

Article

Disappearing Districts: Minority Vote Dilution Doctrine as Politics

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Minority vote dilution doctrine is once again under stress. Decades after the Supreme Court eviscerated Constitution-based approaches to redressing minority vote dilution under the Fourteenth and Fifteenth Amendments,¹ Congress's statutory response, amended section 2 of the Voting Rights Act of 1965,² is similarly endangered. The forces that beset section 2 and minority vote dilution doctrine are both demographic and doctrinal. In demographic terms, certain types of majority-minority districts, namely majority-black ones, are becoming more difficult to create or maintain because of black population dispersal,³ the atrophy of total population in historically black districts, and the relatively high percentage of blacks who are not of voting age.⁴ The doctrinal problem is in part an outgrowth of these trends. In *Pender County v. Bartlett*, the North Carolina Supreme Court held that when a state creates a district pursuant to section 2, the minority group for whom the district is created must constitute a majority of the voting-age population in the remedial district.⁵

The North Carolina court's decision was premised primarily on statutory interpretation and *stare decisis* rather than a rigorous theory of vote dilution.⁶ Yet the constricted prism

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1. *City of Mobile v. Bolden*, 446 U.S. 55, 76–78 (1980).
2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973bb (2000)).
3. *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).
4. *Georgia v. Ashcroft*, 539 U.S. 461, 499 (2003) (Souter, J., dissenting).
5. 649 S.E.2d 364, 372 (N.C. 2007), *aff'd sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).
6. *See id.* at 370–72 (relying on the “plain language of Section 2” and the fact that “the majority of federal circuit courts confronting the question have

through which the court viewed the issue belies several broader implications of the case. First, the court's numerosity requirement exacerbates questionable judicial distinctions between qualitative vote dilution claims (such as minority vote dilution) and quantitative claims (such as one person, one vote). The latter claims are typically based on equality of population generally, not equal numbers of voting-age citizens.⁷

Second, because North Carolina had demonstrated that black voters in the at-issue district could elect the candidate of their choice as a plurality with the aid of white crossover votes, the North Carolina Supreme Court effectively imposed on section 2 an unconstitutional requirement that the state overuse race.⁸ In *Shaw v. Reno* and its progeny, the United States Supreme Court voided several majority-minority congressional districts that it found were created principally on the basis of race without compelling justification.⁹ If a state may violate the Fourteenth Amendment by creating too many black districts without justification, it may also violate the Constitution by overaggregating or packing blacks in a single district.

Third, *Pender County* is cautionary because North Carolina acted of its own accord in creating the section 2 district at issue.¹⁰ In confining the legislature's ability to address minority vote dilution only to circumstances where the minority could be a voting-age majority,¹¹ the North Carolina Supreme Court limited the use of the Voting Rights Act as a justification for preemptive remediation. Yet in constitutional cases involving the Fourteenth Amendment—including voting cases—the United States Supreme Court has afforded states latitude to remedy racial underrepresentation and other concerns. *Pender County* renders it more difficult for states to preemptively address minority vote dilution under section 2 than other forms of racial underrepresentation under the Constitution itself. This outcome is particularly untoward because section 2 was

concluded that, when a district must be created pursuant to Section 2, it must be a majority-minority district").

7. See, e.g., *Moore v. Itawamba County, Miss.*, 431 F.3d 257, 259–60 (5th Cir. 2005) (finding a violation of the Equal Protection Clause based on general population deviation); *Daly v. Hunt*, 93 F.3d 1212, 1219–21 (4th Cir. 1996) (same).

8. *Pender County*, 649 S.E.2d at 366–67.

9. 509 U.S. 630, 641–42 (1993).

10. *Pender County*, 649 S.E.2d at 366.

