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Beth A. Levene
Beth.Levene@chicagounbound.edu

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Influence-Dilution Claims Under the Voting Rights Act

Beth A. Levenet†

Section 2 of the Voting Rights Act ("VRA") creates a claim for citizens when a voting practice or standard abridges their right to vote on account of race. To prove a violation of the VRA, plaintiffs must show, “based on the totality of circumstances,” that “the political processes . . . are not equally open to participation by [their minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Where a state draws its district lines can violate the VRA by dividing or aggregating a minority group's votes in ways that dilute their impact. The clearest example of vote dilution is an “ability-to-elect” claim—a claim that the current districting scheme prevents minorities from electing their candidate of choice by ensuring that minorities do not constitute a majority in any district. If a white majority always votes against the racial minority's candidate, the minority group will require a majority in the district to succeed in electing that candidate.

Districting also can dilute a minority group's ability to influence an election. For example, a minority group comprising 40 percent of one district probably exerts more influence over a candidate's platform than a fragmented group comprising only 10 percent of four districts. Fragmenting a minority group therefore may deny it both the ability to participate meaningfully in the political process and the ability to ensure that candidates address its interests.

† B.A. 1992, Dartmouth College; J.D. Candidate 1996, University of Chicago.
3 The distinction between the ability to elect and the ability to influence elections is actually not so clear. Voters who constitute less than 50 percent of a district may still be able to elect candidates of their choice with sufficient crossover votes. Moreover, voters who constitute more than 50 percent of a district may be unable to elect candidates of their choice because of a lack of voter turnout or a lack of cohesiveness. See J. Morgan Kousser, Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights
Although there is some disagreement among courts, most have concluded that VRA claims are not cognizable if the minority group cannot constitute more than 50 percent of a single-member district. This adherence to a majority requirement reflects some courts' affinity for a bright-line rule. Although there is a legitimate need for a workable standard for assessing influence-dilution claims, a simple bright-line rule cannot appropriately balance judicial efficiency and the need to redress injuries to political participation.

This Comment shows that courts can adopt flexible, but workable, standards for assessing whether plaintiffs have stated a legitimate influence-dilution claim under the VRA. In part I, this Comment describes how courts have treated influence-dilution claims to date. This part illustrates that most courts reject such claims because they require plaintiffs to show that the minority group could constitute a majority in a single-member district, a bright-line rule that precludes influence-dilution claims. Many courts fear that without such a rule, there would be

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This Comment defines an ability-to-elect claim as a claim seeking to create a majority-minority district, that is, a district where minorities constitute more than 50 percent of the population. Influence-dilution claims are defined as claims where it would be impossible to create such districts. Consequently, this Comment labels as 'influence districts' those districts in which minority voters constitute less than 50 percent of the population, but are able to attain crossover votes in support of their preferred candidates. In such districts, minorities may actually be able to elect candidates of their choice despite constituting less than 50 percent of the district. These districts indicate that requiring plaintiffs to be able to constitute a majority-minority district is inappropriate for both vote-dilution and influence-dilution claims. However, this Comment shows that influence-dilution claims, where no majority-minority district is possible, should be cognizable even though courts may still require the creation of majority-minority districts in ability-to-elect claims. Of course, if influence claims are allowed, it would no longer make sense to require majority-minority districts in ability-to-elect claims. It would certainly be ironic to allow a claim where plaintiffs could prove the requisite increase in influence with, for example, forty percent of the population of a proposed district, but then to bar a claim, based on a majority requirement, by plaintiffs who could prove an ability to elect with the same percentage.

*See McNeil v Springfield Park Dist., 851 F2d 937, 947 (7th Cir 1988)(affirming summary judgment in favor of defendant in challenge to city's at-large voting system for electing park board trustees and school board members); Turner v Arkansas, 784 F Supp 553, 570-71 (E D Ark 1991)(finding that Arkansas Congressional redistricting did not cause vote dilution in violation of the VRA); Hastert v State Bd. of Elections, 777 F Supp 634, 654 (N D Ill 1991)(refusing to recognize district with 4.9 percent African-American voting age population as influence district in dispute over which proposed redistricting plan court should adopt); Skorepa v City of Chula Vista, 723 F Supp 1384, 1391-92 (S D Cal 1989)(rejecting challenge to city's at-large election system because Hispanic-Americans could not comprise more than 26.1 percent of eligible voters in any single-member district).*
a flood of litigation. In part II, this Comment argues that courts should recognize influence-dilution claims. Not only does a legitimate injury exist, but the purpose of the VRA supports recognizing such claims. Further, the requirement that the minority group be able to constitute a majority in a single-member district is inappropriate.

In part III, this Comment proposes possible standards that courts can use to recognize influence-dilution claims, then defends those standards against arguments for retaining a bright-line rule. First, plaintiffs would have to show that they are a cohesive and geographically compact minority group that has been split by district lines. Second, plaintiffs would be required to demonstrate that white bloc voting usually defeats candidates who represent minority interests, or that minority influence is so negligible that minority interests are defeated even without a white bloc. Third, plaintiffs would need to show that redistricting would provide their group with a demonstrable increase in influence over candidates currently unresponsive to minority interests. Finally, plaintiffs would have to prove that redistricting would advance minority interests on the whole, taking into account that redistricting may diminish the influence of minorities in some districts.

I. THE QUESTION OF INFLUENCE-DILUTION CLAIMS REMAINS UNRESOLVED

Courts have not yet definitively resolved whether influence-dilution claims are cognizable under the VRA; the Supreme Court has repeatedly deferred addressing this issue and the lower federal courts are currently divided. Although a few circuits have recognized such claims, most have rejected them. Courts generally have rejected such claims because they desire a bright-line rule that separates valid claims from marginal ones—such as a requirement that the group could constitute a majority in a single-member district.

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8 See Garza v County of Los Angeles, 918 F2d 763, 770-71 (9th Cir 1990); Armour v Ohio, 775 F Supp 1044, 1059-60 (N D Ohio 1991).


