ALVARO BEDOYA

The Unforeseen Effects of *Georgia v. Ashcroft* on the Latino Community

ABSTRACT. In *Georgia v. Ashcroft*, the Supreme Court weakened the protections afforded to minority voters in jurisdictions covered by the section 5 preclearance provisions of the Voting Rights Act (VRA). This Note highlights the fact that *Georgia v. Ashcroft*—a decision applicable to all minority voters—was based on selective statistical evidence drawn solely from the African-American community, ignoring consistent data indicating that Hispanics still need the robust protections originally afforded by the section 5 preclearance standard. With the reauthorization of the VRA fast approaching, the Note presents two strategies—one for Congress, one for courts—to remedy the problems that *Georgia v. Ashcroft* has created.

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INTRODUCTION

Despite their status as the largest minority group in the United States, Hispanics remain dramatically underrepresented in elected office. The U.S. Census estimates that over 41.3 million Latinos live in the United States,[1] making up 14% of the nation's population.[2] Nevertheless, of the 535 members of Congress, only 28 (5%) are Hispanic.[3] This pattern of underrepresentation extends to the state level.[4] In California and Texas—the two states with the largest Latino populations[5]—Hispanics amount to approximately one-third of the state population, but hold only 5.2% and 7.3% of state offices, respectively.[6]

This level of representation marks a high point for the Latino community; until the early 1980s, Hispanic representation in Congress lingered in the single digits.[7] The gains in Hispanic office-holding during the 1980s and 1990s can be attributed in part to the passage and implementation of the Voting Rights Act (VRA). The VRA facilitated the establishment of numerous majority-minority districts, in which minority voters constitute a majority of the relevant population, be it total population, voting-age population (VAP), or citizen voting-age population (CVAP).[8] The electoral benefits of majority-

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1. Press Release, U.S. Census Bureau, Hispanic Population Passes 40 Million, Census Bureau Reports (June 9, 2005), http://www.census.gov/Press-Release/www/releases/archives/population/005164.html.

2. *See* U.S. Census Bureau, Annual Estimates of the Population by Race Alone and Hispanic or Latino Origin for the United States and States: July 1, 2004 (Aug. 11, 2005), http://www.census.gov/popest/states/asrh/SC-EST2004-04.xls.

3. There are twenty-five Hispanics in the House of Representatives and three in the Senate.

4. David Lublin, Percent Hispanic Legislators in States Greater Than Ten Percent Hispanic, http://www.american.edu/dlublin/redistricting/tab5.html (last visited Apr. 13, 2006). These figures are up-to-date through the last election held in each seat prior to 2006. *Id.*

5. *See* U.S. Census Bureau, *supra* note 2.

6. Louis DeSipio, *Latino Voters: Lessons Learned and Misunderstood*, *in* THE UNFINISHED AGENDA OF THE SELMA-MONTGOMERY VOTING RIGHTS MARCH 135, 139 (Editors of *Black Issues in Higher Education* & Dara N. Byrne eds., 2005).

7. DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 25 (1997).

8. When this Note refers to a majority-minority district, it refers to those districts in which minority voters constitute a majority of the total population. Many, if not most, scholars have acknowledged that the creation of majority-minority districts was essential to Hispanic and African-American electoral gains at the end of the twentieth century. *See, e.g.*, Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, *in* RACE AND REDISTRICTING IN THE 1990S 13, 37 (Bernard Grofman ed., 1998) (explaining that gains in black and Hispanic representation "were due to the increase in the number of

minority districts became evident after the 1990 round of redistricting. State legislatures constructed ten new majority-Latino districts, and shortly thereafter seven Hispanic freshmen joined the House of Representatives.[9]

Two provisions of the VRA were crucial to the creation and maintenance of majority-minority districts: section 2 and section 5. Section 2 prohibits any policy or practice that has the effect of giving racial minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[10] Under section 5, a state or subdivision seeking to change a law or practice affecting voting must first preclear such a change, either by submission to the Attorney General, or by filing for a declaratory judgment in the United States District Court for the District of Columbia. Regardless of the method employed, the jurisdiction in question must demonstrate that the proposed change does "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group.[11] In contrast to section 2, which applies throughout the United States, the protections of section 5 of the VRA only apply to jurisdictions that have met a particular set of threshold criteria known as a "triggering formula."[12]

The Supreme Court specified what section 5 required in *Beer v. United States*,[13] in which the Court interpreted section 5 to prohibit only those changes that would have a retrogressive effect on a minority community's "effective exercise of the electoral franchise."[14] Until recently, courts considered any

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majority minority districts" and "were not the result of additional minority representatives being elected from majority white districts"); *see also* LUBLIN, *supra* note 7, at 23 ("The growth in the number of black and Latino representatives closely tracks the rise in the number of black and Latino majority districts.").

9. LUBLIN, *supra* note 7, at 25.

10. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973(b) (2000)).

11. *Id.* § 5 (codified as amended at 42 U.S.C. § 1973c (2000)).

12. Initially, section 5 applied to jurisdictions that, as of November 1964, used voter literacy tests and had a participation rate of less than 50% for eligible voters; this formula was later extended to cover districts meeting these criteria in the 1968 and 1972 elections. PAST AND PROLOGUE: NATIONAL CONFERENCE COMMEMORATING THE 40TH ANNIVERSARY OF THE VOTING RIGHTS ACT OF 1965 § 3, at 2 (2005). In 1975, the triggering formula was further broadened to include those jurisdictions conducting English-only elections, under the reasoning that such elections constituted a prohibited "test or device" within the meaning of section 4(c) of the VRA. Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 210-11 (2004).

13. 425 U.S. 130 (1976).

14. *Id.* at 141.

diminution in the ability of minority communities to elect candidates of their choice to be retrogressive; this Note will refer to this as the "ability to elect" standard.[15] For proposed redistricting plans, the number of majority-minority districts was critical evidence for assessing "ability to elect," such that a proposed reduction in the number of such districts was persuasive evidence of retrogression and hence of a section 5 violation.[16]

The reigning ability to elect standard was dethroned in 2003, when the Supreme Court decided *Georgia v. Ashcroft*.[17] Justice O'Connor's opinion, joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, made two major changes to the section 5 preclearance doctrine. First, Justice O'Connor expanded the ability to elect standard so that it would take into account both districts where it is "highly likely" that a minority community will be able to elect its candidate of choice, and other districts where "it is likely — although perhaps not quite as likely" that minority communities will succeed in electing their chosen candidate.[18] Second, Justice O'Connor restructured the section 5 inquiry such that ability to elect was merely one prong in a larger "totality of the circumstances" test.[19] After *Georgia v. Ashcroft* covered jurisdictions could secure preclearance even if they had "unpacked" majority-minority districts to create "coalitional districts," where minority groups depend on coalitions with other voters to elect their candidates of choice,[20] or "influence districts," where minority voters are not able to elect

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

16. Jocelyn Benson, Note, *Turning Lemons into Lemonade: Making* Georgia v. Ashcroft *the* Mobile v. Bolden *of 2007*, 39 HARV. C.R.-C.L. L. REV. 485, 488 (2004) ("[A] redistricting effort that reduced the overall number of majority-minority districts in a covered area, particularly where voting was racially polarized, was found to have a retrogressive effect on minority voters."); *see also* Tim Mellett et al., Dep't of Justice, Section 5 Recommendation Memorandum 25-26 (Dec. 12, 2003), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf ("In the past . . . the level of minority voting strength protected under Section 5 consisted only of those districts in which minority voters could reasonably be expected to elect their candidates of choice.").

17. 539 U.S. 461 (2003).

18. *Id.* at 480.

19. *Id.* at 484.

20. In theory, the term "coalitional district" can be used to describe any district — even a majority-minority district — in which minority voters require the support of white or other minority voters to elect their candidate of choice. In practice, however, the term is typically used to describe districts in which a minority group constitutes less than 50% of the relevant population, be it total population, VAP, CVAP, or registered voters. *See* 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, 1539 (2002) (defining coalitional districts as districts where black

their candidates of choice, but could be swing voters in an election. Prior to *Georgia v. Ashcroft*, preclearance for those jurisdictions would have been highly unlikely.

Justice O'Connor defended this radical change in section 5 jurisprudence by citing five sociological studies that she claimed suggested that "the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."[21] In part, these studies argued that increased white support for black candidates—known as white "crossover voting"—meant that black communities no longer needed majority-minority districts in order to elect their candidates of choice;[22] this would make less-concentrated coalitional districts a viable alternative to majority-minority ones. The studies further posited that the concentration of black voters in majority-minority districts had led to the election of more conservative candidates in surrounding districts, resulting in the decreased effectiveness of black representatives in legislative bodies;[23] this tendency would call for the elimination of majority-minority districts in favor of influence and coalitional districts.

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registered voters are less than 50% of all registered voters and the remainder of the registered voter population is non-Hispanic white). Most importantly, this appears to be the definition favored by the Supreme Court in *Georgia v. Ashcroft*, which spoke of coalitional districts as "'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.'" 539 U.S. at 481 (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (emphasis added)). This Note will use the term to refer to districts where minorities are less than 50% of the total population.

21. *Georgia*, 539 U.S. at 482. The five studies cited were: CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS 193-234 (1995); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?* 90 AM. POL. SCI. REV. 794, 808 (1996); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?,"* 93 AM. POL. SCI. REV. 183, 185 (1999); Pildes, *supra* note 20, at 1517.

