WHY THE NATIONAL POPULAR VOTE PLAN IS THE WRONG WAY TO ABOLISH THE ELECTORAL COLLEGE

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Perhaps no constitutional provision is as controversial as the electoral college. Much of the controversy has stemmed over the possibility that the college has the potential to produce a so-called "wrong winner"—-that is a President who has not won the national popular vote. When this happened for the fourth time in the 2000 presidential election, opponents of the college created a plan to avoid the cumbersome constitutional amendment process and end the electoral college through an interstate compact that would ensure that the winner of the national popular vote would become President. This Note argues that this plan, while certainly clever, may run afoul of another deeply contested area of law—-sections 2 and 5 of the Voting Rights Act—-as either minority vote dilution or retrogression in the ability of minority voters to elect the candidate of their choice. In addition, state-based efforts to abolish the electoral college can also be used for partisan manipulation. Accordingly, the Note concludes that the electoral college should only be abolished through a constitutional amendment.

Introduction

The 2000 presidential election rekindled a debate over the fairness of the electoral college.[1] Much of the controversy surrounds the possibility of the electoral college producing a so-called "wrong winner."[2] Yet, despite widespread criticism, the difficulty of amending the Constitution has stood in the way of reform.[3]

To sidestep this difficulty, a new movement known as the National Popular Vote Plan (NPV) has sought to abolish the electoral college without amending the Constitution. Under the NPV, states pass laws awarding their votes in the electoral college to the winner of the national popu-

1. Al Gore won the nationwide popular vote, but George W. Bush was elected President by the electoral college. A Westlaw search of newspaper articles in the nine months following the 2000 presidential election revealed 1,882 separate articles that discussed or called for abolishing the electoral college.

2. An example of a "wrong winner" is President George W. Bush, who lost the popular vote but was elected by the electoral college. See, e.g., Matthew J. Festa, Note, The Origins and Constitutionality of State Unit Voting in the Electoral College, 54 Vand. L. Rev. 2099, 2100, 2102 n.20 (2001); Akhil R. Amar, The Electoral College, Unfair from Day One, N.Y. Times, Nov. 9, 2000, at A23. But see Luis Fuentes-Rohwer & Guy Uriel-Charles, The Electoral College, The Right to Vote, and Our Federalism: A Comment on a Lasting Institution, 29 Fla. St. U. L. Rev. 879, 900–02 (2001) (detailing argument by supporters that winner of the college cannot be "wrong winner" because electoral college is mechanism chosen by Framers to elect President).

3. See discussion infra note 30 and accompanying text.

lar vote.[4] In August 2006, the California State Legislature became the first legislative body to pass such a law, awarding its fifty-five electoral votes to the national popular vote winner, provided enough states passed similar laws to ensure that the winner of the national popular vote would be elected President.[5] Governor Arnold Schwarzenegger ultimately vetoed the bill,[6] but the Plan has since been ratified by nine different legislative chambers and is gaining momentum.[7] Its supporters have hailed the NPV as a way to turn presidential elections into a "real democracy,"[8] and even those who oppose it seem resigned to its constitutionality.[9]

This Note argues that there is a barrier to the NPV. It contends that, in several jurisdictions covered by section 5 of the Voting Rights Act, the NPV causes the regression of minority voters' effective exercise of the electoral franchise. It also argues that, in Washington, D.C., and perhaps California and New Mexico, the Plan would result in minority vote dilution, violating section 2 of the Voting Rights Act. Part I outlines the electoral college's constitutional underpinnings and its longstanding critiques. It then details the evolution of doctrine under sections 2 and 5 of the Voting Rights Act, emphasizing the Court's recent decisions in *Georgia v. Ashcroft*[10] and *League of United Latin American Citizens v. Perry* (*LULAC*).[11] Part II analyzes whether changing from the electoral college to the NPV would violate either section 2 or section 5 of the Voting Rights Act. It concludes that the answer to that question depends on how the Supreme Court defines "coalitional" or "influence" districts. Part III urges supporters of the NPV to change their strategy in favor of alternatives that do not invite invidious partisan manipulation of presidential elections. It concludes by arguing that the Court should continue to recognize coalitional districts under section 5 of the Act and begin to recognize claims of minority vote dilution of both coalitional and influence districts under section 2 of the Act.

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4. National Popular Vote, Explanation of National Popular Vote Bill, at http://www.nationalpopularvote.com/pages/explanation.php (last visited Oct. 8, 2007) (on file with the *Columbia Law Review*).

5. See Electoral College: Interstate Compact, A.B. 2948, 2006 Leg., Reg. Sess. (Cal. 2006).

6. See, e.g., Veto in California on Electoral College, N.Y. Times, Oct. 3, 2006, at A17.

7. National Popular Vote, 11 Legislative Chambers Have Now Passed Bill, May 31, 2007, at http://www.nationalpopularvote.com/pages/misc/passingchambers_11.php (on file with the *Columbia Law Review*). Both houses of legislatures in Illinois, Maryland, and Hawaii have passed the Plan. Id.

8. See Editorial, Drop Out of the College, N.Y. Times, Mar. 14, 2006, at A26.

9. See, e.g., George Detweiler, Assault on the Electoral College, New Am., June 26, 2006, at 33, 33 (stating that "Constitution permit[s] a state to select its presidential electors by . . . means other than a popular election"); George F. Will, Op-Ed., From Schwarzenegger, a Veto for Voters' Good, Wash. Post, Oct. 12, 2006, at A27 (noting National Popular Vote Plan would not have required constitutional amendment).

10. 539 U.S. 461 (2003).

11. 126 S. Ct. 2594 (2006).

I. The History of the Electoral College and the Evolution of Voting Rights Law

Perhaps no provision of the Constitution is as controversial as Article II, Section 1, which creates the electoral college.[12] Part I.A explains the electoral college's place in the Constitution, explores how it functions today, and details the alleged inequities of the college. Part I.B examines the greatest legal hurdles to the adoption of the NPV: sections 5 and 2 of the Voting Rights Act. Part I.B.1 describes section 5 of the Act, the dramatic shift in the Court's doctrine in *Ashcroft*, and whether Congress overturned that decision when it amended the Act in 2006. Part I.B.2 describes section 2 of the Act, discussing the familiar *Thornburg v. Gingles*[13] preconditions and the totality of the circumstances test courts use once those preconditions are satisfied.

A. *Maligned, but Enshrined: The History of the Electoral College*

Much has changed since Alexander Hamilton commented that the electoral college was "almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents."[14] Today, Hamilton would have to acknowledge that there have been more proposals for constitutional amendments to the electoral college than on any other subject.[15]

Under the electoral college, "the individual citizen has no federal constitutional right to vote for electors for the President of the United States . . . ."[16] Instead, the Constitution provides that each state, through its legislature, is free to develop its own method for determining how it will appoint electors to the electoral college.[17] Forty-eight states appoint

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12. See infra note 15 and accompanying text.

13. 478 U.S. 30 (1986).

14. The Federalist No. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

15. Jennings Wilson, Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way, 5 Election L.J. 384, 388 (2006). There have been more than a thousand proposals to amend the electoral college. See, e.g., Joy McAfee, 2001: Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000, 32 Cumb. L. Rev. 643, 645 n.8 (2002).

16. Bush v. Gore, 531 U.S. 98, 104 (2000); see also McPherson v. Blacker, 146 U.S. 1, 27 (1892) ("The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors.").

17. See U.S. Const. art II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."). The only limit on state legislatures is that, in selecting a method for choosing electors, they may not "violate[ ] some constitutional or [federal] statutory provision." Ray v. Blair, 343 U.S. 214, 227 (1952); see also Williams v. Rhodes, 393 U.S. 23, 49–50 (1968) (Stewart, J., dissenting) (discussing broad authority of states to select electors within certain constitutional limits). As one court has noted, however, "[presidential electors] have been

their electors under a winner-take-all system, where the winner of the state's popular vote receives the state's entire share of electoral college votes.[18] Two states, Maine and Nebraska, determine the choice of some electors by congressional district vote.[19] While the modern system is undoubtedly more democratic than the initially widespread practice of state legislatures selecting the electors themselves,[20] the electoral college has drawn criticism from seemingly every possible angle: Critics dispute whether the college benefits small states[21] or large states,[22] minority voters[23] or white voters.[24]

'selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power.'" Spreckels v. Graham, 228 P. 1040, 1045 (Cal. 1924) (citation omitted).

18. See, e.g., Robert M. Hardaway, The Electoral College and the Constitution 47–49 (1994).

19. In these two states, the winner of the state's popular vote receives two electors, and the winner of each congressional district in the state also receives an electoral vote. Id. at 49.

20. See id. at 45.

21. See, e.g., David W. Abbott & James P. Levine, Wrong Winner: The Coming Debacle in the Electoral College 77 (1991) (noting that allocation of minimum of three electoral votes to each state grants more electoral votes than "deserve[d]" to small states based on their share of national population); Lucius Wilmerding, Jr., The Electoral College 97–99 (1958) (arguing that electoral college has greater bias toward smaller states than larger ones); Paul Boudreaux, The Electoral College and Its Meager Federalism, 88 Marq. L. Rev. 195, 220 (2004) (claiming that assumptions that large states benefit from electoral college "do not withstand scrutiny").

22. See, e.g., The Electoral College and Direct Election of the President: Hearing on S.J. Res. 297, S.J. Res. 302, and S.J. Res. 312 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 102d Cong. 8 (1992) (prepared statement of Sen. David Pryor) (contending that "simple electoral math dictates that the candidates spend all their time campaigning in the 8 to 12 largest States, because that is where the electoral prizes are"); George Rabinowitz & Stuart Elaine MacDonald, The Power of the States in U.S. Presidential Elections, 80 Am. Pol. Sci. Rev. 65, 75–78 (1986) (detailing large-state bias in electoral college); Ky Fullerton, Comment, Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?, 80 Or. L. Rev. 717, 745 (2001) (arguing that based on 1990 Census, electoral college gave voter in California 2.663 times the ability of voter in Montana to decide outcome of presidential election).

23. See Abbott & Levine, supra note 21, at 144 (noting congressional testimony from African American leaders that if electoral college is eliminated, "'Blacks, instead of being crucial to victory in major states, [will have] reduced impact.'" (quoting New Attempt to Abolish the Electoral College, Congressional Quarterly's Guide to Current American Government, Fall 1979, at 73, 78)).

24. See, e.g., Neal R. Peirce & Lawrence D. Longley, The People's President: The Electoral College in American History and the Direct Vote Alternative 127–30 (rev. ed. 1981) (describing electoral college bias against African Americans based on their geographical distribution); Matthew M. Hoffman, The Illegitimate President: Minority Vote Dilution and the Electoral College, 105 Yale L.J. 935, 978–99 (1996) (claiming that electoral college dilutes votes of African Americans in several states in violation of Voting Rights Act).

This frustration with the electoral college reflects a common view among political scientists that it weights some votes more than others.[25] The idea that all votes should be weighted equally is the core of the Supreme Court's "one person, one vote" jurisprudence, and is, as Justice Hugo Black declared in *Wesberry v. Sanders*, one of "our fundamental ideas of democratic government."[26] Yet, the electoral college is enshrined in the Constitution, and the Supreme Court has refused to extend "one person, one vote" to the electoral college.[27]

Despite the college's constitutional status, "the American public would prefer to dismantle the Electoral College system and go to a direct popular vote for the presidency."[28] Gallup's polling on the issue has indicated strong public support for eliminating the electoral college for at least the last fifty years.[29] But the cumbersome constitutional amend-

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25. The first notable work to make this observation was John F. Banzhaf III, One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College, 13 Vill. L. Rev. 303 *passim* (1968); see also Debra Lyn Bassett, The Politics of the Rural Vote, 35 Ariz. St. L.J. 743, 790 (2003) (arguing that electoral college renders votes of any minority within given state meaningless); Michael Herz, How the Electoral College Imitates the World Series, 23 Cardozo L. Rev. 1191, 1193–97 (2002) (noting that "votes would only be of equal weight [in the electoral college] if electoral college votes were *exactly* apportioned among the states, and then on the basis of those actually casting ballots rather than population"). Defenders of the college have suggested that the apparent imbalances in the electoral college ultimately cancel each other out so as not to implicate Fourteenth Amendment concerns. See, e.g., Alexander M. Bickel, Reform and Continuity: The Electoral College, the Convention, and the Party System 14, 17–18 (1971) (discussing "balance of influence" that is achieved through electoral college); Estes Kefauver, The Electoral College: Old Reforms Take on a New Look, 27 Law & Contemp. Probs. 188, 196 (1962) (observing that, at Senate hearings on electoral college, "[t]here were instances . . . where a witness would dismiss the practical chances of direct national election proposals as depriving the small states of their electoral vote advantage and then attack the present system as favoring the large states over the smaller ones").

26. 376 U.S. 1, 8 (1964).

27. A group of smaller states challenged larger states over the winner-take-all method of choosing the winner of a state's electoral votes, but the Court declined to hear the case. Delaware v. New York, 385 U.S. 895, 895 (1966). Two years later, Virginia voters challenged their State's winner-take-all system but lost on a motion for summary judgment. Williams v. Va. State Bd. of Elections, 288 F. Supp. 622 (E.D.Va. 1968). But see Victor Williams & Alison M. MacDonald, Rethinking Article II, Section I and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems, 77 Marq. L. Rev. 201, 243–51 (1994) (explaining argument that electoral college does violate one person, one vote); Michael J. O'Sullivan, Note, Artificial Unit Voting and the Electoral College, 65 S. Cal. L. Rev. 2421, 2433–36 (1992) (suggesting winner-take-all method of choosing presidential electors is unconstitutional under Fourteenth Amendment). Given the differing views of exactly which way the electoral college's biases cut, it is an open question as to how a potential plaintiff could state a valid one person, one vote claim.

28. Press Release, Gallup Poll, Americans Support Proposal to Eliminate Electoral College System (Jan. 5, 2001) (on file with the *Columbia Law Review*).

29. See id.

ment process has stymied attempts at reform.[30] In the wake of the 2000 election, efforts began anew to abolish the college in favor of a national popular vote.[31]

Aware of the difficulties of a constitutional amendment, several scholars have suggested what has become the National Popular Vote Plan (NPV).[32] The NPV's sponsors have developed a strikingly simple method for evading the constitutional amendment process. Under the NPV, a state, either through its legislature or via initiative, would pledge its electoral college votes to the winner of the nationwide popular vote. If enough states agreed to participate (a number of states whose combined electoral vote total exceeds 270 votes would suffice), the electoral college would be effectively abolished in favor of direct election of the President. The plan seems to encounter no constitutional barrier because the Constitution allows states broad discretion to choose a method of selecting presidential electors.[33] The NPV does, however, risk violating either section 2 or 5 of the Voting Rights Act.[34]

B. *Retrogression and Minority Vote Dilution Under the Voting Rights Act*

Since its inception in 1965, the Voting Rights Act has guarded against racially discriminatory voting practices.[35] Its two most significant

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30. In 1969, the House actually passed an amendment calling for direct election of the President by a vote of 338 to 70. The amendment was filibustered in the Senate. That the amendment was stalled in the Senate lends credence to the argument that the electoral college is biased in favor of the smaller states. After all, the Senate itself has faced similar criticism, and its procedural mechanisms, such as the filibuster, have long been viewed as tools to protect smaller, usually southern, states from their more populous northern peers. For a thorough description of attempts to amend the Constitution to abolish the electoral college, see Hardaway, supra note 18, at 12.

31. The winner of the national popular vote had lost in the electoral college three times prior to 2000, in the elections of 1824, 1876, and 1888. See Abbott & Levine, supra note 21, at xi.

32. See e.g., Robert W. Bennett, Popular Election of the President Without a Constitutional Amendment, 4 Green Bag 2d 241 *passim* (2001); Akhil Reed Amar & Vikram David Amar, How to Achieve Direct National Election of the President Without Amending the Constitution, Findlaw, Dec. 28, 2001, at http://writ.news.findlaw.com/amar/20011228.html (on file with the *Columbia Law Review*) [hereinafter Amar & Amar, Direct National Elections].

33. See Bennett, supra note 32, at 243–44. However, state efforts to mandate whom an individual elector actually casts her ballot for are constitutionally unenforceable. Cf. Ray v. Blair, 343 U.S. 214, 227 (1952). But cf. Thomas v. Cohen, 262 N.Y.S. 320, 326 (Sup. Ct. 1933) (commenting that presidential elector who did not support nominee of party it claimed to represent could be required "by mandamus" to carry out will of voters of given state).

34. See infra Part II.

35. See, e.g., Richard H. Pildes, The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote, 49 How. L.J. 741, 742 (2006) (noting that the Voting Rights Act protects against racially discriminatory voting practices, instead of protecting the right to vote as such). Commentators widely agree that the Act has been successful. See, e.g., Drew S. Days, III & Lani Guinier, Enforcement of Section 5 of the Voting Rights Act, *in* Minority Vote Dilution 167 (Chandler Davidson ed., 1989); Harold W. Stanley &

provisions are sections 2[36] and 5[37] of the Act.[38] Section 2 prohibits all states and their subdivisions from denying minorities the opportunity to "participate in the political process and to elect representatives of their choice."[39] Section 5 requires certain jurisdictions to submit all changes to voting procedures to either the Attorney General or the United States District Court for the District of Columbia for preclearance.[40] Part I.B.1 discusses the standards courts have applied to determine what changes must be precleared and when preclearance should be denied under section 5 of the Act. Part I.B.2 presents current issues surrounding claims of minority vote dilution under section 2 of the Act.

