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After Georgia v. Ashcroft: The Primacy of Proportionality

Felix B. Chang
University of Cincinnati College of Law, felix.chang@uc.edu

AFTER *GEORGIA V. ASHCROFT*: THE PRIMACY OF PROPORTIONALITY

*Felix B. Chang**

At the end of its 2002–2003 session, the Supreme Court went back on nearly thirty years of Voting Rights Act (VRA) precedent with its decision in *Georgia v. Ashcroft*.[1] After the 2000 census, Georgia's General Assembly redrew its State Senate districts so as to increase the number of Democratic seats.[2] Georgia then submitted its redistricting plan not to a Republican Department of Justice, but to the DC Circuit, for preclearance.[3] By the time the Supreme Court heard *Ashcroft*, a bizarre set of

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1. 539 U.S. 461 (2003).

2. *Id.* at 469.

3. Under § 5 of the Voting Rights Act, jurisdictions with a history of invidious discrimination against minority voters must preclear any changes in districting with the DOJ or the US District Court for DC. *See* 42 U.S.C. § 1973c. Georgia was such a "covered jurisdiction." Its decision to preclear with the DC Court may have been grounded on more than mere distrust of a Republican agency. The Justice Department had already shown that it could take great liberties in construing precedent on retrogression when it

alliances had formed around the case. On one side, the American Civil Liberties Union joined Attorney General John Ashcroft in arguing that Georgia's plan should not be precleared because it "reduced the ability of [B]lack voters to elect candidates of their choice."[4] On the other side, Congressman John Lewis, a veteran of the Civil Rights movement, vindicated Georgia's plan as one designed to increase Black voting strength.[5] Lewis essentially adopted the traditional argument that covered jurisdictions used to make in refusing to create majority-minority districts—that by spreading Black voters across several districts, the state was merely trying to increase Black voting strength.[6]

Georgia v. Ashcroft certainly challenged our traditional understanding of the parties and arguments in racial vote dilution, but its ultimate twist may have been the return of Justice O'Connor's concurrence in *Thornburg v. Gingles*[7] as the majority-endorsed position. In *Gingles*, Justice Brennan articulated a three-prong test for racial vote dilution that gauged the ability of a minority group to elect its candidate of choice.[8] For the next 17 years, Justice Brennan's test would overshadow Justice O'Connor's protest that ability to elect was but one factor in a "totality of circumstances."[9] Justice O'Connor's invocation of total circumstances recalls the myriad of factors in the Senate report accompanying the 1982 amendments to the VRA,[10] and her multifaceted inquiry suggests that, contrary to Justice Brennan, she would have favored causation over correlation:

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claimed that the Supreme Court's affirmation of a previous Georgia federal districting plan had no bearing on Georgia's subsequent State Senate districts. *See* Johnson v. Miller, 929 F. Supp. 1529, 1540–41 (S.D. Ga. 1996) (citing Pl. Exh. 122, at 2).

4. 539 U.S. at 472. The ACLU had moved to file an amicus brief in support of the DOJ's position that Georgia's plan was retrogressive, but that motion was denied by the DC Circuit. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 33 (D.D.C. 2002), *vacated*, 539 U.S. 462 (2003).

5. *Ashcroft*, 539 U.S. at 472.

6. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS 99–100 (rev. 2d ed. Supp. 2004) ("Historically, the argument that black voters have more influence being spread across many districts, rather than concentrated into a few safe ones, was the centerpiece of the States' defense against charges that the failure to create safe districts diluted minority voting power.").

7. 478 U.S. 30, 83–105 (1986).

8. The three factors are: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that the White majority votes sufficiently as a bloc to defeat the minority's preferred candidate. *Id.* at 50–51.

9. *Id.* at 96–97 (citing S. REP. NO. 97-417, at 194 (1982)).

10. *See generally* S. REP. NO. 97-417. Section 2 of the VRA was amended in response to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), where the Supreme Court required proof of discriminatory purpose in a claim of racial vote dilution, thereby dismantling the effects-based inquiry from cases like *Whitcomb v. Chavis*, 403 U.S. 124 (1971), *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Section 2 gov-

> I do not agree, however, that such evidence [of nonracial causes to divergent racial voting patterns] can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by [W]hite voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by [W]hite voters will consistently defeat minority candidates.[11]

In other words, Justice O'Connor preferred an inquiry into whether there are nonracial causes to racially disparate voting patterns rather than taking disparate voting patterns as emblematic of differing racial preferences. With *Ashcroft*, Justice O'Connor would ultimately win the two-decade tug-of-war with Justice Brennan: her vision of racial vote dilution would resurrect totality of circumstances at the expense of the three *Gingles* factors, and subsequent courts would show greater deference to covered jurisdictions where the defeat of minority candidates of choice can be explained by—or hidden beneath—factors apart from race.

Admittedly, the *Gingles* factors were never intended to be dispositive of racial vote dilution; Justice Brennan himself suggested that they served only as a threshold at pleading.[12] And the Court's adoption of Justice O'Connor's *Gingles* concurrence was hardly unexpected; cases between *Gingles* and *Ashcroft* had signaled that the Court was gradually embracing Justice O'Connor's approach.[13] Nevertheless, in finding that minorities' ability to elect would no longer be the only inquiry in potential violations of the VRA, *Ashcroft* effectively submerged the *Gingles* factors under a broader inquiry. While Justice Brennan's three preconditions do still serve as a threshold that must be met before the remaining totality factors kick in, the practical effect of *Ashcroft* has been to substantially diminish their importance, so that at times they function not as preconditions but as commonplace totality factors on par with the other factors.

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erns racial vote dilution, while § 5 governs retrogression. *Ashcroft* was brought as a retrogression challenge, but its analysis is borrowed largely from vote dilution precedent.

11. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring). Significantly, the next sentence reads, "Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater [W]hite support in future elections." *Id.* This anticipates substantive representation and an end to racially polarized voting, both greatly influencing her decision in *Ashcroft*.

12. *See id.* at 79 ("[I]n evaluating a statutory claim of vote dilution through districting, the trial court is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters.") (internal quotations omitted) (citing S. REP. No. 97-417, at 30).

13. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997 (1994).

This Note argues that the majority in *Ashcroft* have left courts with an unadministerable standard—not so much for reasons that Justice Souter articulated in his dissent,[14] but rather because the Court provided no guidance on navigating around the myriad of factors in the convoluted totality analyses. In the face of this uncertainty, lower courts will rely increasingly on the proportionality standard of *Johnson v. De Grandy*,[15] which marked the midpoint in the judicial shift from Justice Brennan's world-view to Justice O'Connor's world-view. Part I examines two cases after *Ashcroft* which represent different degrees of racial vote dilution: *Shirt v. Hazeltine*[16] and *Session v. Perry*.[17] In *Shirt*, American Indians in South Dakota suffered a history of voting discrimination, racially polarized voting, and a dearth of safe districts; while in *Session*, Blacks and Latinos in Texas at least possessed a larger proportion of safe districts. What emerges from the comparison, then, is the tendency of proportionality to neutralize history and polarization. Through other post-*Ashcroft* cases, Part II teases out the differences (i) between influence districts as injury and remedy and (ii) between a jurisdiction's Section 5 and Section 2 obligations—details closely related to how proportionality is measured. Finally, Part III discusses substantive representation, the ideology that drove much of *Ashcroft*'s analysis. Framing it as a symptom of nonpolarized voting, this Note concludes that endorsement of substantive representation as a device to achieve colorblindness will obscure the causes of polarization.

I. THE PRIMACY OF POLARIZATION

A. Shirt v. Hazeltine

1. Factual Background: *Shirt v. Hazeltine* as Traditional Section 2 Analysis

According to the 2000 census, American Indians constituted 9.05% of South Dakota's total population and 6.79% of the voting age population (VAP).[18] In 2001, South Dakota produced a plan that created 35 legislative districts, each electing one State Senator and two State Congressmen—except for District 28, which was divided into two single-member districts, 28A and 28B, each electing one Congressman.[19] Only

14. These include lack of guidance in measuring the "influence" necessary to avoid retrogression. *See* 539 U.S. at 494–96 (Souter, J., dissenting).

15. 512 U.S. at 1000.

16. 336 F. Supp. 2d 976 (D.S.D. 2004).

17. 298 F. Supp. 2d 451 (E.D. Tex. 2004).

18. *Shirt*, 336 F. Supp. 2d at 983. The opinion uses "American Indian" rather than "Native American." On the significance of this nomenclature, *see* note 165 *infra*.