10 See McNeil, 851 F2d at 947; Hastert, 777 F Supp at 653; Skorepa, 723 F Supp at 1391-92.
A. The Supreme Court Has Deferred Addressing the Issue

The Supreme Court first deferred judgment of the influence-district issue in *Thornburg v Gingles.* In *Gingles,* the Supreme Court addressed a claim that a multimember districting scheme violated the VRA by reducing plaintiffs' ability to elect candidates of their choice. Although the Court recognized the need to evaluate VRA claims based on the "totality of the circumstances," it concluded that there are limits to when a legitimate injury can be proven. Consequently, the Court set out a tripartite threshold test to determine if a challenged districting scheme impaired plaintiffs' ability to elect their preferred representatives. Under this test, plaintiffs must demonstrate that: (1) "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." The *Gingles* Court, however, did not intend these three requirements to apply to claims of an impaired ability to influence elections. It explicitly limited its holding to cases where plaintiffs claimed an impaired ability to elect:

We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim

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9 *Thornburg v Gingles,* 478 US at 46.
10 Id at 50-51.
11 Id (citations omitted). The requirements of racial bloc voting and political cohesiveness stem from the Senate Report on the 1982 amendments to the VRA, which lists racial polarization as one of a number of factors that may be relevant to a VRA claim. Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 28-29 (1982). The Supreme Court required these particular factors because they are necessary to prove that the districting thwarts distinct minority interests because of race. *Gingles,* 478 US at 51. The majority requirement, however, did not stem from the Senate Report but was added to ensure that a causal connection existed. The Court explained that if minority voters could not constitute a majority in a single-member district "the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates." Id at 50 (emphasis omitted). In other words, if redistricting would not enable minority voters to elect candidates of their choice, the challenged districting could not have caused minority voters' inability to elect.
brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.\footnote{Id at 46 n 12 (emphasis in original).}

The Court later applied the same three conditions to ability-to-elect claims challenging single-member districts,\footnote{Growe v Emison, 113 S Ct 1075, 1084 (1993) (reversing district court holding that Minnesota state court's legislative plan violated the VRA).} but continued to defer the question of whether a claim could be stated alleging impairment of minority voters' ability to influence elections.\footnote{Id at 1084-85 n 5. See also Voinovich v Quilter, 113 S Ct 1149, 1157 (1993) (stating, "Of course, the Gingles factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first Gingles precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume arguendo to be actionable today.").} Although the Court has summarily affirmed certain cases addressing the issue,\footnote{See Turner, 112 S Ct at 2296, affirming 784 F Supp 553 (E D Ark 1991).} it recently noted that the question was still undecided.\footnote{Johnson v De Grandy, 114 S Ct 2647, 2656 (1994) (resolving vote-dilution case without deciding "whether the first Gingles condition can be satisfied by proof that a so-called influence district may be created (that is, by proof that plaintiffs can devise an additional district in which members of a minority group are a minority of the voters, but a potentially influential one).")}. 

B. District and Appellate Courts Are Split

Most lower federal courts have rejected influence-dilution claims. At least one court reasoned that influence-dilution claims cannot satisfy the Gingles requirement that white bloc voting exist.\footnote{See Turner, 112 S Ct at 2296, affirming 784 F Supp 553 (E D Ark 1991).} According to the court in Turner v Arkansas,\footnote{Johnson v De Grandy, 114 S Ct 2647, 2656 (1994) (resolving vote-dilution case without deciding "whether the first Gingles condition can be satisfied by proof that a so-called influence district may be created (that is, by proof that plaintiffs can devise an additional district in which members of a minority group are a minority of the voters, but a potentially influential one).")}. therefore, the minority plaintiffs do not meet the third prong of the Gingles test.\footnote{Id at 570-71.}
Most courts, however, have rejected influence-dilution claims based on a mechanical application of the Gingles requirement that the minority group be able to constitute a majority in a single-member district. Influence claims are inherently invalid under this majority requirement because such claims do not seek to create majority-minority districts. Courts have argued that the majority requirement is necessary for two reasons. First, without a bright line dividing legitimate from illegitimate claims, a flood of frivolous suits would ensue. In the words of one court, "an unrestricted breach of the Gingles single-district majority precondition will likely open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes." As a consequence, judicial economy mandates drawing a line. In addition, these courts have argued that the subsequent flood of litigation would make it more difficult for courts to hear legitimate claims. The judicial economy provided by a bright-line rule better enables courts to redress the most substantial injuries.

Second, these courts have argued that without a bright-line rule, they will have no objective way to determine when a cognizable injury exists. Without this determination it is impossible to decide when plaintiffs have stated a valid claim. What is more, because voting-rights claims are usually fact intensive, they are inherently difficult to assess. Therefore, the courts have reasoned, the Gingles preconditions are the only means available to reach rational outcomes. A line at the 50 percent mark is reasonable because of its presumed relationship to the ability to elect. The court in Hastert v State Board of Elections expressed the typical view of most courts on this issue:

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22 See Martin v Allain, 658 F Supp 1183, 1204 (S D Miss 1987)(rejecting influence claims, stating no valid VRA claim exists unless Gingles majority requirement satisfied); Hastert, 777 F Supp at 654 (recognizing that majority requirement would prevent courts from rectifying influence dilution).
24 Hastert, 777 F Supp at 654.
25 Id.
26 See McNeil, 851 F2d at 942-44; Hastert, 777 F Supp at 653-54.
27 See McNeil, 851 F2d at 942-44; Hastert, 777 F Supp at 653-54.
28 See McNeil, 851 F2d at 942-44; Hastert, 777 F Supp at 654.
Where the minority voters could not constitute a single-member district majority, injury becomes a more elusive and subjective concept. It is only through the electoral majority precondition that courts are possessed of a “clear measure of [ ] voting strength, hence a fair and workable standard by which to measure dilution of the strength.”