1. *Covered Changes and Retrogression.* — Section 5 of the Voting Rights Act contains two major provisions meant to secure minority voting rights. First, section 5 prevents so-called covered jurisdictions[41] from adopting any change to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting"[42] until the law receives approval from either the United States Attorney General or a three-judge panel of the District Court for the District of Columbia.[43] Voting changes in covered jurisdictions "'will not be effective as la[w] until and unless cleared.'"[44] Failure to obtain either judicial or administrative preclearance "'renders the change unenforceable.'"[45]

Richard G. Niemi, Vital Statistics on American Politics 74–75 (2000). But see Abigail M. Thernstrom, Whose Votes Count? 235–36 (1987) (arguing that purpose of Voting Rights Act should be reconsidered in light of changed circumstances).

36. Voting Rights Act, 42 U.S.C. § 1973 (2000).

37. Id. § 1973c.

38. See, e.g., Frank N. Schellace, The Pale Impact of Recent Case Law on the Ascendancy of the Voting Rights Act, 11 Touro L. Rev. 445, 447 (1995) (calling sections 2 and 5 "central provisions" of Act).

39. § 1973(b).

40. § 1973c. Preclearance will be denied if it is believed the proposed change has the purpose or effect of denying or abridging the right to vote on account of race or color. Id.

41. Section 4(b) of the Voting Rights Act, § 1973b(b), lists the criteria used to decide which states and their subdivisions are subject to section 5 coverage. A state or subdivision is covered if during a presidential election between 1964 and 1972, it (1) restricted the franchise through use of either a test or device *and* (2) had less than half of the voting-age population actually vote. Currently, nine states and subdivisions in seven others are "covered jurisdictions." See 28 C.F.R. pt. 51 app. (2006). The constitutionality of this provision was upheld in South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

42. § 1973c; see also United States v. Hays, 515 U.S. 737, 739 (1995) (describing procedure for obtaining preclearance).

43. See, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 571 (1969) (holding that covered jurisdiction must submit any regulation or legislation involving covered change to Attorney General for review); Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 632–33, 636–42 (rev. 2d ed. 2002) [hereinafter, Issacharoff, Karlan & Pildes, Law of Democracy] (describing process of preclearance for covered jurisdictions).

44. Clark v. Roemer, 500 U.S. 646, 652 (1991) (quoting Connor v. Waller, 421 U.S. 656, 656 (1975)).

45. Id. (quoting Hathorn v. Lovorn, 457 U.S. 255, 269 (1982)); see also United States v. Bd. of Supervisors, 429 U.S. 642, 645 (1977) (per curiam).

Second, section 5 contains a "natural benchmark that preserves the political gains minority voters have achieved through political or legal action."[46] The preclearance process creates this benchmark by analyzing whether a proposed change in a voting practice or procedure would lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[47] In essence, section 5 requires the preclearing authority to decide whether the proposed change makes minority voters worse off than they were before.[48]

Before 2003, the standard guiding this inquiry was clear. As applied by the Department of Justice, preclearance determinations hinged on whether minority voters had the opportunity to "elect candidates of their choice."[49] Unlike those applied in other forms of racial discrimination

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46. Pamela S. Karlan, *Georgia v. Ashcroft* and the Retrogression of Retrogression, 3 Election L.J. 21, 21 (2004) [hereinafter Karlan, Retrogression]. What constitutes a valid benchmark plan had often been the subject of debate in litigation surrounding section 5. See, e.g., Abrams v. Johnson, 521 U.S. 74, 96 (1997) (discussing whether appropriate benchmark in section 5 challenge to redistricting plan was one of three possibilities, each of which would have altered outcome of case); Chen v. City of Houston, 206 F.3d 502, 515 n.7 (5th Cir. 2000) (commenting on difficulties of determining appropriate benchmark for section 5 claims when no majority-minority districts were present as baseline). The standard has now seemingly been clarified. Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001) (setting benchmark as "the most recent plan to have received Section 5 preclearance").

47. Beer v. United States, 425 U.S. 130, 141 (1976). The holding in *Beer* meant that "ameliorative" districting plans could not be denied preclearance, absent a finding of a constitutional violation. Id.; see also Amy Snyder Weed, Note, Getting Around the Voting Rights Act: The Supreme Court Sets the Limits of Racial Voting Discrimination in the South, 10 B.C. Third World L.J. 381, 399 (1990) (discussing development of retrogression standard following *Beer*).

48. See, e.g., Texas v. United States, 866 F. Supp. 20, 27 (D.D.C. 2004) ("[P]reclearance [must] be denied under the 'effects' prong of section 5 if a new system places minority voters in a weaker position than the existing system."); 28 C.F.R. § 51.54 (2006); Michael J. Pitts, *Georgia v. Ashcroft*: It's the End of Section 5 as We Know It (and I Feel Fine), 32 Pepp. L. Rev. 265, 272 (2005) (discussing *Beer* retrogression standard); Daniel P. Tokaji, The Promise of Voter Equality: Examining the Voting Rights Act at Forty, 57 S.C. L. Rev. 689, 703 (2006) (discussing developments in section 5 "especially vital to the attack on dilutive practices"). Congress and the courts have debated what exactly it means to be "worse off." See Georgia v. Ashcroft, 539 U.S. 461, 479 (2003) ("[W]e have never determined the meaning of 'effective exercise of the electoral franchise' . . . ." (quoting *Beer*, 425 U.S. at 141)); Pitts, supra, at 295 (describing *Ashcroft* as creating new retrogression standard); Frederick G. Slabach, Race, Redistricting and Retrogression in Mississippi After the 2000 Census, 68 Miss. L.J. 81, 87 (1998) ("[T]he courts have merely repeated the retrogression standard from *Beer* without extensive analysis of what constitutes a retrogression."); Lindsay Ryan Errickson, Note, Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act, 54 Vand. L. Rev. 2057, 2060 (2001) (observing that, as of 2001, Supreme Court had not defined true standard for determining what constitutes retrogression under section 5).

49. See Issacharoff, Karlan & Pildes, Law of Democracy, supra note 43, at 607. For an argument that the retrogression inquiry was actually much broader even before *Georgia v. Ashcroft*, see Meghann E. Donahue, Note, "The Reports of My Death Are Greatly

litigation, this standard created an effects-based test for measuring violations.[50]

a. *Changes to the Preclearance Inquiry.* — In *Georgia v. Ashcroft*,[51] the Supreme Court radically changed the preclearance process in two ways. First, rather than simply determining whether a minority group has the ability to elect candidates of its choosing, the Court held that examining claims of retrogression required a wider look at the totality of the circumstances.[52] This inquiry included the traditional element of a minority group's ability to elect candidates of its choice, and also included the extent of the minority group's opportunity to participate in the political process and the feasibility of creating a nonretrogressive plan.[53] Second, and perhaps most controversially, the Court held that replacing "safe" majority-minority districts, where minority voters could easily elect the candidate of their choice, with other demographic configurations might not amount to retrogression.[54] These newly permissible districts include so-called "coalitional districts," districts with a smaller black voting-age population but with enough crossover votes from white voters,[55] and so-called "influence districts," where minorities lack the ability to elect "but can play a substantial, if not decisive, role in the electoral process."[56]

Ashcroft concerned the State of Georgia's redistricting following the 2000 census.[57] In a last ditch effort to preserve Democratic control of the state senate, Democratic legislators created a plan in which the African American populations of several majority-minority districts, where African American voters had comfortably elected the candidates of their choice, were moved to other districts in the hope of creating additional districts that could elect Democrats.[58] Because the plan aimed to maintain Democratic control of the legislature, it received the support of Georgia's

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Exaggerated": Administering Section 5 of the Voting Rights Act After *Georgia v. Ashcroft*, 104 Colum. L. Rev. 1651, 1671–72 (2004).

50. See, e.g., Pitts, supra note 48, at 273.

51. 539 U.S. at 461 (2003).

52. Id. at 479–80.

53. Id. This holding appeared to overturn dicta from prior cases stating that nonretrogression "mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly." Bush v. Vera, 517 U.S. 952, 983 (1996).

54. *Ashcroft*, 539 U.S. at 485–86. Most, if not all, scholarship on the *Ashcroft* decision has assumed the Court held that the Georgia plan was not retrogressive. To be sure, the Court's new standard made this outcome likely. But, importantly, the Court did not rule on the redistricting plan itself, as it remanded the case to the district court. See id. at 490.

55. See, e.g., 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 & n.60 (2002) [hereinafter Pildes, Social Science and Voting Rights] (citing Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 852–53 (5th Cir. 1999)).

56. *Ashcroft*, 539 U.S. at 482; see also Pildes, Social Science and Voting Rights, supra note 55, at 1539 (noting definition of influence districts).

57. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 55–64 (D.D.C. 2002).

58. See id. at 41. For example, prior to the 2000 redistricting in Georgia Senate District 22, there was a black voting-age population of 62.65% and the percentage of black registered voters was 64.07%. Under the plan at issue in *Ashcroft*, District 22 saw its black

African American state legislators, all of whom were Democrats and would maintain their power in the legislature if the Democrats remained in the majority.[59]

Interestingly, the *Ashcroft* Court relied on the support of African American legislators as evidence that the redistricting plan was not retrogressive.[60] In particular, the Court felt that, where a minority group's representatives were predominantly members of one political party (in this case, the Democratic Party), the analysis should examine whether the redistricting plan at issue "maintain[ed] or increase[d] legislative positions of power for minority voters' representatives of choice."[61] By examining the purpose behind a plan, the Court appeared to shift the section 5 retrogression test from a purely effects-based test to a more familiar discriminatory purpose racial discrimination inquiry.[62]

Not surprisingly, *Ashcroft* has turned out to be a controversial decision.[63] Many commentators feared the prescience of Justice Souter's ominous dissent,[64] in which he asserted that "[t]he power to elect a candidate of choice has been forgotten; voting power has been forgotten. It is very hard to see anything left of the standard of nonretrogression."[65] *Ashcroft*'s critics were surely emboldened when, after the Georgia redistricting plan took effect, several minority-backed candidates were defeated in once safe minority districts.[66]

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voting-age population drop to 50.76% and the percentage of black registered voters fall to 49.44%. Id. at 63.

59. See id. at 41.

60. *Ashcroft*, 539 U.S. at 483–84 (stating that support of minority legislators is "significant, though not dispositive" in retrogression inquiry).

61. Id. at 484; see also Pitts, supra note 48, at 296–97.

62. See Karlan, Retrogression, supra note 46, at 35; Pitts, supra note 48, at 313–14. Claims of race discrimination under the Fourteenth Amendment require a showing of discriminatory purpose. See, e.g., Washington v. Davis, 426 U.S. 229, 239–40 (1976); Wright v. Rockefeller, 376 U.S. 52, 56, 58 (1964) (holding, pre-Voting Rights Act, that claim of racial gerrymandering did not violate Fourteenth Amendment because there was no showing that legislature was motivated by racial considerations).

63. See, e.g., Grant Hayden, Refocusing on Race, 73 Geo. Wash. L. Rev. 1254, 1270 (2005) (stating that *Ashcroft* reflects constrained view of minority opportunity); Karlan, Retrogression, supra note 46, at 32–36 (calling *Ashcroft* decision "troubling"); 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, 489 (2004) (discussing possibility that *Ashcroft*'s narrow view of retrogression might spur Congress to take more expansive action in amending Voting Rights Act). But see Samuel Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success?, 104 Colum. L. Rev. 1710, 1729–30 (2004) (asserting that *Ashcroft*'s recognition of coalitional and influence districts expanded possibilities for robust political climate in minority communities).

64. *Ashcroft*, 539 U.S. at 495 (Souter, J., dissenting).

65. Id.

66. For example, then-Georgia Senate Majority Leader Charles Walker, who saw the percentage of the black voting-age population drop in his district from 63% to about 50%, was defeated by a white Republican in a racially polarized election. See Johnny Edwards, Race Still Divides at Polls, Augusta Chron., Nov. 28, 2002, at A01.

c. *The "New" Section 5.* — It appears, however, that the holding in *Georgia v. Ashcroft* will be short lived. In reauthorizing the Voting Rights Act, Congress directly repudiated *Ashcroft*,[67] making clear that the purpose of section 5 is to "protect the ability of [minorities] to elect their preferred candidates of choice."[68] But the congressional amendments left unclear whether the "new" section 5 bars both coalitional and influence districts from serving as substitutes for "safe" districts, or whether coalitional districts may still substitute for "safe" minority districts and not be considered retrogressive. Some data suggest that a decline in racially polarized voting, coupled with the continued capacity of minorities to control the outcome of the democratic primary process, may result in coalitional districts achieving the same net result as safer districts.[69] Because no court has interpreted the new section 5, it seems likely that the law has reverted to its pre-*Ashcroft* status.[70] Therefore, a state would violate section 5 by adopting a procedure or practice with respect to voting that diminishes the ability of minority voters to elect the candidate of their choice.[71]

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67. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577, 578 ("The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decision[ ] in . . . *Georgia v. Ashcroft*, which ha[s] misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.").

68. Id. § 5(d), 120 Stat. at 581 (clarifying purpose of section 5). At least one expert argues that the Court will not restore the pre-*Ashcroft* standard and that the substitution of coalitional districts for safe districts will be upheld. See E-mail from Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School, to David J. Becker, Election Consultant and Voting Rights Attorney (Jun. 19, 2006, 10:43 PDT) (on file with the *Columbia Law Review*) [hereinafter E-mail from Richard L. Hasen].

69. See Bernard Grofman, Lisa Handley & David Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C. L. Rev. 1383 *passim* (2001) (offering data to suggest coalitional districts can be as effective as safe districts in enabling minorities to elect candidates of their choice). If this study were correct it would mean that coalitional districts can be thought of as protecting the ability of minority communities to elect the candidate of their choice. Professor Karlan, in contrast, believes that the studies are inconclusive and that the retrogressive impact of districting plans can be resolved only on a case-by-case basis. See Karlan, Retrogression, supra note 46, at 32–34.

70. If one believes, however, that coalitional districts preserve the ability of minorities to elect the candidate of their choice, it could be held that Congress only overturned the part of *Ashcroft* that recognizes influence districts as substitutes for safe districts.

71. See, e.g., City of Lockhart v. United States, 460 U.S. 125, 134 (1983) (stating that purpose of section 5 is to prohibit retrogressive changes in minority voting strength); League of United Latin Am. Citizens v. Clements, 914 F.2d 620, 645 (5th Cir. 1990) (limiting application of section 5 to changes with retrogressive effect); Ketchum v. Byrne, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984) ("[T]he nonretrogression rule requires the maintenance of representation at roughly the same level as was formerly achieved."); New York v. United States, 874 F. Supp. 394, 398 (D.D.C. 1994) (affirming *City of Lockhart* in light of amendments to section 2 of Voting Rights Act).

2. *Minority Vote Dilution and Influence Dilution.* — While section 5 of the Voting Rights Act protects minority voters in covered jurisdictions against retrogression, section 2 of the Act guards against minority vote dilution throughout the United States.[72] Notably, the text of section 2 does not explicitly provide protection against vote dilution, but merely states that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision . . . that results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[73] Instead, the courts developed the concept of vote dilution in response to states' increased use of at-large districting,[74] which was often intended to limit the ability of minorities to win elections.[75] To address the problem of at-large districts that were in place before the Voting Rights Act and thus not subject to section 5 preclearance, courts first recognized the potential for vote dilution claims[76] and later struck down certain at-large districts as impermissibly diluting the votes of minority voters.[77] Many observers, however, criticized the Court's test for determining what constituted vote dilution as "opaque"[78] and "less than clear."[79]

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72. 42 U.S.C. § 1973(a) (2000). Vote dilution occurs when, although "all voters are able to cast their votes, a state can nonetheless take advantage of [racially polarized] voting pattern[s] to undermine the ability of minority group members to affect the political process." Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1672 (2001).

73. § 1973(a).

74. At-large districts are those in which all the seats for the given electoral body are chosen by the electorate as a whole, rather than in subdivisions. For example, if New York State elected all of its members of Congress through a statewide vote rather than via individual districts, the individual representatives would be said to be at-large members of New York's congressional delegation. Multimember districts and at-large districts are used in the literature and cases synonymously.

75. See, e.g., S. Rep. No. 97-417, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 183 (discussing use of at-large districts to dilute African American vote); Gerken, supra note 72, at 1672 (tracing evolution of vote dilution doctrine); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 487 (1993) (noting that many at-large districts were originally adopted to dilute minority voting power).

76. See Whitcomb v. Chavis, 403 U.S. 124, 143–44 (1971) (upholding at-large plan for election to Indiana General Assembly but recognizing potential of vote dilution claim against at-large district).

77. See, e.g., White v. Regester, 412 U.S. 755, 765 (1973) (striking down use of at-large districting plan in two Texas counties); Zimmer v. McKeithen, 485 F.2d 1297 *passim* (5th Cir. 1973) (creating so-called "*Zimmer* factors" to measure when at-large electoral scheme amounts to vote dilution).

78. Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833, 1843 (1992).

79. E.g., Gerken, supra note 72, at 1673; see also T. Alexander Aleinikoff, The Constitution in Context: The Continuing Significance of Racism, 63 U. Colo. L. Rev. 325, 357 n.120 (1992) (noting three critiques of results test); Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 Yale L.J. 2505, 2520 (1997) [hereinafter Pildes, Limitations] (stating that prior to *City of Mobile v. Bolden* the Court had not developed "coherent conception" of vote dilution). But cf. Kathryn Abrams, "Raising

a. *The 1982 Amendments.* — In *City of Mobile v. Bolden*, the Court adopted a "discriminatory purpose" test for vote dilution claims.[80] Two years later, in its 1982 amendments to the Act, Congress clarified section 2 by instructing courts to use a discriminatory results test. After much debate in the United States Senate, Congress directed that "plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of [a] challenged system . . . in order to establish a [section 2] violation."[81] Plaintiffs under the amended section 2 need only show "that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process."[82] Congress set out nine nonexclusive factors that could constitute evidence of such a denial and therefore a section 2 violation.[83]

b. *The* Gingles *Factors.* — Much of the section 2 litigation has involved efforts to strike down at-large districting schemes. The seminal case setting out the legal framework for evaluating whether such practices are vote dilution is *Thornburg v. Gingles*.[84] *Gingles* held that a plaintiff must prove three elements to state a section 2 vote dilution claim: (1) that the state could have drawn additional, compact majority-minority districts; (2) the minority group in question is "cohesive"—that is, its members vote as a bloc; and (3) the white electorate also votes as a bloc, allowing whites to defeat the minority-preferred candidate at the polls.[85] In addition to the *Gingles* factors, the Supreme Court held in *Johnson v. De Grandy* that courts assessing vote dilution claims must also examine "the totality of facts" surrounding the electoral scheme at issue, including whether the number of majority-minority voting districts is roughly proportional to minority members' share of the relevant population.[86]

Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. Rev. 449, 455–57 (1988) (defending the Court's initial vote dilution approach).

80. 446 U.S. 55, 62 (1980).

81. S. Rep. No. 97-417, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205.

82. Id.

83. The factors are: (1) the history of official discrimination in the state or political subdivision; (2) the extent to which voting is racially polarized; (3) whether the jurisdiction in question uses various practices like anti-single shot voting to enhance opportunities for discrimination against the minority group; (4) denying minorities access to a candidate slating process; (5) the extent to which minorities bear the effects of discrimination which may hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdictions; (8) whether there is a significant lack of responsiveness on the part of elected officials to the needs of the minority group; (9) and whether the policy underlying the use of the policy or practice in question is tenuous. See, e.g., Bone Shirt v. Hazeltine, 461 F.3d 1011, 1021–22 (8th Cir. 2006) (enumerating relevant factors to section 2 vote dilution inquiry).

84. 478 U.S. 30 (1986).

85. See Gerken, supra note 72, at 1674.

86. 512 U.S. 997, 1013–14 (1994).

A recent Fourth Circuit opinion[87] nicely explains the appropriate relationship between the three *Gingles* factors and the emphasis in *De Grandy* on the totality of the circumstances. The case concerned at-large elections to a county council. The parties agreed that the first two *Gingles* prongs were met, but disagreed as to how the third *Gingles* prong—white bloc voting—should be analyzed. Defending its practice, the county argued that voting was racially polarized because of partisanship, not race.[88] The court agreed that the county's causation argument was relevant, but not to analyzing any of the *Gingles* preconditions. Rather, causation is relevant only at the totality of the circumstances stage of the analysis.[89]

c. *Applying* Gingles *to Single-Member Districts.* — *Gingles* and *De Grandy* offered a workable framework for challenges to at-large districts, but left many unanswered questions regarding other forms of vote dilution challenges.[90] Of particular significance to this Note, *Gingles* explicitly left open the question of whether the ability of a minority group to constitute a majority in a single-member district was a threshold requirement under the first of its three prongs.[91] The post-*Gingles* case law reveals that, where single-member districts are challenged, courts have relied more on Congress's multifactor inquiry than on *Gingles*'s more formalistic test for determining vote dilution.[92] Therefore, it is likely that a court considering whether the NPV violates section 2 would examine the full panoply of factors set out by Congress, not just the formalistic *Gingles* preconditions.

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87. United States v. Charleston County, 365 F.3d 341, 346 (4th Cir. 2004).

88. See id.

89. Id. at 347–48. One could also look at the *Gingles* preconditions as giving "rise to an inference that racial bias is operating through the medium of the targeted electoral structure to impair minority political opportunities." Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir. 1995).

90. See, e.g., Samuel Issacharoff, Groups and the Right to Vote, 44 Emory L.J. 869, 880–82 (1995) [hereinafter Issacharoff, Groups] (arguing that *Gingles* fails to provide workable standard for addressing vote dilution in redistricting context); cf. Pildes, Limitations, supra note 79, at 2519 (1997) (claiming Congress paid little attention to anything other than at-large districts in amending section 2).

91. Thornburg v. Gingles, 478 U.S. 30, 46–47 & n.12 (1986); see also Voinovich v. Quilter, 507 U.S. 146, 158 (1993) (sidestepping question whether section 2 permits claim brought by minority group that is not 50% of voting age population); Growe v. Emison, 507 U.S. 25, 41 n.5 (1993) ("*Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice."). Whether and how this issue has been resolved by the Court is discussed infra Part II.B.2.

92. See Metts v. Murphy, 363 F.3d 8, 11 (1st Cir. 2004) (citing cases).

In *LULAC*, for the first time,[93] the Supreme Court voided a single-member district as impermissible vote dilution under section 2.[94] In its opinion, the Court partially clarified what a plaintiff outside the at-large context must prove to state a successful vote dilution claim. As part of its controversial mid-decade redistricting plan, the Texas Legislature sought to alter Congressional District 23, held at the time by Representative Henry Bonilla, a Republican. As the district's Latino population rose, Bonilla became increasingly likely to lose his seat.[95] To provide him with a safer seat, the state legislature redrew District 23's boundaries so that its Latino Citizen Voting Age Population declined from 57.5% to 46%.[96] The State argued that the loss of minority voting strength in District 23 could not constitute vote dilution because Representative Bonilla was still winning elections, meaning that the Latino population was not yet electing the candidate of its choice.

Justice Kennedy, writing for the Court, rejected the State's claim, noting that "the circumstance that a group does not win elections does not resolve the issue of vote dilution."[97] He emphasized that, "[s]ince the redistricting prevented the immediate success of the emergent Latino majority in District 23, there was a denial of opportunity in the real sense of that term."[98] Significantly, the Court undertook this analysis within its analysis of the first *Gingles* prong. The Court thus stated clearly that the first prong of *Gingles* does not require plaintiffs to show that, absent vote dilution, they *would* be electing candidates of their choice.[99] Further-

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93. See Ellen D. Katz, From Laredo to Fort Worth: Race, Politics, and the Texas Redistricting Case, 105 Mich. L. Rev. First Impressions 38, 38 (2006), available at http://students.law.umich.edu/mlr/firstimpressions/vol105/katz.pdf (on file with the *Columbia Law Review*) [hereinafter Katz, From Laredo].

94. LULAC v. Perry, 126 S. Ct. 2594 (2006).

95. In the 2002 election, Bonilla received only 8% of the Latino vote. See Session v. Perry, 298 F. Supp. 2d 451, 488 (E.D. Tex. 2004).

96. Id. at 488–89.

97. *LULAC*, 126 S. Ct. at 2615. It was clearly significant to the Court, however, that the Latino population was nearing the point where it could control the outcome of the election. See id. at 2615–16.

98. Id. at 2615–16.

99. This part of the Court's holding runs contrary to what many commentators believed the law to be. See, e.g., Sam Hirsch, Unpacking *Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey, 1 Election L.J. 7, 18–21 (2002) (interpreting Page v. Bartels, 248 F.3d 175 (3d Cir. 2001), to hold that section 2 claim was not possible unless minority group could show it was sufficiently large and cohesive to select candidate at either primary or general election stage); Stanley Pierre-Louis, Comment, The Politics of Influence: Recognizing Influence Dilution Claims Under § 2 of the Voting Rights Act, 62 U. Chi. L. Rev. 1215, 1236 (1995) (stating that plaintiffs must show they could control election outcome to make out successful vote dilution claim); Note, The Implications of Coalitional and Influence Districts for Vote Dilution Litigation, 117 Harv. L. Rev. 2598, 2609 (2004) [hereinafter, The Implications of Coalitional and Influence Districts] (assuming that Court would apply majority-vote requirement to vote dilution litigation). The ruling also appears to overrule the holdings of the Fifth Circuit in Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368, 372–73 (5th Cir. 1999) (requiring plaintiffs to show they were majority of Citizen Voting Age Population as proof of vote

more, Justice Kennedy's language suggests that a minority group might actually have a stronger section 2 claim if it is on the precipice of being successful.

The *LULAC* Court also took a broad view of the totality of the circumstances inquiry. With respect to proportionality, the Court noted that the absence of a minority opportunity district could give rise to impermissible vote dilution.[100] With respect to the "responsiveness" factor, the Court was willing to assume this was true based solely on the fact that the support of Latinos for Bonilla was dropping.[101] In all, *LULAC* sets out a relatively clear, functional analysis for determining vote dilution claims.

This Part has reviewed the history and criticism of the electoral college. It has also explained the basic doctrine under sections 5 and 2 of the Voting Rights Act. Part II draws on this background analysis in exploring whether the NPV would violate the Voting Rights Act.

II. How the National Popular Vote Plan Would Violate the Voting Rights Act

This Part analyzes whether changing from the electoral college to the NPV would violate either section 5 or section 2 of the Voting Rights Act. Part II.A.1 examines whether the NPV would require preclearance under section 5 of the Act. Part II.A.2 evaluates whether preclearance of the NPV, if required, should be granted. Part II.B.1 examines whether section 2 of the Voting Rights Act applies to presidential elections. Part II.B.2 applies the *Gingles* analysis to the NPV, exploring the results in several different states.

A. *Does the NPV Require Preclearance?*

1. *Changes to the Method of Selecting Presidential Electors Must Be Precleared.* — A threshold inquiry under section 5 is whether the National Popular Vote Plan requires preclearance by the Justice Department. Under section 5, covered jurisdictions must submit for preclearance any change to "any voting qualification or prerequisite to voting, or standard,

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dilution claim under first *Gingles* prong); and the Seventh Circuit in Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (same).

100. *LULAC*, 126 S. Ct. at 2620. This analysis does require, however, an "intensely local appraisal" and is not independently sufficient to bring a vote dilution claim. See id. (quoting Rogers v. Lodge, 458 U.S. 613, 622 (1982)). The Voting Rights Act is explicit, however, that there is no entitlement to proportional representation. 42 U.S.C. § 1973(b) (2000) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); see also Vieth v. Jubelirer, 541 U.S. 267, 287–88 (2004) (noting no constitutional or statutory right to proportional representation) (same); Miss. Republican Executive Comm. v. Brooks, 469 U.S. 1002, 1010–11 (1984) (Rehnquist, J., dissenting) (detailing legislative history of section 2 in support of finding that there is no right to proportional representation).

101. *LULAC*, 126 S. Ct. at 2622; see also, Katz, From Laredo, supra note 93, at 41 (viewing this approach as "novel" and "expansive").

practice, or procedure with respect to voting."[102] The Code of Federal Regulations contains a nonexhaustive list of changes that require preclearance, including "any change in the method of determining the outcome of an election,"[103] and changes as to the "counting of votes."[104] Changes pertaining to the realignment of election districts also require preclearance.[105] Importantly, the inquiry into whether a change must be precleared asks only whether it *may* have a discriminatory purpose or effect, not whether it actually *has* such a purpose or effect in fact.[106]

The NPV clearly implicates the Code of Federal Regulations factors requiring preclearance. No longer allowing the state popular vote to determine the winner of the state's electoral votes would constitute a "change in method in determining the outcome of an election."[107] A change in the "counting of votes"[108] would result from requiring election officials to count the votes of all fifty states and Washington, D.C., to decide who is entitled to their state's electoral votes.[109]

NPV advocates have failed to recognize that their plan implicates the Voting Rights Act.[110] For example, California's legislature did not submit its NPV bill for preclearance before submitting it to Governor

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102. See supra note 43 and accompanying text.

103. 28 CFR § 51.13(f) (2006); see also Operation King's Dream v. Connerly, No. 06-12773, 2006 WL 2514115, at *14 (E.D. Mich. Aug. 29, 2006) (discussing regulation in context of applying section 2 of Voting Rights Act to initiatives).

104. 28 CFR § 51.13(b); see also Boxx v. Bennett, 50 F. Supp. 2d 1219, 1224 (M.D. Ala. 1999) (requiring preclearance for changes in how votes were to be counted in local election).

105. See, e.g., Gunn v. Chickasaw County, 705 F. Supp. 315, 321 (N.D. Miss. 1989) ("Realignment of election districts is a voting practice or procedure within the meaning of Section 5.").

106. See Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 47 (1978) ("[A] fair reading of the legislative history compels the conclusion that Congress was determined in the 1975 extension of the [Voting Rights] Act to provide some mechanism for coping with all potentially discriminatory enactments . . . ."); Allen v. State Bd. of Elections, 393 U.S. 544, 570 (1969) (holding that change in covered jurisdiction must be precleared if potentially discriminatory, regardless of actual purpose or effect). But see Presley v. Etowah County Comm'n, 502 U.S. 491, 504 (1992) (finding that changes to *internal* decisionmaking by elected officials need not be precleared).

107. See supra note 103 and accompanying text. In *Allen*, the Court held that any change that potentially affects the "power of a citizen's vote" must be precleared. *Allen*, 393 U.S. at 569–70; see also Morse v. Republican Party of Va., 517 U.S. 186, 219 (1996) (finding changes to state presidential primary system must be precleared in covered jurisdiction).

108. See supra note 104 and accompanying text.

109. Much of the discussion about changing from a state-based system to a national popular vote has focused on how this shift would change the counting of votes. See, e.g., Judith Best, The Choice of the People? Debating the Electoral College 55 (1996); Ann Althouse, Electoral College Reform: Déjà Vu, 95 Nw. U. L. Rev. 993, 1005–06 (2001) (book review).

110. In the 626-page book NPV supporters have authored, the Voting Rights Act is mentioned only twice, and without any consideration that it might hamper their goal. See John R. Koza et al., Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote xviii, 285 (2006).

Schwarzenegger. California as a whole is not a covered jurisdiction, but, because several counties in the state are covered,[111] the Supreme Court has held that California must submit for preclearance any statewide voting change.[112] Therefore, California should have submitted the NPV for preclearance.[113] If California (or any other covered jurisdiction that passes the NPV) fails to seek preclearance before implementing the change, plaintiffs challenging the plan would be entitled to an immediate injunction preventing the change from taking effect.[114]

2. *How Courts Would Decide Whether the Change Should Be Precleared.* — Because states planning to change to the NPV must seek preclearance, the next question is whether preclearance should be granted. The answer hinges on whether *Georgia v. Ashcroft* remains good law following the 2006 amendments to section 5.[115] Specifically, the Attorney General and, ultimately, the courts must decide whether the section 5 retrogression inquiry still requires an examination of the totality of the circumstances, or whether the sole standard is a minority group's ability to elect the candidate of its choice. Regardless of which standard courts choose, covered jurisdictions retain the burden of proof[116] to show that the change does "not have the effect of denying or abridging the right to vote on account of race or color."[117]

As an initial matter, any state seeking to justify the NPV will argue that under the electoral college, no minority group in its state has the ability to elect the candidate of its choice in a presidential election.[118] This argument has validity because, with the exceptions of Hawaii and Washington, D.C., minority groups do not constitute a majority or plural-

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111. The covered counties include Yuba County and Monterey County. See Determination of Director Regarding Voting Rights, 36 Fed. Reg. 5809 (Mar. 15, 1971).

112. See Lopez v. Monterey County (Lopez II), 525 U.S. 266, 269 (1999).

113. Similarly, a recent initiative proposed in California that would award the state's electoral votes by congressional district, as is currently done in Maine and Nebraska, would require preclearance.

114. See Hathorn v. Lovorn, 457 U.S. 255, 269 (1982) (holding that failure to obtain preclearance renders any change to voting procedures unenforceable). When a complaint alleges failure to preclear an election change under section 5, the reviewing court lacks authority to reach the merits of the proposed change. See Lopez v. Monterey County (Lopez I), 519 U.S. 9, 23 (1996).

115. See supra notes 67–68 and accompanying text.

116. See, e.g., Brooks v. State Bd. of Elections, 848 F. Supp. 1548, 1561 (S.D. Ga. 1994) (stating burden of proof under section 5 rests with covered jurisdiction); 28 C.F.R. § 51.52(a) (2006) (same).

117. 42 U.S.C. § 1973c(a) (2000).