19. *Id.*

two districts were majority-Indian, 27 and 28A; every other district was majority-White under the 2001 Plan.[20] Districts 27 and 28A straddled much of "Indian Country," which consisted of eight rural counties where American Indians were the majority.[21] Shortly after the 2001 Plan, Indian plaintiffs filed suit against South Dakota, claiming that its redistricting scheme diluted their voting strength by packing District 27 with a 90% supermajority of Indians.[22]

Much of the court's analysis in *Shirt* unfolded on fairly traditional, pre-*Ashcroft* grounds, treating the *Gingles* factors as a threshold inquiry before looking at totality of circumstances. The first *Gingles* factor (*Gingles* 1), sufficient size and geographic compactness, was easily satisfied because the plaintiffs could sketch five alternative plans that added at least one majority-Indian house district.[23] The second *Gingles* factor (*Gingles* 2), political cohesion, turned on the comparative reliability of plaintiff and defendant's experts. The plaintiff's expert estimated that American Indians had generally voted with over 73% political cohesion in past elections.[24] By contrast, the defendant's expert found widely disparate results.[25] Ultimately, though, the court deemed that both experts had shown significant Indian electoral cohesion.[26] To reinforce that finding, the court turned to lay testimony for nonstatistical evidence of cohesion. Witnesses pointed to several examples of Indian social and political cohesion; additionally, Representative Matthew Michaels testified that Indians in South Dakota constituted a community of interest.[27] Having witnessed the districting process as Speaker of the House, Michaels also suggested that there had been foul play in the redistricting committee.[28]

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20. *Id.* at 984.

21. *Id.* at 983–84. This entire area was covered under the VRA. *See* Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1157 (D.S.D. 2002) (determining two years earlier that the 2001 Plan needed to be precleared).

22. *Shirt*, 336 F. Supp. 2d 976. American Indians made up 86% of District 27's VAP. *Id.* at 984. Also, District 27 sat on part of Pine Ridge and Rosebud Reservations, which comprise the poorest part of the United States. *See* Evelyn Nieves, *On Pine Ridge, a String of Broken Promises: Politicians' Talk Mean Little on Troubled S.D. Reservation*, WASH. POST, Oct. 21, 2004, at A1.

23. *Shirt*, 336 F. Supp. 2d at 987. *See also* Houston v. Lafayette County, Miss., 56 F.3d 606, 611 (5th Cir. 1995) (noting that prong one focuses on whether plaintiffs can show "that a geographically compact district *could be drawn*") (emphasis in original).

24. *Shirt*, 336 F. Supp. 2d at 997.

25. *See id.* at 999–1000.

26. *Id.* at 1003.

27. *Id.* at 1007.

28. *Id.* at 985 (where Michaels stated that he heard a pro-Plan Senator deny there had been public outcry against the Plan, even though representatives from Districts 26 and 27 did in fact object to the boundaries). The court found Michaels's testimony persuasive because "[h]e grew up around Indians and graduated from the University of South Dakota law school." *Id.* at 1007.

2. Gingles 2 and 3: *Shirt v. Hazeltine* as Anti-*Ashcroft*

Judge Karen Schreier, the District Judge presiding over the trial, would find that statistical evidence and lay testimony had proven political cohesion to the satisfaction of *Gingles* 2. Before arriving at that conclusion, however, she had to address South Dakota's protest that partisanship, instead of race, explained American Indian voting. How Judge Schreier disposed of the state objection would reveal a larger intuition pervading the opinion: that *Ashcroft* has created enormous problems for racial vote dilution cases.[29]

First, the court tried to purge partisanship from the discussion on political cohesion, pigeonholing partisanship as a causation inquiry that belonged in the totality-of-circumstances review to come.[30] Such was the conventional understanding of causation that had developed from a hybrid of Justice Brennan and Justice O'Connor's opinions in *Gingles*.[31] Causation implicates legislative purpose: both were dispelled together in *Gingles* as unnecessary for a *prima facie* case of racial bloc voting.[32] Yet commentators have suggested that *Ashcroft* reintroduced purpose to VRA Section 2 analysis in a manner that precedent did not permit.[33] In holding steadfast to the old dilution regime, Judge Schreier seemed to be taking jabs at the *Ashcroft* majority; without ever mentioning *Ashcroft*, she concluded staunchly, "partisanship has no bearing on the *Gingles* factors."[34]

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29. Remarkably, the opinion mentioned *Georgia v. Ashcroft* only twice: once to resolve a dispute over using the single-race, multiple-race, or dual-race method of identification, *id.* at 982; and once to elaborate on the technique of ecological inference, *id.* at 1003. These were hardly the most important parts of the *Ashcroft* opinion. The first reference settled a technicality about how to use the 2000 census data, which for the first time allowed respondents to self-identify under more than one racial category. The second reference didn't even come from the Supreme Court decision—it was drawn from the lower court, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 69 (D.C. Cir. 2002).

30. *Shirt*, 336 F. Supp. 2d at 1008.

31. *See, e.g.*, Lewis v. County, 99 F.3d 600, 616 (4th Cir. 1996). At the time, *Lewis* was one of the many lower court decisions that thought causation was irrelevant in the three *Gingles* preconditions, but relevant in the totality-of-circumstances inquiry. ISSACHAROFF ET AL., *supra* note 6, at 805.

32. *Gingles*, 478 U.S. at 74 (causation and purpose irrelevant for the three *Gingles* factors).

33. *See, e.g.*, Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 1 ELECTION L.J. 21, 22 (2004) (*Ashcroft* "engages in the kind of non-comparative purpose analysis that *Bossier II* seemed to reject, in a fashion that dramatically undercuts the statutory burden of proof, a burden born of long, bitter, and all-too-recent experience with covered jurisdictions' indifference and hostility toward the political aspirations of minority voters"); Jocelyn Benson, Note, *Turning Lemons into Lemonade: Making* Georgia v. Ashcroft *the* Mobile v. Bolden *of 2007*, 32 HARV. C.R.-C.L. L. REV. 485, 502–05 (2004) (contrasting the Section 2 amendments in 1982 to City of Mobile v. Bolden, 446 U.S. 55 (1980), which read an intent requirement into Section 2).

34. *Shirt*, 336 F. Supp. 2d at 1008.

Of course, *Ashcroft* preceded *Shirt*, and we know Judge Schreier *was* conscious of its effect on political cohesion because she qualified that statement immediately after it was made. In the very next sentence, the court stated that even if partisanship should be considered, the evidence could not attribute Indian voting patterns to partisanship more than race.[35] American Indian candidates of choice were, where possible, American Indians, as shown by a local organization's backing of an Indian Republican over a non-Indian Democrat and preference for Indian candidates challenging non-Indian Democratic incumbents.[36] As for low voter turnout, another South Dakota causation argument, the court sided with a Ninth Circuit decision in finding that low voter registration and turnout demonstrate, if anything, the *lack* of ability to participate.[37]

In evaluating the third *Gingles* precondition (*Gingles* 3), that Whites vote sufficiently as a bloc to defeat minority-preferred candidates, the court went the opposite direction of its approach with *Gingles* 2. It tackled *Ashcroft* not by minimizing a significant factor in that opinion, but by emphasizing a factor belittled by Justice O'Connor: racially polarized voting. To begin with, Judge Schreier stressed that racially polarized voting was the "keystone of a vote dilution case."[38] This statement echoes Justice Souter's vocal criticism of the *Ashcroft* majority when it accepted the DOJ's statistics on racially polarized voting, but then found that factor outweighed in its totality analysis.[39] And in recounting election after election where Indian preference for a specific candidate was upward of 70% but the candidate lost because of lack of White crossover,[40] Judge Schreier demonstrated even more forcefully the factual errors underlying Justice O'Connor's assumptions.[41]

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35. *Id.*

36. *Id.* at 1008–09.

37. *Id.* at 1009–10. *See also* Gomez v. City of Watsonville, 863 F.2d 1047, 1416 n.4 (9th Cir. 1988) (referring back to *Gingles* as authority).

38. *Shirt*, 336 F. Supp. 2d at 1010 (quoting Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5, S.D., 804 F.2d 469, 473 (8th Cir. 1986)).

39. *See* 539 U.S. at 486 ("Nevertheless, regardless of any racially polarized voting or diminished opportunity for black voters to elect a candidate of their choice in proposed Districts 2, 12, and 26, the District Court's inquiry was too narrow") (O'Connor, J.). *See also id.* at 503 ("The District Court was clearly within bounds in finding that (1) Georgia's proposed plan decreased BVAP in the relevant districts, (2) the United States offered evidence of significant racial polarization in those districts, and (3) Georgia offered no adequate response to this evidence") (Souter, J., dissenting).

40. *Shirt*, 336 F. Supp. 2d at 1012–16 (looking at results from endogenous and exogenous elections alike).

