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Loss and Redemption: Voting Rights at the Turn of a Century

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Loss and Redemption: Voting Rights at the Turn of a Century

Pamela S. Karlan*

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I. INTRODUCTION

The year the Voting Rights Act was passed, Langston Hughes published *Long View: Negro*. "Sighted through the [t]elescope of dreams," Hughes wrote, Emancipation loomed very large:

But turn the telescope around,
Look through the larger end—
And wonder why
What was so large
Becomes so small
Again.¹

* Professor of Law and Roy L. and Rosamond Woodruff Morgan Research Professor, University of Virginia. Fifteen years ago, on the eve of the 1982 amendments to the Voting Rights Act, Morgan Kousser began to ask what lessons we could learn from the end of the First Reconstruction to preserve the Second. See J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in Chandler Davidson, ed., *Minority Vote Dilution* 27, 27-46 (Howard U., 1984). This Article reflects my effort to build upon Morgan's earlier work as well as to think about some issues raised in a piece by Jim Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 *Howard L. J.* 633 (1996). I owe a great deal to Jim and Morgan's intellectual and personal generosity in our many conversations over the years. I also received many helpful suggestions from friends and colleagues at Stanford, the University of Texas, the University of Virginia, and Vanderbilt; Tommy Goldstein,

We don't really need to wonder why the political side of the First Reconstruction failed; there were so many reasons. One was the exhaustion of the national commitment to ensuring black equality and its replacement by a cynical bipartisan compromise in which black aspirations played no role. Another was the "progressive" belief that ethnic politics was the enemy of good government. Yet a third was the United States Supreme Court, which in a series of decisions from *United States v. Cruikshank*² through *Giles v. Harris*³ gutted African Americans' ability to protect themselves through the political process.⁴

The Voting Rights Act of 1965 is perhaps the cornerstone of the Second Reconstruction. President Johnson rightly called it "one of the most monumental laws in the entire history of American freedom."⁵ But it seems we are at a moment when the telescope is turning again; when the expansive future is about to become a contracted present. And the reasons for a potential Second Redemption bear a haunting resemblance to the explanations offered for the First. Again, we have an exhaustion of the national commitment to economic and racial justice for blacks; again, "progressives" are suggesting that attention to race has diverted us from more important issues; again, we have a Supreme Court that is hostile to minority political empowerment.

When it comes to things in danger of becoming so small again, the black presence in Congress looms high on the list. The past five years have seen a sustained legal assault on newly created majority-black congressional districts in the South, and there is a very real possibility that for the first time since the end of the First Reconstruction, black representation in southern congressional delegations will decrease.⁶ In previous work, I have explained why I reject arguments that race-conscious districting involves discrimination

Sam Issacharoff, and Rick Pildes gave me particularly extensive comments; and Gary Gansle provided superb research assistance.

1. Langston Hughes, *Long View: Negro*, in *The Panther and the Lash* 30 (Knopf, 1967).
2. 92 U.S. 542 (1875).
3. 189 U.S. 475 (1903).
4. For a comprehensive account of the process, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (Yale U., 1974).
5. David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* at 132 (Yale U., 1978).
6. In this Article, I address only the situation of black Americans, in part because that is where my expertise lies, in part because only they were the focus of both the First and the Second Reconstructions, and in part because, as Sam Issacharoff points out in a marvelous paper, the automatic translation of responses developed for black political exclusion to other racial and ethnic minorities raises a host of problems not entirely germane to my argument here. See Samuel Issacharoff, *Groups and the Right to Vote*, 44 Emory L. J. 869 (1995).

against white voters.⁷ This Article addresses a different strand of the argument against race-conscious districting: the claim that the creation of majority-black districts has perversely injured the very people they were thought to help.⁸ This claim was first advanced as a general criticism of vote dilution theory and it received greater currency in the wake of the 1994 elections, in which the Democrats lost control over the House of Representatives for the first time in forty years.

Part II of this Article sets out and assesses the theoretical and empirical underpinnings of "bleaching" theory. The bleaching critique of race-conscious districting rests on the identification of a potential tension between two of the interlocking concerns embodied in the right to vote: aggregation (the ability to elect the candidates of one's choice) and governance (the ability to see one's policy preferences enacted).⁹ Under some circumstances, increasing a voter's or group of voters' ability to elect candidates directly may decrease the likelihood that the legislature as a whole will be sympathetic to those voters' point of view. In the context of the Voting Rights Act, this tension plays out in the following fashion: concentrating black voters in a few districts increases the likelihood that those voters will be able to elect their most preferred candidates (usually candidates who are themselves black), but leaves adjacent districts far whiter, and thus far more conservative, than they would otherwise be. Ultimately, race-conscious districting produces a legislature whose overall composition is less friendly to the interests of black voters.

I believe that the bleaching hypothesis vastly oversimplifies the relationship between the Voting Rights Act and black influence over the political process as a whole. It rests on a series of contradictory premises about voting behavior both within the electorate and inside the legislature. And it depends, in a way that its adherents do not fully appreciate, on a set of assumptions about party behavior and

7. See Pamela S. Karlan and Daryl Levinson, *Why Voting Is Different*, 84 Cal. L. Rev. 1201 (1996); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 Cumb. L. Rev. 287, 304-05 (1996); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. Chi. Legal Forum 83, 95.

8. Rick Pildes has identified three "empirically oriented structures of belief and rhetoric that justify political and public skepticism toward civil rights policies today," which he calls "Accomplished Success, Abject Failure, and Perverse Effects." Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359, 1359-60 (1995). The argument I consider here is a variant of "Perverse Effects." As Pildes notes, "the perversity thesis is one of the recurring themes of conservative political argument." *Id.* at 1359 n.6 (citing Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* 11-42 (Belknap, 1991)).

9. For a more complete discussion of this taxonomy, see Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1708-20 (1993).

virtual representation. Nevertheless, as I discuss in the second Part of this Article, there *is* a causal connection between black gains and Democratic losses, but it operates on a deeper level than the technical processes of reapportionment. Just as the black disenfranchisement of the First Redemption was critical to creating the solid Democratic South of the early- to mid-twentieth century, the black enfranchisement of the Second Reconstruction was critical to destroying that consensus. As black voters flocked to, and gained increasing influence within, the Democratic Party, white voters left. The main reason why the Democrats have lost the solid South is the disappearance of their white, not their black, base.

While we have the telescope pointing backward, it's worth looking off into the far distance. This is not the first time that some commentators have decried the "unholy alliance" of blacks and Republicans; or that some liberals have argued that the distinctive political aspirations of blacks must be sacrificed to achieve progressive politics; or that some politicians have played the race card to divert white working people from issues of economic and social justice by drawing their attention to racial fissures instead. When we consider what democracy will be like in the next century—the topic of this Symposium—we should ask what promises it held at the end of the last, and how those promises came to be betrayed.

II. WHO'S RIGHT?: THE VOTING RIGHTS ACT AND THE GENESIS OF THE BLEACHING CRITIQUE

The bleaching critique begins with a simple mathematical fact: given the requirements of one-person, one-vote, any districting plan that increases an identifiable group's concentration in one set of districts necessarily decreases its relative presence in the remaining districts.¹⁰ This fact generates a set of competing possibilities. If voting is polarized—that is, if members of the numerical minority support candidates whom the remainder of the community op-

10. This axiom lies at the heart of partisan redistricting—the predominant concern of reapportionment in contemporary America. If the party controlling the districting process enjoyed an overwhelming advantage among the electorate, it might simply spread its opponents across the entire array of districts, in each of which they would constitute a powerless minority. But in most jurisdictions, the party in control has a slim enough margin that such a technique would be risky. Even in jurisdictions where it might be rational for the *party* to take the risk, individual *incumbents* want "safer" seats. So the party in control engages in a simultaneous process of "packing" and "cracking": it concentrates as many of its opponents as possible into a few districts in which it concedes victory, and then spreads the remaining opposition across the districts it has arrogated to itself.

poses—concentrating that minority into a few districts can increase its ability to elect candidates it prefers by creating some districts in which it becomes a majority.¹¹ As long as voting is truly polarized, this is the *only* way that the minority will be able to elect the candidates it prefers, since by definition in a polarized community the majority refuses to support candidates who represent the minority's viewpoint.

By contrast, if the fault lines in the jurisdiction's politics separate voters along some unrelated dimension, placing a minority group's members in only a few districts can decrease the number of representatives they elect.¹² Of particular importance, concentrating the group's members into only those districts in which they predominate can strip the group of its status as a pivotal bloc, able to "swing" elections in a number of districts to the candidates (sponsored primarily by another, larger group) who offer the most in return. A group's ability to operate as a swing bloc depends for the most part on two factors: its size relative to the size of the gap between the competing factions and, as I have already emphasized, its location away from the fissures that divide the rest of the electorate. If the remainder of the electorate is in equipoise, even a very small bloc may be able to extract substantial concessions in return for its support. That has been the position of the ultra-Orthodox parties in Israel. By contrast, although Israeli Arabs could also form the final piece of a winning coalition, they enjoy far less political power than the ultra-Orthodox, even though they are a much larger voting bloc, because the major blocs believe that to compete vigorously for Israeli-Arab support risks alienating more votes from existing supporters than it would attract.¹³

Already we have moved a long way from simple mathematical fact. As Justice Harlan warned us long ago, "people are not ciphers,"¹⁴ and not all numerically identical blocs are equal in their ability to

11. Any members of the group left outside the district will still be unable to elect candidates directly, but they will now enjoy virtual representation from the officials elected by their compatriots in group-controlled districts.

12. "Elect" in this sense includes those candidates who receive the group's support, even if they are not themselves members of the group.

13. See, for example, *The Israeli Election; Israel's Minority Ethnic Groups Could Hold Sway in Election; Arabs, New Immigrants Make Up Key Bloc of Voters*, Minn. Star Trib. 6A (May 27, 1996) (explaining that despite the swing potential of an Arab voting bloc in the Israeli presidential election, it "would still be politically unpalatable for the prime minister to invite an Arab party to become part of a coalition government"); Deborah Horan, *Israel-Elections: Arab Vote Key to Upcoming Elections*, Inter Press Service (May 9, 1996) (describing a Likud short film designed to foster fear of Arab control over the Israeli elections).

14. *Reynolds v. Sims*, 377 U.S. 533, 623 (1964) (Harlan, J., dissenting).

become members of winning electoral or governing coalitions. Thus, there is an important ambiguity in the Justice's later observation that he was not clear "how a court would go about deciding whether an at-large system is to be preferred over a district system [because u]nder one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers."¹⁵ Either Justice Harlan was advancing a very formal notion of influence—that mere presence within the electorate means that a group influences representatives regardless of whether the candidate it supports ever wins¹⁶—or he was assuming that black voters will often be part of the winning coalition *and* (and here the unstated assumption is quite critical), having voted for the winner, will enjoy some tangible influence over the policies she espouses.

