Using Candidate Race to Define Minority-Preferred Candidates under Section 2 of the Voting Rights Act

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Congress passed the Voting Rights Act of 1965 ("VRA")\(^1\) to protect the voting rights of minority citizens. At the time of passage few minorities had the money, resources, or opportunity to serve as candidates for elected office, and voting rules made it difficult for minorities to vote or elect their preferred candidate. Some states, counties, and cities, particularly in the South, created election rules and structured election districts to prevent minority citizens either from voting or from having a reasonable chance of electing a candidate of their choice. The VRA prohibited states and political subdivisions from applying practices and procedures that denied or abridged "the right of any citizen of the United States to vote on account of race or color."\(^2\)

Minority plaintiffs have used the VRA effectively in litigation against discriminatory election practices that prevent minority citizens from registering and voting. As a result, the typical modern VRA claim is not about the denial of the right to vote, but about the denial of the right to an equal opportunity to elect representatives of choice, sometimes called "minority vote dilution."\(^3\)

In 1982, Congress amended the VRA's language to respond to these changed circumstances. Section 2 now guarantees that all citizens, regardless of race or color, have an equal opportunity "to participate in the political process and to elect representatives of their choice."\(^4\) The VRA provides that a court should evaluate claims "based on the totality of circumstances," and that "[t]he extent to which [minorities] have been elected to office ... may

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\(^2\) Id.
\(^3\) *Thornburg v Gingles*, 478 US 30, 46 (1986)(finding impermissible vote dilution in state legislature's redistricting plan).
be considered" in this evaluation. However, the rights created by the VRA do not include "a right to have [minorities] elected in numbers equal to their proportion in the population." 5

Neither the VRA nor the Supreme Court has defined what a candidate must do or be to qualify as a "representative of choice" or "minority-preferred candidate," terms the Supreme Court has used interchangeably. 6 Courts do not agree whether white candidates can be minority-preferred candidates, nor do they agree whether minority candidates are, by definition, minority-preferred candidates. Resolving these issues remains critical because Section 2 vote-dilution claims largely turn on the electoral success or failure of minority-preferred candidates. 7

In Thornburg v Gingles, 8 the Supreme Court interpreted the 1982 amendments but did not reach a consensus on how to define "minority-preferred candidate." 9 Three distinct interpretations arose. Justice Byron White implied that all minority candidates, and only minority candidates, can be minority-preferred candidates. 10 Justice Sandra Day O'Connor treated candidate race as one of several factors for a court to consider when determining who is a minority-preferred candidate. 11 Justice William Brennan, Jr. embraced a strictly race-neutral test under which candidate race is irrelevant. 12

Part I of this Comment discusses the history of the VRA, the purpose and language of the 1982 amendments, and the three tests generated by Gingles. Part II describes the split among the federal circuits following Gingles. The Fifth and Seventh Circuits have applied the strictly race-conscious rule, 13 the Eleventh

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5 Id.
7 Since Section 2 is basically designed to afford minority voters an equal opportunity to elect representatives of their choice, evidence that minority voters have succeeded in doing just that weakens the strength of a Section 2 claim. This is stated as factor seven of the Senate Report accompanying the 1982 VRA amendments. See Senate Judiciary Report on the Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 28-29 (1982).  
9 The Gingles Court discussed this term but failed to reach majority agreement on the role played by candidate race in the definition. See id at 83 (White concurring).
10 Id.
11 Id at 101 (O'Connor concurring).
12 Gingles, 478 US at 67.
13 See Citizens for a Better Gretna v City of Gretna, La., 834 F2d 496, 503 (5th Cir 1987)(affirming vote-dilution claim by rejecting argument that white candidates in white-only elections were minority preferred); League of United Latin American Citizens, Council No. 4434 v Clements, 999 F2d 831, 861 (5th Cir 1993)("LULAC IV") (rejecting a vote-dilution claim for county-wide elections for state trial judges by looking at nonracial causes of racially polarized voting); Baird v Consolidated City of Indianapolis, 976 F2d
Circuit has applied the strictly race-neutral rule, and the Third and Tenth Circuits have taken the middle position that uses candidate race as one factor to define "minority-preferred candidate." In part III, this Comment analyzes the three competing tests and proposes that because not all minority candidates are minority-preferred candidates, and because some white candidates are minority-preferred candidates, a court should reject Justice White's test and not use candidate race as a proxy for minority-preferred candidate. On the other hand, because minority candidates are historically more likely to be minority-preferred candidates, a court should reject Justice Brennan's test that ignores candidate race. Instead, a court should adopt a test similar to Justice O'Connor's and use candidate race as one factor in close cases to determine who is a minority-preferred candidate.

A court should use candidate race only in close cases because evidence of how minorities actually vote is a much better indicator than race. When statistical minority voting patterns clearly demonstrate a preference among candidates, a court should give that factor great weight in identifying minority-preferred candidates, while ignoring candidate race. When minority voting patterns do not clearly demonstrate a preference, then a court should increasingly consider other factors, including: candidate race; minority voter turnout; candidate statements about what constituency she represents; minority community support for the candidate during the campaign; and factors mentioned in the 1982 amendments' legislative history.

357, 361 (7th Cir 1992)(denying vote-dilution claim based on the election of an African-American Republican receiving strong support from white voters).

14 See Carrollton Branch of the NAACP v Stallings, 829 F2d 1547, 1557 (11th Cir 1987)(upholding the vote-dilution claim of African-American voters in Carroll County, Georgia).

15 See Sanchez v Bond, 875 F2d 1488, 1495 (10th Cir 1989)(rejecting vote-dilution claim of Hispanic-American plaintiffs by finding that Hispanic-Americans controlled the Democratic party that had sponsored successfully elected white candidates); Jenkins v Red Clay Consolidated School District Board of Ed., 4 F3d 1103, 1115-16 (3d Cir 1993)(defining a flexible approach that uses candidate race as one factor to define minority-preferred candidate).

