GINGLES IN LIMBO: COALITIONAL DISTRICTS, PARTY PRIMARIES AND MANAGEABLE VOTE DILUTION CLAIMS

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In the past two decades, minority plaintiffs claiming unlawful vote dilution under section 2 of the 1965 Voting Rights Act have been required to pass the three-pronged test elaborated by the Supreme Court in Thornburg v. Gingles. *In light of a recent Supreme Court case extolling coalitional districts, the future of the first prong requiring the minority bloc to demonstrate it is sufficiently large and compact to comprise a majority of a single-member district is uncertain. These districts, eluding easy classification but understood to possess significant minority voting power without the minority bloc comprising a majority of the district, have been identified as shields against section 2 and section 5 suits challenging redistricting maps that reduced the number of majority-minority districts. In this Note, Luke McLoughlin addresses how courts should approach section 2 claims by minority blocs claiming dilution of a coalitional district itself. Arguing that* Gingles*'s framework of bright lines must be respected in any reconsideration of the first prong, McLoughlin identifies the ability of the minority bloc to comprise a numerical majority of a party primary as a potential criterion for defining coalitional districts and a potential benchmark for considering section 2 claims. As McLoughlin shows, however, such a criterion would be difficult to apply in practice, as internal party rules and state ballot access laws may thwart the creation of a viable coalition. Accuracy requires a fact-based inquiry into the coalition, while* Gingles *urges a bright-line approach. Eschewing a wholesale renovation of the* Gingles *framework, McLoughlin concludes that the two countervailing concerns are best reconciled by relying on* Gingles*'s latter two prongs and examining population within the primary, while remaining skeptical at the totality-of-the-circumstances stage of whether a true coalition has been formed. If courts alter the first* Gingles *prong to permit claims by minority blocs unable to comprise a majority in a district, McLoughlin concludes that courts must retain a corresponding alertness to the interstitial role of parties, which are capable of both facilitating and obstructing coalition politics.*

INTRODUCTION: THE CRUMBLING WALL

Section 2 of the Voting Rights Act of 1965 (VRA) is violated when, "based on the totality of circumstances, it is shown that . . . a class of citizens . . . [has] less opportunity than other members of the

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electorate to participate in the political process and to elect representatives of their choice."[1] In the past twenty years, minority plaintiffs have been able to bring section 2 challenges to new redistricting maps only when plaintiffs can satisfy the three-pronged test set forth by the Supreme Court in *Thornburg v. Gingles*:[2] (1) The minority voters are numerous and compact enough to qualify as a majority in a single district, (2) are politically cohesive, and (3) can demonstrate the likelihood of consistent defeat by white-bloc voting.[3] Each of the *Gingles* prongs has served as a de facto standing requirement for vote dilution claims brought under the VRA:[4] Once a group of minority voters meets these threshold criteria, courts address the merits of its vote dilution claim, applying section 2's totality-of-the-circumstances test.[5] With respect to the first prong, when a group of minority voters cannot demonstrate that it could form at least fifty percent of a single-member district,[6] courts consistently deny those plaintiffs a chance to show that the challenged redistricting map impermissibly violates section 2.[7] This fifty-percent rule has become all but a requirement in practice.[8] But the ground beneath this faultline has begun to quake.[9]

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1 42 U.S.C. § 1973(b) (2000).

2 478 U.S. 30 (1986).

3 *Id.* at 50–51.

4 *See* Growe v. Emison, 507 U.S. 25, 40–41 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy."). The *Gingles* prongs comprise a prudential test, judicially grafted onto the Voting Rights Act of 1965 (VRA), which targeted myriad barriers to voting. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

5 *See* 42 U.S.C. § 1973(b) (2000) (articulating totality-of-the-circumstances test).

6 *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 7 n.23 (1991) ("When a district selects only one person to fill a given office, the district is referred to as a single-member district. For example, each congressional district within a state is a single-member district because each is served by only one Representative.").

7 *See, e.g.*, Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848 (5th Cir. 1999). Applying the three-pronged test, the Fifth Circuit upheld summary judgment for the defendant school district that had been sued by a group of plaintiffs amounting to 48.3% of a single district. *See id.* at 851, 855. While this Note focuses on the first *Gingles* prong, others approach vote dilution issues from different angles. *See, e.g.*, Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2209 (2003) (assessing implications of declining racially polarized voting for coalitional districts).

8 *See supra* note 4.

9 *See infra* Parts I and II. Though the fifty-percent rule has been criticized, its benefits should not be overlooked. In the years following *Gingles*, the rule has been valuable because it attempts to ensure that only those claims where actual vote dilution has occurred come before courts. It also suggests a seemingly simple remedy to vote dilution challenges: a remedial map drawn to include fifty percent or more minority voters in a single district. *See* Metts v. Murphy, No. 02-2204, 2003 U.S. App. LEXIS 21987, at *58 (1st

Though *Gingles* has been the law of the land for nearly two decades, the Supreme Court recently held in *Georgia v. Ashcroft*[10] (a case involving another provision of the Voting Rights Act) that minority voters sometimes can wield substantially the same voting power when they comprise less than fifty percent of the electorate as they can when they comprise fifty percent or more.[11] This occurs when minority blocs inhabit so-called "coalitional districts," where consistent support from the minority bloc, along with crossover support from white voters, may result in electoral success despite the absence of a fifty-percent majority.[12] In *Ashcroft*, these coalitional districts were treated as shields against the claim that a statewide map caused "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[13] With a fifty-percent majority rendered less important in the retrogression inquiry, the question arises whether the fifty-percent rule should be abandoned altogether in the vote dilution inquiry. If coalitional districts can be a shield for section 5 purposes, can they also be a sword for section 2 purposes? And if so, how are coalitional districts to be defined such that they can be identified quickly under a refashioned *Gingles* test?

Gingles's fifty-percent rule is aimed at demonstrating a prima facie baseline level of voting strength in existing (or potential) majority-minority districts.[14] In the absence of the fifty-percent rule, some other defining feature of coalitional districts could perform a similar function.[15] Some other objective measurement of minority

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Cir. Oct. 28, 2003) (Selya, J., dissenting) ("The *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of the circumstances comes into play." (emphasis added)), *vacated en banc* 363 F.3d 8 (1st Cir. 2004).

[10] 539 U.S. 461 (2003). The Department of Justice in *Ashcroft* claimed that the new map violated section 5 of the VRA, which aims to "insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

[11] 539 U.S. 461.

[12] *See id.* at 483 ("Section 5 leaves room for States to use these types of influence and coalitional districts."); *see also id.* at 492 (Souter, J., dissenting) (defining "coalition districts" as districts "in which minorities are in fact shown to have a similar opportunity [to elect candidates of their choice as majority-minority districts] when joined by predictably supportive nonminority voters").

[13] *Beer*, 425 U.S. at 141.

[14] The term "majority-minority district" refers to a district "in which a majority of the population is a member of a specific minority group." Voinovich v. Quilter, 507 U.S. 146, 149 (1993).

[15] *See id.* at 158 ("[T]he first *Gingles* precondition . . . would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today."); *see also* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1553 (2002) ("What

voting strength could, in theory, provide an equally sufficient baseline for assessing whether the voting power of coalitional districts has been diluted. One potential proxy for power in these districts is whether the minority bloc can comprise a majority of the voters in a primary election.[16]

Using control-of-the-primary (in pure numerical terms) as a new cutoff for section 2 claims has three particularly attractive features. First, a focus on the primary nicely distinguishes between coalitional districts and harder-to-define "influence districts," where minority voting power is more nebulous.[17] Second, this approach would seem to rely on voting data that is easy to obtain and analyze. Third, it is an elegant solution to the question of when minority blocs can put forth claims founded on their *ability to influence* general elections in that it uses the *ability to elect* (a key concept in *Gingles*) as the foundation for ability to influence.[18] Importantly, this approach appears straight-

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should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional 'safe' district can be created? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?").

[16] This cutoff has been suggested implicitly or explicitly for some time. *See, e.g.*, Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1393 (2001) (proposing framework for analyzing "effective minority districts"); Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 21 (2002) (envisioning no coalitional district as possible "unless the black population is sufficiently large and cohesive to *nominate* a black candidate in the Democratic primary"); Pildes, *supra* note 15, at 1534 ("[I]f black voters have effective control-of-the-primary election, those voters will determine who represents the district, even if black voters are not a majority of the district overall."); *see also* Beth A. Levene, Comment, *Influence-Dilution Claims Under the Voting Rights Act*, 1995 U. CHI. LEGAL F. 457, 476 (finding relevant minority bloc's "new influence . . . over the Democratic primary"); Stanley Pierre-Louis, Comment, *The Politics of Influence: Recognizing Influence Dilution Claims Under Section 2 of the Voting Rights Act*, 62 U. CHI. L. REV. 1215, 1236 (1995) (arguing that in refashioned *Gingles* test, "minority plaintiffs must demonstrate the potential power of their influence in either primary or general elections"). One recent Note simply calls for a new *Gingles* test, using the primary tier as a cutoff instead of the fifty-percent rule, without discussing how parties operate in practice or whether *Gingles*'s bright-line nature would be preserved. *See* Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2609 (2004) (recommending primary tier as "different sort of majority requirement" but leaving implications unexplored).

[17] In the years following *Gingles*, the term "influence districts" has come to mean both the universe of sub-fifty percent minority bloc districts and those blocs with populations too small to be considered coalitional district claims. I adopt the terminology employed by Richard Pildes in his recent article. *See* Pildes, *supra* note 15, at 1539–40 ("The concept of influence is nebulous and difficult to quantify. In contrast, coalitional districts do not present these same difficulties. A coalitional district is defined in terms of actual electoral outcomes . . . .").

[18] The *Gingles* majority found that ability-to-elect claims by minority blocs were cognizable under the VRA but left open the question whether ability-to-influence claims were cognizable. *See* Thornburg v. Gingles, 478 U.S. 30, 46 n.12 (1986) (declining to consider

forward, a key virtue in the context of voting rights cases, a context that "cries out for any legal oversight to take the form of clear, readily-followable rules."[19] The question for future voting rights cases is: Can the fact that a minority bloc comprises a majority in a party primary serve as a new bright-line threshold for minority voting strength under section 2 of the Voting Rights Act and *Gingles*?[20]

This Note contends that the fact that a group comprises a racial majority within the party primary should be utilized as a new *Gingles* prong only as a last resort.[21] While the use of the party primary as part of a new *Gingles* test is an enticing answer to the coalitional district puzzle, the complexities of party primary rules strongly suggest that lowering the fifty-percent bar should not be the first step courts take. Indeed, altering one of *Gingles*'s prongs may risk unraveling the entire framework.

Minority blocs inhabiting coalitional districts should not be foreclosed from bringing section 2 claims, but comprising a majority greater than fifty percent in a party primary is a flawed cutoff. If courts elect to rely upon numerical control-of-the-primary, that crite-

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"whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections"). Ability to elect is thus a key element of the coalitional districts inquiry. *See, e.g.*, Rodriguez v. Pataki, 308 F. Supp. 2d 346, 387 (S.D.N.Y. 2004) (describing inquiry designed to "determine whether Plaintiffs' Proposed District 8 fulfills a modified first *Gingles* precondition requiring a 'potential to elect'"); *cf.* Georgia v. Ashcroft, 539 U.S. 461, 495 (2003) (Souter, J., dissenting) ("[H]ow does one put a value on influence that falls short of decisive influence through coalition?").

[19] Pildes, *supra* note 15, at 1556. Similarly, recent case law indicates that the Court is on an "obvious and continual search throughout this field for simple, bright-line rules that enable judicial administration in this area to minimize (or appear to minimize) the Court's deeper immersion into questions that might appear to implicate the Court in the distribution of political power." *Id.* at 1549. For a discussion of the importance of the chosen population metric to the search for bright lines, see *infra* Part I.B.

