

Opinion of SOUTER, J.

SUPREME COURT OF THE UNITED STATES

Nos. 05–204, 05–254, 05–276 and 05–439

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
ET AL., APPELLANTS
05–204 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

TRAVIS COUNTY, TEXAS, ET AL., APPELLANTS
05–254 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

EDDIE JACKSON, ET AL., APPELLANTS
05–276 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

GI FORUM OF TEXAS, ET AL., APPELLANTS
05–439 *v.*
RICK PERRY, GOVERNOR OF TEXAS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS

[June 28, 2006]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins,
concurring in part and dissenting in part.

I join Part II–D of the principal opinion, rejecting the one-person, one-vote challenge to Plan 1374C based simply on its mid-decade timing, and I also join Part II–A, in which the Court preserves the principle that partisan gerrymandering can be recognized as a violation of equal protection, see *Vieth v. Jubelirer*, 541 U. S. 267, 306 (2004) (KENNEDY, J., concurring in judgment); *id.*, at 317 (STEVENS, J., dissenting); *id.*, at 346 (SOUTER, J., dissent-

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ing); *id.*, at 355 (BREYER, J., dissenting). I see nothing to be gained by working through these cases on the standard I would have applied in *Vieth*, *supra*, at 346–355 (dissenting opinion), because here as in *Vieth* we have no majority for any single criterion of impermissible gerrymander (and none for a conclusion that Plan 1374C is unconstitutional across the board). I therefore treat the broad issue of gerrymander much as the subject of an improvident grant of certiorari, and add only two thoughts for the future: that I do not share JUSTICE KENNEDY’s seemingly flat rejection of any test of gerrymander turning on the process followed in redistricting, see *ante*, at 10–14, nor do I rule out the utility of a criterion of symmetry as a test, see, *e.g.*, King & Browning, Democratic Representation and Partisan Bias in Congressional Elections, 81 Am. Pol. Sci. Rev. 1251 (1987). Interest in exploring this notion is evident, see *ante*, at 13 (principal opinion); *ante*, at 20–23 (STEVENS, J., concurring in part and dissenting in part); *post*, at 2 (BREYER, J., concurring in part and dissenting in part). Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.

I join Part III of the principal opinion, in which the Court holds that Plan 1374C’s Districts 23 and 25 violate §2 of the Voting Rights Act of 1965, 42 U. S. C. §1973, in diluting minority voting strength. But I respectfully dissent from Part IV, in which a plurality upholds the District Court’s rejection of the claim that Plan 1374C violated §2 in cracking the black population in the prior District 24 and submerging its fragments in new Districts 6, 12, 24, 26, and 32. On the contrary, I would vacate the judgment and remand for further consideration.

The District Court made a threshold determination resting reasonably on precedent of this Court and on a clear rule laid down by the Fifth Circuit, see *Valdespino v. Alamo Heights Independent School Dist.*, 168 F. 3d 848, 852–853 (1999), cert. denied, 528 U. S. 1114 (2000): the

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first condition for making out a §2 violation, as set out in *Thornburg v. Gingles*, 478 U. S. 30 (1986), requires “the minority group . . . to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district,” *id.*, at 50, (here, the old District 24) before a dilution claim can be recognized under §2.¹ Although both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, see *ante*, at 37; *Johnson v. De Grandy*, 512 U. S. 997, 1008–1009 (1994); *Voinovich v. Quilter*, 507 U. S. 146, 154 (1993); *Grove v. Emison*, 507 U. S. 25, 41, n. 5 (1993); *Gingles*, *supra*, at 46, n. 12, the day has come to answer it.

Chief among the reasons that the time has come is the holding in *Georgia v. Ashcroft*, 539 U. S. 461 (2003), that replacement of a majority-minority district by a coalition district with minority voters making up fewer than half can survive the prohibition of retrogression under §5 of the Voting Rights Act, 42 U. S. C. §1973c, enforced through the preclearance requirement, *Georgia*, 539 U. S., at 482–483. At least under §5, a coalition district can take on the significance previously accorded to one with a majority-minority voting population. Thus, despite the independence of §§2 and 5, *id.*, at 477–479, there is reason to think that the integrity of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be. While protection should begin through the preclearance process,² in jurisdictions where

¹In a subsequent case, however, we did not state the first *Gingles* condition in terms of an absolute majority. See *Johnson v. De Grandy*, 512 U. S. 997, 1008 (1994) (“[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice”).