16 See Jenkins, 4 F3d at 1126.
I. THE SUPREME COURT HAS FAILED TO AGREE ON A DEFINITION OF “MINORITY-PREFERRED CANDIDATE” UNDER SECTION 2 OF THE VOTING RIGHTS ACT

A. The 1982 Voting Rights Act Amendments’ Rejection of the Intent Requirement for Section 2 Vote-Dilution Claims

The original VRA language prohibited states and political subdivisions from using voting prerequisites, standards, practices, or procedures to deny or abridge citizens’ right to vote on account of race or color. In *White v Regester*, the Supreme Court gave meaning to this protection by defining the legal test for a vote-dilution claim. The Court required plaintiffs to show that under “the totality of the circumstances” minority members “had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” The test did not require plaintiffs to show that the state or political subdivision engaged in the election practice with an intent to discriminate against minorities.

Although the *White* test clearly rejected an intent requirement, it did not state which facts a court should consider in evaluating electoral opportunity, nor did it set forth the manner in which a court should compare minority opportunity to white opportunity. The Fifth Circuit, in *Zimmer v McKeithen*, proposed a list of relevant factors to fill these gaps in the Supreme Court’s *White* test. A minority group could show unequal electoral opportunity if it could demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination.

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17 Prior to the 1982 amendments, Section 2 provided: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” 42 USC § 1973 (1965).


19 Id at 766.

20 See *Thornburg v Gingles*, 478 US 30, 35 (1986)(discussing the “results test” as applied by the *White* Court).


in general precludes the effective participation in the election system . . . . Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.25

Nevertheless, in City of Mobile v Bolden,24 a Supreme Court plurality departed from prior case law by requiring Section 2 plaintiffs to show discriminatory intent.25 The Bolden court placed the burden on the plaintiff to show that the government designed or maintained the challenged election system to further racial discrimination.

In response to Bolden, the 1982 amendments to the VRA27 codified the White holding that discriminatory effect was sufficient to sustain a vote-dilution claim.28 The Senate Report accompanying the amendments stated that the "intent test . . . places an unacceptably difficult burden on plaintiffs"29

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23 Zimmer, 485 F2d at 1305. In Marshall the Supreme Court affirmed the use of these "Zimmer factors" to evaluate minority electoral opportunity. See Gingles, 478 US at 36 n 4 (discussing the Marshall and the Zimmer factors).
26 Justice Stewart, writing for the plurality, wrote that "[a] plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" Bolden, 446 US at 66, citing Whitcomb v Chavis, 403 US 124, 149 (1971).
27 Section 2, as amended, provides:
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b).
(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
28 Gingles, 478 US at 35.
29 Senate Judiciary Committee Report on the Voting Rights Act Extension, S Rep No
and that "the Committee has amended Section 2 to permit plain-
tiff s to prove violations by showing that minority voters were
denied an equal chance to participate in the political process, i.e.
by meeting the pre-Bolden results test." The Senate Report
also directed courts to consider the Zimmer factors when adju-
dicating Section 2 vote-dilution cases.

B. The Gingles Court Created a Three-Part Test to Determine
Section 2 Vote-Dilution Claims

In 1986, the Supreme Court interpreted the amended Section 2 in Thornburg v Gingles. The plaintiffs, registered African-
American voters in North Carolina, challenged six multimember
districts and one single-member district in the state legislature's
redistricting plan. The plaintiffs alleged that the challenged
districts impaired minority citizens' ability "to elect representa-
tives of their choice" in violation of Section 2. The Court unani-


30 Id.

31 The factors noted by the Senate Report are:
1. the extent of any history of official discrimination in the state or political
   subdivision that touched the right of the members of the minority group to reg-
   ister, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision
   is racially polarized;
3. the extent to which the state or political subdivision has used unusually large
   election districts, majority vote requirements, anti-single shot provisions, or
   other voting practices or procedures that may enhance the opportunity for dis-
   crimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority
group have been denied access to that process;
5. the extent to which members of the minority group in the state or political
   subdivision bear the effects of discrimination in such areas as education, em-
   ployment and health, which hinder their ability to participate effectively in the
   political process;
6. whether political campaigns have been characterized by overt or subtle racial
   appeals;
7. the extent to which members of the minority group have been elected to pub-
   lic office in the jurisdiction.
Additional factors that in some cases have had probative value as part of
plaintiffs' evidence to establish a violation are: whether there is a significant
lack of responsiveness on the part of elected officials to particularized needs of
the members of the minority group; whether the policy underlying the state or
political subdivision's use of such voting qualification, prerequisite to voting, or
standard, practice or procedure is tenuous.

Id at 28-29.

33 Id at 35.
34 Id.
mously held that impermissible vote dilution existed in six of the seven challenged districts.\textsuperscript{35}

The majority opinion required plaintiffs to prove three "necessary preconditions" to establish their vote-dilution claim: (1) that the minority population was "sufficiently large and geographically compact to constitute a majority in a single-member district";\textsuperscript{36} (2) that the minority group was "politically cohesive";\textsuperscript{37} and (3) that the white majority voted sufficiently as a bloc "usually to defeat the minority's preferred candidate."\textsuperscript{38}

The \textit{Gingles} test emphasized the concept of racial bloc voting. The \textit{Gingles} Court equated the terms "racial bloc voting" and "racially polarized voting," defining them as either "a consistent relationship between the race of the voter and the way in which the voter votes," or a situation in which "[African-American] voters and white voters vote differently."\textsuperscript{39} Under the \textit{Gingles} test, racial bloc voting is far more important than the other Senate Report factors because a showing of racial-bloc voting satisfies two of the three test elements.\textsuperscript{40} First, racially polarized voting requires minority voters to have voted alike; this requirement establishes political cohesiveness.\textsuperscript{41} Second, racially polarized voting requires majority voters to have voted alike, thus showing majority voter cohesiveness that will usually result in the defeat of the minority-preferred candidate.\textsuperscript{42}

\section*{C. Defining the Term "Minority-Preferred Candidate" Affects the Outcome of the \textit{Gingles} Test}

At the core of a Section 2 claim is a minority group asserting that it lacks an equal opportunity to elect its preferred candidates.\textsuperscript{43} The plaintiffs attempt to establish a violation by showing that the white majority usually defeats the minority-pre-

\begin{footnotesize}
\begin{enumerate}
\item Id at 42.
\item \textit{Gingles}, 478 US at 50.
\item Id at 51.
\item Id.
\item Id at 52-53 n 18 and n 21.
\item The Court noted that under a "functional view" of the political process as mandated by the Senate Report, "the most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" \textit{Gingles}, 478 US at 48 n 15, citing S Rep No 97-417 at 28-29 (cited in note 7).
\item \textit{Gingles}, 478 US at 56.
\item Id.
\item Id at 35.
\end{enumerate}
\end{footnotesize}
ferred candidates at the polls. Where a court defines "minority-preferred candidate" to include more successful candidates, the plaintiff's claim will be weaker. Conversely, where a court defines the term to include less successful candidates, the plaintiff's claim will be stronger. A simple example shows that a court's definition of the term "minority-preferred candidate," and the role of candidate race in that definition, affects the outcome of a Section 2 vote-dilution claim.

