, Nov. 23, 2012, at A19 ("A close look at demographical and electoral trends makes it clear that the 2012 election loss by the Republicans was no fluke, but indicative of a bleak electoral future for the Republican Party unless Republicans make quick adjustments to appeal to minorities, women and younger voters.").

House.”⁹ Conservative pundit Bill O’Reilly thus exclaimed on election night that “[t]he white establishment is now the minority.”¹⁰

Leaving such hyperbole aside—after all, Obama would have lost in a landslide had he done as poorly with white voters as Romney did with minority voters¹¹—it is undoubtedly true that minority voters are participating in the political process in record and increasing numbers. Given what appears to be unprecedented political strength, it is fair to ask whether minority voters continue to need certain protections—in particular, those protections aimed at preventing voting laws that, rather than block access to the ballot, weaken or dilute the weight of the ballots cast by minority voters.

Indeed, in recent years, legal commentators on both the right¹² and the left¹³ have argued that protections against minority vote dilution may no longer be necessary. Even some commentators who support continuing protections against minority vote dilution have acknowledged that recent growth in minority political power has called into question the need for majority-minority districting as a remedy to claims of minority vote dilution.¹⁴ The question,

9. Page, *supra* note 5. Romney won white voters 59% to 39%—improving on John McCain’s showing by four percentage points. See *Changing Face of America Helps Assure Obama Victory*, *supra* note 2.

10. Bill O’Reilly: ‘The White Establishment Is Now the Minority’, FOXNATION (Nov. 7, 2012), <http://nation.foxnews.com/bill-oreilly/2012/11/07/bill-o-reilly-white-establishment-now-minority>.

11. Moreover, many different demographic groups could each lay credible claims to having played a decisive role in the election. See, e.g., Micah Cohen, *Gay Vote Seen as Crucial in Obama’s Victory*, FIVETHIRTYEIGHT (Nov. 15, 2012, 4:40 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/11/15/gay-vote-seen-as-crucial-in-obamas-victory/> (arguing that “the backing Mr. Obama received from gay voters also has a claim on having been decisive”); Sam Go, *Women’s Vote Played Crucial Role In Obama Victory*, MSNBC (Nov. 6, 2012, 11:30 PM), <http://tv.msnbc.com/2012/11/06/exit-poll-women-play-crucial-role-impossible-obama-victory/> (arguing that “[t]he women’s vote propelled Barack Obama to victory”); Joe Green, *The Youth Vote was Crucial to Obama’s 2012 Victory*, AMERICABLOG (Nov. 26, 2012, 7:00 AM), <http://americablog.com/2012/11/obama-youth-vote-2012.html> (observing that “if no one under the age of 30 had voted, the electoral votes of Ohio, Pennsylvania, Virginia and Florida, and therefore the Electoral College, would have swung to Romney”).

12. See, e.g., Abigail Thernstrom, *Redistricting in Today’s Shifting Racial Landscape*, 23 STAN. L. & POL’Y REV. 373, 381–83 (2012).

13. See, e.g., Guy-Uriel E. Charles, Response, *Section 2 is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENNUMBRA 219, 223, 226 (2012), <http://www.pennumbra.com/respses/1-2012/Charles.pdf>

14. See, e.g., Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 456 (2012) (describing the need to “resuscitate” the prohibition on vote dilution in Section 2 of the

put in stark relief by the consecutive successes of an African American candidate to prevail in the largest majority-white district in the country (i.e., the electoral college) is whether minority political participation has reached a critical mass such that the practice of drawing majority-minority districts to afford minority voters with an opportunity to elect candidates of their choice is no longer necessary.

My goal in this article is to identify several factors suggesting that reports of the demise of minority vote dilution doctrine—and the remedy of majority-minority districting—are premature. This article proceeds in three parts. First, I will provide a brief overview of minority vote dilution doctrine and recent criticisms of it in light of growing minority political power. Second, I will offer some observations that may undermine some of the premises of these criticisms. Third, I will briefly address some factors that are indicative of whether, as a general matter, robust protections against minority vote dilution remain necessary today.

Ultimately, it is undoubtedly true that racial polarization—the phenomenon in which white and minority voters vote cohesively within their own respective groups but differently from each other—has receded in some parts of the country, which may make the remedy of majority-minority districting unnecessary under some circumstances. But if racial polarization is on the decline in some places, it is equally true that racial polarization—severe racial polarization—remains stubbornly persistent or is even on the rise in others. In places where we continue to sort ourselves along racial lines on a de facto basis, accusations that majority-minority districting only divides us ring hollow. Rather, in areas where voting is so racially polarized that minority voters can always be outvoted by the majority and effectively shut out of the political process, the remedy of majority-minority districting remains an indispensable mechanism of affording minority voters with an opportunity to cast a meaningful vote.

VRA); Benjamin E. Griffith, *Redistricting Woes After the 2010 Census: Statistical Estimates, Inclusion of College Students and Prisoners, and "Safe" Districts*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* 155, 173 (Benjamin E. Griffith ed., 2d ed. 2012) ("Even the most dedicated civil rights experts and litigators agree that we are moving toward a more open and equal Democratic process. . . . But the issue of the continued viability of and need for super-majority or 'safe' single-member districts is not so easily resolved, even in a time that has witnessed the election of the first African American to the presidency.").

Furthermore, because the election of minority candidates tends to reduce racial polarization and promote cross-racial understanding, majority-minority districting in such areas may have the effect of diminishing, rather than aggravating, racial polarization. If, as Pam Karlan has posited, “[t]he core problem that voting rights theory and case law must face today is the persistence of permanent racial faction,” and “[t]he central task of modern voting rights law must be to control the effects of this polarization,”¹⁵ then the best data available suggests that majority-minority districting remains desirable in many places today. As always, however, the question of whether majority-minority districting is appropriate will depend on the local circumstances of each individual case.

I. MINORITY VOTE DILUTION—THE NEW OLD CRITIQUE

Criticism of minority vote dilution doctrine is hardly new. In fact, questions concerning the theoretical underpinnings, practical need, and possibly adverse consequences of majority-minority redistricting have been with us for some time,¹⁶ dating back at least to 1982, when section 2 of the Voting Rights Act (“VRA”)¹⁷ was amended to make it easier to bring claims alleging that an electoral practice has diluted minority voting power.¹⁸ These criticisms have gained added salience in recent years, however, as minority communities exert ever-increasing influence at the ballot box.

A. *The Standard for Minority Vote Dilution*

Before turning to the current critique, it is helpful to briefly review the statutory standard for minority vote dilution claims under the VRA and the concerns animating minority vote dilution doctrine.

15. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1740 (1993).

16. See *infra* text accompanying notes 37–48.

17. 42 U.S.C. §1973(a) (2006).

18. Section 2 was amended in 1982 to overrule the Supreme Court’s decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which limited liability under the statute to cases where plaintiffs alleged discriminatory intent. See S. COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, at 27–28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07.

Claims of minority vote dilution have been referred to as the “second generation” of voting rights litigation,¹⁹ to distinguish them from challenges aimed at removing barriers to the ballot itself. Essentially, the term minority vote dilution refers to situations where minority voters have been “submerge[d]” into a jurisdiction or an election district where, although not deprived of the right to cast a vote, they are powerless to elect their preferred candidates because they are always outvoted by a white majority.²⁰ As Heather Gerken has explained succinctly, such claims

typically arise when whites and racial minorities consistently prefer different candidates at the polls—that is, when voting is “racially polarized.” Even in circumstances in which all voters are able to cast their votes, a state can nonetheless take advantage of this type of voting pattern to undermine the ability of minority group members to affect the political process.²¹

Vote dilution claims are most commonly brought under section 2 of the VRA.²² In order to bring a claim for vote dilution under section 2, plaintiffs must establish three preconditions: (i) that they are members of a minority group that is sufficiently large so as to form a majority in a compact, single-member district; (ii) that members of the minority group are “politically cohesive,” such that it is accurate to speak in terms of minority-preferred candidates; and (iii) that voting in the area is racially polarized, such that the minority group’s preferences are generally overwhelmed by white voters.²³

Once these threshold conditions have been established, plaintiffs can establish liability by proving the presence of a number of

19. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991).

20. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009). Schemes to dilute minority voting power have included methods other than the manipulation of district lines, such as runoff requirements. Dilution occurs in this instance because a white majority that has split up among several candidates in the first round of voting may coalesce behind a single candidate in the second round, thereby overwhelming minority voters. See Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, 21, 23 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION]. For purposes of this essay, however, I will focus on dilutive schemes involving the drawing of district lines.

21. Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–72 (2001).

22. 42 U.S.C. § 1973(a) (2006); see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 596 (3d ed. 2007).

23. *Thornburg v. Gingles*, 478 U.S. 30, 56–58 (1986).

additional factors, derived from the Senate report to the 1982 amendments to the VRA.²⁴ The remedy for vote dilution claims is typically the drawing of a single-member district in which minority voters constitute a majority, so as to be able to elect a candidate of their choice.²⁵

Initially, minority vote dilution claims were most common in the context of at-large or multi-member electoral arrangements in which all voters within a particular jurisdiction cast ballots for multiple members of the governing body. Where voting is racially polarized, an at-large arrangement for multiple offices can effectively lock out minority voters entirely: “At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.”²⁶ Actionable vote dilution can also occur, however, where the lines in a single-member districting plan have been drawn in such a way that has the same effect of isolating minority voters in racially polarized majority white districts, and thus preventing from electing any candidates of their choice.²⁷

Crucially, although proving discriminatory intent is not an element of liability under section 2, the standard for vote dilution liability is not a simple “effects” test akin to, for example, the disparate impact standard for employment discrimination claims under Title VII of the Civil Rights Act of 1964.²⁸ Rather, as explained below,²⁹ although section 2 speaks in terms of a “results” test, the factors for establishing a statutory violation are quite

24. See S. COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

25. See Gerken, *supra* note 21, at 1673. Non-district remedies that provide minority voters with an opportunity to elect candidates of their choice, such as cumulative or ranked-choice voting, are also possible remedies to vote dilution claims. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1595 (1993); Steven J. Mulroy, *Nondistrict Vote Dilution Remedies under the Voting Rights Act*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS, *supra* note 14, at 199, 199; Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959, 987–1001 (2013).

26. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

27. See *Grove v. Emison*, 507 U.S. 25, 25–28 (1993).

28. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 984–86 (1988).

29. See *infra* text accompanying notes 76–82.

similar to—and indeed, were largely intended to mimic—the factors for finding a constitutional violation based on intentional discrimination.

B. *The Concerns Underpinning Vote Dilution Claims*

Although a full treatment of these issues is beyond the scope of this brief essay, a few points are instructive concerning the theoretical underpinning of vote dilution claims. Broadly speaking, vote dilution claims are premised on the notion that the right to vote does not end with an individual's formal right to cast a ballot. The right also encompasses a collective right to aggregate one's vote with other like-minded voters, so that one's vote may have a meaningful effect on election outcomes.³⁰ Individual participation and expression are certainly important elements of the right to vote, but as Pam Karlan has noted, it is perhaps "[t]he primary function of voting . . . to combine individual preferences to reach some collective decision, such as the selection of representatives."³¹

The Supreme Court's paradigmatic articulation of this notion is found in Justice Douglas's dissent in *South v. Peters*,³² which was subsequently quoted with approval by a majority of the Court in *Reynolds v. Sims*:

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes . . . the right to have the vote counted at full value without dilution or discount.³³

In other words, the right to vote encompasses more than the formal right to cast a ballot. Even a "mathematically equal vote which is politically worthless because of gerrymandering or win-

30. See Gerken, *supra* note 21, at 1677 ("Dilution doctrine rests on two assumptions about the way representative democracy works: first, that there is more to 'voting' than merely casting a vote, and second, that members of an electoral minority should enjoy an equal opportunity to coalesce effectively despite the mandate of majority rule.").

31. Karlan, *supra* note 15, at 1712; see also Gerken, *supra* note 21, at 1677-78 (noting that representative systems assume that the right to vote includes a right to aggregate one's vote with others such that an individual's best chance of influencing the process is when acting in concert with others who throw their weight behind a single candidate).

32. 339 U.S. 276, 279 (1950) (Douglas, J., dissenting) (citing *United States v. Saylor*, 322 U.S. 385, 386 (1944); *United States v. Classic*, 313 U.S. 299, 322 (1941); *Ex parte Yarbrough*, 110 U.S. 651 (1884)).

33. 377 U.S. 533, 555 n.29 (1964) (quoting *South*, 339 U.S. at 279 (Douglas, J., dissenting)).

ner-take-all districting is as deceiving as 'emperor's clothes.'³⁴ The right to vote, then, encompasses a collective aggregation right: to participate *meaningfully* in the political process by combining one's vote with others in order to elect the representatives of one's choice.

Of course, in a winner-take-all system such as ours, not everyone can be afforded such an opportunity in every election,³⁵ but there is something intuitively problematic about electoral arrangements that systematically deprive out-groups of any such opportunity to elect candidates where a simple re-drawing of the lines could produce electoral results that give both political majorities and minorities a voice that more closely reflects their relative voting strength.

For example, leaving race-based claims aside for a moment, if we imagine an electorate in which 60% of voters favored one party and 40% another, a districting plan where the lines were drawn to ensure that all ten seats in a legislature are awarded to members of the majority party might be viewed as problematic, if all else being equal, another plan could provide something closer to a 6-4 split in the legislature. While strict proportionality is not a command, the closer we come to a correlation between voters' actual preferences and electoral results, the fewer votes are "wasted" by not having any weight whatsoever in electoral outcomes.³⁶

Minority vote dilution claims are premised on the notion that, given our constitutional commitment to prohibit racial discrimination, there is a special injury where members of a racial or ethnic minority are locked out in this manner. Thus, section 2 of the VRA aims to remedy situations when minority voters, who could form a majority within a compact single-member district, are instead divided up among multiple districts where they are consistently outvoted and have no say in the political process.

34. ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION* 22 (1968).

35. See Guinier, *supra* note 25, at 1592.

36. See Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 *HOUS. L. REV.* 1119, 1146-47 (1998); cf. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 146 (1862) (arguing that representative government should be based on an electoral system that would guarantee that "a minority of the electors would always have a minority of the representatives").

C. *Contemporary Criticisms of Minority Vote Dilution Doctrine; Or, What's Old Is New Again*

1. Two Recent Criticisms of Minority Vote Dilution Doctrine

There has perhaps always been a bit of unease about whether minority vote dilution is something that with which our civil rights laws should be concerned. This is partly because vote dilution is inherently a group-based problem, the recognition of which in some sense runs counter to the liberal individual rights concerns behind many of our constitutional protections. Indeed, the underlying values that minority vote dilution doctrine seeks to protect have been and remain subject to intense debate.³⁷ But leaving those complex and important theoretical questions aside, there are at least two separate, more practical questions as to whether protections against minority vote dilution remain necessary today.

First, assuming the theoretical validity of such claims, do we still—as a purely practical matter—continue to need protections against minority vote dilution, given the explosive growth of minority political participation and, indeed, political power? As noted, minorities are now participating in the political process in record numbers.³⁸ Given this newfound and unprecedented strength, perhaps minority voters no longer need the advantage of being a numerical majority within their own districts, where they are arguably exempt from the “pull, haul, and trade”³⁹ of coalition-building and deal-making that is inherent to politics itself. Thus, the argument goes, efforts to combat minority vote dilution amount to little more than a racial quota system for electoral politics,⁴⁰ which is neither desirable on its own terms nor necessary for meaningful minority representation today.