11. *Id.* at 372.

amended in 1982 to avert the difficulties of bringing constitutional vote dilution claims.¹²

Finally, the very question of whether a minority must be capable of numbering a voting-age majority in a district before it is entitled to representation is a puzzling query if one substitutes any other interest group (for example, gun owners) for the term “minority.” The court in *Pender County* misconceived minorities as distinct from other interest groups regarding a characteristic on which they are quite similar. An interest-group or coalition conception of minority voters would not deploy their lack of voting-age numerosity to deprive them of representation. Interest groups are concerned foremost with their candidates and issues prevailing.¹³ Their majority status, voting age or otherwise, is a concern only to the extent it is a necessary precondition to their candidates or issues winning. Thus, *Pender County* treats minority voters as exceptional in the districting process in much the same way as the Supreme Court treated them as aberrational in *Shaw v. Reno* and its progeny. These courts have simply shown an inability to graft minorities onto the prevailing two-party, interest-group structure of politics and to treat them similarly to other groups when they are similar and differently when they are different. The effect of this judicial confusion is twofold. First, it discriminates against minority voters. Second, it creates further inconsistency between the Supreme Court’s recognition of states’ interest in a stable, party-based political system on the one hand and the role of minorities in that system on the other.

Below, after discussing why black districts are disappearing, I amplify each of these arguments. I offer these contentions not as an endorsement of coalition districts as the preferred type of remedial district under section 2, but rather as a way of reconciling section 2 jurisprudence with other relevant dimensions of the Supreme Court’s ballot-box jurisprudence. Politics happens on the ground, where the Court’s rulings on electoral politics must necessarily interact with each other, laying bare inconsistencies. *Pender County* must be evaluated in this larger context.

12. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1973–1973bb (2000)).

13. *But see* Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 426 n.64 (“In candidate elections, many interests [sic] groups are concerned less with which candidate wins and more with having access to the ultimate winner once he or she takes office.”).

I. PENDER COUNTY AND THE DEMOGRAPHIC CHALLENGE TO MAJORITY-MINORITY DISTRICTS

Pender County v. Bartlett is an atypical section 2 lawsuit. The State of North Carolina was sued not for its failure to create a remedial district under section 2, but rather for its preemptive creation of such a district.¹⁴ The plaintiffs, Pender County and five of its county commissioners, contended in their suit that North Carolina had violated a state constitutional prohibition on the splitting of counties (the Whole County Provision) in the creation of State House District 18.¹⁵ North Carolina defended on the ground that the creation of District 18 was mandated by section 2 of the Voting Rights Act of 1965, which forbids “denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”¹⁶ Section 2 measures denial or abridgment based on whether a protected group enjoys an equal opportunity to participate in the political process and to elect representatives of its choice.¹⁷ House District 18, however, did not reflect the traditionally preferred remedy for a section 2 violation—the creation of a majority-minority district.¹⁸ Instead, District 18 consisted of “a total African-American population of 42.89 percent, and an African-American voting age population of 39.36 percent.”¹⁹ Prior North Carolina elections had shown that legislative districts with a black population of at least 41.54 percent and a black voting age population of at least 38.37 percent would afford blacks, consistent with section 2’s command, the ability to elect their preferred candidate.²⁰ District 18 fell within these parameters.²¹

Much of the North Carolina court’s attention focused on *Thornburg v. Gingles*,²² the earliest United States Supreme

14. *Pender County*, 649 S.E.2d at 365–66.

15. *Id.* at 367.

16. *Id.* at 367–68 (quoting Voting Rights Act of 1965, 42 U.S.C. § 1973(a)).

17. 42 U.S.C. § 1973(b).

18. Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 289 (1998) (“While not required under the Act, the remedy of choice for section 2 violations has become the creation of majority-minority single-member districts.”).

19. *Pender County*, 649 S.E.2d at 374.

20. *Id.* at 380.

21. *Id.*

22. *See id.* at 378–79.