[20] The notion that *Gingles*'s fifty-percent requirement should be re-examined has faced strong opposition in the past. Some courts have derided the notion that anything less than fifty percent presents a judicially manageable claim. *See, e.g.*, Gingles v. Edminsten, 590 F. Supp. 345, 381 (E.D.N.C. 1984) *rev'd sub. nom.* Thornburg v. Gingles, 478 U.S. 30 (1986) ("Short of [the majority] level, there is no such principled basis for gauging voting strength. . . . Nothing but raw intuition could be drawn upon by courts to determine . . . the size of those smaller aggregations having sufficient group voting strength to be capable of dilution in any legally meaningful sense . . . ."); *see also* Parker v. Ohio, 263 F. Supp. 2d 1100, 1108 (S.D. Ohio 2003) (Graham, J., concurring) ("If influence claims are permitted, then any system of districting, no matter how fair and impartial in its conception, is subject to attack . . . .").

[21] It is no small irony that party primaries are now being looked to in order to vindicate the voting rights of minorities, given that party primaries thwarted those same rights for decades. *See infra* Part III. For a discussion of the White Primary cases, *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944), see *infra* note 102 and accompanying text.

rion should be looked to only after a court has found that the minority bloc in question has satisfied the other two *Gingles* requirements: minority voter cohesion and voter polarization.[22] Even then, party rules must be scrutinized heavily at the totality-of-the-circumstances stage in order to ensure that a coalitional district is a "real prospect,"[23] not a Potemkin coalition where party insiders—rather than the minority bloc—determine the nominee.

The Supreme Court's modern line of cases involving political party autonomy has repeatedly upheld exclusionary party rules, and this line of cases has important ramifications for the coalitional districts endeavor.[24] An increased emphasis on primaries in the voting rights context must take into account this parallel strand of cases, and courts must be cognizant of internal party rules in any assessment of voting power within the party primary. Put simply, a minority bloc's numerical control-of-the-primary must be viewed cautiously, and using that criterion as part of the *Gingles* test requires a corresponding alertness as to whether party rules, in fact, frustrate the formation of coalitional districts.

While this is of course important when courts are analyzing—at the totality-of-the-circumstances stage—whether a map that once included majority-minority districts violates section 2 by creating coalitional districts instead, control-of-the-primary is more important to the *Gingles* inquiry in cases where a minority bloc, having no ability to comprise a majority in any district, has a coalitional district dismantled. A challenge by minority blocs formerly inhabiting majority-minority districts would pass the first *Gingles* prong in virtually all cases, making the key issue for courts and litigants whether or not putative coalitional districts will actually perform for minority voters. This Note deals with the separate issue of how courts should approach section 2 claims by sub-fifty percent blocs themselves, given *Gingles*'s existing bright lines.

Part I of this Note sketches the battle in *Gingles* itself over whether a fifty-percent rule should exist and explores how that numerosity requirement has played out in practice in the cases that

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[22] Of course, additional emphasis on the latter two prongs suggests that they too will come under pressure—from claimants who narrowly fail either prong 2 or 3—to be less strict. But as one scholar has noted, "[T]he most persuasive interpretation of Justice Brennan's prevailing opinion and Justice O'Connor's concurrence in *Gingles* is that the three prongs of the *Gingles* test ought to be considered as a unit, not separately." J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 592 (1993).

[23] *See* Georgia v. Ashcroft, 539 U.S. 461, 493 (2003) (Souter, J., dissenting) (arguing that percentages may belie whether "coalitions with minorities [are] a real prospect").

[24] *See infra* Part II.

followed, examining how courts applied the fifty-percent rule and identifying weaknesses which surfaced in its application. Part II discusses the advent of the control-of-the-primary test as a potential method of identifying coalitional districts and examines recent cases where courts have struggled with coalitional districts and the vote dilution inquiry. Part III discusses flaws in using control-of-the-primary as a substitute for *Gingles*'s fifty-percent requirement. Though the ability to control a party primary might seem to be a good cutoff point, it is no panacea, given the multiple forms of selecting nominees and the Supreme Court's robust conception of party autonomy. Part IV concludes that the conflict between the need for bright lines under *Gingles* and the role that internal party workings play in any fair assessment of coalitional power is best resolved by viewing control-of-the-primary skeptically—recognizing the limited comparative benefits of the control-of-the-primary test over the other *Gingles* prongs and acknowledging the outcome-determinative nature of party rules. This Part examines a unique section 2 case, *Martinez v. Bush*,[25] which analyzed coalitional districts with reference to party primaries, state election law, and actual outcomes.

This discussion is timely because the issue is likely to be considered by the Supreme Court in the near future. In 1999, the Supreme Court invited the Solicitor General to submit a brief to the Court assessing the continued validity of the fifty-percent requirement when the Court considered granting certiorari in *Valdespino v. Alamo Heights Independent School District.*[26] The government argued, "In our view, Section 2 and *Gingles* do not impose an absolute requirement that a minority be shown to constitute a majority in a single member-district."[27] The Court denied certiorari in that case,[28] but now that the Court in *Georgia v. Ashcroft* has embraced coalitional districts in the section 5 context, it is only a matter of time before the other shoe drops in the section 2 context. As the Supreme Court prepares to answer this lingering question, it is important to consider the issue through the lenses of the Court's guiding principles and interlaced assumptions involving primaries, voting, and representation. This assessment is vital as voting rights law enters a new era, and courts and scholars consider alternatives to a crumbling wall.

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[25] 234 F. Supp. 2d 1275 (S.D. Fla. 2002).

[26] 528 U.S. 804 (1999).

[27] Brief for the United States as Amicus Curiae at 6, *Valdespino* (No. 98-1987).

[28] *See* Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848 (5th Cir. 1999), *cert denied*, 528 U.S. 1114 (2000).

I
TWO VIEWS OF POLITICS AND ONE OPEN QUESTION

This Part outlines the origins of the *Gingles* test with emphasis on the fifty-percent rule and how it has been applied. The fifty-percent rule has become a de facto requirement under the vote dilution assessment, despite Justice Brennan's majority opinion in *Gingles* leaving open the question of whether section 2 claims could be brought by plaintiffs numbering fewer than fifty percent of a district's population.[29]

While the question remained open, district and appellate courts began applying the fifty-percent rule mechanically, often resulting in some preposterous outcomes.[30] Meanwhile, the Court began to observe and emphasize the value of districts that were not heavily majority-minority, eventually leading the Court in *Georgia v. Ashcroft* to revisit certain views of politics it had espoused in *Gingles* and to endorse the role of coalitional districts in the retrogression inquiry. *Georgia v. Ashcroft* ultimately creates a significant challenge to *Gingles*, as it marks a shift away from viewing voting strength solely through the lens of electoral victories (the crux of Justice Brennan's majority opinion) and toward analyzing voting strength on the basis of more nuanced and textured measures (the crux of Justice O'Connor's concurrence).[31]

A. Gingles*'s Foundations*

After the passage of the Voting Rights Act of 1965, the Supreme Court interpreted the statutory language of the Act to require that plaintiffs claiming vote dilution show that defendants' actions had both discriminatory intent and effect.[32] This interpretation was rejected explicitly by Congress when it altered the Voting Rights Act in 1982.[33] The 1982 amendments required that courts considering

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[29] *See* Thornburg v. Gingles, 478 U.S. 30, 46 n.12 (1986) (leaving question open); *see also supra* note 18 and accompanying text.

[30] *See infra* notes 59–69 and accompanying text.

[31] While *Ashcroft* is a section 5 case, it is a logical extension of Justice O'Connor's concurrence in *Gingles* that courts should not refuse to hear section 2 claims by sub-fifty percent districts. *See Gingles*, 478 U.S. at 89 n.1. However, the Court has made clear that the two sections are not identical. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 476 (1997) ("[W]e have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States.").

[32] *See* Mobile v. Bolden, 446 U.S. 55, 74 (1980) ("The ultimate question remains whether a discriminatory intent has been proven in a given case.").

[33] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 393 n.191 (1991) (listing *Mobile v. Bolden* as example of Supreme Court statutory interpretation overriden by later congressional enactment).

vote dilution claims perform a totality-of-the-circumstances inquiry into whether "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open" such that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[34] The Court took up the newly revised Voting Rights Act four years later in *Thornburg v. Gingles*.[35]

In interpreting the newly amended Act, the Supreme Court laid out certain preconditions that plaintiffs (who were challenging a system of multimember districting) had to satisfy before the Court began the section 2 totality-of-the-circumstances inquiry.[36] Plaintiffs first had to demonstrate that their group was "sufficiently large and geographically compact to constitute a majority in a single-member district[,] . . . politically cohesive[,] . . . [and] that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[37] By imposing the requirement that the group of minority plaintiffs be "sufficiently large" to "constitute a majority in a single-member district," the Court sought to maintain a connection between the minority population's aggregate voting strength and the allegedly unacceptable voting scheme or practice.[38] In other words, for a dilution claim to proceed under section 2, plaintiffs must be able to demonstrate a threshold showing of baseline voting power. The Court left open the question of how to address claims by sub-fifty percent minority blocs[39] but indicated that any analysis of such blocs would be undertaken within a framework that focused on electoral victories, not just electoral influence: "Unless minority voters possess the *potential* to elect representatives in the

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[34] 42 U.S.C. § 1973(b) (2000).

[35] 478 U.S. 30 (1986).

[36] A multimember district is a district in which voters in a region vote for a group of candidates. Thus the majority in the region consistently can determine all contests. *See id.* at 63 ("[M]ultimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district.").

[37] *Id.* at 50–51; *see also* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 58 (1999) (describing latter two prongs as based on 1982 Senate Report and first prong as "not mentioned in [*White v. Regester*, 412 U.S. 755 (1973)] or the Senate report but suggested as a criterion in at-large cases during 1981 House testimony . . . .").

[38] Failing to rise to the fifty-percent mark was a failure to show "the *multimember form* of the district . . . [is] responsible for minority voters' inability to elect [their] candidates." *Gingles*, 478 U.S. at 50.

[39] *See id.* at 46 n.12 (leaving question open).

absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."[40]

Two conceptions of politics and voting power were articulated in *Gingles*, and these two conceptions ultimately frame the two competing approaches to coalitional district claims. Justice Brennan, speaking for the majority in *Gingles*, focused on elections and clear victories.[41] Brennan differentiated between dilutions of the vote which impair a numerically sufficient minority bloc's "ability *to elect* the representatives of their choice"[42] and a claim "brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections."[43] The bright-line approach in Brennan's opinion made a single factor—winning elections outright—the focal point of a section 2 claim.

Justice O'Connor's opinion concurring in the judgment, by contrast, took a more textured approach to politics and vote dilution. O'Connor noted the "artificiality of the Court's distinction" between ability to elect and ability to influence, and added that "the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories."[44] Whereas for Justice Brennan, the crux of the vote dilution claim was failure to win office,[45] Justice O'Connor's opinion considered politics on a broader scale, beyond simple electoral victories. O'Connor urged an inquiry that looked beyond the outcome of the general election in a particular district,[46] and concluded that the newly created *Gingles* prong one was too strict:

> [I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at

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[40] *Id.* at 50 n.17.

[41] *See id.* at 48 (holding that plaintiffs must prove that contested districting frustrates "their ability to elect their preferred candidates").

[42] *Id.* at 46 n.12.

[43] *Id.*

[44] *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring).

[45] *See Gingles*, 478 U.S. at 50–51 (focusing on minority voters' "potential to elect").

