Straight Party Tickets and Redistricting Thickets: Nonracial Motivations For Voter Preferences

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Imagine there is an electoral district in which a Republican majority consistently defeats a Democratic minority. The Democrats may want to change district lines to incorporate more Democratic voters, but they will have to lobby for change. The Voting Rights Act ("VRA")\(^1\) offers them little help.

Now imagine the Republicans are mostly white and the Democrats include a sizable group of African-Americans who share political values and who live in the same neighborhood. As a racial rather than partisan minority, the African-Americans may bring a claim of minority vote dilution under Section 2 of the VRA. Although the majority might argue that its cohesive voting behavior was caused by partisan, not racial, motivations, some courts would refuse to admit evidence of nonracial causes of the majority's voting behavior.

In 1982 Congress amended the VRA to prohibit courts from requiring that plaintiffs show that an electoral practice was adopted or maintained with an intent to discriminate if they can demonstrate that the practice has discriminatory results.\(^2\) For example, plaintiffs may show that a congressional districting plan spreads the minority vote thinly enough across districts that the minority is unable to influence meaningfully any election outcome, without showing that officials drew the map with the intention of diluting the minority group's vote.

The Supreme Court developed a three-prong test for determining whether such a discriminatory result has occurred in *Thornburg v Gingles*,\(^3\) its first vote-dilution case after the 1982 amendments to the VRA. The *Gingles* test, explained in detail below, is one of two tests required in a vote-dilution analysis; it

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\(^1\) B.A. 1983, American University; J.D. Candidate 1996, University of Chicago.


determines whether a plaintiff can establish a *prima facie* case of vote dilution. The second test, the "totality of the circumstances" analysis, requires an examination of evidence of racial bias in the community to determine whether this bias has interacted with the challenged electoral practice to dilute minority votes.

The circuit courts disagree about what types of evidence parties must introduce to establish racial bloc voting: the Supreme Court in *Gingles* did not reach an agreement on the evidentiary requirements necessary to establish the existence of racial bloc voting, and the "totality of the circumstances" analysis is open-ended by congressional design. In particular, the courts disagree about the relevance of evidence regarding the cause of majority voting preferences. Courts that do not admit evidence of the causation of voter preferences in a vote-dilution claim are concerned that considering these motivations will violate Congress's prohibition of an intent requirement when plaintiffs have proven discriminatory results. Courts that admit this evidence find that the inquiry is permissible under the VRA and view causation of voter preferences as relevant to the existence of racial bias in the community.

In part I, this Comment describes more fully the history of this circuit split. Part II outlines the different ways in which courts have approached the problem. Finally, part III argues that courts should consider the motivations for voter preferences along with other relevant variables in the totality of the circumstances test. Courts should consider voter motivations because evidence of these motivations may help a court understand the degree to which racial bias interacts with the challenged electoral practice to dilute a minority group's vote. Furthermore, such review should be conducted under the totality inquiry rather than the *Gingles* analysis so that evidence of the causes of voter preferences may be weighed along with other factors Congress directed courts to evaluate in determining whether an electoral practice dilutes a minority group's vote.

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4 See *Johnson v De Grandy*, 114 S Ct 2647 (1994)(requiring the use of both the *Gingles* test and the totality of the circumstances test in vote-dilution cases).
5 S Rep No 97-417 at 28-30 (cited in note 2).
6 This Comment examines the use of evidence of causes of majority, but not minority, voting preferences. In general, the examination of partisanship or other causes of voter preference to determine whether the minority group votes cohesively is not controversial. See *Gingles*, 478 US at 100 (O'Connor concurring); *Sanchez v Bond*, 875 F2d 1488 (10th Cir 1989), cert denied, 498 US 937 (1990)(accepting partisanship as evidence that a minority group voted cohesively).
I. Neither Congress nor the Supreme Court Has Determined Whether Courts Should Consider Evidence of the Causes of Voter Preferences in a Vote-Dilution Inquiry

A. History of Vote-Dilution Legislation and Litigation

Congress passed the VRA in 1965 to prohibit racially discriminatory voting practices and to ensure the equality of each citizen's vote. To further this goal, Section 2 of the VRA specifically prohibited any voting practice that diluted citizens' votes on account of race.

