A PROPOSED STANDARD FOR AMENDED SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 AS APPLIED TO REDISTRICTING

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INTRODUCTION

Many minorities still did not have the right to vote[1] nearly a hundred years after the Reconstruction Amendments[2] guaranteed them this constitutional right and others.[3] The Voting Rights Act of 1965[4] (VRA) was to the pre-1965 electoral system what the Reconstruction Amendments were to the institution of slavery. And just as the Reconstruction Amendments required the VRA (an amendment of sorts) to give them any real meaning, the VRA has required amendments of its own.[5] Most recently, Congress reauthorized section 5 for the next

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1 This Note is concerned with vote dilution, a form of disenfranchisement. While vote denial involves the right to vote, vote dilution involves the effectiveness of the vote. Minorities may not realize they are disenfranchised when their disenfranchisement takes the form of vote dilution. The Supreme Court mostly recently dealt with vote dilution under the VRA in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

2 U.S. Const. amends. XIII, XIV, XV.

3 To be sure, pre-1965 disenfranchisement was not limited to the South. In terms of vote dilution through redistricting, arguably the "finest example of the 'stacked' districts [could] be found in the imaginatively defiant handiwork of the New York State legislature in carving congressional boundaries for use during the sixties." Gus Tyler, *Court Versus Legislature (The Socio-Politics of Malapportionment)*, LAW & CONTEMP. PROBS., Summer 1962, at 390, 401.

4 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973c (2006)).

5 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (2006)); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified at 42 U.S.C. §§ 1973a–1973c (2006)); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. §§ 1973aa (2006)).

twenty-five years and amended it through the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006[6] (VRARA). This Note is concerned with a subsection added to section 5 through the VRARA; this subsection makes it a violation of section 5 for a proposed redistricting plan[7] to "diminish[ ] the ability" of minorities "to elect their preferred candidates of choice" when compared to the plan currently in effect, i.e., benchmark districting.[8]

To name only a few ways, vote dilution through redistricting can occur through the apportionment of a higher number of people (regardless of race or color) in some districts than in others[9] or through the apportionment of minorities in single and multimember districts.[10] The single or multimember districts may be equal in popu-

6 Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1971, 1973b (2006)).

7 Of course, section 5 applies to more than just redistricting, but redistricting is especially relevant given the upcoming congressional redistricting.

As way of background, the terms "redistricting" and "apportioning" are often used interchangeably. This Note uses "redistricting" to denote the process of drawing geographical boundaries for elections and "apportioning" to denote the allocating of a number of people in a district. For a helpful explanation of the difference between these two terms, see the following definitions provided by the U.S. Census Bureau: Apportionment is defined as "the process of determining the number of seats to which each state is entitled in the U.S. House of Representatives based on the decennial census." Redistricting is defined as "the process of revising the geographic boundaries within a state from which people elect their representatives to the U.S. House of Representatives, state legislature, county or city council, school board, etc." POPULATION DIV., U.S. CENSUS BUREAU, WHAT YOU SHOULD KNOW ABOUT THE APPORTIONMENT COUNTS 4 (2000), http://www.census.gov/dmd/www/pdf/pio00-ac.pdf.

8 The added subsection reads:

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

42 U.S.C. § 1973c(b) (2006).

9 For landmark cases recognizing and providing standards for identifying unconstitutional vote dilution through the apportionment of a higher number of people (regardless of race or color) in some districts than in others, see Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

10 For landmark cases recognizing and providing standards for vote dilution through the apportionment of minorities in single and multimember districts in violation of the Fifteenth Amendment, Fourteenth Amendment's Equal Protection Clause, or section 2 of the VRA, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2006)), see Thornburg v. Gingles, 478 U.S. 30 (1986);

lation, yet the apportionment of minorities among them can amount to vote dilution. "Cracking" denotes dividing up a concentrated minority population among multiple districts to avoid giving minorities the ability to elect their candidates of choice.[11] "Packing" denotes apportioning a large number of minorities into a single district to avoid giving them the ability to elect their candidates of choice in other districts.[12] "Stacking" denotes combining a large number of minorities with an even larger number of whites into a single district, so that the minorities do not have the ability to elect their candidates of choice.[13]

Section 5 applies only to "covered jurisdictions," which are expressly listed in the statute.[14] Section 5 requires covered jurisdictions to receive preclearance from the U.S. Department of Justice (DOJ) or a declaratory judgment from the U.S. District Court for the District of Columbia[15] before making a change to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting"[16] (covered change). Preclearance is granted if the covered jurisdiction proves that the covered change does not have

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City of Mobile v. Bolden, 446 U.S. 55 (1980); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

11 James S. Fishkin, The Voice of the People 117–18 (1995).

12 *Id.*

13 *Id.* Cracking, packing, and stacking were especially effective at vote dilution before the "one person, one vote" standard announced in *Reynolds* required equal populations in each district. 377 U.S. 558–59 (citing Gray v. Sanders, 372 U.S. 368, 381 (1963)). Before the "one person, one vote" standard,

> [t]he "cracked" district [was] the huge metropolitan center, torn apart into separate pieces, each . . . attached to and outvoted by a surrounding rural hinterland. The "packed" district [was] the one with a concentrated urban population *containing two or three or even four times* as many inhabitants as a neighboring district. The "stacked" district [was] the child of the gerrymander, a delicately carved creature, resembling nothing more than the partisan and rapacious soul of his political creator.

Tyler, *supra* note 3, at 400–01 (emphasis added).

14 42 U.S.C. § 1973b(b) (2006). The majority of jurisdictions are in the South because of their history of discriminatory practices. *See* David L. Epstein & Sharyn O'Halloran, *Does the New VRA Section 5 Overrule* Georgia v. Ashcroft*?*, 63 N.Y.U. Ann. Surv. Am. L. 631, 636–37 & n.29 (2008).

15 42 U.S.C. § 1973c(a) (2006). Preclearance indicates to covered jurisdictions that they may enact or administer the covered change.