Suppose that in a Section 2 case the plaintiff presents as evidence an election between an African-American candidate and a white candidate in a county that is 30 percent African-American and 70 percent white. Suppose further that none of the African-Americans voted for the African-American candidate because they thought that candidate would not represent their interests and that all of the whites voted for the African-American candidate. Garnering 70 percent of the total vote, the African-American candidate would win the election. Given these facts, the court must then decide if the African-American candidate is a minority-preferred candidate.

One way of defining "minority-preferred candidate" is to ignore completely the candidate's race and to look instead at other factors, such as whether minority citizens voted for the candidate. This plain-meaning approach to defining "minority-preferred candidate" effectuates the Section 2 language guaranteeing minority citizens the equal opportunity "to elect representatives of their choice." By this definition of "minority-preferred candidate," it is hard to imagine how the candidate in the above hypothetical could be called minority-preferred where not a single minority voted for him. The plaintiff would have a stronger Section 2 vote-dilution case because the winning candidate is not, and cannot be, a minority-preferred candidate.

A completely different way to define "minority-preferred candidate" is to rely exclusively on the candidate's race. By this definition, minority candidates are minority-preferred candidates, and white candidates are not minority-preferred candidates. This definition uses candidate race as a proxy for "minority-preferred candidate." If a court encountering the hypothetical situation above utilized this definition, then the winning African-American candidate would be, by definition, a minority-preferred candidate, and the minority community's apparent success at electing mi-

44 Id at 48.
45 See note 7.
minority-preferred candidates would undermine the plaintiff's Section 2 vote-dilution claim.

D. The Supreme Court in Gingles Did Not Agree on How to Define "Minority-Preferred Candidate"

The Gingles Court did not reach a majority consensus on the appropriate definition of "minority-preferred candidate." The Justices disagreed specifically about the role that a candidate's race should play in that definition. Underlying this disagreement was whether a court should distinguish between minority voter electoral failure caused by racial discrimination and minority voter electoral failure caused by "interest group politics." Both Justices White and O'Connor wrote concurring opinions in Gingles in which they observed that something other than racial discrimination could cause racially polarized voting and that the cause of racially polarized voting is important under Section 2. In particular, both opinions endorsed the idea that when differing political or socioeconomic characteristics of whites and minorities explain racially polarized voting, Section 2 does not protect that cause of minority voter electoral failure—what Justice White called "interest group politics." For example,

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46 Gingles, 478 US at 83 (White concurring).
47 Both Justices White and O'Connor found that the role of a candidate's race in Section 2 claims was irrelevant to the disposition of the case. Nonetheless, it was discussed at length in the opinions. Id at 83 (White concurring) ("On the facts of this case, there is no need to draw the voter/candidate distinction."); id at 101 (O'Connor concurring) ("I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting... is not necessary to the disposition of this case.").
48 This Comment does not directly address the separate question of whether causes other than race explain racially polarized voting. This topic is addressed in Comment, Straight Party Tickets and Redistricting Thickets: Nonracial Motivations for Voter Preference, 1995 U Chi Legal F 505. This Comment does analyze whether candidate race is a useful determinant to distinguish causes, assuming that courts will engage in this causation inquiry.
49 Gingles, 478 US at 83. Both Justices White and O'Connor considered Justice Brennan's race-neutral position in Gingles to be at odds with White, 412 US at 755, and Whitcomb, 403 US at 124. Both referred to that portion of Whitcomb in which the Court explicitly rejected proportional representation for "any group with distinctive interests," sufficient numbers, and necessary compactness. Gingles, 478 US at 98 (O'Connor concurring), citing Whitcomb, 403 US at 156. Justice White focused on the interest-group politics aspects of White and Whitcomb, arguing that Brennan's rule would protect interest-group politics. See Gingles, 478 US at 83 (White concurring). Although Justice O'Connor was also concerned about overprotecting interest-group politics, she did not agree that "evidence that the divergent racial voting patterns may be explained in part by causes other than race" should not be admissible for some purposes. Gingles, 478 US at 100 (O'Connor concurring). She did not join the majority opinion primarily because it did not respect the
where minorities usually vote Democratic and whites usually vote Republican, and where Republicans generally win elections, a court should determine whether racial discrimination or “interest group politics” causes the candidate for whom the minorities vote to lose.\(^5\)

Unlike Justices White and O'Connor, Justice Brennan rejected the idea that a court should consider the causes of racially polarized voting.\(^5\) He opined that when minority citizens vote for one candidate and white citizens for another, those facts support a Section 2 vote-dilution claim regardless of why the two groups vote in different ways.\(^5\) Justice Brennan noted that since citizen race and socioeconomic characteristics are tightly correlated, when a court admits evidence about the causes of racially polarized voting, the court requires plaintiffs to show that whites vote with the intent to discriminate against minorities.\(^5\) He argued that considering causation would reintroduce an intent requirement into Section 2 of the VRA that Congress clearly abolished in the 1982 amendments.\(^5\)

This disagreement over the admissibility of causation evidence was the primary basis for the opinions’ different positions on the use of candidate race to define “minority-preferred candidate.” Justice White’s requirement that race be the cause of actionable racially polarized voting under Section 2 means that candidate race is crucial to his definition of “minority-preferred candidate.”\(^5\)

Justice White gave an example in his *Gingles* concurrence to show why candidate race is critical.\(^5\) He posited an election in which whites, voting for a Republican ticket, successfully elect both white and minority Republicans, and in which minorities, balance struck by Congress regarding proportional representation. Id at 84-85 (White concurring).

\(^5\) Justice White described this outcome in his concurrence. Id at 83.

\(^5\) Id at 62.

\(^5\) *Gingles*, 478 US at 63.

\(^5\) Id at 66-67.

\(^5\) See id at 70-71 (“To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile v Bolden* . . .”).