22. *See, e.g.*, Cameron et al., *supra* note 21, at 808 ("[D]istricts that are a bit less than majority-minority give black representatives a substantial chance of winning office . . . while supporting minority influence in other districts."); Pildes, *supra* note 20, at 1522 (noting the rise of a "significant percentage of white voters . . . who regularly cast votes for black candidates running against white competitors"). The qualifier "in part" is used because portions of these studies are critical of this proposition. *See* Grofman et al., *supra* note 21, at 1423 (warning that white support for a black incumbent would not necessarily carry over to black candidates running for open seats); Lublin, *supra* note 21, at 183 (cautioning that Cameron, Epstein, and O'Halloran's study "underestimate[s] severely the percentage of blacks needed to assure the probable election of an African American").

23. Again, not all five studies concur on this point. *See* Lublin, *supra* note 21, at 185 (suggesting that such an effect should be limited to the South); *see also* Cameron et al., *supra* note 21, at

Georgia v. Ashcroft triggered a strong response from a number of scholars, who countered that the purported benefits of coalitional or influence districts were poor substitutes for the proven gains of majority-minority districts.[24] As Juan Cartagena has observed, however, because the facts of the case involved the black community in Georgia, the most forceful critiques of *Georgia v. Ashcroft* have focused on the decision's impact on black voters.[25] Thus, a critical gap in Justice O'Connor's reasoning has gone unnoticed: Even though *Georgia v. Ashcroft* applies to all minority groups, not one of the studies cited by Justice O'Connor deals at any significant length with the effectiveness of coalitional or influence districts in Hispanic — rather than black — communities. Given that jurisdictions covered by section 5 are home to almost as many Hispanics as African-Americans, this is a particularly glaring oversight.[26]

This Note asks the questions that Justice O'Connor did not consider: Is there reliable evidence that the best way to maximize *Hispanic* voting strength is to create more Hispanic coalitional and influence districts? If not, what impact will *Georgia v. Ashcroft* have on the Hispanic community? To date, only a handful of scholars have addressed these issues at any length.[27] None, however, has identified the evidentiary gap at the core of Justice O'Connor's holding, nor has anyone accounted for the demographic and electoral attributes uniquely salient in the Latino community and considered whether — in light of those characteristics — the premises of *Georgia v. Ashcroft* are equally applicable to Latinos.

807-809 (providing empirical findings to support this hypothesis); *id.* at 794 ("[Concentrated minority districts] dilute minority influence in surrounding areas, which may then elect representatives unsympathetic to minority concerns.").

24. *See, e.g.*, Benson, *supra* note 16; Karlan, *supra* note 15; Bernard Grofman, A Citizen's Dissent: Potential Long-Term Problems with the Approach to Section 5 taken in *Georgia v. Ashcroft* (May 25, 2004) (unpublished manuscript, on file with author).

25. Cartagena, *supra* note 12, at 217.

26. Figures from the 2000 census show that 11,353,045 individuals identified as Hispanic and 13,906,777 individuals identified as non-Hispanic black reside in jurisdictions covered by section 5. *See infra* tbl. 1.

27. While their analyses were more limited in scope — Grofman's consisting of a single footnote — the three scholars who have addressed *Georgia*'s impact on Hispanics have cautioned that moving away from majority-minority districts and toward coalitional or influence districts may be premature in the Latino context. Benson, *supra* note 16, at 495-96 (citing evidence that "majority-minority districts are important for Black candidates but are even more crucial to the success of Latino and Asian American candidates"); Cartagena, *supra* note 12, at 222 & n.135; Grofman et al., *supra* note 21, at 12 n.13 ("A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.").

This Note finds that coalitional and influence districts are poorly suited to enable Latino voters to elect their candidates of choice, and indeed do little to empower Latino voters in general. Instead, majority-minority districts remain the primary means through which Hispanic communities can elect their preferred candidates. In light of these findings, this Note goes on to discuss two strategies — one for Congress, one for courts — to repair the deficiencies of *Georgia v. Ashcroft* and prevent the unwarranted elimination of Hispanic-majority districts.

This Note proceeds in three Parts. Part I examines the evidentiary foundations of Justice O'Connor's opinion. Part II "fills in the gap," creating a profile of the Hispanic electorate to assess the effectiveness of coalitional and influence districts in the Hispanic context, and hence evaluating *Georgia v. Ashcroft*'s likely impact on the Hispanic community. Part III presents two strategies to avoid possible damage caused by the opinion. Finally, the Conclusion offers some broader observations on the administration of section 5 and the VRA in "other" minority contexts.

I. MISSING HALF OF THE STORY

Despite the fact that *Georgia v. Ashcroft* applies to all minority voters,[28] its holding was predicated on selective evidence drawn solely from the African-American community. Justice O'Connor missed half of the story.

In this Part, I briefly describe the redistricting process that sparked *Georgia v. Ashcroft* and explain the mechanics of the opinion itself. I then explore the foundations of Justice O'Connor's opinion, elaborating on the critiques of majority-minority districts that Justice O'Connor used to justify her emphasis on coalitional and influence districts. Finally, I show how these critiques — and the opinion itself — did not consider the experiences of the Latino community.

A. The Mechanics of the Decision

The legal dispute that led to *Georgia v. Ashcroft* originated in the post-2000 redistricting of the Georgia State Senate. At the start of the redistricting cycle in 2000, Georgia's districting plan included thirteen senate districts in which blacks constituted a majority of the total population, twelve of which had a majority black voting-age population (BVAP). The goal of the Democratic leadership in preparing for the redistricting process was to maintain the number of black majority-minority districts — thus avoiding a section 5

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28. *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 482 (2003).

objection—and simultaneously to increase the overall number of seats held by Democrats. Senate Democrats sought to accomplish this goal by unpacking the most heavily concentrated black-majority districts and allocating the unpacked black voters to surrounding districts. The plan that Democrats in the Georgia Assembly ultimately passed maintained thirteen black-majority districts, drawing those districts such that every one would have a majority BVAP. Five of those districts, however, had been significantly unpacked such that they now included less than 60% BVAP.[29]

The State of Georgia, a jurisdiction covered by section 5, filed an action in the District Court for the District of Columbia seeking a declaratory judgment that the State Senate plan did not violate the VRA. The Department of Justice objected, arguing that changes to three specific districts impermissibly diluted the ability of black voters to elect their candidates of choice; previously ranging from 55% to 63%, the BVAP of the districts in question would be reduced to just over 50% under the proposed state senate plan.[30] Although the plan was eventually revised and precleared with black voters added to all three districts, Georgia appealed to the Supreme Court to have its original plan reinstated.[31]

Justice O'Connor's majority opinion radically altered the section 5 preclearance standard, and remanded the original state senate plan for consideration under this new standard.[32] First, *Georgia v. Ashcroft* expanded the ability to elect test, stating that a redistricting plan that reduced the number of majority-minority districts could offset this reduction in ability to elect by creating coalitional districts where minority voters would make up less than 50% of a district, but could possibly elect their candidates of choice by forming coalitions with voters from other racial or ethnic groups.[33]

Second, Justice O'Connor made the more drastic argument that the validity of a plan under section 5 should not turn entirely on the plan's effect on minority voters' "ability to elect," but rather on the "totality of the

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29. *Id*. at 469-71.

30. *Id*. at 472-73.

31. *Id*. at 475. Note that section 5 cases are brought exclusively before three-judge panels in the District Court for the District of Columbia, with appeals directly to the Supreme Court. 42 U.S.C. § 1973c (2000).

32. As explained above, the preclearance process had previously focused on a determination of the proposed plan's effect on minority voters' ability to elect their candidate of choice. This meant that in section 5 redistricting cases, a decrease in the number of majority-minority districts would likely have been deemed "retrogressive" and resulted in the denial of preclearance. *See supra* notes 13-16 and accompanying text.

33. *Georgia*, 539 U.S. at 481-83.

circumstances,"[34] including the plan's effect on minority voters' "opportunity to participate in the political process," and "the feasibility of creating a nonretrogressive plan."[35] Under this totality of the circumstances test, a decrease in the number of majority-minority districts (and presumably the number of coalitional districts) could be offset by the creation of so-called influence districts where "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[36] This is because these districts would purportedly increase minorities' "opportunity to participate in the political process."[37] In simpler terms, ability to elect—previously the cornerstone of section 5 preclearance analysis—was both (1) expanded and (2) made merely one prong in a three-part totality of the circumstances test.

B. *Justice O'Connor's Evidentiary Foundations*

Justice O'Connor grounded these radical changes by asserting that "the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."[38] She cited five studies in support of this proposition. While not exclusively supportive of Justice O'Connor's stance,[39] taken as a whole these studies aptly summarized the two academic critiques of majority-minority districts prior to *Georgia v. Ashcroft*: the "perverse effects" theory and the "crossover effects" theory. The former justified the use of influence districts; the latter supported the creation of coalitional districts.

1. *The Alleged Harms of Majority-Minority Districts*

Prior to *Georgia v. Ashcroft*, critics of majority-minority districts claimed that by concentrating minority voters into a small set of districts, majority-minority districting plans "bleached" surrounding districts and thus

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34. *Id.* at 484 ("[A] court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5.").

35. *Id.* at 479.

36. *Id.* at 482. Justice O'Connor also suggested that such a decrease in minority voters' ability to elect could be offset by "[m]aintaining or increasing legislative positions of power for minority voters' representatives of choice." *Id.* at 484.

37. *Id.* at 482.

38. *Id.* at 482.

39. *See supra* notes 22-23.

guaranteed the election of officials unsympathetic to minority interests.[40] These critics usually cited the experience of the African-American community, arguing that the isolation of black Democrats in concentrated majority-black districts had led to white Republican victories in neighboring areas and Republican-dominated legislatures unsympathetic to black interests.[41] Hence, they posited that the black "descriptive" representation brought about by majority-minority districting — the presence of black officials in legislatures — inevitably led to losses in "substantive" representation — the ability of legislators to pass legislation favorable to African-Americans.[42] Much of the literature critiquing majority-minority districting attempted to corroborate this alleged trade-off between descriptive and substantive representation, identifying Democratic seats apparently lost due to majority-minority districting,[43] and looking at floor votes to prove that such districting led to policy outcomes unfavorable to black voters.[44] This theory of the inadvertent

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40. *See supra* note 23 and accompanying text.