118. This Note treats states as being equivalent to legislative districts as analyzed by courts in redistricting cases for the purpose of analyzing the effects of the NPV. Because the electoral college has not changed since the Voting Rights Act was passed, it is unclear how a court would treat an individual state. Given the large body of case law under both section 2 and section 5 dealing with individual districts, treating a state as a district in this context would be easy to administer. The analogy is also reasonable because a state functions like a district in that it is a single electoral unit in the electoral college.

ity of any state's population,[119] and no covered jurisdiction has a majority or plurality minority population.[120] Three covered jurisdictions—California (by virtue of its covered counties), Texas, and Arizona—do have substantial Latino populations that may be sufficiently large, now or in the very near future, for the jurisdictions to be considered coalitional districts as defined by *Ashcroft*.[121] Similarly, African Americans in Mississippi comprise a large enough percentage of the entire population for the state to be considered a coalitional district.[122]

This argument is significant because the Supreme Court has held that retrogression claims must fail unless a minority group can demonstrate an ability to elect the candidate of its choice.[123] *Georgia v. Ashcroft* might change matters because, in holding that coalitional and influence districts could replace majority-minority districts, it raised the question of whether the loss of influence or coalitional districts could give rise to a section 5 claim.[124] Justice O'Connor's rationale for allowing the substitu-

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119. See U.S. Census Bureau, Estimates of the Population by Race and Hispanic or Latino Origin for the United States and States: July 1, 2006, available at http://www.census.gov/popest/states/asrh/tables/SC-EST2006-04.xls (on file with the *Columbia Law Review*).

120. See Alvaro Bedoya, Note, The Unforeseen Effects of *Georgia v. Ashcroft* on the Latino Community, 115 Yale L.J. 2112, 2127 (2006). For a list of covered jurisdictions under the Voting Rights Act, see U.S. Dep't of Justice, Civil Rights Div., Section 5 Covered Jurisdictions, at http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Oct. 8, 2007) (on file with the *Columbia Law Review*).

121. See U.S. Census Bureau, supra note 119.

122. See id.

123. See, e.g., Beer v. United States, 425 U.S. 130, 141–42 (1976) (holding that New Orleans redistricting plan should be precleared because under benchmark plan African Americans were not able to elect single candidate of their choice; therefore, while it was possible to draw plan where African Americans could elect two candidates, plan's limit of one African American candidate of choice was not retrogressive); New York v. United States, 874 F. Supp. 394, 397 (D.D.C. 1994) ("If the position of minority voters is no worse under the new scheme than it was under the old scheme, then the proposed change is entitled to preclearance under section 5."). As Justice Breyer has noted, this interpretation of section 5 almost certainly does not effectuate Congress's intent in passing it, because, "at the time [the VRA was passed], . . . historical discrimination had left the number of black voters at close to zero, [and] retrogression would have proved virtually impossible where [section] 5 was needed most." Reno v. Bossier Parish Sch. Bd. (Bossier II), 528 U.S. 320, 374 (2000) (Breyer, J., dissenting); see also The Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 7–8 (2005) (statement of Mark A. Posner, Adjunct Professor of Law, Washington College of Law, American University, University of Maryland Law School) (arguing *Bossier II* should be reversed by Congress).

124. For arguments that *Ashcroft* does permit the loss of coalitional districts to cause retrogression, see Bernard Grofman, Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of *Georgia v. Ashcroft*: Social Science Perspectives on Minority Influence, Opportunity and Control, 5 Election L.J. 250, 253 (2006); cf. Daniel A. Zibel, Note, Turning the Page on Section 5: The Implications of Multiracial Coalition Districts on Section 5 of the Voting Rights Act, 103 Mich. L. Rev. 189, 202–03 (2004) (arguing *Ashcroft* may be read to allow jurisdictions to draw coalition districts in order to comply with section 5). But see Michael A. Carvin & Louis K. Fisher,

tion of coalitional and influence districts for majority-minority districts was that they might provide the "most effective way to maximize minority voting strength."[125] Therefore, courts and the Attorney General should at least consider recognizing the loss of coalitional districts as retrogression. Moreover, where doubts exist about a plan's racial fairness, the Attorney General usually resolves those doubts against the state seeking the change.[126]

a. *Retrogression in California.* — California's Latino population has a strong argument that moving to the NPV would constitute retrogression of its voting power in presidential elections. In the most recent census, Latinos comprised 28.1% of California's Citizen Voting Age Population, whereas whites comprised 51.1% of the Citizen Voting Age Population.[127] Clearly, Latino voters alone cannot elect the candidate of their choice in a statewide popular vote that determines the state's presidential electors.

Yet, presidential exit poll data[128] suggest that Latinos in California are deciding the winner of the state's fifty-five electoral votes, possibly allowing them to claim that California is a "coalitional state." In 2004, California Latinos overwhelmingly supported Democrat John Kerry over Republican George W. Bush.[129] By contrast, while whites in California comprise a majority of the voting-age population, their candidate of

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"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts, 4 Election L.J. 2, 17 (2005) (positing that minority-backed political coalition has no right to elect candidate of its choice).

125. Georgia v. Ashcroft, 539 U.S. 461, 482–83 (2003) (citing, inter alia, Carol M. Swain, Black Faces, Black Interests: The Representation of African Americans in Congress 193–225 (1993); 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, Social Science and Voting Rights, supra note 55, at 1517).

126. See Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 755 (1998).

127. U.S. Census Bureau, Census 2000 Redistricting Data Summary File, California (2000), available at http://www.census.gov/Press-Release/www/2001/tables/ca_tab_1.PDF (on file with the *Columbia Law Review*). In 2000, an additional 4.3% of the state's overall citizen population were Latinos under 18. Some portion of that population is now over the age of 18, making it likely that the Latino population has grown as an overall share of the state's population over the last seven years. See id.

128. Courts have relied on exit polls for data about the electorate under claims brought under both section 2 and section 5. See, e.g., Hall v. Holder, 955 F.2d 1563, 1571 (11th Cir. 1992) (using exit poll data to examine claim of vote dilution under section 2); Romero v. City of Pomona, 883 F.2d 1418, 1426–27 (9th Cir. 1989) (citing exit poll from city council election to conclude African Americans and Hispanics were not politically cohesive); Diaz v. Silver, 978 F. Supp. 96, 101, 124 (E.D.N.Y. 1997) (using exit poll data to find Asian Americans politically cohesive); DeBaca v. County of San Diego, 794 F. Supp. 990, 999 (S.D. Cal. 1992) (citing 1988 presidential primary exit polls to determine African Americans and Latinos were not politically cohesive).

129. Kerry received 63% of the Latino vote, compared to Bush's 32%. See CNN, 2004 Presidential Exit Poll, California (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/CA/P/00/epolls.0.html (on file with the *Columbia Law Review*) [hereinafter CNN 2004 CA Exit Poll].

choice—President Bush—lost the state by nearly ten points.[130] In 2000, Al Gore won California's electoral votes while also losing the white vote to Bush, but won the state thanks to his receiving an even larger percentage of the Latino vote than Kerry.[131] Consequently, California's nonmajority Latino population, with the assistance of reliable crossover voting from whites (and support from the state's relatively small African American population), has elected the candidate of its choice with respect to the state's fifty-five electoral votes in the last two presidential elections.[132]

The last two elections thus serve as benchmarks against which to measure the effect of the shift to the NPV.[133] Accordingly, the Attorney General or a court would have to decide whether the change would lead to retrogression in the "effective exercise of the electoral franchise" by California's Latino population.[134] Under a test focused primarily on the relevant minority group's ability to elect the candidate of its choice, the NPV would cause such retrogression. Currently, California's Latino population has the ability to decide who will win the state's fifty-five electoral votes.[135] But, under the NPV, California's Latino population would no longer control the state's electoral votes. In the most recent presidential election, exit poll data suggested that Latinos comprised only 8% of the national electorate.[136] Thus, the NPV would dramatically limit the ability of California's Latino population to determine the winner of the state's electoral votes—and would correspondingly limit the group's overall influence on the electoral process.

i. *Effect of Minority Legislator Support.* — While the state would have some counterarguments, it is unclear whether it can cite what might be its strongest—that legislators belonging to the relevant minority group supported the NPV—because of the recent amendments to the Voting Rights Act. As was true in Georgia, every minority legislator supported

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130. See CNN, 2004 Presidential Election Results, California (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/CA/P/00/ (on file with the *Columbia Law Review*) [hereinafter CNN 2004 Presidential Election Results, California].

131. See MSNBC, 2000 Presidential Exit Polls, California (Nov. 7, 2000), at http://www.msnbc.com/m/d2k/g/polls.asp?office=&state=CA (on file with the *Columbia Law Review*) [hereinafter MSNBC 2000 CA Exit Poll].

132. Significantly, the phenomenon of Latinos winning elections in California without being a majority of a given district population is not unique to statewide races. Nine Latino legislators have also been elected in districts where the Latino population is below 40%. See 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 n.30 (2001).

133. The Supreme Court has held that, to determine retrogression, courts must compare a covered jurisdiction's new voting plan with the previous plan. See Reno v. Bossier Parish Sch. Bd. (Bossier I), 520 U.S. 471, 478 (1997) ("[T]he jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured.").

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

135. See supra notes 128–132 and accompanying text.

136. CNN, 2004 Presidential Exit Poll, National (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (on file with the *Columbia Law Review*) [hereinafter CNN 2004 National Exit Poll].

the move to the NPV.[137] A central tenet of *Ashcroft*'s holding was that the support of minority legislators serves as evidence that a proposed plan maintains minority influence.[138] The new Voting Rights Act, however, seems to return the focus exclusively to a minority group's ability to elect.[139]

ii. *Trading Descriptive for Substantive Representation.* — The Plan's supporters could also argue[140] that moving to the NPV trades descriptive representation for substantive representation.[141] Such an argument would claim that the NPV, by forcing presidential candidates to pay attention to California (which NPV supporters contend does not happen now because the state is safely Democratic),[142] the NPV would increase the influence of California residents on the election.[143] But they cannot contend that

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137. Every Democratic Latino caucus member supported the plan. See Unofficial Ballot, Electoral College: Interstate Compact (Aug. 22, 2006), at http://www.assembly.ca.gov/acs/acsframeset2text.htm (on file with the *Columbia Law Review*). For the vote of the State Assembly, see Cal. State Assem., Assembly Daily Journal, 2005–06 Leg., Reg. Sess., at 7338–39 (Aug. 30, 2006). For the vote of the California State Senate, see Cal. State S., Senate Daily Journal, 2005–06 Leg., Reg. Sess., at 5101 (Cal. Aug. 22, 2006).

138. See supra notes 60–62 and accompanying text.

139. See supra note 67 and accompanying text. Whether courts will view coalitional districts and influence districts differently under the new Act is debatable. See E-mail from Richard L. Hasen, supra note 68.

140. This argument would be analogous to the argument advanced by the State of Georgia in *Ashcroft*. See, e.g., Juan Cartagena, Latinos and Section 5 of the Voting Rights Act: Beyond Black and White, 18 Nat'l Black L.J. 201, 216 (2004–2005); Ellen D. Katz, Resurrecting the White Primary, 153 U. Pa. L. Rev. 325, 330, 365–68 & n.201–203 (2004).

141. See Georgia v. Ashcroft, 539 U.S. 461, 481 (2003); see also Peyton McCrary, Christopher Seaman & Richard Valelly, The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 Mich. J. Race & L. 275, 317–19 (2006) (analyzing import of Supreme Court's recognition of substantive representation as part of preclearance process).

142. See, e.g., Electoral College: Interstate Compact: Hearing on A.B. 2948 Before the Assemb. Comm. on Elections and Redistricting, 2005–06 Reg. Sess. (Cal. 2006), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2901-2950/ab_2948_cfa_20060424_112241_asm_comm.html (on file with the *Columbia Law Review*) ("Because California hasn't been one of the battleground states, we have largely been ignored by recent Presidential campaigns. Under the current system of electing the President, as long as California remains a solidly Democratic state, there is no reason for Presidential candidates of any party to pay attention to California voters."). This view is buttressed by the fact that, while California is the largest state in the union, it received just two visits from presidential or vice-presidential candidates during the last month of the campaign. Id. at 3. Opponents of the NPV in Colorado do seem to fear that it would lead to increased attention being given to large states like California at the expense of smaller states. See Ed Sealover, Senate OKs Bill to Make State Bypass Electoral College, The Gazette (Colorado Springs), Jan. 23, 2007 (Metro), at 2 ("Republicans . . . called the bill a blow to the influence of Colorado, saying that if the [NPV] develops, candidates will pay attention only to large areas . . . .").

143. States may benefit financially from being viewed as competitive in presidential elections. See, e.g., Boris Shor, Presidential Power and Distributive Politics: Federal Expenditures in the 50 States, 1983–2001, at 4 (Harris Sch. of Pub. Policy Studies, Univ. of Chi., 2006) (unpublished working paper, on file with the *Columbia Law Review*), available at http://home.uchicago.edu/~bshor/research/presidency.distributive.politics.pdf ("States

California's Latino community would see its influence improve under the NPV. In a presidential election between a white Democrat and a white Republican, for example, the Democrat might easily take California's Latino support for granted and vie for solely white voters.[144] In this scenario, Latinos would receive no increase in substantive representation. Moreover, a move to the NPV would harm California's Latinos—assuming that they are best served by the candidate of their choice—because the Plan makes it much more likely that a Republican would carry the state and win the presidency.[145]

iii. *Impact of Amendments to Section 5.* — The 2006 amendments might help supporters of the NPV, however. If the amendments do overturn *Ashcroft*, the Court may no longer recognize coalitional districts and influence districts. It would then be an open question whether moving a "coalitional state" to the NPV would constitute retrogression.

b. *Retrogression in Arizona, Texas, and Mississippi.* — The remaining covered jurisdictions with significant minority populations (Arizona, Texas, and Mississippi) share one thing in common that is not true in California—in recent presidential elections, the minority-preferred can-

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that have more electoral votes per capita, that are more competitive, and that support the president tend to enjoy more federal expenditures per capita."). But see Peter L. Francia & Renan Levine, Feast or Famine at the Federal Luau? Understanding Net Federal Spending Under Bush, The Forum, 2006, at 1, 13, at http://works.bepress.com/renan/1/ (on file with the *Columbia Law Review*) (observing that swing states received no measurable economic benefits during George W. Bush's first term in office; and that in fact, best way for state to benefit from federal spending was to be solid supporter of incumbent president). These two articles are not necessarily incompatible. The Shor article ceases analyzing federal spending at the end of Bill Clinton's presidency, while the Francia and Levine article's analysis begins with the first year of President Bush's administration. Supporters of the NPV would have to demonstrate actual empirical evidence that a state's influence is impacted by its relative competitiveness.

144. Karlan, Retrogression, supra note 46, at 32 (discussing scenario where Republican candidate is so unappealing that white Democrat takes black support for granted). NPV supporters might point out that candidates take the California Latino vote for granted today. Perhaps this is true if one uses time spent campaigning in a particular area as the dominant metric. Yet, because no Democrat can currently win the presidency without California, and because the only way a Democrat can count on carrying the state is by winning its Latino population by a significant margin, it is extremely unlikely that a Democratic candidate on a national ticket would take positions on issues contrary to those of the state's Latino population. A candidate's views on issues and what he or she would do once in office are much better indicators of relative influence on a politician than where a candidate for President spends his or her time.

145. See Bedoya, supra note 120, at 2133–34 (explaining that, if minority voters are Democratic, their influence level diminishes if change in electoral process results in election of more conservative elected officials); cf. Delia Grigg & Jonathan N. Katz, The Impact of Majority-Minority Districts on Congressional Elections 2 (Apr. 4, 2005) (unpublished manuscript, on file with the *Columbia Law Review*), available at http://www.stat.columbia.edu/~gelman/stuff_for_blog/Grigg_Katz_MPSA2005.pdf (concluding that presence of majority-minority districts, while increasing *descriptive* representation of minorities, does not increase their substantive representation).

didate has failed to carry the state. This fact precludes the three states from being considered either "safe" or "coalitional."[146]

i. *Latino "Influence States" in Arizona & Texas.* — While not "coalition states," Arizona and Texas, but not Mississippi, could be thought of as "influence states."[147] Latinos comprise 21.3% of Arizona's Citizen Voting Age Population[148] and 28.6% of Texas's—a figure nearly identical to California.[149] Both states' Latino populations preferred Kerry, but by substantially smaller margins than California's Latino population.[150] This divergence resulted, in large part, from significant Latino outreach in Arizona by the 2004 Bush campaign and from similar outreach to Texas's Latino community while Bush was Governor of that state. Had Bush performed as well among Latino voters in these states as he did in California, he might have lost at least Arizona's electoral votes, if not Texas's.

The fact that Latino communities in Arizona and Texas were central to Bush's victory suggests that Latino voters in both states have the type of influence that *Ashcroft* sought to recognize as protected under section 5.[151] Proof of that influence can be derived from the better-than-average performance of President Bush with the two states' Latino voters and the Bush campaign's dedicated efforts to court those voters. It seems unlikely, however, that section 5 as amended will continue to protect "influence districts." Because the amended section 5 clarifies that its purpose is to protect the ability of minority groups to elect the candidate of their choice,[152] coalitional districts arguably remain protected, but influence

146. For definitions of safe and coalitional districts, see Pildes, Social Science and Voting Rights, supra note 55, at 1522.