Even the two courts that have recognized VRA claims where the minority group was unable to form a majority in a single-member district have explicitly refused to decide whether influence-dilution claims are generally cognizable, perhaps fearing that recognizing such claims would create a flood of litigation. In *Garza v County of Los Angeles*, the court allowed an influence claim, but limited its holding to cases where plaintiffs can show intentional discrimination in the creation of the districts. In *Garza*, the county “intentionally fragmented the [Hispanic-American] population among the various districts in order to dilute the effect of the [Hispanic-American] vote . . . .” The *Garza* court held that it was not relevant that a majority-minority district could not have been drawn; the *Gingles* majority requirement cannot be applied in the face of intentional dilution of minority voting strength.

The *Garza* court’s solution, however, is contrary to legislative intent. Congress specifically amended the VRA to clarify that plaintiffs need only show discriminatory results, not discriminatory intent, to prove a violation of the VRA. Limiting influence-dilution claims to cases of intentional discrimination may allay fears that frivolous suits will flood the courts; however, the VRA itself indicates that it is improper for courts to require plaintiffs to show discriminatory intent.

The court in *Armour v Ohio* also refused to apply the *Gingles* majority requirement. The *Armour* court found that the

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31 Id at 653 (internal citation omitted).
32 *Garza*, 918 F2d at 769; *Armour*, 775 F Supp at 1059 n 19. Note, however, that only the *Garza* court addressed the issue as an influence claim. The *Armour* court addressed the issue as an ability-to-elect claim, despite the group’s inability to constitute a majority in a single-member district.
33 918 F2d at 763.
34 Id at 769.
35 Id.
37 Id.
38 775 F Supp at 1044.
plaintiffs stated a claim for vote dilution despite their inability to constitute a majority in a single-member district. While it might have been framed as an influence claim, the Armour court addressed plaintiffs' argument as an inability-to-elect claim.\textsuperscript{39} The Armour court found that both parties tended to direct their campaigns towards the wealthy suburban white "swing vote."\textsuperscript{40} As a result of this swing vote, candidates had little incentive to take positions responsive to the impoverished, urban, African-American community. Representatives were perceived as being indifferent to minority interests.\textsuperscript{41} Under the minority-proposed redistricting, however, African-Americans would have constituted one-third of the voting age population, about half of the usual Democratic vote. They would therefore have wielded enough influence that "the Democratic Party and its candidates [would] be forced to be sensitive to the minority population by virtue of that population's size."\textsuperscript{42}

The result of redistricting in Armour seems to be an increased ability to influence, rather than control, elections. The Armour court, however, shied away from recognizing the influence claims, holding that "[s]ince [African-American] voters consistently vote eighty to ninety per cent [sic] Democratic and white voters vote consistently almost fifty per cent [sic] Democratic, we find that plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district."\textsuperscript{43} Despite this language, there was no finding that African-Americans could control the primary to nominate the candi-

\textsuperscript{39} Id at 1059 n 19.
\textsuperscript{40} Id at 1059. The evidence demonstrated that there was very little campaigning directed towards the African-American community. This was based on surveys and certain actions by representatives who did not seek African-American community input. Id at 1058.
\textsuperscript{41} Armour, 775 F Supp at 1059.
\textsuperscript{42} Id at 1060. This represents an increase of approximately 8 percent. In the challenged scheme, African-Americans constituted 11.11 percent of one district and 24.96 percent of another. This scheme effectively split the African-American population at its greatest concentration to create two districts with a ratio of 35:65. Id at 1047. In the proposed district, 99 percent of the African-American residents would be in one district. Id at 1048.
\textsuperscript{43} Armour, 775 F Supp at 1060.
date of their choosing." Nor was there any showing that, if African-Americans did control the Democratic primary, the Democratic candidate would be able to retain the white support necessary to win the election.

The above cases are the exception to the rule. Courts generally apply the Gingles preconditions to preclude influence-dilution claims. As this Comment demonstrates, however, courts should recognize such claims and apply different standards to assess their validity.

II. COURTS SHOULD RECOGNIZE INFLUENCE-DILUTION CLAIMS

Minority groups suffer real harm from dilutive districting, even when they are unable to constitute a majority in a single-member district. This is especially clear in cases such as Garza v County of Los Angeles and Armour v Ohio, where the states intended their districting schemes to deprive minorities of influence. Even the court in Hastert v State Board of Elections, which refused to recognize influence-dilution claims, admitted that "[t]he Gingles precondition does prevent sizable minority groups from attempting to rectify electoral practices that dilute their votes and impair their ability to participate in the political process."

The issue, however, is not whether the minority group suffers harm from these practices, but whether the VRA establishes

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44 Indeed, the fact that the Armour court explicitly stated that plaintiffs would probably not be able to elect candidates of their race seems to indicate that this is not an ability-to-elect claim. Furthermore, such a finding would involve analyses not undertaken by the court, for example, an analysis of minority voter turnout in primaries.

45 If an influence-dilution claim is defined as a redistricting claim where the minority group cannot constitute a majority in a single-member district, then the claim in Armour is an influence-dilution claim, not an ability-to-elect claim. See note 3. The Armour court's characterization of it as an ability-to-elect claim is understandable, however, if the ability to elect is seen as a continuum. Whereas prior to redistricting the Armour plaintiffs could not elect their preferred representatives, after redistricting they could have either more ability to elect their preferred candidates or a new ability to elect more preferred candidates. While this understanding may shed some light on the court's characterization of the suit as an ability-to-elect claim, it destroys the distinction between ability-to-elect and influence claims. Once the bright line between the two claims is eliminated, courts cannot reject influence-dilution claims solely on the ground that no bright line demarcates which claims are invalid. Such a line would not exist for ability-to-elect claims, either.

