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# Reading the Tea Leaves: The Supreme Court and the Future of Coalition Districts Under Section 2 of the Voting Rights Act

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# READING THE TEA LEAVES: THE SUPREME COURT AND THE FUTURE OF COALITION DISTRICTS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

## INTRODUCTION

Every ten years, state legislatures or specially designated commissions[1] convene to redraw legislative district lines that comport with new census data[2] in a process known as redistricting.[3] It is from these districts that members of the House of Representatives, state legislatures, and many city councils are elected.[4] The law that emanates from these legislative bodies impacts nearly every aspect of life.[5] Thus, the manner in which legislative districts are drawn has far reaching implications. They may profoundly impact the composition of the body politic[6] which, in turn, informs the

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1. In the majority of states, legislative districts are drawn by state legislatures themselves. *See National Overview of Redistricting: Who draws the lines?*, BRENNAN CTR. FOR JUSTICE (June 1, 2010), http://www.brennancenter.org/analysis/national-overview-redistricting-who-draws-lines. In seven states, Arizona, Colorado, Hawaii, Missouri, New Jersey, Ohio, and Pennsylvania, "politician commissions," in which elected officials may serve as members, draw districts. *Id.* In recent years, however, because of concerns over stark political gerrymandering to protect incumbents or particular political parties, there has been a trend towards establishing independent districting commissions. *See Redistricting Reform*, REDRAWING THE LINES, http://www.redrawingthelines.org/redistrictingreform (last visited Aug. 4, 2013). Such independent districting commissions draw the district lines in six states: Arkansas, Arizona, California, Idaho, Montana, and Washington. *National Overview of Redistricting*, *supra*.

2. The Constitution mandates that a census be conducted every ten years. U.S. CONST. art. I, § 2, cl. 3. As a result, the population and composition of each voting district can be ascertained by reference to the census data.

3. *See* Justin Levitt, *A Citizen's Guide to Redistricting*, BRENNAN CTR. FOR JUSTICE 1, 25 (2010), *available at* http://brennan.3cdn.net/7182a7e7624ed5265d_6im622teh.pdf.

4. *Redistricting 101*, BRENNAN CTR. FOR JUSTICE (Nov. 4, 2009), http://www.brennancenter.org/analysis/redistricting-101.

5. Among other things, statutes establish welfare, social security and other government assistance programs, tax the citizenry, regulate the economy and the environment, establish the rules governing labor relations, set standards and obligations governing the safety and health of workers, consumers, and the general public, govern marital rights and obligations, and create property rights. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 3–4 (3d ed. 2009).

6. Redistricting is an inherently political process. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973). In *Gaffney*, the Supreme Court noted:

> It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The



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policies that ensuing legislators pursue and enact.[7]

It is therefore of paramount importance that districts are drawn to ensure that all citizens have an equal opportunity to elect representatives of their choice. In order to make certain that each vote is of equal weight, the Constitution requires that redistricting plans be drawn as consistently populated, namely, that all legislative districts have the same population size.[8] This bedrock principle is known as "one person, one vote."[9] Redistricting plans must also comport with the Voting Rights Act of 1965, as amended, which safeguards minority voting strength.[10] Both federal and state courts are available as forums in which to challenge a redistricting plan that does not comply with the mandates of the Equal Protection Clause of the Constitution[11] and/or the Voting Rights Act.[12]

Section 2 of the Voting Rights Act requires the creation of districts for protected racial and language minorities that do not dilute their voting

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> reality is that districting inevitably has and is intended to have substantial political consequences.

*Id.* at 753.

7. *See Redistricting 101*, *supra* note 4.

8. In the case of congressional districts, the equal population requirement derives from Article I, Section 2 of the Constitution and mandates that "absolute population equality be the paramount objective of apportionment . . . ." Karcher v. Daggett, 462 U.S. 725, 732 (1983). Therefore, a congressional districting plan will not pass constitutional muster if the population deviations among the districts could have been minimized or avoided by a good faith effort, unless each deviation is justified by legitimate state objectives. *Id.* at 730–31. On the other hand, the equal population requirement as regards state legislative districts, which is rooted in the Equal Protection Clause of the Fourteenth Amendment, permits minor deviations from absolute population equality without justification by the state. *Id.* at 735. The Supreme Court has categorized deviations of under 10 percent as "minor" so that precise equality of population is not required in the construction of state legislative districts. Brown v. Thompson, 462 U.S. 835, 842 (1983). *But see* Larios v. Cox, 300 F. Supp. 2d 1320 (N.D.Ga.) *aff'd*, 542 U.S. 947 (2004) (invalidating state legislative redistricting plans with population deviations of less than 10 percent under the Fourteenth Amendment "one person, one vote" doctrine).

For a detailed discussion of the equality-of-population redistricting requirement, see Michael A. Carvin & Louis K. Fisher, "*A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2 (2005).

9. The "one person, one vote" principle was established through a series of Supreme Court decisions starting in the early 1960s. *See* Baker v. Carr, 369 U.S. 186 (1962) (recognizing justiciability of redistricting cases); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's") (footnote omitted); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires that each vote have approximately equal weight in the context of state redistricting).

10. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)).

11. *E.g.*, Growe v. Emison, 507 U.S. 25 (1993).

12. *See* Hathorn v. Lovorn, 457 U.S. 255 (1982).

strength, provided certain criteria are met.[13] These districts are commonly described as "majority-minority" districts.[14] The failure to draw "majority-minority" districts for any of the protected race or language minorities is actionable under section 2.[15] However, the circuit courts of appeals are split over the question whether section 2 requires the creation of coalition districts.[16] Coalition districts are electoral districts for two minority groups each of which individually would not meet the criteria requiring the construction of a majority-minority district under section 2,[17] but which do meet those criteria when combined as a coalition.[18] The Supreme Court has not been presented with a case that directly raises this issue. This Note will explore whether, and to what extent, coalition districts are required under section 2 of the Voting Rights Act—and correspondingly, whether, and to what extent, the failure to create such coalition districts constitutes a section 2 violation—in light of recent Supreme Court authority.[19]

Part I provides a brief overview of the history of section 2 of the Voting Rights Act and the requirements that must be met to state a claim for vote dilution. Part II summarizes the split among the circuit courts of appeals on the issue of coalition districts. Part III discusses the trend in section 2 vote dilution claims exemplified in the recent Supreme Court cases of *Bartlett v. Strickland*[20] and *Perry v. Perez*.[21] Finally, Part IV analyzes the likely outcome of a Supreme Court contest over coalition districts in view of these recent Supreme Court decisions.

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13. 42 U.S.C. § 1973 (2006); Thornburg v. Gingles, 478 U.S. 30 (1986).

14. The Supreme Court has defined majority-minority districts as "districts in which a majority of the population is a member of a specific [protected] minority group." Voinovich v. Quilter, 507 U.S. 146, 149 (1993).

15. *See* 42 U.S.C. § 1973 (2006); *see also Voinovich*, 507 U.S. at 153–54.

16. Pope v. Cnty. of Albany, 687 F.3d 565, 572 n.5 (2d Cir. 2012).

17. The circumstances under which the construction of a majority-minority district is required, and correspondingly under which the failure to construct a majority-minority district is actionable under section 2, are detailed in Part I.C of the text.

18. Bartlett v. Strickland, 556 U.S. 1, 13 (2009) (plurality opinion) (defining coalition district claims as those "in which two minority groups form a coalition to elect the candidate of the coalition's choice.").

19. In 2009, in *Bartlett*, the Supreme Court addressed the closely related concept of crossover districts. *Id.* A recent Supreme Court case, Perry v. Perez, 132 S. Ct. 934 (2012) (per curiam), raised coalition districts as an aside to the main issue of the case.

20. 556 U.S. 1.

21. 132 S. Ct. 934.

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## I. BACKGROUND

### *A. A Brief History of Section 2 of the Voting Rights Act*

African-Americans were granted suffrage with passage of the Fifteenth Amendment[22] in 1870.[23] However, nearly a century later, African-Americans still remained disenfranchised in several states that used discriminatory "literacy tests and similar voting qualifications"[24] as voting prerequisites.[25] The Voting Rights Act of 1965 was designed to eliminate discriminatory election practices that obstructed African-Americans' right to exercise their voting franchise.[26] Section 2 of the Voting Rights Act was enacted with the intent to remediate these evils[27] and complement the protections afforded under the Fifteenth Amendment.[28] The provisions of section 2 are universal and apply to every jurisdiction that draws lines for election districts.[29] Section 2 states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of [section 2] . . . is established if, based on the totality of circumstances,[30] it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a

22. The Fifteenth Amendment provides "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

23. South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966).

24. *See id.* at 315.