16 *Id.* A proposed redistricting plan is a "covered change." *See generally* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (explaining different types of covered changes).

the purpose or effect[17] of "denying or abridging the right to vote on account of race or color"[18] as compared to the status quo.[19] In other words, preclearance is granted if the covered change does not dilute the vote as compared to the status quo.[20] The VRARA prohibits a covered change from "diminishing the ability" of minorities "to elect their preferred candidates of choice." Diluting the vote as compared to the status quo has long been a prohibited effect, but the added subsection makes clear that a nondiluted vote includes the ability to elect a candidate of choice. Congress added the subsection to overrule the Supreme Court's holding in *Georgia v. Ashcroft*,[21] which moved the focus of a prohibited effect away from the ability to elect, and permitted the trading of descriptive representation of minorities for substantive representation.[22] This contradicted the DOJ's decades-old standard for a prohibited effect[23] based on the interpretation set forth in *Beer v. United States*.[24]

Part I of this Note examines the standard for a prohibited effect before the VRARA. Part II addresses the ability-to-elect standard for determining whether a proposed redistricting plan "diminish[es] the ability" of minorities "to elect their preferred candidates of choice."

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17 42 U.S.C. § 1973c(a). Although the change garnered little attention (for good reason), the VRARA amended subsection (a) by striking "does not have the purpose and will not have the effect" and inserting "neither has the purpose nor will have the effect." Pub. L. No. 109-246, § 5, 120 Stat. 577, 581 (codified as amended at 42 U.S.C. § 1973b (2006)). This amendment is of little consequence. The Senate Report does not explain it and the House Report only notes in a footnote that the purpose of the amendment is to "make[ ] clear that both prongs must be satisfied before a voting change may be precleared." H.R. REP. NO. 109-478, at 65 n.168 (2006). In other words, the amendment makes clear that a covered jurisdiction must prove that a covered change has *neither* a prohibited effect *nor* prohibited purpose. The amendment of consequence for this Note was made to subsection (b).

18 42 U.S.C. § 1973c(a).

19 By its express language, section 5 does not call for a covered change's comparison with the status quo, but long ago the Court read section 5 as calling for a comparison, i.e., prohibiting retrogression. Beer v. United States, 425 U.S. 130, 141 (1976); *see infra* Part I.

20 This means that a covered change could pass the tests for vote dilution under the Constitution and section 2 of the VRA, but fail under section 5 because minorities fare better under the status quo than under the covered change. Furthermore, the covered change may violate the Constitution and section 2, but the DOJ must grant preclearance as long as the minorities fare better under the covered change than under the status quo. Of course, someone could then challenge the new status quo as a violation of the Constitution or section 2.

21 539 U.S. 461 (2003).

22 *Id.* at 480–81.

23 *See infra* Part I.

24 425 U.S. 130 (1976).

This Part analyzes the standard provided in the Senate Judiciary Committee's Report[25] and briefly discusses the House Judiciary Committee's Report,[26] which does not include a standard. In addition, this Part analyzes both the standard used by the DOJ prior to *Ashcroft* and the relatively extreme standard proposed by Nathaniel Persily.[27]

This Note proposes a standard that would require a proposed redistricting plan to at least maintain the number of districts in which it is more likely than not[28] that minorities will elect their preferred candidates of choice (ability-to-elect districts).[29] There are three noteworthy qualities of this proposed standard: First, if this is the only requirement, then it implies that the proposed standard focuses on the redistricting plan as a whole, not a district standing alone. Second, the proposed standard protects "coalitional districts"—districts in which minorities constitute the minority, but where it is still more likely than not minorities will elect their preferred candidates of choice—with white crossover to or coalition of other minorities with minorities in voting.[30] Third, the proposed standard permits the trading of "safe districts"—ability-to-elect districts in which it is "highly likely" that minorities will elect their preferred candidates of choice, *without* the assistance of whites and other minority groups—for coalitional districts because they are both ability-to-elect districts.[31]

The proposed standard differs from the DOJ's in its definition of an ability-to-elect district. This Note conceives of an ability-to-elect district as one in which it is more likely than not that minorities will elect their preferred candidates of choice. In contrast, the DOJ standard requires a higher degree of likelihood in order for a district to be an "opportunity district," or ability-to-elect district. Also, the proposed standard permits the trading of safe districts for coalitional districts, unlike the DOJ's standard. The proposed standard differs from the

25 S. Rep. No. 109-295 (2006).

26 H.R. Rep. No. 109-478 (2006).

27 *See* Nathaniel Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 216–50 (2007).

28 In this Note, "more likely than not" denotes more than fifty-percent probability. This Note also uses "highly likely," which denotes a greater probability than "more likely than not."

29 *See infra* Part II.E. This Note does not address how to determine the minorities' "preferred candidates of choice." This Note focuses on how to determine whether the minorities' ability to elect has been diminished, presuming the preferred candidates of choice have been determined. For a discussion of "preferred candidates of choice," see Persily, *supra* note 27, at 219–34.

30 "Assistance from whites and other minority groups" denotes white crossover to or coalition of other minorities with minorities in voting.

31 *See infra* Part II.D.

Senate Report's in its protection of coalitional districts. Unlike the proposed standard, the Senate Report's standard focuses on a district standing alone.

The proposed standard draws from a discussion in *Ashcroft*, in which the Court described two proposed redistricting plans that would not reduce minorities' ability to elect their candidates of choice. Most notably, the four dissenting Justices endorsed the majority's dictum on the ability to elect. To the extent that the interpretation of section 5 in *Ashcroft* was based on constitutional avoidance,[32] the proposed standard may avoid constitutional difficulty from the Equal Protection Clause of the Fourteenth Amendment or enforcement clauses of the Fourteenth and Fifteenth Amendments.[33] While the Supreme Court recently avoided answering the question of whether preclearance is constitutional (regardless of the standard employed) in *Northwest Austin Municipal Utility District Number One v. Holder*,[34] *Ashcroft* indicates that the Court is not hesitant to take a close look at the standard for section 5.

I. FROM *BEER* TO *ASHCROFT*: THE PRE-VRARA STANDARD FOR PROHIBITED EFFECT

Section 5 originally had the relatively modest aim of ensuring that covered jurisdictions did not find a new way to deny the vote to minorities after section 4 temporarily suspended literacy tests, the primary way states had been denying the vote.[35] Section 5 was not aimed at vote dilution, but at vote denial.[36] Not only did section 5 have a modest aim, but it also went relatively unused by the DOJ. "Far from moving forcefully to insure that states and localities demonstrate that they were not trying to undercut federal supervision of voter registration and the suspension of literacy tests by enacting new laws, the Johnson Administration largely left voter registration, as well as law-

32 It is unclear whether the Court was motivated by constitutional avoidance in its statutory interpretation of section 5. *See* Persily, *supra* note 27, at 176–77.