From 1965 to 1980, a plaintiff could establish a violation of Section 2 by showing that an electoral law or practice interacted with racial bias in the community to dilute a racial minority group's voting strength, or to deny the minority an equal chance to participate in the political process. The plaintiff did not need to establish that the challenged electoral practice had a discriminatory purpose. The Supreme Court used this approach when considering vote-dilution allegations in White v Regester and Whitcomb v Chavis.

In 1980, however, the Court changed direction. In City of Mobile v Bolden, the Court required that the plaintiff not only show that the challenged electoral practice resulted in vote dilution, but also that the practice was implemented or maintained with an intent to discriminate.

Congress rejected this change of direction by amending Section 2 of the VRA in 1982. In the Senate Report on the
Amendment ("Senate Report"), the Judiciary Committee explained that Congress rejected *Bolden's* intent requirement. Instead, Congress codified the results-based test as set forth by the Supreme Court in *White* and *Whitcomb*. The Senate Report explained that Congress intended to permit plaintiffs to prove a discriminatory voting practice by showing discrimination in the "totality of the circumstances" in the electoral process and the community. The Committee listed nine factors as examples of what a court should consider in such a totality analysis ("totality factors").

B. *Thornburg v Gingles*

Disagreement over the evidentiary requirements of amended Section 2's results test was first addressed by the Supreme Court in *Thornburg v Gingles*. Justice William Brennan, Jr., writing for the majority, established a three-prong test for determining if there were discriminatory results. To establish that an electoral practice results in racial minority vote dilution, the plaintiff must

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manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ....

(b) A violation of subsection (a) of this section is established if, based on the totality of the 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.

42 USC § 1973 (emphasis in original).

15 S Rep No 97-417 at 16 (cited in note 2).
16 Id at 30.
17 Id at 32.
18 The factors are: (1) a history of official racial discrimination; (2) the existence of racially polarized voting; (3) use of unusually large districts, majority vote requirements, anti-single-shot provisions, or other schemes that enhance the opportunity for discrimination; (4) the denial of minority group's access to the slating process; (5) the lingering effects of past discrimination that hinder the minority group's ability to participate effectively in the political process; (6) the use of racial appeals in political campaigns; (7) the extent to which minority group members have been elected to public office; (8) a significant lack of responsiveness by elected officials to the minority group's needs; and (9) tenuousness of the state policy underlying the electoral scheme. Id at 28-29. The Judiciary Committee noted that this list was not exclusive and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S Rep No 97-417 at 28-29 (cited in note 2).
show that bloc voting by the majority usually defeats candidates supported by a minority group that is politically cohesive and geographically insular ("Gingles test"). The test was a means of determining whether the challenged electoral practice was responsible for the minority group's inability to elect its preferred candidates.

The Court, however, disagreed as to what constituted evidence of majority bloc voting. Justice Brennan, joined by three other Justices, refused to consider any explanation for voter preference other than race; the correlation between a voter's race and that voter's preference was irrebuttable evidence of racial bloc voting and was the only acceptable evidence ("strict correlation approach"). Under Justice Brennan's strict correlation approach, factors like partisanship and religion were irrelevant.

In a concurring opinion, Justice Sandra Day O'Connor, joined by Chief Justice Warren Burger, Justice Lewis Powell, and Justice William Rehnquist, argued that the plurality's strict correlation approach came closer to a requirement of proportional representation for racial minorities than Congress intended. Justice O'Connor found that the plurality's approach would result in proportional representation for any minority group which proved that its members were geographically discrete, politically cohesive, and consistently defeated in their choice of candidates by the majority. O'Connor argued that courts should examine "all relevant factors bearing on whether the minority group has 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of its choice.'" According to this view, the reasons why white voters rejected minority candidates would be probative, though not dispositive, of the extent to which racial politics dominated a community's voting behavior.