25. *Id.*

26. *Id.* For further discussion of the history of the Voting Rights Act, see *History of Federal Voting Rights Laws*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Aug. 4, 2013); *see also Katzenbach*, 383 U.S. 301.

27. *Katzenbach*, 383 U.S. at 308–15.

28. *See* U.S. Const. amend. XV. For a discussion of the Fifteenth Amendment, see generally City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980); *see also Primary Documents in American History: The Fifteenth Amendment to the Constitution*, THE LIBRARY OF CONGRESS, http://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html#American (last visited Aug. 4, 2013).

29. Bartlett v. Strickland, 556 U.S. 1, 18 (2009) (plurality opinion).

30. For a discussion of the totality of the circumstances standard, see *infra* text accompanying note 35.

> class of citizens protected by [section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[31]

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31. 42 U.S.C. § 1973 (2006). While the Voting Rights Act is explicit that the number of minority districts need not be proportionate to the minority group's population, section 2 nevertheless is in the nature of an affirmative action statute that requires enhancing minorities' voting opportunities. *See* MIKVA & LANE, *supra* note 5, at 278–84.

This inherent conflict derives from a political compromise requiring the inclusion of the no proportionality requirement in order to secure the passage of the 1982 amendment. *See id.* In the 1980 case of *City of Mobile, Ala. v. Bolden*, the Supreme Court interpreted section 2 of the Voting Rights Act as only prohibiting intentional discrimination on account of race. 446 U.S. at 73–74. As a result of lobbying by civil rights groups, a number of senators and congressmen offered an amendment to section 2 prohibiting any voting practice with a discriminatory result. MIKVA & LANE, *supra* note 5, at 278–80. This amendment passed the House of Representatives, but was stalled in the Senate because of concerns that a "results" standard could be interpreted by the courts to mandate proportional representation. *Id.* at 279–84. A compromise added the language to the proposed amendment stating: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* at 279. With this compromise language, the section 2 amendment in question passed both houses of Congress and was signed into law by the President. *See Voting Rights Act, Hearings Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 97th Cong. 2 (1982) (statement of Sen. Robert Dole), *reprinted in* MIKVA & LANE, *supra* note 5, at 282–84. For a further discussion of the 1982 amendments to the Voting Rights Act see *infra* text accompanying notes 34–35.

The compromise created an inherent tension within the statute as it simultaneously prescribes affirmative action while disavowing proportionality.

> The compromise did little more than . . . leav[e] to the courts the task of developing a principled way to distinguish illegal vote dilution from lost races; and to do so without depending so heavily upon the degree of minority success in elections that [the courts] make proportional representation—if not in name, in fact—the true rule.

League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1503 (5th Cir.1987) (Higginbotham, J., dissenting), *vacated and aff'd on other grounds*, 829 F.2d 546 (5th Cir. 1987).

This tension permeates section 2 voting rights jurisprudence even today. *Compare* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (finding no dilution of the white vote in light of the imperatives of the Voting Rights Act), *with* Shaw v. Reno, 509 U.S. 630 (1993) (acknowledging that, notwithstanding the Voting Rights Act, white voters have constitutional protections which are not trumped by the requirement to create majority-minority voting districts). In this regard it is to be noted that *Shaw* was a 5 to 4 decision. *Shaw*, 509 U.S. 630. The majority opinion in *Shaw* states:

> Nothing in the [*United Jewish Organizations*] decision precludes white voters . . . from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.

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As originally enacted, the protections of section 2 of the Voting Rights Act extended exclusively to African-Americans who historically had suffered from discrimination with respect to their exercise of their right to vote.[32] In 1975, Congress amended the Voting Rights Act to broaden the protected class under section 2 to include the following language minorities: Native Americans, Asian Americans, Alaskan Natives, and Hispanic Americans.[33] In 1982, section 2 was further amended to clarify that it renders unlawful any "standard, practice, or procedure . . . *which results* in a denial or abridgement to the right of any citizen of the United States to vote on account of race or color . . . ."[34] Under this discriminatory effects standard, a violation of section 2

> is established if, based on the *totality of circumstances*,[35] it is shown that the political processes leading to nomination or election in the

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*Id.* at 652. By contrast, the dissenters believed that the facts of *Shaw* fit comfortably within the precedent set by *United Jewish Organizations*. *Id.* at 659. The dissent stated:

> [t]he Court today chooses not to overrule, but rather to sidestep, *UJO*. It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action.

*Id.*

32. *See* Nixon v. Kent Cnty., 76 F.3d 1381, 1389 (6th Cir. 1996); League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring).

33. 42 U.S.C. § 1973aa-1a(e) (2006).

34. S. REP. NO. 97-417, at 95 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 268 (emphasis added).

Prior to the 1982 amendment, the Act stated that "No . . . standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." City of Mobile, Ala. v. Bolden, 446 U.S. 55, 60 (1980). In *City of Mobile, Ala. v. Bolden*, the Supreme Court construed this language to mean that proof of discriminatory intent was required to state a claim under section 2. *Id.* at 62. The purpose of the 1982 amendment was to legislatively overrule the holding in *Mobile* by

> mak[ing] clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restore[d] the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*.

S. REP. NO. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.

For a comprehensive discussion of the legislative history of the 1982 amendments to the Voting Rights Act, see Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983); Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PAC. L.J. 619, 629–32 (1990); Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L.Q. 1 (1984).

35. In its report accompanying the 1982 amendment, The Senate Committee on the Judiciary identified factors for courts to consider in the "totality of the circumstances" analysis. *See* S. REP. NO. 97-417. These include: (1) the degree of any history of any voting-related discrimination; (2) the extent of racial polarization in voting; (3) the extent to which procedures have been utilized which increase the opportunity for discrimination; (4) whether members of the minority group have been

> State or political subdivision are not equally open to participation by members of a class of citizens protected by . . . [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[36]

### *B. Vote Dilution Under Section 2*

Section 2 bars any practice that dilutes the voting strength of protected minorities and, correspondingly, gives rise to a cause of action where vote dilution is found.[37] Vote dilution exists where voting schemes "operate to minimize or cancel out the voting strength of racial [minorities in] the voting population."[38] In redistricting, the "[d]ilution of racial minority group voting strength may be caused by the dispersal of [a protected minority group] into districts in which they constitute an ineffective minority of voters or from the concentration of [a protected minority group] into districts where they constitute an excessive majority."[39] These two dilutive practices are commonly known as "cracking"[40] and "packing,"[41] respectively. "Cracking" dilutes minority voting strength because the minority group is divided "among various districts so that it is a majority in none."[42] Alternatively, when a redistricting plan "packs" minorities into a single district, minority voting strength is diluted because, but for the packing, the minority would have been able to elect more candidates of their choice.[43]

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denied access to the candidate slating process; (5) the extent to which minorities bear the effects of discrimination in education, employment, and health; (6) whether political campaigns include racial appeals; and (7) the success of members of the minority in achieving elective office. *Id.* at 28–29. Additional factors that may be probative were also included, namely, the degree of responsiveness to the minority group by elected officials and whether the policy underlying the voting practice is tenuous. *Id.* at 29. The Senate Report states that these factors are not exhaustive and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* This array of factors is drawn from Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976), and commonly referred to as "the *Zimmer* factors." *See* S. REP. NO. 97-417 at 23. The Supreme Court recognized the vitality of the *Zimmer* factors in Rogers v. Lodge, 458 U.S. 613, 621–22 (1982). For a discussion of the contextual application of the totality of circumstances test, see *infra* text accompanying note 51.