46 918 F2d 763 (9th Cir 1990).
48 See Garza v County of Los Angeles, 918 F2d 763, 769 (9th Cir 1990); Armour v Ohio, 775 F Supp 1044, 1060 (N D Ohio 1991).
50 Id at 654.
this harm as a legally cognizable injury. Although most courts have refused as a matter of law to recognize influence claims, the VRA does not mandate this outcome. The VRA and its legislative history are ambiguous;\(^5\) they do not clearly preclude influence claims.\(^6\) To the contrary, both the legislative history of the VRA and the text of the statute support recognizing such claims.\(^5\) Nor did the Gingles Court preclude recognizing influence-dilution claims. The Supreme Court has not only repeatedly deferred addressing the issue, but it has also expressed the view that courts should not apply the Gingles preconditions mechanically, without regard to the nature of the claim.\(^6\)

Most of the arguments for application of the Gingles preconditions to preclude influence claims are based on a policy favoring bright-line rules.\(^5\) Courts understandably want to avoid a flood of litigation and marginal claims. However, a more flexible approach, such as the one proposed below, can address these concerns and is more consistent with statutory intent.\(^6\)

A. The Purpose of the VRA Supports Recognizing Influence-Dilution Claims

A voting practice or procedure violates the VRA if it causes minority-group citizens to have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."\(^5\) This language neither clearly sanctions nor clearly forecloses influence claims.\(^5\)

\(^{51}\) For example, the statute describes the harm as existing when minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 USC § 1973(b) (1988). This language gives no clear indication of whether influence-dilution claims are cognizable.

\(^{52}\) See Hastert, 777 F Supp at 653 (noting that Section 2 of the VRA, "as worded," does not preclude VRA claims by minority groups unable to constitute a majority in a single-member district).

In addition, the legislative history of the 1982 Amendments to the VRA sheds little light on this issue because it does not directly address the issue of influence claims.

The legislative history does indicate, however, that Congress was concerned with ensuring that minority groups are able to participate meaningfully in politics, not just that they are able to elect candidates of their choice where they are sufficiently numerous to do so. In discussing VRA violations, Congress usually referred only to participation in the political processes, not to the ability to elect preferred representatives. For example, the Senate Report states that "the issue to be decided under the results test is whether the political processes are equally open to minority voters." Furthermore, the Senate Report repeatedly describes practices that violate the VRA as those that "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." It seems unlikely that Congress would use the term "minimize" if it meant only to abolish practices that effectively eliminated minority groups' ability to elect candidates of their choice. Either a group can elect its preferred candidate or it cannot. The ability either exists or does not exist—it cannot be minimized.

Furthermore, in discussing the meaning of the right to vote, the Senate Report does not focus exclusively on the ability to elect one's chosen candidate, but instead conceives of voting power as a matter of degree. The Report accepts the Supreme Court's observation that "[t]he right to vote . . . includes the right to have the vote counted at full value without dilution or discount." Practices that operate "to minimize or cancel out the voting

"[t]here is little doubt that the 'participation' provision, as worded, may accommodate a construction that would permit § 2 claims by minority groups lacking a single-district electoral majority." Hastert, 777 F Supp at 653.

58 S Rep No 97-417 at 29 n 115 (cited in note 11).
59 Id at 2, 16, 28, 30.
60 Id at 2. This language echoes the case the 1982 Amendments intended to codify, White v Regester, 412 US 755, 766 (1973)(stating that in a VRA case "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice") (emphasis added). Id at 2, 28.
62 It is possible that the term "minimizing" refers to voting practices other than districting, such as ballot procedures. More likely, however, this was meant specifically to apply to redistricting cases, since it was taken from vote-dilution cases. Id at 20, 23.
63 Id at 19, quoting Reynolds v Sims, 377 US 533, 555 n 29 (1964).
strength and political effectiveness of minority groups \[\ldots\] are an impermissible denial of the right to have one's vote fully count.\(^6\)

"Political effectiveness," however, not only includes the power to elect, but also includes the ability to use a group's voting strength to persuade candidates to address particular issues. In fact, the ability to use its votes to ensure that candidates address at least some of its interests is central to a group's ability to attain representation. Although the minority group may not be able to use its collective votes to elect its ideal candidate, the group can use its votes to make sure that the candidates who are running take a particular approach to certain issues. In this way, the ability to influence elections is an important part of the power of the vote and the ability to participate in the political process.

Thus, the lack of a "minority candidate," someone who is clearly identified as representative of that group's interests, should not shut minority voters out of the political process. Even if a minority group cannot elect its own candidate, its votes are meaningless only if the districting deprives it of the ability to take part in the process that shapes candidates' platforms and subsequent actions in office. According to this understanding of political participation, a dilution of influence would clearly violate minority voting rights under the VRA.

Section 2 of the VRA defines a violation as an act that reduces the opportunity for minorities "to participate in the political process and to elect representatives of their choice."\(^6\) Although one might argue that plaintiffs must demonstrate both factors to state a claim under the VRA, the Supreme Court's opinion in \textit{Chisom v Roemer}\(^7\) implies that simply showing an impaired ability to participate is sufficient, further indicating that influence claims are cognizable under the VRA.\(^6\) In \textit{Chisom}, the Court held that it was not sufficient for plaintiffs to show a lessened opportunity to elect candidates of their choice without also showing that they had less opportunity to participate in the political process.\(^8\) The Court did not state whether showing a lessened opportunity to participate would be sufficient to state a

\(^{65}\) S Rep No 97-417 at 28 (cited in note 11).
\(^{66}\) 42 USC § 1973(b).
\(^{68}\) See Armour, 775 F Supp at 1052 (interpreting \textit{Chisom v Roemer} to imply that influence-dilution claims are cognizable under the VRA).
\(^{69}\) \textit{Chisom}, 501 US at 397.
claim without proof of an inability to elect. It implied, however, that such a showing would be sufficient.\textsuperscript{70} The Court stated that “[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.”\textsuperscript{71} This statement implicitly recognizes that an impaired ability to influence an election would violate the VRA.

The majority's response to Justice Scalia's dissent also implies that influence claims are cognizable under the VRA. Justice Scalia pointed out that if the majority opinion in \textit{Chisom} requires plaintiffs to show an inability to elect candidates of their choice in addition to an impaired ability to participate in political processes, the opinion would foreclose the possibility of influence claims.\textsuperscript{72} He interpreted the majority opinion to require both showings, and argued that this dual requirement would leave minority groups who could not constitute a majority in a single-member district “entirely without § 2 protection.”\textsuperscript{73} As a consequence, “a protected class that with or without the [voting] practice will be unable to elect its candidate can be denied equal opportunity ‘to participate in the political process' with impunity.”\textsuperscript{74} The majority responded to Justice Scalia by asserting that his argument “rest[ed] on the erroneous assumption that a small group of voters can never influence the outcome of an election,”\textsuperscript{75} implying that influence claims could be cognizable, even when brought by a group constituting less than a majority.