\(^5\) Id at 83 (White concurring).

\(^5\) *Gingles*, 478 US at 83 (White concurring).
voting for the Democratic ticket, fail to elect any candidates.\textsuperscript{57} The hypothetical's goal is to show that when whites elect minority candidates, race simply cannot be the cause of any observed racially polarized voting.\textsuperscript{58}

Justice White argued that race could not be the cause of the racially polarized voting because neither the race of the candidate nor the race of the voters explains the voting pattern.\textsuperscript{59} First, he argued that candidate race does not explain the racially polarized voting pattern because whites vote for both white and minority candidates.\textsuperscript{60} Second, he argued that voter race does not explain the racially polarized voting pattern either.\textsuperscript{61} His logic was that when white voters elect minority candidates, those white voters do not act based on their race. If white voters voted because of their race, they would only vote for white candidates.\textsuperscript{62} But because white voters also vote for and elect minority candidates, those white voters act according to their political beliefs, not their race.\textsuperscript{63} Justice White labeled this phenomenon “interest group politics.”\textsuperscript{64}

Justice White's reasoning renders candidate race not only critical to determining who is a minority-preferred candidate, but dispositive. By this reasoning, any time white voters elect minority candidates, some shared social, economic, religious, political, or other factor common to the white voters and the minority candidate explains the racially polarized voting. As a consequence, the racially polarized voting is not actionable under Section 2.

In her concurrence, Justice O'Connor also recommended that a court should consider the causes of racially polarized voting.\textsuperscript{65} According to Justice O'Connor, where the political affiliations of minorities and whites differ, and that difference explains why minorities vote for one candidate and whites for another, a court should question whether racially polarized voting, as defined under Section 2 of the VRA, exists.\textsuperscript{66} Justice O'Connor did not agree with Justice White that this causation inquiry meant that

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} \textit{Gingles}, 478 US at 83 (White concurring).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} \textit{Gingles}, 478 US at 83 (White concurring).
\textsuperscript{65} Id at 100-01 (O'Connor concurring).
\textsuperscript{66} Id.
every minority candidate would be a minority-preferred candidate, and that candidate race would be the only factor needed to define minority-preferred candidate. Instead, she considered candidate race as only one of several factors used to define minority-preferred candidate.

Finally, because Justice Brennan considered racially polarized voting to exist whenever voter race correlates with voter preference, independent of the causes of that correlation, his test does not incorporate candidate race. He proposed a strictly race-neutral rule under which "the race of the candidate per se is irrelevant to racial bloc voting analysis." Justice Brennan supported his definition of "minority-preferred candidate" on two grounds: (1) it follows from the statutory language and (2) it satisfies the reasons for requiring a showing of racial bloc voting. First, Justice Brennan interpreted the VRA's phrase "representatives of their choice" under a plain-meaning approach. He argued that if Congress had meant to say that all minority candidates, and only minority candidates, are minority-preferred candidates, it would have done so. Second, Brennan asserted that using the candidate's race in the inquiry does not further the underlying purposes of examining racial bloc voting—to establish minority group political cohesiveness and to show how submergence in a majority district prevents the minority group from electing a candidate of its choice. He argued that these goals depend only on the voters' race and the ballots they cast, not on the candidate's race.

II. THE FEDERAL CIRCUITS HAVE SPLIT OVER HOW TO DEFINE "MINORITY-PREFERRED CANDIDATE"

Because the majority in *Thornburg v Gingles* failed to agree on a definition of "minority-preferred candidate," the lower federal courts have examined this issue. The positions of Jus-
ties Brennan, White, and O'Connor have each garnered support from at least one federal circuit: the Fifth and Seventh Circuits have adopted Justice White's strictly race-conscious rule; the Eleventh Circuit has applied Justice Brennan's strictly race-neutral rule; the Third and Tenth Circuits have applied Justice O'Connor's test by taking race into account as one factor in determining who constitutes a minority-preferred candidate.

A. The Fifth and Seventh Circuits Have Applied Justice White's Strictly Race-Conscious Rule

The Fifth Circuit developed a strictly race-conscious approach in two seminal cases, *Citizens for a Better Gretna v City of Gretna* and *League of United Latin American Citizens, Council No. 4434 v Clements* ("LULAC IV"). The *Gretna* court ruled that "Gingles is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate." In establishing this rule, the court used candidate race but refrained from holding that a minority candidate is always a minority-preferred candidate. The *Gretna* court attempted to use candidate race to distinguish racial discrimination from other possible causes of racially polarized voting. The court reiterated Justice White's concerns about "the dangers in advancing interest group politics or enforcing proportional representation."
The *Gretna* court ultimately upheld a vote-dilution claim, rejecting the defendants’ argument that successful white candidates in elections with only white candidates were often minority-preferred candidates.\(^\text{87}\) The court excluded those elections because the whites could not be minority-preferred candidates.\(^\text{88}\)

In *LULAC IV*, the Fifth Circuit found that a court can reject vote-dilution claims based upon evidence that factors other than race caused racially polarized voting.\(^\text{89}\) The court held that when partisan affiliation, not race, is the best explanation, no Section 2 violation exists.\(^\text{90}\)

The plaintiffs in *LULAC IV* challenged Texas’s system of electing state trial judges in county-wide elections, claiming that the system impermissibly diluted Hispanic-American and African-American voting power.\(^\text{91}\) The court relied on the successful election of African-American Republicans and the repeated losses of white Democrats to conclude that partisan politics, not race, was the cause of racially polarized voting. The court wrote that

> The race of the candidate did not affect the pattern. White voters’ support for [African-American] Republican candidates was equal to or greater than their support for white Republicans. Likewise, [African-American] and white Democratic candidates received equal percentages of the white vote. Given these facts, we cannot see how minority-preferred judicial candidates were defeated ‘on account of race or color.’\(^\text{92}\)

In other words, although racially polarized voting existed, it did not result from racial discrimination if whites elected African-American Republicans. This position might be true if the only type of racial discrimination targeted by the VRA was discrimination against candidates. White voters that elect minority candidates are not discriminating against those candidates. Those

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\(^\text{87}\) Id at 503-04.

\(^\text{88}\) The appellant claimed that the district court erred by affording the Section 2 claim strictly on the basis of elections with at least one African-American candidate. The appellant wanted the court to consider elections in which minority voters supported winning white candidates. The court applied a quasi-race-conscious rule, stating that “*Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate.” Id at 503.