147. An "influence state" would be the state equivalent of an influence district—one in which the minority community cannot elect the candidate of its choice but still has a substantial impact on the outcome of the election. See supra note 56 and accompanying text; see also Karlan, Retrogression, supra note 46, at 32 (referring to Alabama as "natural influence district").

148. U.S. Census Bureau, Census 2000 Redistricting Data Summary File, Arizona, available at http://www.census.gov/Press-Release/www/2001/tables/az_tab_1.PDF (last visited on Oct. 8, 2007) (on file with the *Columbia Law Review*).

149. U.S. Census Bureau, Census 2000 Redistricting Data Summary File, Texas, available at http://www.census.gov/Press-Release/www/2001/tables/tx_tab_1.PDF (last visited on Sept. 24, 2007) (on file with the *Columbia Law Review*).

150. See CNN, 2004 Presidential Exit Poll, Arizona (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/AZ/P/00/epolls.0.html (on file with the *Columbia Law Review*); CNN 2004 CA Exit Poll, supra note 129; CNN, 2004 Presidential Exit Poll, Texas (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/TX/P/00/epolls.0.html (on file with the *Columbia Law Review*).

151. For an excellent definition of influence districts, see Hall v. Virginia, 276 F. Supp. 2d 528, 534 n.10 (E.D. Va. 2003) ("[A]n influence district is one 'in which a minority group has enough political heft to exert significant influence on the choice of candidate though not enough to determine that choice.'" (quoting Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998))).

152. See supra note 68 and accompanying text.

by itself is likely no longer a factor in the decision to preclear a voting change.

ii. *Mississippi.* — In contrast, Mississippi's African American population was not central to President Bush's victory in the state. Mississippi's African American voters overwhelmingly supported Al Gore in 2000 and John Kerry in 2004. Their support, however, clearly was not suggestive of influence in determining the winner of the state's electoral votes. Accordingly, there would not be a colorable claim under *Ashcroft*.

B. *Vote Dilution and the National Popular Vote Plan*

This section examines whether moving from the electoral college to the National Popular Vote Plan would constitute impermissible vote dilution in violation of section 2 of the Voting Rights Act. Unlike section 5, section 2 covers all fifty states and their political subdivisions, along with the District of Columbia.[153] Also unlike section 5, under section 2 the burden of proof rests with the party challenging the practice of the state.[154]

1. *Does Section 2 Apply to Executive Offices?* — Before analyzing whether a move toward the NPV constitutes minority vote dilution, one must determine whether section 2 applies to presidential elections generally. Two courts of appeals and a district court have questioned whether section 2 of the Voting Rights Act applies to executive offices.[155] These courts based their conclusions on the idea that "[t]here can be no equal opportunity for representation within an office filled by one person."[156] In other words, proportional representation is impossible where only one person wins. As a general matter, this statement is undeniably true—one cannot have a share of the presidency. Yet, the courts that would forbid section 2 claims for executive offices overlook the underlying section 2 inquiry into a minority group's opportunity to participate equally in the political process. To examine only ultimate outcomes confuses section 2 analysis with the section 5 analysis that focuses on a group's ability to elect a candidate of its choice.

Ironically, the Second Circuit, which first held that section 2 did not apply to executive offices, sketched out a relevant scenario where section

153. 42 U.S.C. § 1973(a) (2000).

154. See, e.g., Paul Moke, The Voting Rights Act and the Racial Gap in Lost Votes, 58 Hastings L.J. 1, 34–35 (2006) (noting that plaintiff bears burden of proof in section 2 cases).

155. See Dillard v. Crenshaw County, 831 F.2d 246, 250–52 (11th Cir. 1987); Butts v. City of New York, 779 F.2d 141, 148–49 (2d Cir. 1985); S. Christian Leadership Conference v. Siegelman, 714 F. Supp. 511, 518 (M.D. Ala. 1989). Many commentators have criticized this approach. See, e.g., G. Hunter Bates, Reapportionment and the Dilution of Minority Voting Strength, 16 Harv. J.L. & Pub. Pol'y 820, 828–29 (1993); Pamela S. Karlan, Undoing the Right Thing: Single-Member Offices and the Voting Rights Act, 77 Va. L. Rev. 1, 7 (1991); Edward J. Sebold, Note, Applying Section 2 of the Voting Rights Act to Single-Member Offices, 88 Mich. L. Rev. 2199, 2205–13 (1990).

156. *Butts*, 779 F.2d at 148.

2 *could* in fact apply—when "the office [is] chosen by a convention of delegates . . . that had been selected on a basis that denied class members an equal opportunity to secure representation in the convention."[157] Substituting the word "college" for "convention" produces an accurate description of how Americans currently elect their President. Even under the Second Circuit's restrictive standard, the question becomes whether the NPV would deny minority voters in a particular state an equal opportunity to choose presidential electors.

Moreover, the rationale for denying section 2's applicability to executive offices—that it is impossible to split the jurisdiction into smaller parts—fails when it comes to the presidency. Currently, unlike elections for other executive offices that are elected statewide, the electoral college takes what could be a single electoral unit (the entire country) and instead creates fifty-one smaller parts (in effect, districts) and grants them varying weights. In fact, because the electorate votes for presidential electors rather than the President herself, the election of a President arguably does not resemble the election for a single-member office at all.[158]

The Supreme Court adopted a version of this argument in *Houston Lawyers' Ass'n v. Attorney General of Texas*.[159] The Court held that elections for any specific office could not be universally excluded from section 2 coverage.[160] In broad language, the Court noted that the Voting Rights Act "encompasses the election of executive officers."[161] However, the Court also seemed to narrow the scope of its holding. It found that a state's justification for maintaining or adopting the electoral system was relevant at the totality of circumstances stage of the section 2 inquiry.[162]

Even though the Court's decision equivocates somewhat, its analysis supports a finding that executive offices are covered under section 2. How courts resolve these claims will depend on the normal section 2 analysis and on whether, as a normative matter, applying section 2 to presidential elections is sound policy.

Applying section 2 to presidential elections is the correct approach. As one commentator has noted, "[b]ecause of their distinct power, single-

157. Id. at 149.

158. See Hoffman, supra note 24, at 977–78.

159. 501 U.S. 419 (1991).

160. Id. at 425.

161. Id. at 426.

162. Id. at 427. In fact, on remand, the Fifth Circuit held that there was no section 2 violation because it found the State had an adequate justification for its method of choosing judges. See League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 872–74 (5th Cir. 1993) (en banc). Given the level of opposition to the electoral college, one could easily imagine a court finding a state's desire to move away from the college a sufficient interest to trump any potential minority vote dilution. Yet, the stronger state interest might be in maintaining the electoral college. See Hoffman, supra note 24, at 998 (outlining interest states may have in maintaining electoral college because "states may arguably increase their political influence relative to other states and maximize the voting power of their individual citizens"). For a further description of the type of balancing courts might undertake, see Davis v. Chiles, 139 F.3d 1414, 1423–24 (11th Cir. 1998).

member offices held by officials unsympathetic to minorities have a greater potential than other offices to diminish minority influence in the political process."[163] This would be particularly true for the presidency, which is the most powerful of elected offices. Furthermore, as the Court noted in *Houston Lawyers'*, a voting practice or procedure, such as closing the polls early on a presidential election day, which denies minorities the ability to participate fully in the electoral process or elect the candidate of their choice, could certainly constitute a violation under section 2.[164] It has also been argued that the Supreme Court's holding in *McPherson v. Blacker*—that the Fourteenth and Fifteenth Amendments to the Constitution limit a state legislature's ability to choose the method by which the state selects presidential electors[165]—implicitly endorsed the Voting Rights Act as a constraint on the method of selecting presidential electors.[166] Finally, the trigger formula for section 5 of the Act, which relies on voter turnout during presidential elections,[167] strongly suggests that Congress intended the Voting Rights Act to reach the electoral college.

2. *Applying Section 2 to the NPV.* — The core section 2 challenge to the NPV would be that moving from a state-based to a national popular vote dilutes the voting strength of a given state's minority population by reducing its ability to influence the outcome of presidential elections.[168] Proving vote dilution requires a plaintiff to show that a specific electoral scheme minimizes the minority group's voting strength: "The essence of a [section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[169] Therefore, under the *Gingles* analysis, an electoral

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163. Sebold, supra note 155, at 2200.

164. *Houston Lawyers'*, 501 U.S. at 427; cf. Perkins v. Matthews, 400 U.S. 379, 387–89 (1971) (requiring locations of polling places to be precleared under section 5 of Voting Rights Act).

165. 146 U.S. 1, 39 (1892) ("Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty [of Section 2 of the Fourteenth Amendment].").

166. E.g., Hoffman, supra note 24, at 967 ("[The *McPherson* Court] left no doubt that the Fourteenth Amendment does place limits on the Article II powers of state legislatures."). The Voting Rights Act was passed under the enforcement powers of those Amendments. Id. at 968–70 (referencing Court's rejection of argument that Voting Rights Act exceeded scope of Congress's enforcement power because no Fourteenth or Fifteenth Amendment violation).

167. See supra note 41.

168. For example, California's Latino population could say it presently controls fifty-five electoral votes. Under the NPV, its influence is reduced to 3.3% (the percentage of California Latinos as a percentage of the nationwide Citizen Voting Age Population) of 538 (the total number of votes in the electoral college).

169. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

system may be permissible in one state but, because of differing political conditions, illegal in another.[170]

Similarly, vote dilution claims under section 2 could come out differently depending on the state. An analysis of whether moving to the NPV in New Mexico and California constitutes vote dilution raises interesting questions about the state of section 2 law after *LULAC* and *Georgia v. Ashcroft*. Because all states, not just covered jurisdictions, are subject to section 2 of the Act, Hawaii and Washington, D.C., both of which have majority-minority populations, can also be analyzed for minority vote dilution purposes. Finally, Alabama exemplifies how the current electoral college system might already dilute African American votes in many Southern states.

a. *Latino Vote Dilution in New Mexico and California.* — The success of vote dilution claims in New Mexico and California hinges on the threshold issue of whether a minority group's not being a majority of a state's population can satisfy the first *Gingles* precondition.[171] This prong asks whether a state could have drawn an additional compact majority-minority district, a question that is complicated when discussing states as districts themselves. As noted above, California's Latino population is 28.1% of the state's voting-age population. New Mexico has an even larger Latino voting-age population, 38.7%. Because neither state's Latino population is a majority of the population, it is unclear if plaintiffs in either state could satisfy the first *Gingles* prong.

i. *The First* Gingles *Factor.* — There is, however, some language in *Gingles* that suggests a court might apply a different test when the minority group does not constitute 50% or more of the state's population.[172] In effect, the question raised is similar to that raised by *Ashcroft*: Does the loss of either influence or coalitional "states" potentially give rise to a vote dilution claim?[173] After *Ashcroft*, several lower courts struggled with this

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170. See Hoffman, supra note 24, at 978.

171. See supra notes 84–85 and accompanying text.

172. *Gingles*, 478 U.S. at 46 n.12 (noting that opinion did not develop standards for claim "brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district"); see also Luke P. McLoughlin, *Gingles* in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N.Y.U. L. Rev. 312, 320 (2005) (discussing lack of definitive standard from *Gingles* and indication that minority blocs would be undertaken within framework focused on electoral victories, not just electoral influence).

173. See supra notes 124–126 and accompanying text. A significant amount of scholarship has raised this issue. See, e.g., Jeanne C. Fromer, An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting, 93 Geo. L.J. 1547, 1562 (2005) (stating that it is open question whether the Court will extend *Ashcroft*'s holding to section 2); Richard L. Hasen, No Exit? The Roberts Court and the Future of Election Law, 57 S.C. L. Rev. 669, 679–80 (2006) (observing that lower courts have raised questions regarding *Ashcroft*'s implications for section 2 litigation); Luke P. McLoughlin, Section 2 of the Voting Rights Act and *City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards, 31 Vt. L. Rev. 39, 85 (2006) (noting that while *Ashcroft* seems to

issue.[174] As a normative matter, several commentators have suggested that courts should not interpret *Gingles*'s first prong as requiring a majority-minority population.[175]

Recently, the Supreme Court seemed to find a middle ground. In *LULAC*, the Court stated that it continued to assume, without deciding, that it was possible to state a section 2 claim even where a racial group comprises less than 50% of the population.[176] The Court did hold, however, that the failure to create or maintain an influence district was not actionable under section 2.[177] Specifically, in Texas District 24, where African Americans were 25.7% of the population and had voted consistently for Democrat Martin Frost, the Court refused to recognize the loss of this minority influence district as impermissible vote dilution.[178] Significantly, the Court did note that the plaintiffs could have succeeded had they been able to show that "they constitute 'a sufficiently large mi-

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promote coalitional and influence districts under section 5, *Gingles* would make recognizing such claims difficult under section 2).

174. See Metts v. Murphy, 347 F.3d 346, 353 (1st Cir. 2003) (finding *Ashcroft* supports conclusion that influence districts should be considered in the section 2 context), vacated en banc, 363 F.3d 8 (1st Cir. 2004); McNeil v. Legislative Apportionment Comm'n, 828 A.2d 840, 851 (N.J. 2003) (finding that *Ashcroft* "necessarily serves as the predicate of a state's obligation" under section 2). One court found that the loss of an influence district gave rise to a vote dilution claim but did so under the belief that *Gingles* did not apply to single-member districts. Armour v. Ohio, 775 F. Supp. 1044, 1050–52, 1059–60 & n.19 (N.D. Ohio 1991). But cf. Rodriguez v. Pataki, 308 F. Supp. 2d 346, 384–85 (S.D.N.Y. 2004) (holding that while *Ashcroft* "allows crossover districts under section 5, its reasoning does not broaden the power of federal courts under section 2 of the [Act] to require state legislatures to protect or create such 'ability to elect districts' "); Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 299–300 (D. Mass. 2004) (assuming arguendo that section 2 does not permit vote dilution claims alleging failure to create coalitional and influence districts); Session v. Perry, 298 F. Supp. 2d 451, 480–85, 515 (E.D. Tex. 2004) (per curiam) (denying section 2 claim seeking coalitional district), vacated sub nom. Henderson v. Perry, 543 U.S. 941 (2004), remanded to 399 F. Supp. 2d 756 (E.D. Tex. 2005), aff'd in part, rev'd in part, vacated in part sub nom. LULAC v. Perry, 126 S. Ct. 2594 (2006).

175. See, e.g., Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L. Rev. 173, 202 (1989) ("To the extent that courts have read *Gingles* to elevate the ability to create a district with a majority-black electorate into a threshold requirement for establishing liability in all vote dilution litigation, they have improperly applied one particular theory of liability to other distinct types of vote dilution."); J. Morgan Kousser, Beyond *Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law, 27 U.S.F. L. Rev. 551, 565 (1993) (arguing that first prong of *Gingles* was based on false premises); Beth A. Levene, Comment, Influence-Dilution Claims Under the Voting Rights Act, 1995 U. Chi. Legal F. 457, 472–79 (suggesting creation of new framework for evaluating influence dilution claims).

176. *LULAC*, 126 S. Ct. at 2624 (citing Voinovich v. Quilter, 507 U.S. 146, 154 (1993)).

177. Id. at 2624–25.

178. Id. ("That African-Americans had influence in the district does not suffice to state a [section] 2 claim . . . .") (citation omitted). The district was "lost" in the sense that its population was divided among several other Republican-leaning districts. See id. at 2631 (Stevens, J., concurring in part and dissenting in part).

nority to elect their candidate of choice with the assistance of cross-over votes.'"[179] In effect, the Court held that the loss of a *coalitional* district can give rise to a claim under section 2.[180]

So, under *LULAC*, the determinative factor is whether, for purposes of evaluating the NPV, the Latino populations of California and New Mexico create a "coalitional state" or merely an "influence state." To satisfy the first *Gingles* precondition, the states will have to be viewed as coalitional.[181] The inquiry into whether they are, however, raises two subsidiary questions. First, how frequently must a group demonstrate an ability to elect the candidate of its choice? And second, as the relevant group's population size approaches 50%, does the need to demonstrate a consistent ability in electing the candidate of the group's choice correspondingly diminish? These questions are important because California's Latino population has demonstrated a more consistent ability to elect the candidate of its choice in presidential elections than has New Mexico's. In 2000, both states' Latino populations preferred Al Gore, who ultimately carried both states.[182] In 2004, however, New Mexico's Latino population preferred John Kerry (albeit by a smaller margin than it backed Gore in 2000), yet George W. Bush won the state.[183] Therefore, in recent elections, California's Latino population has shown a more consistent ability to attract enough crossover votes to elect the candidate of its choice. New Mexico's Latino population, however, is a proportionately larger share of the Citizen Voting Age Population than California's Latino population.[184] New Mexico's Latino population is now also a plurality of the state's overall population.[185] The question for New Mexico, then, is whether the 2000 presidential election should suffice as proof of its Latino population's ability to elect the candidate of its choice.

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179. Id. at 2624 (quoting *Voinovich*, 507 U.S. at 158).