Justice Byron White also wrote a brief concurrence in which he suggested that courts should consider the race of candidates to
determine whether voters' preferences were racially biased.\(^{28}\) The refusal of courts to consider the race of the candidate in the vote-dilution inquiry, he argued, would promote interest group politics rather than nondiscriminatory elections.\(^{29}\) For example, each party's slate of candidates might be composed of the same number of white and African-American candidates.\(^{30}\) If *Gingles* prevented a court from considering whites' willingness to vote for African-American candidates and simply looked at which candidates the minority group preferred, the court would end up favoring candidates purely for their party affiliation.\(^{31}\)

The Supreme Court has not resolved this disagreement regarding the consideration of nonracial causes of voter preferences in vote-dilution claims. Without clear direction from the Supreme Court, the circuits have split regarding the consideration of voter motivation in choosing candidates. The circuits have also differed in their willingness to consider evidence of the causation of voter preferences.

II. THE CIRCUITS HAVE SPLIT REGARDING CONSIDERATION OF EVIDENCE OF THE CAUSES OF VOTER PREFERENCES

The circuit courts have taken three different positions regarding consideration of evidence of the causes of voter preferences. Some courts have held that a showing that nonracial explanations for voter preferences exist ends the vote-dilution inquiry and defeats the plaintiff's claim.\(^{32}\) Other circuits have factored motivations for voter preferences into the overall vote-dilution inquiry, employing reasoning similar to Justice O'Connor's in *Thornburg v Gingles*.\(^{33}\) A third view, taken by the dissenting opinion in the Eleventh Circuit case *Nipper v Smith*,\(^{34}\) refuses to consider evidence of voter motivation and argues for an analysis similar to the *Gingles* plurality's strict correlation approach.\(^{35}\)

\(^{28}\) Id at 82-83 (White concurring).

\(^{29}\) Id at 83 (Powell concurring).

\(^{30}\) Id.

\(^{31}\) *Gingles*, 478 US at 83 (Powell concurring).

\(^{32}\) See *League of United Latin American Citizens, Council No. 4434 v Clements*, 999 F2d 831 (5th Cir 1993)("LULAC"), cert denied, 114 S Ct 8781 (1994); notes 36-42 and accompanying text.

\(^{33}\) See *Nipper v Smith*, 39 F3d 1494 (11th Cir 1994); *Jenkins v Red Clay Consolidated School District Bd. of Ed.*, 4 F3d 1103 (3rd Cir 1993), cert denied, 114 S Ct 2779 (1994); *Collins v City of Norfolk*, 883 F2d 1232 (4th Cir 1989); notes 43-58 and accompanying text.

\(^{34}\) 39 F3d at 1494.

\(^{35}\) See *Nipper*, 39 F3d at 1550-53 (Hatchett and Kravitch dissenting); notes 59-63 and
A. Evidence of Nonracial Causation of Majority Voting Preferences Defeats the Allegation of Vote Dilution

In League of United Latin American Citizens, Council No. 4434 v Clements ("LULAC"), the Fifth Circuit found no Section 2 violation where majority partisanship best explained why African-Americans were unable to elect their preferred candidates. The LULAC plaintiffs challenged the state’s electoral system for state trial judges. Because these races did not command much public attention, most voters were not familiar with the race of the candidates for whom they voted. Thus, it would have been difficult for the LULAC court to use the strict correlation approach proposed by the Gingles plurality. The correlation between the race of the voters and the candidates for whom the voters cast their ballots could not be meaningful where the voters likely did not know the race of any of the candidates. Instead, voters tended to vote for judges according to their parties because the ballots listed the party each candidate represented.

One reason the court held that the electoral system did not violate Section 2 was that partisanship was proof that the minorities had not lost “on account of race or color.” The majority noted that partisanship may serve as a “proxy” for unacceptable racial motivations, but that defendants would prevail if they showed that sincere partisanship caused voter preferences. The LULAC court found that, on the facts before it, partisanship, not racial bias, had motivated the majority’s voting behavior.

The Seventh Circuit has joined the Fifth Circuit in requiring plaintiffs to negate causes of majority voter preferences that indicate factors other than racial bias motivated the majority in defeating the minority group’s preferred candidates.

accompanying text.