B. The Gingles Preconditions Do Not Apply to Influence Claims

Influence claims are inherently different than the claim before the Court in \textit{Gingles}. The Court designed the \textit{Gingles} preconditions to determine when challenged districting makes a group unable \textit{to elect} its preferred candidates.\textsuperscript{76} They were not designed to determine when districting has injured a group's ability \textit{to influence} elections. In the first case, it makes perfect

\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id at 409 (Scalia dissenting).
\textsuperscript{73} \textit{Chisom}, 501 US at 409 (Scalia dissenting).
\textsuperscript{74} Id (Scalia dissenting).
\textsuperscript{75} Id at 397 n 24.
\textsuperscript{76} \textit{Thornburg v Gingles}, 478 US 30, 50 n 17 (1986)(pointing out that if plaintiffs could not elect their preferred candidates under a redistricting scheme, then the plaintiffs have failed to show that the challenged districting scheme caused the claimed injury: harm to the group's ability to elect).
sense to require plaintiffs to show that, but for the challenged practice, they would have been able to elect candidates of their choice. But where the injury claimed is not an inability to elect a group's preferred candidates, there is no obvious reason why plaintiffs should have to show they could have elected their candidates of choice in the absence of the challenged practice.

Of course, the \textit{Gingles} factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first \textit{Gingles precondition}, the requirement that the group be sufficiently large to constitute a majority in a single district, \textit{would have to be modified or eliminated when analyzing the influence-dilution claim} we assume arguendo to be actionable today.\textsuperscript{77}

Given this admonition, courts should not mechanically apply the \textit{Gingles} preconditions to preclude influence-dilution claims.\textsuperscript{78}

C. A Bright-Line Rule is Not Appropriate for Evaluating VRA Claims

Congress did not intend for there to be a bright-line rule for VRA cases.\textsuperscript{79} Statutory language explicitly states that courts are to determine when a voting practice violates the VRA based on the "totality of circumstances."\textsuperscript{80} Congress determined that this careful consideration was necessary because "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" in light of the fundamental importance of voting rights in preserving "other basic civil and political rights."\textsuperscript{81}

\textsuperscript{77} \textit{Voinovich}, 113 S Ct at 1157 (emphasis added).

\textsuperscript{78} Some have argued that courts should not apply the majority cutoff mechanically because it does not measure minority voters' ability to elect their preferred candidates, in part because no true distinction exists between the ability to elect and the ability to influence elections. See J. Morgan Kousser, \textit{Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law}, 27 USF L Rev 551, 563-65 (1993)(cited in note 3).


Furthermore, in voting rights cases, a bright line is simply impossible because, in reality, no bright line marks when a group has the ability to elect. See Kousser, 27 USF L Rev at 563-65 (cited in note 3).

\textsuperscript{80} 42 USC § 1973(b).

Although courts may have more difficulty assessing VRA claims without a bright-line rule, the need for judicial ease does not justify denying relief when plaintiffs have suffered real injury to such an important right. The results test codified by the 1982 Amendments "is not an easy test." The Senate Report provided a number of factors that would be relevant to this inquiry, and Congress clearly intended no set formula for determining when a voting practice violates the Act. Even in ability-to-elect claims, once the Gingles preconditions are met, courts must still analyze the totality of the circumstances to determine if plaintiffs have stated a valid VRA claim.

There is a legitimate demand for standards that courts can use to assess influence claims. However, the Gingles precondi-
tions are not appropriate standards. Because Congress did not intend courts to apply a bright-line rule to evaluate VRA claims and because bright-line rules are poorly suited to VRA cases, courts should find more appropriate standards to apply.

III. PROPOSED STANDARDS

Courts must often balance judicial economy against judicial accuracy. This balance, however, must be made in light of the gravity of the injury at issue. Where, as with influence-dilution claims, districting endangers fundamental rights, there is good reason for courts to sacrifice some judicial economy in favor of accuracy. The importance of voting rights requires that courts attempt to create workable standards to assess influence claims so that real injuries to these rights do not go unredressed.

Although the preconditions established in *Thornburg v Gingles*\(^{86}\) should not be applied to influence-dilution claims, they can be the basis of new standards. These new standards should retain two prongs of the *Gingles* test by requiring a showing of white bloc voting and of minority cohesiveness. As in ability-to-elect claims, these prongs show that the alleged harm is race based, as required by the VRA.

The *Gingles* requirement that plaintiffs be able to constitute a majority in a single-member district, however, must be modified. In order to maintain this requirement's focus on causation, the third prong in the proposed influence-claim standards should determine whether the challenged practice has caused a minority group's influence to be diluted. Plaintiffs must show that they would have more influence under a proposed redistricting plan than they had under the challenged plan. Additionally, plaintiffs must show that there is a "lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"\(^{86}\) under the challenged districting.

A fourth prong is necessary to assess influence-dilution claims. If redistricting increases the proportion of minorities in one district, it will reduce the proportion of minorities in another. Thus, plaintiffs must show that the proposed districting plan advances minority voting rights, on balance, across all affected districts. A state can counter an influence-dilution claim by dem-

\(^{85}\) 478 US 30 (1986).

onstrating that it created the challenged districting scheme to support the voting rights of minorities in the district where the minority population would decrease. Plaintiffs then must overcome a presumption that redistricting will actually cause harm to minority voting power in that area.

A. The First Prong: Did the Challenged Districting Unnecessarily Split a Cohesive Minority Group?

One of the Gingles preconditions should remain intact: that the challenged districting plan unnecessarily split a cohesive minority group. This requirement is necessary to demonstrate that the challenged districting has caused the dilution of minority influence or that, in the words of the Gingles Court, the dilution "thwarts distinctive minority-group interests."