41. *See Ashcroft*, 539 U.S. at 486. Justice O'Connor seemed to believe that the diminished Black voting age population (VAP) in Georgia's redistricting plan could, in combination with White crossover of 33%, still lead to the Black candidates of choice. Yet in South Dakota, the plaintiffs found numerous instances where White crossover for the Indian-preferred candidate exceeded 33% but, despite Indian voting cohesion exceeding 70%, the preferred candidate still lost. *See* 336 F. Supp. 2d at 1012–16. To be sure, the analogy

3. Totality of the Circumstances: *Shirt v. Hazeltine* as Moving Beyond *Ashcroft*

A cursory glance at *Shirt* will reveal one of the more obvious effects of *Ashcroft*: it has made racial vote dilution opinions painfully long, some well over 100 pages.[42] The threshold inquiry of *Gingles* preconditions has had to be extremely thorough, with the additional complication of causation. With every factor, courts have second guessed their conclusions, and on a larger scale, courts have duplicated their examination of factors in both the *Gingles* preconditions and the totality of circumstances.[43] Thoroughly baffled, some courts have even conflated the threshold *Gingles* inquiry and the totality of circumstances, collapsing them altogether.[44]

Shirt v. Hazeltine managed to keep its analysis fairly straightforward and extremely thorough. In all, the court explored twelve factors.[45] Pivotal to Judge Schreier's totality analysis, though, were the two Senate factors that drove the 1982 Amendment—history of discrimination and racially polarized voting[46]—and the novel factor introduced by *Johnson v. De Grandy*—proportionality.[47] History, polarization, and proportionality anchored the remainder of the opinion: they received the lengthiest and most sophisticated treatment, and the finding of dilution might have been much harder-pressed had any of these three been lacking.

South Dakota's history of discrimination against American Indians pervaded well into 2004. Indians were barred from voting in county elections as late as 1975, barred from running as county commissioners until 1980, and barred from voting in sanitary district elections in 1999.[48] Non-electoral discrimination included racial harassment in schools, racial profiling, and discrimination in lending.[49] As "the poorest people in South

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to Georgia might not be completely precise, since American Indians comprise less of South Dakota than Blacks do Georgia.

42. *See Shirt*, 336 F. Supp. 2d (coming in at 77 pages); *see also* Session v. Perry, 298 F. Supp. 2d (120 pages) and Rodriguez v. Pataki, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (160 pages). *But see* Metts v. Murphy, 347 F.3d 346 (1st Cir. 2003), whose brevity will be considered *infra*, on p. 39.

43. *See, e.g.*, *Shirt*, 336 F. Supp. 2d 976 (racial polarization in Gingles 3 and in totality of circumstances).

44. *See* discussion on *Session*, 298 F. Supp 2d. 451, in Section I.B.1 *infra*.

45. That is, the court looked at (1) history of discrimination, (2) racially polarized voting, (3) use of voting procedures for discriminatory purposes, (4) access to candidate slating process, (5) socioeconomic disparities, (6) racial appeals, (7) elected American Indian officials, (8) unresponsiveness, (9) tenuousness, (10) proportionality, (11) American Indian candidacies, and (12) voter apathy and low turnout. *See* 336 F. Supp. 2d at 979 (listing factors in the table of contents).

46. *See Gingles*, 478 U.S. at 36–37 (quoting S. Rep. No. 97-417, at 28).

47. *See* 512 U.S. at 1000.

48. *Id.* at 1019, 1023.

49. *Id.* at 1030–32.

Dakota,"[50] Indians were especially vulnerable to pretextual, rational-basis mechanisms that burdened the poor.[51] Even in 2004, they seemed the paragons of discrete and insular minorities, suffering political exclusion and historical discrimination at the level originally envisioned in *Carolene Products*.[52] The importance accorded to the discreteness and insularity of minorities has receded in voting rights cases, given only cursory treatment in *City of Mobile v. Bolden*[53] and *Nixon v. Kent County*.[54] But in 2004, South Dakota's American Indians were bound by a legacy of flagrant discrimination that resembled, if not surpassed, that of Blacks in 1980 and Blacks and Latinos in 1996.

Having driven much of the *Gingles* 2 analysis, racially polarized voting was later singled out by Judge Schreier as "one of the most important considerations in the totality of the circumstances analysis."[55] Among the evidence proffered was the statistic that White crossover voting was 43% when no Indian candidates ran, but 22% percent when an Indian entered the race.[56] Direct comparison to *Georgia v. Ashcroft* is difficult, since Georgia provided only scant numbers on polarization. Yet in one instance, the state's expert did estimate White crossover in three statewide general elections to

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50. *Id.* at 1040.

51. For example, American Indians could not make it to the county offices, where registration occurred, because travel was prohibitively expensive. *Id.* at 1024. Also, county authorities would automatically register taxpayers to vote and require non-taxpayers, many of them American Indian, to register in person. *Id.*

52. *See* Carolene Products v. United States, 304 U.S. 144, 153 n.4 (1938).

53. *See* 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting):

> Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice. (citations omitted)

See also id. at 75 n.22 (Stewart, J.) ("Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete political group *that happens, for whatever reason, to elect fewer of its candidates* than arithmetic indicates it might") (emphasis added). Note how closely Justice Stewart's dismissal of Justice Marshall's idea resembles Justice O'Connor's view on causation.

54. 76 F.3d 1381, 1401 (6th Cir. 1996) (Keith, J., dissenting) ("While it is true that all African Americans do not think alike, share the same political interests, [or] prefer the same candidates at the polls, African Americans and other minorities share a place in history that often translates into shared political goals") (citations and internal quotations omitted).

55. *Shirt*, 336 F. Supp. 2d at 1034 (quoting United States v. Blaine County, 363 F.3d 897, 903 (9th Cir. 2004)).

56. *Id.* at 1035.

be 24.73–57.39%.[57] The least charitable of Georgia's White crossover rate would still fall short of South Dakota's abysmal 22%.

Finally, proportionality played a tremendous role in *Shirt* that, on balance, seemed no less compelling than history and polarization. With her heavy reliance on *De Grandy*, Judge Schreier indicated long before actually reaching the totality analysis that proportionality would be dispositive. *De Grandy* was mentioned alongside *Gingles* at the very beginning of the Section 2 discussion[58] and again at the start of the *Gingles* 3 analysis.[59] The court pounded home the fact that American Indian representation fell well below their share of the population.[60] Here proportionality departs from the other two factors. More than history or polarization, proportionality has the advantage of clarity—that is, proportionality can articulate clear, achievable goals by calculating how many majority-minority districts South Dakota should aspire to.

In short, history, polarization, and proportionality emerge from *Shirt v. Hazeltine* as the dominant totality factors. Each is a mix of the descriptive and the normative, both describing the situation in South Dakota and offering a vision for the future: an end to discriminatory history, an end to racially polarized voting, and proportionality between population and majority-minority districts. *Shirt*, however, is a fairly easy case, where every factor in the totality fell on the side of the plaintiffs. What happens when the totality factors do not all cut the same way? Even more complicated, what happens when history and polarization are aligned but cut against proportionality? Cases in the following Sections suggest that proportionality will become the default factor, the most powerful justification for siding with a legislature or its challengers. Its principles, after all, are easier to follow than the others, precisely because it can articulate a number. Yet proportionality also runs the danger of becoming that beast which *De Grandy* tried to avoid: a safe harbor.

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57. *Ashcroft*, 195 F. Supp. 2d at 66. But compare this statewide percentage to Senate District 2, where in an endogenous 1999 runoff election between Regina Thomas, a Black candidate, and a White candidate, Thomas received only 9% of the White vote. *Id.* at 70. Thomas failed to capture most of the White votes even though her White opponent was described by his own Republican Party as a "flaky, half-crazed Republican that runs for office now and then." *Id.* at 58. This experience with extreme polarization may have led Thomas to vote against Georgia's redistricting plan.

58. *Shirt*, 336 F. Supp. 2d at 986.

59. *Id.* at 1011 (this time as an elaboration of *Gingles*). Again, note the conspicuous absence of *Ashcroft*.

60. American Indians constituted 9% of the state's total population, so (1) the four majority-Indian districts in the state's 105 legislative seats left them with 44% of the power they should have had according to proportionality, (2) the single majority-Indian district in the state's 35 Senate seats left them with 33% of proportionate power, and (3) the three majority-Indian districts in the state's 70 House districts left them with only 50% of proportionate power. *Id.* at 1048–49.VAP statistics are also available. *See id.*

B. Session v. Perry

1. Partisan Purpose: *Session v. Perry* as Traditional *Ashcroft* Analysis

On October 12, 2003, the Texas legislature enacted Plan 1374C into law, one of the first-ever re-redistricting plans.[61] It had come out of a highly visible, highly contentious adoption process, during which Democratic Senators fled the state to frustrate a quorum.[62] The brainchild of Republican legislators to increase Republican influence, Plan 1374C replaced Plan 1151C, which had governed the 2002 elections.[63] Almost immediately, the plan was challenged for mid-decade redistricting, unconstitutional racial discrimination, unconstitutional partisan gerrymandering, and racial vote dilution.