The same tensions are recapitulated when we step back from asking questions about aggregation—such as whether the candidates for whom the group votes win the election—to consider issues of governance: how responsive is the legislative process to the group's distinctive needs? On the one hand, representatives from minority-dominated districts will (presumably) vigorously advance the group's interests.¹⁷ On the other hand, representatives from the remaining districts have no direct incentives to be responsive to the group's interests, since their political survival does not depend on pleasing the minority. Thus, the success of the group's legislative agenda will depend largely on the ability of its representatives to horse trade and logroll. To the extent that representatives from minority-dominated districts can form winning coalitions within the legislature, they can further the group's interests; to the extent that they are shut out of majority coalitions, they cannot. Put another way, the same sort of "swing" dynamic so critical to understanding a group's ability to elect its candidates plays a major role in its ability to see its legislative preferences satisfied.

15. *Allen v. State Board of Elections*, 393 U.S. 544, 586 (1969) (Harlan, J., concurring in part and dissenting in part).

16. This notion is somewhat akin to the notion of influence over the political process as a whole embraced in *Davis v. Bandemer*, 478 U.S. 109 (1986), where even Democrats in an overwhelmingly Republican district were seen as enjoying influence despite the fact that they never voted for the winning candidate. See Karlan and Levinson, 84 Cal. L. Rev. at 1209 (cited in note 7).

17. The minority group presumably will have more influence over officials when it makes up their entire electoral base than over officials who have to juggle responding to the group's interests with responding to the interests of other essential constituencies.

A. *The Bleaching Critique and Direct Representation*

The bleaching critics offer a set of essentially categorical answers to questions about the aggregation/governance tradeoff. Their central claim is that creating majority-black districts comes at (too high) a price. Such districts concededly increase the likelihood that black voters will be able to elect the candidates of their choice. This is particularly true if those candidates are black, as they tend to be, since virtually no black representatives from the South are elected except from majority-black districts.¹⁸ Thus, to the extent that voting power is measured simply in terms of controlling the outcome of particular elections, these districts benefit black voters: in majority-black districts, black voters can elect the candidates they prefer regardless of the white community's preferences.

But to the extent that voting power is measured in terms of the ability to enact favorable legislation, these critics think blacks are worse off. Their representatives find themselves isolated within a majority-white legislature whose white representatives now have little incentive to respond to blacks' needs, since their districts are

18. See Lisa Handley and Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* at 335, 337, 343 (Princeton U., 1994) (observing that all of the black House members from the South were elected from majority-black districts and fewer than 2% of black state legislators in the South were elected from majority-white jurisdictions). See also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1112-13 & nn. 165-68 (1991) (collecting cases, surveys, and scholarly studies that show a widespread refusal of white voters to vote for black candidates).

In the 1996 congressional elections, five incumbent black Representatives who had originally won election from majority-black districts retained their seats despite having had their districts reconfigured in the wake of wrongful districting challenges. Kevin Sack, *Victory of 5 Redistricted Blacks Recasts Gerrymandering Dispute*, N.Y. Times 1 (Nov. 23, 1996). While these victories are clearly a cause for optimism, since they suggest that incumbent black politicians can appeal to at least some white voters, they hardly suggest that racial bloc voting has ended. See *id.* (noting that only 31% of white voters in the reconfigured Georgia Eleventh District voted for black incumbent Cynthia McKinney and only 36% of white voters in the reconfigured Georgia Second District voted for black incumbent Sanford Bishop). Moreover, in two of the districts, black voters still represented a plurality of the electorate. See *id.* (describing Texas's new Eighteenth District as 44% black and 21% Hispanic; its Thirtieth District as 42% black and 16% Hispanic). And the haste with which the plans were redrawn may even have increased the normal advantage incumbents enjoy. See also Charles S. Bullock, *Incumbency, Not Race, Wins in the South*, Newsday A41 (Nov. 13, 1996) (raising the question whether black candidates would be able to compete successfully for open seats). As the Fifth Circuit once remarked in responding to the claim that a school district that had been desegregated for only one semester had achieved unitary status, "[o]ne swallow does not make a spring." *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400, 1401 (5th Cir. 1971).

safely white. Blacks have sacrificed influence over a broad array of legislators for control over only a few, and those few are too few to command legislative power. Put in somewhat more formal terms, the critique assumes that although "citizens choose among candidates that then constitute assemblies rather than choose among the [potential] assemblies directly . . . the voter's preferences over assemblies, not candidates, are fundamental."¹⁹

Abigail Thernstrom's work epitomizes the standard version of the bleaching critique.²⁰ Thernstrom begins from the premise that non-racial political cleavages eclipse racial cleavages within southern politics. Thus, black voters occupy a potentially pivotal position within the electorate: "[W]hite solidarity in the face of black enfranchisement is seldom permanent; blacks become a powerful swing vote when white candidates begin to compete."²¹ Race-conscious districting, however, deprives blacks of their role as swing voters, and frees politicians in the majority of districts, which are now overwhelmingly white, of the pressure to respond to blacks' concerns:

Amending section 2 [of the Voting Rights Act] . . . was neither in the public interest nor in the more narrowly defined interest of minorities. [Professor Donald] Horowitz contended that "assured minority representation encourages local white politicians to say to the minority communities: You have your own representatives. Don't come to us with your problems; speak to them." And, "at best, under such circumstances, it can be said that separate representation postpones interethnic and interracial political contact and bargaining until after the election results are in, when polarization may already have occurred and when a minority on a local council may be powerless." In the end,

19. Jean-Pierre Benoit and Lewis Kornhauser, *Voting Simply in the Election of Assemblies* 27 (1991) (Starr Center for Applied Economics Working Paper No. 91-32) (on file with the Author).

20. Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (Harvard U., 1987). An updated and abridged version of her critique appears in Abigail Thernstrom, *More Notes from a Political Thicket*, 44 *Emory L. J.* 911 (1995). In this piece, I address solely Thernstrom's articulation of the bleaching hypothesis. For my response to other parts of her argument, see Pamela S. Karlan and Peyton McCrary, Book Review, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 *J. L. & Pol.* 751 (1988).

21. Thernstrom, *Whose Votes Count?* at 23 (cited in note 20). See *Holder v. Hall*, 114 S. Ct. 2581, 2596, 129 L. Ed. 2d 687 (1994) (Thomas, J., concurring in judgment) ("[E]specially in a two-party system such as ours, the influence of a potential 'swing group' of voters composing 10%-20% of the electorate in a given district can be considerable."); *Rural West Tennessee African-American Affairs Council v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn. 1995) (three-judge court) (holding, as a matter of law, that blacks are an influential swing vote when they constitute between 25% and 55% of the voting age population) summarily aff'd, 116 S. Ct. 42 (1995).

minority influence may thus be reduced. The amendment was "very good . . . for prospective black officeholders but not for their constituents."²²

Thernstrom claims not simply that blacks will elect more representatives if they are "plac[ed] . . . in largely white constituencies"²³—in the sense that more incumbents will owe their victory to black support—but that blacks will enjoy more overall influence on the legislative process.²⁴ Although the ranks of the bleaching critique are largely filled by neoliberals and neoconservatives, even some unabashedly liberal intellectuals have articulated a similar concern.²⁵

22. Thernstrom, *Whose Votes Count?* at 124-25 (cited in note 20) (citations omitted). Thernstrom continues:

Where the line is drawn between the excessive concentration and the undue dispersal of minority voters within and between districts ultimately depends on the weight given to minority officeholding. To the civil rights groups in New York [who were arguing that the state legislative redistricting plan should include more districts with effective non-white voting majorities], the risk of "wasting" minority votes by creating districts with a 65 or 75 percent minority concentration appeared more acceptable than losing seats. The city began with a different premise—that the number of black officeholders could rise, and yet real black power decrease. From this perspective, black interests are served to the degree that black or white elected officials who are responsive to the black community hold office. To assume that concentrating the black and Hispanic population necessarily benefits those voters, an attorney for the city suggested, "fails to recognize that minority access to the political process can also be enhanced by placing minority voters in largely white constituencies. That way, the minorities will have a political foothold in more than one district. Otherwise, the pure white districts are free to ignore the interests of minorities with impunity."

Id. at 187-88.

23. Id. at 188 (quoting, with evident approval, a memorandum by Edward Costikyan arguing in favor of a New York City councilmanic redistricting plan).

24. In her concurrence in *Thornburg v. Gingles*, 478 U.S. 30 (1986), Justice O'Connor offered a similar perspective. She rejected the idea that "the voting strength of a racial group [should] be assessed solely with reference to its prospects for electoral success." Id. at 87-88. Instead, courts should "bear in mind that 'the power to influence the political process is not limited to winning elections.'" Id. at 99 (quoting *Davis*, 478 U.S. at 132). That Justice O'Connor nonetheless agreed with Justice Brennan as to the proper result in each of the challenged districts relieved her of the need to explain the precise contours of her theory. And as she later recognized in her unanimous opinion for the Court in *Voinovich v. Quilter*, 507 U.S. 146 (1993), the question could not be answered in the abstract in any event:

[T]he creation of majority-minority districts does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. . . . Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.

Id. at 154-55. In the period between *Gingles* and *Shaw*, however, the ability to elect directly served as the dominant measure of voting strength.

25. See, for example, Hendrik Hertzberg and Henry Louis Gatos, Jr., *The African-American Century*, *New Yorker* 9-10 (Apr. 29 & May 6, 1996) ("In the House of Representatives . . . black progress has come at the price of racial gerrymandering. It's a high

There is an unexamined tension at the core of this argument. At one level, for bleaching to be a realistic possibility, Thernstrom and her allies must accept that the black community has a set of distinctive electoral preferences that most white voters do not share.²⁶ If black and white voters had identical preferences, no one would have an incentive to engage in race-conscious districting, since the same candidates would win, and the same laws would be enacted, regardless of the racial composition of the electorate. Thus, the candidates whom black voters would elect if they controlled the political process outright differ from the candidates white voters would choose if they alone were in charge. As a doctrinal matter, proof that black and white voters prefer different candidates is a necessary precondition to any *requirement* that majority-black districts be drawn.²⁷ At another level, however, proponents of the bleaching hypothesis maintain that politics is not so racially riven that the number of white voters driven away by a candidate's pursuit of black support exceeds the number of black voters she can attract. This places them in an ambiguous relationship to the central concept of vote dilution law: racial bloc voting.²⁸ They must both assume and downplay its existence.

A similar tension underlies the bleaching critics' account of behavior within the legislature. Their central assumption is that black voters would be better off having *some* influence over a broad range of legislators rather than *intense* influence over a few. Both experience and public-choice theory suggest, however, that insular, well-organized constituencies often enjoy disproportionate influence relative to diffuse groups. Moreover, the fact that groups that have influence within the reapportionment process usually choose to draw

price: it drains (liberal) black voting strength from neighboring districts, often tipping them over into the control of politicians indifferent to black interests. . . ."); Sean Wilentz, *The Last Integrationist*, *New Republic* 19 (July 1, 1996) (stating that Representative John Lewis also worries that majority-black districts may segregate black voters).