36. 42 U.S.C. § 1973(b) (2006) (emphasis added).
37. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).
38. *Id.* at 47 (quotation marks omitted).
39. *Id.* at 46 n.11.
40. Bartlett v. Strickland, 556 U.S. 1, 14 (2009) (plurality opinion).
41. Voinovich v. Quilter, 507 U.S. 146, 153 (1993).
42. *Id.* at 153.
43. *Id.*

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### *C. The* Gingles *Preconditions: Establishing A Vote Dilution Claim Under Section 2*

In the seminal case of *Thornburg v. Gingles*,[44] the Supreme Court, construing section 2, as amended in 1982, set forth three "necessary preconditions"[45] ("the Gingles factors" or "the Gingles preconditions") that a minority group must demonstrate in order to establish a claim for vote dilution under section 2 of the Voting Rights Act.[46] "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[47] "Second, the minority group must be able to show that it is politically cohesive."[48] "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."[49] It is only if these three preconditions are met[50] that courts will look to the totality of the circumstances to determine "based 'upon a searching practical evaluation of the "past and present reality,"' . . . whether the political process is equally open to minority voters."[51] Under such circumstances, to avoid vote dilution, those who redistrict are required to create majority-minority districts[52] to protect the minority's ability to elect a candidate of its choice.[53] Section 2 of the Voting Rights Act is silent on the matter of minority coalitions.[54]

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44. 478 U.S. 30 (1986).

45. *Id.* at 50–51.

46. The *Gingles* case arose in the context of multimember districts. *Id.* at 35. However, subsequent to *Gingles*, the Supreme Court held that the *Gingles* preconditions apply equally to section 2 claims involving single member districts. Growe v. Emison, 507 U.S. 25, 40–41 (1993). Single member districts are districts where "one candidate is elected to represent voters in the district. By contrast, in multimember districts, 'two or more legislators [are] elected at large by the voters of the district.'" Hall v. Virginia, 385 F.3d 421, 426 n.8 (4th Cir. 2004) (quoting Whitcomb v Chavis, 403 U.S. 124, 127–28 (1971)).

47. *Gingles*, 478 U.S. at 50.

48. *Id.* at 51.

49. *Id.* (citation and footnote omitted).

50. As the Fourth Circuit has observed, a minority group that does not satisfy all of the *Gingles* preconditions cannot demonstrate, as it must to state a claim under section 2, that it is the challenged electoral practice, as opposed to some other cause, that "impede[s] the ability of minority voters to elect representatives of their choice." *Hall*, 385 F.3d at 426 (quoting *Gingles*, 478 U.S. at 48).

51. *Gingles*, 478 U.S. 30, 79 (1986) (quoting S. REP. NO. 97-417, at 30 (1982)). For a discussion of the circumstances that courts examine under the totality of the circumstances analysis, *see supra* text accompanying note 35.

52. For a definition of majority-minority districts, *see supra* text accompanying note 14.

53. *See, e.g.*, *Gingles*, 478 U.S. 30.

54. *See* 42 U.S.C. § 1973b (2006). In *Nixon v. Kent County*, the Sixth Circuit observed that the concept of minority coalitions is addressed only once—elsewhere in the Voting Rights Act—and in that case, in the negative. 76 F.3d 1381, 1387 n.7 (6th Cir. 1996). *See also* 42 U.S.C. § 1973b(f)(3)

## II. COALITION DISTRICTS AND THE SPLIT AMONG THE CIRCUITS

The question has arisen whether impermissible dilution exists where two protected minority groups, each of which individually does not meet the *Gingles* preconditions, can be combined as a coalition and thus qualify for section 2 protection.[55] Three circuits, the Fifth, the Eleventh, and the Sixth, have opined on this question.[56] The Fifth Circuit[57] and the Eleventh Circuit[58] have found coalition districts to be actionable under section 2 of the Voting Rights Act, while the Sixth Circuit has taken the opposite view.[59] Two other circuits, the Ninth[60] and the Second,[61] have implicitly

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(prohibiting the aggregation of language minorities for purposes of meeting the numerical requirements for foreign language ballots under 42 U.S.C. § 1973b).

55. The notion of coalition suits did not emerge until after the 1982 amendments to section 2 when the intent test of *Mobile* was replaced with the totality of circumstances analysis under the Senate Report and *Zimmer* factors. *Nixon*, 76 F.3d at 1387 n.8. Coalition districts were not even feasible until 1975, when the Voting Rights Act was broadened to extend its protections to minority groups other than African-Americans. *Id.* For discussions of coalition districts under section 2, see Butler & Murray, *supra* note 34, at 629–32; Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389; Chelsea J. Hopkins, Comment, *The Minority Coalition's Burden of Proof Under Section 2 of the Voting Rights Act*, 52 SANTA CLARA L. REV. 623 (2012); Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 HARV. LATINO L. REV. 183 (2012); Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethically Diverse Communities*, 1995 U. ILL. L. REV. 441; Christopher E. Skinnell, Comment, *Why Courts Should Forbid "Minority Coalition" Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, 2002 U. CHI. LEGAL F. 363.

56. The Fourth Circuit has also spoken to the issue of coalition districts, albeit in the context of a case where the complaint alleged a violation of section 2 by reason of failure to draw a crossover district. Hall v. Virginia, 385 F.3d 421, 425 (4th Cir. 2004). For a discussion of crossover districts, see *infra* Part III.A.

57. *See* Campos v. City of Baytown, Tex., 840 F.2d 1240 (5th Cir. 1988), *reh'g denied*, 849 F.2d 943 (1988) (per curiam), *cert. denied*, 492 U.S. 905 (1989); League of United Latin Am. Citizens Council, No. 4386 v. Midland Indep. Sch. Dist., 812 F.2d 1494 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987).

58. *See* Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524 (11th Cir. 1990).

59. *See Nixon*, 76 F.3d 1381. The Fourth Circuit also has expressed the view that section 2 does not require the construction of coalition districts. *See Hall*, 385 F.3d 421.

60. In Badillo v. City of Stockton, Cal., 956 F.2d 884 (9th Cir. 1992), the city changed the voting method for city council elections from single district to essentially at-large voting. *Id.* at 885. A coalition of African-American and Hispanic voters challenged this change under section 2, maintaining that it decreased minorities' ability to elect their preferred candidates. *Id.* at 886. The Ninth Circuit held that the plaintiffs did not establish the cohesiveness required by the second *Gingles* factor without addressing whether the coalition suit itself was permissible. *Id.* at 890. However, by undertaking a *Gingles* analysis, the Ninth Circuit tacitly acknowledged the existence of a section 2 violation by reason of the failure to create a coalition district.

61. *See* Bridgeport Coal. for Fair Representation v. City of Bridgeport, 26 F.3d 271 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994).

In *Bridgeport*, a group of African-American and Hispanic voters sought a preliminary injunction against the City of Bridgeport to prevent the implementation of a new redistricting plan. *Id.* at 272–73.

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endorsed coalition claims so long as they satisfy the *Gingles* preconditions without specifically ruling on the question.[62]

### *A. Recognition of Coalition Districts in the Fifth and Eleventh Circuits:* Campos v. City of Baytown *and* Concerned Citizens of Hardee County v. Hardee Board of Commissioners

In *Campos v. City of Baytown, Texas*,[63] the Fifth Circuit squarely confronted the issue whether Hispanic and African-American citizens could be combined as one minority group for the purpose of establishing vote dilution under section 2. The majority of the Court determined that the failure to create such a coalition district could constitute a violation of section 2 provided the criteria for establishing vote dilution are met.[64] The court reasoned that the Voting Rights Act protects "both racial and language minorities" and does not preclude aggregating protected minorities.[65] It further observed that both racial and language minorities experienced similar historical discrimination in voting.[66]

On petition for rehearing *en banc*, Judge Higginbotham issued a sharp dissent, in which five of his colleagues joined, taking the opposite view.[67] He criticized the majority's assumption that a coalition of minorities is itself protected under section 2 of the Voting Rights Act as an "unwarranted extension of congressional intent."[68] According to Judge

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The Second Circuit upheld the district court's issuance of the injunction, finding that its decision that the coalition was likely to succeed on the merits was not clearly erroneous. *Id.* at 277. While the court was "persuaded . . . that there [was] more than sufficient evidence to support a conclusion that the Coalition satisfied its burden imposed by *Gingles*," it neither mentioned nor expressly addressed the issue of coalition districts. *Id.* at 275.

