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REDISTRICTING:
INFLUENCE DISTRICTS—A NOTE OF CAUTION AND A BETTER MEASURE[1]

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When discussing how best to draw districts to protect minority voting strength, some commentators and courts suggest that minority voters would be better served by decreasing the number of majority-minority districts and increasing the number of minority influence districts. Unfortunately, "influence districts" have been loosely defined and have yet to be sufficiently empirically determined. This research brief examines past judicial definitions of "influence districts," identifies their shortcomings, and posits a new empirically-based standard that line drawers can use to identify presumptive influence districts.

INTRODUCTION

Elections to legislative bodies in the United States rely heavily on geographic districts, the vast majority of which elect a single representative. When these districts are created or revised, racial and certain language minority groups protected by the Voting Rights Act (VRA) benefit from two protections in that Act.[2] Section 2, which applies to the entire country, prohibits districting arrangements that unfairly dilute the vote of minority voters, precluding them from electing "representatives of their choice," or limiting them in doing so. Section 5, which applies to a limited number of jurisdictions, including four counties in California, prohibits changes in districts that unnecessarily reduce the minority group's ability to elect their "preferred candidates of choice."[3]

The application of these protections has focused on districts in which the protected minority constitutes a majority of the voting age population. That is, districts in which by virtue of being in the majority, the group at issue has an opportunity to elect

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1. For a more extensive discussion of "influence districts," see RICHARD L. ENGSTROM, *Influence Districts: The Concept and the Courts,* in *The Most Fundamental Right: Contrasting Perspectives on The Voting Rights Act* (Daniel McCool ed., Indiana Univ. Press, forthcoming 2011).

2. The language minorities covered by the Act are specified in Section 1973aa-a(e). They are Native Americans, Asian Americans, Alaskan Natives, and persons of Spanish heritage (Latinos).

3. Section 5 requires a state or local government covered by that section to gain "preclearance" (i.e. permission) for a change in districts or other election policy or practice prior to implementing it. Preclearance is obtained if the submitting jurisdiction proves that the new plan was not adopted with discriminatory intent nor does it have a retrogressive effect, i.e., it does not place minority voters in a worse electoral position than under the existing plan. Preclearance may be granted by the Attorney General of the United States or the United States District Court for the District of Columbia.

a representative of their choice, including one from within their own group. An opportunity to elect from within their group is a critically important condition. As one federal court of appeals has noted in a racial context, "the Voting Rights Act's guarantee of equal opportunity is not met when 'candidates favored by blacks can win, but only if the candidates are white.'"[4] This concern for an opportunity to elect from within the group is the reason why analyses of elections in VRA cases focus on elections in which voters are presented with a choice between or among a minority candidate or candidates and other candidates.

Three other types of districts have received attention as well, however. Two are districts in which a minority group does not constitute a majority, but the group's voters still have an opportunity to elect representatives from within their group: "coalition districts"

and "crossover districts." Both depend on predictable levels of support from other voters in order to elect such a representative. In the case of coalition districts, the other voters are members of other protected minorities; in the case of crossover districts, they are typically white or Anglo voters.[5]

The third type of district is an "influence district," in which minority voters are not viewed as having an opportunity to elect a member of their group, but do have an opportunity to help choose the winner from among the white or Anglo (and sometimes other) candidates contesting that election.[6] The choice of minority voters in these contests do not necessarily equate to a "representative of choice," in the nomenclature of Section 2, or a "preferred candidate of choice," per Section 5. On the contrary, it is simply a choice between what is available. As one federal judge has noted, "the choice presented to minority voters in an election contested by only two white candidates is somewhat akin to offering ice cream to the public in any flavor, as long as it is pistachio."[7] That is, minority vote preference in elections with no co-ethnic candidate "may well represent something less than a true preference."[8]

I

Influence districts are referenced frequently in debates, commentaries, and judicial decisions concerning redistricting. They remain, however, the most poorly defined and least understood of the types of districts. The concept of an "influence district" has been described as "ambiguous," even "nebulous."[9]

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4. *Rural W. Tenn. African-Am. Affairs Council v. Sundquist,* 209 F.3d 835, 840 (6th Cir. 2000) (citing *Smith v. Clinton,* 687 F. Supp. 1310, 1318 (E.D. Ark. 1988)). See also *Jenkins v. Red Clay Consolidated Sch. Dist. Bd. of Educ.,* 4 F.3d 1103, 1128 n. 22 (3d Cir. 1993); *Clarke v. City of Cincinnati,* 40 F.3d 807, 812 (6th Cir. 1994); *Ruiz v. City of Santa Maria,* 106 F.3d 543, 553 (9th Cir. 1998); *Sanchez v. Colorado,* 97 F.3d 1303, 1321 (10th Cir. 1996).