41. *See, e.g.*, SWAIN, *supra* note 21, at 205 ("To the extent that the black Democrats are concentrated in legislative districts, it is easier for Republican candidates to win more seats overall. . . . The more 'lily-white' the districts so drained become, the easier it is for Republicans to win them."); Cameron et al., *supra* note 21, at 808 (arguing that "substantive minority representation" is hurt by majority-minority districting); Pildes, *supra* note 20, at 1558 ("Concentrating black voters into safe majorities tends to hurt the Democratic Party across a state as a whole because too many of the party's most loyal voters have been safely confined to one district."); *see also* LUBLIN, *supra* note 7, at 97 ("In the South, racial redistricting packs black liberal voters into districts and makes the surrounding districts more white and conservative."). Note that the Cameron study bases its conclusions on quantitative data drawn solely from black-white contests. Cameron et al., *supra* note 21, at 808.

42. Cameron et al., *supra* note 21, at 794 ("[M]ajority-minority districts may increase the number of minority legislators but decrease the number of votes in support of minority legislation. . . . [T]here may be a trade-off between descriptive and substantive representation."); *see also* SWAIN, *supra* note 21, at 210 ("Black faces in political office do not guarantee the substantive representation of the policy preferences of the majority of African Americans.").

43. David Lublin calculated that majority-black districts cost Democrats eleven seats in the 1992 and 1994 congressional elections. Lublin, *supra* note 21, at 185. Carol Swain, writing in 1993, estimated that the loss of seventeen Democratic seats can be "directly attributed to the creation of majority-black districts" in the post-1990 redistricting process. SWAIN, *supra* note 21, at 227.

44. *See* Cameron et al., *supra* note 21, at 810 ("[P]ast a certain point, an increase in the number of minority representatives comes at the cost of votes in favor of minority-sponsored legislation."); Lublin, *supra* note 21, at 185 (arguing that Democratic losses in 1992 and 1994 made the House of Representatives less likely to adopt initiatives supported by blacks).

harms of majority-minority districting is known as the perverse effects hypothesis.[45]

By definition, an influence district is highly unlikely to elect a minority community's chosen candidate.[46] Nevertheless, using the perverse effects theory, Justice O'Connor's totality of the circumstances test presents these districts as viable alternatives to majority-minority districts. Admitting that influence districts would not generally allow the election of minority groups' candidates of choice—and hence have no positive impact on minority voters' ability to elect—Justice O'Connor reasoned that influence districts would "[increase] the number of representatives sympathetic to the interests of minority voters," hence improving minority voters' ability to participate in the political process.[47]

2. *The Reduced Need for Majority-Minority Districts*

The second prong of the critique of majority-minority districts posited that they were no longer necessary in light of allegedly declining levels of racially polarized voting. Critics of majority-minority districts typically argued that black candidates increasingly received the support of white "crossover" votes and that, therefore, black voters no longer needed majority-black districts to elect their candidates of choice.[48] The critics thus alleged that the redistricting provisions of the VRA that protected majority-minority districts had served their purpose, and that today they could be obstacles to greater substantive representation, or to the formation of valuable interracial coalitions.[49] Hence

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45. *See* Delia Grigg & Jonathan N. Katz, The Impact of Majority-Minority Districts on Congressional Elections 1 (Apr. 4, 2005) (unpublished manuscript, on file with author). *But see id*. at 9, 13 (presenting evidence refuting this hypothesis).

46. Georgia v. Ashcroft, 539 U.S. 461, 482 (2003) ("[A] court must examine whether a new plan adds or subtracts 'influence districts'—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.").

47. *Id*. at 483.

48. *See, e.g.*, Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1253 (1999) ("As long as white crossover rates outpace black crossovers, and black and white registration rates are roughly equal, African-Americans will not need majority-black districts to win."); Pildes, *supra* note 20, at 1529 (noting that some have argued that a drop in racially polarized voting "permits a meaningful level of white-black coalitional politics," enabling black candidates to get elected from non-majority-black districts); *see also supra* note 22 and accompanying text.

49. *See* Cameron et al., *supra* note 21, at 798 (arguing that majority-black districts may actually "hinder the formation of the biracial liberal coalitions that were the impetus behind the original civil rights campaign"); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a*

Professor Richard Pildes's provocative question: "Is voting rights law now at war with itself?"[50]

The crossover effects hypothesis provided the basis for Justice O'Connor's broadening of the ability to elect prong to allow for the creation of coalitional districts in lieu of majority-minority ones; the underlying premise of coalitional districts is that such coalitions are possible in the first place. Thus, Justice O'Connor tellingly quoted from *Johnson v. De Grandy*, in which the Court found 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."[51]

C. The Absence of Latinos in Georgia v. Ashcroft

Justice O'Connor's reliance on the five studies—and the critique of majority-minority districts that they present—is notable for two reasons. First, while these studies draw heavily on data from black communities, particularly those in the South,[52] Justice O'Connor ignored a large body of contradictory evidence suggesting that it is extremely difficult for black candidates to get elected outside of majority-minority districts, and that coalitional districts are relatively ineffective for African-Americans.[53]

More surprising, however, is Justice O'Connor's complete disregard for Hispanic communities. Not one of the studies cited by Justice O'Connor deals at any significant length with the effectiveness of coalitional and influence

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Victim of Its Own Success?, 104 COLUM. L. REV. 1710, 1731 (2004) ("The emerging conclusion is that section 5 has served its purposes and may now be impeding the type of political developments that could have been only a distant aspiration when the VRA was passed in 1965.")

50. Pildes, *supra* note 20, at 1517.

51. 512 U.S. 997, 1020 (1994) (quoted in Georgia v. Ashcroft, 539 U.S. 461, 481 (2003)).

52. The Grofman, Lublin, and Pildes studies were primarily based upon evidence from black-white electoral contests in the South. Grofman et al., *supra* note 21, at 1394 (focusing on black districts in the South in the 1990s); Lublin, *supra* note 21, at 184 ("Since all but one of the new black districts created during the 1990 redistricting round were in the South, I will focus primarily on the results for this region."); Pildes, *supra* note 20, at 1522 ("The 1990s saw the real emergence of a robust, genuine two-party political system across most contests in the South . . . .").

53. *See, e.g.*, LUBLIN, *supra* note 7, at 45 ("The election of an African American from a non-majority-minority district is an incredibly unlikely event."); Handley et al., *supra* note 8, at 37 ("[W]e have found no evidence to indicate that majority minority districts are no longer necessary to ensure African-American and Hispanics fair representation in our legislative bodies.").

districts in the Hispanic—rather than black—context. Two of the studies make little or no reference to Latinos: Cameron, Epstein and O'Halloran's essay never once uses the words "Latino" or "Hispanic";[54] those same terms appear a total of five times in the body of Professor Pildes' fifty-seven page article.[55] Carol Swain and David Lublin do make brief mentions of Hispanics,[56] but both do so exclusively in the context of the electoral experience of African-Americans.[57] The one study that briefly addresses the effectiveness of coalitional districts in the Hispanic context explicitly cautions that such districts may be insufficient to provide Hispanic voters an opportunity to elect their candidates of choice.[58]

The absence of Latinos in these studies—which provide the factual and theoretical basis for Justice O'Connor's holding—is highly problematic. While section 5 jurisprudence is typically thought of as a "black issue,"[59] figures from the 2000 census show that covered jurisdictions are home to almost as many Hispanics as African-Americans.[60] Justice O'Connor's holding in *Georgia v. Ashcroft* may affect 13.9 million African-Americans, but it also affects well over 11 million Hispanics.[61] Nevertheless, Justice O'Connor did not weigh or

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54. *See* Cameron et al., *supra* note 21.

55. *See* Pildes, *supra* note 20. Two of the occurrences of "Hispanic" come in the phrase "non-Hispanic white." *Id.* at 1539, 1568.

56. SWAIN, *supra* note 21, at 226-34; Lublin, *supra* note 21, at 183-84, 186.

57. Lublin, for example, does mention Hispanics, but only to discuss the beneficial effect of Hispanic communities on African-American candidates running in minority-black districts. *See* Lublin, *supra* note 21, at 183-84.

58. *See* Grofman et al., *supra* note 21, at 1391 (citing evidence that "due primarily to lower citizen voting age eligibility rates among Hispanics, Hispanic population percentages well above 50% may be needed to provide Hispanic voters with an equal opportunity to elect candidates of choice").

59. Cartagena, *supra* note 12, at 202.

60. *See infra* tbl. 1.

61. *Id.* Given the VRA's historical roots in the black civil rights movement, some would argue that Justice O'Connor's emphasis on the African-American community was understandable. While the VRA was primarily conceived as a means to empower the African-American community, one should not understate the role of Hispanics in the establishment and development of the VRA. Juan Cartagena has meticulously shown that in 1965, Puerto Rican politicians and voting rights advocates successfully pushed for a provision in the VRA—section 4(e)—that guaranteed that Puerto Rican voters educated in Spanish-language schools would be allowed to vote in American English-only elections. Cartagena has also documented how lawyers from the Mexican American Legal Defense Fund used this provision and the precedents arising out of it to successfully lobby for the expansion of section 5 to jurisdictions conducting English-only elections. *See* Cartagena, *supra* note 12, at 204-12. This expansion of the VRA in 1975 led to the section 5 coverage of Texas, today the

consider their experiences. The following Part will show why this was a critical mistake.