\(^\text{89}\) *LULAC IV*, 999 F2d at 879.

\(^\text{90}\) Id at 879.

\(^\text{91}\) Id at 837-38.

\(^\text{92}\) Id at 879.
same white voters, however, may discriminate against the minority community if the white voters elect minority candidates who support programs that directly or indirectly disadvantage minority citizens.

The Seventh Circuit reached the same conclusion on similar reasoning in *Baird v Consolidated City of Indianapolis*, a case with facts comparable to those of *LULAC IV*. The court refused to discount the election of an African-American Republican even though he received only a small fraction of the minority vote.4

In *Baird*, African-American voters challenged the system for electing council members in Marion County, Indiana, a county where minorities constituted 19 percent of the voting-age population.5 The county had twenty-nine council seats, twenty-five of which were filled in single-member elections, and the other four of which were filled by an at-large election.6 Plaintiffs claimed that the four-seat, at-large election diluted minority voting power.7

Seven of the twenty-five single-member districts had a 60 percent African-American population, and in the most recent county election, candidates favored by African-American voters carried all seven districts.8 Thus, minority voters controlled seven of twenty-nine seats, or 24 percent of the total.9 Commenting on the council's composition after those elections, the court stated that "[a]ll questions of intentional discrimination to one side, §2(b) also implies that African-Americans who have influence proportional to their numbers do not state a claim under §2(a)."10 Despite the more than proportional minority representation, the court went on to address the legality of the four-seat, at-large district.11

The court rejected the Section 2 claim because one of the at-large council members was African-American, even though minorities did not favor him in the election. Refusing to discount

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93 976 F2d at 357.
94 Id at 361.
95 Id at 358.
96 Id.
97 *Baird*, 976 F2d at 358.
98 Id.
99 Id.
100 Id at 360.
101 *Baird*, 976 F2d at 358.
the evidentiary weight of the elected minority Republican candidate, the court remarked that “[v]oters in Marion County seem to prefer Republicans but do not necessarily judge their Republicans by color.”

B. The Eleventh Circuit Adopted Justice Brennan’s Strictly Race-Neutral Rule

The Eleventh Circuit adopted Justice Brennan’s race-neutral rule in City of Carrollton Branch of the National Association for the Advancement of Colored People v Stallings. In Carrollton, African-American voters in Carroll County, Georgia, challenged the single-county-commissioner form of government, alleging that it impermissibly diluted African-American voting strength. The plaintiffs presented statistical voting data showing racially polarized voting to establish their Section 2 vote-dilution claim.

The court sustained the vote-dilution claim and stated that “[u]nder Section Two, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important.” The court also agreed with Justice Brennan’s position that a court should not examine the causes of racially polarized voting:

In sum, we would hold that the legal concept of racially polarized voting, as it related to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

C. The Third and Tenth Circuits Have Applied Justice O’Connor’s Intermediate Approach

Like Justice O’Connor, the Tenth Circuit in Sanchez v Bond took an intermediate position, using candidate race as
one factor to define which candidates are minority-preferred candidates. The court rejected Justice White's call for an inquiry into the causes of racially polarized voting and the strictly race-conscious rule. It also rejected Justice Brennan's standard that candidate race is irrelevant, noting that five justices "felt that such a hard and fast rule was contrary to precedent and was not necessary to the disposition of the case."

The facts of the case, however, did not compel the court to explain how to employ candidate race in the adjudication of Section 2 claims. The Sanchez court rejected the claim that Hispanic-Americans in Saguache County, Colorado, lacked an equal opportunity to elect minority-preferred candidates despite constituting 36 percent of the voting-age population in a county in which no Hispanic-American ever had won a seat on the County Commission. Having decided as a matter of law that elections with only white candidates could receive consideration, the court had little difficulty finding that several elected Democratic whites were minority-preferred candidates because Hispanic-Americans controlled the Democratic party. Therefore, the court did not engage in a more detailed analysis of which candidates were minority preferred.

Recently, in Jenkins v Red Clay Consolidated School District Board of Education, the Third Circuit also used candidate race as one factor, giving both a reason and a method for its use. The Third Circuit used candidate race as one factor because "experience does demonstrate that minority candidates will tend to be candidates of choice among the minority community." But the court used candidate race only as part of a flexible approach that included many factors to identify minority-preferred candidates. The court also admitted as evidence statistical analyses of: voting patterns; candidate race; minority voter

108 The court opined that "a court may not explain away evidence of racial bloc voting by finding that such voting is caused by underlying differences between the minority and white population." Id at 1493.

109 The court did "not believe that a per se rule against examining races that have only white candidates is implicit in Gingles." Id at 1495.

110 Id at 1494.
111 Sanchez, 875 F2d at 1490.
112 Id at 1496.
113 4 F3d at 1103.
114 Id at 1126.
115 Id at 1129.
116 Statistical analysis of racial voting patterns is available from exit polls, statistical analysis of district voting and racial composition, or some combination of the two. For a discussion of the creation of racial voting patterns from election results and district racial
turnout; lay testimony by voters and candidates; and minority involvement in the candidate's "initial advancement," campaign, and financing. The court afforded the most weight to statistical analysis of voting patterns, except where a bare majority of minority voters supported a candidate. In those elections, the Jenkins court looked to the other factors, including candidate race.

The Jenkins court did not examine Justice White's causation concerns, but it rejected a strictly race-conscious rule as overinclusive. The court noted that "[t]here may well be minority candidates who cannot be considered the minority community's representative of choice...." The court also found the strictly race-conscious rule potentially underinclusive, noting that "there may be majority candidates who truly may be the minority community's representative of choice."

The plaintiffs in Jenkins, African-American voters, presented evidence of seven elections in which African-American candidates lost to white candidates. The defendant responded, first, that plaintiffs had not shown the African-American candidates to be minority-preferred, and second, that the plaintiffs must include white-on-white election figures in their case.

The court inferred that any particular African-American candidate was "the minority voters' candidate of choice" from the district court's finding that there was "a strong correlation between the race of the candidate and the preference of [African-American] voters." The court was careful to note that while this inference did not completely satisfy the plaintiffs' burden of proof, it went "a considerable distance" toward it. The court held that the plaintiff met the burden with respect to six of the seven elections with statistical voting data and lay testimony.

compositions, see Jenkins v Red Clay Consolidated School District Board of Education, 780 F Supp 221 (D Del 1991).