After throwing out the re-redistricting challenge,[64] the Eastern District of Texas moved onto the merits of the claims, starting with equal protection. In citing *Washington v. Davis*,[65] the court foreshadowed that it would rule for the state not only on equal protection grounds, but also on the issue of racial vote dilution. It spoke at length about partisan advantage, not race, being the sole motivation behind the Texas Legislature;[66] it noted that the result was to decrease Democratic representation, which incidentally disadvantaged Blacks and Latinos, many of whom were Democrats.[67] This mirrored the language of Justice O'Connor in *Ashcroft* and *Gingles*, framing equal protection as a warm-up for the VRA analysis to come. Writing for the majority, Judge Patrick Higginbotham cited *Miller v. Johnson* for the directive to searchingly review blatant race-motivated districting, from which he distanced Plan 1374C.[68] Though he recognized the history of discrimination against Blacks and Latinos in Texas, he concluded,

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61. *Session*, 298 F. Supp. 2d at 457. Another example is People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003).

62. Ralph Blumenthal, *State Senate Democrats Return to Texas*, N.Y. TIMES, Sept. 12, 2003, at A18.

63. 298 F. Supp. 2d at 470.

64. *See generally id.* at 458–68.

65. *Id.* at 469 ("a claimed denial of equal protection has required proof that discrimination was purposeful; differential or adverse impact alone is not sufficient") (summarizing Washington v. Davis, 426 U.S. 229 (1976)).

66. *Id.* at 470–71.

67. *Id.*

68. *See id.* at 470 (summarizing Miller v. Johnson, 515 U.S. 900 (1995)). In an even more cynical move, the court cited a member of the redistricting committee who testified that he had been directed by Glenn Lewis, a minority Democrat, to preserve Lewis's House seat at all costs. *Id.* at 451 n.62. More obviously self-dealing than Georgia's plan according to John Lewis, it is as if the participation of a Black Democrat absolved Plan 1374C of racial animus.

nonetheless, that the redistricting plan had been "a political product from start to finish."[69]

When Judge Higginbotham moved to the Latino claim of racial vote dilution in South and West Texas, he prefaced the discussion with the legislature's "primary partisan goal."[70] By reiterating the drafters' intent to increase Republican influence, the court made explicit what commentators have feared about *Georgia v. Ashcroft*: the introduction of purpose into Section 2 analysis.[71] The dissent, which sided with the majority on all counts but the dismantling of majority-Latino District 23, distinguished Georgia's purpose from Texas's purpose.[72] Under Judge John Ward's reading, while Georgia sought to maximize Black influence, Plan 1374 was designed to "crush" Latino participation.[73] Nevertheless, this debate was firmly ensconced within the parameters of *Ashcroft*. Both majority and dissent cited to *Ashcroft* as authority. In doing so, both sides accepted, if fought over, what *Shirt* could not: causation and legislative purpose.

Another *Ashcroft* characteristic in *Session* was its decentralized Section 2 analysis for Congressional District 23. Under the old plan, District 23 had had a bare majority of the Latino citizen voting-age population (CVAP) but did not perform as an opportunity district.[74] Its representative, a Republican Latino named Henry Bonilla, waned in Latino support with each successive election, so that by 2002 he captured only 8% of the Latino vote.[75] To make District 23 more Republican, the legislature pushed the border northward to rope in White Republican areas, resulting in a district with 50.9% Latino VAP and 46% Latino CVAP.[76] A portion of District 23, 90% Latino in VAP and 86.5% Democrat, was shifted into adjacent District 28; in order to avoid retrogression, Plan 1374C created another district with majority-Latino CVAP.[77] In addressing the plaintiffs' contention that an additional majority-Latino district could have been drawn, the court would struggle to formulate a coherent *Gingles* and totality-of-circumstances rationale.

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69. *Id.* at 473.

70. *Id.* at 488.

71. *See* Karlan and Benson, *supra* note 33.

72. *Session*, 298 F. Supp. 2d at 517–18.

73. *Id.* at 518 (Ward, J., dissenting) (adding, "I do not read *Ashcroft*—a decision designed to foster minority participation in the political process—to permit the state to dismantle an existing opportunity district for political purposes so long as the loss is made up somewhere else.").

74. *Id.* at 488.

75. *Id.* In the dissent, however, Judge Ward pointed out that Bonilla was *not* the Latino candidate of choice if he only received 8% of their vote. *Id.* at 519 (Ward, J., dissenting) (emphasis added). The legislature's claim of preserving Latino voting strength seems odd, then, since it anticipated Bonilla's imminent loss. *See id.*

76. *Id.* at 488–89.

77. *Id.*

The court stated that the plaintiffs' proposed Plan 1385C failed because of its unusually shaped districts, underscoring the difficulty of drawing seven majority-Latino districts out of South and West Texas's irregular population distribution.[78] In fact, *Session*'s entire *Gingles* analysis unfolded in one paragraph, one footnote, and a chart comparing the perimeter-to-area and smallest-circle measurements of 1374C and 1385C.[79] Right away, however, Judge Higginbotham conceded the *Gingles* preconditions as a matter of argument,[80] and the rest of the District 23 vote dilution analysis would focus on proportionality.[81] *Ashcroft* certainly permits putting the three *Gingles* preconditions on par with other factors in the totality, so that satisfaction of the *Gingles* 3 may be washed over by failure to demonstrate the other factors. But even *Ashcroft* might not have balanced the *Gingles* factors, racial polarization, and history of discrimination against a singular finding of proportionality.

District 23 is an extremely difficult case, fraught with equal protection concerns, VRA requirements, and the difficulty of drawing equipopulous districts in Texas's unique geography. To be sure, the two other claims of racial vote dilution do get dismissed after more substantial *Gingles*-style treatment. For example, Black plaintiffs challenged adjustments to District 24 in Central Texas, arguing that Plan 1374C obliterated a coalition district.[82] Yet this injury was neatly dismissed because primary

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78. *Id.* at 491–92. *But see id.* at 523 ("The majority also rejects the GI Forum plaintiffs' contention that their districts are 'compact.' But under the objective compactness scores, several of the GI Forum plaintiffs' demonstration districts are, on balance, more compact than those in Plan 1374C.") (Ward, J., dissenting). The majority's criticism of Plan 1385C is curious, given that its replacement of District 23 forced it to compress the already elongated districts of South and West Texas into flatter, longer "bacon-strip" districts. To say that a seventh majority-Latino district would push the already irregular six-district arrangement past a threshold of compactness seems disingenuous. At the very least, it belies the functional approach to shape and compactness blessed in Dillard v. Baldwin County Bd. Educ., 686 F. Supp. 1459 (M.D. Ala. 1988). *See* discussion in Part I.B.3 *infra*.

79. *Id.* at 491–93. Judge Higginbotham seemed to have struck Plan 1385C on sufficient size and geographic compactness, but it is hard to tell from the rather conclusory discussion: "The record, however, does not show that their demonstration plan would satisfy *Gingles*." *Id.* at 491.

80. *See id.* at 492:

> [E]ven if this court were to overlook the *Gingles* problems reflected in the proffered demonstration plan, the GI Forum Plaintiffs have failed to make the necessary showing under § 2. This court recognizes that Plaintiffs have established racially polarized voting and a political, social, and economic legacy of past discrimination. But any examination of the totality of circumstances beyond *Gingles* must include proportionality.

81. *See generally id.* at 492–97.

82. *Id.* at 482 (noting that District 24 had a Black VAP of 21.4% and a Latino VAP of 33.6% and leaned 60% Democrat).

contests had shown that there was no Black-Latino cohesion.[83] Still, as *Session* revealed with District 23, the danger remains that in adjudicating more tenuous plans which have met the *Gingles* preconditions but only a mix of factors in the totality of circumstances, courts could invoke *Ashcroft* to dismiss racial vote dilution claims because a single factor militates for the defendant jurisdiction.

2. *De Grandy* Proportionality: *Session v. Perry* as Moving Beyond *Ashcroft*

The state's main defense to the charge of racial vote dilution in District 23 was that "the effective Latino majority citizen voting age population districts in the relevant area is more than roughly proportional to the Latino citizen voting age population in that area."[84] This invocation of proportionality has two consequences: (i) it turns proportionality into just what *De Grandy* decried, a safe harbor, and (ii) it shifts the fight between redistricters and challengers toward "the relevant area" of proportionality.

After acknowledging history of discrimination and racially polarized voting, the Eastern District of Texas would focus on South and West Texas as the relevant area. The court attempted to prove that six out of seven majority-Latino districts in that part of the state was close enough to the 58% of South and West Texas comprised by Latinos that a seventh majority-Latino district was not needed.[85] Proportionality so dominated the remaining Section 2 discussion that the only cases cited, apart from *Gingles* and *De Grandy*, were footnoted references to settle whether the appropriate frame of reference was the entire state or South and West Texas.[86] *Session* thus presents a curious variation on *Shirt v. Hazeltine*, with history and polarization aligned opposite to proportionality. In *Session*, we have a test for the importance of proportionality relative to the other totality factors, a comparison that *Ashcroft* refrained from touching. Still, it does seem from *Session* that proportionality has moved from a *necessary* part of the totality analysis to a *sufficient* part of the dilution analysis.[87] With all other factors pulling for plaintiffs, the single finding of proportionality dictating the verdict converts a demonstrable link between

83. *Id.* at 484 (finding that, if anything, the success of Black candidates of choice in District 24 could be attributed to crossover voting by White Democrats).