This prong has two parts. First, the minority group must be cohesive enough to have identifiable interests and potential influence as a group. Second, the districting must injure this political influence by splitting a concentration of the cohesive group.

B. The Second Prong: Does White Bloc Voting Usually Defeat Candidates Who Represent Minority Interests, or is Minority Influence So Negligible that No White Bloc Exists?

The standard for influence-dilution claims should also borrow the Gingles requirement that white bloc voting play a role in the plaintiffs' lack of influence. This prong demonstrates that the

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89 Contrary to the Turner court's analysis, which led it to conclude that influence claims could never satisfy the requirement of white bloc voting, white bloc voting is not an either-or proposition. See Turner v Arkansas, 784 F Supp 553, 570, 571 (E D Ark 1991). Significantly, the Turner court defined the minority-preferred candidate to be an African-American candidate (in accordance with plaintiffs' definition). Id at 571. Given this definition, the Turner court's presumptions regarding the either-or nature of bloc voting are more understandable. But in reality, bloc voting occurs on a continuum—there can be more or less of it. The Supreme Court has recognized this to be the case. See Johnson v De Grandy, 114 S Ct 2647, 2657 (1994); Gingles, 478 US at 55-58. For an analysis of the effects of varying degrees of bloc voting, see, generally, Kousser, 27 USF L Rev at 551 (cited in note 3). For instance, white bloc voting could mean that 80 percent of the white voters will vote as a bloc to defeat a minority-preferred candidate. This level of bloc voting will defeat minority candidates in some, but not all, situations, depending on whether the 20 percent who cross over are enough to elect the minority-preferred candidate.
influence dilution is race based because it is caused by the submergence of the minority group in a white majority.

Courts should not, however, require white bloc voting in all cases. Where the number of minority voters in a challenged district is so small that their votes are expendable, candidates will not address minorities' interests even in the absence of white bloc voting. The candidates will instead focus all their attention on trying to attract the votes of the white majority. With both candidates focusing exclusively on whites, the white voters likely will split because there would be no candidate against whom they would vote as a bloc. Thus, plaintiffs may still satisfy this prong by showing that the lack of a white bloc vote results from the minority group's expendability to candidates.

_Armour v Ohio_⁹⁰ presents a good example of the dynamics of white bloc voting and why districting may dilute plaintiffs' influence even though there is no white bloc.⁹¹ The _Armour_ court found that minority candidates were defeated by white bloc voting, but when no minority candidate existed, the white vote was split.⁹² The court based these findings on statistics regarding past electoral behavior. Political races in the area were partisan, with 80 to 90 percent of African-Americans consistently voting for the Democratic candidate.⁹³ About 10 percent of whites in these races voted Republican; the rest were split between independent and Democratic candidates.⁹⁴ In races in which an African-American candidate ran, however, about 80 percent of African-Americans voted for the African-American candidate, whereas only 12 percent of whites voted for the African-American candidate.⁹⁵ The _Armour_ court found that, because African-American voters were safely Democratic when there was no African-American candidate, candidates addressed their campaigns primarily towards the wealthy white suburbanites who constituted the swing vote.⁹⁶ Thus, the white vote was split because of the absence of a candidate who represented minority interests.

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⁹¹ Id.
⁹² Id at 1056-58.
⁹³ Id at 1057 n 17.
⁹⁴ _Armour_, 775 F Supp at 1056.
⁹⁵ Id at 1057.
⁹⁶ Id at 1058-59 (including, for example, evidence that there was very little campaigning directed toward the African-American community).
Plaintiffs would not have satisfied this prong of the proposed test if whites did not vote as a bloc against minority candidates. Without such a bloc, plaintiffs could not have attributed their lack of success to race. Plaintiffs' claim would also have failed if they could not have explained the absence of a white bloc on the grounds that no candidate represented minority interests and that the African-American vote was dispensable.

C. The Third Prong: Do Candidates Currently Tend to be Unresponsive and Would Redistricting Demonstrably Increase Minority Influence?

Unlike the *Gingles* test for ability-to-elect claims, in influence-dilution claims, courts cannot require the minority group to constitute a majority in a single-member district. This would necessarily prevent any claim from succeeding. Plaintiffs making influence-dilution claims must instead show that the challenged districting caused the alleged dilution. That is, plaintiffs must show that a proposed redistricting would provide greater influence to the minority group than the challenged plan allowed. 97 Plaintiffs cannot rest on the assumption that more people will mean more influence, but must bring forth proof that this is so. 98

Additionally, plaintiffs must show that they lack influence in the first instance by demonstrating that representatives under the challenged districting scheme tend to be unresponsive to minority interests. To show a lack of responsiveness, plaintiffs must present evidence that representatives have tended to vote against, or without regard to, identified minority interests.

97 See Kousser, 27 USF L Rev at 577 (cited in note 3). The Senate Report included candidate responsiveness to minority interests as one of the factors relevant to establishing a violation of the VRA. S Rep No 97-417 at 29 (cited in note 11). In *Gingles*, the Court recognized that, depending on the case, some Senate Factors will be more important than others. *Gingles*, 478 US at 49 n 15. In cases of influence dilution, responsiveness of candidates will be among the most important considerations.

98 This assumption, though seemingly intuitive, is incorrect in the context of voting-rights cases. The claim in voting-rights cases depends on the existence of racially polarized voting that skews the political process, such that numbers do not have their normal significance in voting. For instance, if racial bloc voting consistently defeats the minority-preferred candidate, increasing the number of minority voters will not help unless it reaches the threshold necessary to defeat the white bloc. As long as minority voters remain below this number, candidates have no incentive (indeed, they have a disincentive) to address minority issues, regardless of the fact that minorities may constitute a substantial portion of the district, because if they do, they will be defeated by the white bloc.
The *Armour* case exemplifies how plaintiffs can demonstrate increased influence. The *Armour* court found that, in the challenged districts, candidates were unresponsive to minority interests because the districts' racial composition created incentives for candidates to focus only on the white swing vote.