26. For a summary of evidence supporting the existence of divergent black and white policy preferences, see Pildes, 108 *Harv L. Rev.* at 1378 n.84 (cited in note 8).

27. See *Gingles*, 478 U.S. at 48-50 (requiring minority voters to "prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates").

28. Racial bloc voting (or racially polarized voting) refers to situations in which members of different racial groups prefer different candidates. There is an ongoing debate in the case law and in the courts over whether racial bloc voting refers simply to a correlation between race and a voter's preference—that is, that white and black voters support different candidates for whatever reason—or instead requires some proof of causation—that is, that white and black voters prefer different candidates for reasons connected to race. For a discussion of this issue, see Karlan and Levinson, 84 *Cal. L. Rev.* at 1220-25 (cited in note 7). See generally Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 *Mich. L. Rev.* 1833 (1992) (describing the centrality of racial bloc voting to modern voting rights law).

districts in which they predominate, rather than spreading themselves across a greater number of districts, cautions against blind acceptance of the critics' assumption.

Thus, the burden on the bleaching critic is to explain why blacks, as opposed to other groups with discrete policy preferences, should reject the strategy of interest-group logrolling within the legislature in favor of diffuse influence within the polity. The critics need to explain why representatives from white districts will be distinctively reluctant to trade with black representatives. Otherwise, representatives from black communities would presumably be able to build winning coalitions the same way representatives from other groups can. A fair amount of governmental largesse is garnered by groups—for example, workers associated with particular industries—who start out with far fewer congressmen in their camp than belong to the Congressional Black Caucus.

Two explanations for white representatives' reluctance to trade leap to mind. Perhaps they are so personally bigoted that they refuse to bargain with black representatives even when it is in their constituents' interest. That seems unlikely, certainly as a systematic explanation. A more plausible assumption is that white representatives believe that the voters in their districts will penalize them for voting in favor of black interests, in contrast, for example, to the fact that voters in an overwhelmingly urban district will not retaliate against their representative when she votes in favor of subsidies for rural disaster relief in a faraway state. White "backlash" could have several causes: white voters might have a mean-spirited taste for frustrating black aspirations; they might rightly conclude that satisfying some particular demand of the black community is a zero-sum game; or they might simply misunderstand the consequences of particular policies. Whatever the cause of this white backlash, its effect on a white representative is similar: the cost to her (in terms of her own career prospects) of offering to trade votes with black representatives is higher than the cost of joining coalitions with representatives who do not ask her to back an identifiably black agenda as the price of their support. Thus, although at the electoral level, proponents of bleaching embrace a strong presumption in favor of seeing blacks as a swing vote, they have to assume that blacks are

precluded from being swing votes within the legislature. For reasons I have explored elsewhere, this assumption seems implausible.²⁹

B. Bleaching and Virtual Representation

The most recent expression of bleaching theory arose in the wake of the 1994 elections. It offers an important refinement relating to partisan politics.³⁰ For the first time in forty years, the Democratic Party lost control over the House. The party lost the Senate and a slew of governorships and state legislatures as well. In a "who lost China?" mood, commentators fastened on the Voting Rights Act as a prime culprit. They argued that by overconcentrating black voters in a few, "safe," majority-black districts, the post-1990 reapportionment left white Democratic incumbents vulnerable.³¹ The estimates of the number of seats lost due to this reapportionment vary from a handful to roughly twenty.³² Many of the observers claim that race-conscious

29. Representatives from the black community may enjoy a fair degree of influence within the legislature because of their abilities to logroll and to enforce previously agreed-upon deals. Representatives are more likely than their constituents to enjoy these abilities because voting within legislatures is neither anonymous nor "bundled." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 216-19 (1989).

30. The absence of attention to partisan consequences in the early bleaching critiques is explicable perhaps as a function of their concentration on the effects of moving from at-large to ward-based elections for local and county governments. That certainly was the context for most of the arguments raised at the time of the 1982 amendments. First, most of those elections were nonpartisan. See 1982 *Municipal Year Book* 181 (International City Management Association) (finding that 70.2% of municipal elections are nonpartisan). Second, even when the elections were not formally nonpartisan, in most of the relevant jurisdictions the Democratic Party was so dominant at the local level that no election system was likely to produce distinctive partisan effects.

31. See, for example, Mark F. Bernstein, *Racial Gerrymandering*, Pub. Int. 59 (Winter 1996); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans?: An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. Pol. 384 (1995); David Ian Lublin, *Racial Redistricting and the New Republican Majority: A Critique of the NAACP Legal Defense Fund Report on the 1994 Congressional Elections* (1995) (unpublished manuscript) (on file with the Author); John J. Miller, *Race to Defeat: How the Black Caucus Elected Newt Gingrich Speaker*, Reason 23 (Feb. 1995); Carol M. Swain, *Limiting Racial Gerrymandering: The Future of Black Representation*, Current 3 (Jan. 1996).

Petrocik and Desposato offer a more complex account. They argue that the creation of majority-black districts in itself had only a marginal direct effect. John R. Petrocik and Scott W. Desposato, *The Partisan Consequences of Majority-Minority Redistricting in the South, 1992 and 1994* at 14-15 (Feb. 1996). Rather, the second-order effects that came from reshuffling majority-white Democratic districts in order to comply with one-person, one-vote once black voters had been relocated to newly created districts deprived many Democratic representatives of the traditional incumbency bonus. This, combined with an anti-Democratic tide, led to incumbents' defeats. See *id.* at 16-24. As I shall discuss below, Petrocik and Desposato's focus on the disappearance of white Democrats is a key element of the overall picture.

32. See, for example, Charles Bullock, *Affirmative Action Districts: In Whose Faces Will They Blow Up?*, Campaigns & Elections 22 (Apr. 1995) (noting that the GOP gained sixteen

districting was a major cause of the Republican takeover.³³ Moreover, the commentators say that not only has this been bad for white Democrats, but that it has been bad for black voters as well, since the incoming white Republican legislators are far less friendly to black interests.³⁴ While some proponents of this theory see the situation as an unintended consequence of the pressure for majority-black districts, others have taken a more conspiratorial tack, viewing the electoral results as the product of an alliance between Republicans and blacks.³⁵

southern seats in 1994 in addition to a net pick-up of nine seats in 1992 and that "[a]mong the causes is affirmative action gerrymandering"); Hill, 57 J. Pol. at 391 (cited in note 31) (estimating that four of seven southern seats that changed hands in 1992 were attributable to the creation of majority-black districts, and predicting a far greater loss in 1994); Lublin, *Racial Redistricting* at 26 table 1 (cited in note 31) (identifying seven districts lost in 1992 as a result of racial redistricting and six additional districts lost in 1994); Miller, Reason at 23 (cited in note 31) (quoting David Bositis, a senior researcher at the Joint Center for Political and Economic Studies, asserting that "[o]ver the last two elections, the Democrats have lost as many as 15 seats because of majority black redistricting"); Jeffrey Rosen, *Southern Comfort*, New Republic 4 (Jan. 8 & 15, 1996) ("Carol Swain of Princeton University conservatively estimates that the creation of fifteen black and eleven Hispanic districts after the 1990 Census cost the Democrats a total of seventeen seats in the last two elections.").

At the other end of the spectrum, a report prepared by the NAACP Legal Defense and Educational Fund claims the Democrats would have lost even *more* House seats without the creation of additional minority-dominated districts. See NAACP Legal Defense & Educational Fund, *The Effect of Section 2 of the Voting Rights Act on the 1994 Congressional Elections 2* (Nov. 30, 1994).

33. See, for example, Lublin, *Racial Redistricting* at 19-20 (cited in note 31); Miller, Reason at 23 (cited in note 31); Swain, Current at 4 (cited in note 31).

34. As Bernstein notes:

Black participation in Congress may be at an all-time high, but are black interests better represented this year under Republican control than they were last year? Loss of the House cost the Congressional Black Caucus three full committee and 17 subcommittee chairmanships. As David A. Bositis of the Joint Center for Political and Economic Studies notes, blacks feel the loss of House control more severely than do whites because black political fortunes are inseparable from those of the Democratic party. True, the Black Caucus does now exercise proportionately more influence within the Democratic caucus, but gaining a larger share of a shrinking pie is not a formula for success.

Bernstein, Pub. Int. at 59 (cited in note 31). See also Swain, Current at 4 (cited in note 31) ("African Americans lost substantive representation in 1994: The new Republican Congress represents their interests less than the previous Democratic one even though the new Congress has more black members.").

35. For representative descriptions of the "unholy alliance" theory, see, for example, Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* 269-71 (W.W. Norton & Co., 1991); Kimball Brace, Bernard Grofman, and Lisa Handley, *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. Pol. 169, 182 n.15 (1987); Michael Oreskes, *Political Memo: Seeking Seats, Republicans Find Ally in Rights Act*, N.Y. Times A11 (Aug. 20, 1990); A. Lee Parks, *Georgia's Unholy Alliance*, N.Y. Times A21 (Aug. 25, 1995); Jim Sleeper, *The Newest Hurdle for Minorities; Racial Gerrymandering Will Hurt, Not Help, Blacks and Hispanics*, Newsday 55 (Aug. 28, 1992); Rosen, New Republic at 4 (cited in note 32); Swain, Current at 5 (cited in note 31); Paul Taylor, *GOP Will Aid Civil Rights Groups in Redistricting; Party Sees Additional*

I don't want to get bogged down in the methodologies and validity of the various studies, each of which, as far as I can tell, is almost entirely a prisoner of its assumptions. Rather, I want to highlight two features of the political landscape that generally have either been missed or dismissed.

The first is that the Democratic share of the white vote in the South has been dropping for the past thirty years.³⁶ The decline first appeared in national elections—the 1964 Johnson/Goldwater race was the watershed here—but by the 1990s it had reached congressional and statewide contests as well. A majority of the U.S. Senators from the South are Republican (thirteen of twenty-two), as are a majority of the governors (six of eleven). The Republican Party won five of six southern senatorial seats up for election in 1994, as well as four of seven southern gubernatorial races.³⁷ Neither senatorial nor gubernatorial elections are subject to redistricting. Thus, something beyond districting is clearly at work in producing Republican gains.³⁸

For a time, the strength of the southern turn toward the Republican Party was masked by several factors. Democrats already occupying elective office enjoyed an incumbency bonus.³⁹ Some voters continued to vote for their current Democratic representative even after they had otherwise abandoned the Democratic Party. But when that representative retired or, as a result of redistricting, was relo-

Minority Legislative Seats Boosting Republican Fortunes Elsewhere, Wash. Post A6 (Apr. 1, 1990). For a critical rejoinder to the argument, see Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 Miss. L. J. 271, 291-94 (1995) ("Republican efforts were no more sinister, nor less constitutionally protected, than similar efforts by Democrats . . . to advance their partisan interests.").