²Like JUSTICE STEVENS, I agree with JUSTICE SCALIA that compliance

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that is required, if that process fails a minority voter has no remedy under §5, because the State and the Attorney General (or the District Court for the District of Columbia) are the only participants in preclearance, see 42 U. S. C. §1973c. And, of course, vast areas of the country are not covered by §5. Unless a minority voter is to be left with no recourse whatsoever, then, relief under §2 must be possible, as by definition it would not be if a numerical majority of minority voters in a reconstituted or putative district is a necessary condition. I would therefore hold that a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage. To have a clear-edged rule, I would hold it sufficient satisfaction of the first gatekeeping condition to show that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election.³

This rule makes sense in light of the explanation we gave in *Gingles* for the first condition for entertaining a claim for breach of the §2 guarantee of racially equal opportunity “to elect representatives of . . . choice,” 42 U. S. C. §1973: “The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large . . . is this: Unless minority voters possess the potential to elect representatives in the ab-

with §5 is a compelling state interest. See *ante*, at 31, n. 12 (STEVENS, J., concurring in part and dissenting in part); *post*, at 9 (SCALIA, J., concurring in judgment in part and dissenting in part).

³I recognize that a minority group might satisfy the §2 “ability to elect” requirement in other ways, and I do not mean to rule out other circumstances in which a coalition district might be required by §2. A minority group slightly less than 50% of the electorate in nonpartisan elections for a local school board might, for example, show that it can elect its preferred candidates owing to consistent crossover support from members of other groups. Cf. *Valdespino v. Alamo Heights Independent School Dist.*, 168 F.3d 848, 850–851 (CA5 1999), cert. denied, 528 U. S. 1114 (2000).

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sence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.” 478 U. S., at 50, n. 17 (emphasis deleted); see also *id.*, at 90, n. 1 (O’Connor, J., concurring in judgment) (“[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice”). Hence, we emphasized that an analysis under §2 of the political process should be “functional.” *Id.*, at 48, n. 15 (majority opinion); see also *Voinovich, supra*, at 158 (“[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim”). So it is not surprising that we have looked to political-primary data in considering the second and third *Gingles* conditions, to see whether there is racial bloc voting. See, e.g., *Abrams v. Johnson*, 521 U. S. 74, 91–92 (1997); *Gingles, supra*, at 52–54, 59–60.

The pertinence of minority voters’ role in a primary is obvious: a dominant party’s primary can determine the representative ultimately elected, as we recognized years ago in evaluating the constitutional importance of primary elections. See *United States v. Classic*, 313 U. S. 299, 318–319 (1941) (“Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, §2. . . . Here, . . . the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative”); *id.*, at 320 (“[A] primary election which involves a

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necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision”); *Smith v. Allwright*, 321 U. S. 649, 660 (1944) (noting “[t]he fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers”); *id.*, at 661–662 (“It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. . . . Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color”).⁴ These conclusions of our predecessors fit with recent scholarship showing that electoral success by minorities is adequately predictable by taking account of primaries as well as elections, among other things. See Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N. C. L. Rev. 1383 (2000–2001).⁵

I would accordingly not reject this §2 claim at step one of *Gingles*, nor on this record would I dismiss it by jumping to the ultimate §2 issue to be decided on a totality of

⁴Cf. *California Democratic Party v. Jones*, 530 U. S. 567, 575 (2000) (“In no area is the political association’s right to exclude more important than in the process of selecting its nominee. That process often determines the party’s positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views”).

⁵One must be careful about what such electoral success ostensibly shows; if the primary choices are constrained, say, by party rules, the minority voters’ choice in the primary may not be truly their candidate of choice, see McLoughlin, Note, *Gingles* In Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N. Y. U. L. Rev. 312 (2005).

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the circumstances, see *De Grandy*, 512 U. S., at 1009–1022, and determine that the black plaintiffs cannot show that submerging them in the five new districts violated their right to equal opportunity to participate in the political process and elect candidates of their choice. The plurality, on the contrary, is willing to accept the conclusion that the minority voters lost nothing cognizable under §2 because they could not show the degree of control that guaranteed a candidate of their choice in the old District 24. See *ante*, at 37–40. The plurality accepts this conclusion by placing great weight on the fact that Martin Frost, the perennially successful congressional candidate in District 24, was white. See, e.g., *ante*, at 38–39 (no clear error in District Court’s findings that “no Black candidate has ever filed in a Democratic primary against Frost,” *Session v. Perry*, 298 F. Supp. 2d 451, 484 (ED Tex 2004) (*per curiam*)), and “[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate,” *ibid.*); *ante*, at 38–39 (no clear error in District Court’s reliance on testimony of Congresswoman Eddie Bernice Johnson that “District 24 was drawn for an Anglo Democrat (Martin Frost, in particular) in 1991”).