[46] *See id.* at 84–85 (O'Connor, J., concurring) ("[T]he Court adopts a test, based on the level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution."). This foreshadows Justice O'Connor's approach in *Georgia v. Ashcroft*, seventeen years later: "In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice." 539 U.S. 461, 480 (2003).

least under this measure of its voting strength, it would be able to elect some candidates of its choice.[47]

This vision of politics—glossing the distinction between ability to influence and ability to elect—would find forceful expression in Justice O'Connor's majority opinion in *Georgia v. Ashcroft*.[48] However, even if O'Connor's vision has trumped Brennan's in the section 5 context,[49] it is important to remember that both Brennan and O'Connor agreed in *Gingles* that it was plausible that a bloc of minority plaintiffs might present a viable claim of a section 2 violation despite failing to satisfy the numerosity requirement.[50]

B. The Fifty-Percent Rule in Application

Voting rights litigants recognized soon after *Gingles* that the numerosity requirement did not always live up to its billing as a rational threshold for voting claims.[51] Although the *Gingles* prongs

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[47] *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring).

[48] 539 U.S. 461 (2003); *see infra* notes 83–88 and accompanying text (discussing coalitional districts under *Ashcroft*).

[49] Notably, the decision by Justice O'Connor in *Georgia v. Ashcroft* suggests that many of the arguments made in her *Gingles* concurrence have eclipsed Justice Brennan's arguments and are now binding law. In *Ashcroft*, O'Connor emphasized the myriad ways in which individuals can impact the political process without winning an election outright. *See* 539 U.S. at 480–91. In some ways, the attempt to square the numerosity requirement in *Gingles* with the textured approach to politics in *Ashcroft* reflects the continuing difficulty in mapping a rigid Brennan concept onto a flexible O'Connor worldview.

[50] *Compare Gingles*, 478 U.S. at 46–47 n.12 ("We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections."), *with Gingles*, 478 U.S. at 89 n.1 (O'Connor, J., concurring) ("I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice."). Even though *Gingles* suggests a willingness on Justice O'Connor's part to permit sub-fifty percent section 2 claims, the decision does not hint at an answer to the question: "How low is too low?"

Nor does *Gingles* hint that the party primary is a plausible cutoff. An often-forgotten aspect of *Gingles* is that the Court fails to note the role of party primaries in its discussion of ability to elect or influence, despite featuring primaries in the appendices immediately following the Brennan and the White opinions. *See id.* at 80–82 (showing election data). Appendix A includes tables which identify certain vote percentages broken down by race, general election, and primary election. The data on primaries is there, but even in dicta it is not mentioned as important. Justice Brennan's opinion also makes reference to the relevance of demonstrating that a minority group could form a majority in single-member district elections because single member districts are the "smallest political unit from which representatives are elected" but did not mention primaries. *Id.* at 50 n.17.

[51] *See* J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 565 (1993) ("As a matter of logic, the statement in the lower court opinion in *Gingles* that 'no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority' is simply

were administered dutifully by appellate and district courts, weaknesses emerged in the fifty-percent rule's ability to define the relevant population, create a functional remedial district, and appear rational in the closest cases.[52] These weaknesses highlight the prong's functional aim at the heart of the formal fifty-percent requirement: connecting the challenged voting practice to the baseline voting power of a minority bloc.[53] The fifty-percent rule connects a wrong (vote dilution) with a remedy (a remedial map),[54] but several cases suggest that the functional connection can be preserved without retaining the fifty-percent rule itself.[55]

First, courts have differed as to what type of "numerosity" is appropriate. It remains a hotly debated issue (with enormous stakes, given that litigants have claims accepted or dismissed depending on the formulae chosen) what precisely is the proper population that should be examined in the numerosity inquiry. Citizen voting age population and mere voting age population are the leading contenders, but eight years after *Gingles*, the Supreme Court in *Johnson*

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false." (quoting *Gingles v. Edminsten*, 590 F. Supp. 345, 381 n.3 (E.D.N.C. 1984))). The flaws inherent in the census, specifically the undercounting of minorities, are additional grounds for skepticism about the usefulness of a rigid fifty-percent rule. In addition, due to the disenfranchisement of ex-felons, in several states the black voting age population figure will overrepresent the actual number of black voters eligible to register to vote.

[52] *See infra* notes 59–69 and accompanying text.

[53] Brennan himself noted that the fifty-percent rule was ultimately about causation. Failing to meet the numerosity requirement was a failure to show "the *multimember form* of the district . . . [is] responsible for minority voters' inability to elect candidates." *Gingles*, 478 U.S. at 50.

[54] While the "sub-fifty percent" question remained open after *Gingles*, the numerosity requirement nevertheless remained in effect and became one of the "threshold findings for a vote dilution claim." Abrams v. Johnson, 521 U.S. 74, 91 (1997). Despite taking care to leave the question open, the Supreme Court routinely stated that the numerosity requirement was foundational to a section 2 claim. Justice Scalia stated in *Growe v. Emison*: "Unless [the three *Gingles* factors] are established, there neither has been a wrong nor can be a remedy," before immediately noting in a footnote that the question as to the numerosity requirement still remained open. 507 U.S. 25, 40–41 & 41 n.5 (1993). When subsequent plaintiffs challenged district maps that included single districts (as opposed to multimember), the Court found the *Gingles* approach equally applicable. *See, e.g.*, *Growe*, 507 U.S. 25 (applying fifty-percent rule to challenge single-member districts); Voinovich v. Quilter, 507 U.S. 146 (1993) (same).

[55] *See* 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, 202 (1989) ("To the extent that courts have read *Gingles* to elevate the ability to create a district with a majority-black electorate into a threshold requirement for establishing liability in all vote dilution litigation, they have improperly applied one particular theory of liability to other distinct types of vote dilution.").

v. De Grandy[56] took no position on this issue, and eighteen years after *Gingles*, it still remains undecided.[57]

Second, to the extent that fifty percent of the district population was considered by Brennan and the majority in *Gingles* to be a sufficient quantity such that a minority bloc could have an equal chance of electing candidates of its choice, history has shown that fifty percent of the district often is neither necessary nor sufficient to ensure that equal chance.[58] In voting rights cases following *Gingles*, a supermajority often was necessary to ensure an equal chance of electing a candidate due to differing levels of voter registration, citizenship, age, and turnout amongst minority and white populations.[59] This led to an assumption by some that it was incumbent upon line drawers to draw majority-minority districts with at least a sixty-five percent minority population.[60]

Thus, while the fifty-percent showing was treated as sufficient for mustering a majority under *Gingles*'s first prong, it often provided little comfort for minority blocs if a supermajority district was not created later in a remedial map. In fact, remedial maps at times were rebuked when they failed to compensate for anticipated depressions of the minority bloc vote.[61] Fifty percent, on its own, is no guarantee

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56 512 U.S. 997 (1994).

57 *See id.* at 1008–09 (leaving open question of which population should be basis for vote-dilution inquiry).

58 *See* Ketchum v. Byrne, 740 F.2d 1398, 1415–16 (7th Cir. 1984) (noting that fifty percent is not always sufficient to create viable majority-minority district and discussing factors that raise percentage required for viability).

59 *See generally* Theane Evangelis, Note, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, 77 N.Y.U. L. REV. 796, 799 nn.14 & 16 (2002) (collecting cases involving population adjustments in remedial districts on account of registration, citizenship, age, and turnout).

60 *See Ketchum*, 740 F.2d at 1408 n.7 (7th Cir. 1984) (noting that sixty-five percent is "percentage considered necessary to ensure blacks a reasonable opportunity to elect candidates of their choice"); *see also* United Jewish Orgs. v. Carey, 430 U.S. 144, 162–66 (1977) (discussing sixty-five percent assumption). There were also courts that understood the Voting Rights Act to demand the creation of majority-minority districts whenever possible. *See* Rural W. Tenn. Afr.-Am. Affairs Council, Inc. v. McWherter, 836 F. Supp. 453, 466 (W.D. Tenn. 1993) ("[T]he language of § 2 and its legislative purposes strongly favor the creation of majority black districts and visible black representation, instead of 'influence' districts, when block voting is racially polarized and there is a history of racial discrimination.").

61 *See* Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998) ("In one of the wards that we have called a white-majority ward, blacks have 54 percent of the voting-age population. It is nevertheless a white-majority ward because blacks constitute only 55 percent of the ward's total population, which is much less than 65 percent . . . ."). *But see McWherter*, 836 F. Supp. at 467 (indicating that, where black voter turnout surpassed white voter turnout, fifty-five percent was acceptable).

that a remedial map will do what the VRA promises.[62] What the fifty-percent rule attempts to achieve in strict terms—assurance that the potential to elect a candidate exists—conceivably could be expressed with equal effectiveness by a different test.[63]

Third, when applied strictly in the closest of cases, the numerosity requirement seems to lose much of its rationale, at times producing absurd results. In *Valdespino v. Alamo Heights Independent School District*,[64] the Fifth Circuit upheld a district court's denial of minority voters' dilution claim even though the defendant school district conceded that a minority bloc could comprise 48.3% of a single district. The 1.7% margin of defeat was directly attributed to a temporary closing and re-opening of a single apartment complex.[65]

The same harsh result befell the plaintiffs in *Negron v. City of Miami Beach*,[66] in which the Eleventh Circuit affirmed the ruling of the district court which held that because the citizen voting age population amounted to no more than 48.45%, 47.58%, and 41.17% in three hypothetical districts, the vote dilution claim had failed the *Gingles* test.[67] Perhaps the most unique result occurred in *McNeil v. Springfield Park District*,[68] where the minority bloc comprised *greater* than fifty percent of a hypothetical district's overall population but was denied relief because the court found that the bloc would not comprise fifty percent of the voting age population.[69]

Even the rule of "one person, one vote" in state legislative elections—a constitutional holding of the Court, not a gloss on a statute—is administered with greater flexibility than this rule.[70] In adhering to

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62 While the sixty-five percent assumption was abandoned over time as adjustments for low voter turnout and registration became less necessary (or less justifiable), the requirement of going above fifty percent nevertheless shows that fifty percent is not helpful as a "talismanic" number. Pildes, *supra* note 15, at 1555 (referring to fifty-percent rule as "talismanic requirement, divorced from any underlying functional reasons . . . .").

63 Just as "minority supermajorities" were necessary when various indicia indicated such a supermajority was needed to reach equal opportunity to elect, minority "submajorities" now can be created such that a forty-seven percent minority district amounts to a fifty-percent citizen voting age population on election day. *See* Grofman et al., *supra* note 16, at 1407 (noting that in certain districts, African-American turnout was higher than white turnout, thus sub-fifty percent African-American citizen voting age population district could be drawn).

64 168 F.3d 848, 850–51 (5th Cir. 1999).

65 *See id.*

66 113 F.3d 1563 (11th Cir. 1997).

67 *See id.* at 1567–68.

68 851 F.2d 937 (7th Cir. 1988).

69 *See id.* at 944–48.

70 *See, e.g.*, Brown v. Thomson, 462 U.S. 835, 842 (1983) (stating that, in reapportionment of state legislative districts, "minor deviations" from one-person, one-vote rule are constitutional, as "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of

the requirements of one person, one vote, line drawers usually can assume compliance with the Equal Protection Clause when the size of districts differs by no more than ten percent. Minority bloc plaintiffs seeking redress under section 2, however, get no such leeway from the *Gingles* numerosity requirement.