II. FILLING IN THE GAP

This Part considers whether Justice O'Connor's assertion—that "the best way to maximize minority voting strength may be to create more influence or coalitional districts"[62]—holds in the Latino context. This inquiry is divided into several parts. Section III.A provides a profile of the Hispanic electorate, identifying salient demographic and behavioral differences between the black and Hispanic electorates. The following two Sections use that profile to assess whether coalitional and influence districts actually maximize the voting strength of the Latino electorate. This Part concludes that coalitional and influence districts are highly ineffective for Latinos, both in terms of electing Latino candidates and in allowing Latinos to participate in electoral politics. Instead, the Hispanic population's unique combination of demographic characteristics creates a situation in which robust majority-minority districts constitute their primary—if not their only—avenue for electoral success. In light of these findings, the final Section discusses why *Georgia v. Ashcroft* may be particularly damaging to the Latino electorate.

A. A Comparative Profile of the Hispanic Electorate

There are at least four characteristics of the Hispanic electorate that may cause Hispanics to be particularly reliant on majority-minority districts and highly prejudiced by their elimination—perhaps even more so than their black counterparts.

First, the Hispanic population is crippled by high levels of voter ineligibility, at rates unseen among whites or African-Americans. In a recent report, the Pew Hispanic Center found that only 39% of Latinos are eligible to vote, compared to 65% of blacks and 76% of whites.[63] As the Hispanic population is disproportionately young, the size of the Latino electorate is

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most populous jurisdiction subject to section 5. *See infra* tbl. 1. Cartagena concluded: "The truth is that the Voting Rights Act . . . was initially and deservedly aimed at restoring the dignity of African-American voters, but even in 1965, it was never just black and white." Cartagena, *supra* note 12, at 201.

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

63. ROBERTO SURO ET AL., PEW HISPANIC CTR., HISPANICS AND THE 2004 ELECTION: POPULATION, ELECTORATE AND VOTERS 5 (2005), *available at* http://pewhispanic.org/files/reports/48.pdf.

reduced by age-based ineligibility. Thirty-four percent of the Hispanic population cannot vote due to age alone.[64] The remaining 27% are disqualified from voting due to noncitizenship.[65]

Table 1.

HISPANIC AND BLACK POPULATIONS IN JURISDICTIONS COVERED BY SECTION 5[66]

JURISDICTION	HISPANIC	BLACK	TOTAL
Fully Covered States			
Alabama	75,830	1,162,189	4,447,100
Alaska	25,852	25,733	626,932
Arizona	1,295,617	170,191	5,130,632
Georgia	435,227	2,369,427	8,186,453
Louisiana	107,738	1,457,805	4,468,976
Mississippi	39,569	1,035,627	2,844,658
South Carolina	95,076	1,192,592	4,012,012
Texas	6,669,666	2,429,966	20,851,820

64. *Id.* at 5. Thirty-one percent of non-Hispanic blacks and 22% of non-Hispanic whites were ineligible to vote due to age. *Id.* at 6.

65. *Id.* at 5. Only 4% of non-Hispanic blacks and 2% of non-Hispanic whites are disqualified from voting due to noncitizenship. *Id.* at 6. While noncitizens are unable to vote, they are counted for redistricting purposes. Section 2 of the Fourteenth Amendment requires Congress to apportion representatives by "counting the whole number of persons in each State," making no mention of citizenship status. U.S. CONST. amend. XIV, § 2; *see also* U.S. Census Bureau, Questions and Answers on Apportionment, http://www.census.gov/population/www/censusdata/apportionment/faq.html#Q2 (last visited Apr. 14, 2006) ("The apportionment calculation is based upon the total resident population (citizens and non-citizens) of the 50 states.").

66. I generated a customized table using data from "Census 2000 Summary File 1 (SF 1) 100-Percent Data," which is available at U.S. Census Bureau, United States—Data Sets—American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (follow "get data" hyperlink under "Decennial Census" heading) (last visited Apr. 17, 2006). VRA-covered jurisdictions are listed at U.S. Department of Justice Civil Rights Division, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Apr. 17, 2006). Black population figures include all non-Hispanic individuals identifying as black alone or as black in combination with another race.

JURISDICTION	HISPANIC	BLACK	TOTAL
Partially Covered States			
California	350,345	37,837	801,996
Florida	265,488	174,774	1,393,062
Michigan	1,564	5,820	12,422
New Hampshire	130	114	16,167
New York	1,550,399	1,554,764	5,335,171
North Carolina	124,730	884,313	2,916,502
South Dakota	315	34	21,516
Virginia	315,499	1,405,591	6,698,349
Total	**11,353,045**	**13,906,777**	**67,763,768**

Second, the Latino population suffers from participation rates lower than those of non-Hispanic black and white populations, in terms of both voter registration and election day turnout. While turnout rates among Hispanics are lower than those among whites and blacks,[67] low registration rates among eligible voters pose the biggest problem. Only 58% of eligible Latino voters were registered to vote in 2004, compared to 75% of whites and 69% of blacks.[68] Experts attribute these low participation rates to the fact that, like African-Americans, Hispanics are disproportionately young, less educated, and less affluent—all attributes that traditionally dampen political participation.[69] For Hispanics, these factors are exacerbated by language barriers. The combined effect of low voter eligibility and participation is devastating: Only

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67. SURO ET AL., *supra* note 63, at 6-7.

68. *Id.* at 6.

69. *See* Louis DeSipio & Rodolfo O. de la Garza, *Between Symbolism and Influence: Latinos and the 2000 Elections*, *in* MUTED VOICES: LATINOS AND THE 2000 ELECTIONS 13, 21-22 (Rodolfo O. de la Garza & Louis DeSipio eds., 2005) (discussing the impact of youth, education, and poverty on Latino participation rates); Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Twenty Years of Voting Rights Act Coverage*, *in* PURSUING POWER: LATINOS AND THE POLITICAL SYSTEM 72, 103-07 (F. Chris Garcia ed., 1997) [hereinafter de la Garza & DeSipio, *Save the Baby*] (same).

18% of all Hispanics voted in 2004, compared to 51% of whites and 39% of blacks, and Hispanics only contributed 6% of all the ballots cast on election day.[70]

Third, Hispanic voters are not as politically cohesive as African-American voters. Hispanics may predominantly identify as Democrats (among registered voters, self-identified Democrats outnumber Republicans two to one[71]), but Latinos do not exhibit the same degree of support for Democratic candidates as African-Americans. In the 2004 elections, for example, Senator John Kerry garnered an impressive 88% of the African-American vote, but only gained the support of slightly more than half (53%) of Hispanic voters.[72] While these particular figures[73] and the results of this particular election[74] are not to be overemphasized, few can contest that Latinos are less politically cohesive than African-Americans.

Fourth and finally, the Hispanic population has experienced a pattern of growth distinct from that of the African-American population, and indeed most other populations in the United States. The Hispanic population has undergone a dramatic increase in the past few decades, more than doubling in size between 1980 and 2000.[75] Over 20 million Latinos were added to census rolls in those two decades, compared to 14 million non-Hispanic whites, and 7.5 million non-Hispanic blacks.[76] Additionally, instead of settling in concentrated Latino enclaves, census figures suggest that Hispanics are more likely to live in areas where they do not constitute a majority of the

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70. SURO ET AL., *supra* note 63, at 6, 8.

71. PEW HISPANIC CTR. & KAISER FAMILY FOUND., THE 2004 NATIONAL SURVEY OF LATINOS: POLITICS AND CIVIC PARTICIPATION 2 (2004), *available at* http://pewhispanic.org/files/reports/33.pdf.

72. CNN.com, Election 2004, http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (last visited Feb. 22, 2006).

73. *See* Memorandum from the Nat'l Council of La Raza to Interested Parties, How Did Latinos *Really* Vote in 2004? (Nov. 16, 2004), *available at* http://nclr.org/content/publications/download/28218 (critiquing evidence from the National Election Pool exit poll that CNN and other news sources relied upon).

74. *See* Louis DeSipio & Rodolfo O. de la Garza, *Forever Seen as New: Latino Participation in American Elections*, *in* LATINOS: REMAKING AMERICA 398, 402-03 (Marcelo M. Suarez-Orozco ed., 2002) (noting that Latino support for Republican politicians like George W. Bush and John McCain is generally an exception to the rule of Latino Democratic partisanship).

75. PEW HISPANIC CTR., HISPANICS: A PEOPLE IN MOTION 4 (2005), *available at* http://pewhispanic.org/files/reports/40.pdf.

76. *Id.*

population.[77] While this trend may eventually reverse, Latinos at the current moment are more residentially dispersed than African-Americans.[78]

B. Implications for Districting in the Hispanic Context

Latinos' demographic and electoral attributes affect the voting strength that coalitional, influence, and majority-minority districts can provide. Standing alone, these characteristics render Latino coalitional and influence districts highly ineffective. Speaking comparatively, this profile suggests that even if coalitional and influence districts actually maximize African-American voting strength — an unwarranted assumption — the same will not necessarily be true of Latinos.

1. The Failure of Hispanic Coalitional Districts

Evaluating the voting strength provided by coalitional districts is straightforward. The *Georgia v. Ashcroft* Court sanctioned the creation of coalitional districts in lieu of majority-minority districts by expanding the ability to elect prong. Hence, a coalitional district increases a minority group's voting strength insofar as it enhances a minority group's ability to elect its candidate of choice. This can be measured in two ways: (1) levels of crossover support for Hispanics, and (2) the success rates of Hispanic candidates in Hispanic coalitional districts. This Subsection will evaluate each in turn.