36. For a comprehensive study of party realignment, see Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* (Princeton U., 1989). In House elections from 1980 to 1994, on average 87% of black voters, but only 49% of white voters, voted Democratic. And this racial gap has increased over time. From 1990 to 1994, the Democratic Party's share of the southern white vote decreased from 50% to 35%, while its share of the southern black vote increased from 80% to 91%. See *Portrait of the Electorate: Who Voted for Whom in the House*, N.Y. Times 24 (Nov. 13, 1994).

37. See Appendix I. "Southern" states refers to Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

38. See McDonald, 65 Miss. L. J. at 295 (cited in note 35) (stating that "since the Senate is elected statewide rather than from districts, congressional redistricting could not have logically been the cause of the Democratic losses"). Leaving the South for a moment, it is worth noting that in 1994, the Democrats lost seven non-southern governorships, six non-southern senatorial seats, and control over six non-southern state senates and seven non-southern state houses. See Election Data Services, 1994 Election Results Map (1994). Moreover, of the fifty-four U.S. House seats the Democrats lost in 1994, twenty-four were in states without majority-black districts. See NAACP Legal Defense & Educational Fund, *Effect of Section 2* at 5 (cited in note 32).

39. One estimate is that incumbency is currently worth 8.4 percentage points for a Democrat. Lublin, *Racial Redistricting* at 5 (cited in note 31).

cated to a different district,⁴⁰ the voters' Republican colors emerged. In addition, as black voters surged into the voting booth, their increasing numbers compensated for decreasing white support. Finally, because Democrats controlled the post-1990 redistricting process,⁴¹ they were able to spread their remaining votes very efficiently through partisan gerrymandering. But there is an inherent tradeoff between efficiency and risk in such gerrymandering: the closer the party in power shaves its margin of victory, the more seats it can acquire, but the more likely it becomes that a small shift in the electorate will produce a huge swing in seats.⁴² The 1990 Democratic gerrymanders were, with respect to white Democratic incumbents, tremendously efficient, *given the existing partisan distribution of white votes*. But "[t]he slow bleeding of whites from the Democratic party reached hemorrhage proportions in 1994" when sixty-five percent of white southern voters supported Republican candidates.⁴³ Thus, seats that would have remained Democratic if Democratic allegiance and turnout had remained at their 1990 levels turned Republican because some Democratic voters switched parties and others simply stayed home.⁴⁴ Perhaps a more prudent Democratic Party would have sacrificed a few of its seats following 1990 in order to shore up its margins in the remainder, but that would have required throwing some incumbent Democratic representatives overboard. Unlike shipwrecked mariners of previous centuries who apparently always ate the cabin boy, however, incumbents have yet to develop a convention for deciding whose district to carve up. Even so, Democrats retained some of their partisan advantage: in seven of the eleven Deep South states the vote/seat ratio was still in their favor.⁴⁵

40. This is the core of Petrocik and Desposato's thesis. See Petrocik and Desposato, *Partisan Consequences* at 16-20 (cited in note 31).

41. See Appendix 1. See also Pildes, 108 Harv. L. Rev. at 1389-90 (cited in note 8) (discussing partisan aspects of the 1990s reapportionment process).

42. This would be true even if an anti-incumbent shift occurs in *every* district, since a key gerrymandering technique is to "pack" one's opponents into a few districts in which one concedes victory.

43. McDonald, 65 Miss. L. J. at 298 (cited in note 35).

44. This latter factor is worth emphasizing. Nationwide, "only 17 of the 56 Republicans who won seats [in 1994] formerly held by Democrats had higher vote totals than *losing* Republicans had won in those districts in 1992." Center for Voting and Democracy, *Dubious Democracy: 1994 Elections: U.S. House of Representatives 2* (1995). In the eleven southern states, eight of the fourteen Republicans who captured previously Democratic seats actually received fewer votes than losing Republicans had received two years before. See *id.*

45. Even in Georgia and North Carolina, the two states which proponents of bleaching most often cite, had the Democrats won five seats instead of four, their share of the seats would be proportional to their share of the votes. See Appendix 1.

The results of the 1996 House elections in three key states demonstrate this general point. The Supreme Court had struck down four majority-black congressional districts in North Carolina, Texas, and Georgia on the grounds that race had played an unjustifiably pivotal role in their creation.⁴⁶ District courts in the latter two states ordered new apportionment plans into effect for the 1996 elections. In Georgia, the plan dramatically reduced the percentage of black voters within the districts represented by black incumbents.⁴⁷ Yet the spreading of black voters over many more districts apparently had *no* effect on the outcome.⁴⁸ Every Georgia district reelected the incumbent Representative;⁴⁹ all three Democratic Representatives are black, while all eight whites are Republican. By contrast, the Democrats picked up a seat in North Carolina and managed to retain an open seat.⁵⁰ Perhaps the 1996 elections do offer one auspicious signal: black *incumbents* can attract enough white support to retain their seats, presumably in part because their legislative track records and constituent services win over some skeptical white voters. In this sense, the affirmative-action dimension of race-conscious districting worked wonderfully: it enabled black candidates for the "job" of Representative who otherwise would never have been selected to

46. *Shaw v. Hunt*, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) (North Carolina); *Bush v. Vera*, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (Texas); *Miller v. Johnson*, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (Georgia). For extensive discussions of the contours of these "wrongful districting" cases, see, for example, T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588 (1993); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 S. Ct. Rev. 245; Karlan, 26 Cumb. L. Rev. at 287 (cited in note 7); Richard H. Pildes and Richard T. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

47. See *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995) (completely revamping Georgia's congressional apportionment in light of its earlier holding that Georgia House District 2, as well as District 11—the subject of the earlier *Miller* litigation—involved an unconstitutional use of race), prob. juris. noted as *Abrams v. Johnson*, 116 S. Ct. 1823 (May 20, 1996) (Nos. 95-1425 and 95-1460). *Miller* reduced the black voting-age populations in the two Georgia districts drastically, from 52% and 60%, respectively, to 35% and 33%. *Miller*, 922 F. Supp. at 1571-72; Sack, N.Y. Times at 1 (cited in note 18). See also *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) (redrawing, among others, Texas House Districts 18 and 30). *Vera* reduced the black voting-age populations in the two Texas districts from 49% and 47%, respectively, to 44% and 42%. Nonetheless, these districts were still plurality black, and majority nonwhite, due to substantial concentrations of Hispanic voters. Sack, N.Y. Times at 1 (cited in note 18). In North Carolina, the district court declined to order a new plan for the 1996 elections, so those elections took place under the pre-existing plan declared unconstitutional in *Shaw v. Hunt*. See *In re Shaw*, 65 U.S.L.W. 3162 (Aug. 27, 1996) (summarizing the litigation on remand from the Supreme Court).

48. Under the court's plan, blacks constituted more than a quarter of the population in five of the ten newly majority-white districts. *Miller*, 922 F. Supp. at 1571-72.

49. *The 105th Congress of the United States*, Boston Globe A24 (Nov. 10, 1996).

50. *The 1996 Elections: The States; South*, N.Y. Times B9 (Nov. 7, 1996).

demonstrate their qualifications and overcome white stereotypes that viewed them as unqualified.

A second critical feature of the political landscape involves the mechanism by which black southerners in majority-white districts have their policy preferences actually "represented." Leaving aside direct constituent services—which I do not mean to slight, but which are largely performed, at least today, without regard for the race of the constituent⁵¹—the major benefit southern blacks receive from being in white Democratic, as opposed to white Republican, districts often comes from a sort of *virtual*, rather than direct, representation. One especially powerful reason for southern black voters to support the Democratic candidate is not really because he personally will be a staunch advocate for their policy preferences,⁵² but because when

51. When observers remark on how Strom Thurmond has become responsive to his black constituents, see, for example, Thernstrom, *Whose Votes Count?* at 109 (cited in note 20), this has to be the level to which they are referring. Senator Thurmond is well noted in Washington for having one of the most diligent senatorial staffs with respect to constituent services. That these services are divorced from substantive policy positions seems clear, since no one contends that Senator Thurmond supports the Democratic legislative agenda that every congressman elected from a majority-black district supports.

52. The most powerful illustration of this point was made by Morgan Kousser. He graphed the *Congressional Quarterly* Conservative Coalition scores of North Carolina's representatives for the period from 1970 to 1993. Until 1992, there was no systematic difference between the votes of the two congressmen from the most heavily black districts—districts that were nonetheless majority white—and the votes of the representatives from districts with substantially lower black populations. A few times, the two representatives from the "blackest" districts were more conservative than even the Republicans. By contrast, there was an immense gap between the two representatives' voting behavior and the voting behavior of black southern Democratic representatives. The North Carolinians' scores were, with one exception, always above sixty; the black Democrats' scores were always at or below twenty.

After 1992, the CQ scores for the two representatives serving the two most heavily black districts in North Carolina dropped from roughly sixty to roughly ten, putting them essentially in line with representatives from predominantly-black districts. The difference? The post-1990 reapportionment created two majority-black districts which elected black representatives. See Conference, *The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 Am. U. L. Rev. 1, 60-62 (1994) (comments of Morgan Kousser). See also A. Leon Higginbotham, Jr., Gregory A. Clarick, and Marcella David, *Shaw v. Reno: A Mirage of Good Intentions With Devastating Racial Consequences*, 62 Fordham L. Rev. 1593, 1653-57 (1994) (reprinting tables showing the voting records of white and black southern Democratic representatives in the 103d Congress, 1st Session, that show huge disparities between the two groups).

Appendix 2 to this Article replicates Kousser's research with regard to southern Democratic representatives more generally. It contains a scattergram plotting the Conservative Coalition scores for all southern Democratic representatives against the percentage of each district's voting-age population that is nonwhite. The data reveal that increasing the black percentage of a white Democratic representative's district had virtually no effect on his voting behavior and that there was a dramatic difference between the voting behavior of representatives elected by majority-nonwhite constituencies and those elected from majority-white districts.

there is a partisan divide the Democrat will align with the party most sympathetic to black interests. When committee chairs and assignments are doled out, or when a bill important to the party leadership comes to a vote, he will support the Democratic position, and the *national* Democratic Party is far closer to black voters' views than their "local" white representatives are.⁵³ When it comes to policy, rather than territorially allocated pork, the "real" representatives of black southerners who live in majority-white districts are Democrats from districts where a majority of the electorate supports those policies—usually districts that are themselves majority black or are northern and liberal.⁵⁴ The reason to vote for a southern white Democrat is to empower that coalition of virtual representatives.

Consider black voters in Alabama. It was rational for them to support Richard Shelby's campaigns for the Senate in 1986 and 1992, not simply because he was the lesser of two evils—two respected commentators have described his as "possibly the most conservative record of any Democratic Senator" and this conservatism extended to

The central point here is that even if voting for the Democrat makes sense because he is the lesser of the two politically viable evils with respect to his votes on particular policy issues, black votes are really being cast defensively, rather than affirmatively.