62. The Ninth and Second Circuit cases have been characterized by at least one court as "tacit recognition" of the viability of such an aggregation claim. *Nixon*, 76 F.3d at 1384. The First Circuit took a position similar to that of the Ninth and Second Circuits in Latino Political Action Comm., Inc. v. City of Boston, 784 F.2d 409 (1st Cir. 1986), but that authority is dubious inasmuch as the case was decided in early 1986, several months prior to the issuance of the Supreme Court's opinion in *Gingles*.

63. 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

64. *Campos*, 840 F.2d 1240. The court there stated "[i]f, together, they [African-Americans and Hispanics] are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters." *Id.* at 1244.

65. *Id.*

66. *Id.*

67. Campos v. City of Baytown, Tex., 849 F.2d 943, 944–46 (5th Cir. 1988) (Higginbotham, J., dissenting) (per curiam), *cert. denied*, 492 U.S. 905 (1989). Eleven judges of the Fifth Circuit were polled as to the petition for rehearing in *Campos* (three judges did not participate in the poll). *Id.* at 944. Although the six dissenting judges constituted a majority of the judges voting, the petition nevertheless was denied because a majority of the circuit judges in regular active service did not favor granting rehearing. *Id.*

68. *Id.* at 945. Judge Higginbotham took issue with the court's statutory analysis of section 2, stating that "[t]he question is not whether Congress in the Voting Rights Act intended to *prohibit* such

Higginbotham, coalition districts are outside the *Gingles* framework since "[i]ts three step inquiry assumes a group unified by race or national origin and asks if it is cohesive in its voting."[69] Judge Higginbotham asserted that, in his view,"[i]f a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities."[70] Judge Higginbotham admonished the court for confusing "a cohesive voting minority with protected minorities who sometimes share similar political agendas."[71] Thus, under Judge Higginbotham's analysis, coalitions are simply interest groups seeking to maximize their political power and not the object of constitutionally impermissible discrimination.[72]

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coalitions; instead, the proper question is whether Congress intended to *protect* those coalitions." *Id.* Judge Higginbotham first articulated this position in his dissenting opinion in League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1503 (5th Cir. 1987) (Higginbotham, J., dissenting), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987). *Midland* was an action under section 2 of the Voting Rights Act initiated by a coalition of African-Americans and Mexican-Americans alleging dilution of their combined vote by an at-large system of electing the board of trustees for the Midland Independent School District. *Midland*, 812 F.2d at 1495. The majority opinion endorsed the aggregation of the African-American and Mexican-American voters for the purposes of applying the *Gingles* factors. *Id.* at 1501–02. In his dissent, Judge Higginbotham sounded the same theme on which he elaborates in *Campos*, namely, that permitting coalition claims is inconsistent with the purpose of the Voting Rights Act as this risks confusion of political coalitions, with little or no connection to discrimination, with a cohesive minority group sharing a common history of persistent bigotry. *Id.* at 1504 (Higginbotham, J., dissenting).

69. *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting).

70. *Id.* (quoting Higginbotham's dissent in *Midland*, 812 F.2d at 1504).

71. *Id.*

72. Judge Higginbotham's viewpoint was endorsed by his colleague on the Fifth Circuit, Judge Edith Jones, in her concurrence in League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 894–98 (5th Cir. 1993) (Jones, J., concurring), in which four of her colleagues joined. Judge Jones stated, "I believe the . . . court should lay to rest the minority coalition theory of vote dilution claims. *Id.* at 894. Judge Jones offered a variety of reasons which, in her opinion, argue against aggregating racial and/or language minorities for purposes of a section 2 vote dilution claim.

Judge Jones opined that a textual analysis of the Voting Rights Act demonstrates that Congress did not intend to extend the section 2 protections against vote dilution to coalitions of different ethnic and language minorities. *Id.* She pointed to the 1975 amendment to the Voting Rights Act which extended section 2 protections to four additional distinct minorities. *Id.* Because each group was separately identified, Judge Jones concluded that "[b]y negative inference, Congress did not envision that each defined group might overlap with any of the others or with blacks." *Id.* She observed that the 1982 amendment to section 2 "likewise offers no textual support for a minority aggregation theory" as it refers only to a "class of citizens" and "a protected class" not "protected *classes* of citizens." *Id.* Judge Jones also noted that coalition districts ignore the individual identity of each minority group and that aggregating minorities could result in the submergence of one minority group in a district dominated by a different minority and potentially lead to racial animosity. *Id.* at 896.

Lastly, in Judge Jones' view, the recognition of coalition district suits under section 2 runs afoul of "the Section 2 prohibition of proportional representation" and would lead to the "possibly unconstitutional" remedy of "mandating proportional representation." *Id.* This final argument has been

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In *Concerned Citizens of Hardee County v. Hardee Board of Commissioners*,[73] African-American and Hispanic voters contended that the at-large system for electing the Hardee County Board of Commissioners (governing the county) and the Hardee County School Board violated section 2 by diluting the combined voting strength of African-Americans and Hispanics.[74] The Eleventh Circuit, citing *Campos* and *Midland* without elaboration, found that "[t]wo minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."[75]

### *B. The Sixth Circuit's Rejection of Coalition Districts:* Nixon v. Kent County

By contrast, the Sixth Circuit in *Nixon v. Kent County*,[76] found that multiracial coalition districts are not covered by section 2, and held that the failure to create such districts does not give rise to a cognizable claim of vote dilution under the Voting Rights Act.[77] The court's decision was informed by principles of statutory construction.[78] The court reasoned that section 2 "does not mention minority coalitions, either expressly or conceptually . . . [and] consistently speaks of a 'class' in the singular."[79] It further noted that the legislative history lacks "evidence that Congress even contemplated coalition suits, far less intended them"[80] as the committee reports for the 1975 and 1982 amendments did not "make any reference[s], implicit or explicit, to the issue of aggregation."[81]

The Sixth Circuit was not persuaded by the *Campos* decision. Instead it "share[d] the concerns articulated by Judge Higginbotham in his dissent from the denial of rehearing."[82] Like Judge Higginbotham, the Sixth Circuit addressed, at length, policy concerns that underscored its

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criticized by at least one commentator who argues that while section 2 does not provide a right to proportional representation, nothing in the statute expressly prohibits it. *See* Schulte, *supra* note 55, at 470.

73. 906 F.2d 524 (11th Cir. 1990).
74. *Id.* at 525.
75. *Id.* at 526.
76. 76 F.3d 1381 (6th Cir. 1996).
77. *Id.* at 1393.
78. *Id.* at 1386.
79. *Id.*
80. *Id.* at 1387. However, the court pointed out that because the statute was clear it was "unnecessary and improper" to look to the legislative history. *Id.*
81. *Id.*
82. *Id.* at 1388.

conclusion.[83] First, the court noted that based on historical discrimination, Congress had singled out select minorities for protection under the Voting Rights Act and that Congress made no finding of discrimination against multiracial coalitions.[84] A finding of discrimination as to each group individually does not, in the Sixth Circuit's view, afford a "basis for presuming such a finding regarding a group consisting of a mixture of both minorities."[85] In this regard, the court noted that the findings of discrimination as to African-Americans and the findings of discrimination against Hispanics were made years apart, and rested on different grounds, namely, "that African Americans had been disadvantaged specifically by reason of race, while Hispanic Americans had been disadvantaged by reason of language and education."[86]

Next, again citing Judge Higginbotham, the court noted that imposing a requirement to create coalition districts could lead to results that are contrary to the distinct interests of each group.[87] The court was also concerned with the impact that requiring coalition districts would have upon those who draw district lines.[88] It explained that those who redistrict would be confronted with the impossible task of having to choose whether to enhance minorities separately and subject the redistricting plan to the challenge that greater influence could have been achieved by creating coalition districts, or to create coalition districts, and subject themselves to the challenge that greater influence could have been achieved by creating individual minority districts.[89]

Third, the court found that coalition districts fly in the face of the first *Gingles* precondition that the minority group be sufficiently numerous to constitute a majority in a single member district.[90] Lastly, the court reiterated as "most persuasive[]"[91] Judge Higginbotham's observation that the joining together of protected minorities is animated by shared political interests, something the Voting Rights Act is not intended to protect.[92]

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83. *See id*. at 1390–92.

84. *Id.* at 1390–91.