36 999 F2d at 831.
37 Id at 860-61.
38 Id at 850.
39 Id.
40 "When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, [there is no violation of Section 2]." LULAC, 999 F2d at 850.
41 Although the opinion implies that the plaintiff should have the burden of proving that its defeats at the polls are due to racial animus, it stops short of requiring this and holds merely that the plaintiff must negate nonracial explanations for its defeat in order to prevail. Id.
42 See Baird v Consolidated City of Indianapolis, 976 F2d 357 (7th Cir 1992), cert denied, 113 S Ct 2334 (1993) rejecting a vote-dilution claim after finding that the majority had elected minority-race candidates and that the majority’s voting preferences were partisan, not racial).
B. Causation of Majority Voting Preferences is Relevant to the Vote-Dilution Inquiry

In her Gingles concurrence, Justice O'Connor argued that evidence of the reasons for the rejection of candidates by white voters was relevant in determining whether white voters would consistently defeat minority voters. This evidence, she argued, would help a court determine whether another minority-preferred candidate might be able to gain greater white support. According to Justice O'Connor, this evidence should be able to "affect the overall vote dilution inquiry." According to this view, the plaintiff and the defendant could both offer evidence of motivations for voting in support of their cases. The court would then examine this evidence along with evidence of the nine factors listed in the Judiciary Committee report, such as responsiveness of officials to minority needs and the history of official racial discrimination in the community. None of these factors would be decisive; instead, the court would perform a "searching practical evaluation of the 'past and present reality'" based on all these factors.

Although the LULAC court quoted extensively from Justice O'Connor's Gingles opinion, there is a fundamental difference between the two opinions. Justice O'Connor emphasized that the reasons voters support a candidate are relevant to the vote-dilution question, but she did not view evidence of any single factor tending to show whether racial bias exists in the community as ending the vote-dilution inquiry. In contrast, the Fifth Circuit reasoned that if the defendants established that racial bias does not motivate the majority in voting for candidates, then the plaintiffs would lose. The Eleventh Circuit followed reasoning similar to Justice O'Connor's in Nipper v Smith, over an emphatic dissent that echoed that circuit's earlier per curiam opinion in Solomon v

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44 Id.
45 Id.
46 These factors were first enumerated in Zimmer v McKeithen, 485 F2d 1297, 1305 (5th Cir 1973)(en banc). The Senate Judiciary Committee included the same factors in its report. See Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 28-29 (1982), reprinted in 1982 USCCAN 177, 205-07 (cited in note 2).
48 Id.
49 LULAC, 999 F2d at 850.
50 39 F3d at 1524-25.
According to the *Nipper* court, a plaintiff must first prove the *Gingles* factors. Only afterward can both parties offer evidence of the totality factors. The ultimate burden of proof rests with the plaintiff to show that, based on a totality of the circumstances, racial bias in the community has interacted with the challenged electoral practice to dilute the minority's vote. The court characterized the plaintiff's burden as requiring a showing that the community was currently "motivated by racial bias in its voting patterns."

The *Nipper* court rejected the use of voter preference causation as an affirmative defense to the plaintiff's prima facie case under *Gingles*. Instead, the court held that the defendant could offer evidence of nonracial motivations for voters' choices in the totality of circumstances test, where the court would consider this evidence along with evidence of the other totality factors. Thus the Eleventh Circuit did not view voter preference causation by itself as determinative of the outcome of the case, as the Fifth Circuit had in *LULAC*.54

The Third and Fourth Circuits have used reasoning similar to that of *Nipper* in evaluating evidence of causes of majority voting, although the voter motivation in question was not the partisan preference of the majority but the race of the candidate. In *Jenkins v Red Clay Consolidated School District Board of Education*,55 the Third Circuit found that the race of the candidate was a motivation for voter preferences that was relevant to the vote-dilution inquiry. However, the court rejected the argument that this motivation was dispositive.56 Similarly, in *Collins v City of Norfolk*,57 the Fourth Circuit considered evidence that the majority motivation was not racially biased because majority members had voted for African-Americans. The court found this

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52 *Nipper*, 39 F3d at 1524-26.
53 However, it is not clear that Congress intended for a finding of vote dilution to depend on current racial bias in the community. The Senate Report lists two factors that are relevant to past, not current, community racial bias: a history of official discrimination, and the effects of past discrimination on the minority's socioeconomic status, health, and education. S Rep No 97-417 at 28-29 (cited in note 2).
54 *Solomon*, 899 F2d at 1035 (Tjoflat concurring).
55 4 F3d at 1103.
56 Id at 1125.
57 883 F2d at 1232.
evidence unpersuasive in light of evidence that members of the majority believed that they were voting for a "safe" African-American, or an African-American candidate who would represent the views of the majority.  