Court case interpreting amended section 2.²³ In *Gingles*, the United States Supreme Court set forth three preconditions for a successful vote dilution claim under section 2:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.²⁴

Although the Court in *Gingles* expressly declined to apply its preconditions to cases such as *Pender County*, where the minority group does not constitute a majority in the section 2 district,²⁵ the plaintiffs in *Pender County* argued that section 2 does not require the creation of a remedial district where the protected group for whom it is created would not constitute a voting-age majority in the new district.²⁶

The North Carolina Supreme Court agreed.²⁷ The court first observed that there was no reason why the numerosity requirement of *Gingles* should not also apply in the case before it, even though *Gingles* involved a challenge to a multi-member district, whereas *Pender County* was challenging the creation of a single-member district.²⁸ The court next noted that a majority of federal circuits have required a section 2 remedial district to consist of a majority of voting-age citizens of the protected group.²⁹ It found these cases availing because:

If a minority group lacks the voting population “to independently decide the outcome of an election,” it cannot demonstrate that its voting strength has been diluted in violation of Section 2 because it cannot show that any electoral structure or practice has thwarted its ability or potential to elect candidates of its choice.³⁰

Finally, the North Carolina Supreme Court concluded that a voting-age majority requirement creates a judicially manageable standard that can “be applied fairly, equally, and consis-

23. *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

24. *Id.* at 50–51 (citation omitted).

25. *Id.* at 46 n.12.

26. *Pender County*, 649 S.E.2d at 371.

27. *Id.* at 372.

28. *Id.*

29. *Id.*

30. *Id.* at 372–73 (quoting *Hall v. Virginia*, 385 F.3d 421, 429 (4th Cir. 2004)).

tently throughout the redistricting process,” and should make litigation more predictable and less frequent.”³¹

House District 18 exemplifies a coalition district. Coalition districts are electoral units in which a racial minority does not constitute a majority of the voters but is nevertheless able to elect the candidate of its choice because of the crossover votes of sympathetic whites.³² These districts pose two problems in the representation of minority interests. First, they may adversely affect the substantive representation of minorities by inhibiting the racial liberality of the representative elected from such a district.³³ Second, they may redouble a minority group’s focus on race because the minority is required to be especially cohesive if it is to elect the candidate of its choice in a district in which it is not the majority.³⁴

Notwithstanding these concerns, coalition districts may be necessary if vote dilution doctrine is to have continuing vitality in the face of demographic trends. Of the forty-two members of the Congressional Black Caucus, only twenty-one hail from districts that contain a black-majority, voting-age population.³⁵ Thus, section 2 litigation regarding the remaining districts would face a substantial hurdle were courts to impose a voting-age majority requirement.³⁶ Part of the difficulty in maintaining or creating districts with black voting-age majorities stems from the relative youth of the black population. According to the 2000 Census, while only 23.5 percent of the white popula-

31. *Id.* at 373 (“Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates.”).

32. Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 293 (2005). Sometimes courts distinguish between crossover and coalition districts depending upon whether minority voters join with another minority group or a faction of the majority voting group to achieve an effective majority. *See, e.g., Pender County*, 649 S.E.2d at 371.

33. Smith, *supra* note 32, at 293–94.

34. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 798 (2008).

35. U.S. Census Bureau, American Community Survey, 110 Congressional District Summary File (2007), <http://factfinder.census.gov/servlet/DatasetMainPageServlet> (referring to data compiled using table “District by Race for Persons 18 Years or Older”).

36. The non-retrogression mandate of section 5 would protect the existence of these districts if they are located in a covered jurisdiction and if section 5 did not similarly look solely to the voting-age population as its measure of non-retrogression. *See* 42 U.S.C. § 1973c (2000).

tion is below the voting age of eighteen,³⁷ nearly one-third (31.4 percent) of the black population is below the voting age.³⁸ Majority-black congressional districts were also among those losing the greatest overall population between 2000 and 2007. Of the twenty-five congressional districts experiencing the greatest population decreases during this period, nine are majority-black and thirteen are represented by blacks.³⁹ In addition to necessitating that surrounding populations be adjoined to these districts at the next decennial reapportionment, these population decreases portend difficulty in maintaining a black-majority district if the adjoining areas are not also predominantly black.