85. *Id.* at 1391 (citing to Judge Higginbotham's dissent to the denial of a rehearing in Campos v. City of Baytown, Tex., 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting) (per curiam), *cert. denied*, 492 U.S. 905 (1989), as well as to Judge Jones' concurring decision in League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 896 (5th Cir. 1993) (Jones, J., concurring)).

86. Nixon v. Kent Cnty., 76 F.3d 1381, 1391 (6th Cir. 1996).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1391–92. The Fourth Circuit's rejection of coalition districts in *Hall v. Virginia*

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The Sixth Circuit's decision, however, was not unanimous. Judge Damon Keith authored a dissenting opinion in which he endorsed the position of the Fifth and Eleventh Circuits that nothing in section 2, as amended, precludes aggregated minorities from constituting a protected class.[93] Judge Keith contended that section 2 should be construed liberally since it is a remedial statute.[94] He expressed his view that the language of section 2 does not require racial homogeneity[95] and that the majority's imposition of such a racial classification is constitutionally impermissible.[96] Finally, Judge Keith challenged the majority's position that the combination of two minority groups would necessarily result in the submersion of each group's legitimate political interests because section 2 protection is only afforded to groups whose interests are politically cohesive.[97] Thus, in Judge Keith's view, attempts to submerge divergent interests would not be tolerated under the Act.[98]

## III. COALITION DISTRICTS AND THE SUPREME COURT VOTING RIGHTS ACT DECISIONS

The Supreme Court, on more than one occasion, has declined the opportunity to opine directly on the question whether section 2 vote dilution is extant where a jurisdiction declines to draw a coalition district. Certiorari was sought and denied in *Campos*.[99] While certiorari was granted in *Bridgeport*, the Supreme Court, in a memorandum decision, vacated the judgment and remanded the case for further consideration

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likewise is informed by the notion that the banding together of disparate racial minorities is, at its core, political. Hall v. Virginia, 385 F.3d 421 (4th Cir. 2004). The court there stated:

> any construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined. "Congress enacted § 2 of the Voting Rights Act . . . to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude.'"

*Id.* at 431 (alterations in original) (quoting Voinovich v. Quilter, 507 U.S. 146, 152 (1993) (quoting U.S. Const. amend. XV, § 1)).

93. *Nixon*, 76 F.3d at 1396–97 (citing Campos v. City of Baytown, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) and Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990)).

94. *Id.* at 1397.

95. *Id.* at 1399.

96. *Id.* at 1399–1402.

97. *Id.* at 1402–03.

98. *Id.* at 1403.

99. 492 U.S. 905 (1989).

without addressing the issue of coalition districts.[100] In *Growe v. Emison*,[101] the Supreme Court declined to determine whether minority groups can be combined under section 2. Instead, the Court assumed without deciding that the failure to create a coalition district could constitute a violation of section 2.[102] This was of no consequence in *Growe* because, in that case, the Court found that "the *Gingles* preconditions were . . . unattainable."[103] Although the Supreme Court has yet to squarely address coalition districts under section 2, the issue has arisen peripherally in recent cases.

### *A. The Supreme Court's Rejection of Crossover Districts:* Bartlett v. Strickland

In *Bartlett v. Strickland*,[104] a plurality opinion,[105] the Supreme Court addressed the closely related concept of crossover districts.[106] A crossover district, as the Court explained, is a district in which the "minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate."[107] The Court observed that crossover districts can be regarded as a species of coalition districts because they also involve the aggregation of two groups—the protected

100. City of Bridgeport, Conn., v. Bridgeport Coal. for Fair Representation, 512 U.S. 1283 (1994).

101. 507 U.S. 25 (1993).

102. *Id.* at 41. That the Supreme Court in *Growe* opted to assume the viability of coalition districts under section 2 without deciding the issue likely is of little predictive value. During that very same 1992–1993 term, the Court was also presented with the related question of whether section 2 requires the creation of influence districts. *See* Voinovich v. Quilter, 507 U.S. 146 (1993). Influence districts are districts in which the minority has the ability to influence, but not determine, the electoral outcome. *See* Georgia v. Ashcroft, 539 U.S. 461, 482 (2003). In *Voinovich*, the Court chose to assume without deciding that section 2 protection extends to influence districts. *Voinovich*, 507 U.S. at 154. Nevertheless, when the Court was presented with an influence district case thirteen years later, it rejected the viability of influence districts under section 2. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006). *See infra* text accompanying note 111.

103. *Growe*, 507 U.S. at 41.

104. 556 U.S. 1 (2009) (plurality opinion).

105. Justice Kennedy, in an opinion in which Chief Justice Roberts and Justice Alito joined, determined that section 2 is not violated by the failure to create a crossover district. *Id.* at 6, 23. Justice Thomas, in an opinion joined by Justice Scalia, concurred in the judgment on the ground that "the text of § 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim . . . ." *Id.* at 26 (Thomas, J., concurring). Thus, for varying reasons, five Justices agreed that section 2 does not mandate the creation of crossover districts.

106. *Bartlett*, 556 U.S. at 3 (plurality opinion). For a law review article discussing the *Bartlett* decision, see Jacob Whitted, Comment, Bartlett v. Strickland*: The Crossover of Race and Politics*, 87 DENV. U. L. REV. 581 (2010).

107. *Bartlett*, 556 U.S. at 3 (plurality opinion).

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minority and the white majority.[108] However, the opinion is explicit that it is not directed to, and does not decide, the question whether the scope of section 2 vote dilution protection extends to multiracial coalition districts in which two protected minorities join together to form a coalition.[109]

In *Bartlett*, the plurality determined that section 2 does not require the creation of crossover districts, and correspondingly, that the failure to create a crossover district is not actionable under section 2.[110] The plurality opinion, authored by Justice Kennedy, reasons that section 2 applies only when the minority has "less opportunity than other members of the electorate to . . . elect representatives of their choice."[111] In crossover districts, the minority group does not have less opportunity because, standing alone, it does not constitute a majority capable of electing a candidate of its choice.[112] Rather, in such circumstances, the minority group has the same "opportunity [as any other minority group within the electorate] to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate."[113] In other words, minorities constituting less than a majority need to form political coalitions in order to elect their candidate of choice.[114] Affording minorities section 2 protection where the joinder of other groups is needed to elect a protected minority's candidate of choice

108. *Id.* at 13.

109. *Id.* at 13–14 (explaining "[w]e do not address that type of coalition district here").

110. *Id.* at 14–15.

111. *Id.* at 14 (alteration in original (quoting 42 U.S.C. § 1973b (2000 ed.)). Justice Kennedy relied on this same statutory language when he authored an opinion rejecting the sustainability of "influence districts" under section 2. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 434 (2006). An influence district is one in which, by virtue of their number, "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." Georgia v. Ashcroft, 539 U.S. 461, 482 (2003).

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, squarely rejected the notion that section 2 requires the creation of districts in which a protected minority group has the ability to influence, but not determine, the electoral outcome. *See League of United Latin Am. Citizens*, 548 U.S. at 443–47. Justice Kennedy cited the language of section 2 that requires that the protected minorities have the opportunity "*to elect* representatives of their choice," 42 U.S.C. § 1973b, to opine that "the lack of such [influence] districts cannot establish a § 2 violation. The failure to create an influence district . . . does not run afoul of § 2 of the Voting Rights Act." *League of United Latin Am. Citizens*, 548 U.S. at 446. He added, "If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.*

Justice Scalia, joined by Justice Thomas, concurred in the dismissal of the section 2 claim on the basis that no claim for vote dilution lies under section 2 of the Voting Rights Act. *Id.* at 512 (Scalia, J., concurring) (citing Justice Thomas's concurrence in Holder v. Hall, 512 U.S. 874 (1994)). Accordingly, they too would not recognize an influence district based vote dilution claim, albeit for reasons different than those articulated by Justice Kennedy, Chief Justice Roberts, and Justice Alito.

112. *Bartlett*, 556 U.S. at 14 (plurality opinion).