33 However, the proposed standard may be problematic if constitutional avoidance is responsible for *both* the Court's ability-to-elect discussion *and* the holding that section 5 permitted a proposed redistricting plan's reducing the ability of minorities to elect their candidates of choice as compared to the benchmark districting, provided that there was an increase in minorities' opportunityto participate in the political process. *See infra* notes 47–56 and accompanying text.

34 129 S. Ct. 2504 (2009).

35 Epstein & O'Halloran, *supra* note 14, at 636.

36 *See id.* at 635–36.

suits, to civil rights organizations."[37] However, once the Court interpreted the Constitution as prohibiting vote dilution, it was not long before vote dilution became relevant to the standard for a prohibited effect.[38]

Beer v. United States reaffirmed that vote dilution was relevant to the standard for a prohibited effect. The harder issue—and the issue for which *Beer* has become a landmark—was in setting the exact standard for section 5 if vote dilution was relevant. The Court held that the standard for a prohibited effect was "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[39] While the Court did not explicitly address what amounted to the "effective exercise of the electoral franchise" (nondiluted vote), it implied that it was the ability to elect preferred representatives.[40] Thus, the Court's standard for a prohibited effect in the context of redistricting could have been written as the following: "A proposed redistricting plan's reduction of the ability of minorities to elect their preferred representatives as compared with the benchmark districting." The VRARA would codify a variation of this standard thirty years later in response to *Georgia v. Ashcroft*.[41]

Subsequent amendments to the VRA[42] did not further define the standard for a prohibited effect, leaving *Beer*'s standard unchanged.[43] Congress could have addressed whether a proposed redistricting plan's reduction of the ability of minorities to elect their preferred representatives violates section 5, as *Beer* implied. But it chose not to. Likewise, the district court and Supreme Court took few opportunities to clarify the *Beer* standard[44] until *Ashcroft*. The DOJ handled

37 J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 684 (2008).

38 Allen v. State Bd. of Elections, 393 U.S. 544, 565–66 (1969) (finding that vote dilution was relevant to section 5).

39 Beer v. United States, 425 U.S. 130, 141 (1976).

40 *See id.*

41 *See infra* Part II.

42 See sources cited *supra* note 5.

43 These amendments were not insignificant. Most significantly, in responding to the discriminatory intent requirement that the Court had read into the constitutional standard for vote dilution, Congress sought to decouple section 2 from the Constitution. The amendments to the VRA in 1982 made clear that vote dilution under section 2 did not require discriminatory intent, just the effect of vote dilution. Pub. L. No. 97-205, § 2, 96 Stat. 131, 133 (codified as amended at 42 U.S.C. § 1973 (2006)).

44 David J. Becker, *Saving Section 5: Reflections on* Georgia v. Ashcroft, *and Its Impact on the Reauthorization of the Voting Rights Act, in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006, at 223, 228 (Ana Henderson ed., 2007) ("Over time, until the *Ashcroft* decision, there were few published cases discussing the *Beer* standard."). Becker was the DOJ's lead attorney for *Georgia v. Ashcroft*. *See id.* at 223 n.1.

preclearance of most proposed redistricting plans.[45] Following *Beer* and consistent with it, the DOJ's standard was as follows:

> A proposed plan is retrogressive under the Section 5 "effect" prong if its "net" effect would be to reduce minority voters'[ ] "effective exercise of the electoral franchise" when compared to the benchmark plan. The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice.[46]

Ashcroft revised the *Beer* standard as "'retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'"[47] The Court held in a narrow 5–4 decision that the standard permitted a proposed redistricting plan to reduce the ability of minorities to elect their candidates of choice as compared to benchmark districting, provided that there was an increase in the opportunity of minorities to participate in the political process.[48] In practice, this standard permits the trading of descriptive representation for substantive representation[49] through the trading of safe districts for "influence districts" or control of the state legislature by minorities' preferred party. The reaction of civil rights groups and others to the apparent abandonment of descriptive representation of minorities was "swift and heated"[50] and gave rise to the VRARA, which made a proposed redistricting plan's "diminishing the ability" of minorities "to elect their preferred candidates of choice" a prohibited effect.

As a preliminary matter, *Ashcroft* held that the standard for a prohibited effect focused on the proposed redistricting plan as a whole, not on a district standing alone.[51] Next, the Court reasoned that its standard for a prohibited effect was necessary because the "effective exercise of the electoral franchise" means more than the ability of

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45 Becker, *supra* note 44, at 228.

46 Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001) (citation omitted).

47 Georgia v. Ashcroft, 539 U.S. 461, 462 (2003) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

48 *Id.* at 480.

49 Definitions vary, but as a general matter, substantive representation means *representation* sympathetic to minorities' interests; descriptive representation means *representatives* preferred by minorities.

50 Epstein & O'Halloran, *supra* note 14, at 633. *But cf.* Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 as We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 284–91 (2005) (arguing that *Ashcroft* was necessary to ensure section 5's continuing constitutionality).

51 *Ashcroft*, 539 U.S. at 479. This makes unnecessary a comparison of District *A* in the proposed redistricting plan with District *A* in the benchmark districting.

minorities to elect their candidates of choice. Justice O'Connor, writing for the majority, explained: "In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process."[52] The Court explained that the opportunity to participate in the political process could take many forms, such as influence districts, "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[53] Justice O'Connor added that in order for influence districts to provide an opportunity for minorities to participate in the political process, the districts must have representatives respond to the interest of minorities:[54] "In addition to influence districts, one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts."[55] Also relevant was approval or disapproval of the proposed redistricting plan by the representatives of minorities (i.e., community leaders).[56]

The dissent, led by Justice Souter, began by characterizing (quite accurately) the implication of the majority's standard for a prohibited effect: "The Court holds . . . that there would be no retrogression when the power of a voting majority of minority voters is eliminated, so long as elected politicians can be expected to give some consideration to minority interests. The power to elect a candidate of choice has been forgotten . . . ."[57] Justice Souter identified another issue with this standard for a prohibited effect, namely its administrability. After listing a number of questions that the new standard raised, such as the definition of "influence," the dissent concluded: "[T]here are no answers of any use under § 5. The fault is more fundamental, and the very fact that the Court's interpretation of nonretrogression under § 5 invites unanswerable questions points to the error of a § 5 preclearance regime that defies reviewable administration."[58] At bottom, the dissent thought that minorities would lose under the new standard, reasoning that "if in subsequent cases the Court allows the

52 *Id.* at 482.