In the proposed district, however, African-American voters would constitute about one-third of total voter population (as opposed to 25 percent and 11 percent in the two challenged districts), and about half of the usual Democratic vote. Consequently, candidates (at least Democratic candidates) could no longer afford to ignore minority interests.

Plaintiffs can use other types of evidence to show that redistricting would increase minority influence. Plaintiffs' evidence will differ depending on the alleged cause of their lack of influence. For instance, if minority plaintiffs lack influence because their votes are expendable (instead of being defeated by white bloc voting), as in *Armour*, plaintiffs can show that the proposed redistricting would increase their population to the degree necessary to command the candidates' attention. In *Armour*, plaintiffs successfully demonstrated this because of the new influence they would have over the Democratic primary. Alternatively, plaintiffs can show that with the increased population the minority group would become a swing vote, commanding candidates' attention so that they can no longer ignore minority interests. Plaintiffs might also use statistics demonstrating that a redistricting plan would increase their population to the point where campaigns would begin to target them.

A successful defense to a claim that minority influence is so negligible that there is no white bloc might show that whites, if redistricted, would begin to vote as a bloc to defeat any candidate

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69 *Armour*, 775 F Supp at 1058.

100 Id at 1047, 1059-60.

101 Id at 1060.

102 Id.

103 The court in *Illinois Legislative Redistricting Comm'n v LaPaille*, 786 F Supp 704, 715 (N D Ill 1992), noted that this argument depends upon the existence of a partisan race. This objection presents little difficulty since bipartisan races are the reality in many areas, although plaintiffs would have to show that elections follow this pattern as a part of showing that they can form a swing vote.
that served minority interests. If the white bloc defeats the minority group despite redistricting, then redistricting does not remedy plaintiffs' injury. In this situation, redistricting would not change candidates' incentives to ignore minority interests.

To succeed in an influence claim based on white bloc voting, plaintiffs must show that bloc voting could be overcome, at least partially, so that some of their interests will be addressed. For example, plaintiffs can show that the crossover voting that does exist would be sufficient to allow the minority group greater influence once redistricting increases its population. Alternatively, plaintiffs can present evidence that redistricting would facilitate the forming of coalitions or make existing coalitions more effective. There may be other evidence that would show the requisite difference in influence. Because voting-rights cases are fact intensive, the above examples do not exhaust the possibilities. The important point is that plaintiffs must show that some concrete difference exists; plaintiffs cannot merely rest on the assumption that a larger percentage of the population would wield more influence and that therefore the challenged districting plan violates the VRA.

D. The Fourth Prong: Would Redistricting, on the Whole, Advance Minority Interests Across All Districts Affected?

Influence claims are complicated by the fact that increased influence in one district likely means decreased influence in another. Thus, shifting the minority group's population, even though it may increase influence in one district, may not advance minority voting rights as a whole. Which allocation of influence best furthers minority voting rights remains unclear. For this reason, courts should defer to the state's districting decision if the state shows that the decision was both reasonable and done in a good faith effort to protect minority voting rights.

Thus, this prong involves a shifting burden of proof. Initially, plaintiffs must show that their proposed redistricting will increase the aggregate minority influence. If the proposed redistricting will decrease minority influence in other districts, a gain in the proposed "influential" minority district must compensate for this decrease. For instance, if the minority group in the "losing district"—the district with a reduced minority population—sacrifices little influence, because it had virtually none initially, a demonstrable increase in influence in the "gaining district" would compensate for this loss.
Armour is an example of a case where redistricting would benefit the voting power of minorities on the whole. In Armour, the ratio of minorities in the two districts at issue would have been changed from 35:65 to about 1:99. Thus, redistricting would have benefitted 99 percent of the minorities across the two districts. It is unlikely that the remaining 1 percent's loss of influence would outweigh the benefit to the other 99 percent. This is especially true because, under the challenged districting scheme, none of the minorities had any significant influence.

However, courts should presume that the challenged districting is valid if either of two situations exist: (1) if the state demonstrates that it purposefully districted to create a beneficial allocation of minority influence for purposes of the VRA; or (2) if the minorities in the losing district object to their loss of influence under the plaintiff's proposed redistricting. Although courts will presume the districting to be valid in either of these circumstances, plaintiffs can overcome this presumption. For example, plaintiffs can counter the state's demonstration of good faith. To do so, plaintiffs bear the burden of showing that the state's actual motive was not to further minority interests. The state's demonstration puts motive at issue and thus differs from the usual VRA claim in which the state's intent is irrelevant. Plaintiffs need not demonstrate that the state intended the districting to reduce minority influence. They need to show only that the state did not intend to protect minority voting rights.

Alternatively, plaintiffs can counter the state's assertion that it districted reasonably. To do this, plaintiffs must show that the state's conclusion that redistricting will not advance minority rights on the whole is unreasonable. Thus, there is a different standard of proof with regard to the effects of the districting if plaintiffs choose to attack the state's reasonableness claim. Instead of having to show, based on a preponderance of the evidence, that redistricting would advance minority interests, plaintiffs must now show that it would be unreasonable to conclude that redistricting would not have this effect. Plaintiffs must

104 Armour, 775 F Supp at 1047-48. The numbers offered by the court reveal that if redistricted, one district would reduce from 11.11 percent to about 0.87 percent African-American, whereas the other would increase from 24.96 percent to about 35.9 percent African-American.

105 Id at 1059.

106 Whether this standard becomes "fatal in fact," essentially defeating all influence-dilution claims, depends on how courts apply it. It is intended that, just as it is possible to demonstrate that a lower court's decision was clearly erroneous on an appeal, it should be
also show unreasonableness to overcome an objection to the plaintiff’s proposed redistricting by minorities in the “losing district.”

IV. THE PROPOSED STANDARDS RESPOND TO OBJECTIONS AGAINST INFLUENCE-DILUTION CLAIMS

These standards address the concerns that have driven courts to seek a bright-line rule. Allowing influence-dilution claims subject to these standards does not threaten a flood of marginal claims. Thus, applying these standards will not prevent valid claims from being redressed. In addition, applying these standards provides some measure of security from frivolous claims to states that draw district lines in good faith.