113. *Id.*

114. *Id.*

would, in Justice Kennedy's view, grant minorities an improper political advantage not contemplated by section 2.[115] Reiterating the Court's observation in *Johnson v. De Grandy*,[116] the plurality opinion emphasized that "[m]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[117] The opinion is clear that section 2 does not require districts to grant minorities "the most potential, or the best potential, to elect a candidate by attracting crossover voters."[118]

Justice Kennedy articulated another rationale—the need for workable standards for those who draw district lines.[119] According to the plurality, adhering to the requirement that a minority must constitute fifty percent provides administrative certainty and simplicity[120] while deviating from such a standard would require courts to delve into a host of nettlesome political inquiries concerning racial voting practices and patterns which courts are ill-suited to determine.[121] Other reasons the *Bartlett* plurality expressed for maintaining the requirement that the minority population exceed fifty percent include the "special significance, in the democratic process, of a majority"[122] and the fact that "§ 2 . . . is not concerned with maximizing minority voting strength."[123]

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115. *Id.* at 14–15, 20. "Nothing in §2 grants special protection to a minority group's right to form political coalitions." *Id.* at 15.

116. 512 U.S. 997 (1994).

117. *Bartlett*, 556 U.S. at 15 (plurality opinion) (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994)).

118. *Id.*

119. *Id.* at 17.

120. *Id.*

121. *Id.* These include the percentage of white voters that supported minority preferred candidates, what types of candidates have minority voters and white voters historically supported together, what evidence indicates crossover support will continue, an examination of minority and white turnout rates, and what evidence supports that such turnout rates will remain the same. *Id.*

122. *Id.* at 19.

123. *Id.* at 23. By contrast, the dissent authored by Justice Souter argues that the plurality's position, that the minority group must equal or exceed fifty percent of the district's population, would force those who draw district lines to pack African-Americans into African-American districts thereby "contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation." *Id.* at 27 (Souter, J., dissenting). The dissenting opinion expressed concern regarding the adverse impact on racial harmony of the plurality's decision. *Id.* The dissent admonished that the plurality's view will effectively transform the objective of Voting Rights Act as it "will now be promoting racial blocs, and the role of race in districting decisions as a proxy for political identification will be heightened." *Id.*

Justice Ginsburg, who joined in the dissent, also wrote separately to urge Congress to clarify the reach of section 2 in light of the plurality's opinion. *Id.* at 44 (Ginsburg, J., dissenting). Justice Breyer, while joining Justice Souter's dissent, likewise authored a separate dissent in which he proposed revamping the fifty percent majority-within-a-district requirement under the first *Gingles* precondition. *Id.* at 44–48 (Breyer, J., dissenting).

Some commentators agree with Justice Breyer that the current *Gingles* analysis should be reconsidered, but suggest a different approach. Judge Strange of the Eleventh Circuit has advocated for

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### *B.* Perry v. Perez*: Coalition Districts Receive a Notable Mention*

In a 2012 per curiam decision, *Perry v. Perez*,[124] the Supreme Court took occasion to comment on coalition districts. The *Perry* case did not directly raise the question whether section 2 mandates the creation of coalition districts.[125] Rather, the case involved the propriety of an interim redistricting plan drawn and ordered into effect by a three-judge district court pending preclearance under section 5 of the Voting Rights Act of the congressional and state legislative plans enacted by the state of Texas.[126] The state of Texas argued that the court's interim plans failed to pay due deference to the plans enacted by the state.[127] One area of concern

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a preliminary inquiry before reaching the three *Gingles* preconditions. Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is The Whole Greater Than The Sum Of The Parts?*, 20 TEX. TECH L. REV. 95 (1989). That inquiry would focus on three factors: "[f]irst, whether the members of the aggregated group have similar socio-economic backgrounds; second, whether the members of the aggregated group have similar attitudes toward significant issues affecting the challenged entity; and third, whether the members of the aggregated group have consistently voted for the same candidates." *Id.* at 129. If the three factors produce "the same or similar results" the minorities may be aggregated; if the results are different, then no aggregation would be permitted. *Id. See also* Butler & Murray, *supra* note 34, at 624 (arguing that aggregation is permissible only where the two minority groups can establish they are effectively one by showing "a common history of exclusion, that their political interests are so similar, and their past political behavior so uniform as to make the two groups one.").

124. 132 S. Ct. 934 (2012).

125. *See id.*

126. *Id.* at 940. Unlike section 2, which applies to all jurisdictions nationwide, section 5 addresses only those jurisdictions that fall under the rubric of section 4, commonly known as "covered jurisdictions." *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Aug. 4, 2013). In order for a covered jurisdiction to implement any electoral change, including implementing a new redistricting plan, section 5 mandates that it obtain approval or preclearance from the Attorney General of the United States or from a three-judge panel convened in the District of Columbia District Court. 42 U.S.C. § 1973c(a)(2006).

As of 2012, Texas was a covered jurisdiction. However, on June 25, 2013, the Supreme Court held the existing coverage formula of section 4(b) of the Voting Rights Act unconstitutional. Shelby Cnty., Ala., v. Holder, 133 S. Ct. 2612 (2013). Accordingly, as a practical matter, section 5 is no longer operative and under current circumstances, those jurisdictions previously covered under section 5, including Texas, can implement electoral changes without the necessity for preclearance. For a discussion of *Shelby County*, see *infra* text accompanying note 159.

127. *Perry*, 132 S. Ct. at 940–41. The Supreme Court repeatedly has stated that the primary responsibility for redistricting the Congress and the state legislatures lies with the states. *See* Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); *accord* Growe v. Emison, 507 U.S. 25, 34 (1993) ("[W]e renew our adherence to the principle[] [that] the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts."); Voinovich v. Quilter, 507 U.S. 146, 156 (1993) ("Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."); Connor v. Finch, 431 U.S. 407, 414–15 (1977) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for

identified by the *Perry* Court was court-drawn Congressional District 33.[128] While the district court's intentions in drawing District 33 were not entirely clear, its order suggested that the court "may have intentionally drawn District 33 as a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority."[129] Citing to *Bartlett*, with a "cf", the *Perry* Court stated the following with respect to the lower court's District 33: "If the District Court did set out to create a minority coalition district . . . it had no basis for doing so."[130]

## IV. COALITION DISTRICTS IN THE WAKE OF *BARTLETT* AND *PERRY*

In the aftermath of *Bartlett* and *Perry*, courts have evinced a difference of opinion as to whether the issue of coalition districts under section 2 has been resolved. In a footnote in *Pope v. County of Albany*,[131] the Second Circuit, without referencing either *Bartlett* or *Perry*, indicated that the circuits are split on the question whether minorities can be aggregated to form a coalition district under section 2.[132] By contrast, in *Texas v. United States*,[133] a three-judge panel convened in the District of Columbia stated that *Perry* forecloses coalition districts under section 2.[134]

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legislative consideration and determination,' for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.") (citation and footnote omitted); White v. Weiser, 412 U.S. 783, 795 (1973) ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment."); Reynolds v. Sims, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."); *see also* Scott *v.* Germano, 381 U.S. 407 (1965) (per curiam).

*Perry* rests on this principle. As the *Perry* Court stated, the fact that a plan has not been pre-cleared and cannot be implemented "does not mean that the plan is of no account or that the policy judgments it reflects can be disregarded by a district court drawing an interim plan. On the contrary, the state plan serves as a starting point for the district court." *Perry*, 132 S. Ct. at 941.

128. *Id.* at 944.

129. *Id.* Alternatively, other parts of the order suggested that the district was drawn strictly by reason of population growth. *Id.*

130. *Id.*

131. 687 F.3d 565 (2d Cir. 2012).

132. *Id.* at 572 n.5. The Second Circuit continued to follow its own jurisprudence and accordingly, assumed without deciding that coalition districts are protected under section 2. *See supra* text accompanying note 61.

133. 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

134. *Id.* at 149 (stating "*Perez* held only that the district court had no basis to draw a *new* coalition district under section 2"). The purpose of the three-judge court was to consider a request for preclearance under section 5 of the Voting Rights Act. *Id.* at 138–39. At issue was the question

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Supreme Court precedent suggests that the Second Circuit is correct as a technical matter, namely, that the circuits are split on this question and that neither *Bartlett* nor *Perry* expressly resolved the split. In neither case was the question of coalition districts squarely before the Court.[135] *Bartlett* contains only a brief discussion of coalition districts in which it provides a definition accompanied by citation to *Nixon v. Kent*, in order to eliminate any confusion between coalition districts and crossover districts.[136] Moreover, the plurality decision explicitly states: "[w]e do not address that type of coalition district [where two minority groups join] here."[137]

The three-judge panel in the District of Columbia interpreted an isolated statement in *Perry*—that the district court had no basis for creating a coalition district, accompanied by a "cf" to *Bartlett*—to be a holding that section 2 does not require the creation of coalition districts.[138]

However, the Supreme Court's previous treatment of this and similar issues suggests that it is unlikely that the *Perry* Court intended to resolve whether section 2 requires the creation of coalition districts in such a cryptic fashion.