Sufficient levels of crossover support are difficult to attain for Hispanics. Due to high rates of ineligibility and disengagement, Hispanics in a Hispanic coalitional district would need massive levels of crossover support from non-Hispanic whites and blacks. Based on average ineligibility rates,[79] a coalitional district with a 40% Latino total population and a 60% white population translates into a district with a 25% Latino citizen voting age population (CVAP) and a 75% white CVAP. In fact, since Hispanics have higher ineligibility rates and lower participation rates than blacks, assuming a generalized increase in crossover support for minority candidates, Latinos in a Latino coalition district would need to receive more crossover support than

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77. ROBERTO SURO & SONYA TAFOYA, PEW HISPANIC CTR., DISPERSAL AND CONCENTRATION: PATTERNS OF LATINO RESIDENTIAL SETTLEMENT 1 (2004), *available at* http://pewhispanic. org/files/reports/36.pdf.

78. *Id.* at 2; Robert R. Brischetto, *Latino Voters and Redistricting in the New Millennium*, *in* REDISTRICTING AND MINORITY REPRESENTATION 43, 56 (David A. Bositis ed., 1998).

79. *See supra* notes 63-64 and accompanying text.

their black counterparts in a similarly apportioned black coalition district to enjoy the same likelihood of electing their candidate of choice. This level of crossover support seems intuitively unlikely.

While there is admittedly little aggregate data on precise levels of white crossover support for Hispanic candidates in Hispanic coalitional districts,[80] the existing data does not reflect significant levels of crossover support for Hispanics, let alone levels that would offset the differences in the eligibility and participation rates between Hispanics and blacks.[81] There is one putative exception to this rule. Several studies suggest that in California, Latino candidates may benefit from high levels of crossover support.[82] Nevertheless, these studies primarily rely on anecdotal evidence,[83] and must be weighed against convincing econometric findings reaching the opposite conclusion.[84] In

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80. Bruce Cain and Kenneth Miller have explained that as a quickly growing "other minority" group, Hispanics have often not inhabited a jurisdiction sufficiently long enough such that it is possible to develop a clear record of voting discrimination. Bruce E. Cain & Kenneth P. Miller, *Voting Rights Mismatch: The Challenge of Applying the Voting Rights Act to "Other Minorities," in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 141, 146-47 (Mark E. Rush ed., 1998).

81. *See* Brischetto, *supra* note 78, at 50 ("[T]here seems to be no trend toward lessening of polarized voting [against Latinos] during the [past] three decades."). Indeed, racially polarized voting—the opposite of crossover support—remains rampant and well-documented in places like Texas. *See* Symposium, *Drawing Lines in the Sand: The Texas Latino Community and Redistricting 2001*, 6 TEX. HISP. J.L. & POL'Y 1, 50-51 (2001). For a discussion of the "Republican Primary Curse" in Texas, a euphemistic term to describe the consistent defeat of promising—and even GOP-backed—Hispanic candidates by underfunded, almost clearly inferior white Republican opponents, see Rodolfo Rosales et al., Report on San Antonio Hearings Related to the Extension and/or Expansion of the Federal Voting Rights Act 21-22 (Feb. 2006) (unpublished manuscript, on file with author).

82. Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C. L. REV. 1283, 1289 (2001) ("Latinos . . . have demonstrated their ability to win elections in non-Latino districts more so than other ethnic groups."). Another scholar has implied the same without directly stating so. *See* J. Morgan Kousser, *Beyond* Gingles: *Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 566-67 (1993) (citing Latino congressional and State Assembly victories in California districts where Latinos constituted a minority of registered voters); *see also* Cano v. Davis, 211 F. Supp. 2d 1208, 1247 (C.D. Cal. 2002) (concluding that California's electoral system is "far from closed to Latinos"). The court in *Cano* also found extensive evidence of substantial white crossover voting in favor of Latinos in two regions in California. *Id.* at 1243.

83. *See* Estrada, *supra* note 82, at 1289 n.30 (listing successful Latina candidates from non-Latino-majority districts in California; Kousser, *supra* note 82, at 566-67 (same).

84. *See* Yishaiya Absoch et al., An Assessment of Racially Polarized Voting for and Against Latino Candidates 28-30 (Feb. 9, 2006) (unpublished manuscript, on file with author)

any event, scholars generally regard California as an exception to the rule in terms of redistricting.[85] Overall, then, while there has been scattered evidence of increased white crossover support for black voters' candidates of choice[86] — evidence that has been criticized by voting rights scholars[87] — there has been no reliable evidence of comparable gains for Hispanic voters.

The general ineffectiveness of coalitional districts is underscored by evidence from electoral contests in Hispanic coalitional districts. David Lublin found that of 5,190 congressional races between 1972 and 1994, Latinos only won 29 races (0.6%) outside of majority-Latino districts.[88] Moreover, all except one of the Hispanic candidates who won in Latino-minority districts ran in majority-minority districts made up of a mix of minority groups within which Latinos constituted a prominent plurality of voters.[89]

There is little evidence that coalitional districts work to maximize Hispanic voting strength: Crossover support for Hispanics has proven insufficient, and Latinos are rarely, if ever, elected from supposedly "coalitional" Latino districts.

2. The Empty Promise of Hispanic Influence Districts

It is more difficult to evaluate the voting strength provided by Hispanic influence districts. Influence districts never result in the election of a minority

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(finding that "non-Latinos voted substantially against the Latino preferred candidate or issue" in thirteen elections in Los Angeles County from 1994 to 2003).

85. *See, e.g.*, Cartagena, *supra* note 12, at 220; Bernard Grofman & Lisa Handley, *Preconditions for Black and Hispanic Congressional Success*, *in* UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 31, 37 (Wilma Rule & Joseph F. Zimmerman eds., 1992) ("Hispanics generally are not elected to Congress from districts that are less than 64 percent combined minority except in California and New Mexico.").

86. *See supra* notes 22, 48 and accompanying text.

87. *See, e.g.*, Benson, *supra* note 16, at 496-97 (critiquing Richard Pildes's use of ambiguous data on racially polarized voting).

88. LUBLIN, *supra* note 7, at 48. Lublin made comparable, though slightly more favorable, findings for African-Americans. *Id.* at 41 (finding that African-Americans won 72 out of 5,079 races (1.4%) held outside of majority-black districts).

89. *Id.* at 49. The support of black voters can partially explain the initial success of Latino officials like Senator Robert Menendez of New Jersey, who first ran for Congress in a district with a 42% Hispanic population and a 14% African-American population. *See* Page v. Bartels, 144 F. Supp. 2d 346, 356 (D.N.J. 2001). One scholar attributes Senator Menendez's subsequent success — prior to being appointed to the Senate, Menendez served seven terms in the House of Representatives and was elected chairman of the House Democratic Caucus — to the power of incumbency. Juan Cartagena, *New Jersey's Multi-Member Legislative Districts and Latino Political Power*, 7 RUTGERS RACE & L. REV. (forthcoming 2006).

group's candidate of choice, and so cannot be understood to maximize a minority group's voting strength, traditionally defined. This is why Justice O'Connor placed influence districts under the opportunity to participate" prong of the totality of the circumstances test, and not the ability to elect prong.[90] Instead, the benefits afforded by influence districts are grounded in the perverse effects hypothesis, the idea that majority-minority districts harm minority groups' substantive representation (their ability to pass bills that support their agenda)[91] and thus should be dismantled.[92] In a sense, then, the voting strength provided by Hispanic influence districts turns on the validity of the perverse effects theory in the Hispanic context.

At first glance, the perverse effects theory appears self-evident. It seems reasonable that by packing progressive minority voters into a small set of districts, a greater number of conservative officials will be elected in surrounding districts. In reality, however, the dual propositions central to the perverse effects theory—(1) that concentrating minority voters into majority-minority districts will harm those minority voters' overall substantive representation, and (2) that unpacking those districts to create influence districts will benefit that substantive representation by making minority voters a viable "swing" constituency—are highly contingent upon two specific factors.

First, concentrating minority voters into majority-minority districts will only harm those voters' substantive interests if the minority voters are sufficiently Democratic, and the neighboring nonminority voters sufficiently Republican,[93] such that the concentration of minority voters into majority-minority districts—and hence their separation from neighboring nonminority voters—will result in the election of more conservative officials in the surrounding districts. This specific set of circumstances may hold in some regions, but not in others. Indeed, David Lublin has pointed out—in an article that Justice O'Connor cited[94]—that while the concentration of black voters in Southern states may result in conservative electoral outcomes in surrounding districts, such concentrations will not necessarily have the same effect in the

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90. *See* Georgia v. Ashcroft, 539 U.S. 461, 482 (2003) (stating that influence districts provide minority groups an opportunity to "play a substantial, if not decisive, role in the electoral process").

91. See *supra* notes 45-48 for a more extended discussion of substantive representation.

92. *See supra* note 47 and accompanying text.

93. I acknowledge that the default labeling of minorities as Democrats and nonminorities as Republicans can be misleading. These assumptions are made here for the sake of simplicity, and in recognition of the fact that African-Americans and Hispanics do in fact tend to vote Democratic. *See supra* notes 71-72 and accompanying text.

94. *Georgia*, 539 U.S. at 482 (citing Lublin, *supra* note 21).

North, where black voters are often surrounded by liberal—yet non-African-American—Jewish and Latino voters.[95]

Second, any substantive benefit that a minority group may gain from being unpacked and placed in an influence district is highly contingent upon the responsiveness of the nonminority legislators representing (or candidates vying to represent) the district. As Pamela Karlan has asserted, the dynamics of an influence district will not necessarily make minority voters a coveted swing constituency: In a race between a white Democrat and a white Republican, for example, if the Republican candidate is highly undesirable to black voters, his Democratic opponent could easily take black support for granted.[96]

The perverse effects theory's underlying logic reveals it to be critically dependent upon two empirical factors: (1) the political distance between voters, or whether nonminority voters are considerably more conservative than minority voters, and (2) the political distance between candidates, which affects the responsiveness of nonminority legislators to their minority constituents. Since the perverse effects theory is an empirical proposition—not a logical certainty—a review of the literature on the subject can reveal the validity of its application to minority communities.