84. *Id.* at 490.

85. *See id.* at 492–96.

86. *See id.* at 494. The only additional digression to other cases was on whether CVAP was the relevant voting population for Latinos, an issue that took place within the space of a footnote. *Id.*

87. *Session* states that "any examination of the totality of circumstances beyond *Gingles* must include proportionality," *id.* at 492, but its focus on proportionality belies the suggestion that it is merely a necessary part of the totality inquiry.

minority population and safe districts into a safe harbor, if not an affirmative defense.

The court did disclaim, however, that "[j]ust as the Supreme Court in *De Grandy* made clear that 'proportionality' of opportunity cannot be a 'safe harbor' precluding § 2 liability, which turns on total circumstances, so, too, a showing of lack of proportionality is but one factor in the total circumstances analysis."[88] Furthermore, the court took from *De Grandy* that no single statistic can serve as a shortcut in determining minority vote dilution.[89] Yet, as Judge Higginbotham observed, Justice Souter's opinion in *De Grandy* also left open the possibility that proportionality could assume greater importance depending on the facts.[90] If the facts could elevate proportionality above the *Gingles* preconditions, history of discrimination, or even racially polarized voting, then the battles between redistricters and challengers would be fought over the mechanics of proportionality. Aptly, the remainder of the dilution analysis in *Session* turned to the proper frame of reference for proportionality.[91]

Courts remain divided over precisely what frame of reference to use for the minority population and safe district percentages. Although *De Grandy* resolved proportionality for Latinos in Dade County,[92] it provided no specific guidance for future courts. In *Session*, the state wanted to use South and West Texas as the frame of reference, where Latinos comprised 58% of the CVAP and already possessed six safe districts out of seven total districts.[93] The plaintiffs, on the other hand, wanted to look at the entire state; since Latinos represented 22% of the CVAP in Texas, they were entitled to at least seven safe districts out of thirty-two total districts.[94] The court sided with the defendants, since South and West Texas was the only area where the *Gingles* preconditions could be met.[95] But

88. *Id.* at 493 n.127.

89. "The Supreme Court has made clear that 'the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.'" *Id.* (quoting *De Grandy*, 512 U.S. at 1020–21). Significantly, Justice O'Connor also quoted this passage in *Georgia v. Ashcroft*, but only the second sentence was excerpted ('No single statistic . . .'), and it was in the context of de-emphasizing the impact of a minority group's effective exercise of electoral franchise in the totality of circumstances. *See* 539 U.S. at 4799–80. Because *Ashcroft* was concerned mainly with de-emphasizing the three *Gingles* preconditions that went into effective exercise of electoral franchise, it is difficult to imagine that the Supreme Court would have touted any factor over all else in totality.

90. Again, "the degree of probative value assigned to proportionality may vary with other facts." *Session*, 298 F. Supp. 2d at 493 n.127 (quoting *De Grandy*, 512 U.S. at 1020–21).

91. 298 F. Supp. 2d at 493–94.

92. 512 U.S. at 1022.

93. 298 F. Supp. 2d at 492–93.

94. *Id.* Six out of 32 would have been 19%; seven out of 32 would have been 22%.

95. *Id.* at 493.

due to the uncertainty from Justice Souter's opinion, Judge Higginbotham noted that, in the alternative, *De Grandy* never required "mathematical" agreement between the minority population and majority-minority district percentages—"rough proportionality" throughout Texas would have been enough.[96]

Adopting an equally functional stance, Judge Ward argued that while Plan 1385C proposed situating an additional majority-Latino district in South and West Texas, the plaintiffs' overall argument was that Latino influence would be diluted statewide by Plan 1374C.[97] Hence, Texas itself was the proper frame of reference. Judge Ward responded to the majority's defense of Plan 1374C, that it led to safe districts at a percentage close to the Latino share of Texas's CVAP,[98] on two grounds. First, the 22% figure skirted the fact that Latinos constituted 32% of Texas's population and 29% of its VAP, so six safe districts fell well short of the state's obligation for nine or ten safe districts.[99] Additionally, since Congressional seats are apportioned from overall population, Texas reaped a windfall by using the Latino population to gain two extra Congressional seats but curbed Latino voting power by drawing their districts in a more restrictive way.[100]

Ultimately, Judge Ward failed to persuade the court that the entirety of Texas was the proper framework for proportionality analysis. This was a more favorable framework because of the Latino population distribution statewide and in South and West Texas: 58% of the VAP, with six safe districts out of seven total districts.[101] Yet we might imagine another situation where the state is less favorable a frame of reference for minority challengers-say, if eastern Texas were 15% Latino but had one safe district out of ten total districts, or if western South Dakota were 65% American Indian but offered two safe districts out of ten total districts. In this counterfactual, Texas and South Dakota would opt to measure proportionality statewide. Such a counterfactual also demonstrates the stakes of getting the court to adopt a party's argument on "relevant area" for proportionality. In complicated cases of vote dilution, winning the relevant-area argument would position a side for winning the proportionality factor.

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96. *Id.* at 493–94 (discussing *De Grandy*, 512 U.S. at 1023–24).

97. *Id.* at 525.

98. *Id.* at 525–26 (citing Revised State Defendants' Trial Brief, filed December 3, 2003).

99. *See id.* at 526.

100. *See id.*

101. *Id.* at 492–93.

3. The Reemergence of *Gingles* 1: *Session v. Perry* as a *Shaw II* Challenge[102]

Despite stressing population equality for Congressional districts,[103] the Supreme Court has permitted deviation from "one-person one-vote" for rational and legitimate state policies.[104] Such policies include creating compact districts, preserving municipal boundaries, and avoiding contests between incumbents.[105] Even the VRA has been invoked as a compelling justification for departure from one-person one-vote.[106] For its part, *Session* recognized the broad power of states in drawing districts to remedy Section 2 violations.[107] Yet it inverted the traditional conception of Section 2's relationship to one-person one-vote when it defended Texas' use of oblong, "bacon-strip" shaped districts to replace District 23. While Section 2 has justified deviation from population equality, in *Session*, population equality was used to justify the creation of extremely elongated districts which challenge our understanding of size and compactness from *Gingles* 1.

To compensate for the spillover of Latino population into District 28 from District 23, the Texas legislature reconfigured four districts in South and West Texas to cover more territory and travel further north than under the previous plan.[108] The result was a set of flattened, elongated districts with high-density population pockets at either end of the bacon-strip districts.[109] Combining more voters from both central Texas and the border with Mexico, these changes were necessary to comply with one-person one-vote.[110] Naturally, the plaintiffs made a *Shaw*-style challenge of facial bizarreness, which the Eastern District rebutted with

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102. Shaw v. Hunt, 517 U.S. 899 (1996) (*Shaw II*).

103. *See* Karcher v. Daggett, 462 U.S. 725, 732–33 (1983).

104. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 577–81 (1964).

105. *Karcher*, 462 U.S. at 740.

106. *See* Bush v. Vera, 517 U.S. 952, 978 (1996) ("States retain a flexibility that federal courts enforcing § 2 lack . . . insofar as deference is due to their reasonable fears of, and their reasonable efforts to avoid, § 2 liability"). Justice O'Connor was not entirely confident about this, and she wrote two opinions: while her opinion announcing the Court's judgment declared that § 2 can be a compelling state interest, *id.* at 977, her concurring opinion sympathized with the state juggling between competing liabilities, *see id.* at 993–95 (O'Connor, J., concurring).

107. 298 F. Supp. 2d at 499 (citing *Vera*, 517 U.S. at 978). For further support of a state's broad § 2 remedial powers, Judge Higginbotham cited *Ashcroft* on retrogression: "under § 5, a state may choose to create a certain number of effective majority-minority districts or a greater number of minority influence districts." 298 F. Supp. 2d at 499 n.148.

108. *Id.* at 504.

109. *Id.* at 507.

110. *Id.* at 504, 507.

the comparative smallest-circle and perimeter-to-area measurements of Plan 1151C and Plan 1374C.[111]

But perhaps this type of comparison, borrowed from retrogression analysis, is the wrong way to approach one-person one-vote and vote dilution. It may have been more appropriate to look at the kinds of populations that were being lumped together, from a due process perspective of minimum standards instead of an equal protection perspective of comparative equality. Under both the old and new plans, District 23 extended 800 miles along the Mexico border, and District 13 spanned 40,000 square miles and 43 counties, many with fewer than 3000 people.[112] These districts surely push the notions of geographic compactness from *Gingles* 1.[113] Even under *Dillard*'s functional analysis,[114] it would be hard to justify drawing oddly shaped remedial districts where economically diverse Latinos are lumped together and where Congressional representatives must travel from Central Texas to the Rio Grande Valley to meet their constituents.[115]

The court did scrutinize evidence demonstrating that structurally, these districts enabled Latinos the effective opportunity to elect their candidates of choice.[116] However, one wonders whether there is not some backsliding on the economic progress that Latinos in central Texas have made when they are lumped politically with poorer Latinos to the South. This choice, between (i) protecting discrete and insular minorities and (ii) reinforcing their discreteness and insularity through majority-minority districts, is a choice that *Ashcroft* has forced into the open.[117] However this ends, we might question whether the combination of *Ashcroft* and *Easley v. Cromartie*,[118] which ends the *Shaw* line of cases, appropriately delegates that decision to jurisdictions with a history of racial vote dilution.