5. *Bartlett v. Strickland,* 129 S.Ct. 1231, 1242-3 (2009)

6. How districts are structured, especially in terms of the relative presence of minority voters within them, affects the racial composition of the pool of candidates that run in them. Since influence districts, by definition, do not provide viable opportunities for minority candidates to win, few if any minority candidates are likely to run in them. The candidate that receives the most votes from minority voters in an influence district therefore does not necessarily equate to a *representative* of choice or a *preferred* candidate of choice.

7. *Black Political Taskforce v. Galvin,* 300 F. Supp. 2d 291, 304 (D.C. Mass. 2004). Other courts have found it appropriate to quote, in this context, Henry Ford's statement in 1912, concerning buyers of his Model T, that "Any customer can have a car painted any color he wants as long as it is black." *Meek v. Metro. Dade Cnty.,* 805 F. Supp. 967, 985 (S.D. Fla. 1992); *Citizens for a Better Gretna v. City of Gretna,* 636 F. Supp. 1113, 1121 (E.D. La. 1986).

8. *Galvin,* 300 F. Supp. 2d at 304.

9. See, e.g., ABIGAIL THERNSTROM, *Voting Rights—And Wrongs: The Elusive Quest For Racially Fair Elections* 181 (AEI Press, 2009); 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. 1539 (2002)

They are essentially districts "in which minority candidates do not win, but minority voters can play a significant role in electing candidates who will be sympathetic to their interests."[10] In the words of Justice Sandra Day O'Connor, writing for a majority of the U.S. Supreme Court in *Georgia v. Ashcroft*, a Section 5 case in which the minority group at issue was African Americans, minority voters within influence districts "can play a *substantial, if not decisive,* role in the electoral process."[11]

The "substantial role" that minority voters are alleged to play in such a district does not end with the electoral process. They are further assumed to influence the post-election behavior of the district's representative in the legislative body to which he or she has been elected. Influence districts, according to Justice O'Connor, are supposed to result in "representatives sympathetic to the interests of minority voters."[12] It is this assumption that has led some to suggest that minority groups would be better represented in legislative bodies, at least in terms of voting on bills and amendments, if majority-minority districts were dismantled in order to create more influence districts. But there is nothing axiomatic about legislators elected in so-called "influence districts" being sympathetic. O'Connor herself recognized this when discussing the tradeoff between majority-minority districts and influence districts, stating that "[i]n assessing the weight of these influence districts, it is important to consider 'the *likelihood* that candidates elected without decisive minority support would be *willing to take the minority's interests into account.*'"[13]

Despite acknowledging that this "likelihood" would vary across representatives from alleged influence districts, O'Connor offered no suggestion as to how such likelihood could be assessed. In fact, she

completely abandoned this notion in her examination of the Georgia state senate districts at issue in the case, focusing solely on the relative presence of minority group members in districts. She simply identified as influence districts all districts in which the African American voting age population (VAP) was less than a majority but above 25 percent or 30 percent.[14] At one point, she even suggested that districts in which the black VAP was as low as 20 percent could be considered influence districts.[15] She then simply counted all of the districts in the respective range and treated them as if they were all equally likely to have representatives "willing to take the minority's interests into account." Her empirical examination, in short, did not reflect her conceptual discussion.

II

A look at what happened in Georgia senate districts in the 2002 election, the first using new districts revised to reflect the population counts in the 2000 Census, should create great pause in using O'Connor's simple quantitative formula as a way to identify influence districts. After the Supreme Court's decision, the state of Georgia, on remand, identified "influence districts" in its plan for the first time.[16] In doing so, the state simply identified all of its districts that were at least 25 percent African American in VAP

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10. David T. Canon, "Renewing the Voting Rights Act: Retrogression, Influence, and the *Georgia v. Ashcroft* Fix," 7 *Election Law Journal* 3 (2008).

11. 539 U.S. 461, 482 (2003) (emphasis added).

12. *Id.* at 483.

13. *Id.* at 482 (emphasis added) (citing *Thornburg v. Gingles,* 478 U.S. 30, 100 (1986) (O'Connor, J., concurring in judgment)).

14. *Id.* at 470, 471, 487.

15. *Id.* at 489.