53 *Id.*

54 *Id.*

55 *Id.* at 483.

56 *Id.* at 471. This Part omits *Ashcroft*'s ability-to-elect discussion and saves it for the discussion of the proposed ability-to-elect standard. *See infra* Part II.E.

57 *Id.* at 495 (Souter, J., dissenting).

58 *Id.* at 496.

state's burden to be satisfied on the pretense that unquantifiable influence can be equated with majority-minority power, § 5 will simply drop out as a safeguard."[59]

II. ABILITY-TO-ELECT STANDARDS

The twenty-five-year reauthorization of section 5 from the 1982 amendments was set to expire in 2007. Considering that few politicians wanted to be on record as opposing the extension of part of one of the most important civil rights laws of the twentieth century,[60] the VRARA passed by a large margin in Congress.[61] There was, however, an underlying sharp disagreement over the decision to reauthorize section 5 and, more relevant to this Note, the meaning of its amendments.[62] The sharp disagreement under the veneer of bipartisanship is best illustrated by the story behind the Senate Report: "Never before in American history . . . has a Senate committee that unanimously voted in favor of a law later published a postenactment committee report that was supported only by members of one party."[63]

The VRARA prohibits a proposed redistricting plan from diminishing of the ability of minorities to elect their preferred candidates of choice. The VRARA does not overrule *Beer*'s interpretation of a prohibited effect as "retrogression," only *Ashcroft*'s interpretation of the "effective exercise of the electoral franchise" as the ability to elect candidates of choice *and* the opportunity of minorities to participate in the political process. It did not help the majority's reasoning that "[e]ven before *Ashcroft* was argued in the Supreme Court, the hardheaded calculations that created the opportunity for O'Connor's practical, ad hoc opinion had proven wildly incorrect"[64]: four Democrats in influence districts had switched parties after the election, giving Republicans control of the state senate in Georgia.[65]

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59 *Id.* at 497.

60 Persily, *supra* note 27, at 179–80.

61 The vote in the House was a comfortable 390–33, see 152 CONG. REC. H5207 (daily ed. July 13, 2006), and the vote in the Senate was a resounding 98–0, see 152 CONG. REC. S8012 (daily ed. July 20, 2006).

62 Persily, *supra* note 27, at 180. For a discussion of the "strange, ironic" nature of the passage of the VRARA, see Kousser, *supra* note 37, at 669 ("Never has the radical, still-controversial Act been treated in such hushed, reverential tones, and never has its discussion been so blatantly manipulated for immediate partisan advantage. Never have there been so many proposals for comprehensive changes when the temporary parts of the Act have come up for renewal, and never has there been less serious debate about the Act in committees and on the floor of Congress.").

63 Persily, *supra* note 27, at 178.

64 Kousser, *supra* note 37, at 740.

65 *Id.*

The VRARA does not provide a standard to determine whether a proposed redistricting plan "diminish[es] the ability" of minorities "to elect their preferred candidates of choice" because Congress could not agree on one. But it is logical to assume that the ability-to-elect standard should not permit the trading of substantive representation for descriptive representation through the trading of safe districts for influence districts because it was these tradeoffs that gave rise to the VRARA.[66]

A. The Senate Report's Ability-to-Elect Standard

The Senate Report, authored after the vote and only by Republicans, provides a standard that requires that a majority-minority district in the benchmark districting to remain a majority-minority district in the proposed redistricting plan.[67] The Senate Report's standard does not focus on the proposed redistricting plan as a whole, but instead on a district standing alone. To complicate matters, the Senate Report's standard only protects "naturally occurring" majority-minority districts,[68] which probably means "districts drawn in urban areas with high concentrations of minority voters."[69] To further complicate matters, there remains the issue as to the precise requirement for the district to be a majority-minority district.[70]

Even a naturally occurring majority-minority district is protected only from elimination.[71] This means that the number of minorities in the district could be decreased until the minorities in the district are a majority by one person. The problem with permitting such a decrease in the number of minorities is that a district in which it is highly likely that minorities will elect their preferred candidates of choice may become a district in which it is no longer highly likely or more likely than not that minorities will elect their preferred candidates of choice. This is because, inter alia, enough minorities failing to vote endangers the likelihood. If the drafters of the VRARA sought to overrule *Ashcroft*'s allowance of the trading of descriptive representation for substantive representation, the Senate Report's standard is especially egregious because descriptive representation is traded for nothing.

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66 Persily, *supra* note 27, at 247–48.

67 S. Rep. No. 109-295, at 20–21 (2006).

68 *Id.* at 15, 21.

69 Epstein & O'Halloran, *supra* note 14, at 649.

70 *See infra* note 108.

71 *See* Persily, *supra* note 27, at 244.

The Senate Report takes pains to make clear that its standard does not protect coalitional and influence districts from elimination.[72] The Senate Report is correct to dismiss the definition of influence districts as vague, making protecting them unworkable. An even more satisfying reason for permitting the elimination of influence districts is that in such districts minorities "may not [even] be able to elect a candidate of choice" and "can [only] play a substantial, . . . not decisive, role in the electoral process."[73] While there is "influence" in influence districts, there is little likelihood of minorities electing their preferred candidates of choice. However, the Senate Report standard's permitting the elimination of coalition districts is untenable because they are districts in which it is more likely than not that minorities will elect their preferred candidates of choice with assistance from whites and other minority groups. Not protecting coalitional districts permits the trading of descriptive representation for nothing—the same consequence of permitting the decrease in the number of minorities in majority-minority districts until minorities in the district are a majority by one person.