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111. *See id.* at 506–07.

112. *Id.* at 507.

113. For example, 77% of the population in majority-Latino District 25 came from the endpoints of the district. *Id.* at 502.

114. *See Dillard*. 686 F. Supp. at 1462–71 (granting size and compactness if a district can point to the existence of a community of interest).

115. *See Session*, 298 F. Supp. 2d at 502–04.

116. *See id.* at 502–04.

117. *See Shaw II*, 517 U.S. at 917 n.9 (offering states the option of creating either a majority-minority district or more minority influence districts).

118. 532 U.S. 234 (2001), also cited in *Session*, 298 F. Supp. 2d at 506 n.189. *Cromartie* basically ended the use of district irregularity, borrowed from *Shaw*, as circumstantial evidence that race predominated at redistricting. Even in 2002, one commentator wondered whether *Cromartie* would "reintroduce the bizarre districts of the 1990s through the use of a different rationale." *See* Katharine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 217 (2002).

II. MIDPOINTS ALONG THE EVOLUTION FROM *SHIRT* TO *SESSION*

For all their differences about totality of circumstances in the aftermath of *Ashcroft*, *Shirt* and *Session* at least comprise two endpoints in a continuum which shows that racial vote dilution can diminish. In *Shirt*, twelve of twelve factors in the totality pointed to South Dakota's qualitative dilution of American Indian votes. Crossover voting was low, and the number of safe districts fell well short of the state's proportionality obligation. *Session* was undoubtedly more complicated, in part because Texas had made genuine effort to draw majority-minority districts, even if they came out on "the low end of rough proportionality."[119] Racial vote dilution was less blatant, with the legislature's showing of proportionality and with *Gingles* difficulties in devising alternate plans. Moreover, the court engaged in both qualitative and quantitative scrutiny of Plan 1374C.[120] The progression from *Shirt* to *Session* thus demonstrates at least the *propensity* of covered jurisdictions for improvement.

This Section examines the midpoints along that continuum of improvement. By looking at other post-*Ashcroft* cases, this Section explores the mechanics and norms underpinning the pronouncement that *Session* is a better predicament to be in than *Shirt*. Part A looks at the debate surrounding influence districts as a cognizable injury, a question *Ashcroft* left open.[121] Part B looks at *Ashcroft*'s conflation of Section 2 and Section 5 of the VRA. Part C returns to influence districts, this time as a remedy, which implicates a state's flexibility in meeting proportionality obligations.

A. *Influence Districts as Injury*

One twist on the structural ability of minorities to "pull, haul, and trade"[122] as a result of *Georgia v. Ashcroft* is that the dismantling of influence

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119. 298 F. Supp. 2d at 526 (Ward, J., dissenting).

120. I borrow these terms from Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589 (2004). Professor Hayden organizes the history section in his article into "The Right of Access" (covering the early case law denying Black Americans access to the ballot box), "The Right to an Equally Weighted Vote: Addressing 'Quantitative Vote Dilution'" (covering the *Shaw* line of one-person one-vote cases), and "The Right to a Meaningful Vote: Addressing 'Qualitative Vote Dilution'" (covering *Ashcroft* and its precursors).

121. Distinct from coalition and safe districts, influence districts are where minority voters might not be able to elect their candidate of choice, but can play a substantial role in the electoral process. In an influence district, no combination of minority populations amounts to 50% of the district. *See Ashcroft*, 539 U.S. at 470; *see also* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C.L. REV. 1517, 1539 (2002).

122. Wording taken from *De Grandy*, 512 U.S. at 1020 ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground").

districts may provide the basis for a retrogression or vote dilution claim. As Judge Ward put it, if *Ashcroft* found that "the most effective way to *maximize* minority voting strength is to create more influence or coalition districts, then the most effective way to *minimize* minority voting strength may be to dismantle those districts."[123] The Supreme Court had on prior occasions declined to address how influence districts fit into VRA claims,[124] but with *Ashcroft*, both sides in the debate felt like precedent was finally on their side.

Barely one month after *Ashcroft* came down, the New Jersey Supreme Court cited to it as support for the position that a reduction in influence districts was as cognizable an injury as a reduction in safe districts. In *McNeil v. Legislative Apportionment Comm'n*, the court reasoned that since the VRA helps transition America into a society where race no longer matters, recognizing influence dilution claims would hasten that transition, presumably by fostering racial crossover voting.[125] Similarly, the First Circuit in *Metts v. Murphy* refused to dismiss an influence dilution claim, having taken *Ashcroft* to confirm that influence districts are as important as crossover districts in assessing minority voting strength.[126] However, *Session* casts doubt on *Metts* on procedural grounds[127] because the First Circuit took *Metts* en banc and vacated the panel decision, and *Rodriguez v. Pataki*[128] criticized *Metts* on substantive grounds as contradistinct from a line of cases advocating the "bright-line approach" of majority-minority districts.[129]

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123. *Session*, 298 F. Supp. 2d at 529–30 (Ward, J., dissenting) (emphasis in original).

124. *See, e.g.*, *De Grandy*, 512 U.S. at 1008–09; Voinovich v. Quilter, 507 U.S. 146, 154 (1993); Growe v. Emison, 507 U.S. 25, 41 (1993).

125. 828 A.2d 840, 853 (N.J. 2003). This idea goes as far back as *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966), where the Supreme Court noted that Congress had enacted the VRA to end racial discrimination in voting. It was reformulated by Justice O'Connor in *Ashcroft*: "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." 539 U.S. at 490–91.

126. 347 F.3d 346, No. 02-2204, 2003 U.S. App. Lexis 21987, *27 (1st Cir. 2003).

127. 298 F. Supp. 2d at 476 n.75. Yet *Metts* came back to the First Circuit on an even more tenuous claim, that vote dilution can be shown where the Black population in an influence district drops from 26% to 21%. The First Circuit ended up reversing the lower court's ruling that a vote dilution claim can be resolved at the motion to dismiss phase of a trial. 363 F.3d 8 (2004).

128. 308 F. Supp. 2d at 383.

129. *E.g.*, Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996); League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (majority opinion authored by Judge Higginbotham). *See Rodriguez*, 308 F. Supp. 2d at 383 (listing cases that belied a functional approach to ability-to-elect claims); Hall v. Virginia, 276 F. Supp. 2d 528, 538 (E.D. Va. 2003) (emphasizing "the well-established and objective rule requiring a majority-minority district").

More compelling than administrative ease, though, may be the intuition that influence districts are different from safe and coalition districts altogether, too amorphous to form a retrogression or vote dilution benchmark. Deliberating vote dilution claims in several Long Island counties, *Rodriguez* distinguished influence districts from coalition districts, where significant and reliable crossover voting, usually between Blacks and Latinos, enables combining those groups for *Gingles* 1.[130] *Rodriguez* suggested that relaxing the requirements of *Gingles* 1 would "effectively eviscerate" *Gingles* 3; by allowing smaller groups of racial minorities to pass as sufficiently large, courts would ease the burden of showing that whites always outvote the minority.[131] Conversely, as another post-*Ashcroft* decision put it, if minorities could convert influence districts into "effective" majority-minority districts, then minority plaintiffs would always fail to prove that the majority White bloc outvotes them.[132]

These concerns build on Justice Souter's caution in *Ashcroft* that influence short of coalition is too difficult to gauge.[133] While Justice Souter warned against using influence districts to satisfy a state's remedial obligation, *Rodriguez* and other cases preview the disarray that will arise with the next generation of retrogression and vote dilution cases, where influence districts have been approved as remedy and come to form the baselines for tomorrow.[134]

B. *Remedial § 2 Obligations versus Procedural § 5 Obligations*

A difference does exist, however, between influence districts as injury and influence districts as remedy. This difference turns on the distinction between a jurisdiction's *remedial* Section 2 obligations and *procedural* Section 5 obligations.[135] Early on, cases attacked racially dilutive

130. 308 F. Supp. 2d at 374–76. Factually, *Rodriguez* is an interesting counterpart to *Session v. Perry*. Whereas in *Session* population increases led to Texas gaining two Congressional seats, 298 F. Supp. 2d at 457, in New York lower relative population growth led to the state dropping two Congressional seats, 308 F. Supp. 2d at 354.

131. *Rodriguez*, 308 F. Supp. 2d at 394.

132. Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 300 (D. Mass. 2004). *Galvin* and *Rodriguez* come out differently, with *Galvin* finding influence dilution, *id.* at 312, and *Rodriguez* not, 308 F. Supp. 2d at 353–54, but it is telling that they share the same concern about influence districts.

133. *See* 539 U.S. at 495 (Souter, J., dissenting) ("The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters.").

134. Assuming, of course, that the VRA survives Congressional approval in 2007.

135. As Judge Ward summarized in his *Session* dissent:

> [T]he majority first tells us that District 25 was created "to avoid retrogression under Section 5." Quite correctly, the majority recognizes that the changes to District 23 resulted in the dilution of the Latino vote therein. But then ... the majority explains that the state enjoys the flexibility under

districts under Section 5, triggered only when covered jurisdictions changed their voting practices.[136] But Section 5 covered only changes in districting, offering no remedy for pre-existing dilutive plans; meanwhile, Section 2 required plaintiffs to show discriminatory intent and discriminatory impact in a redistricting plan.[137] After Congress amended the VRA in 1982, Section 2 was taken out of the Fourteenth and Fifteenth Amendment framework which required proof of discriminatory intent.[138] Henceforth decoupled from Constitutional claims, Section 2 became the go-to portion of the VRA in voting rights litigation.[139]

How much of Section 2 is left, then, after *Georgia v. Ashcroft*, whose retrogression analysis has been applied to *Gingles*-style vote dilution? Courts have used *Ashcroft*'s recoupling of the two sections as convenient precedent for discriminatory intent.[140] In fact, *Ashcroft* seems to have so balkanized Section 2 analysis that courts now understand racial vote dilution charges to face even greater barriers than retrogression charges.[141] This does seem to contradict the preference of challengers for Section 2 because of its more exacting burden on the state. In *Reno v. Bossier Parish*, for example, Justice O'Connor refused to collapse retrogression into vote dilution; whereas allegedly dilutive plans were held against the paragon of

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> *De Grandy* to draw *Gingles* districts in a different way, so long as it creates a total of six (but only six) districts in which Latinos may elect a candidate of choice. But *Gingles* addresses liability under § 2 .... The majority blurs the distinction between the State's flexibility to comply with its *procedural* obligations under § 5 and its flexibility to comply with its *remedial* obligations under § 2.

Session, 298 F. Supp. 2d at 521 (emphasis in original).

136. *See* Hayden, *supra* note 120, at 1601. One example is Beer v. United States, 425 U.S. 130 (1976).

137. *See* Hayden, *supra* note 120, at 1601–02.

138. *Id.*

139. *Id.*; *see also* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 476 (1997) (indicating that Sections 2 and 5 "combat different evils and ... impose very different duties upon the States.").

140. *See, e.g.*, *Session*, 298 F. Supp. 2d at 480 ("While *Ashcroft* is a § 5 preclearance case addressing the question of retrogression, the Court's opinion makes plain that safe districts are no longer untouchable. States previously read *Gingles* as requiring safe districts to ensure the election of minorities by countering racially polarized voting."). *Session* was brought, however, as a dilution challenge. *But see* McNeil v. Legislative Apportionment Comm'n Of State, 828 A.2d at 840, 853–54 (citing *Ashcroft*'s conflating of Sections 2 and 5, though for another purpose—upholding the plaintiff's claim of influence dilution.)

141. Such was the hunch in *Metts*, 2003 U.S. App. Lexis at *19, which approached influence dilution tentatively—that is, although *Ashcroft* recognized influence claims in the Section 5 context, it did not automatically translate into recognizing influence claims in the Section 2 context. Even more explicit is *Rodriguez*, which said that "[w]hile *Ashcroft* allows crossover districts under Section 5, its reasoning does not broaden the power of federal courts under section 2 of the VRA to require state legislatures to protect or create such 'ability to elect' districts." 308 F. Supp. 2d at 384.

a "hypothetical, undiluted plan," retrogression was measured against a concrete baseline, on which the state needed not improve.[142] On the other hand, Section 5 was equally restrictive with covered jurisdictions because it imposed on them "the difficult burden of proving the *absence* of discriminatory purpose and effect."[143] This makes sense if one recalls that Section 5 targeted the worst offenders of voting discrimination. Section 2, in contrast, applied to all jurisdictions, so it allowed states flexibility in drawing nondilutive districts.[144] If a covered jurisdiction overstepped the freedoms of Section 2, it would theoretically still be constrained by the Section 5 approval procedure.

The debate about retrogression and vote dilution is now moot. Regardless of which VRA section used to be tougher, *Georgia v. Ashcroft* seems to have mixed the lax parts of both provisions into a new hybrid. When covered jurisdictions now submit redistricting plans for approval, they can invoke their broad remedial power in drawing districts. And when plans are challenged for dilutive effect, legislatures can point to a lack of discriminatory purpose. This has a profound consequence on the way plaintiffs bring forth claims. Before *Ashcroft*, courts seldom dealt with influence dilution;[145] after *Ashcroft*, the stakes have been raised. Because a state can now use influence districts as a remedy, challengers have fought back on the procedural end, pointing to the dismantling of a benchmark influence district as a cognizable injury.

C. *Influence Districts as Remedy*

These issues—the progression of influence districts from remedy to injury and the conflation of a state's remedial and procedural obligations—have great bearing on proportionality. The next round of voting rights cases will likely be fought over the benchmarks that this generation's remedial influence districts eventually become. Even as the floodgates open to influence dilution, courts will have the rest of the decade to deal with legislatures redistricting in response to the 2000 census. And given the current deference to re-redistricting, we might expect a spate of lawsuits arising from the fissure of safe districts into influence districts. Already, there are signs that states have taken up *Ashcroft*'s invitation to crack safe districts in the name of partisanship, incumbency, and

142. *See* 520 U.S. at 480.

143. *Id.* (emphasis in original).

144. *See Vera*, 517 U.S. at 978 (1996) (indicating that states possess a flexibility in remedying vote dilution that federal courts lack). This forms the basis for Judge Higginbotham's reliance on a state's broad Section 2 enforcement powers.

145. *See* Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271 (2d Cir. 1994) (one of the few pre-2003 cases on influence dilution); Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 281 F. Supp. 2d 436 (N.D.N.Y. 2003) (a contemporary of *Ashcroft* on the topic).

even preserving minority voting strength. These justifications are critical in passing Section 2 discriminatory purpose scrutiny, after which states can point to more than ample proportionality.

Such were the justifications proffered by the Massachusetts legislature in *Black Political Task Force v. Galvin*,[146] after its 2001 Enacted Plan changed the boundaries of a Black safe district so that it became majority-White, while maintaining the boundaries of another majority-White district where Representative Kevin Fitzgerald would be the sole incumbent.[147] In defending its Plan, the legislature pointed first to the Black CVAP of 22.07%, and then included in proportionality analysis the five districts where Blacks and Latinos supposedly could combine to elect their preferred candidates.[148] Hence, the legislature concluded, Blacks had nine "functional equivalents" of majority-minority districts out of seventeen total districts—52.94%, more than what proportionality called for.[149] The District of Massachusetts rejected this argument; *De Grandy* explicitly linked the minority share of the population to the number of majority-minority districts.[150] Oddly enough, in spite of that explicit link, some plaintiffs have successfully argued that legislatures did not unpack safe districts enough, or consider influence districts as remedial possibilities, to spread out minority influence.[151]

Shortly after citing *De Grandy*, the District of Massachusetts did a curious pirouette: it applied proportionality analysis to Whites in the Boston area and noted that their safe districts exceeded their share of the population.[152] Should future courts look at *both* minority and White numbers, proportionality may become more firmly entrenched as a safe

146. 300 F. Supp. 2d at 297 ("[T]he defendants urged us to refrain from engaging in an unnecessary 'tinkering exercise' because the Enacted Plan furnishes African American and Hispanic voters with electoral opportunities that are no worse than 'roughly proportional' to their percentage of the relevant population"). Note the blend of "no worse than" and "roughly proportional," wording that had been distinctly emblematic of retrogression and dilution.

147. The brainchild of Representative Fitzgerald, this portion of the Enacted Plan was adopted only because Fitzgerald had stated that he would not run for re-election. He changed his mind afterward. *See id.* at 295–96.

148. *See id.* at 311.

149. *Id.*

150. *Id.* at 312.

151. *Ashcroft*, 539 U.S. 461, and *Metts*, 2003 U.S. App. Lexis *1, are such examples. These successes, though, trap challengers at pleading between two equally unappealing options: arguing on one hand that influence districts do not adequately remedy an unpacked safe district and on the other hand that an influence district should not have been dismantled because it functioned like a safe district.