In sum, the fifty-percent requirement often has failed to fulfill its promise to act as a rational threshold that filters out those claims which are simply too tenuous.[71] At least one explanation for this is the fact that the fifty-percent rule is simply a formal name for a functional tool intended to connect a current map with a hypothetical one, and to connect a wrong to a remedy.[72] As strict adherence to the fifty-percent rule becomes harder to justify, it becomes clear that that the aim of *Gingles*'s first prong can be vindicated without slavishly adhering to the numerical rule. A more functional approach also seems to favor the recent preference of coalitional districts over districts that are nakedly majority-minority.

C. The Rise of the Coalitional District

Though line drawers created majority-minority districts for years, political forces eventually began to push them out of favor, and the Court has welcomed this change.[73]

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minor deviations"). *But see* Cox v. Larios, 124 S. Ct. 2806, 2808 (2004) (Stevens, J., concurring) ("[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than ten percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.").

[71] At least one federal appeals court has found that there is a set of minority vote dilution claims for which no numerosity threshold is required. In *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), the Ninth Circuit held that *Gingles*'s preconditions were inapplicable in cases of intentional vote dilution.

[72] *See* Growe v. Emison, 507 U.S. 25, 40 (1993) (finding that fifty-percent rule is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district"); Martinez v. Bush, 234 F. Supp. 2d 1275, 1334 (S.D. Fla. 2002) ("[C]onfluence of the three *Gingles* preconditions establishes a causal link between the challenged electoral scheme and the vote dilution injury plaintiffs allege."). It is clear from the close cases that such potential can be shown in other ways.

[73] *See* Georgia v. Ashcroft, 539 U.S. 461, 482 (2003) (declaring that with regard to descriptive representation and substantive representation, "Section 5 gives States the flexibility to choose one theory of effective representation over the other"). Two scholars recently echoed the call for understanding the benefits of districts founded on coalitions. *See* Henry Louis Gates, Jr., Editorial, When Candidates Pick Voters, N.Y. TIMES, Sept. 23, 2004, at A27 (going so far as to hint that African Americans would be better served if Congress were not to re-authorize section 5 of VRA in 2007); *see also* Samuel Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success?, 104 COLUM. L. REV. 1710, 1731 (2004) (noting "mischief that section 5 can play in stalling coalition politics and inviting politically inspired interventions from outside the covered jurisdictions").

The political reasons were obvious. Minority candidates could be elected by districts that were not majority-minority, and it was not by accident. Often, once a majority-minority district elected a minority candidate, the candidate began to gain more white votes due to various factors including the power of incumbency, rendering the surplus of minority votes less necessary.[74]

Meanwhile, the Court became more and more openly concerned with racially conscious districting in its most blatant forms. A host of redistricting cases reflected the concerns of several justices that districts appeared to have been drawn with "too much" attention to race.[75] This was true even when it was clear that the line drawers were taking race into account in order (they believed) to comply with, rather than circumvent, the VRA. "[R]eapportionment is one area in which appearances do matter," the Court stated in *Shaw v. Reno*,[76] where it found a new cause of action under the Fourteenth Amendment for citizens harmed by district maps. Writing for the majority in *Shaw*, Justice O'Connor stated, "[A] racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."[77] She further stated that some majority-minority districts bore "an uncomfortable resemblance to political apartheid."[78] Justice Souter, writing for the Court in

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[74] *See* Grofman et al., *supra* note 16, at 1403 ("Despite an unmistakable pattern of racially polarized voting and little evidence of an incumbency advantage for these black candidates, these African-American incumbents continued to win election to Congress even after their districts were no longer majority black."). In addition, the externalities of drawing majority-minority districts had been clear to political actors for some time. Republicans had been working with African Americans in the Democratic Party to draw maps that ensured some safe seats for black Democrats at the expense of a bevy of seats for white Democrats, thus contributing to a gradual Republican takeover of the South. Known as "Project Ratfuck," this plan had become more and more successful, and eventually the political players recognized its effect. *See* Jeffrey Toobin, *The Great Election Grab*, THE NEW YORKER, Dec. 8, 2003, at 63. Of course, this project no doubt had the aid of Democrats and disinterested actors who thought compliance with the VRA required the creation of majority-minority districts whenever possible. This view was not repudiated forcefully until the Supreme Court's 1994 decision in *Johnson v. De Grandy*, 512 U.S. 997, 1016–17 (1994) (holding that states are not required to maximize number of majority-minority districts).

[75] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 962–63 (1996) (subjecting Texas redistricting plan to strict scrutiny and holding that redistricting amounted to unconstitutional racial gerrymandering); Shaw v. Reno, 509 U.S. 630, 649 (1993) ("[P]laintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters in different districts on the basis of race . . . .").

[76] *Shaw*, 509 U.S. at 647.

[77] *Id.* at 648.

[78] *Id.* at 647. For a critique of *Shaw*'s reasoning, see KOUSSER, *supra* note 37, 379–96 (1999) (describing decision in *Shaw* as shock to voting rights specialists).

Johnson v. De Grandy,[79] similarly called the district-drawing required by the Voting Rights Act the "politics of second best."[80] In this case, and in a variety of other cases, the Supreme Court expressed its discomfort with blatant race-based line drawing and hinted at alternative ways in which the goals of the VRA might be vindicated.[81] The Court stated,

> [While] society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.[82]

Georgia v. Ashcroft, decided by the Court in June 2003, reinforced this trend. The case involved a Georgia state senate districting map alleged to be in violation of section 5 of the 1965 Voting Rights Act.[83] Section 5 is triggered when certain states or localities (which historically utilized discriminatory voting practices) alter their current voting practices, such as district maps.[84]

In elaborating the manner in which retrogression must be assessed, the Supreme Court in *Ashcroft* gave pride of place to "coalitional districts"—districts in which minorities amount to less than fifty percent of the citizen voting age population. Even though the racial composition of individual districts might change from, say, sixty percent African American to forty-six percent African American, the Court in *Ashcroft* held that such a reduction nevertheless could satisfy section 5's requirement that the map would not lead to a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[85] The Court directed lower courts to "examine whether a new plan adds or subtracts 'influence districts'—where minority voters may not be able to elect a candidate of

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[79] 512 U.S. 997, 1020 (1994).

[80] *Id.* (internal citation omitted).

[81] *Id.* (stating that minority blocs, like all blocs, must "pull, haul and trade" to succeed in politics); *see also* Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (praising "transition to a society where race no longer matters").

[82] *De Grandy*, 512 U.S. at 1020.

[83] *See Ashcroft*, 539 U.S. at 461.

[84] Section 5 mandates that voting qualifications or prerequisites in certain jurisdictions do not have "the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c); *see also* Beer v. United States, 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

[85] *Beer*, 425 U.S. at 141.

choice but can play a substantial, if not decisive, role in the electoral process," as "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."[86]

In the section 5 context, therefore, the *Ashcroft* Court held that the inquiry into whether a map was acceptable had to go beyond how many majority-minority districts were created or maintained. Instead, a more functional, context-specific inquiry was warranted in order to discern whether equal voting power could be achieved through coalitional districts as opposed to strictly race-based majority-minority districts.[87] In *Ashcroft*, all nine Justices gave their blessing to maps with such districts: A map with districts consisting of sub-fifty percent minority populations was not necessarily a retrogression from a map with majority-minority districts, if the political science data and other indicia demonstrated that minority voters had an equal chance of electing a candidate of their choice with those numbers.[88]

As a result, districts where minorities cannot amount to fifty percent have taken on newfound significance in the section 2 vote dilution context. If the "effective exercise of the electoral franchise" can be sustained by sub-fifty percent districts, it implies that minority blocs in such districts, though not able to comprise fifty percent of a single-member district, can present viable vote dilution claims. Yet this would seem to conflict with the *Gingles* requirement that minority voters amount to fifty percent in a given district.

With the decision in *Ashcroft*, the stage was set for plaintiffs to push the role of coalitional districts in the section 2 context. That was precisely what happened in several lower court cases decided in 2003 and 2004.

II

CONTROL-OF-THE-PRIMARY: PROMISE AND PROBLEMS

This Part examines the doctrinal problem courts face in the wake of *Georgia v. Ashcroft*: whether coalitional districts, extolled in the context of section 5, can be the basis of vote dilution claims under section 2.[89] If sub-fifty percent claims are to be heard, it is imperative to locate limiting principles for coalitional districts that will preserve

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[86] *Ashcroft*, 539 U.S. at 482.

[87] *See id.* at 479–85.

[88] *Id.* at 492 (Souter, J., dissenting) ("I agree with the Court that reducing the number of majority-minority districts within a State would not necessarily amount to retrogression barring preclearance under § 5 of the Voting Rights Act of 1965.").

[89] The empirics of party procedures that make coalitional districts a problematic basis for vote dilution claims are discussed in Part III.

the judicial manageability of vote dilution claims. One potential principle is whether or not the minority bloc can comprise a majority in a party primary. This Part explores how such a threshold might work (or not work) given the Supreme Court's robust vision of political party autonomy.

A. Control-of-the-Primary as a Limiting Principle

In the months following *Georgia v. Ashcroft*, courts struggled with the issue of coalitional districts in the context of section 2.[90] Each court recognized that *Gingles* had not closed the door to sub-fifty percent claims, yet almost all expressed concern as to whether alternatives to the fifty-percent rule could be consistent with *Gingles* while weeding out frivolous or marginal cases.[91] Notably, when analyzing the arguments for coalitional districts, several courts cited an article by Bernard Grofman, Lisa Handley, and David Lublin which

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[90] *See, e.g.*, Metts v. Murphy, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (leaving door open for coalitional district section 2 claim); Meza v. Galvin, 322 F. Supp. 2d 52, 64 (D. Mass. 2004) (finding plaintiffs had not met *Gingles*'s first prong but proceeding to totality-of-circumstances analysis and rejecting vote dilution claim); Rodriguez v. Pataki, 308 F. Supp. 2d 346, 382, 394 (S.D.N.Y. 2004) (finding plaintiffs had not met *Gingles*'s first prong and alternatively that no effective minority district could be formed); Session v. Perry, 298 F. Supp. 2d 451, 478, 481 (E.D. Tex. 2004) (finding plaintiffs had not met *Gingles*'s first prong and that no coalitional district had existed); Hall v. Virginia, 276 F. Supp. 2d 528, 536 (E.D. Va. 2003) (denying coalitional claim and upholding fifty-percent rule).

[91] *See, e.g.*, *Metts*, 363 F.3d at 12 ("At this point we know practically nothing about the motive for the change in district or the selection of the present configuration . . . or anything else that would help gauge how mechanically or flexibly the *Gingles* factors should be applied."); *Rodriguez*, 308 F. Supp. 2d at 383 (siding with "[c]ourts adopting the majority-in-a-district requirement [which] have emphasized the need for a bright-line rule to act as a gatekeeper"); *Perry*, 298 F. Supp. 2d at 481 ("We are not persuaded that Texas had the duty in drawing a new map to trace the old lines to avoid any disruption of coalitions. To so conclude would have profound consequences, freezing ephemeral political alliances, which are the bull's eyes of partisan redistricting."); *Hall*, 276 F. Supp. 2d at 536–37 ("Members of any protected minority group could always launch a lawsuit to increase their presence in a district from 15 percent to 20 percent, or from 20 percent to 25 percent, and argue that this increase will cause their candidate to prevail."). Some courts have savaged any process that would do away with the fifty-percent rule as inviting chaos. *See, e.g.*, Hastert v. Bd. of Elections, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (fearing "open[ing] a Pandora's box of marginal Voting Rights Act claims"); *see also* McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) ("If allowed, the 'ability to influence' claim would severely undermine whatever good purpose is served by the threshold factors. . . . Courts might be flooded by the most marginal section 2 claims . . . ."); Gingles v. Edminsten, 590 F. Supp. 345, 381 (E.D.N.C. 1984) ("We do not readily perceive the limit short of the effective voting majority level that can rationally be drawn and applied."), *rev'd sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986); *see also* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 117 (1992) (arguing that if influence dilution claims "were to be accepted widely, minorities might be harmed more than helped").

puts a strong emphasis on party primaries.[92] Thus party primaries—explicitly or tacitly—underpinned much of the courts' thinking about coalitional districts and sub-fifty percent section 2 claims.