The Senate Report's refusal to protect coalitional districts from elimination rests on at least three grounds.[74] First, it rests on the unrealistic assumption that such districts provide only the ability of minorities to elect "just a candidate of choice settled for when forced to compromise with other groups."[75] The Senate Report refuses to acknowledge the existence now or in the next twenty-five years of a true coalitional district, one in which whites or other minorities vote for the minorities' preferred candidates of choice. In such a state of denial, it is hardly surprising that the Senate Report refuses to protect coalitional districts.

Second, the Senate Report claims that protecting only majority-minority districts protects the districts "with which section 5 was originally concerned."[76] To the contrary, section 5 was originally a corollary to section 4 and was only aimed at vote denial, not vote dilution through redistricting.[77] Assuming that the original aim of section 5 was protecting majority-minority districts, the Court in *Beer*—its first significant redistricting case under section 5—did not read section 5

72 S. REP. NO. 109-295, at 21.

73 Georgia v. Ashcroft, 539 U.S. 461, 482 (2003).

74 One of the grounds, partisan motivation, is omitted from the analysis in this Note. For a brief discussion of the partisan motivation behind the Senate Report's proposed standard, see Epstein & O'Halloran, *supra* note 14, at 649–50.

75 S. REP. NO. 109-295, at 21.

76 *Id.*

77 Epstein & O'Halloran, *supra* note 14, at 636–37.

as necessarily protecting only majority-minority districts.[78] An ability-to-elect standard such as the Senate Report's standard should be avoided in consideration of the nearly three decades of the DOJ's protection of coalitional districts, discussed below.[79] The number of coalitional districts that have been protected is presumably large and, thus, the Senate Report's ability-elect-standard will invite the elimination of a large number of districts in which it is more likely than not that minorities will elect their preferred candidates of choice in the initial round of redistricting.

Third, the Senate Report's refusal to protect coalitional districts stems from a fear that protecting coalitional districts would in turn require permitting the trading of safe districts for coalitional districts. This would mean the trading of a district in which it is highly likely that minorities will elect their preferred candidates of choice for a district in which it is more likely than not that minorities will elect their preferred candidates of choice. The Senate Report explains that "[t]his approach would avoid what one minority witness called the 'cracking of majority-minority districts.'"[80] Admittedly, the Senate Report's fear is well founded. But this should not be of much concern because the tradeoff would result in a district in which it is still more likely than not or even highly likely that the minorities will elect their preferred candidates of choice. The Senate Report's standard itself is not immune from tradeoffs between districts in which it is highly likely that minorities will elect their preferred candidates of choice for districts in which it is more likely than not. As discussed earlier, the Senate Report's standard permits a decrease in the number of minorities in majority-minority districts, which in effect permits a tradeoff between a safe district and a district in which it is no longer highly likely or more likely than not that minorities will elect their preferred candidates of choice.

The Democrats who did not sign on to the Senate Report provided brief additional views that made clear that they did not agree with its standard. While the Democrats did not explicitly provide a standard of their own, it is clear that their issue with Senate Report's ability-to-elect standard is that it only protects majority-minority districts, not coalitional districts, and does not permit the trading of safe districts for coalitional districts. Echoing other Democrats, Senator Edward Kennedy stated the following on the floor:

78 For further discussion of the Court's reading of section 5, see *infra* Part II.C.

79 For further discussion of the DOJ's ability-to-elect standard, see *infra* Part II.C.

80 S. REP. NO. 109-295, at 21 (2006) (quoting Nathaniel Persily, Professor of Law and Political Science, Univ. of Penn.).

> [W]hile the standard rejects the notion that 'ability-to-elect' districts can be traded for 'influence' districts, it also recognizes that minority voters may be able to elect candidates of their choice with reliable crossover support and, thus, does not mandate the creation and maintenance of majority-minority districts in all circumstances. The test is fact specific, and turns on the particular circumstances of each case.[81]

B. The House Report's Ability-to-Elect Standard

As for the House Report, it may even be a stretch to describe what it provides as an ability-to-elect standard. As Persily describes it:

> The House Report also evaded the tough questions concerning the retrogression standard by merely clarifying (and reiterating ad nauseum) that it overruled *Georgia v. Ashcroft*, reinstated the standard from *Beer v. United States*, and focused the retrogression inquiry on the "ability to elect" rather than on any amorphous standard of influence.[82]

The only thing that comes close in the House Report to an ability-to-elect standard is the following: "Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5."[83] As Persily writes, "From this sentence one might reasonably conclude both that a tradeoff of majority-minority districts with coalitional districts would not violate the new section 5, and that a reduction in the number of coalitional districts would in fact be retrogressive."[84] Thus, the House Report's standard does what the Senate Report's standard does not; that is, it protects coalitional districts and permits the trading of safe districts for coalitional districts.

C. The DOJ's Ability-to-Elect Standard

The DOJ's standard relies on *Beer*. While *Beer* did not explicitly announce a standard to determine whether a proposed redistricting plan reduces the ability of minorities to elect their preferred representatives as compared to the benchmark districting, one can extrapolate a standard from the explanation of the lack of a prohibited effect:

> Under [a reapportionment plan proposed by the New Orleans City Counsel], . . . Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters

81 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy).
82 Persily, *supra* note 27, at 190 (citations omitted).
83 H.R. REP. NO. 109-478, at 71 (2006).
84 Persily, *supra* note 27, at 237.

> in one of them. Thus, there is every reason to predict, upon the District Court's hypothesis of bloc voting, that at least one and perhaps two Negroes may well be elected to the council under [the plan].[85]

As a preliminary matter, the Court indicated that, unlike the Senate Report's standard, the *Beer* standard focuses on the proposed redistricting plan as a whole, not a district standing alone. *Beer*'s implied ability-to-elect standard requires the number of districts in the proposed redistricting plan in which minorities "may well" elect blacks (who the Court assumed were the preferred representatives in the 1970s) to remain the same or increase. While the fact that a district is a majority-minority district is relevant to determining whether a district is a "may well" district, *Beer*'s implied ability-to-elect standard does not require that the number of majority-minority districts in the proposed redistricting plan remains the same or increases. The standard also takes into account whether there is racially polarized voting, which is a way of taking into account whether there is assistance from whites and other minority groups. This taking into account of racially polarized voting suggests that the standard protects coalitional districts and permits the trading of safe districts for coalitional districts.