16. The Supreme Court in the *Georgia* case created a new alternative approach to preclearance decisions and vacated and remanded the case back to the district court that had denied preclearance. This revision in preclearance standards was negated by an amendment to the VRA in 2006. See Pub. L. 109-246, §§ 5(3)(b)-(d), July 27, 2006.

but less than 50 percent as influence districts, citing O'Connor's opinion as justification. No additional information about them was provided.[17]

While Georgia was seeking Section 5 preclearance for its senate districts, the 2002 election was held under an interim plan adopted by the state that year.[18] This plan created 17 so-called influence districts, using the lower threshold of 25 percent African American VAP the state had adopted. Nothing else about these districts had been identified as justification for labeling them influence districts.

Political scientist Bernard Grofman has suggested that, in the Deep South at least, which includes Georgia, any district that elects a Republican should not be considered an African American influence district.[19] Applying this rule of thumb casts an interesting light on the state's designation of influence districts. Of the 17 districts identified as influence districts by Georgia, 13 had contested elections in the 2002 general election. Republicans were elected in three of these contested districts, despite the African American support for them being estimated at only

1.5 percent in two and 1.9 percent in the other.[20] The likelihood of these representatives feeling electorally accountable, let alone sensitive, to their African American constituents must be considered extremely low, given that they won their election despite 98 percent or more of African American voters supporting their opponent.

In addition, in two of the other contested districts, African American support for the Democratic candidate was not just substantial, but actually *decisive*. These candidates did *not* receive a majority of the votes cast by the non-African Americans in their districts, garnering an estimated vote of only 47.2 percent and 42.3 percent from them. In contrast, the candidates received an estimated 98.5 percent and 99.0 percent of the African American vote, which provided them with their overall majority. Despite these senators-elect owing their victory to their African American constituents, their political attachment to them could hardly be considered significant, given that they switched their party affiliation to Republican prior to the legislature convening. Two more Democratic candidates in purported influence districts who were elected without opposition in the general election also switched to the Republican Party before the legislative session began.

The four party switchers, plus the three Republicans who won in districts the state identified as influence districts, resulted in 41.2 percent of the senators representing so-called African American influence districts being Republicans. These senators were critical to the Republican Party gaining control

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17. The case was settled when the state increased the African American presence in three majority-African American districts that had been shaved to just above 50 percent African American VAP in Georgia's 2001 plan, its first post-2000 plan. These three districts had been the basis of the U.S. Department of Justice's objection to that plan, and the Department withdrew its objection when the state made the changes. The district court then granted preclearance. The case therefore was resolved without any judicial scrutiny of the influence district claim.

18. *Georgia v. Ashcroft,* 204 F. Supp. 2d 4, 15 (D.D.C. 2002) *aff'd sub nom. King v. Georgia,* 537 U.S. 1100 (2003). This interim plan increased the African American percentage of the VAP in the three districts at issue in the litigation. The Department of Justice did not object to this plan, and the district court

precleared it. The court found that the other districts in the interim plan were "largely similar" to those in the plan adopted in 2001.

19. BERNARD GROFMAN, "Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in Light of *Georgia v. Ashcroft*: Social Science Perspectives on Minority Influence, Opportunity and Control," 5 *Election Law Journal* 263 (2006).

20. These estimates, and the others reported in this paragraph, were derived through the ecological inference procedure developed by Gary King. See GARY KING, *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data* (Princeton Univ. Press, 1997).

of that legislative chamber. This was an outcome the state had argued the influence districts, adopted by a Democratic legislature, were designed to preclude.[21]

III

Why did the influence districts in Georgia "perform" so badly, given expectations? The criterion the state used to identify influence districts undoubtedly was a major factor. The state identified influence districts based solely on the voting age population percentages in districts: they were districts in which African Americans constituted 25 percent or more of the VAP, but less than a majority of it. But as Justice David Souter pointed out in his dissent in *Georgia v. Ashcroft,* when it comes to influence districts, "percentages tell us nothing in isolation."[22]

Souter's comment revealed the troublesome simplicity of Justice O'Connor's and Georgia's quantitative definition of an influence district. Percentage thresholds are poor measures of influence districts because they ignore the variation in the overall political characteristics of districts. Districts can vary greatly in the preferences of both the African American voters and non-African American voters within them. The degree of responsiveness of a legislator to minority interests and concerns may vary with the extent to which minority interests are viewed as conflicting with those of other members of the representative's constituency, especially his or her core or reelection constituency, as well as the perceived need for future minority support. In "safe" Democratic districts, African Americans may not be viewed as likely to cast a critical vote, and in "safe" Republican districts, African American voters may not be considered likely to have any impact on the election outcome.