Grofman and others suggest making control-of-the-primary a prominent means of defining coalitional districts.[93] Importantly, they do not suggest that control-of-the-primary should be a new *Gingles* prong were the fifty-percent rule to be discarded.[94] They recognize that defining coalitional districts is best achieved by careful readings of the political dynamics at work and the politics on the ground.[95] Yet, as discussed above, courts are struggling to find limiting principles, and judges may elect to substitute control-of-the-primary for the fifty-percent prong in order to allow some coalitional district section 2 claims while preventing a flood of cases.[96] Applying the logic of effective minority districts to section 2, if a minority bloc is not sufficiently numerous to comprise fifty percent of the citizen voting age popula-

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[92] *See* Metts v. Murphy, No. 02-2204, 2003 U.S. App. LEXIS 21987 at *29 (1st Cir. Oct. 28, 2003), *vacated en banc*, 363 F.3d 8 (1st Cir. 2004) (citing Grofman article); *Perry*, 298 F. Supp. 2d at 529 (Ward, J., dissenting) (mentioning article); *see also* Grofman et al., *supra* note 16. Professors Grofman and Handley submitted testimony in *Rodriguez v. Pataki*, a challenge to New York's state senate and congressional maps. 308 F. Supp. 2d 346, 403, 457–58 (S.D.N.Y. 2004). The majority in *Parker v. Ohio* did not cite the Grofman article, but Judge Gwin did cite in his dissent a comment which referenced a form of the control-of-the-primary test. 263 F. Supp. 2d 1100, 1109 (S.D. Ohio 2003) (Gwin, J., concurring in judgment) (citing Levene article); *see also* Levene, *supra* note 16, at 476 (finding relevant minority bloc's "influence . . . over the Democratic primary").

[93] *See* Grofman et al., *supra* note 16, at 1393 ("We propose a conceptual framework for determining the percentage minority needed to create an effective minority district that incorporates . . . the likely impact of the primary (and runoff) election on the ultimate electoral outcome.").

Several other thresholds have been suggested, as cracks in the fifty-percent rule began to show. Most of these attempt to provide relief to non-majority minority plaintiffs while at the same time preserving *Gingles*'s simplicity. One approach, outlined by J. Morgan Kousser, considers whether a geographically compact area, comprised of minority voters, has been divided by the line drawers. Kousser states, "In practical terms, the first question to ask in district boundary cases is whether an area of minority group concentration has been split." Kousser, *supra* note 51, at 576. Under this approach, fragmentization by the line drawer could be one prerequisite for reaching the totality-of-the-circumstances approach. However, Kousser did not call outright for fragmentization to replace the first *Gingles*'s prong. *See also* Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990) (finding liability under section 2 because defendants had sought to "fragment[ ] the Hispanic voting population"); Levene, *supra* note 16, at 473 (supporting *Gingles*'s precondition requiring "that the challenged districting plan unnecessarily split a cohesive minority group").

[94] *See* Grofman et al., *supra* note 16, at 1423 (envisioning a "case-specific functional analysis, which takes into account such factors as the relative participation rates of whites and minorities, and the degree of cohesion and crossover voting that can be expected, as well as the type of election . . . and the multi-stage election process" in order to determine "the percentage minority necessary to create an effective minority district").

[95] *Id.*

[96] *See supra* note 92 and accompanying text.

tion, yet can achieve a majority in the primary and determine the nominee, some courts may deem this to be a sufficient cutoff for finding a coalitional district present, given that such coalitional districts include an "ability to elect" element.[97]

Ashcroft enshrines coalitional districts as key building blocks in voting rights law and suggests that fifty percent as a strict cutoff worships a rule but not its reason.[98] The close cases (for example, where minority blocs comprise forty-eight percent of a hypothetical district) and the history of sixty-five percent remedial districts put the weaknesses of the fifty-percent rule in sharp relief. The Grofman article, in turn, shows how control-of-the-primary can lead to an effective minority district.[99] It therefore seems plausible for a court to find control-of-the-primary a principled basis for permitting section 2 claims by coalitional districts.

While this syllogistic reasoning is attractive, however, a note of caution is warranted. Can mere racial breakdowns of party membership rolls be a principled cutoff in reality? Is there reason to be skeptical about switching from one percentage (the percentage of eligible minority voters) to another (the racial percentage within parties)?[100]

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[97] *See* GROFMAN ET AL., *supra* note 91, at 118 ("When there are 'electability' claims at issue, there is a natural threshold. Without such a threshold, how does one decide whether shifting minorities from one district to another increases or decreases their overall influence?"). The initial decision in *Metts v. Murphy* contained only an oblique discussion of the role of political primaries, but the logic of the decision points towards using the control-of-the-primary as a limiting principle. *See* No. 02-2204, 2003 U.S. App. LEXIS 21987 (1st Cir. Oct. 28, 2003), *vacated en banc*, 363 F.3d 8 (1st Cir. 2004). Aside from the other *Gingles* prongs, the key limiting principle was that the minority bloc had to be able to elect representatives of *their choice* with the help of others, as opposed to cases where "[a] minority group may require so many crossover votes that it does not truly have the capacity to choose its own candidate, but only to help elect candidates *chosen by other groups*." *Id.* at *32 (emphasis added). Numerical control-of-the-primary is a logical cutoff for separating claims where the minority bloc is persuading others to support its candidate as opposed to the minority bloc being persuaded to support a predetermined candidate.

[98] *See* Georgia v. Ashcroft, 539 U.S. 461 (2003).

[99] *See generally* Grofman et al., *supra* note 16.

[100] Despite Justice O'Connor's extensive description in *Georgia v. Ashcroft* of potential ways in which a minority bloc may exert political influence, nowhere in the discussion of coalitional districts are primaries discussed explicitly. *See* 539 U.S. at 479–85. While one should not read too much into a "missing" discussion in an opinion, the primary was not absent from the justices' radar screen. At least one Justice raised the issue at oral argument: "In any of the analysis, do the—the judges take into account the likelihood of winning primaries as opposed to the likelihood of winning the election itself?" Transcript of Oral Argument, *Ashcroft*, 2003 WL 21055999, at *20 (No. 02-182). It also was mentioned in Appellant's brief. *See* Brief of Appellant State of Georgia, *Ashcroft*, 2003 WL 554486, at *15 n.7 (No. 02-182) ("Winning the Democratic primary . . . allows African-American nominees a greater chance of election in a partisan general election because carrying the Democratic nomination brings additional white voters to his/her candidacy."). Most importantly, the primary tier was the main focus of Grofman's heavily cited piece on drawing effective minority districts. *See* Grofman et al., *supra* note 16.

The next sections identify the drawbacks of relying on control-of-the-primary to define coalitional districts, as well as some of the problems lurking around the corner once courts begin anchoring the VRA to the structure of political parties. First, the legal doctrine supporting the power of party insiders is at an apex despite a history of gamesmanship and exclusion by and within political parties.[101] Second, party rules undermine the bright-line aspect of the primary and regularly predetermine which candidates primary voters will be able to select as their nominee. Both suggest that controlling the selection of a party nominee is more than a matter of membership numbers.

B. Doctrinal Problems: The Expanding Scope of Party Autonomy

There is a history in the United States of party leaders marginalizing minority voters via the primary. The White Primary cases (a set of cases which exposed the efforts of the Texas Democratic Party to exclude minorities from having a meaningful vote) highlighted the ends to which parties and associations would go to thwart the minority vote.[102] The history of political parties would be even more important if the primary became part of the *Gingles* inquiry. Despite the troubling history of party primaries and race, the ability of parties to exclude potential voters for almost any reason other than explicit discrimination remains strong.[103]

The Court's recent political party decisions, in particular *California Democratic Party v. Jones*,[104] have held that internal party rules governing the primary have constitutional dimensions. These rules can be highly exclusionary, but recent Supreme Court jurisprudence has upheld most exclusionary practices as falling within the party's constitutional sphere of autonomy.[105] What is important to

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101 *See infra* Part II.B.

102 In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court invalidated a resolution that excluded African-American voters from voting in the Democratic primary. In *Terry v. Adams*, 345 U.S. 461 (1953), the Court struck down several variations of a racially-discriminatory primary in Texas, going so far as to invalidate a pseudo-primary conducted by a political association known as the Jaybird Association under the logic that the Jaybirds were deciding the most relevant election. *See id.* at 470. These cases are considered the high-water mark of the Court's intervention in party primaries.

103 In a state where one party controls the redistricting process, party leaders have a free hand to draw safe seats for their candidates and then establish maze-like, restrictive party rules that effectively thwart any opposition from insurgent candidates in the only election that matters, the party primary. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992) (upholding law of one-party state of Hawaii banning all write-in voting for candidates).

104 530 U.S. 567 (2000).

105 *See id.*; *see also* Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 785 (2001) ("*Jones* represents the most emphatic defense yet of a robust First Amendment right of party autonomy . . . ."). In *Jones*, the Court noted that certain party actions were constitutionally sacrosanct: "In no area is the

recognize for the purpose of coalitional districts is the fact that *some* party activity is considered beyond the state's reach as a matter of constitutional law, and that this party activity, not the primary itself, may determine whether a bloc can determine the nominee.

The legal background against which this party activity takes place, including the way the party manages its primaries, has seen significant changes in the past several years. Political parties have had increasing success in challenging laws which attempt to control the parties' internal procedures. Although the state role in regulating the primary has not been eliminated, parties have enjoyed increasingly broad latitude to set their membership rules,[106] to determine their internal structure,[107] to prohibit certain candidates from carrying their banner,[108] to eliminate write-in voting,[109] and to endorse candidates in the party primary.[110] The result has been a modern political party jurisprudence which sanctions the exclusion of voters and candidates not embraced by party insiders. These internal rules determine to a significant extent whether a minority bloc will have the option of choosing a candidate on its own or whether it instead will be forced simply to choose from among the party's preselected candidates.

Thus, while at first it may be enticing to conclude that a coalitional district may be formed where a thirty-five percent Hispanic district contains a Hispanic bloc that comprises sixty percent of the party, that distribution may have no effect on voter power if the party rules nevertheless predetermine the nominee. If the minority bloc (comprising a majority of the party electorate) only has the power to select among predetermined candidates, it is hardly playing a "substantial" role in the electoral process.[111] In fact, the minority bloc appears better to resemble an influence district than a coalitional district, as long as the rules for putting candidates on the ballot remain outside its

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political association's right to exclude more important than in the process of selecting its nominee." 530 U.S. at 575.

[106] *See, e.g.*, Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding state requirement that voters register for party primary many months in advance).

[107] *See, e.g.*, *Jones*, 530 U.S. 567 (striking down blanket primary system); Langone v. Sec. of Commonwealth, 446 N.E.2d 43 (Mass. 1983), *cert. denied*, 460 U.S. 1057 (1983) (upholding role of pre-primary party conventions in endorsing particular candidates).

[108] *See, e.g.*, Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) (upholding deletion of candidate from ballot by party insiders).

[109] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992) (upholding law of one-party state of Hawaii banning all write-in voting for candidates).

[110] *See, e.g.*, Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214 (1989) (upholding district court ruling that ban on primary endorsements violated First and Fourteenth Amendments).