C. Causation of Majority Voter Preferences is Irrelevant  

A third view, taken by the dissent in Nipper, is that Section 2 prohibits an inquiry into racial bias on the part of the community. Instead, the only racial bias relevant to the vote-dilution inquiry is whether or not state officials had been biased in their selection of a particular election scheme. The dissenter interpreted the totality factors as focusing only on "the activities of state and quasi-state officials in employing various devices to obstruct the ability of minorities to elect candidates of their choice." Therefore, the dissenters understood that the only relevant racial bias in a Section 2 inquiry was that of the officials and state legislators responsible for elections.  

The dissent also disagreed with the majority's interpretation of the VRA's prohibition of the denial or abridgement of the right to vote "on account of race or color." They found Congress's use of this phrase meant "with respect to" race or color, rather than requiring a racial bias inquiry. Therefore, according to the dissenters, a court should limit its examination of racial bias in the community to an inquiry into the biases of electoral officials as demonstrated by the totality factors. The court should not examine the reasons why majority voters preferred certain candidates over others.

58 Id at 1242.
59 The dissent echoed the position of Judge Kravitch in an earlier Eleventh Circuit opinion. Solomon, 899 F2d at 1035 (Kravitch concurring).
60 Nipper, 39 F3d at 1497, 1550-51 (Hatchett and Kravitch dissenting). It is not clear, however, how the dissent would relate some of the totality factors to the motivations of officials. For example, the first factor, racially polarized voting, seems to relate more to the community than to officials; the fifth factor, lingering effects of past discrimination, seems to relate to the objective capabilities of a minority group within the community; and the seventh factor, the extent to which minority members have been elected to office, relates to both the majority's willingness to vote for minority-race candidates and the minority's ability to support its candidates' campaigns.
61 Id at 1553.
62 Id.
63 Id at 1550.
III. VOTER PREFERENCES SHOULD BE CONSIDERED IN THE VOTE-DILUTION INQUIRY AS ONE RELEVANT FACTOR IN THE TOTALITY OF THE CIRCUMSTANCES ANALYSIS

A court should consider evidence of the motivations of voter preferences as an element of the totality of the circumstances test in evaluating a vote-dilution claim. Evidence of voter motivations is relevant to whether racial bias in the community has interacted with the challenged electoral practice to dilute the minority vote, as Justice O'Connor argued in *Thornburg v Gingles* and as the Eleventh Circuit held in *Nipper v Smith*. Neither Congress nor the Supreme Court has prohibited courts from deciding whether racial bias plays a role in determining how majorities vote. By considering evidence of the motivations of voter preference in the totality analysis rather than the *Gingles* test, courts can evaluate this evidence without creating too heavy a burden for the plaintiff and can avoid allowing a showing of non-racial causes for voter preferences to defeat a vote-dilution allegation by itself. This evidence of underlying motive should be considered along with other evidence of racial bias in the community as part of the totality analysis of a vote-dilution inquiry.

A. Courts Should Consider Causes of Voter Preferences in a Vote-Dilution Inquiry

When evaluating a vote-dilution claim, a court should scrutinize the causes of majority voter preferences because this scrutiny best comports with the requirements and principles of the VRA. First, Congress's directive that courts perform a comprehensive factual inquiry into the circumstances of vote dilution suggests that courts should consider all evidence relevant to the minority's inability to elect its preferred candidates. Second, considering the causes of voter preferences is consistent with Congress's requirement that plaintiffs prove racial bias has interacted with the challenged electoral practice to dilute their voting strength. Third, an analysis of voter motivations is consistent with the principles established in those cases that Congress codified in the amended Section 2.