A. The Proposed Standards Will Halt a Potential Flood of Litigation

Some courts are concerned that without a bright-line, prophylactic rule, they will be flooded with marginal claims. Although the proposed standards do not provide a bright line, they will stem this tide. The fourth prong will enable courts to dismiss many claims, especially given the required deference to the current districting scheme, if the state shows that it acted reasonably and in good faith to abide by the VRA. The third prong will reduce the potential for frivolous claims by requiring that representatives under the current districting scheme be unresponsive.

B. The Proposed Standards Will Not Leave States Perpetually Vulnerable to VRA Claims

Another concern is that without a bright-line rule, states will not be able to draw districts that they are confident do not violate the VRA. Arguably, the Thornburg v Gingles 50 percent requirement enabled politicians to know what they had to do to succeed against VRA challenges. Absent this bright line, politicians may be perpetually vulnerable, and courts may find it difficult to fashion remedies. The 50 percent requirement

possible for plaintiffs to demonstrate that a districting decision was unreasonable.

107 See notes 18-45 and accompanying text.
108 See notes 104-06 and accompanying text.
109 See notes 97-103 and accompanying text.
111 See Hastert v State Bd. of Elections, 777 F Supp 634, 653 (N D Ill 1991)(expressing
gives direction as to what needs to be done—create a district with at least 50 percent minority voters.

These concerns, however, are overstated. Allowing influence claims subject to the proposed standards will not make politicians inordinately insecure. The deference called for in the fourth prong ensures that as long as states district reasonably and in good faith with regard to voting rights considerations, they will be safe from challenges based on influence dilution.

Admittedly, however, allowing influence claims will make politicians' and courts' jobs somewhat more difficult. But this fact does not necessarily mean these claims should go unrecognized. Certainly it is easier to district if one ignores voting rights entirely. The vulnerability of these rights means politicians and courts must be that much more careful to perform their jobs responsibly.

C. A Note on Maximization Concerns

Lack of a bright-line, prophylactic rule may not be at the heart of the concern regarding the flood of marginal claims. Rather, the concern may stem from the lack of a benchmark to determine how much influence minority voters should have. In other words, even if redistricting can increase a minority group's

112 See Turner v Arkansas, 784 F Supp 553, 572 (E D Ark 1991)(expressing concern that allowing claims for influence dilution would effectively turn the VRA into an affirmative action statute, asking, "How do ... plaintiffs ... contend that [the challenged districting] results in [African-American] voters having less opportunity to participate or to elect? 'Less' assumes some benchmark. Less than what?"). The Turner court concluded that the benchmark must be the amount of voting opportunity that plaintiffs had immediately before implementation of a challenged practice. But this cannot be right. If it were, it would allow consciously racist districting that intentionally diluted minority voting power to remain intact for the simple reason that it was initially created 30 or 40 years ago. Under this rule, because the legislature made no change for the worse when it retained those districts in 1990, no VRA claim existed. See Hastert, 777 F Supp at 654 n 33.

The idea that at some point a group is just too small to have a claim reflects the question of how much influence such small groups should expect to have in the first place. While the benchmark question remains open for both influence and ability-to-elect claims, it may alleviate some of these concerns to remember that it will be more difficult for such small groups to meet their burden of proving that redistricting will significantly increase their influence.
influence, it is difficult to discern when the challenged districting scheme causes a legal injury by diluting the minority group's influence and when the minority group is merely seeking more influence.

The same problem exists in ability-to-elect claims. In Johnson v De Grandy, the Supreme Court stated that vote-dilution claims may not be made merely to "maximize" minority voting power. In order for plaintiffs to state a claim, it is not enough to show that it is possible to create more majority-minority districts; plaintiffs must also show that the challenged practice injured them by disproportionately limiting the number of representatives they were able to elect.

In De Grandy, the Court held that evidence of "proportionality" proved that plaintiffs' claim was to maximize their influence, rather than to remedy an injury. Because the number of majority-minority districts was proportional to the number of minority voters in the state, no evidence existed that minorities suffered vote dilution or that the current districting scheme tended to perpetuate a history of systematic discrimination. While the court denied that proportionality could insulate a state from VRA challenges, proportionality was at least identified as one factor relevant to determining whether vote-dilution claims are for maximization or for redress of a legitimate injury.

It would be quite different to apply proportionality to influence-dilution claims. There may only be crude ways to distinguish between maximization and redress of harm in the influence context. One possibility is to require that plaintiffs demonstrate that only a minimal amount of minority influence exists under the challenged districting scheme. A form of this requirement is incorporated into the third prong of the proposed test. Plaintiffs must show that, under the challenged scheme, elected officials tend to be unresponsive to minority interests. This test is based on the notion that a minority group that would otherwise have at least some of its interests addressed, and some measure of political representation, should not be left virtually unrepresented because of poor districting.

114 S Ct 2647 (1994).
115 Id.
116 Id at 2658-60.
117 Id at 2660.
118 De Grandy, 114 S Ct at 2660.
Legitimate concerns drive courts’ general reluctance to recognize VRA claims for influence dilution. The proposed test, however, addresses these concerns by creating standards to assess alleged injury to a minority group’s political influence. These standards are designed to detect when districting has impermissibly diluted minority voters’ influence. Under the proposed standards, plaintiffs must show that: (1) the challenged districting scheme unnecessarily split a cohesive minority group; (2) either white bloc voting usually defeats candidates who represent minority interests, or minority influence is so negligible that no white bloc exists; (3) redistricting could provide minority voters with a demonstrable increase in electoral influence in place of a scheme where candidates tend to be unresponsive; and (4) redistricting would, on the whole, advance minority interests across all districts affected. This test allows courts to remedy influence dilution—an important yet generally unrecognized harm to minority voting rights. At the same time, this standard limits marginal claims through a sensitivity to the voting rights of minorities in all relevant districts and a recognition that it is not always clear which districting plan best furthers minority voting rights.