53. Logrolling theory also helps to answer one criticism of race-conscious districting: that it produces representatives who are outside the political mainstream of their own districts. See, for example, Jim Wooten, Editorial, *Racial Electoral Districts Create Division*, Atlanta Constitution G7 (Apr. 23, 1994) (claiming that Representatives Cynthia McKinney and John Lewis, each of whom was elected from a majority-black congressional district, "are decidedly more liberal than most Georgians, black or white" and that their districts lack "[t]he moderating influences genuine diversity offers"). Some of the liberal positions black representatives take may be the product of their vote trading with liberal representatives to obtain their support for items of more importance to the black community. For example, a black representative from a culturally conservative, religious community, might support funding for the National Endowment for the Arts in return for receiving support from a culturally liberal congressman on nutritional subsidies for poor rural school children. If the black representative's constituents care more about the nutrition legislation than the arts funding, and the vote trading is integral to passage of the nutrition bill, then the representative has in fact faithfully represented his constituents' views *over the legislative agenda as a whole* even if he appears more liberal than his constituents with respect to his vote on each issue taken separately.

54. For an historical example of this phenomenon, see Lani Guinier, *The Tyranny of the Majority* 37 (Free Press, 1994) (noting that some blacks living in North Carolina during the 1940s, 1950s, and 1960s viewed Harlem congressman Adam Clayton Powell, rather than the congressman from their district, as "their" representative).

For black southerners who live in Republican districts, substantive representation turns out to have little to do with their relative presence in the electorate. "[A]cross all geographic regions, the voting behavior of House Republicans turns out to be wholly unaffected by variations in Black constituency size." Pildes, 108 Harv. L. Rev. at 1385 & n.116 (cited in note 8). Furthermore, nearly three quarters of the black voters who were relocated into majority-black districts in the South as part of the 1990 round of redistricting "were moved out of Republican districts in which their presence appears to have had no effect on the voting patterns of their representative." *Id.*

racially salient issues⁵⁵—but because his vote on structural issues of party control was instrumental in placing moderate and liberal Democrats such as Edward Kennedy, Howard Metzenbaum, and Daniel Patrick Moynihan in charge of key committees and subcommittees where those more sympathetic senators would exert strong influence over the legislative agenda. Just because black support was absolutely essential to his 1986 victory⁵⁶ does not mean blacks had much “influence” over Shelby. To take the most glaring example, their once indispensable support didn’t prevent him from switching parties in 1995. As a Republican, his legislative value to his black constituents has essentially disappeared, even though his voting record on most legislation, as opposed to issues of party loyalty, has stayed relatively stable. As for the “swing” vote element of the bleaching theory, blacks went from being an essential piece of a winning coalition in 1986 to being entirely written off by 1995 even as their overall share of the Alabama electorate had in fact increased.

The recent decision in *Rural West Tennessee African-American Affairs Council v. McWherter (Rural West II)*⁵⁷ shows, albeit somewhat unintentionally, how virtual, party-based representation is the key to any realistic account of how bleaching works. *Rural West I*⁵⁸ and *Rural West II* involved a section 2 challenge to Tennessee’s 1992 state senatorial reapportionment. Initially, the district court held that the plan violated section 2. Tennessee’s voting-age population was 14.4% black. The challenged plan, however, contained only three majority-black districts out of thirty-three (9.1%).⁵⁹ The plaintiffs showed how two additional majority-black districts could be drawn: Shelby County (Memphis) could be reconfigured to contain three 60% black districts rather than the two overwhelmingly black ones created by the existing plan. Another, 55% black district could be constructed by linking black communities in six rural west Tennessee counties that were split among several majority-white districts.

55. Michael Barone and Grant Ujifusa, *The Almanac of American Politics, 1994* at 6 (National Journal, 1993). As a member of the House, Shelby had voted against extending the Voting Rights Act and against the Martin Luther King holiday.

56. *Id.* at 10 (showing that Shelby received only 50% of the total votes cast; since black voters voted overwhelmingly Democratic and constitute roughly 25% of the electorate, their votes were clearly pivotal).

57. 877 F. Supp. 1096 (W.D. Tenn. 1995) (three-judge court), summarily aff’d, 116 S. Ct. 42 (1995).

58. *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 453 (W.D. Tenn. 1993) (*Rural West I*) (three-judge court).

59. *Rural West II*, 877 F. Supp. at 1099.

In *Rural West I*, the district court rejected the state's claim that while the creation of these additional majority-black districts would increase the number of districts blacks controlled outright, such a change would reduce the overall clout of black voters in the State Senate. It described that argument as inconsistent with section 2's focus on "visible black representation over other forms of political influence."⁶⁰ The court ordered the state to adopt a plan with at least one more majority-black district.⁶¹ But when given a second opportunity, after the Supreme Court's decision in *Johnson v. De Grandy*,⁶² the court took a very different approach.

This time, the district court found that black voters had achieved the kind of proportionate power that foreclosed a section 2 claim. In addition to the three districts which blacks controlled outright, the court held that the black community enjoyed legally significant "influence" in any district where it formed more than 25% of the voting-age population.⁶³ Under the court's definition, the challenged plan contained three influence districts that were between 30 and 33 percent black, in addition to the three majority-black districts.⁶⁴ "Together these six districts comprise 18.2% of all districts,"⁶⁵ the court observed, and therefore, under the totality of the circumstances, the plan satisfied section 2.

60. *Rural West I*, 836 F. Supp. at 466.

61. The court noted that "[f]our majority-black districts would be 12.1% of the Senate districts, slightly below the voting-age population of 14.4%; five of thirty-three districts would be 15.2%, slightly above the black voting-age population." *Id.* at 463. It therefore concluded that:

[O]ne more majority-black Senate district must be drawn in west Tennessee. A second majority black district would provide slightly more representation than the state's black voting age population require. It would create five black Senate districts in the state or more than 15% of the districts when the black voting age population is 14.4%. The issue of creating a fifth black Senate district should be left to the political judgment of the legislature. It is not required by federal law.

Id. at 467.

62. 512 U.S. 997 (1994).

63. *Rural West II*, 877 F. Supp. at 1101. The court explained:

We are confident that a minority population that votes as a bloc (as required by the second *Gingles* precondition) and comprises at least 25% of the voting-age population in an electoral district will have significant influence on candidates in virtually every election. A serious candidate for office cannot ignore 25% of the population that tends to vote as a bloc.

Id. at 1105.

For discussions of the concept of "influence districts" more generally, see, for example, J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551 (1993); Stanley Pierre-Louis, Comment, *The Politics of Influence: Recognizing Influence Dilution Claims under § 2 of the Voting Rights Act*, 62 U. Chi. L. Rev. 1215 (1995).

64. *Rural West II*, 877 F. Supp. at 1106 n.8.

65. *Id.* at 1106.

The evidence for *Rural West II*'s new rule—that blacks enjoy legally significant political influence in any district where they form 25% of the voting-age population—was so thin as to be almost nonexistent. In addition to a kind of casual statistical analysis that looked solely at whether an abstract bloc of 25% of the electorate could be decisive in determining the winning candidate⁶⁶—which, for reasons I have already explained, is a very different thing from determining whether a racially defined minority bloc has influence—the court relied heavily on two witnesses, both of whom were white state senators who represented districts with substantial black populations. Its account of Stephen Cohen's testimony is an analytical gold mine. Senator Cohen, whose district was 33% black, acknowledged that without the support of black voters he would probably have lost the 1988 and 1992 elections.

The most probative aspect of Senator Cohen's testimony, however, concerned the role that senators elected from influence districts play in the political dynamics of the Senate. Specifically Senator Cohen persuasively testified that adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate. He cited as an example the legislative proposal to make the birthday of Martin Luther King a state holiday, a bill which passed the Senate by only one vote (17 to 16). Senator Cohen and another senator who represents a district with a substantial black population in west Tennessee both voted for the bill. Senator Cohen argued that by removing the black voters from the influence districts to create a new majority-minority district, at least one more conservative white senator would also be elected. This new conservative senator, elected from an overwhelmingly white district, would be uninfluenced by black voters and would have been inclined to vote against the Martin Luther King holiday, a measure strongly favored by black voters but opposed by many white voters in west Tennessee. As a consequence the measure would not have passed.⁶⁷

Leave aside the most obvious problem with this evidence: its self-serving motivation. Legislators always claim to represent all

66. If the *Rural West II* court's theory were correct, one would expect that representatives from districts whose voting-age populations were between 25% and 50% black would have voting records that more closely resemble those of representatives from majority-black districts than their counterparts from overwhelmingly white districts would have. But as Appendix 2 suggests, there is little discernable difference between the voting records of southern Democratic congressmen who represent influence districts and ones who represent predominantly-white districts. Of the ten most "liberal" white representatives (leaving out one white representative from a 65% nonwhite district), only two are from influence districts; the other eleven white representatives from so-called influence districts *all* have higher CQ conservative coalition scores than the *most* "conservative" representative from a majority-nonwhite district.

67. *Rural West II*, 877 F. Supp. at 1105-06.

their constituents, and legislators whose seats are in jeopardy are likely to be particularly fervent in their protestations. The brooding omnipresence of *Rural West II* is a fact that appears nowhere in the published opinion: the partisan composition of the Tennessee Senate. In February 1995, when *Rural West II* was announced, Democrats enjoyed a one-vote edge.⁶⁸ I suspect that the reason Speaker John Wilder, whose district was 21% black, "used his authority to ensure that black senators became chairmen of committees"⁶⁹ was because those senators were Democrats and he was too, not because he was responding directly to pressure from constituents. And votes on the Martin Luther King Day bill split largely along party lines as well. Unnoticed by the *Rural West II* court was a central fact about the passage of the Martin Luther King Day bill: a majority of the senators who voted in favor represented *neither* majority-black districts nor "influence" districts. The presence of a substantial black community within his district was by no means a necessary determinant of a senator's support, although it might well have been sufficient. Classical logrolling theory—not the concept of black "influence"—is fully adequate to explain the outcome. Black legislators' position as a necessary element of the Democratic majority coalition probably explains more of the affirmative votes than black voters' presence within individual districts. Ironically, within a year after *Rural West II* celebrated black influence within the Tennessee Senate, one of its central preconditions disappeared. In September 1995, two Democratic state senators defected to the Republican Party, and the Republicans gained control of the state senate by a 17-16 margin.⁷⁰

The fact that many white legislators with negligible numbers of black constituents voted in favor of the King holiday, while legislators representing only the white community in Shelby County would presumably have opposed it,⁷¹ offers an illustration of a broader phenomenon. A great deal of historical and contemporary evidence suggests the presence of an influence "tipping point": blacks are more likely to occupy a pivotal position when they are a relatively small share of the electorate, because white voters are then less likely to perceive them as a threat. As the possibility that blacks might be a

68. Ed Cromer, *GOP Focuses on Capturing General Assembly; Senate Gains Energize Party for Tough Work Ahead*, Nashville Banner B2 (Sept. 19, 1995). The margin represented a substantial erosion from 1992, when Democrats had enjoyed a twenty to thirteen lead.