There are at least two responses. First, “[u]nder §2, it is the status of the candidate as the chosen representative of a particular group, not the race of the candidate, that is important.” *Gingles, supra*, at 68 (emphasis deleted). Second, Frost was convincingly shown to have been the “chosen representative” of black voters in old District 24. In the absence of a black-white primary contest, the unchallenged evidence is that black voters dominated a primary that consistently nominated the same and ultimately successful candidate; it takes more than speculation to rebut the demonstration that Frost was the candi-

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date of choice of the black voters.⁶ There is no indication that party rules or any other device rigged the primary ballot so as to bar any aspirants the minority voters would have preferred, see n. 5, *supra*, and the uncontroverted and overwhelming evidence is that Frost was strongly supported by minority voters after more than two decades of sedulously considering minority interests, App. 107 (Frost’s rating of 94% on his voting record from the National Association for the Advancement of Colored People exceeded the scores of all other members of the Texas congressional delegation, including black and Hispanic members of both major parties); *id.*, at 218–219 (testimony by State’s political-science expert that Frost is the African-Americans’ candidate of choice); *id.*, at 239 (testimony by Ron Kirk, an African-American former mayor of Dallas and U. S. Senate candidate, that Frost “has gained a very strong base of support among African-American . . . voters because of his strong voting records [in numerous areas]” and has “an incredible following and amount of respect among the African-American community”); *id.*, at 240–241 (Kirk’s testimony that Frost has never had a contested primary because he is beloved by the African-American community, and that a black candidate, possibly including himself, could not better Frost in a primary because of his strong rapport with the black community); *id.*, at 242–243 (testimony by county precinct administrator that Frost has been the favored candidate of the African-American community and there have been no primary challenges to him because he “serves [African-American] interests”).⁷

⁶Judge Ward properly noted that the fact that Frost has gone unchallenged may “reflect favorably on his record” of responding to the concerns of minorities in the district. See *Session v. Perry*, 298 F. Supp. 2d 451, 530 (ED Tex. 2004) (opinion concurring in part and dissenting in part).

⁷In any event, although a history or prophecy of success in electing candidates of choice is a powerful touchstone of §2 liability when

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It is not that I would or could decide at this point whether the elimination of the prior district and composition of the new one violates §2. The other *Gingles* gate-keeping rules have to be considered, with particular attention to the third, majority bloc voting, see 478 U. S., at 51, since a claim to a coalition district is involved.⁸ And after that would come the ultimate analysis of the totality of circumstances. See *De Grandy*, *supra*, at 1009–1022.

I would go no further here than to hold that the enquiry should not be truncated by or conducted in light of the Fifth Circuit's 50% rule,⁹ or by the candidate-of-choice analysis just rejected. I would return the §2 claim on old District 24 to the District Court, which has already labored so mightily on this case. All the members of the three-judge court would be free to look again untethered by the 50% barrier, and Judge Ward, in particular, would

minority populations are cracked or packed, electoral success is not the only manifestation of equal opportunity to participate in the political process, see *De Grandy*, 512 U. S., at 1014, n. 11. The diminution of that opportunity by taking minority voters who previously dominated the dominant party's primary and submerging them in a new district is not readily discounted by speculating on the effects of a black-white primary contest in the old district.

⁸The way this third condition is understood when a claim of a putative coalition district is made will have implications for the identification of candidate of choice under the first *Gingles* condition. Suffice it to say here that the criteria may not be the same when dealing with coalition districts as in cases of districts with majority-minority populations. All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.

⁹Notably, under the Texas Legislature's Plan 1374C, there are three undisputed districts where African-Americans tend to elect their candidates of choice. African-Americans compose at most a citizen voting age majority (50.6%) in one of the three, District 30, see *Session*, *supra*, at 515; even there, the State's expert pegged the percentage at 48.6%, App. 185–186. In any event, the others, Districts 9 and 18, are coalition districts, with African-American citizen voting age populations of 46.9% and 48.6% respectively. *Id.*, at 184–185.

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have the opportunity to develop his reasons unconstrained by the Circuit's 50% rule, which he rightly took to limit his consideration of the claim, see *Session*, 298 F. Supp. 2d, at 528–531 (opinion concurring in part and dissenting in part).