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65 39 F3d 1494, 1524-25 (11th Cir 1994).
67 Id.
Furthermore, a court's consideration of the causes of voter preferences will not violate Congress's prohibition of an intent requirement as explained by the Senate Report or as interpreted by the Supreme Court in *Gingles*. Allowing courts to consider evidence that voters chose candidates based on party lines or other nonracial factors is not the same as requiring plaintiffs to prove that election officials intended to discriminate against racial minorities in designing or maintaining an electoral practice; Congress forbade the latter inquiry in vote-dilution claims, not the former.

1. **Congress's directive to the courts.**

The Senate Report explained that courts are to perform a "searching practical evaluation of the 'past and present reality'" in order to determine whether racial bias in the community and the challenged electoral practice have interacted to dilute a minority's vote. In amending Section 2, Congress directed courts to consider plaintiffs' allegations in "the context of all the circumstances in the jurisdiction in question . . . ." The Senate Report states that the nine factors to be considered in the totality analysis are relevant, but not exclusive, factors; courts may consider other factors that are not listed. For example, in *Johnson v De Grandy,* the Supreme Court examined proportionality of minority representation as a factor in its totality of the circumstances test, although proportionality is not one of the factors listed in the Senate Report. This suggests that a court should examine any evidence that is relevant to the plaintiff's claim that a challenged election system interacted with racial bias in the community to dilute the minority vote. The causes of majority voter preferences should be a part of the "searching practical evaluation," because causes of majority voter preferences may indicate the presence or absence of racial bias in the community and its politics.

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69 S Rep No 97-417 at 30 (cited in note 2).
70 Id at 27.
71 Id at 29.
72 114 S Ct 2647, 2658 (1994). The Court explained that proportionality was a factor in evaluating racial bias in the community even though it is not one of the original totality factors listed in the Senate Report. See also *Nipper*, 39 F3d at 1513 n 41.
73 S Rep No 97-417 at 30 (cited in note 2).
2. Importance of causation evidence to prove a Section 2 claim.

Congress required that plaintiffs prove that racial bias interacted with the challenged electoral system to dilute their votes.74 The Senate Report explained that Congress did not intend that a discriminatory result, in and of itself, should decide the issue.75 Such a result would amount to proportional representation, an idea Congress squarely rejected.76 According to the Senate Report, plaintiffs must prove that racial bias has interacted with the electoral process to dilute minority votes if they are to prevail on a vote-dilution claim.77 The nine totality factors discussed in the Senate Report are representative of the variables that a plaintiff may use to show community racial bias, and that a defendant may use to disprove the plaintiff’s allegations.78

Members of Congress feared that if a plaintiff did not have to prove that vote dilution occurred because of racial bias, a results-only test would, in effect, assume that race is the predominant determinant of political preference.79 However, an examination of the motivations for voter preferences does not assume anything about the role of race; it merely asks what role race played in these motivations. Armed with that evidence, the court can then perform the “searching practical evaluation of the ‘past and present reality’” that Congress envisioned.80

One may argue that adding new variables to the inquiry into racial bias in the community further complicates an already open-ended and intensive fact-finding effort. The strict correlation approach espoused by the Gingles plurality opinion adds structure and predictability to a vote-dilution inquiry that otherwise has relatively few objective measures of what is bias and what is not; evidentiary requirements should be kept as straightforward as the Gingles test if possible. As the Judiciary Committee pointed out, however, courts applied this open-ended test in “two dozen” decisions reported prior to City of Mobile v. Bolden.81

74 Id at 34.
75 The Supreme Court recognized this report as the authoritative source for the legislative intent of the amended Section 2. Gingles, 478 US at 43 n 7.
77 S Rep No 97-417 at 34 (cited in note 2).
78 Id at 28-29.
79 Id at 30.
80 Id.
81 S Rep No 97-417 at 23 (cited in note 2).
Those courts were able to consider the variables relevant to the particular community in question without the rehearings, demands without direction, and sharply divided courts that have marked the post-Gingles cases.

The pervasive and insidious nature of racial discrimination in electoral processes may require methods that are more intensive and less well-defined than those described in Gingles. Nevertheless, the Senate Report emphasized that Congress amended the VRA to require courts to prevent racially discriminatory vote dilution and to direct courts to perform the fact-finding necessary to achieve that goal.  