This literature is split on the validity of the perverse effects theory in the African-American context. While there are several studies suggesting that African-Americans have lost substantive representation as a result of their concentration in majority-minority districts,[97] there is a growing body of evidence suggesting that the descriptive gains precipitated by majority-black districts do not lead to subsequent losses in substantive representation, and that in fact the best means to maximize black substantive representation is to maximize the number of black elected officials.[98]

There is less ambiguity in the Latino context. While no study has yet put forward affirmative evidence that the perverse effects theory holds true for Latinos, Delia Grigg and Jonathan Katz have concluded that gains in descriptive representation do not come at the expense of losses in substantive

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95. LUBLIN, *supra* note 7, at 91-96; Lublin, *supra* note 21, at 185.

96. Karlan, *supra* note 15, at 32.

97. *See supra* notes 41-44 and accompanying text.

98. *See* Grigg & Katz, *supra* note 45, at 9, 13 (finding that the perverse effects hypothesis was not supported by data from the 1972-2000 House of Representatives elections); Christian R. Grose, Black-Majority Districts or Black Influence Districts?: Evaluating the Effect of Descriptive Representation on the Substantive Representation of African-Americans in Black-Majority and Black Influence Districts in the Wake of *Georgia v. Ashcroft* 28-29 (Feb. 9, 2006) (unpublished manuscript, on file with author).

representation,[99] specifically finding that the presence of majority-Hispanic (and majority-black) districts in a redistricting plan does not create a pro-Republican bias in the overall area undergoing redistricting.[100]

Although this lack of affirmative evidence is not dispositive, there are independent reasons to believe that majority-Latino districts are not harmful to Latino substantive representation. The Hispanic electorate is generally less politically cohesive—specifically, less uniformly Democratic—than the black electorate. This means that the placement of Hispanic voters in majority-Hispanic districts—and hence their separation from neighboring non-Hispanic voters—will have a less polarizing effect on subsequent elections in surrounding districts.[101] For example, if there are one hundred minority voters in a hypothetical thousand-person district, the removal of those voters from that district will cause less of a rightward swing if those hundred minority voters vote merely 55% Democratic (as Latinos roughly do), and not 80% Democratic (the approximate rate for African-Americans). On the other hand, if Hispanics are more moderate than African-Americans, Hispanics in an influence district may stand a greater chance of being critical swing voters; it is less likely that they will be so dissatisfied with a Republican candidate that they will automatically vote for a Democrat.

More research is needed to determine the harms and benefits of Latino influence districts. At this point, however, given that there is no guarantee that Latino influence districts will create a coveted class of Latino swing voters, and no evidence that such districts will avoid any substantive harms brought by majority-Latino districts, it is hard to identify any increase in voting strength brought about by Latino influence districts. Therefore, there is little justification for using Latino influence districts in lieu of Latino-majority districts.

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99. Grigg & Katz, *supra* note 45, at 13.

100. *Id.* at 2. Notably, the study that has most closely examined the parallel districting experiences of both African-Americans and Latinos—*The Paradox of Representation* by David Lublin—concludes that the perverse effects theory holds for African-Americans (at least in the South), but remains silent on the topic for Latinos. LUBLIN, *supra* note 7, at 91-96.

101. This hypothesis is strengthened when one considers that Hispanics in covered jurisdictions are slightly more likely to live in so-called blue states than African-Americans. This means that the political distance between Hispanics and their non-Hispanic neighbors will, on average, be smaller than that for African-Americans. Just under 17% of Hispanics living in covered jurisdictions live in California, Michigan, New Hampshire, and New York—states that went to Senator John Kerry in 2004—compared to 12.5% of African-Americans. *See supra* tbl. 1; Michael Gastner et al., Maps and Cartograms of the 2004 US Presidential Election Results, http://www-personal.umich.edu/~mejn/election (last visited Apr. 6, 2006).

3. The Continuing Need for Hispanic-Majority Districts

In contrast to the unsubstantiated benefits of Hispanic coalitional and influence districts, Hispanic-majority districts are critical to Latino voting strength. Hispanic candidates are rarely elected outside of Latino-majority districts,[102] and they enjoy a high rate of success within them.[103] The demographic characteristics of the Hispanic population do more than necessitate the use of majority-minority districts, however. High rates of ineligibility and low participation rates require that the majority-Hispanic districts constructed be more than simply 50% Hispanic.[104] Some scholars have placed the average population threshold necessary for Hispanics to have the ability to elect their candidate of choice between 55% and 60% Latino.[105]

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102. My tabulations of 2000 census figures show that only 20% of the current Hispanic members of the House of Representatives hail from districts that are less than half Hispanic in total population. Similar proportions exist in state legislatures. *See* David Lublin, Percent of Hispanic Legislators Elected in Hispanic-Majority, Black + Hispanic-Majority, and Other Districts, http://www.american.edu/dlublin/redistricting/tab7.html (last visited Apr. 14, 2006) (showing that approximately 80% of Hispanic state legislators are elected from majority-Hispanic districts). Note that figures are up to date for the last election held in each seat prior to 2006. *Id.* This is not a recent development; the vast majority of Hispanics elected to Congress in the twentieth century were elected from majority-minority congressional districts. Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: The New Demographics and the Voting Rights Act*, 79 N.C. L. Rev. 1215, 1231 (2001).

103. David Lublin's historical analysis found that Latinos won 82 of the 105 elections held in Latino-majority districts. *See* Lublin, *supra* note 7, at 48.

104. My tabulations of 2000 census data show that over two-thirds of the current Hispanic members of the House of Representatives come from districts where Latinos make up over 60% of the total population.

105. *See* Brischetto, *supra* note 78, at 49 ("[T]he threshold for likely success of Latinos is 58 percent Latino."); Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 Asian L.J. 41, 78 (2002) (reporting that Latino elected officials surveyed had an average of 56% Latino population in their districts). Geron and Lai concluded that the "concentration of Latinos into relatively compact electoral districts remains the primary means that Latinos will be elected to office." Geron & Lai, *supra*, at 78.

    Some earlier studies estimated the necessary population threshold to be even higher. James Loewen, for example, used data from 1980s city and national races in New York City to calculate that in three white-Latino boroughs Latinos would need to constitute between 66% and 79% (or a "super-majority") of a district's population in order for there to be a "tossup" between another candidate and their candidate of choice. James W. Loewen, *Levels of Political Mobilization and Racial Bloc Voting Among Latinos, Anglos, and African Americans in New York City*, 13 Chicano-Latino L. Rev. 38, 67-70 (1993). In 1988, Kimball Brace warned that because of high noncitizenship rates, Hispanics might need to constitute "well above 65%" of a district's population in order to serve as an effective majority in the district.

Like Hispanics, African-Americans depend on majority-black districts to elect their candidates of choice.[106] Due to Hispanics' eligibility and participation rates, however, Hispanics need stronger majority-minority districts than African-Americans.[107] Bruce Cain and Kenneth Miller explain this phenomenon:

> [W]hereas the African-American population is often at a disadvantage with respect to the ratio of voters to population when it is grouped together with Anglo voters, it is often advantaged as compared to Latinos (who in addition to sharing similar problems in terms of levels of education and socioeconomic disadvantage suffer the burdens of noncitizenship and higher levels of age ineligibility).[108]

This disadvantage is such that the average Hispanic-majority district is less likely to elect a Hispanic than a black-majority district a black candidate.[109]

Justice O'Connor made a mistake when she ignored powerful evidence showing that African-American voters still need majority-minority districts to elect their candidates of choice. Her most grievous error, however, was

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Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL'Y 43, 61 n.8 (1988).

One study that deviated from this earlier trend was conducted by Bernard Grofman and Lisa Handley, who found that Latinos only needed a clear plurality to have a realistic opportunity to elect their candidate to Congress, but only if the district had a combined minority population of 55%. They also admitted that Hispanics "generally are not elected" in cities with less than a 64% combined minority population. Grofman and Handley, *supra* note 85, at 37-38.

106. David Lublin found that while African-Americans consistently lost in black coalitional districts, they consistently succeeded in majority-black districts. *See* LUBLIN, *supra* note 7, at 41; *see also* Handley et al., *supra* note 8, at 37 ("[W]e have found no evidence to indicate that majority minority districts are no longer necessary to ensure African-Americans and Hispanics fair representation in our legislative bodies."); Benson, *supra* note 16, at 494; Grigg & Katz, *supra* note 45, at 13 ("The evidence shows that the presence of [majority-minority districts] in a state substantially increases the election of [black and Latino] members to Congress.").

107. *See* Brischetto, *supra* note 78, at 50 ("Compared to African Americans, Latinos usually must comprise a greater proportion of the population if the district is to be 'safe.'").

108. *See* Cain & Miller, *supra* note 80, at 146.

109. *See* Handley et al., *supra* note 8, at 25-26; *see also* LUBLIN, *supra* note 7, at 54 (showing that black-majority districts are slightly more effective than Latino-majority districts in electing a minority representative). Lublin further explained that Hispanic-majority districts are even less effective when the proportion of long-term residents in the district drops to or below 80%. *Id.* at 51. Likewise, Hispanic coalitional districts are, on average, slightly less effective than black coalitional districts. *Compare* LUBLIN, *supra* note 7, at 48 (finding that Latinos only won 29 out of 5190 congressional races held outside of majority-Latino districts), *with id.* at 41 (finding that African-Americans won 72 out of 5079 races held outside of majority-black districts).

ignoring an entire body of literature that uniformly established that Hispanics are poorly served by coalitional and influence districts, and that they continue to rely on robust majority-minority districts—even more so than their black counterparts.[110]

C. The Threat of Georgia v. Ashcroft to the Hispanic Community

The evidence above reveals the markedly detrimental impact that *Georgia v. Ashcroft* will have on the Hispanic community. While Hispanics are acutely

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110. The few studies that question the benefits or necessity of majority-Hispanic districts are either outdated or based on a relatively narrow field of statistical evidence. Rodolfo de la Garza and Louis DeSipio argued that the creation of majority-minority districts through the VRA has lowered turnout and hence "reduced electoral competition in high-concentration Latino areas." *See* de la Garza & DeSipio, *Save the Baby*, *supra* note 69, at 102. They recommended the creation of influence districts to "assure that there is active competition for Latino votes and mobilization of new voters." *Id.* at 116.