117 See Jenkins, 4 F3d at 1129.
118 Id at 1126-27.
119 Id at 1129.
120 Id at 1125.
121 Jenkins, 4 F3d at 1125.
122 Id.
123 Id at 1111-12.
124 Id at 1124.
125 Jenkins, 4 F3d at 1128.
126 Id.
127 Id.
The court further held that the plaintiffs were not required to present evidence concerning other elections involving only white candidates, but the defendants could present evidence showing that a white candidate was minority-preferred. The court noted that a white candidate who received a majority of the minority community's vote was not necessarily "truly the minority community's representative of choice." The court described how to determine when a white candidate is minority-preferred:

In deciding which, if any, of the white candidates were minority-preferred, the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice. We believe that there are a number of factors to which a court can look to determine whether a white candidate may properly be considered the minority's preferred candidate.

The court suggested looking at minority-community candidate sponsorship, defined as minorities "initially advancing" the candidacy and helping to finance and run the campaign. The court next suggested evaluating the candidate's support for the minority community and the social, economic, and political issues that concern this community, noting that this commitment to the minority community is indicated by how much time, money, and energy a candidate spent campaigning in minority neighborhoods.

Two additional factors were offered by the court in its flexible approach to determine when a white candidate is minority-preferred. First, a higher minority voter turnout is suggestive of the presence of a minority-preferred candidate. Second, a white candidate more likely represents the minority community when the number of minority candidates historically has been low.

128 Id.
129 Jenkins, 4 F3d at 1126.
129 Id at 1129.
132 Id.
133 Id.
134 Id.
III. A COURT SHOULD USE CANDIDATE RACE AS ONE FACTOR TO IDENTIFY MINORITY-PREFERRED CANDIDATES

A court can use candidate race three different ways to identify minority-preferred candidates in a VRA Section 2 vote-dilution claim. Justice White's strictly race-conscious rule and Justice Brennan's strictly race-neutral rule are both rigid rules that prevent a court from accurately identifying candidates preferred by the minority community. Justice O'Connor's test endorses using candidate race as one factor in a multifactored approach to identify minority-preferred candidates.

A. Candidate Race Is Not a Useful Proxy for "Minority-Preferred Candidates"

Justice White's rule is that minority candidates are always minority-preferred candidates and that white candidates are never minority-preferred candidates. In other words, a court should look only at candidate race to determine who is a minority-preferred candidate under Section 2.

Justice White's interpretation of the VRA language reads more into the text than is present. The relevant text states that a Section 2 violation exists when minority citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Section 2 addresses voting acts by citizens, not by a candidate's race.

Justice White, however, was not simply interpreting the Section 2 term "representatives of their choice," referred to as minority-preferred candidates in Thornburg v Gingles. He was concerned with the overall purpose of Section 2. Justice White stated that Congress intended Section 2 to apply only to racially polarized voting caused by racial discrimination. He opined that Section 2 did not prohibit racially polarized voting caused by "interest group politics," defined as citizens who vote for a candidate because of shared economic, political, social, or re-

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137 Justice Brennan stated this criticism of a strictly race-conscious rule in his Gingles opinion. Gingles, 478 US at 67-68.
139 Id at 83 (White concurring).
140 Id.
Justice White stated that a strictly race-conscious rule provided the only way to ensure that successful Section 2 vote-dilution claims were based on racially polarized voting caused by racial discrimination.

However, even if one accepts Justice White's premise, his strictly race-conscious rule is not a good proxy for racial discrimination as the cause of racially polarized voting. Racial discrimination by white voters can cause racially polarized voting even if the white majority elects a minority candidate or even if the white majority rejects a white candidate. The reason that racial discrimination can cause racially polarized voting, regardless of the candidate’s race, is that white voters can discriminate not on the basis of the candidate’s race, but on the basis of the candidate’s positions. Regardless of their race, candidates campaign by asserting certain beliefs and promises that often favor or disfavor certain racial groups. For example, government assistance to the poor in a political subdivision where most of the poor are minorities may benefit minority citizens over white citizens.

White and minority voters can discriminate on the basis of race by voting for or against a candidate who espouses such government assistance to the poor, regardless of the candidate’s race. White voters can discriminate on the basis of race by voting for a minority candidate who opposes such assistance to the poor. Similarly, minority voters can discriminate on the basis of race by voting for a white candidate who supports such assistance to the poor.

How frequently voters consciously discriminate on the basis of race by voting for candidates that disproportionately benefit the voter’s racial group is a difficult empirical question. A strictly race-conscious rule ignores this form of discrimination and, therefore, relies on an oversimplified understanding of racial discrimination.

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141 Id.

142 Gingles, 478 US at 83 (White concurring). The purpose of this Comment is not to analyze whether a court should consider the causes of racially polarized voting under Section 2. This contentious topic is addressed in Comment, *Straight Party Tickets and Redistricting Thickets: Nonracial Motivations for Voter Preferences*, 1995 U Chi Legal F 505 (cited in note 48). This Comment cannot, therefore, reject Justice White’s strictly race-conscious rule because of its premise that a court will consider the causes of racially polarized voting.

143 Gary Franks, the first African-American Republican elected to the United States House of Representatives since the depression, was elected in a district composed predominantly of whites. See Sam Howe Verhovek, *Black Republican Candidates Find Niche in the New Order*, NY Times A1 (Oct 7, 1994).
B. Candidate Race Is Relevant to the Inquiry of Who Is a Minority-Preferred Candidate

Just as a strictly race-conscious rule to define "minority-preferred candidate" is an overly rigid and inaccurate proxy for determining when racial discrimination causes racially polarized voting, a strictly race-neutral rule also suffers from inflexibility and inaccuracy. Under this approach, endorsed by Justice Brennan,\(^{144}\) candidate race is irrelevant when determining who is a minority-preferred candidate. This rule would prevent a court from considering that minority voters more likely prefer minority candidates to white candidates.

Justice Brennan noted the relationship between candidate race and minority community voting preferences. He stated in *Gingles* that "[b]ecause both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that an [African-American] candidate will be the choice of [African-Americans], while a white candidate is the choice of whites."\(^{145}\) Nevertheless, Justice Brennan's strictly race-neutral rule makes no use of this relationship, a somewhat puzzling result.