180. See, e.g., Pildes, Social Science and Voting Rights, supra note 55, at 1539 n.60 (defining coalitional district).

181. See supra notes 176–179 and accompanying text.

182. MSNBC 2000 CA Exit Poll, supra note 131; MSNBC, 2000 Presidential Exit Polls, New Mexico (Nov. 7, 2000), at http://www.msnbc.com/m/d2k/g/polls.asp?office=P&state=nm (on file with the *Columbia Law Review*) [hereinafter MSNBC 2000 NM Exit Poll].

183. CNN, 2004 Presidential Election Results, New Mexico (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/NM/P/00/, and CNN, 2004 Presidential Exit Poll, New Mexico, http://edition.cnn.com/ELECTION/2004/pages/results/states/NM/P/00/epolls.0.html (on file with the *Columbia Law Review*) [hereinafter CNN 2004 NM Exit Poll].

184. New Mexico's Latino population is approximately 8% more of the state population as a whole than California's Latino population. Compare U.S. Census Bureau, State & County QuickFacts, California (last revised Aug. 31, 2007), at http://quickfacts.census.gov/qfd/states/06000.html (on file with the *Columbia Law Review*) (showing 35.2% Latino population), with U.S. Census Bureau, State & County QuickFacts, New Mexico (last revised Aug. 31, 2007), at http://quickfacts.census.gov/qfd/states/35000.html (on file with the *Columbia Law Review*) [hereinafter Census QuickFacts, New Mexico] (showing 43.4% Latino population).

185. Census QuickFacts, New Mexico, supra note 184.

In the next round of litigation surrounding congressional redistricting (if not in an upcoming presidential election), the Court will likely face these questions as the Latino population in the Southwest continues to grow.[186] For the purpose of analysis, this Note mimics the Court's approach in *LULAC* and assumes that minority voters in California or New Mexico could satisfy the first *Gingles* precondition.[187]

ii. *Do Latinos in New Mexico and California Vote as a Bloc?* — A reviewing court would then examine whether the second *Gingles* precondition—minority bloc voting[188]—occurs in California and New Mexico. Plaintiffs can satisfy this prong by showing that "a significant number of minority group members usually vote for the same candidates."[189] *Gingles* did not specify the percentage of the vote necessary to demonstrate cohesiveness, and little litigation or scholarship exists on this point, though one article suggests a 60% threshold.[190] Assuming 60% as the baseline for political cohesiveness, California's Latino population could demonstrate its cohesiveness based on Kerry receiving 63% of its vote in 2004.[191] New Mexico's Latino population, however, presents a more complicated picture. In 2000, Al Gore received over 60% of the state's

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186. See id.

187. In Part III, this Note argues the Court should allow minority groups to satisfy the first *Gingles* precondition when the groups are less than 50% of the state population but have a demonstrated ability to elect in one election or will soon be able to elect the candidate of their choice.

188. See Thornburg v. Gingles, 478 U.S. 30, 55 (1986); see also Goosby v. Town Bd. of Hempstead, 180 F.3d 476, 492 (2d Cir. 1999) (requiring minority plaintiffs to demonstrate they were politically cohesive); Badillo v. City of Stockton, 956 F.2d 884, 886 (9th Cir. 1992) (finding that plaintiffs were unable to demonstrate they reliably voted as bloc and accordingly district court was correct in finding there was no section 2 violation); United States v. Marengo County Comm'n, 731 F.2d 1546, 1566 (11th Cir. 1984) (holding, pre-*Gingles*, that minority bloc voting "will ordinarily be the keystone of a dilution case"). There are two types of cases in which plaintiffs need not demonstrate racially polarized voting: those in which plaintiffs challenge voting procedures (i.e., the system a county uses to register voters or administer absentee ballots) and those in which plaintiffs can demonstrate that the change in question was adopted and/or maintained with a discriminatory intent. Ellen Katz et al., Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J.L. Reform 643, 664 n.99 (2006) [hereinafter Katz et al., Documenting Discrimination] (citing cases).

189. *Gingles*, 478 U.S. at 56; see also Richard Briffault, Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues, 36 Rutgers L.J. 1125, 1131–32 (2005) ("One way of proving the necessary minority political cohesiveness is to show that minority voters tend to vote for the same candidates.").

190. Allan J. Lichtman & J. Gerald Hebert, A General Theory of Vote Dilution, 6 La Raza L.J. 1, 5 (1993) (noting that 60% margin of support represents victory of "landslide proportions" according to social science literature).

191. See CNN 2004 CA Exit Poll, supra note 129. In the counties in California covered by the Voting Rights Act, however, the margin between Kerry and Bush in the most recent election was much narrower than the margin by which Kerry won the Latino vote statewide. See CNN 2004 Presidential Election Results, California, supra note 130. This fact could weigh against a finding of cohesiveness.

Latino vote.[192] In 2004, however, John Kerry received only 56% of the state's Latino votes.[193] When comparing the outcome to other recent statewide races, New Mexico's Latinos do regularly vote as a bloc for the Democratic candidate.[194] And, in most section 2 litigation, courts are willing to give plaintiffs the benefit of the doubt with respect to whether the relevant racial group votes as a bloc.[195] Therefore, based on the Court's historical deference to plaintiffs on this issue, it is doubtful that plaintiffs challenging the NPV would fail on the second *Gingles* precondition.

iii. *Do White Voters in California and New Mexico Usually Defeat the Latino-Preferred Candidate?* — The third *Gingles* precondition, that the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate,"[196] can be construed as inherently contradictory with the first *Gingles* prong under an analysis of coalitional districts. That is, assuming that California and New Mexico Latino voters can demonstrate that they are able to elect the candidate of their choice because of white crossover voting, it is hard to claim that white bloc voting usually defeats the minority-preferred candidate.[197] One way to reconcile this conflict would be to allow minority group plaintiffs that are less than 50% of the relevant population to meet their burden by citing an "outlier" election in which they were able to elect the candidate of their choice.[198] Then, if the white majority normally prevents the minority from electing the candidate of its choice, plaintiffs could still meet the third precondition. This formula would allow New Mexico's Latino population to meet the first and third *Gingles* preconditions. Another option would be for courts to rely less on the *Gingles* factors when analyzing racially polarized voting and instead adopt an approach that recognizes that Congress intended, in amending section 2, to prevent states from

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192. See MSNBC 2000 NM Exit Poll, supra note 182.

193. See CNN 2004 NM Exit Poll, supra note 183. Some articles have suggested that exit polls from the 2004 election overstated Latino support for Bush and that Kerry might have received 60% of New Mexico's Latino vote. See, e.g., David L. Leal et al., The Latino Vote in the 2004 Election, 38 PS: Pol. Sci. & Pol. 41, 42–43 (2005) (chronicling dispute over 2004 exit polls in relation to Latino vote). In the 2006 midterm elections, Latinos supported Democratic candidates for Congress with nearly 70% of the vote. See Democrats Recapture Part of Hispanic Vote, AP News Online (Jan. 9, 2007), at http://www.msnbc.msn.com/id/16537412/ (on file with the *Columbia Law Review*).

194. This trend is particularly true in the last two gubernatorial elections in the state, when Democrat Bill Richardson, himself a Latino, was elected.

195. See Katz et al., Documenting Discrimination, supra note 188, at 657.

196. Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

197. Two courts have held as much. See Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 300 (D. Mass. 2004); Cane v. Worcester County, 874 F. Supp. 687, 690–91 (D. Md. 1995), aff'd in part, vacated in part, 59 F.3d 165 (4th Cir. 1995) (unpublished table decision).

198. In New Mexico, the outlier election would be the 2000 presidential election, in which New Mexico's Latino population was crucial to Al Gore's victory in the state.

adopting electoral schemes that hinder the ability of minority groups to elect the candidate of their choice.[199]

The above inquiry is only significant if a court examines the white vote solely within the state in which the minority group votes. In the context of a national popular vote, examining the white vote nationally makes more sense, as the actual dilution resulting from the NPV would arise at the national level. For example, the Latino vote in California would become a much smaller percentage of the national vote compared to whites nationwide than compared to whites only in California. Examining the white vote nationally reveals that whites would vote as a bloc to deny minority populations in these states the ability to elect candidates of their choice. In the 2004 election, the white vote was 77% of the electorate and supported George W. Bush with 58% of the vote.[200] All nonwhite racial groups, by contrast, supported John Kerry.[201] Because whites constitute a large majority of the national population, if they prefer a different presidential candidate than African Americans or Latinos they will be able to vote as a bloc to defeat the minority preferred candidate. Therefore, because Latino voters would not be able to control the outcome in California,[202] and could not always control the outcome in New Mexico,[203] their claims of vote dilution are strong.

iv. *The Totality of the Circumstances in California and New Mexico.* — Should plaintiffs succeed in meeting the three *Gingles* preconditions, they would not automatically succeed in claiming vote dilution.[204] Courts reviewing vote dilution claims under section 2 must also examine the totality of the circumstances surrounding the electoral device or scheme being challenged.[205] States whose move to the NPV is challenged could argue that the change does not constitute vote dilution because it would treat all voters in a state the same way.[206]

This argument should, however, fail on the merits. By their very nature, vote dilution claims involve challenges to facially neutral electoral procedures or practices that operate to dilute the votes of minority vot-

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199. This is the approach advocated in The Implications of Coalitional and Influence Districts, supra note 99, at 2605–06.

200. CNN 2004 National Exit Poll, supra note 136.

201. See id.

202. See CNN 2004 CA Exit Poll, supra note 129; MSNBC 2000 CA Exit Poll, supra note 131.

203. See CNN 2004 NM Exit Poll, supra note 183.

204. See, e.g., Issacharoff, Groups, supra note 90, at 881–82 (citing Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994)). But, as of summer 2006, in sixty-eight separate cases decided since *Gingles*, plaintiffs were able to establish the presence of all three *Gingles* preconditions. Those same plaintiffs failed at the totality of the circumstances stage only nine times. See Katz et al., Documenting Discrimination, supra note 188, at 660 & n.71.

205. See supra notes 86–89 and accompanying text.

206. One commentator has already suggested this argument. See Wilson, supra note 15, at 385 n.4.

ers—regardless of their effect on whites.[207] Therefore, whether the Plan treats everyone the same should be irrelevant.

States might argue more persuasively that any vote dilution is only caused by the electoral college's inherent biases.[208] Under such an argument, any minority vote dilution caused by the NPV would simply ensure that everyone's votes count equally.[209] Many courts could find this line of reasoning persuasive. It does seem a perversion of the doctrine of vote dilution for it to be used to uphold a scheme—the electoral college—that itself dilutes votes.

There are, however, two problems with the argument that the electoral college currently serves to dilute votes as a rationale for changing to the NPV. First, the Supreme Court held otherwise in *Delaware v. New York*.[210] Second, the Voting Rights Act is intended to protect against minority vote dilution, regardless of how minorities happen to possess the voting power they have. The controversy over which demographic groups actually benefit from the electoral college's structure[211] indicates that states defending the NPV by criticizing the electoral college would have difficulty presenting a compelling statistical case.

The remainder of the factors are so fact intensive that resolving them with respect to the states discussed is beyond the scope of this Note. Given the success rate of plaintiffs who satisfy the *Gingles* preconditions,[212] potential NPV plaintiffs in California and New Mexico would likely satisfy enough of the so-called "Senate factors"[213] to succeed in stating their vote dilution claim. Of course, as discussed above, satisfying the *Gingles* preconditions is no easy matter.

b. *Minority Vote Dilution in Hawaii.* — Were Hawaii to switch to the NPV, it would also face a potential minority vote dilution challenge. The

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207. See, e.g., Karcher v. Daggett, 462 U.S. 725, 761 n.27 (1983) (Stevens, J., concurring) (stating that even neutral plan may amount to vote dilution); Muntaqim v. Coombe, 366 F.3d 102, 113 (2d Cir. 2004) (noting that Congress made clear in amending section 2 that facially neutral plans that had disparate impact on minorities could give rise to vote dilution claim); Baker v. Cuomo, 58 F.3d 814, 823 (2d Cir. 1995) (same).

208. The debate surrounding potential biases of the electoral college is discussed supra notes 25–27 and accompanying text.

209. Regardless of which direction one thinks the electoral college's biases run, direct election of the President would equalize voting power. See, e.g., Abbott & Levine, supra note 21, at 132 ("[D]irect election of the president . . . equalizes voter influences on outcomes."); Audra L. Wassom, The Help America Vote Act of 2002 and Selected Issues in Election Law Reform, 29 T. Marshall L. Rev. 357, 394 (2004) (arguing that electoral college should be abolished in favor of direct election of President so all votes cast for President would be of equal weight).

210. See supra note 27.

211. See supra notes 21–24 and accompanying text.

212. See supra note 204.

213. See, e.g., Johnson v. Governor of Fla., 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (stating that totality of the circumstances inquiry is guided by so-called "Senate factors"); United States v. Blaine County, 363 F.3d 897, 903 (9th Cir. 2004) (same); Ruiz v. City of Santa Maria, 160 F.3d 543, 550 n.15 (9th Cir. 1998) (listing "[S]enate factors" in totality of the circumstances inquiry).

largest racial group in Hawaii is Asian Americans, who comprise 44.6% of the total Citizen Voting Age Population.[214] While less than 50% of the voting age population, Asian Americans could still satisfy the first prong of *Gingles* because they are nearly twice as prevalent as any other race in the state. Additionally, 14.2% of Hawaii's population considers itself to be biracial—part Asian and part another race—which puts the state's Asian population at closer to 58% statewide.[215] Only an extremely formalistic reviewing court would find Hawaii's Asian population insufficiently large to satisfy the first *Gingles* precondition.

i. *Why Hawaii's Asian American Community Satisfies the First* Gingles *Prong.* — Even if a court were to apply the first prong of *Gingles* rigidly, Hawaii's Asian American population exemplifies why the loss of coalitional and influence districts should give rise to section 2 claims. Because they constitute such a large proportion of the electorate, Asian Americans in Hawaii have shown significantly higher likelihoods of registering to vote and voter turnout than Asian Americans in other states.[216] If the core right protected by section 2 is to "ensure that members of a racial group have a fair opportunity to participate in the electoral process,"[217] the electoral college is the scheme that best effectuates that right for Hawaii's Asian American population.

ii. *Political Cohesiveness Among Hawaii's Asian American Community.* — Yet, should it meet the first precondition, the Asian American population's claim would likely fail to meet the second *Gingles* precondition,[218] because Hawaii's Asian Americans are not politically cohesive. In the 2004 election, the state's Asian American population narrowly supported John Kerry with 52% of the vote.[219] Further, although the data for this group is less reliable, those who self-identified as "other" supported Bush with 52% of the vote.[220] These figures would likely not meet the threshold for cohesiveness.[221] The failure of Hawaii's Asian population to meet the cohesiveness test demonstrates why the *Gingles* framework is a poor fit for analyzing vote dilution claims other than those aimed against at-large

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214. See U.S. Census Bureau, Census 2000 Redistricting Data Summary File, Hawaii, available at http://factfinder.census.gov/servlet/QTTable?_bm=Y&-geo_id=04000US15&-qr_name=DEC_2000_PL_U_QTPL&-ds_name=DEC_2000_PL_U&-redoLog=false (last visited Oct. 14, 2007) (on file with the *Columbia Law Review*).

215. Id.

216. See Pei-Te Lien, The Participation of Asian Americans in U.S. Elections: Comparing Elite and Mass Patterns in Hawaii and Mainland States, 8 Asian Pac. Am. L.J. 55, 97 (2002).

217. Gerken, supra note 72, at 1671; see also Testimony of Professor Pamela S. Karlan, The Continuing Need for Section 5 Preclearance, 5 Election L.J. 331, 339 (2006) (commenting that section 2 protects not only ability to elect, but also ability to participate).

218. See supra notes 84–85 and accompanying text.

219. See CNN, 2004 Presidential Exit Poll, Hawaii (2005), at http://www.cnn.com/ELECTION/2004//pages/results/states/HI/P/00/epolls.0.html (on file with the *Columbia Law Review*).

220. Id.

221. See supra note 190 and accompanying text.

districting. Here, demonstrable evidence exists that being the majority group in a particular state has energized the group to engage more deeply in the political process. A shift to the NPV would drastically limit the benefits of being the majority of voters in the election voters care most about.[222] The *Gingles* test makes no allowance for situations in which a minority group is powerful, yet happens not to be monolithic in its political views.

c. *Vote Dilution in Washington, D.C.* — Though not a state, Washington, D.C., receives three electoral votes, which makes it viable for vote dilution analysis regarding a switch to the NPV.[223] With an African American Citizen Voting Age Population of 55.7%, it also easily satisfies the first *Gingles* precondition. There is certainly political cohesiveness to meet the second precondition: In 2004, African Americans supported John Kerry with 97% of the vote,[224] and, in 2000, Al Gore received 93%.[225] Because a white majority nationally[226] would usually vote as a bloc to defeat the minority preferred candidate, the final *Gingles* precondition would also be satisfied.[227] The totality of the circumstances test that follows the *Gingles* analysis is difficult to resolve and beyond the scope of this Note. But, as a purely probabilistic matter, assuming the *Gingles* preconditions are met, a court would likely find that moving to the NPV dilutes African American votes in the District of Columbia.[228]

d. *Vote Dilution in Alabama Under the Electoral College.* — While moving to the NPV may dilute African American votes in Washington, D.C., it is the electoral college itself that arguably dilutes African American votes in Southern states like Alabama. The argument for vote dilution in Alabama would be that maintaining the winner-take-all format, rather than moving to a congressional-district scheme similar to those of Maine

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222. See, e.g., Douglas J. Amy, Real Choices/New Voices: How Proportional Representation Elections Could Revitalize American Democracy 27–28 (2d ed. 2002) (noting low voter turnout in non-presidential election years).