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IV

Relying on a percentage threshold, in isolation, is an invitation to misapply, and perhaps even abuse, the concept of influence districts, not just by politicians but by judges as well. The adoption of a percentage-based gauge can spell trouble for minority voters because a percentage rule, by itself, does not determine whether minority voters may achieve effective influence on their representatives, resulting in legislative behavior responsive to their interests. This is evident in a federal district court's review of the "re-redistricting" of U.S. House of Representatives districts in Texas in 2003.[23] After the Republicans gained control of the Texas legislature following the 2002 state elections, they adopted a new plan for congressional districts to replace the one that the court had created in 2001 and that was used for the 2002 elections.

District 23 in the re-redistricting plan had a Latino citizen voting age population (CVAP) of 45.8 percent and Latino voter registration of 44 percent. Two of the judges on the district court panel hearing a VRA challenge to the re-redistricting concluded that given these figures, District 23 was a Latino "influence district."[24]

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21. For evidence that white state senators in Georgia representing districts in which African Americans constitute over 25 percent of the VAP vary greatly in their responsiveness to African American interests, and are often not more responsive than those representing districts with less than 25 percent, see Canon, *supra* note 10, at 3-24.

22. *Georgia v. Ashcroft,* 539 U.S. at 505 (Souter, J., dissenting).

23. *Sessions v. Perry,* 298 F. Supp. 2d 451 (2004).

24. *Id*. at 489.

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The incumbent in the district was Henry Bonilla, a seven-term member of the House and the only Latino among the state's Republican delegation to that body. Bonilla had been reelected in 2002 in the old version of District 23, in which Latinos constituted 57.5 percent of the CVAP and 55.3 percent of the registered voters, but with only 51.5 percent of the vote.

The court had more information about the newly revised District 23 than just its Latino CVAP and registration. Based on evidence that was never challenged, the court knew that the district's incumbent, Bonilla, had never been the candidate of choice of Latino voters in his Congressional elections, and that his support among Latino voters had declined in each of his elections. The court also knew that in the 2002 election, Bonilla received only an estimated 8 percent of the Latino vote.[25]

The court also knew that the version of the district in the re-redistricting plan was designed to improve Bonilla's reelection prospects by reducing his electoral exposure to Latino voters. The drop in the Latino CVAP and registration in District 23 was accomplished by removing approximately 100,000

Latinos from the district and replacing them with roughly the same number of Anglos. The reason for this change, the court noted, was clear: "The record presents *undisputed evidence* that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection."[26] Indeed, the court acknowledged at least five times in its opinion that the district was designed to provide for the reelection of Bonilla over the wishes of his Latino constituents.[27]

The court never explained how Latinos in such a district could be expected to play a "substantial if not decisive role" in the election of Bonilla, nor expect him to become a legislator sympathetic to their distinctive concerns.[28] Despite the abundance of evidence that Latinos' presence in the district would neither influence the election nor gain increased attention to their policy concerns and preferences, the court designated District 23 as an influence district, based solely on the percentage of Latinos in the district.

The dissenting judge on the panel, in contrast, refused to ignore the evidence. He found that the Latinos in the district were virtually guaranteed to be on the losing side of every election, and that the district had been designed to ensure "a lack of competitiveness and a corresponding lack of responsiveness."[29] The majority had committed an error, he concluded, by categorizing the district as "a Latino 'influence district.'"[30]

The Supreme Court, in *League of United Latin American Citizens v. Perry,* 548 U.S. 300 (2006), reversed the district court's decision on District 23. In a five to four decision, it held that the court's version of the district had provided Latino voters with

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25. *Id.* at 488.

26. *Id.* (emphasis added).

27. *Id.* at 488, 490, 496, 511.

28. In its appeal to the Supreme Court in *LULAC v. Perry,* 548 U.S. 399 (2006), the State's 122 page brief included only one piece of evidence to demonstrate that Bonilla had been responsive to his Latino constituents: a letter from the American GI Forum, the national organization to which the GI Forum of Texas was affiliated, stating that he had been "'a voice and effective advocate' for

Hispanic veterans." (State Appellees' Brief, at 101 n. 111 (Nos. 05-204, 05-254, 05-276, 05-439)). In contrast, the GI Forum of Texas, the major protagonist concerning District 23, noted that on a set of roll call votes during the Congressional session leading up to the 2002 election, Bonilla "voted for Latino interests a mere 18 percent of the time." (Reply Brief for Appellants GI Forum, Et Al., at 4 n. 10 (No. 05-439)) (referencing the National Hispanic Leadership Agenda Congressional Scorecard for the 107th Congress).

29. *Sessions,* 298 F. Supp. 2d at 519.