Perhaps, some have argued, there is a middle ground in which we can achieve meaningful representation for minority voters while at the same time reducing our reliance on majority-minority districting, for instance, by drawing districts that, while less than majority-minority, may still elect candidates who sup-

37. See, e.g., Charles, *supra* note 13, at 221.

38. See *supra* text accompanying notes 1–14.

39. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

40. See *id.*

port minority-favorable policies.⁴¹ In many places, it may no longer be necessary to draw districts that are majority-minority in order to give minority voters a real opportunity to elect candidates of their choice, either because there is a small but reliable group of white voters who are willing to cross over and support minority-preferred candidates or because a group of minority voters, though not an absolute majority, form a plurality of the voters in a heterogeneous multiracial district.⁴²

Second, is it possible that drawing majority-minority districts in today's demographic landscape only increases political or even racial polarization? Because such districts tend to be more left-leaning than the average Democrat district, some commentators have suggested that the drawing of such districts may bleach surrounding districts of minority influence and may threaten to balkanize us into competing racial factions.⁴³

2. Back to the Past?

Times have certainly changed in many ways. But what is striking about these purportedly “new” criticisms of minority vote dilution doctrine is how *old* they in fact are. Although dressed in new facts, the two concerns described above are not new. In fact, they have been raised throughout the history of the VRA's engagement with the problem of minority vote dilution.

For example, the argument that minority voters do not need majority-minority districts in order to elect their preferred candidates and that reliance on such districts amounts to an unnecessary quota has been put forward since the 1980s,⁴⁴ despite the fact that “racial polarization l[ed] to the systematic electoral de-

41. See DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* 10 (1997).

42. See Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1389–93 (2001).

43. See, e.g., CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 205 (1995); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 808 (1996); Thernstrom, *supra* note 12, at 374 n.4 (“[M]ore Black voters in some districts meant fewer in others, and, in the South particularly, districts that had been ‘bleached’ were fertile ground for Republican political aspirations.”). See generally LUBLIN, *supra* note 41.

44. See, e.g., ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 243 (1987); Charles S. Bullock III, *Symbolics or Substance: A Critique of the At-Large Election Controversy*, 21 ST. & LOC. GOV'T REV. 91, 95 (1989).

feat of minority candidates of choice” and “there [wa]s very little evidence to suggest that white bloc voting ha[d] substantially diminished in the South.”⁴⁵

The anti-quota argument, however, became a rallying cry during the 1982 debates over the amendments and reauthorization of the VRA. Chief Justice Roberts, who was then a young Reagan administration lawyer, argued in various memoranda against making it easier for plaintiffs to bring vote dilution claims under section 2 of the VRA, asserting that there was no “need for such a change,” which, in his view, “could also lead to a *quota system* in electoral politics.”⁴⁶ Minority voters, in other words, had no need for any protections against vote dilution (other than, presumably, the basic prohibition on unconstitutional racial discrimination under the Fourteenth Amendment).

In these memoranda, Roberts also argued that amending section 2 to require majority-minority districts would inhibit efforts to integrate communities across racial lines, for example, by prohibiting annexations of suburbs and the consolidation of school districts, forcing predominantly minority inner cities to remain politically divorced from more predominantly white suburbs.⁴⁷ Eleven years later, Justice O’Connor would echo these sentiments in more abstract terms in *Shaw v. Reno*, expressing the concern that race-conscious districting “may balkanize us into competing racial factions” and “carry us further from the goal of a political system in which race no longer matters.”⁴⁸

45. Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in QUIET REVOLUTION, *supra* note 20, at 378, 460–61 n.19. See generally Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POLITICS 751 (1988) (reviewing THERNSTROM, *supra* note 44).

46. Memorandum from John Roberts to the Attorney General, Talking Points For White House Meeting on Voting Rights Act (Jan. 26, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf>. In another memorandum, Roberts argued that the amendments “would in essence establish a ‘right’ in racial and language minorities to electoral representation proportional to their population in the community,” and amount to an improper “basis for the most intrusive interference imaginable by federal courts into state and local processes.” Memorandum from John Roberts to the Attorney General, Voting Rights Act: Section 2 (Dec. 22, 1981), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf>.

47. Memorandum from John Roberts to Brad Reynolds et al., Voting Rights Act: § 2 (Feb. 17, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/025-voting-rghs-act/folder025.pdf>.

48. 509 U.S. 630, 657 (1993).

These concerns, in other words, do not reflect a radically new analytic context. Rather, the vote dilution doctrine contended with these criticisms from its inception. This is not to say that these criticisms do not raise very serious points, but we would do well to remember that the debate over minority vote dilution doctrine is a long-standing one and that attention to this history may be warranted.

II. TWO QUESTIONABLE PREMISES

With that observation in mind, it is worth noting that there seem to be two ideas implicit in these critiques, which are that districting plans that dilute minority voting power—even those that do so intentionally—(i) represent a radical break from and (ii) are qualitatively different from more blunt discriminatory laws that denied access to the ballot itself. Viewed in this light, vote dilution is in some sense a lesser form of discrimination than actual vote denial.

This idea was perhaps made most explicit in Justice Thomas's opinion in *Holder v. Hall*, in which he argued that section 2 of the VRA should not be read to encompass vote dilution claims, which he viewed as radically distinct—both historically and qualitatively—from vote denial:

The statute was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South. Now, the Act has grown into something entirely different. In construing the Act to cover claims of vote dilution, we have converted the Act into a device for regulating, rationing⁴⁹ and apportioning political power among racial and ethnic groups.

This view—that vote dilution was somehow alien to the concerns that originally animated the VRA—has been echoed repeatedly by commentators.⁵⁰ What I hope to demonstrate below is that this view misperceives the history surrounding the enactment of the VRA and ignores critical strains in voting rights precedent that

49. 512 U.S. 874, 893 (1994) (Thomas, J., concurring).

50. See, e.g., Thernstrom, *supra* note 12, at 379 (“Today’s allegations of electoral exclusion . . . are not remotely analogous to the physical and economic danger that Blacks in the Deep South faced if they tried to register to vote in the years before the passage of the Voting Rights Act. We now live in an America far removed from that of the Jim Crow South. . .”).

reject the notion that the right to vote is limited merely to the formal right of ballot access.

A. *The History of Minority Vote Dilution*

The first premise in the standard critique of vote dilution doctrine is that, historically speaking, there was some sort of radical break between devices employed to deny the vote from minority voters and those designed to weaken their voting power. Although there is a temptation to view electoral arrangements and districting plans that dilute minority strength as just another example of the sort of partisan gerrymandering in which the political parties routinely engage, this view misapprehends the struggle for voting rights during and since the era of the civil rights movement.

Historically, districting plans that diluted minority voting power only came about *as a response* to minority enfranchisement. "Whites had used such laws in the nineteenth century both during and after Reconstruction to dilute or curtail the power blacks had obtained at the ballot box."⁵¹ Dilutive schemes were originally used during and after Reconstruction in order to deprive newly enfranchised African Americans of any effective voting power.⁵²

Widespread disfranchisement at the end of the nineteenth century rendered such techniques largely unnecessary; after all, there would be no need to dilute minority voting power when there were very few registered minority voters to speak of. But when African American voting power "threatened to become" a "serious factor" again in the 1960s, once again, "efforts were mounted throughout the former Confederacy to establish laws that would dilute minority voting strength."⁵³ Such dilutive methods were often "the result of white southern politicians' recognition after World War II that, since black enfranchisement was

51. Davidson, *supra* note 20, at 22; *see also id.* at 24.

52. *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 15-16 (1999); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in MINORITY VOTE DILUTION 27, 32-33 (Chandler Davidson ed., 1984) [hereinafter Kousser, *Lessons for the Second*].

53. Davidson, *supra* note 20, at 24 (citing Kousser, *Lessons for the Second*, *supra* note 52, at 32-33).

probably inevitable . . . new means would have to be found to limit black voters' effectiveness."⁵⁴

Thus, as it became clear that it would soon be impossible to prevent African Americans from casting ballots altogether, efforts were once again undertaken to minimize the effectiveness of those ballots. For example, it was immediately after the Selma to Montgomery march, which catalyzed national support for the passage of the VRA,⁵⁵ that the Alabama state legislature passed a bill to require at-large elections, with the sponsor expressly stating that his goal was to restrict the impact of the so-called "block vote."⁵⁶ Such efforts were common throughout the South around the time that the VRA was enacted.⁵⁷

Here in Richmond, similar efforts manifested at both the state and local levels. A year before the VRA was enacted, the Virginia state legislature enacted redistricting plans that called for: (i) the election of two state senators from a single at-large district in Richmond; and (ii) the election of eight members of the House of Delegates from a single eight-member at-large district that combined the City of Richmond and Henrico County.⁵⁸ The plan had its intended effect during the following election cycle in 1965; despite growing African American enfranchisement in Richmond, no African Americans were elected from Richmond to the Virginia General Assembly.⁵⁹

At the local level, Richmond employed a variety of techniques to try to ensure that African Americans would be unable to elect any candidates. After African American registration surged from approximately one-quarter to one-third of voters within Richmond itself, the city responded with a proposal to adopt staggered terms for the city council, which was intended to prevent African Americans from pooling their voting power to elect their preferred

54. *Id.* at 22; *see also id.* at 26–27.

55. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 263 (2000).

56. Davidson, *supra* note 20, at 25 (internal quotation marks omitted).

57. *See, e.g.,* Laughlin McDonald et al., *Georgia*, in *QUIET REVOLUTION*, *supra* note 20, at 67, 67, 82.

58. *See* Act of Dec. 2, 1964, ch. 2, 1964 Va. Acts 4, 5; Act of Dec. 2, 1964, ch.1, 1964 Va. Acts 3, 4; Thomas R. Morris & Neil Bradley, *Virginia*, in *QUIET REVOLUTION*, *supra* note 20, at 271, 280.

59. *See* Morris & Bradley, *supra* note 58, at 280.

candidates.⁶⁰ Later, African Americans became a majority in Richmond during the 1970s. But, in an effort that a district court determined was a “move by the white political leadership, frightened by the new electoral strength of black voters, to maintain control of city council,”⁶¹ the city sought to annex several surrounding largely white suburbs to reduce the city’s African American population to only 42%.⁶²

Richmond was no different from a number of places in the South—as African Americans grew in electoral strength, efforts were undertaken to try to limit their influence. Thus, as the Supreme Court later explained, shortly after passage of the VRA “it soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. . . . [to] reduce or nullify minority voters’ ability, as a group, ‘to elect the candidate of their choice.’”⁶³ But the architects of the VRA anticipated developments like these and therefore designed the VRA to be a broad, remedial tool to prevent all forms of racial discrimination in voting.

Today, some litigants—including the plaintiff in *Shelby County v. Holder*, a case currently pending before the Supreme Court⁶⁴ challenging the constitutionality of section 5 of the VRA⁶⁵—have contended that the exclusive purpose of the VRA was to ensure ballot access and nothing more.⁶⁶ But, in fact, the VRA’s section 5

60. *Id.* at 282. Staggered terms can be used to counteract a “bullet-vote” strategy employed by minority voters in an at-large districting plan. *See id.* That is, in a multi-member at-large setting where all candidates run against each other, with the top vote-getters receiving seats, a minority group can sometimes elect their favored candidate, by “bullet voting” for a single preferred candidate while withholding votes for any other candidate. *See Davidson, supra* note 20, at 23. Staggered terms are meant to combat this strategy by ensuring that only one office from a multi-member district is up for election at a given time, such that the majority can outvote the minority each time. *See Morris & Bradley, supra* note 58, at 283.

61. *Morris & Bradley, supra* note 58, at 283.

62. *Id.*

63. *Shaw v. Reno*, 504 U.S. 630, 640–41 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)).

64. 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3064 (U.S. Nov. 9, 2012) (No. 12–96).

65. 42 U.S.C. § 1973c (2006).

66. *See Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 489 (D.D.C. 2011) (describing the plaintiff’s argument that section 5 of the VRA was not intended to apply to claims of minority vote dilution).

“preclearance procedure . . . was a mechanism designed to prevent recalcitrant white Southerners from undermining the *effectiveness* of black enfranchisement.”⁶⁷

Thus, section 5 of the VRA, which requires certain states and subjurisdictions to obtain prior federal approval (“preclearance”) before implementing changes to their voting laws, expressly applies to “*any . . . standard, practice, or procedure with respect to voting.*”⁶⁸ Section 5 plainly is not limited only to laws that limit the actual casting of ballots but rather was drafted broadly so that it could capture any discriminatory voting laws, including those aimed at diluting minority voting power. Its purpose was to prevent the adoption of new schemes that prevent minority voters from exercising political power, not “to authorize covered jurisdictions to pour old poison into new bottles.”⁶⁹

Section 5 was originally enacted on a temporary basis and has been subject to periodic reauthorizations, the most recent of which was in 2006.⁷⁰ Starting with the legislative hearings concerning the initial enactment of the VRA, however, Congress heard testimony concerning not only outright disfranchisement but also minority vote dilution.⁷¹ The purpose of the VRA was to combat both problems. As Attorney General Katzenbach subsequently explained during the 1975 reauthorization hearings,

[w]hen we drafted this legislation, we recognized that increased black voting strength might encourage a shift in the tactics of discrimination. Once significant numbers of blacks could vote, commu-

67. KEYSSAR, *supra* note 55, at 288 (emphasis added); *see also Shelby Cnty.*, 811 F. Supp. 2d at 489 (“Section 5 never had such a limited purpose. To the contrary, Congress specifically designed the preclearance requirement in order to prohibit covered jurisdictions from implementing any and all discriminatory voting changes, regardless of the form they might take.”).

68. 42 U.S.C. § 1973c(a) (emphasis added).

69. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part).

70. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

71. During the original 1965 hearings concerning the VRA, Attorney General Katzenbach warned that Southern states could engage in a wide variety of strategies that could be used for “purposes of evading the 15th Amendment.” *Hearings On H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 95 (1965) (statement of Nicholas Katzenbach, Att’y Gen. of the United States). Five years later, during the first reauthorization, the House Report to the reauthorization bill warned that, although minority voter registration rates were on the rise, jurisdictions covered by section 5 “ha[d] undertaken new, unlawful ways” to discriminate. H.R. REP. NO. 91-397, at 7 (1969), reprinted in 1970 U.S.C.C.A.N. 3277, 3283.

nities could still throw up obstacles to . . . make it difficult for a black to win elective office. . . . Section 5 has had its broadest impact . . . in the areas of redistricting and reapportionment. A substantial majority of the objections have been directed at this type of change. . . . Objections to this type of change, more than any other, have allowed blacks to achieve a greater measure of political self-determination . . . [and] have played⁷² such a central role in stimulating black political participation . . .

Thus, while it is accurate to say that, initially, the VRA was principally concerned with disfranchisement, it is an overstatement to suggest that disfranchisement was its exclusive target, or that preventing minority vote dilution was somehow alien to its initial purpose. In fact, as Katzenbach's testimony makes clear, preventing minority vote dilution was one purpose of the act. As dilution schemes quickly became the chief threat to the effective exercise of the franchise by minority voters, they soon became the VRA's principal focus.

And, extensive empirical research has demonstrated that the rise of single-member district voting to replace at-large districting plans—thanks largely to the VRA—has been responsible for substantial diversification among elected officials in the South.⁷³ It is probably not an exaggeration to say that, but for the application of the VRA to vote dilution schemes, efforts to block minority voters from exercising meaningful political power in the South may have been successful.

72. *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 123–24. (1975) (statement of Nicholas Katzenbach, Att'y Gen. of the United States); see also H.R. REP. NO. 94-196, at 10 (1975) (expressly stating that one purpose of section 5 was to prevent the use of “at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans”). Congress would also make clear during subsequent reauthorizations that dilutive schemes were one of the chief rationales for the continuing need for the VRA's expiring provisions. See, e.g., S. REP. NO. 97-417, at 10 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 187 (finding that “covered jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices to dilute minority voting strength”); see also H.R. REP. NO. 109-478, at 36 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 640 (justifying the most recent reauthorization of section 5 based on “voting changes devised by covered jurisdictions [which] resemble those techniques and methods used in 1965, 1970, 1975, and 1982”); *id.* at 21, reprinted in 2006 U.S.C.C.A.N. 618, 631 (noting evidence of “calculated decisions to keep minority voters from fully participating in the political process”).

73. See Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in QUIET REVOLUTION, *supra* note 20, at 301, 313, 319–21; see also Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in QUIET REVOLUTION, *supra* note 20, at 378, 384–87.