The *Pender County* court did not weigh these national demographic realities or the specific trends in North Carolina before holding that section 2 required the minority group to constitute a voting-age majority in a remedial district. Yet these trends may render it difficult to satisfy the court's numerosity requirement even when vote dilution is present and the need for a remedy is otherwise demonstrable. In this regard, the *Pender County* court was faced with a choice between allowing demographics to dictate vote dilution doctrine and calibrating vote dilution doctrine to account for demographic realities.

II. ONE PERSON, ONE VOTE AND THE UNEQUAL DEMANDS OF QUALITATIVE VOTE DILUTION CLAIMS

In opting to allow demographics to dictate vote dilution doctrine, the court eschewed reference to quantitative vote dilution claims, which likely would have directed it to the opposite conclusion. Although the United States Supreme Court's one-person, one-vote jurisprudence has long elided difficult questions about the relevant population for determining whether districts are equipopulous,⁴⁰ the Court appears to have

37. U.S. CENSUS BUREAU, WHITE POPULATION, BY AGE AND SEX FOR THE UNITED STATES: 2000 (2002), <http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab02.pdf>.

38. U.S. CENSUS BUREAU, BLACK OR AFRICAN AMERICAN POPULATION, BY AGE AND SEX FOR THE UNITED STATES: 2000 (2002), <http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf>.

39. Swing State Project, *Population Change by Congressional District*, Sept. 3, 2008, <http://www.swingstateproject.com/showDiary.do?diaryId=2952> (ranking the congressional districts with the greatest population losses between 2000 and 2007).

40. *See, e.g.,* *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from the denial of certiorari) ("Having read the Equal Pro-

settled on total population as an acceptable metric (rather than, for example, voting-age population or registered voters).⁴¹ In treating section 2 remedial districts as *sui generis*, the North Carolina Supreme Court continued a pattern of imposing more stringent requirements on qualitative vote dilution claims than quantitative vote dilution claims.⁴² The result is to substantially defeat the point of providing a statutory alternative to constitutional vote dilution claims.

Courts do not recognize a unitary standard for constitutional vote dilution claims.⁴³ The typical quantitative claim is relatively straightforward.⁴⁴ A state's failure to adhere to equal population standards requires it to justify its deviation.⁴⁵ The plaintiff's burden is minimal—it simply points out the absence of adherence to equipopulation principles.⁴⁶

In contrast, a plaintiff who alleges racial vote dilution in violation of the Fourteenth and Fifteenth Amendments must show discriminatory intent, which means more than mere acquiescence by a decision maker in the harmful effects of a redistricting plan.⁴⁷ But despite these different evidentiary burdens, the plaintiffs in both quantitative and qualitative vote dilution suits suffer a similar type of harm: debasement of the right to vote (albeit based on different characteristics).⁴⁸

tection Clause to include a 'one-person, one-vote' requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined. We have never determined the relevant 'population' that States and localities must equally distribute among their districts.”).

41. Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 232 (2003).

42. Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 575–80 (1995).

43. *Id.* at 561–62.

44. *See id.* (comparing the judicial approaches to qualitative and quantitative vote dilution claims).

45. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

46. *See Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983) (stating that the plaintiff must show “the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population”).

47. *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion).

48. Phillips, *supra* note 42, at 581–82 (“The starting point of the rational approach to vote dilution issues must be that a member of a racial faction has the same right to effective participation in political life as promised to whites in *Reynolds* . . .”).