[111] *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 482 (2003) (discussing 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.").

access or control.[112] Despite the utility of the primary tier in defining coalitional districts, party rules and arcana may create a defensive web against the formation of a coalitional district, as they may prevent an otherwise powerful bloc within the party from nominating the candidate of its choice.

It is vital to acknowledge, as well, that under the modern view of strong political parties, the very rules which could thwart control of a party primary by a minority bloc can be defended on the ground that strong party autonomy protects racial and political minorities from the state and the party in power. As one scholar has argued,

> Judicial protection for party organizational autonomy prevents the party-in-government from crafting electoral rules that disadvantage its opponents and further add to the advantages of incumbency. Moreover, such protection allows *party organizations to build coalitions among minorities*, crafting bargains (in effect) between the median voter in a district and less "popular" factions to produce candidates that appeal to a broad audience and therefore have a chance at winning the election.[113]

As the doctrinal issues involving party autonomy are bound up with empirical assumptions about whether parties are protecting minority interests or injuring them, this defense of party autonomy cannot end the debate. Yet, it is important not to forget while in the context of the VRA—a statute which aims to protect the unfair (dis)aggregation of minority votes—that one theory of party autonomy envisions strong parties acting as protectors of minority votes and preferences.

In short, not only do candidate nomination and selection take place in the context of both state involvement and a growing respect for the constitutional rights of political parties, but the results of such choices by the parties may be defended as pro-minority even as they thwart the reach of a law aimed at eradicating racial discrimination in voting.[114]

C. Pushing Section 2 into Party Arcana

Because party insiders, not the party electorate, often predetermine the candidate selected on primary day, any in-depth analysis of

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[112] *Cf.* Terry v. Adams, 345 U.S. 461, 469 (1953) ("The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections . . . ."). African-American voters had been barred from participating in the Jaybird elections. *See id.*

[113] Persily, *supra* note 105, at 753 (emphasis added).

[114] District courts are well-suited to analyze this context. *See* Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (discussing "the benefit of the trial court's particular familiarity with the indigenous political reality").

how the primary is controlled would require a more searching inquiry than *Gingles* contemplates.

Anchoring the VRA to party primaries transforms what is essentially a second-order inquiry that asks how votes are aggregated back into a first-order inquiry that asks who can cast a ballot that is counted. While the turn towards examining strength within political parties is in some ways an intuitive means of measuring minority voting power—in a one-party state, the primary is the most important election—enshrining parties as part of *Gingles* would not be simple. Parties may choose their nominees and their members in a variety of ways, with various restrictions on who is allowed to participate. This makes determining the extent of minority clout in a political party far more difficult to quantify than merely counting voting age population (or citizen voting age population) in a party.[115] An attempt to do so, however, quickly takes a court out of the easy-to-apply, bright-line *Gingles* framework.[116]

Judge Posner hinted at the problem of accurately determining whether a coalitional district exists. In noting that even a simple fifty-percent minority district may be insufficient to guarantee minority voters equal opportunity to elect and participate, he stated that the creation of "an effective majority . . . depends on voting-related char-

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[115] The census is not designed to provide that data. Equally problematic for data collection purposes is the fact that many states do not require voters to record their party and race when registering. Even if control-of-the-primary is selected as a means of defining coalitional districts, racial breakdowns of parties can only be estimated. *See* Vieth v. Jubelirer, 124 S. Ct. 1769, 1811 n.32 (2004) (Stevens, J., dissenting) ("After all, eligibility to vote in primary elections often requires the citizen to register her party affiliation, but it never requires her to register her race.").

[116] It is difficult to imagine that courts could delve into party rules at the *Gingles* stage without duplicating the totality-of-the-circumstances inquiry. *See* United States v. Charleston County, 365 F.3d 341, 348 (4th Cir. 2004) (expressing concern for altering *Gingles* and "convert[ing] the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede"). *But see* Rodriguez v. Pataki, 308 F. Supp. 2d 346, 404 (S.D.N.Y. 2004) (declaring, after ten pages of extensive analysis of crossover rates, turnout, incumbent effects, and other factors, that court did "not need to reach the totality of the circumstances inquiry"). The ballot access jurisprudence itself lacks bright-line rules for determining what restrictions are unacceptable. The usual process of analyzing burdens on First and Fourteenth Amendment rights is reversed when ballot access rules are challenged directly. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 206 (1999) (Thomas, J., concurring) ("When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review."). As one appellate court has stated, "Ordinarily, policing this distinction between legitimate ballot access regulations and improper restrictions . . . does not lend itself to a bright line or litmus-paper test, . . . but instead requires a particularized assessment of the nature of the restriction and the degree to which it burdens those who challenge it." Lerman v. Bd. of Elections, 232 F.3d 135, 145–46 (2d Cir. 2001) (internal citations omitted). Bright lines and litmus paper, however, are seen as essential to the section 2 jurisprudence.

acteristics of the population, notably age, citizenship, registration, and turnout."[117] Similarly, in the context of the party primary, the effectiveness of a coalitional district depends on the "voting-related characteristics" of the primary electorate, characteristics (such as party membership) which the party itself is permitted to determine through internal rule or state law.[118]

But as reviewing courts are drawn deeper into party affairs in their attempt to gauge the voting strength of minority blocs, the triage function of a revamped *Gingles* test could be quickly lost. It should be no surprise, given the White Primary cases,[119] that internal party arcana present obstacles to the minority bloc's ability to determine the nominee. Courts would have to examine party rules for such effects in each case. Given the importance of internal party rules and the need to examine them in detail, were a new inquiry into the minority bloc's numerosity and baseline voting strength to entail necessarily a ballot access inquiry, *Gingles* would become less a useful filter than a meaningless sieve.[120] Courts cannot be expected to undertake such complex inquiries twice. Performing a detailed, fact-based inquiry into clout within a political party, just to get to the detailed, fact-based, totality-of-the-circumstances inquiry required by the VRA, makes little sense.

Justice Souter's dissent in *Georgia v. Ashcroft* drives home this point: "[T]o demonstrate [effective minority influence], a State must do more than produce reports of minority voting age percentages; it must show that the probable voting behavior of nonminority voters will make coalitions with minorities a real prospect."[121] Such a showing, as discussed in the next Part, depends on an enhanced

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117 Barnett v. City of Chicago, 141 F.3d 699, 702 (7th Cir. 1998).

118 For example, the Supreme Court upheld a state law which permitted the parties to block anyone from registering who had been registered in another party in the last *twelve months*. *See* Storer v. Brown, 415 U.S. 724 (1974). The Court in *Kusper v. Pontikes* invalidated a restriction reaching back twenty-three months. 414 U.S. 51 (1973).

119 For decades, internal party rules in Texas thwarted African-American voters from having an effective vote in the Democratic Primary (the only primary that mattered in Texas). *See, e.g.*, Terry v. Adams, 345 U.S. 461, 461 (1953) (plurality opinion) (describing state of affairs in which African-American voters were "excluded . . . from voting in elections held by an Association consisting of all qualified white voters in the County"). *See generally* Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004).

120 It is important to be cognizant of the need to provide a rule for courts to apply that is grounded in the aims of the statute, not a targeted number of section 2 suits. As the Court stated in *Chisom v. Roemer*: "Even if serious problems lie ahead in applying the 'totality of the circumstances' standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." 501 U.S. 380, 403 (1991).

121 539 U.S. 461, 493 (2003) (Souter, J., dissenting).

awareness of the role of party rules and insiders in limiting the possibilities for such coalitions.

III
COALITIONAL DISTRICTS AND INSIDE POLITICS

This Part explores reasons to be concerned that, if the fifty-percent rule is to be abandoned, the control-of-the-primary threshold does not present a more equitable or manageable alternative. The ability to control (in terms of sheer numbers) the outcome of the party primary has been identified as a valuable tool for defining coalitional district claims and establishing remedial coalitional districts.[122] But a simple majority in the party should not be treated as proof of the existence of a coalitional district. Were *Gingles* altered, a reviewing court presented with evidence that a minority bloc comprises a majority of a political party in a district must be conscious of the intermediate role of party leaders and party rules in guiding the choices and candidates presented to party members.[123]

A. Party Conventions

Unlike modern party conventions for presidential candidates, state party conventions have more than superficial purposes. In several states, parties have a critical role in the selection of who can appear on the primary ballot. In Massachusetts, the Massachusetts Democratic Party (which controls virtually every level of government) enacted a rule which "permits an individual to run in the party primary only if he or she has received 15% of the votes on any ballot at the state party's convention to endorse candidates, which is held before the primary."[124] In *Langone v. Secretary of Commonwealth*,[125] a candidate for lieutenant governor had acquired the necessary signatures from registered voters in support of his candidacy (more than 10,000) but could not attain the necessary support of fifteen percent of the delegates. The candidate challenged the fifteen-percent rule and sought to be placed on the ballot, but the Massachusetts Supreme Judicial Court held that it could not override the party's autonomy,

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122 *See supra* Part II.A.

123 Party leaders can, in some instances, simply remove candidates from the ballot. *See* Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) (upholding deletion by Republican party leaders of David Duke's name from presidential primary ballot). *See generally* Newberry v. United States, 256 U.S. 232, 286 (1921) (Pitney, J., concurring) ("As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.").

124 Bellotti v. Connolly, 460 U.S. 1057, 1057 (1983) (Stevens, J., dissenting).

125 *See* 446 N.E.2d 43, 45 & n.3 (Mass. 1983).

under state law, to determine ballot eligibility.[126] In Connecticut, a similar system was in place for years: Elections for state legislative offices only involved primaries when candidates first could pass the party convention hurdles.[127] The result: "[O]nly one person has ever successfully navigated the primary ballot system against an incumbent running for U.S. House of Representatives, U.S. Senate, Connecticut governor, or Connecticut secretary of state in 47 years."[128]

It is also important to note that the party convention rule may be a state law, not simply a party rule.[129] Ballot access rules are inevitably crafted by the party in power and reflect its aims. State law, therefore, may enshrine the interstitial party action and insider control that determines who can get on the ballot.

In at least some states, therefore, the real power of selecting candidates is in the hands of party delegates, regardless of the size of the minority bloc. If a sizable minority bloc has no assurance that its preferred candidates can muster the support of fifteen percent of their nominating convention, the primary vote is not a reflection of the minority bloc's choice of its own candidate. Ability to control the primary means little without the means to control the convention.[130] The fifteen-percent rule, and other similar ballot restrictions, "can permit

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126 *See id.* at 48–50.

127 These restrictions were *improvements* over Connecticut's earlier system. *See* Campbell v. Bysiewicz, 213 F. Supp. 2d 152, 156 n.9 (D. Conn. 2002) ("Over its 47-year history, at times the election statutes have imposed an even higher burden than at present. Until 1993, candidates were required to win 20% of the delegate vote. Until 1979, candidates were required to file petitions in addition to winning 20% of the delegate vote."); *see also id.* at 153 (stating that to appear on primary ballot, "a candidate must either receive the political party endorsement or else obtain at least 15% of the delegate votes to that political party's state or district convention. A primary is then held if there is more than one candidate for a political party nomination for a given office"). Notably, the existence of this convention was considered by the Supreme Court when it struck down Connecticut's state-required closed primary in *Tashjian v. Republican Party*, 479 U.S. 208, 220–21 (1986) ("The Party is not proposing that independents be allowed to choose the Party's nominee without Party participation . . . . [T]o be listed on the Party's primary ballot continues to require . . . that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party members may attend.").

128 *Campbell*, 213 F. Supp. 2d at 156 (internal citation omitted). In the interest of full disclosure, I worked as an assistant on the legal challenge to Connecticut's convention system in 2001.