69. *Rural West II*, 877 F. Supp. at 1105.

70. Cromer, Nashville Banner at B2 (cited in note 68).

71. See *Rural West II*, 877 F. Supp. at 1106 (recounting testimony that a "conservative senator, elected from an overwhelmingly white district, would be uninfluenced by black voters and would have been inclined to vote against" the holiday).

dominant component of a biracial coalition grows, white backlash increases as well.⁷² The backlash hypothesis suggests that the influence of black voters "is not a linear continuum along which responsiveness increases as the minority population percentage in a district increases."⁷³ Instead, it seems as if influence might almost be *curvilinear*: black influence grows as blacks increase to roughly 30% of the electorate; black voters face increasing resistance when they constitute between 30% and 50% of the electorate; and beyond 50%, the relationship between presence and influence is again positive because, in William Keech's sardonic observation, "a Negro voting majority can overcome a lot of white resistance."⁷⁴

III. WHO'S LEFT?: THE VOTING RIGHTS ACT AND THE EXODUS OF WHITE DEMOCRATS

Any description of the political consequences of the Voting Rights Act that looks solely at black voters will necessarily offer only a partial account. The discussion in the previous section suggested that the Democrats' declining electoral base is at least as much a product of white voters individually deserting the party as it is of black voters collectively being transferred to majority-nonwhite districts. The great unasked question is what role, if any, the Voting Rights Act has played in inducing white voters' defection.

72. See, for example, V.O. Key, Jr., *Southern Politics in State and Nation* (Alfred A. Knopf, 1949); Kousser, *The Shaping of Southern Politics* at 90-91 (cited in note 4); James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* at 351, 359-60, 370-71 (Princeton U., 1994); Blacksher, 39 Howard L. J. at 674 n.194 (cited in note *).

This phenomenon explains much of the anecdotal evidence that commentators like Thernstrom use to claim that white bloc voting is no longer an obstacle to black political aspirations. Rigorous statistical analysis suggests the persistence of white bloc voting in most southern jurisdictions with substantial black populations. See generally Handley and Grofman, *Impact of the Voting Rights Act on Minority Representation*, in Davidson and Grofman, eds., *Quiet Revolution* at 339 (cited in note 18). Many of the examples of successful black candidates in Thernstrom's recent *Emory Law Journal* piece involve jurisdictions—like Maine, which is less than 1% black, or Minneapolis, where blacks constitute 13% of the population, or black Republican Representative J.C. Watts's 83% white Oklahoma district—where white resistance to black candidates is likely to be dampened by the implausibility of fears of a black political takeover.

73. McDonald, 65 Miss. L. J. at 308 (cited in note 35).

74. Id. at 309 (quoting William R. Keech, *The Impact of Negro Voting: The Role of the Vote in the Quest for Equality* 101 (Rand McNally, 1968)). For a summary of recent studies that support this classical observation, see Pildes, 108 Harv. L. Rev. at 1382 n.102 (cited in note 8).

I think the Voting Rights Act is partially responsible for the collapse of the New Deal coalition that kept congressional Democrats in power. But the causal connection lies in the Act's central moral commitment to full black enfranchisement rather than in its adoption of the particular technique of race-conscious districting. It's a question of rights, not remedies. When southern blacks regained the vote as a result of the Voting Rights Act, they flocked to the Democratic Party. The party became identified with their political program, and this identification, along with their growing presence and influence within the party, prompted "white flight."⁷⁵ Put more starkly, recapturing the white southern element of the New Deal Democratic coalition might be far more costly than eliminating a handful of majority-black congressional districts; it might demand the party's visible repudiation of its black supporters. My personal belief is that such an abandonment would be immoral (as well as politically imprudent), but I don't mean to debate that question here. Rather, my more limited aim is simply to show that the stakes are higher than critics who focus on districting as the devil seem to understand.

The idea that embracing civil rights might repel white southerners is hardly new. As an historical matter, the solid Democratic South was itself built on opposition to black enfranchisement.⁷⁶ Without the disenfranchisement of a large portion of the potential opposition (blacks), Democrats could not have completely eliminated party competition across the region. Democrats consolidated their then-tenuous hold over southern politics by playing the race card. Charges that Republicans, Populists, and other opposition parties were in thrall to black votes played a significant role in attracting white insurgents back to the Democratic Party. When, for the first time, the Democratic Party adopted a pro-civil rights platform at its 1948 national convention, then-Democrat Strom Thurmond led a walkout of southern delegates, ran for President on the Dixiecrat ticket, and carried Alabama, Louisiana, Mississippi, and South Carolina.⁷⁷ After he signed the Civil Rights Act of 1964, President Lyndon Johnson remarked, "I think we just delivered the South to the Republican party for a long time to come."⁷⁸

75. In a recent conversation, Rick Pildes suggested an additional link in this chain: the emergence of identity politics that further alienated white members of the New Deal Democratic coalition. I think he may well be right, although I wonder to what extent *any* effective black politics is likely to be viewed in that light.

76. See, for example, Kousser, *The Shaping of Southern Politics* at 37 (cited in note 4) (arguing that Democrats played on southern racism to maintain their control).

77. Edsall and Edsall, *Chain Reaction* at 34 (cited in note 35).

78. Joseph Califano, *Tough Talk for Democrats*, N.Y. Times Mag. 28 (Jan. 8, 1989).

That deliverance was at least in part the product of sheer temporal coincidence. The coalition that passed the 1964 Act was truly bipartisan: congressional Republicans were *more* supportive than congressional Democrats, largely because virtually all the Republicans were from the North while many of the Democrats were from the still virtually solid South.⁷⁹ But just as the Act was making its way through the legislative process, “a conservative intraparty insurrection, drawing most heavily on the South for the core of its support” was “toppling . . . the pro-civil rights, eastern-establishment wing of the Republican party.”⁸⁰ Barry Goldwater campaigned vigorously on his opposition to the 1964 Act, and for the first time since Reconstruction, a Republican presidential nominee carried the Deepest South—Alabama, Georgia, Louisiana, Mississippi, and South Carolina.⁸¹ By contrast, Lyndon Johnson was firmly committed to, and identified with, the Second Reconstruction. Thus the national parties, which prior to 1964 were viewed as quite similar with regard to civil rights,⁸² diverged sharply on the eve of the Voting Rights Act.⁸³ From the point of view of opponents of civil rights, 1964 marked the emergence of a choice, not an echo as between the two national parties.

The reason President Johnson called the Voting Rights Act of 1965 one of the most monumental laws in the entire history of

79. See Edsall and Edsall, *Chain Reaction* at 61 (cited in note 35) (noting that 80% of House Republicans but only 62% of Democrats voted in favor of the bill and 82% of Senate Republicans but only 66% of Democrats voted for cloture, the essential step in getting the bill to a vote).

80. *Id.* at 35.

81. Richard M. Scammon and Alice V. McGillivray, eds., *America Votes 16* at 29 (Elections Research Center, 1985). Goldwater's share of the votes cast in the two states that were mostly the focus of voting rights agitation—87.1% in Mississippi and 69.5% in Alabama—suggests the level of black disenfranchisement.

82. Edsall and Edsall, *Chain Reaction* at 35-36 (cited in note 35).

83. See C. Vann Woodward, *The Strange Career of Jim Crow* 129 (Oxford U., 3d rev. ed. 1974) (observing that “instead of dividing their votes between the two great parties . . . Negroes have flocked fairly solidly to the Democratic standard and cast off their historic allegiance to the Republican party”). There was perhaps a second temporal coincidence. The brutal treatment of peaceful black demonstrators on the Edmund Pettus Bridge outside Selma galvanized the nation in support of expansive federal protection of black voting rights. The Act was signed into law on August 2, 1965, amid great optimism that guaranteeing blacks the right to participate in the political process would solve the problems of the color line. Six days later, the Watts riots erupted. Civil unrest, and fears of civil unrest, would replace the moral simplicity of the Civil Rights Movement of the early 1960s with more intractable issues. That Vann Woodward, Thomas Edsall, and the producers of the acclaimed PBS series *Eyes on the Prize* juxtapose these events suggests their salience to observers with quite disparate perspectives. Compare Woodward, *Strange Career* at 189 (cited in this note), with Edsall and Edsall, *Chain Reaction* at 48 (cited in note 35), and with *Bridge to Freedom* (episode 6 of *Eyes on the Prize*).

American freedom was not simply because it was "the goddamnedest toughest voting rights act" that his staff could devise.⁸⁴ The Act's ambition separated it from preceding civil rights laws: it sought to transform black southerners into active participants in the governance process rather than simply recipients of congressionally conferred fair treatment in some discrete arena.⁸⁵ And it was precisely this key moral ambition that implicates the Act directly in the decline of the solid South.

The Act's immediate effect on black participation was electric: by the end of 1967, more than 500,000 new black voters had been registered in the seven southern states subject to the Act's most stringent provisions.⁸⁶ Overall registration skyrocketed from roughly 29% of the southern black voting-age population in 1965 to over 52% in 1967.⁸⁷ Southern resistance, particularly in jurisdictions with large numbers of black voters and potential voters, was equally swift. For example, the 1966 regular and special sessions of the Mississippi Legislature passed a host of bills designed to ensure that even if blacks managed to register and cast ballots, whites would remain in control of the levers of power.⁸⁸ That this resistance involved struggle for control of the Democratic Party is symbolized by the fact that the first reported post-Act racial vote dilution case, *Smith v. Paris*,⁸⁹ involved a challenge to changes in the rules for selecting the Democratic Executive Committee of Barbour County, Alabama. In the face of an influx of newly enfranchised black voters, the party switched to at-large elections to ensure that no black candidate could win.

Black voters flocked to the Democratic Party at the very moment that the national Republican Party was launching what became

84. Howell Raines, *My Soul Is Rested: Movement Days in the Deep South Remembered* 337 (G.P. Putnam's Sons, 1977) (interview with Nicholas Katzenbach, Attorney General during the Johnson Administration).

85. See Karlan, 71 *Tex. L. Rev.* at 1719 (cited in note 9) (stating that the right to elect "is what distinguishes self-governance, in which groups participate through their representatives in the formation of policy, from civic republican charity, in which individuals depend on the kindness of Platonic guardians").

86. Federal registrars, appointed under section 3 of the Act, registered almost as many black voters in the South in five years as had been registered in the entire preceding century. Chandler Davidson, *The Voting Rights Act: A Brief History*, in Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Twenty-Five Year Perspective* 7, 21 (Brookings Institution, 1992).

87. Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* 21-23 (Cambridge, 1992).

88. For an extensive account of this massive resistance, see Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965* at 37-66 (U. of North Carolina, 1990).