The different treatment of constitutional quantitative and qualitative claims, namely the imposition of a discriminatory intent requirement on the latter, led to the amending of section 2 in 1982 to create a disparate impact standard and ease the prosecution of minority vote dilution claims.⁴⁹ With its voting-age-majority-minority requirement, the *Pender County* court perpetuated undue distinctions between quantitative and qualitative claims, but this time under section 2 instead of the Constitution. Ironically, vote dilution claims under section 2 may become more difficult to bring because courts refuse to abide by the practice of relying on total population, instead of voting-age population, in one person, one vote claims. Thus, the salutary effects of escaping the intent requirements of the Fourteenth and Fifteenth Amendments have been excised by declining to apply other constitutional norms.

III. SHAW'S SHADOW

Although unusual because it required the defendant state, rather than the plaintiffs, to prove the preconditions of *Thornburg v. Gingles*,⁵⁰ the posture of *Pender County* was otherwise similar to a series of racial gerrymandering cases the Supreme Court entertained throughout the 1990s, beginning with *Shaw v. Reno*.⁵¹ In each case, states allegedly created majority-minority congressional districts primarily on the basis of race and defended them by citing sections 2 and 5 of the Voting Rights Act of 1965.⁵² North Carolina's burden of proof in *Pender County* was measured against section 2 and the state constitution's prohibition on splitting counties.⁵³ The *Shaw* cases implicated vote dilution under section 2 and non-retrogression under section 5, requiring states to demonstrate that these provisions

49. *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) ("The intent test was repudiated for three principal reasons—it is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities, it places an inordinately difficult burden of proof on plaintiffs, and it asks the wrong question.") (internal quotations omitted).

50. *Id.* at 46.

51. 509 U.S. 630 (1993).

52. *Abrams v. Johnson*, 521 U.S. 74, 85 (1997) (asserting sections 2 and 5 of the Voting Rights Act of 1965 as a defense to a claim of unconstitutional racial gerrymandering); *Bush v. Vera*, 517 U.S. 952, 976 (1996) (plurality opinion) (pointing to section 2 and section 5 for justification); *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) (arguing that compliance with section 2 and section 5 is a compelling state interest).

53. *Pender County v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007), *aff'd sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

necessitated the drawing of irregular lines to create majority-minority districts.⁵⁴ The *Shaw* cases, however, centered on the states' alleged overuse of race—their proverbial segregation of the races in redistricting.⁵⁵ *Pender County*, on the contrary, asked whether states could provide a remedy at all, if that remedy was something less than a majority-minority district.

The essence of a claim under *Shaw v. Reno* is that a state, without compelling justification, has permitted race to predominate in its redistricting decisions by subordinating traditional districting criteria.⁵⁶ If the Fourteenth Amendment constrains states' use of race in redistricting, *Shaw* clashes with a requirement under section 2 that states create nothing less than a majority-voting-age-minority district where a lesser number might suffice. Coalition formation is a bedrock principle of politics in general and districting in particular.⁵⁷ Because North Carolina had demonstrated that racially polarized voting could be sufficiently contained to permit a limited coalition between blacks and certain white voters, the *Pender County* court's insistence on a majority-black district⁵⁸ subordinated a traditional districting criterion to race. In essence, the court eliminated the opportunity for black voters to participate in normal politics merely because they could not constitute a racial majority in a putative district.

In addition to creating constitutional concerns under *Shaw*, the North Carolina court's interpretation pits section 2 against itself. Section 2 not only ensures that minorities have an equal opportunity “to elect representatives of their choice,” but also that they can equally “participate in the political process.”⁵⁹ Although section 2 does not define “opportunity . . . to participate in the political process,” the term cannot be read

54. *Abrams*, 521 U.S. at 85; *Bush*, 517 U.S. at 976; *Shaw*, 517 U.S. at 911.

55. *Shaw*, 509 U.S. at 647 (“A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.”).

56. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.”).

57. See *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003); *infra* Part IV.

58. *Pender County*, 649 S.E.2d at 371–72.

59. Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 42 U.S.C. §§ 1973–1973bb (2000)).

as redundant of electoral opportunity and includes the panoply of activities for achieving political goals, including dialogue, lobbying and coalition-building.⁶⁰ The formation of coalitions, where they are not otherwise unfeasible because of racially polarized voting, certainly constitutes protected participation in the political process. The North Carolina court interprets section 2's protection of minorities' equal opportunity to elect at the expense of derogating their equal opportunity to participate in the political process.

Setting to one side concerns with the subordination of traditional districting criteria, *Shaw* and its progeny are predicated on the broader harms caused by the overuse of race in districting, namely, racial stereotyping.⁶¹ If a state may inflict this harm by adjoining what the Supreme Court concluded were unrelated communities of color for purposes of maximizing the number of black congressional districts,⁶² it is difficult to see why a racial group is not similarly harmed when it is overaggregated into a single district. *Pender County* requires this type of packing,⁶³ regardless of whether it is needed to nullify the effects of racially polarized voting.

The *Shaw* cases are factually but not analytically distinguishable from the excess use of race imposed by the *Pender County* court's numerosity requirement. North Carolina abrogated a state constitutional requirement of not dividing counties in order to comply with section 2 of the Voting Rights Act, a provision which the United States Supreme Court has assumed without deciding would be a compelling state interest in its racial gerrymandering cases.⁶⁴ The Supreme Court has admonished, however, that states' efforts to comply with section 2 will abridge the Equal Protection Clause if race is used gratuit-

60. Kathryn Abrams, *'Raising Politics Up': Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 452-53 (1988).

61. *Miller*, 515 U.S. at 920 ("[W]here the State assumes from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls, it engages in racial stereotyping at odds with equal protection mandates.") (internal quotations omitted). I have rejected as fictional the injury asserted by the white plaintiffs in *Shaw*. See Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Part Paradigm*, 48 DUKE L.J. 1, 44-51 (1998). I do not here ascribe to the Court's reasoning but simply apply it to the section 2 context.

62. See, e.g., *Miller*, 515 U.S. at 920.

63. *Pender County*, 649 S.E.2d at 371-72.

64. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion).

ously.⁶⁵ In *Bush v. Vera*, the Court rejected Texas's attempt to invoke section 2 as a defense to a claim that certain of its congressional districts had been drawn principally on grounds of race. According to the Court, nothing in section 2 required the drawing of irregular district lines connecting dispersed minority populations.⁶⁶ Like *Pender County*, the focus of *Bush* was the first *Gingles* precondition that a minority group be sufficiently large and geographically compact to constitute a majority in a single-member district.⁶⁷ Unlike *Pender County*, however, the *Bush* Court's focus was on geographic compactness⁶⁸ rather than numerosity. *Bush*'s insistence on geographic compactness complemented, and was purportedly integral to, its vigilance of the gratuitous use of race. The North Carolina Supreme Court's numerosity requirement, on the other hand, did not advance that constitutional interest, and indeed augmented the role of race for its own sake.⁶⁹

IV. RACE AND PREEMPTIVE REMEDIATION

The preemptive posture of *Pender County* poses a larger question of whether a state's burden of proof for the creation of a remedial district is the same as a plaintiff's burden if the state were sued for failing to create such a district. The Supreme Court has generally recognized three bases for the preemptive creation of a remedial minority-enhanced district: (1) compliance with section 2 of the Voting Rights Act;⁷⁰ (2) compliance with section 5 of the Voting Rights Act;⁷¹ and (3) remedying past or present discrimination.⁷² With respect to the section 2 justification, in lieu of imposing the technical evidentiary standards that a plaintiff must meet, the Court has ac-

65. *Id.* at 979 (“[T]he district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is ‘reasonably necessary’ to avoid § 2 liability.”).