The DOJ's ability-to-elect standard is the one that many scholars think will be followed because the VRARA only requires the DOJ to do what it had been doing before *Ashcroft* shifted the focus away from the ability to elect.[86] As the DOJ explained its standard in the Federal Register in 2001:

> Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission. For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan. This information is used to compare minority voting

85 Beer v. United States, 425 U.S. 130, 142 (1976).

86 *See, e.g.*, Epstein & O'Halloran, *supra* note 14, at 650 (noting that leading interpretation of the standard "is that the VRARA returns retrogression analysis to its pre-*Georgia v. Ashcroft* state"); Persily, *supra* note 27, at 226 (stating that DOJ's standard is "likely to rule the day once again").

> strength in the benchmark plan as a whole with minority voting strength in the proposed plan as a whole.[87]

Professors David L. Epstein and Sharyn O'Halloran write of the way in which the DOJ implements this ability-to-elect standard[88]: First, it determines the number of minorities necessary in a district for minorities to have the "opportunity" to elect their candidates of choice, that is, to be an "opportunity district." This is the "threshold below which minority-supported candidates have very little chance of gaining office and above which they are practically certain to win."[89] The number of minorities required in a district factors in assistance from whites and other minority groups; that is, the DOJ's standard protects coalitional districts.[90] Second, the DOJ determines the number of opportunity districts in the benchmark districting. Third, the DOJ determines how many districts in the proposed redistricting plan are opportunity districts. There must be at least as many opportunity districts in the proposed redistricting plan as the benchmark redistricting.[91] In *Georgia v. Ashcroft*, the DOJ arguably added a fourth step that prohibits trading safe districts for coalitional districts.[92]

D. Persily's Ability-to-Elect Standard

Persily provides the following relatively extreme standard and reasoning behind it:

> Section 5 should be read as preventing new districting plans that reduce the aggregated probability across districts that minorities will elect the candidates that they prefer and that whites generally disfavor. This standard escapes the charges of partisan bias or racial essentialism that would rightly be lodged against alternatives. Moreover, throughout the twenty-five year tenure of this law, it will not

87 Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5411, 5413 (Jan. 18, 2006) (citation omitted) (footnote omitted).

88 Epstein & O'Halloran, *supra* note 14, at 640–41.

89 *Id.* at 641. Opportunity districts in the DOJ's ability-to-elect standard require that there be a greater likelihood than the ability-to-elect districts in the proposed ability-to-elect standard.

90 Becker, *supra* note 44, at 238.

91 Note that this three-step process focuses on the proposed redistricting plan as a whole as compared with the benchmark district, not a district standing alone.

92 *See* Epstein & O'Halloran, *supra* note 14, at 644 ("Such a menagerie of choices immediately raises difficult questions about tradeoffs. How many coalitional districts does one need to outweigh one safely controlled district? Perhaps some combination of coalitional and probable-control districts may outweigh one safe district? Or perhaps, as the DOJ argued, there is no combination of other district types that could possibly offset the loss of even one safe district.").

> hamstring jurisdictions into a legal framework predicated on the persistence of outdated assessments of racial polarization in the electorate.[93]

As long as in the proposed redistricting plan the probability of minorities electing their preferred candidates of choice remains the same or increases in the aggregate, safe districts could be traded for districts with very low likelihood.[94] Persily recognizes that this standard is extreme: "After all, the interpretation proposed here would allow the trading of one 100% ability-to-elect district for ten 10% ability-to-elect districts."[95]

Persily contends, accurately, that his standard permits less extreme tradeoffs than the *Ashcroft* Court permitted because his standard's tradeoff of safe districts at least requires that the traded-for districts have *some* probability of minorities electing their preferred candidates of choice. After all, the *Ashcroft* Court did not require that safe districts be traded for districts in which there was *any* probability of minorities electing their preferred candidates of choice—just influence districts or control of the state legislature by the minorities' preferred party. Persily describes the difference as "preventing reductions in the number of ability-to-elect districts to increase the number of influence districts or to capture control of the legislature is not the same as banning tradeoffs among ability-to-elect districts."[96] Persily contends that his standard only permits tradeoffs among ability-to-elect districts. Persily is correct only because his definition of an ability-to-elect district is expansive, including a district in which minorities have a ten-percent probability of electing their preferred candidates of choice.

Because the term ability-to-elect district denotes a district in which it is more likely than not that the minorities will elect their preferred candidates of choice, I would describe Persily's standard as permitting the trading of safe districts for "tossup districts" or "hopeless

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93 Persily, *supra* note 27, at 219.

94 *See* Epstein & O'Halloran, *supra* note 14, at 654 ("[Persily's approach] is no doubt the 'cleanest' approach to the problem, mathematically precise and intuitively clear. It emphasizes the fact that retrogression is a standard applied to plans, not districts, and makes obvious the requirement that diminutions in the ability to elect in some districts must be offset by equal or greater gains elsewhere. It would, however, allow tradeoffs such as dismantling one district where a minority-supported candidate was sure to win for three districts with a one-third probability each. This 'gambling' of some safe seats makes some observers queasy. On the other hand, with favorable electoral results, this strategy could increase overall minority office-holding by generating more minority wins than would occur with just safe seats." (footnote omitted)).

95 Persily, *supra* note 27, at 248.

96 *Id.* at 247.

districts," which is prohibited under the proposed standard.[97] Persily acknowledges that even though the drafters of the VRARA may have been responding to the more extreme trading permitted by the Court of safe districts for influence districts or control of the state legislature by the minorities' preferred party, "[f]or those who worry about any decrease in minority descriptive representation, . . . trading a few safe seats for a larger number of . . . districts [with low probability] would invite the same criticism as would such tradeoffs to increase the number of influence districts."[98]

In response to the fair criticism that his interpretation frustrates the intent of the drafters of the VRARA to prohibit the trading of descriptive representation for substantive representation, Persily explains that his standard prevents constitutional difficulty posed by the Fourteenth Amendment's Equal Protection Clause and the Fourteenth and Fifteenth Amendments' enforcement clauses:

> An interpretation of the new section 5 that seems to freeze majority-minority districts for twenty-five years raises concerns about racial predominance akin to those expressed in the *Shaw* line of cases. The decision to mandate a particular view of descriptive representation in a subset of states also raises concerns that Congress has exceeded its remedial and prophylactic authority under section 2 of the Fifteenth Amendment or section 5 of the Fourteenth Amendment.[99]

While Persily's standard avoids constitutional difficulty, so too would a standard that draws from the Court's ability-to-elect discussion (to the extent that the Court was motivated by constitutional avoidance in its ability-to-elect discussion), as proposed by this Note.[100]

E. Proposed Ability-to-Elect Standard

This Note draws from the ability-to-elect discussion in *Georgia v. Ashcroft* to propose a standard for the following reasons: First, the legislative history is self-contradictory regarding a standard.[101] Second, the language of the VRARA only overrules the *Ashcroft* standard for a *prohibited effect*.[102] The language standing alone does not overrule the

97 See *infra* Part II.E.

98 Persily, *supra* note 27, at 248.

99 *Id.* at 248–49.