89. 257 F. Supp. 901 (M.D. Ala. 1966).

known as the Southern Strategy—a calculated attempt to use race, and racially coded issues, as the wedge to “break the economics class base of the New Deal Coalition.”⁹⁰ The Voting Rights Act was one such issue, and in 1969, when key temporary provisions of the Act were up for review, the Nixon Administration publicly opposed them, “demonstrat[ing] to the concerned electorate that a Democratic Congress . . . was behind the singling out of the South as the target of the most stringent enforcement provisions.”⁹¹ Similarly, in 1981, when the Act again came up for extension and amendment, the Reagan Administration opposed efforts to continue preclearance or substitute a results test for the difficult to satisfy “intent” requirement.⁹² Even if the conspiracy theorists are right in supposing that Republicans have cynically used the Act to weaken white Democratic districts,⁹³ the point still holds: the *public* posture of the presidential wing of the Republican Party was one of resistance to the Act’s solicitude for minority voters, and this public posture served to attract white southern support.⁹⁴

Most analyses of white voters’ behavior, including the bleaching critique, rest on a rational choice model that “assumes mutually independent preferences of the various voters in a district.”⁹⁵ That is, these analyses assume that white voters pick their substantive positions, party affiliation, and candidates without regard to the choices being made by black voters. But as Rick Pildes pointed out, “a less formal, more culturally specific model appears to capture more accurately the dynamic relationship between race and politics, at least in

90. Edsall and Edsall, *Chain Reaction* at 40 (cited in note 35). As the Edsalls succinctly phrase it, “the issue of race actually produced an *ideological* conversion of poor southern whites from a deeply held economic liberalism to economic conservatism.” *Id.* at 41.

91. *Id.* at 83.

92. See, for example, Thernstrom, *Whose Votes Count?* at 116-17, 125, 127, 132-33 (cited in note 20).

93. See note 35 and accompanying text.

94. See, for example, Michael Lind, *The Next American Nation: The New Nationalism and the Fourth American Revolution* 13-14 (Free Press, 1995) (suggesting that the Reagan and Bush Administrations’ embrace of “[t]okenism” in the redistricting arena not only undermined Democratic congressional candidates but “provide[d] a suitably ‘progressive’ camouflage for a system of divide-and-rule politics” in which the white elite “benefits from racial divisions among the American majority”).

A converse effect may operate on white Democrats. Laughlin McDonald suggests that Georgia’s white Democratic legislative bloc could have enacted a post-*Miller* congressional plan that would have given it three new seats, as well as preserving the seats of the three black Democratic incumbents, but that they declined to do so “because they thought the party would damage itself among conservative whites by appearing to give in to black demands.” McDonald, 65 *Miss. L. J.* at 295-96 n.113 (cited in note 35).

95. Pildes, 108 *Harv. L. Rev.* at 1382 (cited in note 8).

the South. This alternative might be called the 'racial backlash' or 'racial tipping point' model.⁹⁶ Under this model, whites tolerate black presence within an institution until it reaches a critical mass, somewhere well short of a majority. Once critical mass is reached, "white flight" begins. Tipping points are an example of catastrophe theory since white individuals leave the community "at rate r up until some percentage of minority population is reached, at which time the departure rate increases dramatically."⁹⁷

Most of the tipping point literature is concerned either with residential neighborhoods or public schools. Pildes was concerned with representatives' voting behavior and the influence-district element of the bleaching hypothesis.⁹⁸ But perhaps the insights of tipping point theory can be extended to deal with the question of party affiliation. Perhaps the visible presence and concomitant influence of black voters within the Democratic Party is itself a factor in white voters' choice of political affiliation.

The conditions for tipping already exist: "In some of the deep southern states . . . blacks are steadily moving toward majority status in Democratic primaries, and very few whites are prepared to be part of a coalition in which they are a minority."⁹⁹ That whites and blacks have very different ideas of what an integrated community means is suggested by surveys regarding residential neighborhoods. Blacks tend to think of an integrated neighborhood as being from thirty to sixty percent black. Among whites who express a commitment to integration, the optimal racial composition is around twenty percent black.¹⁰⁰ That this general vision carries over into politics is suggested by the Supreme Court's descriptions of the districts challenged in the wrongful districting cases: the description of barely majority-black districts as " 'segregated' suggests that only majority-white, and

96. *Id.* See also notes 72-74 and accompanying text (discussing other articulations of the insight that the level of white resistance is positively correlated with black presence).

97. Frederick Schauer, *A Comment on the Structure of Rights*, 27 Ga. L. Rev. 415, 424 n.33 (1993).

98. Pildes's analysis tracks the discussion of curvilinear influence discussed in the text accompanying notes 71-74. Pildes notes:

As the Black population reaches a critical mass, White voters begin to see Black participation as a credible threat; in reaction, White voters band together and develop more conservative preferences. Given this backlash, increasing the number of liberal Black voters in election districts will make those districts more conservative, until Black voters themselves become the majority.

Pildes, 108 Harv. L. Rev. at 1382 (cited in note 8).

99. Edsall and Edsall, *Chain Reaction* at 259-60 (cited in note 35).

100. See Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 Chi.-Kent L. Rev. 795, 818 (1991); Reynolds Farley, Suzanne Bianchi, and Diane Colasanto, *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, 441 Annals 97, 105 (1979).

therefore white-controlled, jurisdictions *can* be integrated.”¹⁰¹ Another version of this perspective is offered by the former state chairman of the South Carolina Democratic Party:

For a long time now, Democrats generally in the South have been walking a fairly narrow line between using black support as an advantage and letting blacks take over and the Democratic Party becoming a black party. Blacks, if they control the Democratic Party, will make it lose its viability. . . . Blacks understandably are restless in the Democratic Party because they look at their level of loyalty and say “Damn, if anybody deserves anything, we do.” And in normal political terms, that’s true. But the other side of it is that if we gave them everything they wanted, it would be a black party.¹⁰²

As we have seen, the solid South was already shaky by 1964 as a result of the realignment of the presidential wings of the two parties. The Voting Rights Act’s contribution was to introduce into the process a sizable bloc of black voters, virtually all of whom entered the Democratic Party. I do not want to oversimplify how this led to tipping. The causes of white flight¹⁰³ from the Democratic Party are undoubtedly complex. There are a number of ways in which blacks’ increased presence might encourage white flight. First, their appearance within the Democratic Party made the party visibly “blacker.” This might have precipitated the departure of white voters who had a strong taste for discrimination. Second, as some white voters left, and as blacks became more politically active and adroit, they became increasingly influential within the party. Some white voters might then leave the party simply because they cannot accept black control. Yet a third explanation might focus on the fact that an increasing black presence within the party affected the party’s stand on a variety of substantive legislative issues. Perhaps this increased (or continued) liberalism drove away some more conservative voters.¹⁰⁴ A fourth might focus on black voters’ insistence on descriptive representation,

101. Karlan, 1995 U. Chi. Legal Forum at 95 (cited in note 7).

102. Edsall and Edsall, *Chain Reaction* at 271 (cited in note 35) (interview with Donald Fowler, former chairman of the South Carolina Democratic Party).

103. Perhaps it might also be characterized as white attraction to the Republican Party, since a substantial part of the Republican Party’s growth in the South is made up of transplants from other parts of the country and younger voters who never were Southern Democrats.

104. See Daniel D. Polshy and Robert D. Popper, Jr., *Racial Lines*, Nat’l Rev. 53, 55 (Feb. 20, 1995) (arguing that “[t]here is a secondary ripple effect [to race-conscious districting] that may be even more important in the long run” since “racial gerrymandering inexorably pushes the Democratic Party as a whole to the left” and “[t]he country grows more conservative even as the relative influence of Jesse Jackson’s rooting section increases within Democratic Party councils”).

that is, the creation of majority-black districts that elected black representatives. Viewed in this light, one problem with race-conscious districting is that when every majority-black district elects a Democrat, it fans public perceptions of a black takeover.¹⁰⁵ Finally, white voters' perceptions of their own interests might be changed by their view on racially salient issues. Politicians and commentators all agree that the Democratic Party must rebuild its base among the white middle-class and working-class voters who formed a key element of the dominant New Deal coalition. The disagreements come over the possibility and means of constructing a multiracial governing coalition that fairly responds to the distinctive demands of its black constituents. For the black community to exercise real political power, blacks must be a key constituency within a party that controls Congress, rather than an increasingly influential bloc within the party out of power.

In some ways, we have been down this road before. One of the tragedies of the last century was the answers we gave then to very similar questions. America has had a few moments of opportunity when economic distress and rising inequality have offered a possibility for economic-based coalitions that could transcend the normal barriers of racial polarization. Reconstruction, the rise of the Populists at the turn of the century, and the New Deal all offered a chance for politicians to build cross-racial coalitions.¹⁰⁶ Unfortunately, America has squandered many of those opportunities. At the height of the Populist movement, one of its leaders, Tom Watson, emphasized the difficulty in maintaining a working class alliance in the face of partisan manipulation of the race card:

You might beseech a Southern white tenant to listen to you upon questions of finance, taxation, and transportation; you might demonstrate with mathematical precision that herein lay his way out of poverty into comfort; you might have him "almost persuaded" to the truth, but if the merchant who furnished his farm supplies (at tremendous usury) or the town politician (who never spoke to him excepting at election times) came along and cried "Negro rule!" the entire fabric of reason and common sense which you had patiently constructed would fall, and the poor tenant would joyously hug the chains of an actual wretchedness rather than do any experimenting on a question of mere

105. See *Redistricting Increases Strength of Southern GOP*, All Things Considered (Apr. 19, 1995) (Transcript # 1822-7) ("The Democratic Party in the Deep South is almost perfectly divided between white and black politicians, and that is creating a picture in the minds of many voters, I think, of a Democratic Party increasingly dominated by blacks. And in the long history of Southern politics—I hate to say it—but that's always been a negative for white voters.") (comments of Emory University political science professor Merle Black).

106. I owe this comparative historical insight to comments Willie Forbath made on an earlier version of this paper.

sentiment. . . . The Negro has been as valuable a portion of the stock in trade of a Democrat as he was of a Republican.¹⁰⁷

The beginning of the New Deal offered another chance to build a biracial coalition that was ultimately spurned. In a similar vein, newfound liberal Michael Lind today argues that “[t]oday’s Republican strategy also resembles that of the old Southern Bourbons, who for generations after the 1890s used racism and cultural populism to prevent the formation of a biracial alliance devoted to economic reform.”¹⁰⁸ In reviewing Lind’s book, which calls explicitly for outlawing the deliberate creation of majority-black districts—“[a]ll racial preference programs should be consigned to the junkyard of history,” Lind says¹⁰⁹—pragmatic liberal philosopher Richard Rorty echoes Watson’s bottom line:

Lind may well be right . . . that there is no hope of social and economic equality unless the blue-collar “Reagan Democrats” can be convinced that the enemies of the oligarchy are their friends. He may also be right that the abandonment of racial preferences is the price that liberal politicians will have to pay to regain the allegiance of those blue-collar voters. Most of that price will, as usual, be paid by poor black people rather than politicians or intellectuals. But it may have to be paid nonetheless. It will take a lot of class consciousness to defeat the oligarchy, and Lind makes a good case for saying that we will not get sufficient class consciousness if we continue to insist on racial consciousness.¹¹⁰

Of course no one within a mile of the political mainstream today argues that the solution is outright black disenfranchisement. In that sense, the Voting Rights Act has been a smashing, and apparently enduring, success. It has completely changed the terms on which the right to vote as a right to formal participation is discussed. But we ought to remember that it was precisely *because* blacks were viewed as a possibly decisive swing bloc that might upset the existing political order that resistance to full black political empowerment was so

107. Tom Watson, *The Negro Question in the South*, 6 *Arena* 541 (1892), quoted in C. Vann Woodward, *Tom Watson: Agrarian Rebel* 222 (Oxford U., 1972). Perhaps in part as a consequence of frustration over the Populists’ defeats, Watson (and many other Populists) ultimately succumbed to a particularly demagogic form of racism. Woodward, *Strange Career of Jim Crow* at 80-81, 89-90 (cited in note 83).