B. *The Constitutional Injury of Minority Vote Dilution*

A second premise in the standard critique of vote dilution doctrine is that vote dilution schemes are somehow less injurious to a person's right to vote than outright denial of the ballot. In one obvious sense, this seems to be true. After all, even if we treat the right to vote not only as an individual's participation right, but also as the right to aggregate one's vote with others so as to influence election outcomes,⁷⁴ a person will always have at least some chance of doing so successfully, so long as she is not disfranchised entirely.

As a form of constitutional injury, however, vote dilution should be understood as being on the same footing as outright denial of the ballot, for two reasons. First, where dilutive schemes are motivated by racially discriminatory intent, such schemes violate the Equal Protection Clause of the Fourteenth Amendment. It is axiomatic that facially neutral state action motivated by discriminatory racial animus violates the Equal Protection Clause.⁷⁵ This is true even if the same law enacted without such animus would be otherwise valid. Thus, intentionally discriminatory efforts to dilute the voting power of minority voters are no less odious under the Equal Protection Clause than are intentionally discriminatory efforts to deny access to the ballot.

To be sure, the VRA's prohibitions on minority vote dilution—under either section 2 or section 5—are not limited only to those situations involving intentional discrimination. But the test for actionable minority vote dilution under section 2 of the VRA encompasses elements that are substantially similar to the factors set forth by the Supreme Court as relevant to determining the presence of unconstitutional discrimination. In *Rogers v. Lodge*, the Supreme Court held that a variety of factors were “relevant to the issue of intentional discrimination,”⁷⁶ including

lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a tenuous state policy underlying the preference for multimember or at-large districting, and the existence of past discrimination which precludes

74. See *supra* text accompanying notes 30–31.

75. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985). *Hunter* is particularly noteworthy because it establishes that a facially neutral and otherwise constitutionally permissible voting law (there, a state felon disfranchisement law), is unconstitutional if it was motivated by discriminatory intent. See *id.* at 223–24, 227–28.

76. 458 U.S. 613, 624 (1982).

effective participation in the elector process. Factors which enhance the proof of voting dilution are the existence of large districts, anti-single-shot voting provisions, and the absence of any provision for at-large candidates to run from geographic subdistricts.⁷⁷

All of these elements are encompassed within the list of factors to prove statutory liability under section 2's results test (with the overlapping factors emphasized in bold):

1. **the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;**

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. **the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;**

4. **if there is a candidate slating process, whether the members of the minority group have been denied access to that process;**

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.⁷⁸

Thus, a statutory claim that is nominally based on dilutive effect rather than on discriminatory intent requires proof of the very same factors that the Supreme Court has deemed probative

77. *Id.* at 619-20 n.8 (citations omitted) (citing *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973)).

78. *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (emphasis added) (quoting S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07).

of unconstitutional intent.⁷⁹ This connection to elements of intentionality was, for lack of a better word, *intentional*. In laying out the factors for liability under section 2's results test, the Supreme Court borrowed from a 1982 Senate Report.⁸⁰ The report, in listing factors that the Senate deemed relevant to section 2 liability, in turn borrowed from a Fifth Circuit decision concerning circumstantial evidence of discriminatory intent.⁸¹

Thus, although Congress adopted a nominal "results" test which sought to ease the standard for bringing an actionable claim under section 2 by eliminating the requirement that plaintiffs expressly allege discriminatory intent, the "results" test leans heavily on "intent" evidence. Mere dilutive effect by itself is insufficient. Additional factors that are essentially circumstantial evidence of discriminatory animus are also necessary. The result, therefore, is a test that in many ways mimics the test for intentional—and therefore unconstitutional—discrimination but which avoids "placing local judges in the difficult position of labeling their fellow public servants 'racists.'"⁸² Dilutive schemes that vio-

79. See Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 76 (2006) (describing how "intent remains an aspect of Section 2" liability). In fact, three United States Courts of Appeals require that plaintiffs bringing claims under section 2 show that their injuries in some way stem from race-based decisionmaking. See *Teague v. Attala Cnty.*, 92 F.3d 283, 295 (5th Cir. 1996); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1293–94 (11th Cir. 1995).

80. Compare *Rogers*, 458 U.S. at 619–20 n.8, with S. REP. NO. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07.

81. Compare *Zimmer*, 485 F.2d at 1305, with S. REP. NO. 97-417, reprinted in 1982 U.S.C.C.A.N. 177, 206–07.

82. *United States v. Blaine Cnty.*, 366 F.3d 897, 908 (9th Cir. 2004); see also *The Continuing Need for Section 5 Pre-clearance: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Pamela Karlan) ("[O]ne of the reasons for the results test in section 2 is to avoid the difficult problem of having to call people racists in order to solve the exclusion of minorities from the political process. So when courts decide cases on effects test reasons, they don't reach the question whether there is also a discriminatory purpose. But let me tell you from my own experience that if we had to show discriminatory purpose in lots of these cases, we could do it."); S. REP. NO. 97-417, at 36 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 214 ("[T]he intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities."). To be clear, I am not suggesting that the statutory standard for vote dilution under section 2 is identical to the constitutional standard for intentional dilution under the Equal Protection Clause. Section 2 undoubtedly proscribes a somewhat broader swath of conduct: that which occupies space that lies somewhere between outright discriminatory intent and mere disparate impact—where racial bias plays a decisive role in electoral outcomes, but cannot necessarily be identified as the sole impetus behind an electoral arrangement. See, e.g., *Elmendorf*, *supra* note 14, at 456 ("Section 2 prevents or compensates for a type of constitutional violation that the courts cannot remedy through ordinary constitutional lit-

late section 2 can therefore be understood in many instances as implicating constitutional concerns about racial animus.

Second, if we accept the premise that the right to vote is best understood as encompassing the right to aggregate one's vote with others in order to participate *meaningfully* in the political process,⁸³ then dilutive arrangements essentially have the same practical effect as outright denial of the ballot.

The Supreme Court has not yet clearly decided the issue of whether schemes intended to dilute minority voting rights violate the Fifteenth Amendment's guarantee that "[t]he 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,"⁸⁴ but it has acknowledged that the right to vote "includes all action necessary to make a vote *effective*."⁸⁵ Thus, the Court has held that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," the former of

igation: the election outcome that is unconstitutional owing to the racial basis for the electorate's verdict.").

83. See *supra* text accompanying notes 30–34.

84. U.S. CONST. amend. XV, § 1; see, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000) ("[W]e have never held that vote dilution violates the Fifteenth Amendment."). Although a full discussion of this complex issue is beyond the scope of this short article, I note Justice Scalia's pronouncement that intentional efforts to dilute minority voting power lie outside the Fifteenth Amendment's prohibitions—or Congress's authority to enforce those provisions—may be unfounded. The text of the Fifteenth Amendment prohibits not only the outright denial of the right to vote, but also the abridgement of it. U.S. CONST. amend. XV, § 1. "Abridge" is defined as "[t]o reduce or diminish." BLACK'S LAW DICTIONARY 7 (9th ed. 2009). That is precisely what a dilutive scheme seeks to do to a person's right to vote. Moreover, pre-VRA Supreme Court precedent appears to establish the proposition that intentional dilution of minority voting power violates the Fifteenth Amendment. See *Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. . . . If a State . . . weighted . . . the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable.") (emphasis added); see also *Georgia v. United States*, 411 U.S. 526, 534–35 (1973) (noting that electoral arrangements that "have the potential for diluting the value of the Negro vote . . . are within the ambit of [Section] 5 of the Voting Rights Act . . . [which] is a permissible exercise of congressional power under [Section 2] of the Fifteenth Amendment"). Even *City of Mobile v. Bolden* itself, from which much of the current confusion over this question stems, can be read to hold that the Fifteenth Amendment prohibits intentional minority vote dilution. See 446 U.S. 55, 62 (1980) (plurality opinion) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)) ("[A]llegations of a racially motivated gerrymander of municipal boundaries state[] a claim under the Fifteenth Amendment."); cf. *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 552 n.8 (5th Cir. 1980) (observing that in *Bolden* "a majority of the court believe[d] that a fifteenth amendment claim can be made out against vote-diluting at-large districting if discriminatory purpose is proved").

85. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (emphasis added) (quoting 42 U.S.C. § 1973l(c)(1) (1958 & Supp. I 1964)) (internal quotation marks omitted).

which “could therefore nullify [minority voters’] ability to elect the candidate of their choice *just as would prohibiting some of them from voting.*”⁸⁶

If we accept the proposition that the right to vote entails more than the act of casting a ballot, it seems clear that the injury occasioned by vote dilution should not be understood as less constitutionally significant than outright denial of the ballot. In a very practical sense, dilutive schemes can render a person’s vote meaningless, just as surely as if the person had been denied the ballot altogether.

III. VOTE DILUTION IN THE EARLY TWENTY-FIRST CENTURY

Of course, the mere fact that minority vote dilution is a serious matter tells us nothing about whether it remains a pervasive problem today or whether the costs of race-conscious redistricting outweigh the benefits. That is, even if the critics too often fail to grapple with the history of minority vote dilution and too easily dismiss the significance of the injury it occasions, it is still fair to ask whether this is largely a problem for our history books, and whether the VRA’s robust protections, which permit parties to state a claim for minority dilution without raising allegations of clear discriminatory intent, remain necessary today.

A. *The Practical Need for Vote Dilution Doctrine in the Twenty-First Century*

1. Intentional Efforts to Dilute Minority Voting Power

It should go without saying that the country has witnessed tremendous progress in the last few decades. Intentional efforts to dilute minority voting power are likely less common today than they were thirty or forty years ago. But we should resist the temptation to think that the unfortunate history of efforts to intentionally discriminate against minority voters during the process of election line-drawing is no longer with us. In fact, we need look no further than the current redistricting cycle, and in particular, the state of Texas’s failure to obtain approval for any of its three redistricting plans. In *Texas v. United States*, a three-judge

86. *Id.* at 569 (emphasis added).

panel of the District Court for the District of Columbia unanimously ruled that that two of Texas's three redistricting plans—its congressional and state senate plans—had been enacted with discriminatory purpose.⁸⁷ Without reaching the question of discriminatory purpose with respect to Texas's third plan—its state house plan—the Court found that the evidence “strongly suggest[ed]” that it, too, was tainted by discriminatory intent.⁸⁸

With respect to the congressional redistricting plan, the panel unanimously concluded that it was “enacted with discriminatory purpose,”⁸⁹ based on a number of factors. First, the court noted that state officials had, in one district, “consciously replaced . . . active Hispanic voters with low-turnout Hispanic voters,” in order to “reduce Hispanic voters’ [voting power] without making it look like anything in [the district] had changed,” all “in an effort to strengthen the voting power of [the district’s] Anglo citizens.”⁹⁰ Notably, the district where this occurred—Congressional District 23—was the same district where, only six years earlier, Justice Kennedy observed that Texas attempted to dilute Hispanic voting power and thereby deprive Hispanic voters of an opportunity to elect a candidate of their choice just as they “were about to exercise it,” in a manner that bore “the mark of intentional discrimination that could give rise to an equal protection violation.”⁹¹

Next, the court noted that “substantial surgery” had been performed on majority-minority districts, including the removal of key economic centers, while nothing comparable had occurred in majority white districts, and that this occurred without any plausible explanations.⁹² Third, the court pointed to departures from the normal legislative process, such that “Black and Hispanic members of Congress . . . were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored.”⁹³ Although the court declined to address other evidence indicative of discriminatory intent, it pointedly noted that “[t]he parties have provided more ev-

87. No. 11-1303 (TBG–RMC–BAH), 2012 WL 3671924, at *18, *23–26 (D.D.C. Aug. 28, 2012).

88. *Id.* at *36–37.

89. *Id.* at *18.

90. *Id.* at *16.

91. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438, 440 (2006).

92. *Texas*, 2012 WL 3671924, at *19–20.

93. *Id.* at *21.

idence of discriminatory intent than we have space, or need, to address here.”⁹⁴

Indeed, what was remarkable about the court’s opinion is that the court did not need to reach the issue of discriminatory intent *at all*. Because a majority of the court ruled that Texas’s congressional redistricting plan violated the VRA on other grounds—namely, section 5’s effects or “retrogression” prong⁹⁵—the court could have issued its ruling without addressing the question of intent. The fact that all three members of the court reached this issue as “an alternative, unanimous basis”⁹⁶ for declaring the Texas redistricting plan unlawful speaks volumes.

There really should not be much debate about whether we should continue to prohibit redistricting plans that intentionally dilute minority voting power or otherwise harm the interests of minority voters. After all, such conduct violates, at a minimum, the Equal Protection Clause. But because the VRA sweeps beyond allegations of intentional discrimination to proscribe a somewhat broader swath of conduct, we must still ask whether prohibitions on redistricting plans that merely violate the statutory standard for dilutive effect remain necessary.

2. The Stubborn Persistence of Racially Polarized Voting

One way to get at this question is to ask whether the conditions that enable such dilutive schemes to succeed remain with us today. After all, efforts to dilute minority voting power can only work against the backdrop of racial polarization. That is, it is only in a context where, among other things, minorities are consist-

94. *Id.* at *21 n.32. As noted, the court also found evidence of discriminatory intent with respect to Texas’s two other redistricting plans. With respect to Texas’s Senate plan, the court noted that: (i) without any explanation, the legislature cracked apart the African American and Hispanic populations in one Senate district, distributing minority voters among three separate districts where their voting power would be diluted and (ii) in a departure from typical redistricting practices, every Senator who represented a majority-minority district was excluded from the map-drawing process and was not permitted to preview the maps. *See id.* at *23–24. Finally, with respect to House plan, the court blocked its implementation on other grounds, but noted that it had “concern” about possible discriminatory intent, as the plan diluted minority voting power in four separate districts, while Texas’s mapdrawer provided “incredible testimony,” explaining that these results further “suggest[ed] [that] mapdrawers cracked [districts] along racial lines to dilute minority voting power.” *Id.* at *36–37.

95. *See id.* at *17.

96. *Id.* at *18.

ently outvoted by a white majority that policymakers can design electoral arrangements that permit “those elected to ignore [minority] interests without fear of political consequences”⁹⁷ Only in such circumstances can one say that minority voters had somehow been locked out of meaningful participation in the electoral process.⁹⁸

A relevant question, therefore, is to ask whether such conditions of polarization persist today. After all, contemporary critics of minority vote dilution doctrine could concede that intentional vote dilution is problematic because it is motivated by discriminatory animus, while still maintaining that results-based vote dilution protections are generally unnecessary because white voters are purportedly willing in significant numbers to support minority or minority-preferred candidates.

It is undoubtedly true that, broadly speaking, white attitudes towards minority office holding have improved tremendously since 1965. Despite this progress, however, it is an unfortunate fact that racial polarization continues to mark American political life in many places. Indeed, while many hailed the election of President Obama in 2008 as marking the beginning of a post-racial era,⁹⁹ the 2008 election was also notable for deepening racial polarization in some places. In fact, “the 2008 election did not represent a fundamental shift in national patterns of race and vote choice. . . . In the Deep South, Obama actually did *worse* than Kerry among white voters.”¹⁰⁰ This result was particularly surprising, as “Obama’s failure to improve over Kerry’s margin among whites” in certain parts of the country “stands out,” given the favorable conditions in 2008 for a Democratic candidate, including “[t]he economic collapse, the historic unpopularity of a sitting Republican president, and an enormous fundraising ad-

97. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

98. See *supra* text accompanying notes 35–36; cf. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 263 (2008) (“[A]s the Attorney General explains, racial bloc voting is a necessary precondition for vote dilution. . .”).

99. For examples, see NAACP LEGAL DEF. & EDUC. FUND, “POST-RACIAL” AMERICA? NOT YET 4 (2009), available at <http://www.naacpldf.org/files/publications/Post-Racial-America-Not-Yet.pdf>.

100. Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1387 (2010) (emphasis added); see also Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL’Y REV. 59, 68–70 & tbl. 1 (2009).

vantage.”¹⁰¹ Moreover, this decline among white support cannot be explained by partisan affiliation; in 2008, Obama did seven points worse than John Kerry did in 2004 among white voters in the states covered by section 5 of the VRA.¹⁰²

As of the time of this writing, comprehensive data regarding the 2012 presidential election is not yet available on a state-by-state basis, but a few data points are available. We know that, nationally, voting in the 2012 presidential election was *more* polarized along racial lines than it was in 2008, with Obama winning a smaller share of white voters, leading *USA Today* to proclaim on its front page the morning after the election: “A Nation Moving Further Apart.”¹⁰³

Twenty-nine state-by-state exit polls provided by CNN illustrate substantial variance in the degree of racial polarization around the country as demonstrated in the following table:

CNN STATE-BY-STATE EXIT POLLS¹⁰⁴		
<u>State</u>	<u>Percent of White Vote for Obama</u>	<u>Percent of Black Vote for Obama</u>
Alabama	15%	95%
Arizona	32%	Not Available
California	45%	96%
Florida	37%	95%
Illinois	46%	96%
Indiana	38%	89%

101. Ansolabehere et al., *supra* note 100, at 1414.

102. *See id.*; *see also* Clarke, *supra* note 100, at 75–76.

103. *See* Page, *supra* note 5. Exit poll data indicated that Obama won “more than nine of 10” African American votes, improved his margin among Hispanics to 69% and Asian Americans to 73%, but lost ground among whites winning only 40% of their votes. *Id.*; *Exit Polls*, CNN, <http://www.cnn.com/ELECTION/2008/results/polls/#USP00p1> (last visited Feb. 18, 2013) (noting Obama won 62% of the Asian American vote in 2008); *President: Full Results*, CNN, <http://www.cnn.com/election/2012/results/race/president> (last visited Feb. 18, 2013) (noting Obama won 73% of the Asian American vote in 2012).

104. All data is compiled from the CNN Election Center’s data on the 2012 Presidential Election. To access each state’s individual data, visit *President: Full Results*, *supra* note 103, and select the specific state under the “results for” drop down tab on the left. When taken to the specific state’s page, select the “Exit Polls” tab.

<u>CNN STATE-BY-STATE EXIT POLLS</u> ¹⁰⁴		
<u>State</u>	<u>Percent of White Vote for Obama</u>	<u>Percent of Black Vote for Obama</u>
Iowa	51%	Not Available
Kansas	33%	Not Available
Maine	57%	Not Available
Maryland	43%	97%
Massachusetts	57%	92%
Michigan	44%	95%
Minnesota	48%	Not Available
Mississippi	10%	96%
Missouri	32%	94%
Montana	38%	Not Available
Nevada	43%	92%
New Hampshire	51%	Not Available
New Jersey	43%	96%
New Mexico	41%	Not Available
New York	49%	94%
North Carolina	31%	96%
Ohio	41%	96%
Oregon	54%	Not Available
Pennsylvania	42%	93%
Vermont	66%	Not Available
Virginia	37%	93%
Washington	53%	Not Available
Wisconsin	48%	94%

A careful analysis of these figures will of course seek to control for a range of factors.¹⁰⁵ But a few points immediately stick out. First, racial polarization persists in many parts of the country. Second, such polarization remains extremely severe in certain pockets. For instance, there are four states that are covered in whole under section 5 of the VRA that are found in the table above: Alabama, Arizona, Mississippi, and Virginia. Obama received the support of only 10% of white voters in Mississippi and only 15% of white voters in Alabama. Regardless of partisan affiliation, these numbers indicate stark racial polarization in those two states. Obama's best showing among white voters in those states was in Virginia, where he only received only 37% of white voters.

Furthermore, presidential elections have some unique characteristics and may therefore feature diminished levels of racial polarization when compared to state and local elections in the same area.¹⁰⁶ This suggests that overall racial polarization may actually be worse than the presidential electing data would indicate.

In other words, despite tremendous progress in racial attitudes since the enactment of the VRA in 1965, substantial differences persist between the electoral preferences of white voters and African American voters, and these differences are severe in certain parts of the country. To be sure, there may be more places in the country than ever before where minority voters could elect their preferred candidates without having the benefit of a majority-minority district. We should not be blind to that fact, which should be reflected in our application and interpretation of the VRA. It may be appropriate to rely on "crossover" districts—in which a small group of white voters support minority-candidates—to satisfy the need for minority representation.¹⁰⁷

But, as Justice Kennedy recently observed, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes

105. See Ansolabehere et al., *supra* note 100, at 1416–19 (explaining controls for partisan skew in analysis of 2004 and 2008 presidential data).

106. See Clarke, *supra* note 100, at 76–81. Analyzing vote dilution claims always requires a close focus on the particulars of an individual case, and racial polarization patterns may differ from place to place, and depending on the size of the jurisdiction or election district at issue. See *id.*

107. See *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).

and traditions. . . ."¹⁰⁸ Given the persistence of severe racial polarization, it remains the case that, at least in some places, minority voters will only be able to elect their preferred candidates from majority-minority districts. In such places, majority-minority districts remain an important means to provide minority voters with a meaningful opportunity to participate in the political process.

B. *Costs and Benefits: The Risk of Balkanization*

It is possible, however, that reliance on such districts exacts some costs, in the form of balkanizing the electorate. Those concerned with the purportedly polarizing effects of race-conscious districting tend to raise at least three distinct concerns: (1) that dividing voters among racial lines inappropriately reproduces race as an organizing principle of civic life;¹⁰⁹ (2) that majority-minority districts are particularly (left-leaning) voters from surrounding districts, tilting those districts farther to the right than they might otherwise be, increasing division and polarization among the overall electorate.¹¹⁰

With respect to the first concern that race-conscious districting reproduces race as an organizing principle, it is difficult if not impossible to measure empirically what effect the use of race-conscious remedies has on the level of race-consciousness in society generally. Rather than something measurable, this seems to be a largely philosophical objection stemming from a discomfort with race-conscious remedies per se, based on the expressive harm that such remedies purportedly incur. While the danger that the race-conscious remedies reify racial divisions should be taken seriously, the concern about race-consciousness in the re-districting context omits the fact that statutory claims for minority vote dilution can only be brought—and majority-minority districting can only be required—in contexts where racial polarization is *already present*.¹¹¹ That is, it is only in situations

108. See *id.* at 25.

109. For an expression of this view, see Justice Thomas's opinion in *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)) (arguing that majority-minority districting "systematically divid[es] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid'").

110. See *supra* text accompanying note 43.

111. See *supra* text accompanying notes 19–25.

where the electorate is already effectively balkanized along racial lines where a plaintiff can claim that his voting rights have been *diluted* in some sense, such that the drawing of a majority-minority district may be required by the VRA. Majority-minority districting is not—indeed, it cannot be—the initial cause of polarization, since such districting can only be required where such polarization has already been observed.

Thus, when Abigail Thernstrom observes that “only five members of the [Congressional Black Caucus] . . . have been elected from majority-White constituencies, and only two are Republicans,”¹¹² and from this fact draws the conclusion that majority-minority districting is the cause of polarization, she may have mistaken cause for effect. That is, persistent racial polarization may be precisely the reason why so few minority candidates have found success in majority-white districts.

While it is absolutely correct to observe that nearly all African American members of Congress have been elected from majority-African American districts, the inverse of that fact is that very few majority-white districts have ever elected African American representatives. As of 2006 (when section 5 of the VRA was last reauthorized), only 49 of 8047 elections—0.61%—in white-majority U.S. House districts had provided black winners since 1966.¹¹³ And while the country has elected its first African American president, three states that have among the highest African American populations in the country—Louisiana, Mississippi, and South Carolina—have never elected an African American to *any* statewide office.¹¹⁴ Instead of lamenting the fact that so many minority members of Congress represent majority-minority constituencies, perhaps we should instead be troubled by the fact that so many majority-white districts have never elected a minority legislator.