223. See U.S. Const. amend. XXIII (granting Washington, D.C., number of electors "in no event more than the least populous State"). This Note subsequently refers to Washington, D.C., as a state because it is treated as such for electoral college purposes.

224. See CNN, 2004 Presidential Exit Poll, District of Columbia (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/DC/P/00/epolls.0.html (on file with the *Columbia Law Review*).

225. See MSNBC, 2000 Presidential Exit Poll, Washington, D.C. (Nov. 7, 2001), at http://www.msnbc.com/m/d2k/g/polls.asp?office=P&state=dc (on file with the *Columbia Law Review*).

226. For a discussion of why the white population nationwide is the relevant group for comparison here, see supra notes 199–200 and accompanying text.

227. See supra notes 196–203 and accompanying text for a detailed discussion of the analysis of the third *Gingles* precondition.

228. This discussion is probably academic in nature. Because Congress would have to pass a law moving Washington, D.C., away from a state-based winner-take-all system, it could simply amend the Voting Rights Act to exclude such a change from violating section 2.

and Nebraska,[229] dilutes African American voting strength in presidential elections.[230]

i. *The Second and Third* Gingles *Prongs.* — For Alabama's African Americans, meeting the second and third *Gingles* preconditions is straightforward. They comprise 23.8% of the voting age population[231] and overwhelmingly preferred John Kerry in the 2004 election, but Kerry, like the previous seven Democratic nominees for President, had little chance of carrying the state.[232] He lost because the white majority voted in nearly as large numbers for George W. Bush.[233] The second and third *Gingles* preconditions are thus easily satisfied. Moreover, the history of voting discrimination in the South and racially polarized voting would weigh heavily in favor of a finding of vote dilution as part of the totality of the circumstances analysis.[234]

ii. *Meeting the First* Gingles *Prong.* — To meet the first *Gingles* prong, plaintiffs could make a novel and controversial argument. Because African Americans could be a majority in one of the state's six congressional districts (and are a majority in one district), they satisfy the requirement that the African American population be sufficiently large.[235] This argument, of course, only works if plaintiffs challenging the winner-take-all format seek to move to a district-based method of choosing electors. It would not work if plaintiffs seek to move to the NPV. Therefore, it appears that plaintiffs in a state like Alabama could succeed on a vote dilution claim challenging the electoral college.[236]

Assuming such a claim could succeed creates an interesting dilemma. The NPV would dilute the votes of African Americans in Washington, D.C., and potentially do the same for Latinos in New Mexico, Arizona, California, and Texas. Yet, the current system also dilutes the votes of African Americans in the Deep South. Whether courts would consider the effects of state-based shifts in methods of electing the President on minority groups outside the state in which the vote dilution claim is filed is an open question with no relevant case law on point.

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229. See supra note 19 and accompanying text.

230. For such an argument see Hoffman, supra note 24, at 999.

231. See U.S. Census Bureau, Census 2000 Redistricting Data Summary File, Alabama, available at http://www.census.gov/Press-Release/www/2001/tables/al_tab_4.PDF (last visited Sept. 25, 2007) (on file with the *Columbia Law Review*).

232. CNN, 2004 Presidential Exit Poll, Alabama (2005), at http://www.cnn.com/ELECTION/2004/pages/results/states/AL/P/00/epolls.0.html (on file with the *Columbia Law Review*) [hereinafter CNN 2004 AL Exit Poll]. For past Alabama presidential election results, see Hoffman, supra note 24, at 1000–01.

233. See CNN 2004 AL Exit Poll, supra note 232.

234. See Hoffman, supra note 24, at 1000.

235. Id. (stating Alabama's African American population is sufficiently large to satisfy the first *Gingles* prong).

236. Whether a court would actually agree is less than certain—but if a group of plaintiffs wanted to make this challenge, they would have a strong legal argument.

This Part has detailed how the NPV can, in certain states, result in either minority vote dilution, or retrogression, in violation of sections 2 and 5 of the Voting Rights Act. Furthermore, this Part has also discussed why the current electoral college system dilutes minority votes in the Deep South. While the current unsettled nature of Voting Rights Act case law makes it difficult to predict the outcome of litigation, at the very least, it is clear that piecemeal changes to how we elect the President are rife with potential legal difficulties.

III. Why States Should Reject the National Popular Vote Plan and How the Court Should Resolve the Coalitional and Influence District Dilemma

Until now, this Note has assumed that states are not acting perniciously in considering the NPV. In Part III.A, this Note poses a hypothetical scenario in which a state moves to the NPV to achieve partisan advantage, not to remove the inequities of the electoral college or to increase its influence in the presidential election process. Part III.B draws on the scenario to highlight the NPV's flaws and suggests alternative ways of abolishing the electoral college. Part III.C argues that the Supreme Court must clarify its position on influence and coalitional districts in cases involving claims under section 2 and section 5 of the Voting Rights Act.

A. *Crisis 2020: A Hypothetical Scenario*

1. *The 2020 Presidential Election.* — As the 2020 elections approach, the Republicans who control the Texas Legislature are getting nervous. The Latino population has grown from 28.6% of the overall state population in 2006 to 37.6%.[237] This growth has led the state's politics to trend Democratic. Republicans need not worry about losing their majority in the state legislature, however, because that legislature enacted an extreme partisan gerrymander during the 2010 redistricting.

Unfortunately for the Republicans, early polling shows likely Democratic nominee New York Governor Eliot Spitzer with a substantial lead in Texas over the soon-to-be Republican nominee South Dakota Senator John Thune. If the Democratic nominee carries Texas in the general election, he will have a "lock" on the electoral college, as Democrats still dominate the Eastern seaboard, California, and Illinois.

At the behest of Republican Party leaders, the state legislature passes a bill awarding its electoral votes to the winner of the national popular

237. The population figures are the U.S. Census Bureau's actual projections for Texas. See U.S. Census Bureau, Population Projections for States by Age, Sex, Race, and Hispanic Origin (Oct. 1996), available at http://www.census.gov/population/www/projections/ppl47.html#hl-race (on file with the *Columbia Law Review*).

vote.[238] The Republican Governor of Texas signs the bill into law.[239] With the addition of Texas, enough states now participate for the NPV to take effect. Several groups challenge the plan under sections 2 and 5, claiming vote dilution. As the case moves through the courts, polling makes clear that the Supreme Court's ruling will determine the outcome of the election. Regardless of how the Court rules, its legitimacy will be called into question—as in the aftermath of *Bush v. Gore*.[240]

The electoral college, while seriously flawed, was at least a known quantity. Its rules were clear and stable. In retrospect, there seemed to be great inherent value in a process that, while unfair, was equally unfair to both candidates.

2. *Presidential Partisan Gerrymandering*. — "Crisis 2020" is undeniably a worst case scenario. Yet changes in how elections are run are rarely without impact.[241] Presently, Democrats are pushing for the NPV in most states,[242] fueled by the memory of the 2000 election. But early studies of the 2008 presidential election and beyond suggest that such a view could be shortsighted, as the electoral college seems to place Democrats in a stronger position than Republicans.[243] If this were true, the NPV would

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238. Potentially, the legislature could do something more mischievous—like award the state's electoral votes to the winner of the popular vote in a reliably conservative state such as Utah.

239. Whether the Governor would even have the authority to sign or veto the bill is an open question. The Supreme Court has suggested, based on the literal text of Article II, Section 1, Clause 2 of the Constitution that the manner of choosing electors is the province of the state legislature exclusively. See Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); see also David A. Strauss, *Bush v. Gore*: What Were They Thinking?, 68 U. Chi. L. Rev. 737, 748 (2001) (noting that Supreme Court had created "independent legislature" doctrine). For a contrary view of the meaning of Article II, Section 1, Clause 2, see Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 Fla. St. U. L. Rev. 731, 737–39 (2001) (arguing that doctrine lacks any "textual, doctrinal, or policy rationale for its existence").

240. See, e.g., *Gore*, 531 U.S. at 128–29 (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); Bush v. Gore: The Question of Legitimacy vii–viii (Bruce Ackerman ed., 2002) (noting "sense of illegitimacy" arising from negative judgment of how government performed); Alan M. Dershowitz, Supreme Injustice: How the High Court Hijacked Election 2000, at 183 (2001) (arguing *Gore* majority undermined Court's moral authority); David Cole, The Liberal Legacy of *Bush v. Gore*, 94 Geo. L.J. 1427, 1427 (2006) (commenting that few other cases have as "deeply tested" Court's legitimacy as *Bush v. Gore*). But see Samuel Issacharoff, Political Judgments, 68 U. Chi. L. Rev. 637, 654–55 (2001) (claiming the Court's decision in *Bush v. Gore* added legitimacy to judicial intervention in political process).

241. See Issacharoff, Karlan & Pildes, Law of Democracy, supra note 43, at 139–40 (estimating impact of compulsory voting system); Michael M. Uhlmann, Federalism and Election Reform, 6 Tex. Rev. L. & Pol. 491, 498 (2002) (arguing that "[c]hanges in election procedures are seldom neutral in effect").

242. See Presidential Elections Reform Program, Fairvote, Presidential Election Inequality: The Electoral College in the 21st Century 51 (2006).

243. Id. at 7.

not be the first electoral reform that backfired on Democrats. The National Voter Registration Act of 1993 (better known as the "motor voter" law),[244] by making it easier to register to vote, was supposed to boost the fortunes of Democratic candidates. Instead, it appears that "motor voter" had the opposite effect and produced a more socially conservative electorate.[245]

Regardless of which party would gain from the NPV, tinkering with how the country elects the President for potential partisan benefit is troubling and theoretically unconstitutional. In the redistricting context at the state level, partisan gerrymandering may give rise to a constitutional violation.[246] The Supreme Court, however, has never found a redistricting plan to amount to partisan gerrymandering, and many commentators have argued that the bar for succeeding on a partisan gerrymandering claim is impossibly high.[247] Given the Court's reluctance to intercede on claims of partisan redistricting, it is exceedingly unlikely that it would uphold a challenge to the NPV on grounds akin to partisan gerrymandering.

3. *Problems with the Electoral College: "Swing" and "Spectator" States.* — At the same time, many motives for *keeping* the electoral college are no less invidious. Many Republicans continue to support the electoral college solely because of the 2000 election.[248] Furthermore, the electoral college may have a more deleterious impact on minority vote power than the NPV. This impact exists because the true electoral college bias is not

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244. 42 U.S.C. §§ 1973gg to -10 (2000).

245. Issacharoff, Karlan & Pildes, Law of Democracy, supra note 43, at 136.

246. See Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in judgment) (allowing for possibility of judicial relief in political gerrymandering cases); Davis v. Bandemer, 478 U.S. 109, 119–21 (1986) (holding claims of political gerrymandering justiciable as potential violations of equal protection clause).

247. See, e.g., Henderson v. Perry, 399 F. Supp. 2d 756, 760 (E.D. Tex. 2005) ("The light offered by *Vieth* is dim, and the search for a core holding is elusive."); Jesse H. Choper, The Political Question Doctrine: Suggested Criteria, 54 Duke L.J. 1457, 1487 (2005) (arguing that Court has created tests "nearly impossible for litigants to satisfy" in political gerrymandering cases); Samuel Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Tex. L. Rev. 1643, 1680–81 (1993) (discussing problems with methods for determining if political gerrymandering exists); Daniel H. Lowenstein, *Vieth*'s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?, 14 Cornell J.L. & Pub. Pol'y 367, 369 (2005) (noting lack of clear partisan gerrymandering standard after *Vieth*). No court has ever found a partisan gerrymander unconstitutional; however, the Fourth Circuit did hold that partisan gerrymandering states a claim upon which relief can be granted. Republican Party of N.C. v. Martin, 980 F.2d 943, 961 (4th Cir. 1992).

248. In California, for example, only one Republican voted for the bill, even though presently there is little chance of a Republican receiving the state's electoral votes, and prior to 2000 Republicans had attempted to move away from the state's winner-take-all method of allocating electoral votes. See Rick Lyman, Innovator Devises End Run Around Electoral College, N.Y. Times, Sept. 22, 2006, at A18. A similar movement sponsored by Republicans is currently ongoing. See supra note 113.

between small or large states,[249] but rather between so-called "swing" states, where either candidate has a chance of winning, and so-called "spectator" states, where the outcome of the vote is never in doubt.

In the most recent presidential election, the difference between living in a "swing" state and a "spectator" state was dramatic. The candidates purchased no television commercials whatsoever in twenty-three "spectator" states, while Florida alone had 55,477 individual airings of ads.[250] Unsurprisingly, voter turnout levels were significantly higher in swing states than in spectator states, with differences particularly acute among younger voters.[251] Further, as previously noted, there may also be socioeconomic benefits that derive from living in a swing state.[252]

Racial minorities are more likely to reside in spectator states than are white voters. Thirty percent of the nation's white population live in "swing" states, while just 21% of African Americans and 18% of Latinos live in "swing" states.[253] Thirty years ago, 73% of African Americans lived in what could be considered "swing" states.[254] This dramatic loss of influence might itself be viewed as retrogression under section 5. Moreover, to the extent there are benefits to be had from living in a competitive state, minorities are disproportionately denied them.

Also, the electoral college has few merits. Its defenders often assert that without the electoral college, small states would "have no voting clout at all."[255] This argument, if true, might be persuasive. One could describe the electoral college as a hybrid of the two houses of Congress—a structure intended by the Framers to ensure that the President would have to take the structure of federalism seriously.[256] Yet, in reality, small states that are not "swing" states simply do not benefit. In Mississippi, the state to which the above quote on voting clout referred, neither party's presidential candidate paid a single visit to the state during the 2004 cam-

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249. See supra notes 21–22 and accompanying text (discussing alleged biases in favor of large and small states).

250. FairVote—The Ctr. for Voting and Democracy's Presidential Elections Reform Program, Who Picks the President? 14 (2007), available at http://www.fairvote.org/media/research/who_picks_president.pdf (on file with the *Columbia Law Review*) [hereinafter FairVote, Who Picks].

251. See generally Daniel E. Bergan et al., Grassroots Mobilization and Voter Turnout in 2004, 69 Pub. Opinion Q., (Special Issue), at 760, 772 (2005) (noting "that battleground states had turnout rates that are five percentage points higher than those of nonbattleground states).

252. See supra note 143 (stating that "[s]tates may benefit financially from being viewed as competitive in presidential elections").

253. FairVote, Who Picks, supra note 250, at 23.

254. Id. at 24.

255. Editorial, Electoral College: Miss. Must Keep Clout, Jackson Clarion-Ledger, Jan. 23, 2007, at 8A.

256. See, e.g., Judith Best, The Case Against Direct Election of the President: A Defense of the Electoral College 205–18 (1971); Uhlmann, supra note 241, at 501 ("The Electoral College is animated by precisely the same organizing principle as the Congress.").

paign, nor did they spend a single dollar on campaign activities in the state.[257] Mississippi was not unique. In 2004, among the thirteen smallest states, only New Hampshire received significant attention from either Senator Kerry or President Bush.[258]

B. *Alternatives to the NPV*

This section argues for ending the electoral college due to its failure to engage the entire electorate. Because of the problems outlined in the "Crisis 2020" hypothetical, in addition to the VRA difficulties, the NPV is an imperfect mechanism for bringing about that change; further, it has additional legitimacy problems because it amounts to an end run around the Constitution. The traditional alternative—amending the Constitution—is simply unlikely to occur. So, this section suggests two alternatives to the NPV: adopting the Plan through state ballot initiatives or through a majority vote of both houses of Congress pursuant to Article I, Section 10's Interstate Compact Clause.

1. *Why the NPV and a Constitutional Amendment Won't Work.* — Fairness dictates that the electoral college should be abolished. The NPV is undoubtedly a clever alternative. But it is still an end run around the Constitution and should be struck down by the Court for that reason alone.[259] Simply put, the Framers intended the Constitution to be difficult to amend. In so doing, the Framers ensured the continuing relevance of the Constitution.[260] Furthermore, demanding that Congress and not a group of states abolish the electoral college avoids the Voting Rights Act implications of moving to direct election of the President. While the actions of states and their subdivisions are subject to the Voting Rights Act's requirements, the federal government has no such restraint.[261]

The prospects of a constitutional amendment abolishing the electoral college, however, remain slim,[262] and as a normative matter, if given

257. See FairVote, Who Picks, supra note 250, at 7.

258. See id. at 7–15.

259. See Ullman v. United States, 350 U.S. 422, 428 (1956) ("Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.").

260. See Erwin Chemerinsky, Amending the Constitution, 96 Mich. L. Rev. 1561, 1567 (1998) (reviewing David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995 (1996)) ("The profound public trust in the Constitution is one of its most important features[;] . . . Article V's mechanisms for amendment have been crucial to this public confidence since the Constitution's inception.").