First, de la Garza and DeSipio themselves admitted that majority-minority districting could be a minor cause of low turnout when compared to the depressive effects of other socioeconomic factors. *Id.* at 113. Second, the authors only cited a single study to support their central contention that majority-minority districts do, in fact, lower turnout; the study in question analyzed elections in only five cities. *Id.* at 112, 122 n.12. Finally, these findings are contradicted by at least three studies suggesting that majority-minority districts in fact work to boost Latino turnout. *See* Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) ("Latinos vote more when in a majority-Latino district, contrary to the expectations of those who expected or feared minority demobilization."); Loewen, *supra* note 105, at 67 ("[D]rawing districts with higher proportions of Latino voters may prompt political mobilization."); Gary M. Segura & Nathan D. Woods, Majority-Minority Districts, Co-Ethnic Candidates, and Mobilization Effects 11-12 (Feb. 9, 2006) (unpublished manuscript, on file with author) (finding that the concentration of Hispanic voters in electoral districts has a uniformly mobilizing effect in California, and a net positive effect in New York, once the Hispanic percentage of a district reaches 40% to 55%); *see also* Benson, *supra* note 16, at 498 ("[M]inority voter turnout *decreases* when the concentration of minority voters in a district falls below a certain point.").

Leo Estrada made the distinct argument that majority-minority districts are, in fact, unnecessary for Latinos' electoral success. First, he claimed that "Latinos . . . have demonstrated their ability to win elections in non-Latino districts more so than other ethnic groups." Estrada, *supra* note 82, at 1289. Second, he argued in favor of influence districts, stating that "Latinos . . . are capable of winning strong influence districts without having majority CVAP districts." *Id.* at 1293. Again, however, Estrada's information is questionable and limited in its applicability. He cited no comprehensive econometric studies; rather, he supported both claims with purely anecdotal evidence—for example, lists of successful Latino candidates from non-Latino districts—that appears to be entirely drawn from California. *See id.* at 1289 n.30. Indeed, while there has been limited anecdotal evidence that Latinos in California enjoy substantial crossover support, these findings must be weighed against contradictory econometric evidence. In any event, California is regarded by some experts to be an exception to the rule in the redistricting context. *See supra* note 85.

dependent on Hispanic-majority districts, *Georgia v. Ashcroft* allows those districts to be unpacked in favor of coalitional or influence districts that do little to build Hispanic voting strength, however it is defined. This process has already begun in Texas, where the Department of Justice precleared[111] a 2003 congressional redistricting plan that its own analysts determined would not "maintain districts where Hispanic voters previously elected their candidates of choice."[112] Specifically, they found that the proposed plan reduced by one the number of districts where Hispanics could safely elect their candidates of choice, and only added a Hispanic coalitional district to make up the difference.[113]

There is one final consideration that makes *Georgia v. Ashcroft* particularly damning for Hispanics: Majority-Hispanic districts are more difficult to create than majority-black districts. Even though Hispanics are more reliant on majority-minority districts than African-Americans, Hispanics' geographic dispersion and the recent nature of their population growth have made drawing (and maintaining) majority-Hispanic districts relatively more difficult. To begin with, Hispanics' geographic dispersion makes it difficult for Hispanics to successfully bring a section 2 vote dilution suit, which might prompt the creation of a majority-Hispanic district. Since *Thornburg v. Gingles*[114] — a foundational section 2 case — the Supreme Court has required vote dilution plaintiffs to prove that the minority group in question is sufficiently compact to form a single-member district. This compactness requirement is more difficult for Hispanics to meet, given that they are more residentially dispersed than African-Americans.[115] One group of scholars cited the relative dispersion of Hispanics to explain the fact that fewer majority-Hispanic districts were created relative to population than majority-black districts during the post-1990 redistricting process.[116]

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111. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1 (documenting that senior Justice Department officials approved the districting plan).

112. Mellett et al., *supra* note 16, at 68.

113. *Id.*

114. 478 U.S. 30 (1986).

115. *Id.* at 50.

116. Handley et al., *supra* note 8, at 25; *see also* Brischetto, *supra* note 78, at 55 (citing residential isolation as one factor making "effective districts" for Latinos particularly difficult to create); Geron & Lai, *supra* note 105, at 46 (confirming that districts favorable to Hispanics are more difficult to draw due to greater residential dispersion).

Hispanics' geographic dispersion also makes it more difficult for majority-Hispanic districts to survive legal challenges. In 1993, *Shaw v. Reno*[117] established that districts that appeared to rely overwhelmingly on race could be deemed invalid under the Equal Protection clause.[118] This is particularly threatening for Hispanics, who, because of their relative residential dispersion, often cannot be joined into one district without creatively shaped district boundaries. Hence, a widely dispersed Hispanic community seeking to create a majority-Hispanic district faces the double burden of being unable to demand the construction of a majority-Hispanic district due to *Gingles*, and, conversely, having their district deemed invalid under *Shaw*.[119]

Hispanics' recent population growth has only added to these difficulties. Because the Latino population boom has only taken shape in the last several decades,[120] there have been few districting cycles in which Hispanic-majority districts could have been drawn. Bernard Grofman extrapolates from this factor to conclude that Hispanics will be the group most harmed by the legacy of *Georgia v. Ashcroft*:

> In Congress, and in state legislatures, most of the black majority (or near majority) districts that could have been created are already in place, and blacks are a declining portion of the total electorate (except in a handful of states) so we should not expect to see new black majority seats created. For Hispanics (the fastest growing minority in the U.S.) in covered jurisdictions, such as Texas, that is not true. A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.[121]

Perversely, then, *Georgia v. Ashcroft* creates all the wrong incentives. Hispanics face exceptional difficulties in establishing and maintaining majority-Hispanic districts. Nevertheless, *Georgia v. Ashcroft* will facilitate the elimination of those precious few majority-Hispanic districts that have already been created – in spite of the fact that today, the evidence suggests that Hispanics may need them the most.

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117. 509 U.S. 630 (1993).

118. *Id.* at 649.

119. Cain & Miller, *supra* note 80, at 161 ("Since Latino and Asian communities are usually less compact than those of African Americans, these groups will face an even harder task creating districts that meet the first *Gingles* precondition while still complying with *Shaw*.").

120. *See supra* note 77 and accompanying text.

121. Grofman, *supra* note 24, at 12 n.13.

III. REPAIRING THE DAMAGE OF *GEORGIA V. ASHCROFT*

The Supreme Court's opinion in *Georgia v. Ashcroft* is written in a way that invites the erosion of electoral gains in Latino communities covered by section 5. In broadening the ability to elect standard and subsuming that standard within a totality of the circumstances test, Justice O'Connor markedly deemphasized the role of racially polarized voting in the section 5 preclearance calculus.[122] It is easy to envision the Department of Justice or the courts preclearing redistricting plans that unpack majority-Latino districts in favor of Latino coalitional districts without recognizing that "coalitions" are not actually possible.

This Part discusses two strategies—one for Congress, one for courts—to prevent the unwarranted elimination of majority-minority districts that may be occasioned by *Georgia v. Ashcroft*. The first strategy centers around the reauthorization of section 5 of the VRA, which is currently due to expire in 2007. The second strategy is to advance a novel legal argument should the first strategy—currently pursued by the NAACP Legal Defense Fund and other civil rights groups—not succeed.

A. The Georgia v. Ashcroft *Legislative "Fix"*

In 2005, hearings began in the Judiciary Committee of the House of Representatives to discuss the reauthorization of section 5 and several other VRA provisions set to expire in 2007. Voting rights advocates hope to convince legislators to amend section 5 during the reauthorization process to undo the changes of *Georgia v. Ashcroft*; this legislative fix would add language to section 5 that would make ability to elect the cornerstone of section 5 preclearance analysis. This would not result in a return to the pre-*Georgia v. Ashcroft* standard; rather, this would make ability to elect the first among equals of the factors of the totality of the circumstances test.

Such an amendment would prohibit the unpacking of majority-minority districts in the absence of a specific set of circumstances. Professor Jocelyn Benson has proposed a ban on reductions below 55% of covered minority populations in any currently majority-minority district, unless the jurisdiction

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[122]. In fact, racially polarized voting makes a single appearance in Justice O'Connor's opinion, in a sentence in which she states that "evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district." Georgia v. Ashcroft, 539 U.S. 461, 485 (2003); *see* Karlan, *supra* note 15, at 34 (noting *Georgia*'s one-sentence treatment of racially polarized voting).

can present convincing evidence that racially polarized voting is nonexistent or that minority voters' participation rates will remain unaffected.[123] A more tempered approach would avoid a specific numerical cutoff, and would allow the unpacking of majority-minority districts only upon a showing of historically consistent levels of crossover support sufficient to enable the minority community in question to enjoy the same ability to elect as it had experienced before.

Neither formulation would allow for the substitution of influence districts for majority-minority districts: By definition, the substitution of influence districts for majority-minority districts diminishes a minority group's "ability to elect." These strategies would, however, allow for the substitution of coalitional districts for majority-minority districts—but only upon a showing that the coalitional district would have enough crossover voters to actually work.