The second concern that majority-minority districts reward extremist candidates has mixed empirical support at best. In fact, the actual experience in such jurisdictions suggests the opposite, because in districts where minorities constitute a modest majori-

112. Thernstrom, *supra* note 12, at 412.

113. *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing before the Subcomm. on the Constitution, Civil Rights & Property Rights of the S. Comm. on the Judiciary*, 109th Cong. at 184 (2006).

114. See H.R. REP. NO. 109-478, at 33 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 636.

ty, white voters develop an “incentive[] to collaborate with segments of the minority community and to coalesce behind . . . ‘new-style’ minority candidates, who assiduously court both white and minority voters.”¹¹⁵ To adopt the contrary conclusion in the face of substantial empirical evidence—namely, to assert without more than anecdotal evidence that majority-African American districts will generally favor candidates who pander to racial resentments—would be to assume that African American voters are a far-left monolith, rather than a group featuring some ideological diversity. Indeed, it is frequently the case that “a centrist coalition of moderate white and black voters [have] the power to elect the black candidate of *their* choice in many [majority-African American] districts.”¹¹⁶

The third concern that majority-minority districting may bleach surrounding districts of minority influence, ultimately harming minority voters’ substantive interests is perhaps the most troubling. There is indeed some research indicating that, in many circumstances, the drawing of majority-minority districts tends to “bleach” neighboring districts of minority voters, rendering those districts whiter and more conservative. Thus, some have therefore posited that drawing majority-minority districts, while enhancing “descriptive” representation for minority voters by enabling the election of more minority candidates, harms “substantive” representation for such voters by reducing the total number of electeds who sympathize with minority voters’ policy goals.¹¹⁷ From the perspective of minority voters, it may instead be better to distribute minority voters across a larger range of districts where they can hope to wield greater influence.

This may be true in some circumstances and warrants some concern. But I note three caveats. First, these concerns are less valid in circumstances involving high racial polarization. For example, if we assume perfect polarization, then the relative proportion of white to minority voters is irrelevant at levels that are either below or above a 50% threshold of the electorate in actual turnout. That is, in a context in which all white voters prefer one

115. Elmendorf, *supra* note 14, at 398 (quoting DAVID T. CANON, RACE, REDISTRICTING AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 128 (1999)).

116. See CANON, *supra* note 115, at 3.

117. See SWAIN, *supra* note 43, at 210; Cameron et al., *supra* note 43, at 794.

candidate, while all minority voters prefer another, it makes no difference if the district is drawn to be 51% white or 90% white—in either scenario, minority voters will be locked out of the process. In such circumstances, draining minority voters from surrounding districts will have no effect—or even influence—on outcomes in those districts.

Of course, conditions of perfect polarization are almost never observed. Where racial polarization has diminished significantly, minority voters' interests may be best served by districting plans that enhance influence of minority voters. But influence is a nebulous concept. And significant or even extreme polarization—with almost 90% of whites favoring one candidate and 90% of minorities favoring another—*does* still occur, as it did during the 2012 presidential election in Alabama and Mississippi.¹¹⁸ In contexts of substantial polarization (let alone extreme polarization), concerns about diminishing minority influence in surrounding districts are largely unfounded.

Second, the concern that descriptive representation trades-off with substantive representation is, at best, a caution about the possible partisan consequences of majority-minority districting (i.e., it may make it more difficult for white Democrats to prevail in neighboring districts). But this tells us nothing about whether the drawing of majority-minority districts causes voting patterns to actually become more polarized along *racial lines* as a result of the drawing of majority-minority districts. And, in fact, the “consistent” finding among political scientists is that majority-minority districting may soften racial polarization among the electorate because “the election of out-group candidates tends to *reduce* biased voting by members of the in-group and to diminish negative stereotyping of the out-group.”¹¹⁹

Third, although it is tempting to ascribe growing partisan polarization in our politics to the line-drawing process, in part because redistricting has come to be viewed as an ugly example of self-dealing by entrenched politicians, there actually appears to

118. See *supra* note 104 and accompanying text.

119. Elmendorf, *supra* note 14, at 397 & n.97 (discussing empirical political science work in this area). Even Abigail Thernstrom has noted anecdotal evidence of this point. See Thernstrom, *supra* note 12, at 376 n.9 (recounting that “numerous White legislators expressed astonishment at the change in racial attitudes for which the passage of the Voting Rights Act was responsible”).

be little empirical evidence to support that claim.¹²⁰ For example, it is certainly true that, broadly speaking, election districts have become more homogeneous, that competition within districts has declined, and that districts have become more ideologically polarized when compared to each other, such that the percentage of districts that can be considered “safe” seats for both Democrats and Republicans has increased.¹²¹ But Senate races have also become less competitive, and voting patterns at the county level have also become more homogeneous, suggesting that other factors such as geographic self-sorting among like-minded voters may be at play.¹²² Moreover, in the aggregate, the voting patterns of officials elected from competitive districts are little different from those elected from “safe” seats.¹²³ Partisan polarization seems to have increased everywhere and at all levels, not simply where the VRA has been at work.

In fact, the decline in electoral competition within particular districts has not correlated with more significant ideological polarization, which “appears to be a longer-term phenomenon whose origins predate” recent redistricting cycles.¹²⁴ Moreover, recent research employing comprehensive computerized redistricting simulations demonstrates that efforts to create districts randomly (i.e., race-blind) would not significantly reduce overall partisan polarization (but would decrease minority representation); conversely, maximizing minority representation by drawing as many majority-minority districts as possible would not increase such polarization significantly.¹²⁵ All of this suggests that the composition of the electorate in a given district may not be the best pre-

120. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 307–08 (2011).

121. See *id.* at 308–10.

122. See *id.* at 311–13.

123. See *id.* at 314.

124. Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 AM. J. OF POL. SCI. 666, 672–73 (2009); see also Harry J. Enten, *Why “Gerrymandering” Doesn’t Polarise Congress the Way We’re Told*, THE GUARDIAN (Jan. 3, 2013, 2:20 PM), <http://www.guardian.co.uk/commentisfree/2013/jan/03/gerrymandering-polarise-congress> (citing “well-established political science literature” establishing that “even when controlling for district partisanship, there are increasing ideological differences between Democrats and Republicans in Congress”); Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, FIVETHIRTYEIGHT (Dec. 27, 2012, 9:46 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/> (concluding that empirical data indicates that ideological polarization has increased substantially “above and beyond any changes brought about by redistricting”).

125. See McCarty et al., *supra* note 124, at 673–79.

dicator for how centrist or ideologically extremist the district's elected representative might be. The causes of recent hyper-partisan polarization seem to lie somewhere else than in the line-drawing process.¹²⁶

Ultimately a conclusive evaluation of these empirical claims is beyond my limited expertise. But it appears that there is little empirical evidence to support the notion that breaking up minority-minority districts would somehow diminish racial or even partisan polarization, it is the persistence of racial polarization that necessitates the remedy of race-conscious districting in the first place.

CONCLUSION

The sheer growth of the non-white population and its attendant gains in voting power raise some significant challenges for the minority vote dilution doctrine. Where substantial racial polarization remains a feature of electoral life, however, such districts remain necessary to provide minority voters with an opportunity to elect candidates of their choice. But in places where racial polarization has declined substantially, critics of minority vote dilution doctrine have raised valid questions as to whether majority-minority districts remain necessary in order to provide minority voters an opportunity to elect candidates of their choice. In circumstances where racial polarization has waned but still persists to a lesser degree, legislatures and courts could be encouraged to draw something less than majority-minority districts, so long as such districts preserved the minority community's ability to elect candidates of its choice.

To acknowledge this point is not to concede that majority-minority districting has become wholly irrelevant—rather, it is to acknowledge the progress that we have made without denying that the old medicine remains necessary in many parts of the country.

126. See Pildes, *supra* note 120, at 314–15. It may simply be the case, as Richard Pildes has argued, that the growing polarization that we are witnessing in our politics today is simply part of America's development into a "mature" two-party democracy. *Id.* at 288. He argues this is due in part to the fact that the VRA transformed the South from a region of one-party rule, and that, once two parties had to compete for votes in the South, a new dynamic emerged whereby the parties became more ideologically pure at the national level. *See id.* at 293–94.



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