66. *Id.*

67. *Id.*

68. *Id.*

69. Were a state to mandate the same gratuitous use of race in, for instance, the assignment of students to secondary or elementary schools, there is now little question that such a plan would violate the Fourteenth Amendment in the absence of compelling justification. *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753–54 (2007) (declaring unconstitutional school districts' student-assignment systems that made the race of the student “determinative standing alone”).

70. *Bush*, 517 U.S. at 976.

71. *Id.* at 982–83.

72. *Id.* at 981.

corded states deference, requiring only “a strong basis in evidence”⁷³ and emphasizing that “the States retain a flexibility that federal courts enforcing § 2 lack, . . . insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability.”⁷⁴ Thus, one could argue that North Carolina’s decision to create a voting-age black plurality district need not adhere to the strict letter of section 2 in the absence of a clear prohibition on its interpretation of section 2’s numerosity requirement.

But the posture of the case lends itself to a still bolder proposition about preemptive remediation by states in redistricting. Although there is little doubt that the Supreme Court has been reluctant to allow race-based state action, “not every decision influenced by race is equally objectionable”⁷⁵ Thus, in *Grutter v. Bollinger*, the University of Michigan’s Law School admissions program, which used race as an ingredient in evaluating applicants, survived strict scrutiny because it was narrowly tailored toward furthering the compelling interest of ensuring a diverse student body and the educational benefits that flow therefrom.⁷⁶ In so holding, the Court afforded the state a measure of deference because the Law School was in the best position to know the benefits of student diversity:

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions⁷⁷

Similarly, in the Supreme Court’s most recent school assignment case, the Court ultimately rejected Seattle’s system for assigning students to secondary schools as overly race-based. Justice Kennedy’s pivotal fifth vote in a concurring opinion acknowledged that “[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”⁷⁸

73. *Id.* at 979.

74. *Id.* at 978.

75. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

76. *Id.* at 328–29.

77. *Id.* at 328.

78. *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct.

States do not have a less compelling interest in achieving diversity in their representative bodies than in their educational systems.⁷⁹ Section 2 of the Voting Rights Act has been one vehicle for achieving this diversity. It should not be easier for states to act preemptively under the Constitution to effectuate diversity in the classroom than it is for them to proactively remedy vote dilution under section 2, which was amended to avoid the difficulties in bringing constitutional vote dilution claims.⁸⁰ Instead, the deference accorded states in other contexts, such as diversity in education,⁸¹ should be accorded them in the preemptive use of section 2. This deference would be consistent with the Supreme Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan."⁸²

V. STRONG PARTIES, STRONG INTEREST GROUPS, COALITION DISTRICTS

I begin this Part by reprising a heuristic from an article in which I argued that the Supreme Court's racial gerrymandering jurisprudence undercut its two-party jurisprudence by making it unduly difficult for African Americans to enjoy the ordinary prerequisites of their party fealty, including districts drawn to elect the candidate of their choice.⁸³ Gratuitous race exceptionalism in section 2 vote dilution doctrine works a comparable harm to states' interest in stable party government—an interest recognized as important by the Supreme Court.⁸⁴

Suppose members of the Christian Conservative Coalition in Georgia began flexing their growing political muscle. Coalition members are overwhelmingly white and Republican, although they tend to outflank Republicans on the right of certain issues. Principal among these is abortion . . . Frustrated that fellow Republicans rarely go

2738, 2792 (2007).

79. A central reason for finding diversity to be a compelling interest in the educational context was the need "to cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. According to the Court, to achieve this legitimacy, "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* It is difficult to exclude these considerations from the make-up of a body of officials elected to be responsive to myriad societal concerns.

80. See *Bush v. Vera*, 517 U.S. 952, 976 (1996) (plurality opinion) (discussing the addition of the results test).

81. *Grutter*, 539 U.S. at 328–29.

82. *Bush*, 517 U.S. at 952, 978.