First, by assuming without deciding that coalition districts were permissible in *Growe*,[139] and by severing coalition districts from its decision in *Bartlett*,[140] the Court clearly has reserved the issue in two cases that it has decided. Such treatment indicates that the Court believes that the issue of coalition districts should not be given short shrift.

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whether the failure to maintain a preexisting coalition district constituted retrogression precluding section 5 preclearance. *Id.* at 139–40. It was in that context that the court made its statement regarding the status of coalition districts under section 2.

Retrogression is determined by measuring "the extent to which a new plan changes the minority group's opportunity to participate in the political process." Georgia v. Ashcroft, 539 U.S. 461, 482 (2003). A retrogression analysis involves comparing the new redistricting plan to the existing plan.

> A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice."

Guidance Concerning Redistricting Under Section 5 of The Voting Rights Act, 76 Fed. Reg. 7469, 7471 (Feb. 9, 2011) (citations omitted) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

135. *See* Bartlett v. Strickland, 556 U.S. 1 (2009); Perry v. Perez, 132 S. Ct. 934 (2012).

136. *Bartlett*, 556 U.S. at 13 (plurality opinion) (explaining "[t]his Court has referred sometimes to crossover districts as 'coalitional' districts, in recognition of the necessary coalition between minority and crossover majority voters").

137. *Id.* at 13–14.

138. *Texas*, 887 F. Supp. 2d at 148-49; *see supra* text accompanying note 134134.

139. Growe v. Emison, 507 U.S. 25, 41 (1993).

140. *Bartlett*, 556 U.S. at 13–14 (plurality opinion).

Second, *Perry* was a *per curiam* decision, namely, one in which all of the Justices were in agreement as to the result.[141] Justice Thomas, who authored a concurrence, was the only Justice to write separately.[142] Strikingly, neither Justice Ginsburg nor Justice Breyer dissented from the statement as to coalition districts, despite the fact that both so strongly opposed the plurality's rejection of crossover districts in *Bartlett* that they not only joined the dissent,[143] but also wrote separately to endorse it.[144] It would be incongruous to expect that Justice Ginsburg and Justice Breyer, both of whom read section 2 to require crossover districts aggregating protected minorities and whites, would come out differently in the context of coalition districts, which aggregate two protected minority groups. Thus, the fact that neither Justice dissented as to the reference to coalition districts in *Perry*, suggests that they did not take the statement there to mean that the Court was extending the *Bartlett* holding to multiracial coalition districts.

While perhaps not holdings with respect to coalition districts, *Bartlett* and *Perry* are nevertheless instructive. In *Bartlett*, the plurality framed the issue as whether a minority group that constitutes less than fifty percent can meet the first *Gingles* precondition.[145] In this regard, a coalition district, which by definition comprises two minority groups each of which constitutes less than fifty percent, can never meet the first *Gingles* factor. The plurality decision explained that in a situation where the minority group constitutes less than fifty percent, the minority's ability to elect a candidate of its choice is no different than that of other groups with equal voting strength since they "have the opportunity to join other voters—*including other racial minorities*, or whites, or both—to reach a majority

141. *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1238 (2012) (explaining that the Court issues per curiam decisions where "the result is so obvious that no Justice feels the need to write separately").

142. Justice Thomas agreed with the outcome of the Court's decision—to vacate the interim redistricting map and remand the case to the District Court for the determination of the constitutional and section 2 challenges—but differed as to how the Court should have arrived at this result. *See* Perry v. Perez, 132 S. Ct. 934, 944–45 (2012). Specifically, Justice Thomas would have vacated the interim orders on the ground that section 5 is unconstitutional. *Id.* at 945.

143. Three Justices, Justice Stevens, Justice Breyer, and Justice Ginsburg, joined Justice Souter's dissenting opinion in *Bartlett*. 556 U.S. at 26–44 (Souter, J., dissenting). However, the composition of the Court changed between the *Bartlett* and *Perry* decisions. Justice Souter and Justice Stevens retired in 2009 and 2010, respectively, and thus did not participate in the *Perry* decision. *Members of the Supreme Court of the United States*, THE SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members.aspx (last visited Aug. 4, 2013).

144. Justice Ginsburg joined in what she characterized as a "powerfully persuasive dissenting opinion," *Bartlett*, 556 U.S. at 44 (Ginsburg, J., dissenting), and Justice Breyer joined the dissenting "opinion in full." *Id.* (Breyer, J., dissenting).

145. *Id.* at 12 (plurality opinion).

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and elect their preferred candidate."[146] Thus, although *Bartlett* does not decide coalition districts, by framing the aggregation as either with whites (as was the case in *Bartlett*) or with "other racial minorities," the plurality decision gives a clear indication that the result would be no different if the case before it involved the creation of coalition districts as the reasoning would be the same.[147]

*Bartlett's* citation to *Nixon* is also telling. *Bartlett* explicitly states that it does not address coalition districts and uses *Nixon* as a citing reference for this proposition.[148] Arguably, this could be attributed to the fact that the Sixth Circuit's decision in *Nixon* is the most recent on the issue. However, more persuasive reasons suggest that in citing *Nixon*, the *Bartlett* plurality was implicitly ratifying the *Nixon* opinion and, because *Nixon* relies heavily on Judge Higginbotham's dissent in *Campos*, discrediting the position of the Fifth and Eleventh Circuits.[149]

The principal rationales of the *Bartlett* plurality mirror many of the policy concerns with respect to extending protection to coalition districts that were articulated by Judge Higginbotham and echoed by the Sixth Circuit in *Nixon*.[150] *Bartlett*, like the Sixth Circuit, appeared to be most concerned with the notion that requiring crossover districts would be tantamount to creating a district for a political interest group thereby bestowing upon protected minorities special privileges that exceed the scope of the Voting Rights Act.[151] Moreover, both the plurality in *Bartlett*

146. *Id.* at 14 (emphasis added).

147. Coalition districts, like crossover districts, require that another group of voters cross over to join with the minority for electoral success. The only difference is that with crossover districts, the group crossing over is the white majority, whereas in coalition districts it is another minority group that crosses over.

148. *Bartlett*, 556 U.S. at 13–14.

149. The Eleventh Circuit's *Concerned Citizens* decision does not articulate a rationale for its decision but merely cites to the *Campos* decision of the Fifth Circuit. Concerned Citizens of Hardee Cnty. v. Hardee Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990). In so doing, the Eleventh Circuit implicitly adopted the arguments and reasoning of the *Campos* court when it determined that coalition districts were actionable under section 2. *See* Campos v. City of Baytown, Tex., 840 F.2d 1240 (5th Cir.), *reh'g denied*, 849 F.2d 943 (1988) (per curiam), *cert. denied*, 492 U.S. 905 (1989).

150. *Bartlett*, 556 U.S. at 15–19; Nixon v. Kent Cnty., 76 F.3d 1381, 1391–92 (6th Cir. 1996).

151. *Bartlett*, 556 U.S. at 14–15 (plurality opinion) ("Recognizing a § 2 claim in this circumstance would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance.' Nothing in § 2 grants special protection to a minority group's right to form political coalitions.") (citations omitted); *Nixon*, 76 F.3d at 1391–92 (characterizing this as the "most persuasive[]" policy concern in support of its holding); *See also Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting) (explaining "[a] group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition . . . [and expressing his] concern that so stretching the concept of cohesiveness dilutes its effectiveness as a measure of the causal relationship among the statutory disability, election structures or processes, and election outcomes").

and the Sixth Circuit in *Nixon* express the need for clear redistricting standards and recognize that requiring crossover districts and coalition districts, respectively, would impose an arduous task on those who draw district lines.[152] *Bartlett* and *Nixon* also share the concern that permitting a single minority group to join with another group to satisfy the first *Gingles* factor would render its numerosity requirement and consequently, the first *Gingles* factor itself, a nullity.[153]

Accordingly, *Perry's* "cf" reference to the *Bartlett* rationale might be better understood as suggesting that, although *Bartlett* involved crossover districts, the rationale of the case is not limited to that context.