261. Section 5 of the Act applies only to covered states and their political subdivisions. See 42 U.S.C. § 1973c(a) (2000). Section 2 of the Act applies to all states and their political subdivisions, but its language limits its coverage to those two entities. See id. § 1973(b).

262. See, e.g, William Josephson & Beverly J. Ross, Repairing the Electoral College, 22 J. Legis. 145, 151 (1996) ("[C]onstitutional elimination or reform of the electoral college seems unlikely to occur in the near future . . . ."); David S. Wagner, Note, The Forgotten Avenue of Reform: The Role of States in Electoral College Reform and the Use of Ballot

the choice between the electoral college and the NPV, the electoral college is the better approach. The NPV threatens to destabilize presidential elections by subjecting them to the enormous amounts of litigation that redistricting plans already face. Not surprisingly, opponents of the NPV are already threatening litigation challenging its constitutionality.[263] In many of the states discussed above, the challenges might rely on claims of minority vote dilution—with the likelihood of success varying both by state[264] and by how courts choose to interpret the "new" section 5 of the Voting Rights Act.[265]

No one desires a replay of the Florida election mess of 2000. Undoubtedly, the creators of the NPV were motivated by Florida and the questions of legitimacy that surrounded George W. Bush's ascent to the White House.[266] And, while scholars debate exactly who benefits from the electoral college, a system of voting that weights some votes more than others should not be used to elect candidates to a position as important as the Presidency.

But attempting an end run around the Constitution is the wrong way to effect change. Rather than improving the chances of having a President elected legitimately, it could cause state legislatures to rig the process in favor of the candidate of their choice. Further, as this Note has asserted, it could also run afoul of the Voting Rights Act.[267] While Congress is certainly capable of acting with a motive as partisan as that of the Texas Legislature in the "Crisis 2020" scenario above, some measure of congressional approval would serve to check either political party from seeking to eliminate the electoral college for immediate political gain.[268]

In the long run, however, the electoral college must go. Democracy simply does not function as well in an environment where two-thirds of

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Initiatives to Effect that Change, 25 Rev. Litig. 575, 593–95 (2006) (discussing cases holding that Constitution grants state legislatures power to appoint electors).

263. See Julia Silverman, Oregon, Other States, Consider End Run Around Electoral College, Associated Press, Jan. 29, 2007, available at http://www.theworldlink.com/articles/2007/01/29/news/news09012907.txt (on file with the *Columbia Law Review*).

264. See discussion supra Part II.B (discussing whether move to NPV would be impermissible vote dilution in violation of section 2 of Voting Rights Act).

265. See discussion supra Part I.B.1.c.

266. See Sarah Cooke, Bill Would Bypass Electoral College in Presidential Elections, Associated Press, Feb. 1, 2007, available at http://www.helenair.com/articles/2007/02/02/legislative/misc/98_01.prt (on file with the *Columbia Law Review*) ("Backers say the movement is aimed at preventing a repeat of 2000 . . . .").

267. See discussion supra Part II (discussing how NPV may violate Voting Rights Act in certain states).

268. This serves one of the goals of the Framers in creating the constitutional amendment process. See The Federalist No. 43 (James Madison), supra note 14, at 278 (noting that Article V "guards . . . against that extreme facility, which would render the Constitution too mutable"); E. Donald Elliott, Constitutional Conventions and the Deficit, 1985 Duke L.J. 1077, 1079–86 (1985) (observing that convention method of amendment allows for "making changes in the structure of our political institutions that we cannot expect the political institutions to initiate themselves").

voters are made to be bystanders.[269] Two variants of the NPV, while imperfect, offer the soundest practical paths to electoral college reform: Either ratification of the NPV by ballot initiative, or the eventual approval of the NPV as an interstate compact by a majority vote of Congress, would accomplish the goals of NPV supporters without provoking a crisis of legitimacy.[270]

2. *Ballot Initiative.* — From a policy perspective, adopting the NPV through a statewide initiative is preferable to a state legislature making the change on its own. In the states discussed above, the relevant minority communities have already demonstrated either a significant ability to influence the outcome of state elections or the ability to decide them outright.[271] Therefore, direct democracy can offer the communities some protection against a state legislature that seeks to dilute its vote for partisan gain.[272] Elections, of course, are unpredictable, and no guarantee exists that minority communities would succeed in defeating measures that diluted their voting power, but some protection is better than none. Further, using ballot initiatives to adopt the NPV mirrors the original process for ratifying the Constitution[273]—thereby removing some of the impropriety of such an end run around the Constitution.[274]

It is not clear, however, that the Supreme Court would permit modifications to the electoral college through an initiative. The language of Article II, Section 1 of the Constitution seems to limit the appointment of states' presidential electors to such a manner as the "legislature thereof may direct."[275] The question, then, is whether "legislature" can be construed broadly to include all the valid lawmaking processes of a particular state.[276] The Supreme Court has held that a ballot initiative can substi-

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269. See supra Part III.A.3.

270. See U.S. Const. art. I, § 10 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .").

271. See supra Part II.B.

272. See, e.g., Richard Briffault, Distrust of Democracy, 63 Tex. L. Rev. 1347, 1368 (1985) (book review) (claiming that value of initiatives is greatest in "those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures and regulation of the political process, taxation, and spending"). Presumably, if the minority population had grown to the point at which it could control the outcome of a state's vote for President, it could also determine the outcome of a statewide referendum.

273. See U.S. Const. art. VII.

274. See, e.g., Editorial, A Bad Gimmick, Chi. Trib., Oct. 16, 2006, at 18 (arguing NPV "violates the spirit of the Constitution"). It is, however, debatable whether initiatives themselves are in keeping with the spirit of the Constitution and the intent of the Framers. For an argument that they are not, see generally Marci A. Hamilton, Direct Democracy and the Protestant Ethic, 13 J. Contemp. Legal Issues 411 (2004) (arguing direct democracy is anathema to the Protestant influence on Framers' conception of democracy).

275. See supra note 17.

276. See, e.g., Bush v. Gore, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting) (arguing for broad interpretation of legislature); Smiley v. Holm, 285 U.S. 355, 363 (1932) (interpreting word "legislature" in Article I, Section 4 of Minnesota State Constitution to include normal lawmaking processes). But see Colo. Gen. Assembly v. Salazar, 541 U.S.

tute for the "legislature," but the case is nearly 100 years old.[277] On the surface, it appears that there are a maximum of four votes on the Court for a narrow interpretation of "legislature," indicating that a ballot initiative might pass constitutional muster.[278] At the same time, the Supreme Court has been reluctant to allow changes by state referendum to affect the means of electing federal officers.[279]

Most likely, state referendums would not produce the uncertainty that would surround legislative adoption of the NPV. And challenges to a referendum would likely occur before passage of the Plan, probably through injunctions that would force the courts to resolve quickly the legitimacy and constitutionality of this route of reform. Therefore, the "Crisis 2020" scenario could likely be avoided.[280]

3. *Interstate Compact.* — Another possibility is to treat the NPV as an interstate compact.[281] By the terms of Article I, Section 10 of the Constitution, congressional approval would then be required. Some NPV supporters have argued that the Plan is not a true compact as states are simply passing legislation contingent on action by other states, and accordingly the congressional approval is not required.[282] Other NPV proponents have advanced the notion that the implicit support of Congress might satisfy the Constitution.[283] The legal merits of both of these arguments are beyond the scope of this Note.

1093, 1094–95 (2004) (Rehnquist, J., dissenting) (arguing "legislature" should be construed narrowly).

277. Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916).

278. Justices Souter, Ginsberg, Breyer, Stevens, and Kennedy have all indicated they are opposed to a narrow reading of legislature in Article II, Section 1. *Gore*, 531 U.S. 98. The newest Justices—Alito and Roberts—have not yet had a chance to rule on the issue, but even if they joined with Justices Scalia and Thomas, they would still be a vote shy of a majority.

279. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806–09 (1995) (rejecting congressional term limits imposed by state referendum as an impermissible addition to constitutional qualifications for office). Interestingly, the dissenting Justices in *Thornton*—the same Justices who advocate a narrow reading of "legislature"—cited state power to change the qualifications for electors in the electoral college as an argument for allowing term limits by referendum. See id. at 861–63 (Thomas, J., dissenting).

280. See supra Part III.A.

281. "Compacts are agreements between two or more states that bind them to the compacts' provisions, just as a contract binds two or more parties . . . . As such, compacts are subject to . . . substantive . . . contract law and are protected by the constitutional prohibition against laws that impair the obligations of contracts." Council of State Gov'ts, Interstate Compacts and Agencies 7 (2003), available at http://www.csg.org/pubs/Documents/2003_Compacts_Directory.pdf (on file with the *Columbia Law Review*).

282. See, e.g., Robert Bennett, Commentary, California Bill Could Spur Changes in How We Elect President, Sept. 30, 2006, Chi. Sun-Times, at 14.

283. See Koza et al., supra note 110, at 212–13. This argument is based on the Supreme Court case *Virginia v. Tennessee*, which held that congressional consent for an interstate compact may be implied from the surrounding circumstances. 148 U.S. 503, 525 (1893).

As a policy matter, however, congressional approval of the NPV would offer several advantages. First, approval of the NPV as a compact would require only a majority vote of both houses of Congress—not the two-thirds vote a constitutional amendment would require—making the abolition of the electoral college easier.[284] Second, congressional approval would act as an important check against abuses by states in adopting the NPV. To be sure, Congress is partisan itself, and if both houses were controlled by the party seeking advantage through moving to the NPV, Congress ratifying the "Crisis 2020" scenario would not serve as much of a check on partisan abuse. If congressional action were seen as overtly partisan, however, individual members of Congress would risk losing their seats in the subsequent election. Moreover, congressional approval would negate any Voting Rights Act problems that the NPV may cause.[285] Finally, and perhaps most importantly, congressional approval would confer legitimacy on the NPV. The President is the Chief Federal Officer and changes to how he or she is selected should require the consent of a body that also represents the interests of the nation as a whole.[286]

C. *The Court Must Treat Coalitional and Influence Districts Differently Under Section 2 than Under Section 5*

Another method of removing the potential harm of the NPV is to clarify how coalitional and influence districts are to be treated under section 2. This is because the legality of the NPV in many states turns on how the court resolves this conflict.[287]

The law of section 5 preclearance is largely unknown in the wake of Congress's 2006 amendments to the Act.[288] This uncertainty is particularly problematic because without clear guidance from the courts as to the scope of changes that should now be precleared, the Department of Justice cannot know when denying preclearance is appropriate. As a result, the Justice Department may preclear changes where they should be denied on the merits. Or, alternatively, the Justice Department may increasingly deny preclearance to force new litigation that will clarify the law. The Court has noted that the preclearance procedures in section 5 already place substantial federalism costs on states. Denial of

284. See Koza et al., supra note 110, at 213.

285. See supra note 228.

286. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) ("[T]he power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution."); Buckley v. Valeo, 424 U.S. 1, 257 (1976) (White, J., concurring in part and dissenting in part) ("It is accepted that Congress has power under the Constitution to regulate the election of federal officers, including the President and Vice President.").

287. See Part II.B. supra.

288. See supra notes 67–71 and accompanying text.

preclearance for the sole purpose of forcing litigation might raise constitutional questions as well.[289]

The Court should recognize that Congress's clear intent in amending section 5 was to preserve as part of the retrogression inquiry the ability of minority groups to elect the candidate of their choice.[290] Doing so should mean that states may trade coalitional districts for safe districts, but it would not mean a trade for so-called influence districts is permissible. By their definition, influence districts do not preserve a minority group's ability to elect the candidate of its choice.[291] The Court must, however, require clear indicia that a coalitional district will in fact preserve the relevant minority group's ability to elect the candidate of its choice. A general rule requiring that the minority group elected its candidate of choice in the prior three elections would guard against retrogression.

In one sense, the need for clarification of the relevant doctrine under section 2 is greater because it covers the entire nation. At the same time, its provisions are enforced exclusively through private plaintiffs, not the federal government. Accordingly, rights must be redeemed through the courts, meaning that no action can be taken without a court getting involved, regardless of how clear the law is in advance. This does mean, however, that courts will ultimately have to say what the law is with respect to subtracting influence and coalitional districts.[292]

In *LULAC*, the Court appeared to hold that the loss of a minority influence district cannot give rise to a valid section 2 claim.[293] This position only makes sense as a doctrinal matter if the Supreme Court reads the amended section 2 to prohibit the substitution of influence districts for majority-minority districts. Otherwise, a state legislature will first be allowed to exchange a majority-minority district for an influence district at one round of redistricting. Then, at a future redistricting, the loss of the influence district, if precleared by the Attorney General, would not

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289. See, e.g., Reno v. Bossier Parish Sch. Bd. (Bossier II), 528 U.S. 320, 336 (2000) (speculating that exacerbation of federalism costs section 5 already imposes on states might "rais[e] concerns about § 5's constitutionality"); see also Miller v. Johnson, 515 U.S. 900, 926–27 (1995) (noting that "federalism costs exacted by § 5 preclearance" can only be justified by "extraordinary circumstances"); Ellen D. Katz, Federalism, Preclearance, and the Rehnquist Court, 46 Vill. L. Rev. 1179, 1181–82 (2001) (stating that section 5 "dramatically shifts the balance of power between the federal government and the States"); Daniel H. Lowenstein, You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases, 50 Stan. L. Rev. 779, 790 (1998) (commenting that preclearance process is "an unprecedented federal intrusion into the governing processes of the states").

290. See supra notes 67–68.

291. See supra note 151.

292. See, e.g., Jocelyn Benson, Preparing for 2007: Legal and Legislative Issues Surrounding the Reauthorization of Section 5 of the Voting Rights Act, 67 U. Pitt. L. Rev. 125, 153 (2005) (arguing Court in *Ashcroft* was confused as to true meaning of coalition and influence districts and further clarification is needed).

293. See supra note 178 and accompanying text.

give rise to any claim at all under the Voting Rights Act because section 2 would be foreclosed as a mechanism for blocking the redistricting.

Yet, even if forbidding influence district dilution claims under section 2 is doctrinally justified, there is a good policy reason for recognizing these types of claims. If a legislature were in fact acting with a discriminatory purpose to dilute a minority group's vote, it could give rise to a constitutional claim under the Fourteenth Amendment, even if the group had no ability to elect the candidate of its choice and was merely a small portion of the overall electorate.[294] Because section 2 measures discriminatory results, irrespective of discriminatory purpose,[295] it should not be harder to bring a claim under section 2 than it is under the Fourteenth Amendment, which requires a discriminatory purpose.

Conclusion

As states begin their 2007–2008 legislative sessions, the NPV appears to be gaining support across the country.[296] Initially viewed by many as an ingenious pipedream,[297] it is possible that enough states will have joined the NPV to make it a reality by the 2012 election. Although we have come close before,[298] it appears that this time the electoral college might finally be in jeopardy. Such a dramatic deviation from the intent of the Framers requires a legitimate political process—not simply legislation passed by as few as eleven state legislatures.[299] Moreover, if state legislatures adopt the NPV, presidential elections will be forced into the murky arena of Voting Rights Act jurisprudence, ensuring vast amounts of litigation.

Nevertheless, NPV supporters are correct to focus public attention on the electoral college. The way we elect the President is an anachronism that distances most Americans from choosing the most powerful official in the country. The best way to end the electoral college is through a constitutional amendment. Perhaps given the pressure NPV supporters are applying, Congress will finally pass an amendment. In the alternative, either submitting the NPV to Congress as an interstate compact for the approval of a majority of Congress, or adopting it through ballot initia-

294. See Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (holding petitioners had stated constitutional claim under Fourteenth Amendment even though there were only 400 black voters in city).

295. See supra notes 80–82 and accompanying text.

296. See, e.g., Push for Popular Vote Gaining More Support, Ft. Wayne J. Gazette, Jan. 17, 2007, at A3; Spotlight: Voting—Junk the Electoral College?—Effort Gaining in States to Reflect Popular Will, Com. Appeal (Memphis, Tenn.), Jan. 17, 2007, at A10.

297. See Hendrik Hertzberg, Count 'em, The New Yorker, Mar. 6, 2006, at 27, 27 (questioning "political feasibility" of plan while praising its intent).

298. See supra note 30 and accompanying text.

299. The eleven most populous states have a total of 271 electoral votes, meaning that if all eleven decided to switch to the NPV, the winner of the national popular vote would have enough votes in the electoral college to be elected president. See Amar & Amar, Direct National Elections, supra note 32.

tives in the states, provides a sounder method for ending the electoral college.

In recent months, the potential chaos of states being allowed to change their methods of electing the President has become all too clear. As this Note is being published, it is still unclear what the order of presidential primaries will be, as different states jockey for the honor of being among the first in the nation. Meanwhile, California voters will get to decide on a ballot initiative that would move away from state winner-take-all voting—but not to the NPV. Instead, the referendum proposes that the state copy Maine and Nebraska's formula of allowing congressional districts to determine who receives an electoral vote. Such a change would be extremely damaging to the Democratic Party's nominee for President. These examples, while not directly related to the NPV, demonstrate why states should not be allowed to casually change their rules for electing the President. It is true that the current system is flawed. But the right way to correct those flaws is through the constitutional amendment process—not through allowing state legislatures to make partisan choices intended to help their preferred candidate in the next election.