Justice Brennan's position on whether a court should consider the causes of racially polarized voting helps explain his rule on the use of candidate race to define "minority-preferred candidate." He concluded that a court should not consider the causes of racially polarized voting for two reasons. First, the text of Section 2 makes no mention of the underlying causes of unequal minority opportunity "to elect representatives of their choice."\(^{146}\) From this, Justice Brennan inferred that evidence of unequal opportunity could sustain a Section 2 claim regardless of the causes of the denied opportunity.\(^{147}\) Second, the Senate Report accompanying the 1982 VRA amendments clearly stated that Section 2 plaintiffs did not need to show intent to discriminate on the basis of race to prove their vote-dilution claim.\(^{148}\) To Justice Brennan, a court inquiry into the causes of racially polarized

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\(^{144}\) *Gingles*, 478 US at 66-67.

\(^{145}\) Id at 68.

\(^{146}\) Id at 67.

\(^{147}\) Id at 66.

\(^{148}\) *Gingles*, 478 US at 66.
voting was equivalent to requiring plaintiffs to show intent to discriminate on the basis of race and thus contradicted the legislative history of Section 2.\textsuperscript{149}

Finding that a court should not inquire into the causes of racially polarized voting by looking at factors beyond statistical voting patterns, Justice Brennan's strictly race-neutral rule precludes making a causation inquiry. In effect, Justice Brennan held that the only significant factor in determining racially polarized voting was voter race and that other factors such as candidate race, candidate socioeconomic status, voter socioeconomic status, and voter political affiliation were irrelevant.

This strictly race-neutral rule suffers from two significant flaws. First, whether a court should consider the causes of racially polarized voting is a separate and distinct question from which candidates minorities prefer. The Supreme Court should resolve the causation question directly, rather than sacrifice accuracy in the identification of minority-preferred candidates by adopting rigid rules. Second, a strictly race-neutral rule presumes that a court can use statistical voting data without candidate race to identify minority-preferred candidates. In many elections, voting results alone will clearly identify the candidates preferred by the minority community. In elections where minority voters do not clearly favor one candidate, however, candidate race can be a useful additional determinant, and a court can use candidate race without inquiring into the causes of racially polarized voting.

C. A Court Should Identify Minority-Preferred Candidates by Using a Multifactored Approach that Includes Candidate Race

Courts should use neither a strictly race-conscious rule nor a strictly race-neutral rule to identify minority-preferred candidates. Instead, courts should identify minority-preferred candidates using a multifactored approach that treats candidate race as one of several factors. Statistical voting patterns primarily identify minority-preferred candidates. Candidate race, along with other factors, helps when such voting patterns are fuzzy.

When an election demonstrates racially polarized voting and one of the candidates receives a clear\textsuperscript{150} majority of the politi-

\textsuperscript{149} Id at 66-67.

\textsuperscript{150} Use of the term "clear majority" raises the question of how a court should define
ally cohesive minority vote, a court should give great weight to those voting results. This is essentially the command of Gingles, which held that when a plaintiff makes a showing of racially polarized voting, she establishes evidence of unequal opportunity to elect "representatives of choice" in violation of Section 2.\(^{151}\) For example, when whites predominantly vote for a winning candidate and minorities predominantly vote for a losing candidate, the winning candidate is not a minority-preferred candidate.

In a Section 2 case, however, a court often must consider elections where the minority community almost evenly splits its vote between two candidates. Although identifying the minority-preferred candidates in these elections may not be as easy, identifying them remains crucial to the outcome of a Section 2 claim, as a brief example illustrates.

Suppose that since the time a state approved and instituted a redistricting plan only five elections have occurred in a new, highly segregated district that is 70 percent white and 30 percent Hispanic-American. Suppose further that all five elections have been two-candidate elections, and that in two of the five elections, the losing candidate claimed to represent the Hispanic-American minority and received 90 percent of the minority vote while the winning candidate received 80 percent of the white vote. Considering only these two elections, a court would sustain a vote-dilution claim because all three elements of the Gingles test are satisfied: (1) the Hispanic-American community is large and geographically compact; (2) the Hispanic-American community has demonstrated political cohesiveness, since 90 percent of the voters supported the same candidate; and (3) the white majority voted as a group to defeat the minority-preferred candidate in both of the elections.

However, suppose that in the other three elections the winning candidate received 51 percent of the minority vote, that minority voter turnout was unusually low,\(^{152}\) and that the winners did not claim to represent minorities. In such a case, the pivotal question would be whether these three winning candi-

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the term "clear" and what factors should be used to do so. The point of a test using statistical voting results is to recognize the critical importance of actual voting in expressing preferences among candidates. Courts should employ a flexible test giving greater weight to voting results the larger the majority for a particular candidate.

\(^{151}\) Gingles, 478 US at 56.

\(^{152}\) Using voter turnout as a factor assumes some baseline of voter turnout for elections which include a minority-preferred candidate.
dates were minority-preferred candidates under Section 2. If a court deemed them minority-preferred candidates, the plaintiffs would have difficulty showing dilution in the face of apparent minority-voter electoral success. If a court did not deem them minority-preferred candidates, plaintiffs would have a strong vote-dilution claim based on the first two elections.

To identify minority-preferred candidates in these circumstances, a court should adopt the Third Circuit’s approach in *Jenkins v Red Clay Consolidated School District Board of Education*. This approach examines actual minority-voter balloting as the first step to determine which candidates are minority-preferred candidates. For candidates of any race who receive less than an overwhelming majority of the minority vote, a court must increasingly look to more than election results. A court should consider: candidate race; minority voter turnout; candidate statements about the constituency they represent; minority community support for the candidate during the campaign; and other factors mentioned in the 1982 amendments’ legislative history.

A court should look at the race of the candidate as one factor because, as noted above, the minority community more likely will prefer minority candidates to white candidates. Another important factor is minority voter turnout. Members of the minority community historically turn out in greater numbers for elections including a minority-preferred candidate. Therefore, the greater the minority voter turnout, the more likely the candidate with a modest majority is minority-preferred. On the other hand, if minority voter turnout is low, minority voters may be merely choosing between the lesser of two evils.