## CONCLUSION

Thus, while *Bartlett* and *Perry* could be interpreted as resolving the circuit split, as the District Court for the District of Columbia did,[154] the Supreme Court's oblique references did not dissuade the Second Circuit from maintaining that the circuit split exists in the aftermath of *Bartlett* and *Perry*.[155] Nevertheless, at the very least, these cases strongly suggest that if and when the issue of coalition districts is directly presented to the Supreme Court, the Court will hold that coalition districts do not come within the ambit of section 2. Such a holding, however, would not deliver an entirely fatal blow to coalition districts. Even though such districts would not be afforded protection under section 2, states and political subdivisions would be able to draw coalition districts voluntarily[156] so long as the predominant reason for drawing coalition districts is not race.[157] Further, at least one court has held that coalition districts are

152. *Bartlett*, 556 U.S. at 18 (the "rule [requiring greater than 50% minority population] provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2"); *Nixon*, 76 F.3d at 1391 (stating "acceptance of the coalition district theory . . . would . . . serve to frustrate those who, in good faith, seek to draw district lines according to the Voting Rights Act's nebulous requirements").

153. *Bartlett*, 556 U.S. at 16 (explaining that "[a]llowing crossover-district claims would require [the Court] to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of [the Court's] § 2 jurisprudence); *Nixon*, 76 F.3d at 1391 (noting that the first *Gingles* precondition "recognizes that, in some cases, a minority will not be numerous enough to prove a violation . . . . Permitting coalition suits effectively eliminates this obstacle").

154. Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

155. Pope v. Cnty. of Albany, 687 F.3d 565 (2d Cir. 2012). The Second Circuit clearly was aware of the *Bartlett* decision as it is cited elsewhere in the opinion. *Id.* at 573 n.6, 574, 576, 577 n.9.

156. In *Bartlett*, Justice Kennedy explained that "§ 2 does not mandate creating or preserving crossover districts. . . . [but][s]tates that wish to draw crossover districts are free to do so where no other prohibition exists." 556 U.S. at 23–24.

157. *See* Easley v. Cromartie, 532 U.S. 234, 241 (2001) (holding that, while race may be a factor,

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implicated in the retrogression analysis for preclearance under section 5 of the Voting Rights Act.[158] As a practical matter, section 5 has been eviscerated in the wake of the Supreme Court's decision in *Shelby County, Alabama v. Holder*,[159] which invalidated the formula for selecting jurisdictions subject to section 5 coverage. Consequently, there are presently no jurisdictions as to which the preclearance requirement of section 5 is operative. Nonetheless, the prospect remains that in the future, jurisdictions will be subject to preclearance either through the enactment of a new, constitutional formula for section 5 coverage, or on a case-by-case basis through litigation under section 3 of the Voting Rights Act.[160] In that event, the prohibition against retrogression may preclude the elimination of coalition districts that already exist, unless there is a legitimate justification for doing so.[161] As a corollary, if a jurisdiction

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it may not be the "*predominant* factor motivating the legislature's districting decision") (quotations omitted); Miller v. Johnson, 515 U.S. 900, 913 (1995) (holding that race may not be "the legislature's dominant and controlling rationale in drawing its district lines."); Shaw v. Reno, 509 U.S. 630, 631 (1993) (same).

By contrast, The Supreme Court has identified several legislative policies as legitimate redistricting objectives so long as they are applied consistently. *See* Karcher v. Daggett, 462 U.S. 725, 740 (1983). One such objective is drawing district lines in order to avoid pitting incumbents against one another. *See* Bush v. Vera, 517 U.S. 952, 964 (1996) ("recogniz[ing] incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal.") (alteration in original) (quoting Karcher v. Daggett, 462 U.S. 725, 740 (1983)); White v. Weiser, 412 U.S. 783, 797 (1973) ("'The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.'") (quoting Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966)). Other legitimate state objectives include "making districts compact, respecting municipal boundaries, [and] preserving the cores of prior districts." *Karcher*, 462 U.S. at 740.

158. *Texas*, 887 F. Supp. 2d 133. For a discussion of section 5, see *supra* text accompanying note 126.

159. 133 S. Ct. 2612 (2013). Section 4(b) of the Voting Rights Act sets forth a formula by which those jurisdictions covered by section 5 are determined. 42 U.S.C. § 1973b(b) (2006). In *Shelby County*, the Supreme Court held the section 4(b) coverage formula, reauthorized by Congress in 2006, unconstitutional as it was not updated to reflect current voting conditions in the covered jurisdictions. 133 S. Ct. at 2631. Instead, section 4(b) continued to be premised on conditions existing on November 1, 1964, November 1, 1968, or November 1, 1972. *Id.* at 2619–21. As such, the Court found the formula to irrationally "differentiate[] between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 2621 (quoting Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009).

160. 42 U.S.C. § 1973a(c) (2006). Under section 3's so-called "bail in mechanism" or "pocket trigger," a federal court can render a jurisdiction subject to preclearance if it has violated the voting rights protections of the Fourteenth or Fifteenth Amendments. For a detailed discussion of section 3, see Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

161. *Texas*, 887 F. Supp. 2d at 148–49. The District Court for the District of Columbia there explained that because section 5, unlike section 2, deals with retrogression and not vote dilution, the rationale of *Bartlett* does not militate against requiring the continuation of coalition districts under section 5:

subject to preclearance opts, as a matter of political choice, to create a coalition district, it might not be able to later dismantle that district without justification.

However, until the Supreme Court addresses this question, the split among the circuit courts remains, as does the possibility that the split may expand to encompass other circuits and become further entrenched. The circuit split is particularly harmful because it presents the potential of divergent redistricting requirements, depending upon the circuit in which a state is situated. This inconsistency undermines the legitimacy of the electoral process and the legitimacy of the decision-making of elected officials since the same rules ought to apply nationwide. That such a question remains unresolved strikes directly at the heart of our democratic system and the nature of representative government as it exists in the United States.[162] Thus, this is an area of the law that clearly calls for predictability, uniformity, and certainty.

Notwithstanding the absence of direct Supreme Court authority, the Court has nevertheless left beacons to guide the lower courts. Its steadfast adherence to the majority-within-a-district requirement under the first *Gingles* precondition, as evidenced in its decisions regarding crossover districts and influence districts, as well as its admonition to the lower court in *Perry*, ineluctably point to the conclusion that, while coalition districts may be constructed as a matter of political choice, they are not required by section 2 of the Voting Rights Act and the failure to create them does not give rise to a cause of action under that section. Therefore, because of the

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> Part of the Court's analysis [in *Bartlett*] rested on the difficulties of predicting whether a potential coalition would provide minorities with an opportunity to elect. Section 5, by contrast, asks whether an existing coalition has achieved an ability to elect. Section 5 does not call on us to guess the future, but to determine whether there is past evidence of a demonstrated ability to elect. And while section 2 does not demand granting "special protection to a minority group's right to form political coalitions" or "impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters," section 5 mandates that we ensure that "the gains thus far achieved in minority political participation [are] not destroyed."

*Id.* at 149 (citations omitted) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

162. Judge Higginbotham expressed this concern in his dissent in the petition for rehearing in *Campos*:

> The Supreme Court's decision in *Gingles* left undecided fundamental questions under the Voting Rights Act. Today we fail to give to protected minorities, district courts, state government, and the bar our best considered reading of the core meaning of legislation that speaks to the essence of our arrangements of governance. We can do better but if we will not, hopefully, the Supreme Court will do so.

Campos v. Baytown, Tex., 946 (5th Cir. 1988) (Higginbotham, J., dissenting), *cert. denied*, 492 U.S. 905 (1989). This concern still persists today, decades after it was first expressed by Judge Higginbotham in his 1988 *Campos* dissent.

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need for consistency among the circuits, in the interim pending definitive resolution by the Supreme Court, those circuits that have yet to opine on the issue of coalition districts, should observe the spirit of *Bartlett* and *Perry* and decline to recognize a right to coalition districts under section 2. Similarly, those circuits that have recognized the viability of coalition districts under section 2 should revisit their jurisprudence in light of the *Bartlett* and *Perry* decisions.

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