152. *See Galvin*, 300 F. Supp. 2d at 312 (observing that the Enacted Plan gave Whites control over 70.6% of the area's twelve districts, while they only comprised 55% of the VAP).

harbor, as the most neutral way to satisfy competing claims.[153] There is, however, one powerful value countering such a move: substantive representation, which drove much of Justice O'Connor's reasoning in *Ashcroft*.[154] While Justice O'Connor's deferral to Georgia's ability to choose between descriptive and substantive representation favored no position over the other, her last words in the opinion, anticipating the transformation of America into a race-blind society, suggest that she preferred the mode of representation where officials and constituents are tied more by core values than outward appearance.[155]

III. THE SUBSTANCE OF SUBSTANTIVE REPRESENTATION

Much has been written about the tension between descriptive and substantive representation since Hanna Pitkin's influential book, *The Concept of Representation*. Commentators have formulated extremely sophisticated theories about both modes of representation, dissecting their internal processes[156] and mapping out their macropolitical consequences.[157] This Note concludes by taking a more basic approach to substantive representation, which seems to have moved into the limelight with *Georgia v. Ashcroft*. Beginning with the values couched in substantive representation, this Part will distinguish between *symptoms of* racially nonpolarized voting and *instruments for* achieving racially nonpolarized voting.

That the Voting Rights Act, in the words of Justice O'Connor, seeks "to prevent discrimination in the exercise of the electoral franchise"[158] is a notion held since the earliest jurisprudence on the VRA.[159] More questionable, though, is whether the VRA was intended to "foster our

153. By then, we may have tumbled down the slippery slope toward proportional representation.

154. *See* 539 U.S. at 481.

155. *See id.* at 490. This seems to comport with Justice O'Connor's deeply held belief that America will move, and has to move, beyond race-conscious decisions. *See also* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

156. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (breaking down democratic politics into its institutional components); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (classifying diversity into its first- and second-order species).

157. *See, e.g.*, Hayden, *supra* note 120, at 1609. In his article, Professor Hayden attributes Democratic losses in the South to the push for safe districts, which potentially moved the areas around these safe districts to the Republicans. Evidence of this "bleaching effect" in descriptive representation, Hayden says, is the strange alliance we saw in *Georgia v. Ashcroft*—conservative Republicans and the civil rights community. *Id.* at 1609–13.

158. *Ashcroft*, 539 U.S. at 490.

159. *Katzenbach*, 383 U.S. at 301 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

transformation into a society that is no longer fixed on race."[160] Even while voting rights litigation evolved from (i) safeguarding minority access to the ballot box to (ii) the right to an equally weighted vote to (iii) the right to a meaningful vote,[161] the push to expel race consciousness was only to ensure structural equality in the "ability to elect." As courts became more uneasy with the fixation on race, they began to target the most obviously racial classification in the electoral structure: safe districts,[162] the one area where race-conscious decisions had been permitted out of remedial necessity. Stigmatizing safe districts, however, is not only premature if the attitudes behind racially polarized voting are not yet wiped out; it can be counterproductive, eliminating the only redress minorities have in a historically suspect electoral system.[163]

To be sure, polarized voting forms a large part of the racial vote dilution inquiry, both as its own totality factor and in *Gingles* 2 and 3.[164] Where there is no racially polarized voting, there is no injury. Yet *Gingles*' was a passive approach: Justice Brennan interpreted Section 2 merely as a palliative for symptoms of racially polarized voting (minority candidates of choice always being outvoted), not as a panacea for racially polarized voting itself. Eliminating polarization would have required programs far broader than the VRA, programs aimed at the social and economic causes of minority discreteness and insularity. Thus, when the *Ashcroft* Court affirmed Georgia's disaggregation of safe districts as a mechanism for the

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160. *Ashcroft*, 539 U.S. at 490 (citing *De Grandy*, 512 U.S. 997 and *Shaw II*, 517 U.S.).

161. *See* headings in Hayden, *supra* note 120, at 1595–1600; *See also Summary of Contents* in Pildes, *supra* note 6, at *xiii*, for the titles to Chapter 2 (The Right to Participate"), Chapter 3 ("The Reapportionment Revolution"), and Chapter 9 ("Racial Vote Dilution under the Voting Rights Act").

162. *See De Grandy*, 512 U.S. at 1020 (calling majority-minority districts as remedial devices "the politics of second best" in comparison to those districts where coalitions with other races help elect the minority candidates of choice); Shaw v. Reno *(Shaw I)*, 509 U.S. 630, 657 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.").

163. As Justice Souter noted in his *Vera* dissent:

> [T]he price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect, precisely the problem that necessitated our recognition of vote dilution as a constitutional violation in the first place .... Thus, unless the attitudes that produced racial bloc voting were eliminated along with traditional districting principles, dilution would once again become the norm.

Vera, 517 U.S. at 1071–72 (Souter, J., dissenting).

164. *Gingles*, 478 U.S. at 56 ("The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates".).

substantive representation that would eradicate American racial fixation, it made three logical leaps.

The first was that spreading minority voting strength across several influence districts would actually lead to substantive representation, where minorities "pull, haul, and trade" with Whites and where the candidate to emerge better represents minority interests than the candidate to emerge in a safe district, usually a minority herself. Yet the influence-district process of pulling, hauling, and trading is a far cry from the coalition-district process of pulling, hauling, and trading first articulated in *De Grandy*.[165] In coalition districts, that process entails the interaction of two or more minority populations, otherwise submerged into the majority White population and therefore more or less equal in bargaining power. Yet in influence districts that process approaches a form of compromise antithetical to the VRA, forced upon minorities through one-on-one interaction with the dominant population in majority-White districts.[166]

The second of *Ashcroft*'s assumptions is that substantive representation would propel America toward race-neutral voting. More plausibly, true substantive representation, in which official responsiveness to minorities endures beyond the campaign season, seems to stem from minorities having achieved a visibility that Whites cannot ignore.[167] To push substantive representation upon districts not yet ready for crossover voting would seem to confuse symptom with cause.

Finally, and most fundamentally, the third assumption is that racially polarized voting even needs to be eradicated. The influence district, where minorities substantially affect elections without necessarily being able to elect their candidates of choice, creates an implicit hierarchy with dominant and submissive coalition members.[168] This subservience is a position that, for example, American Indians have fiercely rejected, on principles more legally substantive than racial separatism. American Indians had, until recently, dealt with the US government as sovereign equals

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165. *See* 512 U.S. at 1020.

166. Nor are these candidates of "second best" necessarily responsive, for the coalitions backing them are often ephemeral and their platforms incoherent. *See* Note, *The Ties that Bind: Coalitions and Governance under Section 2 of the Voting Rights Act*, 117 HARV. L. REV. 2621, 2636 (2004).

167. *See* Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 HARV. L. REV. 1359, 1387 (1995) (book review) (noting that representative responsiveness to Black voters jumps sharply after the Black population reaches 40%). Though 10% shy of a safe district, this 40% threshold is generally higher than the 40–50% and 25–30% influence districts upheld in *Ashcroft*.

168. *See* Note, *supra* note 166, at 2636. The footnote to this discussion, moreover, explicitly cites Native Americans as "paradigmatic example of a racial group often cast in the submissive coalitional role." *Id.* at fn.92. *Native American* denotes those of indigenous heritage more likely to pursue livelihoods in mainstream America than *American Indians*.

instead of minorities in American society.[169] This impulse of separation reached its zenith with the American Indian Movement (AIM) of the 1960s, whose militancy inadvertently gave way to the absorption of Indians into American society as "Native Americans."[170] By shifting toward the individual-rights orientation of the Civil Rights Movement, American Indians would lose much of their cultural independence and political strength.[171] And even though American Indians might not be an apt paradigm for all minorities, this much does hold constant: the greatest cultural gains come largely out of visible and unpalatable activism, and the greatest cultural losses come after trading independence for submergence.[172]

Whatever our feelings on racially polarized voting and cultural assimilation, we must be clear on the purpose of the Voting Rights Act. It should combat every electoral scheme that thwarts minority enfranchisement. But it cannot, by dismantling those schemes as they arise, hope to wipe out the motivation to disenfranchise. Understandably, courts have shied away from redistricting cases as the arguments invoke more sophisticated variations of political nonjusticiability. Yet while the results from nondilutive elections are indeed untouchable, a dilutive electoral process should not be immune from judicial scrutiny. With *Ashcroft*, the Court has done just the opposite, deferring to a state districting process because it discerned the imprints of substantive representation. *Vieth v. Jubelirer*[173] followed in that deference to electoral process instead of electoral result. In remanding *Session* back to the district court to consider *Vieth*,[174] the Supreme Court may have armed legislatures with even more arguments to mask retrogressive and dilutive plans, thereby pushing the unspoken sunset to the VRA—the end of polarized voting—even further.

169. *See generally* Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER J. 107 (1999). Though this article does not mention Professor Gerken's work on the individual-injury and group-injury dimensions of racial vote dilution, the two pieces dovetail nicely. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

170. Porter, *supra* note 169, at 145.

171. *Id.*

172. Edward D. Gehres, III, Note, *Visions of the Ghost Dance: Native American Empowerment and the Neo-Colonial Impulse*, 17 J.L. & POL. 135, 165 (2001).

173. 541 U.S. 267 (2004).

174. *See* 125 S. Ct. 351 (2004).