100 *But cf. supra* note 33.

101 *See supra* Parts II.A–II.B.

102 This was the prohibited-effect standard that permitted a proposed redistricting plan's reducing the ability of minorities to elect their candidates of choice, provided there was an increase in the opportunity of minorities to participate in the political process.

discussion in *Ashcroft* describing two proposed redistricting plans that do not reduce the ability of minorities to elect their candidates of choice—the language actually draws attention to it. Third, and perhaps most compellingly, the dissent signed on to the ability-to-elect discussion, only taking issue with the standard for a prohibited effect.[103] A necessary caveat here is that the ability-to-elect discussion was dictum, as the Court never had to rule on whether the proposed redistricting plan reduced the ability of minorities to elect their candidates of choice. The Court held that even if the redistricting plan reduced the ability of minorities to elect their candidates of choice, the district court had failed to consider whether there was an increase in the opportunity of minorities to participate in the political process.

The discussion in *Ashcroft* described two proposed redistricting plans that would not reduce the ability of minorities to elect their candidates of choice: First, starting with the uncontroversial proposed redistricting plan, "[i]n order to maximize the electoral success of a minority group, a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will elect the candidate of their choice."[104] Controversially, a state can "choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice."[105] The Court explained that while the second option creates greater risk that minorities will not elect their candidates of choice, "[s]uch a strategy has the potential to increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose."[106]

1. Classification of Districts

The proposed standard requires that the districts in the benchmark districting and proposed redistricting plans be classified in terms of the likelihood of minorities electing their preferred candidates of choice, not in terms of the number of minorities in the district. There are five kinds of districts: (1) A safe district, as the term was used in *Ashcroft*, is a district in which it is highly likely that minorities will elect their preferred candidates of choice, without assistance

103 Georgia v. Ashcroft, 539 U.S. 461, 492–93 (2003) (Souter, J., dissenting).
104 *Id.* at 480 (majority opinion).
105 *Id.*
106 *Id.* at 481 (citation omitted).

from whites and other minority groups. A safe district is by definition an ability-to-elect district,[107] which is one in which it is more likely than not that minorities will elect their preferred candidates of choice. A majority-minority[108] district is not necessarily an ability-to-elect district because, inter alia, enough minorities failing to vote may endanger the likelihood of minorities electing their preferred candidates of choice. The most common form of a safe district is a supermajority-minority district.[109] (2) A coalitional district is a district in which minorities constitute the minority, but it is still more likely than not that minorities will elect their preferred candidates of choice, with assistance from whites and other minority groups. The proposed standard protects coalitional districts; that is, a coalitional district is an ability-to-elect district, just like a safe district. It is worth noting that not all ability-to-elect districts are either safe districts or coalitional districts. A district in which minorities constitute the majority and are more likely than not (but not highly likely) to elect their preferred candidates of choice is an ability-to-elect district. Safe districts and coalitional district are given their own sub-category because they are the extreme types of ability-to-elect districts. (3) A "tossup district"[110] is one in which the likelihood of minorities electing their preferred candidates of choice is significantly greater than zero, but it is not more likely than not. A tossup district is by definition not an ability-to-elect district. There may be a fifty-percent

107 The Court does not use the term "ability-to-elect district," but describes districts in which it is "likely" that minorities will elect their preferred candidates of choice as ones in which minorities have the ability to elect their preferred candidates of choice. *See id.* at 480.

108 According to Persily,

> [a]s an initial matter, the moniker "majority-minority" is not as concrete as it first sounds. The central question will often be: majority of what? That is, what should the denominator be for which minorities constitute over 50% of the given district? Should it be population, voting age population (VAP), citizen voting age population (CVAP), eligible voting population, registered voters, or likely voters?

Persily, *supra* note 27, at 241. The difficulty in defining majority-minority districts is just one of many reasons against using a standard that protects majority-minority districts.

109 A "supermajority-minority district" has a high percentage of minorities.

110 Becker, *supra* note 44, at 251. This is not a term used by the *Ashcroft* Court, but one that is necessarily implied because the Court leaves a hole in its description of districts. It jumps from an influence district (a district in which there is no or very little likelihood of minorities electing their preferred candidates of choice) to an ability-to-elect district (a district in which it is more likely than not that minorities will elect their preferred candidates of choice). *Ashcroft*, 539 U.S. at 495–96. Ostensibly, there must be a type of district between these two.

probability, which of course does not make it more likely than not. A common form of a tossup district is a minority-minority district that is not a coalitional district because there is not enough assistance from whites and other minority groups. Similarly, a majority-minority district could still be a tossup district and not an ability-to-elect district because, inter alia, enough minorities failing to vote endangers the likelihood. (4) An influence district is one in which there is zero or very little likelihood of minorities electing their candidates, but minorities "can play a substantial, if not decisive, role in the electoral process."[111] (5) Lastly, there are "hopeless districts,"[112] which are districts in which minorities have zero or very little likelihood of electing their preferred candidates of choice, and minorities do not play a role in the electoral process, which would make the district an influence district.

2. Proposed Ability-to-Elect Standard's Requirements

After categorizing the districts in the proposed redistricting plan and benchmark districting, this Note proposes a standard that requires the number of ability-to-elects districts in the proposed redistricting plan to remain the same or increase.[113] If this is the only requirement, then the proposed standard implicitly focuses on the proposed redistricting plan as a whole, not a district standing alone. Additionally, if a coalitional district is an ability-to-elect district, it is necessarily implied that the proposed standard permits the trading of safe districts for coalitional districts.[114]

This proposed standard differs from the Senate Report's—and is similar to the DOJ's—in its protection of coalitional districts. The

111 *Ashcroft*, 539 U.S. at 482.