154 Id at 1126.
155 The *Jenkins* court was particularly concerned about treating any candidate who receives a majority of the minority vote as a minority-preferred candidate: “[I]t is important to look beyond whether a white candidate received a majority of the minority community’s vote and determine whether that white candidate is truly the minority community’s representative of choice.” Id. See also *Westwego Citizens for Better Government v City of Westwego*, 946 F2d 1109 (5th Cir 1991). The court there stated: “[W]hen there are only white candidates to choose from it is ‘virtually unavoidable that certain white candidates would be supported by a large percentage of [African-American] voters.’” *Jenkins*, 4 F3d at 1119, citing *Westwego Citizens for Better Government v City of Westwego*, 872 F2d 1201, 1208 n 7 (5th Cir 1989).
156 *Jenkins*, 4 F3d at 1128-30.
157 Id.
158 Id. See also *Campos v City of Baytown, Tex.*, 840 F2d 1240, 1245 (5th Cir 1988).
Characterization of a candidate’s campaign can also help in close cases.160 A court should examine the following areas to judge whether a candidate represents the minority community: (1) the candidate’s overt claims to represent the minority community; (2) the candidate’s position on social, political, and economic issues traditionally of concern to minorities; (3) the candidate’s expenditures of significant campaign resources in the minority community; and (4) the candidate’s sponsorship by leaders or other members of the minority community during the campaign.160

A court also should evaluate the Senate Report factors that bear on this question.161 For example, whether minorities have been denied access to the candidate-slating processes is one Senate Report factor. Another is the extent to which racial discrimination in education, employment, health, and other areas has reduced minority opportunities to participate effectively in the political process as candidates. When minority opportunities for nomination shrink, the likelihood that white candidates will step in to represent the minority community increases.162

D. The Flexible Approach to Defining "Minority-Preferred Candidate" Most Accurately Identifies Candidates Preferred by the Minority Community

Justice White’s hypothetical in Gingles illustrates how this proposal would work. Justice White posits “an eight-member multimember district that is 60% white and 40% [African-Ameri-

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160 See Collins v City of Norfolk, Va., 883 F2d 1232, 1238-39 (4th Cir 1989). See also Jenkins, 4 F3d at 1129.

161 "[T]he attention which the candidate gave to the particular needs and interests of the minority community, including the extent to which the candidate campaigned in predominantly minority areas or addressed predominantly minority crowds and interests, may be relevant factors." Id at 1129, citing Senate Judiciary Committee Report on the Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 29 (1982)(cited in note 7).


163 "[B]earing in mind the disincentives that may exist for minority candidates to seek office, the extent to which minority candidates have run for office and the ease or difficulty with which a minority candidate can qualify to run for office may be relevant considerations." Jenkins, 4 F3d at 1129.
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can]...[in which] there are six white and two [African-American] Democrats running against six white and two [African-American] Republicans.\(^{163}\)

Suppose that 80 percent of the minority community votes for all eight Democrats. Which candidates are minority-preferred? This example is straightforward and simple, yet it dramatically highlights the difference between using voting patterns to define “minority-preferred candidate” versus using candidate race as an absolute proxy for “minority-preferred candidate.”

Based on the voting patterns, all eight Democrats, the six white candidates and the two African-American candidates, would be minority-preferred candidates. Similarly, having received at most 20 percent of the minority vote, neither of the two African-American Republicans would be minority-preferred. A court would discount the elections of the African-American Republicans because voting data clearly show that they have not received the support of the majority of minorities.

By contrast, under a strictly race-conscious approach, all four of the African-American candidates, Republicans and Democrats, but none of the white candidates, would be deemed minority-preferred candidates. Despite receiving only 20 percent of the minority vote, a court would treat the African-American Republicans as minority-preferred candidates under the race-conscious approaches of Justice White and the Fifth and Seventh Circuits. Similarly, despite the fact that Democrats had received 80 percent of the minority vote, a court would not regard the white Democrats as minority-preferred candidates.

A second example demonstrates the proposed steps when election results are not as clear. Imagine a Hispanic-American candidate opposing a white candidate in a two-person election. Assume the election district is 60 percent white and 40 percent Hispanic-American; Hispanic-American voter turnout is extremely low compared to previous elections; the minority candidate receives 60 percent of the Hispanic-American vote; and the white candidate wins the election with 100 percent of the white vote and 40 percent of the Hispanic-American vote. Whether the Hispanic-American candidate is legally a minority-preferred candidate is critical to proof of a vote-dilution claim. If she is, then a

\(^{163}\) Gingles, 478 US at 83 (White concurring).
court likely would conclude that this election shows racially polarized voting. If she is not, then her election loss probably would not be evidence of racially polarized voting.\footnote{See note 7.}

This Comment recommends the following analysis. First, the court should evaluate the distribution of Hispanic-American voters between the two candidates—60 percent for the minority candidate and 40 percent for the white candidate. The minority community probably has not demonstrated a clear preference for the Hispanic-American candidate because 60 percent does not constitute an overwhelming majority of the minority community.

Lacking a definitive result from using voting patterns, the court should then evaluate secondary factors: the existence of strong minority voter turnout; the Hispanic-American candidate having claimed to represent the minority community; the Hispanic-American candidate having campaigned in the minority community; and minority candidates in the past having “tend[ed] to be candidates of choice among the minority community.” The only relevant fact presented in the example is that minority voter turnout was low. This may indicate minority indifference, lessening the probability that the Hispanic-American candidate was a minority-preferred candidate.

CONCLUSION

Not all minority candidates represent the minority community. Some white candidates represent the minority community. To protect the rights of minority citizens “to participate in the political process and to elect representatives of their choice,” a court cannot apply a rigid rule, which relies solely on candidate race. Only by looking beyond a candidate’s race to her acts and the acts of the minority community that she may or may not represent can a court accurately assess whether or not she is a minority-preferred candidate.

This Comment recommends a flexible test. A court should give great weight to statistical voting results that clearly indicate minority community preference, but should also consider other factors in order to identify minority-preferred candidates as the gap between the number of votes cast for the candidates shrinks. Additional factors that should be taken into consideration include: candidate race; minority voter turnout; evaluation of the

\footnote{Jenkins, 4 F3d at 1126.}
candidate's campaign for indications that she represents the minority community; and the *Zimmer v McKeithen* factors. 

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