108. Lind, *The Next American Nation* at 184 (cited in note 94).

109. *Id.* at 307.

110. Richard Rorty, *Sins of the Overclass*, *Dissent* 109, 110 (Spring 1996). For an example of the strength of Lind’s willingness to throw blacks overboard if they don’t get with the program, see Lind, *The Next American Nation* at 337-39 (cited in note 94). Thomas and Mary Edsall adopt a complementary stance in *Chain Reaction*. Edsall and Edsall, *Chain Reaction* at 270-71 (cited in note 35).

strong the last time around.¹¹¹ And we should remember that it was not reactionaries alone who interred the First Reconstruction, leaving us a century later with the festering remains of the racial divide it sought to bridge. As Morgan Kousser concludes, disenfranchisement was a typical product of Progressive ideas in its use of a good government rationale to banish the messy realities of politics and to impose a set of reforms that "disarmed radical critics while actually strengthening the status quo."¹¹²

So perhaps we should think longer and harder than many frustrated and disappointed liberals have so far about whether embracing the universalist aspiration of a colorblind Constitution will be a step forward, or a step back. After all, the very same paragraph of Justice Harlan's *Plessy* dissent which articulated that vision began by declaring:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.¹¹³

The lens of colorblindness loses a bit of its clarity when we see how its very framer understood its compatibility with white educational, economic, and political dominance. And rather than reviving the failed notion that we can talk about American politics without taking up questions of race, we need to face the question of how to integrate the political process. Or else, when the future looks back at us, we will appear small indeed.

IV. APPENDICES

Appendix 1 contains selected data about partisan politics in eleven southern states. An asterisk next to a state's name in the first column means that the state created one or more new majority-non-white congressional districts after the 1990 census.

"Control?" refers to control over the post-1990 reapportionment process. Capital letters mean that a party controlled both houses of the state legislature as well as the governorship.

111. See Kousser, *The Shaping of Southern Politics* at 35-38 (cited in note 4) (stating that political parties played upon fears that "[i]f whites split . . . the Negroes would hold the balance of power").

112. *Id.* at 260-61.

113. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Votes/seats ratios show the percentage of the state's overall vote received by Republican candidates as opposed to Democratic candidates and the percentage of the state's seats won by Republican candidates compared to the percentage won by Democratic candidates. The vote/seat ratios may not total 100% due to minor party and independent candidates.

The 1994 Senate and Governor columns report both the results of the 1994 elections (in caps; N/A means no election was held) and the partisan breakdown following the election.

Sources: Election Data Services, *1994 Election Results Map* (1994); Center for Voting & Democracy, *Dubious Democracy, 1994 Elections: U.S. House of Representatives* (1995).

Appendix 2 contains a chart and scattergram representing voting behavior and district composition in the same eleven states.

The scattergram and chart contain information on the voting behavior of white and black southern Democrats in the House of Representatives for the 103d Congress, 1st Session. The chart does not contain information on southern Hispanic representatives.

In the scattergram, series 1 (the diamonds) represents white Democratic representatives. Series 2 (the squares) are black representatives.

The horizontal axis reflects the percentage of each district's voting-age population which is black or Hispanic. The vertical axis reflects the Congressional Quarterly Conservative Coalition voting scores with 100 being the most conservative and 0 being the most liberal. These scores are calculated by looking at all votes on which northern Democrats and Republicans disagree, and is a widely used measure of conservatism/liberalism.

On the chart, the column labeled "CD" contains an identifier for each congressional district in my sample. "HVAP" is the percentage of the district's voting-age population that is Hispanic; "BVAP" is the percentage that is black; "MVAP" is the sum of HVAP and BVAP. The voting score is in column "CQ CC".

In the top right hand corner is a chart showing the correlation coefficients, r^2 values, and slope of the regression lines for white representatives only, black representatives only, and the entire set of representatives.

Source: Data contained in Higginbotham, Clarick, and David, 62 *Fordham L. Rev.* at 1653-67 (cited in note 52).

APPENDIX 1

Selected Data About Partisan Politics in Eleven Southern States

State	Control?	1992 votes vs. seats in % [R-D]	1994 votes vs. seats in % [R-D]	1994 Senate	1994 Governor
AL*	divided (GOP gov)	V:40.1-55.9 S:42.9-57.1 3R, 4D	V:56.2-43.8 S:42.9-57.1 3R, 4D	N/A 1R, 1D	GOP (switch)
AR	DEM	V:40.2-59.1 S:50.0-50.0 2R, 2D	V:52.6-47.4 S:50.0-50.0 2R, 2D	N/A 0R, 2D	DEM (retained)
FL*	DEM	V:51.1-46.0 S:56.5-43.5 13R, 10 D	V:51.4-48.6 S:65.2-34.8 15R, 8D	GOP (retained) 1R, 1D	DEM (retained)
GA*	DEM	V:45.1-54.9 S:36.4-63.6 4R, 7D	V:54.6-45.4 S:63.6-36.4 7R, 4D	N/A 1R, 1D	DEM (retained)
LA*	DEM	V:36.5-42.3 S:42.9-57.1 3R, 4D	V:52.1-44.9 S:42.9-57.1 3R, 4D	N/A 0R, 2D	N/A dem
MS	divided (GOP gov)	V:28.0-69.7 S:0.00-100 0R, 5D	V:41.5-56.9 S:20.0-80.0 1R, 4D	GOP (retained) 2R, 0D	N/A gop
NC*	DEM	V:47.5-50.7 S:33.3-66.7 4R, 8D	V:54.3-45.7 S:66.7-33.3 8R, 4D	N/A 2R, 0D	N/A dem
SC*	divided (GOP gov)	V:52.1-45.4 S:50.0-50.0 3R, 3D	V:57.0-42.7 S:66.7-33.3 4R, 2D	N/A 1R, 1D	GOP (retained)
TN	DEM	V:42.7-51.2 S:33.3-66.7 3R, 6D	V:54.8-43.4 S:55.6-44.4 5R, 4D	GOP (2 seats switched) 2R, 0D	GOP (switch)
TX*	DEM	V:47.8-49.9 S:30.0-70.0 9R, 21D	V:53.0-44.6 S:36.7-63.3 11R, 19D	GOP (retained) 2R, 0D	GOP (switch)
VA*	DEM	V:48.3-48.5 S:36.4-63.6 4R, 7D	V:54.0-42.2 S:45.5-54.5 5R, 6D	DEM (retained) 1R, 1D	N/A gop

CD	BVAP	HVAP	MVAP	CQ CC		Correl	RSQ	Slope
AL3	23.6	0.6	24.2	91	White	-0.04312	0.001859	-0.02573
AL4	5.9	0.3	6.2	93	Black	0.183887	0.033815	0.068955
AL5	13.7	0.7	14.4	91	All	-0.61971	0.38404	-0.42496
AR1	14.8	0.5	15.3	50				
AR2	15.2	0.7	15.9	86				
FL1	11.2	1.9	13.1	100				
FL2	21	2	23	73				
FL5	4.7	2.6	7.3	57				
FL11	14.5	13.7	28.2	48				
FL15	6.3	3	9.3	49				
FL19	2.2	5.5	7.7	19				
FL20	3.9	11.5	15.4	27				
GA7	11.7	1	12.7	89				
GA8	18.4	1.4	19.6	89				
GA9	3.5	1.6	5.1	80				
GA10	16.5	1.1	17.6	75				
LA3	19.5	2.4	21.9	88				
LA7	17.7	1.3	19	86				
MS1	20	0.4	20.4	87				
MS3	27.9	0.5	28.4	95				
MS4	36.5	0.4	36.9	95				
MS5	17.5	1.1	18.6	91				
NC2	20.1	1.1	21.2	76				
NC3	19.6	1.4	21	79				
NC4	18.9	1.2	20.1	47				
NC5	14	0.7	14.7	71				
NC7	17.1	1.2	18.3	56				
NC8	20.9	1	21.9	67				
SC3	18.8	0.5	19.3	66				
SC5	27.9	0.5	28.4	82				
TN3	10.5	0.6	11.1	93				
TN4	3.5	0.4	3.9	88				
TN5	20.6	0.8	21.4	65				
TN6	5.4	0.5	5.9	70				
TN8	17.4	0.6	18	91				
TX1	16.4	2.7	19.1	90				
TX2	15.4	4.9	20.3	76				
TX4	7.7	3.8	11.3	86				
TX5	15.3	15.3	30.6	30				
TX9	19.8	8.5	28.3	79				
TX10	10	18.7	28.7	63				
TX11	14.6	10.4	25	86				
TX12	7.4	13.8	21.2	95				
TX13	7.3	15.7	23	95				
TX14	10.4	20.4	30.8	93				
TX16	3.6	66.4	70	60				
TX17	3.2	14.1	17.3	91				
TX24	17.9	18.8	36.7	79				
TX25	24.9	14.9	39.8	90				
TX29	9.8	55.4	65.2	40				
VA2	15.5	3	18.5	82				
VA4	30.7	1	31.7	88				
VA5	22.9	0.5	23.4	82				
VA8	12.5	8	20.5	36				
VA9	2.4	0.5	2.9	52				
VA11	7.5	7	14.5	34				
AL7	63.5	0.3	63.8	30				
FL3	50.6	2.7	53.3	39				
FL17	54	24.1	78.1	43				
FL23	45.7	9.1	54.8	18				
GA2	52.3	1.6	53.9	59				
GA5	57.5	1.8	59.3	9				
GA11	60.4	1	61.4	7				
LA2	56.2	3.8	60	23				
LA4	62.6	0.9	63.5	20				
MS2	58.1	0.5	58.6	14				
NC1	53.4	0.7	54.1	14				
NC12	53.3	0.8	54.1	7				
SC6	58.3	0.5	58.8	45				
TN9	54.1	0.7	54.8	7				
TX18	48.6	13.7	62.3	5				
TX30	47.1	15.1	62.2	34				
VA3	81.2	1.2	62.4	30				

APPENDIX 2

Voting Behavior and District Composition in Eleven Southern States