There are two reasons to think that a legislative fix could actually work. First of all, such a strategy has succeeded before: During the 1982 reauthorization of the VRA, advocates successfully lobbied for the amendment of section 2 to prohibit all voting changes with a discriminatory effect, overturning the holding in *Mobile v. Bolden*, a case that held that only those changes with discriminatory intent would be prohibited.[124]

Second, a flexible section 5 standard that allows for the unpacking of majority-minority districts only upon the satisfaction of a specific set of conditions actually appears to be what Richard Pildes—one of Justice O'Connor's cited authorities and arguably the most vehement critic of section 5—originally envisioned. Professor Pildes called for the adoption of a "functional approach" to section 5 under which "there is no impermissible 'retrogression' under section 5 of the VRA if a jurisdiction recasts a safe district of the 1990s into a coalitional district in the 2000s, as long as the evidence shows that the coalitional district will afford an equal opportunity to elect."[125] In fact, Professor Pildes has recognized that in redistricting cases, the level of racially polarized voting in a jurisdiction is "[t]he critical legal question" that courts must consider.[126] The benefit of a flexible but reformed section 5 standard is that it would both recognize that coalitional districts are sometimes effective—accepting the mantra of various conservative voting rights

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123. Benson, *supra* note 16, at 509.

124. 446 U.S. 55, 62, 74 (1980); *see* Benson, *supra* note 16, at 501-505 (explaining how the holding in *Mobile* was successfully neutralized during the 1982 reauthorization process).

125. Pildes, *supra* note 20, at 1568.

126. *Id.* at 1518.

scholars[127]—and simultaneously prevent the substitution of such districts for majority-minority districts where this would have a negative net impact on the minority group's ability to elect.

B. Reinvigorating the Totality of the Circumstances Test

In the event that voting rights advocates are unable to convince Congress to amend section 5 during the reauthorization process, these advocates could pursue a litigation strategy to persuade the Court to achieve the same result—the restoration of ability to elect as the cornerstone of section 5 analysis.

Specifically, litigants should seize upon Justice O'Connor use of the totality of circumstances test employed in section 2 vote dilution suits in the section 5 context.[128] This move was critical to the holding in *Georgia v. Ashcroft*: Only by adopting this broad test was O'Connor able to argue that the section 5 preclearance inquiry should not be limited to an evaluation of a plan's effect on a minority group's ability to elect, but that it should also include a consideration of the plan's impact on a minority group's "opportunity to participate in the political process"[129]—no previous section 5 case allowed opportunity to participate to enter the preclearance calculus. What Justice O'Connor did not consider, however, is that there is a body of precedent that informs when and how coalitional districts can be weighed in the section 2—and arguably now in the section 5—calculus.

In section 2 vote dilution suits, plaintiffs seek to establish that their overall electoral effectiveness has been diminished by the law, regulation, or activity in question. In the redistricting context, the few courts that have been asked to do so have generally considered the presence of coalitional districts to weigh against a finding of vote dilution. This has not been automatic, however: Rather, courts typically have only found coalitional districts unproblematic upon a showing that these districts would serve their stated purpose—the

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127. *See, e.g.*, Kousser, *supra* note 82, at 565 (arguing that the effectiveness of a district does not depend on the existence of a numerical majority of minority voters within it).

128. Georgia v. Ashcroft, 539 U.S. 461, 484-85 (2003) ("As Justice Souter recognized for the Court in the § 2 context, a court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5." (citing Johnson v. De Grandy, 512 U.S. 997, 1020-21 (1994))).

129. *See id.* at 485. Note that *Johnson* is a section 2 vote dilution case and not a section 5 preclearance case. *Id.*

formation of biracial or multiracial coalitions. Three cases illustrate this dominant trend.[130]

Representatives of minority voters in section 5 covered jurisdictions should cite these precedents and demand, in the words of one district court judge, that "before the existence of [a coalitional] district is given significant weight in the balance, the evidence must reveal that minority voters in the district have in fact joined with other voters to elect representatives of their choice."[131] Thus, such unpacking should occur only if minority groups maintain their ability to elect candidates of their choice. Under these same precedents, advocates could categorically oppose the unpacking of majority-minority districts in favor of influence districts, given that this would necessarily result in a diminution of ability to elect.

This strategy is promising, but by no means guaranteed. In spite of her adoption of the section 2 totality of the circumstances standard in the section 5 context,[132] Justice O'Connor inexplicably emphasized that section 2 and section 5 "combat different evils and, accordingly . . . impose very different duties upon the States."[133] More troubling, however, is that in the section 2 vote dilution cases, even courts requiring evidence of crossover voting inevitably

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130. *See* Uno v. City of Holyoke, 72 F.3d 973, 991 n.13 (1st Cir. 1995) (cautioning that for an influence district to weigh against a finding of vote dilution under section 2, evidence of crossover voting must be presented). Note that Judge Selya used the term "influence district" to refer to coalitional districts. *Id.*; *see also* Page v. Bartels, 248 F.3d 175, 197 (3d Cir. 2001) (remanding a section 2 vote dilution case with the warning that "[e]vidence establishing the factual existence of [crossover] voting behavior will be absolutely vital"); Martinez v. Bush, 234 F. Supp. 2d 1275, 1323-24 (S.D. Fla. 2002) (eschewing distinctions between majority-minority, coalitional, and influence districts in favor of the simple question of whether a district would actually result in the election of a minority candidate). *But see* Rural W. Tenn. Afr.-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096, 1104 (W.D. Tenn. 1995) (using a standard rule that any district with 25%-55% minority population would be considered a coalitional district for the purposes of the vote dilution analysis, regardless of the level of racially polarized voting in the district in question.). Note that the court in *McWherter* did not distinguish between influence districts and coalitional districts, using the former term to refer to both. Nevertheless, the language of the opinion, particularly its discussion of "the actual ability of minority voters to build coalitions within a district," strongly suggests that these passages addressed coalitional districts. *Id.* at 1104.

131. *Uno*, 72 F.3d at 991 n.13. As clarified above, Judge Selya of the First Circuit mistakenly used the term "influence" district to refer to a coalitional district. This is evidenced by his referral to the formation of coalitions between minority and other voters. *See supra* note 130.

132. *See supra* notes 128-129 and accompanying text.

133. *Georgia*, 539 U.S. at 478 (citing Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 477 (1997)).

found that such crossover support was present.[134] This suggests that the crossover voting requirement was not sufficiently rigorous.

The fact remains, however, that *Georgia v. Ashcroft* is a crucial precedent on surprisingly tenuous footing, having lost two members of its 5-4 majority — Chief Justice Rehnquist and Justice O'Connor herself — within one year. In the 2010 redistricting cycle, assuming Congress has reauthorized section 5 without implementing a legislative fix, the Roberts Court will undoubtedly reexamine the reasoning in *Georgia v. Ashcroft*. In this precarious situation, a line of precedents preventing the elimination of majority-minority districts in the absence of evidence of crossover voting could provide valuable guidance in reevaluating a radical new judicial standard.

CONCLUSION

Professor Pildes pointed out that "[l]aw and social science are perhaps nowhere more mutually dependent than in the voting-rights field"[135] and that the validity of much of voting rights law depends on a "decade-by-decade updating of the law's application based on the most current social-scientific findings."[136] Today, more than forty years after the enactment of the VRA, the nature of that updating must itself be updated. The demographics and voting patterns of Latinos are sufficiently different from those of African-Americans that courts considering section 5 cases — and indeed, much of voting rights laws and precedents — should be wary of assuming that the possible attributes of one group extend to another.

Evidence from "minority communities," "minority groups," or "minorities" should not be presented as such unless the data cited is indeed drawn from all of the minority groups affected by the measure at hand. Furthermore, courts should account for the relevant differences between minority groups in drafting their opinions by leaving in place the factual triggers — for example, rates of ineligibility and levels of crossover support — that are necessary to

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134. *Uno*, 72 F.3d at 991 (finding that the presence of a 28% Hispanic district in an aldermanic districting plan should be considered in the district court's vote dilution inquiry); *Martinez*, 234 F. Supp. 2d at 1323-24 (finding that the minority-black districts in question would likely "perform for black voters" and hence not finding vote dilution); *Bartels*, 144 F. Supp. 2d at 364-66 (finding that reliable crossover voting existed such that the districting plan that unpacked a majority African-American district into a 27% African-American coalitional district would actually "enhance and expand" opportunities for blacks and Hispanics to participate in the political process).

135. Pildes, *supra* note 20, at 1518.

136. *Id.* at 1519.

differentiate between the electoral experiences of different minority communities.

Such caution is entirely absent from *Georgia v. Ashcroft*. Instead, the decision highlights information derived entirely from a certain group of African-American communities—selective and controversial data in its own right—and uses it to justify a radical change in section 5 that will apply to African-Americans and Hispanics alike. This Note has shown this conflation to be unjustified. There is no evidence that coalitional or influence districts will bolster the voting strength of most Hispanic communities; instead, robust majority-minority districts remain the primary avenue to electoral success for the Hispanic communities' candidates of choice. While there is also strong evidence that African-Americans continue to rely on majority-minority districts—evidence that was itself unjustifiably sidestepped by Justice O'Connor—this pattern is almost undeniable in the Hispanic community.

It is too late to ask what would have happened if Justice O'Connor had examined studies pertaining to Hispanics as well as African-Americans, or if she had considered all of the evidence available from the African-American community. It is not too late, however, for voting rights advocates to take action to correct the Court's mistakes—for the benefit of Hispanics and other minority groups alike. The reauthorization process provides an ideal opportunity to right the wrongs of *Georgia v. Ashcroft*; if that effort fails, however, voting rights advocates can still make strong legal arguments to prevent the dissolution of majority-minority districts in those minority communities that may now need them the most.