83. Smith, *supra* note 61, at 4.

84. *Id.* at 9–15.

the distance in espousing the Coalition's views on abortion, the leadership of the Coalition threatens Republican members of the Georgia Assembly that if they do not create a congressional district favoring the election of Ron Davis, a popular Republican state legislator who has been a fervent advocate of the Coalition's agenda, the Coalition will actively encourage its members to sit out the next election, which would deprive Republicans of much-needed conservative votes Since major parties can gerrymander to achieve a roughly proportional allocation of seats between themselves, there is no reason to believe that they cannot gerrymander to maintain an electoral coalition that is critical to the party's success at the polls.⁸⁵

As the hypothetical underscores, American two-party politics is coalitional in nature. If Republicans in Georgia responded to the Christian Coalition's request by insisting that no district could be created on their behalf because they were not a voting-age majority in the relevant geographic area, it would be difficult for Republicans to perpetuate their party. Moreover, it would be difficult for the state of Georgia to further what the Supreme Court has recognized as an important interest in "preserv[ing] the political parties as viable and identifiable interest groups."⁸⁶ Racial minorities are, of course, a racial group, but within the electoral process they are likewise an interest group.⁸⁷ Although the Supreme Court has been remarkably inconsistent in aligning blacks between these categories,⁸⁸ it has permitted race to be used in furtherance of partisan gerrymandering.⁸⁹ Moreover, political parties themselves have seized section 2's non-dilution mandate for partisan gain.⁹⁰ Thus, although section 2 is written as a protection of the right to vote for racial and language groups, it is also fundamentally a statute about interest-group, two-party politics, for that is the context in which the statute's protections must operate.

Imposing a numerosity requirement on racial minorities when no such requirement exists for the Christian Coalition discriminates against racial minorities. The requirement deprives them of the right to form the very coalitions that are the

85. *Id.* at 23–24.

86. *Clingman v. Beaver*, 544 U.S. 581, 585 (2005).

87. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1223 (1996) (noting the impossibility of distinguishing race from party affiliation as an explanation of black voting behavior).

88. Smith, *supra* note 32, at 281–89.

89. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

90. Pamela S. Karlan, *The Right to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1734–35 (1993) (discussing Republican attempts to maximize majority-minority legislative districts in order to convert Democratic districts dependent on black-white coalitions).

core of stable party government. In so doing, it prevents the Supreme Court's ballot-box jurisprudence from operating as an integrated whole, because it is difficult for states to foster vibrant political parties if Democrats must consistently apply constraints to their black constituencies that Republicans are not compelled to apply to their primarily white constituencies, such as the putative Christian Coalition. The exceptional treatment of minorities in the districting process is justifiable where racial bloc voting in conjunction with other historical and socioeconomic circumstances precludes cross-racial coalitions, or where such a coalition may elect a minority candidate that is not the minority-preferred candidate.⁹¹ North Carolina, however, had demonstrated the probability that a black plurality would be able to elect the candidate of its choice with the aid of white crossover votes. Requiring more than a plurality for no other reason than the race of the interest group for whom the district is created elevates section 2 above the very fray in which it was intended to function—politics.

CONCLUSION

I have devoted this Article largely to highlighting the doctrinal inconsistencies that ensue from treating minorities differently from other interest groups under section 2 when no relevant distinctions exist. There remains the statutory question posed in *Pender County*: if not the majority-minority rule, what threshold should courts use to determine when a racial group is entitled to a section 2 remedial district? This is a question of practical significance, but it is one that cannot be answered in practical terms without first reckoning with politics on the ground—the composite of practices that have evolved from the Supreme Court's ballot-box jurisprudence and have yielded a coalitional, interest-group style of politics. Section 2's purpose is to provide protection for racial and language minorities who are effectively locked out from this system because racially polarized voting prevents the formation of electoral coalitions. *Pender County* undercuts section 2's protection by imposing additional hurdles to the formation of multi-racial electoral coalitions even where the effects of racially polarized voting can be contained.

91. Smith, *supra* note 32, at 291.