129 *See, e.g.*, Morse v. Republican Party, 517 U.S. 186, 197 (1996) ("[T]he Commonwealth [of Virginia] has prescribed stringent criteria for access with which nearly all independent candidates and political organizations must comply. But it reserves two places on its ballot—indeed, the top two positions—for the major parties to fill with their nominees, however chosen.").

130 *See also id.* at 206 ("Just like a primary, a convention narrows the field of candidates from a potentially unwieldy number to the serious few who have a realistic chance to win the election.").

the virtual nullification of the primary process"[131] and amount to "a casting of the die in the first stage of the delegate selection, whether by town committee or caucus."[132]

Quickly, the control-of-the-primary question becomes a question of who controls the party or the party convention, how delegates are chosen, and how membership is decided. This is true even if the party has chosen not to exercise its constitutional right to endorse a primary candidate. Thus, the mere canvassing of racial percentages in a given party may be founded on the incorrect assumption that there is no fifteen-percent rule (or its equivalent) lurking in the background. It may assume there is no smoke-filled room.

B. Petition-Gathering Rules

Just as the minority bloc's ability to be a majority of the party as a matter of numbers may be no comfort if party insiders can pick the candidates through a party convention, the same will be true if party insiders can stack the deck through petitition-gathering rules. Rules constraining who can get on the primary ballot (and who can collect signatures to place a candidate on the ballot) are a prime example of the ways in which party insiders retain ultimate control over the slate of candidates for whom the party members can cast a vote.

Under such rules, it often will be impossible for a candidate who is not annointed by the party bosses to get on the ballot by gathering petitions because the petition-gathering rules have been designed to prevent such candidates from reaching the requisite minimum levels. Several particularly egregious cases have arisen in recent years in which the powerful impact of ballot access rules has been laid bare.[133]

Until a federal court in 2000 found that several Republican Party ballot access rules unconstitutionally burdened First Amendment rights, the New York Republican Party had succeeded in keeping many candidates from being placed on the ballot.[134] Thus, in 1996, when these rules were still in effect, most Republican candidates skipped the New York Republican presidential primary altogether, and Steve Forbes was forced to seek judicial intervention to get on the ballot, despite national recognition, statewide support, and millions of dollars spent in his attempt to qualify. At the polls, Republican voters

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131 Bellotti v. Connolly, 460 U.S. 1057, 1061 (1983) (Stevens, J., dissenting) (internal citation omitted).

132 *Campbell*, 213 F. Supp. 2d at 156.

133 *See, e.g.*, Lerman v. Bd. of Elections, 232 F.3d 135 (2d Cir. 2000) (striking down restrictions on petition gathering); Molinari v. Powers, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) (striking down barriers to appearing on Republican primary ballot).

134 *See Molinari*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000).

voted overwhelmingly for Bob Dole, the candidate chosen by the Republican political machine.[135] Did the party members choose Dole as their nominee? Or did they merely ratify the selection made by party bosses? What power did any bloc in the Republican Party have on primary day, given that the choices were orchestrated by the insiders?[136] Evidence of such gamesmanship should be considered carefully in the assessment of a coalitional district claim, but such an assessment is at odds with *Gingles*'s preference for bright lines.

C. Switching the Primary Structure

A decision by legislators or party leaders to switch from a closed primary to an open primary immediately would dilute, on most fact patterns, the voting power of the minority bloc, leaving little chance of redress for minority voters. Were Democratic primaries for state legislative races switched from a closed-primary to an open-primary system, Republicans and Independents could vote in the Democratic Primary, likely diluting the clout of the minority bloc (which had heretofore constituted a majority of the Democratic Party in the district).[137]

The Georgia primary battle in 2002 between Cynthia McKinney and Denise Majette throws this issue into sharp relief.[138] McKinney's loss to Majette could be attributed directly to the primary structure. According to one commentator, "[McKinney's supporters] wanted . . . McKinney reelected, and understood that only a closed primary with an overwhelmingly black electorate could make that happen."[139] A large number of white voters contributed to McKinney's loss to the more moderate Democrat Denise Majette in the primary. As the commentator noted, "Excluding nonmembers from the 2002 Democratic primary in the Fourth District would have given rise to a majority-minority primary in which African Americans comprised

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135 Adam Nagourney, *Dole is Victor in New York, Continuing Primary Surge; Rivals Vow to Stay in Race*, N.Y. TIMES, Mar. 8, 1996, at A1.

136 *Cf.* Session v. Perry, 298 F. Supp. 2d 451, 484 (E.D. Tex. 2004) ("We have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate.").

137 While the move to an open primary does not determine formally ex ante which candidates will appear on the ballot (though certainly some candidates will choose not to run upon realizing the likelihood of a flood of new voters into their primary), it does change how votes are aggregated. In a district that has been drawn (on the assumption that a closed primary exists) to create a majority-minority primary, the potential exists for that majority clout to be erased in an instant by party bosses.

138 *See* Katz, *supra* note 119, at 380–90 (describing Majette-McKinney primary dynamics).

139 *Id.* at 148.

more than 70% of the primary electorate."[140] Even if it means the effective dilution of minority votes in a district that has just been redrawn, the party has some constitutional latitude to make that determination. The fact that coalitional districts depend heavily on this malleable primary structure shows numerical control-of-the-primary to be an unreliable metric of voting strength.

This Part has shown that numbers alone do not ensure the vindication of minority voting clout; in fact, they may overestimate such clout and overpromise what it can do. In the context of conventions, ballot restrictions, and primary structures, a great deal of politics occurs before primary day. The next Part addresses how courts can take those politics into account while retaining *Gingles*'s bright-line function.

IV
JUDICAL SCRUTINY OF CONTROL WITHIN A PRIMARY

"There is always a well-known solution to every human problem—neat, plausible, and wrong." —H.L. Mencken[141]

This Part addresses how to reconcile careful assessments of coalitional district claims with the need for manageable judicial standards. Given the contextual nature of coalitional districts and the fact that the control-of-the-primary test provides only marginal benefits over the other *Gingles* prongs, courts should be hesitant to use it as a filter for section 2 claims. As discussed above, the vote in the primary may be "an empty vote cast after the real decisions are made,"[142] and changes to one part of *Gingles* may have unintended consequences for the rest of the framework. If, however, courts do use control-of-the-primary as a limiting principle, they must subsequently perform as part of their analysis a searching inquiry into whether party rules might thwart the creation of a coalitional district in actuality.[143]

A. Marginal Benefits

There are several assumptions behind the numerical control-of-the-primary test that limit its overall utility and the circumstances under which it applies. It is assumed that significant minority voting

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[140] *Id.* at 146.

[141] H.L. MENCKEN, PREJUDICES: SECOND SERIES 155, 158 (1920).

[142] Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring).

[143] This inquiry does not breach the bounds of the inquiry envisioned by Congress in the Senate Report that accompanied the 1982 Amendments. *See* S. REP. No. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07 (listing factors to be considered at totality of circumstances stage such as responsiveness of elected officials to minority concerns and existence of voting practices which hinder participation).

strength exists *when the primary means something.* Control of a meaningless primary does not strike one as a reason to prize a claim by a minority bloc over a claim by a more numerous bloc that cannot control the primary outright.

Regardless of the size of the minority bloc, a section 2 claim still must satisfy all three *Gingles*'s prongs, not merely the first.[144] Ultimately neither the fifty-percent cutoff nor the control-of-the-primary cutoff can permit claims which fail the polarization prong. Thus, even if plaintiffs can show numerical control-of-the-primary, they also must have evidence of significant polarized voting in order for a sub-fifty percent minority bloc to have sufficient clout worth diluting. Control-of-the-primary will not matter when the population is very small because the minority bloc will fail the *Gingles* test due to insufficient voter polarization.[145]

If the minority bloc is limited by the extent of voter polarization, what role does control-of-the-primary truly play? One answer is that it simply allows the judiciary to avoid the tricky task of selecting a new threshold percentage lower than fifty percent.[146] Some may contend that the number of likely problems with the control-of-the-primary test suggest it is no better than an arbitrary percentage like forty percent or thirty-three percent.[147] One court has stated flatly with respect to coalitional districts that "[t]here is no bright-line test for

144 *See* Metts v. Murphy, No. 02-2204, 2003 U.S. App. LEXIS 21987, at *33 (1st Cir. Oct. 28, 2003) ("A minority population that is too small, and that therefore requires too high a level of crossover support, will not be able to meet the third [*Gingles*] precondition."), *vacated en banc by* 363 F.3d 8 (1st Cir. 2004). This echoes the view of the United States on appeal in *Valdespino*. *See* Brief for the United States as Amicus Curiae at 12 n.3, *Valdespino* (No. 98-1987) ("At some point, of course, the amount of crossover voting may be sufficiently substantial that it would not be possible to sustain a finding that voting is racially polarized or that the majority votes as a bloc to defeat the candidate preferred by minority voters.").

145 *See* Voinovich v. Quilter, 507 U.S. 146, 158 (1993) ("We need not decide how *Gingles*'s first factor might apply here, however, because appellees have failed to demonstrate *Gingles*'s third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice.").

146 It may make sense, therefore, to shift the focus of the *Gingles* inquiry to how the three prongs operate as a whole, rather than trying to redefine the first one. *See supra* note 22.

147 Some courts have not shied away from proposing or hinting at new percentages. *See, e.g.*, Rural W. Tenn. Afr.-Am. Affairs Council v. McWherter, 877 F. Supp. 1096, 1101 (W.D. Tenn. 1995) (finding that districts where minority group comprises twenty-five to fifty-five percent of voting age population are "influence district[s]"). It should be noted that the Supreme Court had before it in *Gingles* the possibility that a candidate could run and win with less than fifty percent of the population (under a plurality voting regime), but it chose not to recognize this, perhaps because the problems seemed too thorny. Trying to calibrate voting clout to the number of candidates expected to run in any given race would be a nightmarish task. As noted, *supra* Part I, the Court also had data on party primaries but chose not to emphasize that tier.

determining whether a district is likely to perform for minority candidates of choice."[148] But a prime benefit of the control-of-the-primary test is that it includes an "ability to elect" concept and allows courts to avoid naming any other percentage that cannot conclusively answer the question: "How low is too low?"[149] As long as the ability to elect language in *Gingles* remains good law, control-of-the-primary will appear preferable to new percentages.

Thus, without dismantling all three of the *Gingles* prongs and reconsidering the entire framework, it appears the best way to permit coalitional district section 2 claims and retain *Gingles*'s triage function is for courts to rely on the latter two *Gingles* prongs to filter vote dilution claims for the bulk of section 2 cases; where blocs satisfy those requirements and comprise a numerical majority in the primary, courts then can scrutinize carefully (at the totality-of-circumstances stage) whether a true coalitional district existed previously or is likely to form in the near future.[150]

This approach is consistent with *Gingles*'s emphasis on the "primacy of the history and extent of minority electoral success and of racial bloc voting"[151] and also comports with the understanding the Court expressed in *Johnson v. De Grandy* that the "ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts."[152]

The next Section discusses how one court performed a comprehensive canvassing in a unique section 2 case.

B. Viewing Control-of-the-Primary Skeptically

As discussed, a history of succesful exclusionary tactics and a robust party autonomy jurisprudence suggest that numerical control-of-the-primary may mean very little in practice and may be difficult to quantify as quickly as *Gingles* might like. The current *Gingles* regime

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[148] Martinez v. Bush, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) ("We have no occasion to devise a formula for determining how many districts of one type or another are required by section 2.").

[149] Though not the subject of this Note, one can envision the argument that coalitional district claims should be vindicated by relaxing the compactness requirement, as opposed to the numerosity requirement.