112 The *Ashcroft* Court does not use this term or even describe this type of district, but it is necessarily implied: there must be a type of district that has the likelihood of an influence district absent the influence.

113 In the Court's ability-to-elect discussion, the number of ability-to-elect districts remained the same in the first proposed redistricting plan and increased in the second one. *See Ashcroft*, 539 U.S. at 492.

114 This is the second tradeoff in the ability-to-elect discussion and the Court probably included the ability-to-elect discussion to make clear that trading of safe districts for coalitional districts was permissible. Most notably, the dissent endorsed the trading of safe districts for coalitional districts:

> The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters.

Id. at 492 (Souter, J., dissenting).

proposed standard differs from the DOJ's in its definition of an ability-to-elect district as one in which it is more likely than not that minorities will elect their preferred candidates of choice. In contrast, the DOJ's standard requires a higher degree of likelihood to be an opportunity district. Additionally, the proposed standard permits the trading of safe districts for coalitional districts.

The Court's ability-to-elect discussion, on which this Note's proposed standard is based, has been characterized as "jarring" and "a significant departure from its earlier approach."[115] This apparently refers to permitting the trading of safe districts for coalitional districts, as the Court defined them. The Court explained the effects of such a tradeoff: "Such a strategy has the potential to increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose."[116] In short, the trading of safe districts for coalitional districts could equate to a trading of a district in which it is highly likely that minorities will elect their preferred candidates of choice for one in which it is more likely than not.[117]

I offer several responses to those who are upset by the Court's ability-to-elect discussion: First, it may be highly likely that minorities will elect their preferred candidates of choice in a coalitional district. Coalitional districts are not just districts in which it is more likely than not that the minorities will elect their preferred candidates of choice—this is only the threshold.[118] Second, coalitional districts are by definition ability-to-elect districts. It would be jarring for the Court to permit the trading of safe districts for influence districts, tossup districts, hopeless districts, or control of the state legislature by the minorities' preferred party in its ability-to-elect discussion: all of these are tradeoffs in which it is not more likely than not that minorities will elect their preferred candidates of choice. In short, standard simply permits the trading of one ability-to-elect district for another ability-to-elect district, as the Court defined an ability-to-elect district. (Admittedly, however, the Court defines an ability-to-elect district much differently than the DOJ defines opportunity districts.) Third, the Court's acknowledgment that coalitional districts are riskier than safe

115 Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 30–31 (2004).

116 *Ashcroft*, 539 U.S. at 481 (citation omitted).

117 This could mean the trading of a district with 99% probability for a district with 50.01% probability.

118 This means that a state is permitted to trade a district with a 50.01% probability for a district with 99% probability.

districts is of little significance. Ability-to-elect districts are still districts in which it is more likely than not that the minorities will elect their preferred candidates of choice. The Court is only stating the obvious: there is no guarantee in ability-to-elect districts. The Court's caveat that a "minority group's candidate may lose" does not change the fact that the coalitional district still must be one in which it is more likely than not that minorities will elect their preferred candidates of choice.

Fourth, it is easy to overreact to the Court's explanation that the tradeoff of safe districts for coalitional districts has the potential to increase "substantive representation." If the VRARA sought to prohibit trading of descriptive representation for substantive representation, one might be concerned by the Court's invocation of substantive representation. However, while permitting the trading of safe districts for coalitional districts has the potential of increasing substantive representation, it is not at the cost of descriptive representation. The trading of safe districts for coalitional districts may simultaneously increase substantive representation *and* descriptive representation, or at least maintain descriptive representation.[119] However, one could argue that the tradeoff of safe districts for coalitional districts *increases the risk of a decrease in descriptive representation.* This increase in risk is real. Minorities could have less likelihood of electing their preferred candidates of choice in coalitional districts as compared to safe districts. However, an increased risk of a decrease in descriptive representation is a far cry from what gave rise to the VRARA. In the tradeoff that gave rise to the VRARA, the decrease in descriptive representation was guaranteed; that is, a state's proposed redistricting plan could survive section 5 preclearance with *no likelihood* of minorities electing their preferred candidates of choice. States were permitted to abandon descriptive representation in the name of substantive representation, completely ignoring the likelihood that minorities will elect their preferred candidates of choice. Under the proposed standard, the states must still keep an eye on descriptive representation (i.e., maintain the same number of district in which it is more likely than not that minorities will elect their preferred candidates of choice) even if they want to seek substantive representation. Lastly, and this may be of little comfort, some scholars argue that each of the leading ability-to-elect standards permits the trading of descriptive

119 In other words, the proposed redistricting plan still must maintain or increase the number of ability-to-elect districts, which could maintain the descriptive representation.

representation for substantive representation, despite the standards' attempts to do otherwise.[120]

CONCLUSION

More work could be done on this Note's proposed standard in its definition of an ability-to-elect district as one in which it is more likely than not that minorities will elect their preferred candidates of choice. How does one calculate whether a district meets this likelihood? Should the standard account for a margin of error in calculating whether the district meets this likelihood? These questions are beyond the scope of this Note, although the DOJ's past standard's use of probabilities indicates this calculation should not be a barrier. (But arriving at precise percentages may be more difficult than what the DOJ has done in the past.) Just as the Reconstruction Amendments required the creation of the VRA, and the VRA required the creation of the VRARA, the VRARA requires the creation of a standard to make it effective. The proposed standard makes the VRARA effective in a way that may avoid constitutional difficulty by drawing from the *Ashcroft*'s ability-to-elect discussion. Even if Congress were to provide an ability-to-elect standard that codifies the DOJ's standard, *Ashcroft* indicates that the Court is not hesitant to take a hard look at the standard for section 5, even if it recently avoided the larger issue of section 5's constitutionality.

120 *See generally* Epstein & O'Halloran, *supra* note 14 (arguing that three leading proposed standards for VRARA permit trading descriptive representation for substantive representation and, thus, VRARA does not overrule *Ashcroft*).