30. *Id.*

an opportunity to elect a candidate of their choice, despite Bonilla's narrow victory in 2002, but the state's new version did not. The reduction of Latino CVAP was found to dilute Latino voting strength in violation of Section 2 of the VRA. The Supreme Court did not address whether District 23 was an influence district. No Justice referred to it as such; the district court's characterization of it being an influence district was simply ignored.[31]

V

There is clearly a need for a better set of criteria for identifying influence districts. Without it, the concept is open to misapplication and abuse. A proposed measure that will provide valuable constraint on the application of the concept is presented below. It is offered as a presumptive measure that, if satisfied, would shift the burden of proof to those challenging the classification. It satisfies O'Connor's conceptual criterion that an influence district be a district in which minority voters play a substantial if not decisive role in elections.

An influence district is:

A DISTRICT IN WHICH MINORITY VOTERS, UNABLE TO ELECT A REPRESENTATIVE OR CANDIDATE OF THEIR CHOICE IF SUCH INDIVIDUAL WOULD BE FROM WITHIN THEIR OWN GROUP, CAN EITHER:

(A) CAST A DECISIVE VOTE, OR BE EXPECTED TO CAST SUCH A VOTE, FOR THEIR CHOICE AMONG THE CANDIDATES CONTESTING THE SEAT; OR

(B) CAST ENOUGH VOTES, OR BE EXPECTED TO CAST ENOUGH VOTES, FOR THEIR CHOICE AMONG THE CANDIDATES CONTESTING THE SEAT TO CONSTITUTE AT LEAST HALF OF THE MARGIN OF VOTES BY WHICH THE CANDIDATE WINS.

This definition takes into account the voting preferences of not only the minority voters in a district,

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but the preferences of other voters in the district as well. It is manageable because it provides an empirically-based standard for determining when a district is or is not a presumptive influence district—when the minority vote in it has or can be expected to have a decisive impact on the election of its choice between or among the candidates, or at least a substantial impact on the election of that candidate in that its support accounts for at least half of the vote margin by which that candidate wins.

The definition specifies no partisan affiliation for that candidate. He or she is simply the protected group's preference, as expressed through their voting behavior. It also does not contain a predetermined minimal threshold or range for the minority percentage of a district because such cutoffs may exclude potential influence districts. Districts with a very small minority presence in them, however, are not likely to satisfy either the decisive or substantial standard to achieve presumptive influence district status, and if they do, they are still subject to challenge through rebuttal evidence.

This approach, focusing on actual voting behavior, can be employed during the legislative process or any

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31. The 2006 election was held under a new version of the district adopted by the court on remand, in which the CVAP was 57.4 percent Latino based on the 2000 Census, and the voter registration was estimated to be 54.1 percent Latino. A Latino Democrat defeated Bonilla in that district in 2006, receiving 54.3 percent of the votes.

other process used to adopt districts, as well as during judicial review of districts, and can also be applied to alternative districts as well as those adopted. It will also facilitate a comparative assessment of the number of influence districts in plans, as well as their relative strength. Districts in which the minority vote is, or is expected to be, decisive are theoretically, other things being equal, more likely to provide a context in which a representative will be responsive to minority community interests.[32] Likewise, differences in the relative percentage of the winning margin of the vote that can be attributed to minority voters could be used to distinguish the likelihood of elected representatives being responsive to their interests.

Determining whether minority voters were decisive or cast at least half of a winning candidate's margin in past elections does not require the development of new statistical or quantitative methodologies. These questions can be addressed empirically by employing the same methods already widely used to assess racially polarized voting in voting rights cases. Particular applications of these procedures, of course, are open to challenge during the process of adopting districts and during any judicial review that may follow.

Challenging or defending a district's status as an influence district could entail other information as well. District-specific factors, concerning intent as well as effect, could impact a district's designation. For example, undisputed evidence that a district was intentionally designed to re-elect a particular candidate who had never been the choice of minority voters, like the evidence concerning Congressional District 23 in Texas in 2003, could provide important contextual information. And the past responsiveness to minority concerns and preferences by incumbents in presumptive influence districts could also be considered.

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VI

Percentage thresholds or ranges are currently widely used to identify influence districts within both the political as well as judicial processes. This methodology is unquestionably deficient, and ripe for misapplication and possibly abuse. The definition proposed above requires examining more than just the relative presence of minority voters in the voting population of a district and will require that the preferences of other voters in the district be taken into account as well. It constitutes at least a first step toward a more realistic and more accurate identification of influence districts, and offers an important constraint on the use of the concept. Conceptual improvements in the definition are welcome, as are modifications based on lessons learned from actual applications of it.

32. In the 2002 state senate election in Georgia, African Americans cast decisive votes for the winning Democratic candidates in seven of the 13 contested elections in the "influence districts" identified by the state. As noted above, however, two of these candidates switched to the Republican Party prior to the legislature convening after that election.