[150] *See, e.g.*, Page v. Bartels, 144 F. Supp. 2d 346, 364 (S.D. Fla. 2002) ("[W]e feel it more expeditious in this case to consider the third threshold element of the *Gingles* test out of turn."). Some courts make such conclusions in the alternative. *See* Session v. Perry, 298 F. Supp. 2d 451, 484–85 (E.D. Tex. 2004) (expressing skepticism, after deriding coalitional district claim, that prong two criterion could be met).

[151] *Gingles*, 478 U.S. at 49 n.15.

[152] 512 U.S. 997, 1011 (1994).

offers no relief to blocs amounting to forty-eight percent in a district, but the proposed regime offers relief to a thirty-five percent bloc amounting to sixty percent of the primary electorate, even when the party insiders will consistently predetermine the nominee in the new district. The first test openly fails to vindicate vote dilution claims; if courts are not wary, the second may attempt to vindicate those claims but instead provide insiders a litigation device while affording no protection to the minority bloc.

One pre-*Ashcroft* court was appropriately wary of this problem in a case where the *Gingles* factors were met and coalitional districts were analyzed at the totality-of-the-circumstances stage. Assessing a Florida House of Representatives district map and a Florida Congressional District map, the court in *Martinez v. Bush*[153] took notice that the parties conceded that section 2 requires the "creation of performing minority districts."[154] Thus the question was only whether the coalitional districts actually would perform for minority voters. In addressing this question (and citing Grofman's *Drawing Effective Minority Districts*[155]) the court did not look simply at racial breakdowns within the party. The court scrutinized the features of the district and gave particular attention to the party rules in place in order to determine whether a coalitional district existed.[156]

The court began by looking at population percentages. The Third Florida Congressional District (CD 3) had a total black population of 51.4%, and a total black voting age population of 46.9%.[157] The court found that "[e]ven with only a 46.9% black voting age population, new CD 3 will afford black voters a reasonable opportunity to elect candidates of choice and probably will in fact perform for black candidates of choice."[158] The court immediately emphasized the primary tier and racial breakdowns. The court stated, "[B]ased on 2000 data, blacks constitute 61.3% of registered Democrats in new CD 3, and Democrats constitute 63.8% of registered voters. . . . The black candi-

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153 234 F. Supp. 2d 1275. The court in *Page v. Bartels*, 144 F. Supp. 2d at 355–66, noted the importance of the primary tier and saw much to admire in an apportionment map which transformed several majority-minority districts into coalitional districts. While the court examined how coalitional districts would perform in practice, the court's examination of the party primary was not as detailed as that in *Martinez*, and it omitted any examination of party rules or ballot access laws.

154 234 F. Supp. 2d at 1298.

155 *Id.* at 1322.

156 *Id.* at 1305–15.

157 *See id.* at 1307.

158 *Id.*

date of choice is likely to win a contested Democratic primary, and the Democratic nominee is likely to win the general election."[159]

But the court did not rely on percentages alone. Holding to its principle that "[d]ilution claims involve practical judgments about the real world," the court looked to the real world effects of two recent changes in the laws governing primaries.[160] According to the court, "There have been two changes in Florida law in the last decade that affect the analysis."[161] First, state law changed party primaries from closed to open when the only candidates for an office are from the same party.[162] Second, Florida law altered the requirement for winning a primary vote from winning a majority to winning a plurality.[163] The court stated, "It is clear that, in a *closed Democratic primary* in which only a single candidate has substantial support among black voters, CD 3 is likely to perform for that candidate.... The likelihood is overwhelming that the Democratic primary winner will prevail in any general election."[164] The court followed a textured approach, giving party rules their due as well as taking into account the impact of new legislation on the ability of minority blocs to wield clout.

This textured approach was repeated when the court analyzed a Florida State House district with a sub-fifty percent minority voting age population, House District 118 (HD 118). There was a minority voting age population of 41.8%, but the court found that the district "will afford black voters a reasonable opportunity to elect candidates of their choice and probably will in fact perform for black candidates of choice."[165] Again, the court first noted data on the racial breakdown of the primary: "[B]lacks constitute 64.4% of registered Democrats in new HD 118, and Democrats constitute 61.8% of registered voters."[166] The court then examined the history of electoral outcomes within the district and determined that, in fact, the district "performed for the black candidate of choice in every election from 1992 through 2000."[167] A look to historical performance allowed the court to move

159 *Id.* at 1308.

160 *Id.* at 1307 n.37.

161 *Id.* at 1304.

162 *See id.* at 1304.

163 *Id.* at 1305.

164 *See id.* at 1305 (emphasis added). The court also looked into the primary history to assess vote dilution of Congressional District 3 and acknowledged that "Ms. Brown, the incumbent, has drawn no primary opposition at all since 1994. The possibility that in 2002 there would be three candidates in the Democratic primary . . . was remote." *Id.* at 1308 n.39.

165 *Id.* at 1315.

166 *Id.*

167 *Id.* Even with majority-minority districts, the court took pains to look beyond raw numbers and to examine the internal party workings as part of its totality-of-the-circum-

past percentages and closer to a decision based on the unique facts of the district.

The *Martinez* court ultimately found, by pushing the inquiry beyond mere percentages, that the sub-fifty percent districts at issue were genuinely responsive to the minority bloc in each district. "[T]his case involves districts with an unbroken 10-year history of demonstrated performance for minority candidates of choice,"[168] the court stated. In *Martinez*, the detailed discussion of how such coalitional districts in fact operated in practice suggests a way to avoid replacing the first *Gingles* prong with a new rule that would be either inflexible or meaningless.[169]

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stances inquiry. Thus while the Twenty-third Congressional District had a 50.1% black voting age population, the court nevertheless examined actual occurrences with respect to the two recent changes in Florida election law. The court stated, "[T]he conditions that would lead to an open Democratic primary have not occurred in at least a decade. The likelihood that any Democratic primary in any district will be 'open' in the next decade is small." *Id.* at 1305. It also concluded that the plurality vote requirement would not have dilutive effect. *Id.* at 1306, 1315, 136.

168 *Id.* at 1323. This focus on "the extent to which minority group members have been elected to public office" mirrors the approach envisioned in *Gingles* for multimember districts. *Gingles*, 478 U.S. 30 at 48 n.15 (1986) (internal citations omitted). The ability to form this conclusion about "performing for the minority" has its own problems. Normally the race of the candidate is used to help determine whether there has been a violation of section 2. But if coalitional districts are premised on collaboration and compromise, there is ample reason to believe that such a criterion is antithetical to the coalitional district inquiry. Requiring minority blocs to vote minorities out of the primary diminishes their ability to work strategically to achieve tangible election results in the general election. The "responsiveness" criterion, which is identified in the Senate Report and operates regardless of the race of the candidate, appears more in tune with the aims of coalitional districts. *See* S. REP. NO. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 (inviting courts to assess "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.").

169 A majority of the three-judge court that analyzed a vote dilution claim by a sub-fifty percent minority bloc in *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004), refused to believe that Congressional District Twenty-four (the district of powerful legislator Martin Frost) was a coalitional district. The court stated, "We are told that Blacks control the Democratic primary with less than 22% of the [citizen voting age population] because Anglos and Latinos vote either in the Republican primary or not at all, but return home out of party loyalty in the general election." *Id.* at 484. However, the court did not recognize that African Americans comprised sixty-four percent of the Democratic Primary electorate. *See* Brief of Appellants at *18, Jackson v. Perry, 2004 WL 7594341 (2004) (mem.) (No. 03-1391). The court concluded that because Frost was (1) white and (2) unchallenged by any black primary opponents for the past decade, District Twenty-four could not be a coalitional district. *See Session*, 298 F. Supp. 2d at 484. This is a troubling conclusion. The point of coalitional districts, like the VRA itself, is to "foster our transformation to a society that is no longer fixated on race." Georgia v. Ashcroft, 539 U.S. 461, 490 (2003). Martin Frost, then the Senior Member of Congress from Texas and the Ranking Democrat on the House Rules Committee, arguably is the type of officeholder one might expect a minority bloc to select as their candidate of choice in a coalitional district.

As noted at the outset, challengers of maps that split majority-minority districts into coalitional districts have little problem meeting the fifty-percent requirement; the issue in those cases is whether it can be shown at the totality-of-the-circumstances stage that coalitional districts can be expected to perform for minority voters. Thus, while coalitional districts were used in *Martinez* to rebut claims of vote dilution, on fact patterns where the fifty-percent rule cannot be met, future courts will benefit from the roadmap *Martinez* provides for scrutinizing putative coalitional districts.

The Supreme Court's current vision of politics prizes compromise.[170] Even if an individual's (or group's) "first choice" of candidate could be determined, no one has a right to her first choice being elected.[171] Coalitional districts hold out the possibility that candidates and blocs will "pull, haul, and trade" together.[172] But the Court will not permit parties to turn coalitional districts into political fiefdoms where minority voters simply get lip service and no true influence. That is precisely what a short-sighted application of the control-of-the-primary criterion could produce, and what a careful evaluation of party rules and district politics could prevent. The larger question, beyond the scope of this Note, is whether courts will find such an inquiry feasible in light of the corresponding impact on the *Gingles* framework overall, and whether the reasons for altering the first prong also require a re-evaluation of the latter two. The repercussions of altering one part of *Gingles*, even in a limited, principled way, may simply seem too daunting.

CONCLUSION

Despite the compelling rationales for recognizing coalitional district vote dilution claims, the party majority criterion is not the panacea it first seems to be. Because this is an area of jurisprudence where courts have put a premium on manageable judicial standards and bright-line rules, any modification of *Gingles* to allow vote dilution claims by coalitional districts must aim to retain the *Gingles*'s

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170 For an opposing view, see generally Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 283, 283 (David K. Ryden ed., 2d ed. 2002) (arguing that Court's decisions "reflect no theory of electoral politics").

171 *See* Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) ("[Coalition candidates] may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics."); *see also id.* at 1014 n.11 ("[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success . . . .").

172 *Id.* at 1020.

triage function to the greatest extent possible. The alteration of prong one requires prongs two and three to receive more focus and very likely bear more weight. That weight may ultimately force a reconsideration of the entire *Gingles* framework; if the control-of-the-primary test is adopted, it is only a matter of time before the courts are faced with claimants amounting to just under fifty percent of the party primary.

If the fifty-percent rule is to be modified, there are grounds to believe that the benefits of the control-of-the-primary threshold are marginal compared to what prongs two and three already provide; courts, therefore, would do well to apply those prongs first. To the extent that a minority bloc can demonstrate numerical control of a primary, any modification of the fifty-percent rule must include a look at the totality-of-the-circumstances stage to the internal party rules (and state laws which enshrine party aims) in order to assess whether a minority bloc possesses "a real prospect"[173] of playing a substantial role in the electoral process.

The increasing power of parties may once again test minority blocs' faith in party insiders. If control-of-the-primary supplants the fifty-percent rule, it must be coupled with a searching analysis of party dynamics at the totality-of-the-circumstances stage to determine whether a coalitional district in fact exists or can exist.

The strict application of the fifty-percent rule leads to many claims being unfairly dismissed. A move to correct this problem by modifying *Gingles* and relying heavily on the racial breakdowns of parties may give false assurance that minority voters are achieving equal access to the political process. The consequences of formally altering *Gingles* may appear too ominous for courts, but if *Gingles* is in fact modified, courts may be able to hear section 2 claims without inviting a deluge of marginal claims. Between a strict application of *Gingles* and an absolute reliance on the racial demographics of parties lies a route where—via a close judicial inquiry into party rules and local politics—minority voters can have their coalitional district vote dilution claims heard without flooding the courts.

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[173] *Id.* at 493 (Souter, J., dissenting).