3. Consistency with Supreme Court principles codified in amended Section 2.

Considering evidence of the motivations of voter preference is consistent with the principle of Whitcomb v Chavis, one of the cases the Senate Report used to exemplify the intended operation of Section 2. In Whitcomb, the Supreme Court rejected a vote-dilution claim because the defeat of the minority's candidates was due to partisan voting, not racial bias. Using the totality of the circumstances test, the Supreme Court determined that the significant factor was the partisanship of the majority. The majority voted for Republicans, the minority group voted for Democrats, and the Republicans usually won. However, when Democrats had won, minority-preferred candidates had been elected to office. "The voting power of [the minority] may have been 'canceled out,' . . . but this seems a mere euphemism for political defeat at the polls." Therefore, in some cases where a discriminatory result has occurred but can be explained by partisan voting, Congress did not intend that courts would find a violation of Section 2.

4. Section 2 of the VRA does not prohibit consideration of the causes of voter preferences.

In rejecting an intent requirement, the VRA does not prohibit courts from considering evidence of the causes of voter prefer-
ences. Section F of the Senate Report, "The Limitations of the Intent Test," outlined three reasons for rejecting the intent test.88 Congress's first reason was to direct the inquiry toward determining whether minorities could participate equally in electoral processes, rather than finding out why they could or could not participate.89 Second, Congress did not want vote-dilution litigation to become racially divisive by requiring plaintiffs to levy charges of racism at individuals and communities.90 Finally, Congress did not want to require plaintiffs to carry the heavy burden of proving the motives of individuals who designed electoral schemes.91

Evidence of the causes of majority voter preferences, however, raises none of these concerns; it is not a tangential issue, it is not as racially divisive, and it does not impose as heavy a burden on the plaintiff as proving intent to discriminate. Therefore, courts should not include an examination of motivations for voter preferences in the prohibition against examination of discriminatory intent.

One reason Congress rejected an intent requirement is that an inquiry into the intent of legislators in developing or maintaining an electoral practice "asks the wrong question."92 The Senate Report notes that in the Bolden case on remand, the district court concluded that officials over one hundred years ago had, in fact, implemented the challenged electoral practice with the intent to discriminate against minorities.93 But the Judiciary Committee ("Committee") believed that what officials had in mind one hundred years ago was of little relevance.94 Congress wanted to enable minorities to participate equally in electoral processes regardless of the intentions of officials a century ago.95 An electoral practice should be changed if it has a discriminatory effect today, regardless of historical intent.96

However, the causes of voter preferences in a community are not as remote or irrelevant as historical intent. Furthermore, the reasons that voters defeat minority-preferred candidates are not

88 S Rep No 97-417 at 36 (cited in note 2).
89 Id.
90 Id.
91 Id at 36-37.
92 S Rep No 97-417 at 36 (cited in note 2).
93 Id.
94 Id.
95 Id.
96 S Rep No 97-417 at 36 (cited in note 2).
tangential to the objectives of Section 2. In fact, a court's consideration of the motivations of majority voters in defeating minority candidates can help the court determine the central inquiry in a vote-dilution case—whether there is racial bias in the community that interacts with the electoral process to dilute the minority vote.97

Another reason for Congress's rejection of the intent test was its divisive effect on the community. Proving intent involved charging individual officials or entire communities with racism.98 The Committee wanted to avoid creating a test in which parties would have to prove that individuals or communities had been racist. To require a showing of racism would, according to the Committee, destroy any racial progress that had been made in the community.99

Allowing parties to introduce evidence of the causes for voting preferences in the vote-dilution inquiry does not require parties to levy charges of community racial bias. In *Nipper*, the Eleventh Circuit explained that "an inquiry into racial bias in the voting community, using objective factors, does not require that any individuals be labelled as racists," because parties would offer circumstantial evidence to support their claims.100 In *LULAC*, for example, evidence offered by plaintiffs that white voters voted against candidates when they knew the candidates were of a minority race might have been enough to rebut the defendants' showing of nonracial motivations in voting.101

The third reason the Committee offered for rejecting the intent test is that it would be an "inordinately difficult burden for plaintiffs in most cases."102 Plaintiffs would have a difficult case because most of the evidence they would need to establish the requisite intent would have been buried with long-dead legislators.103 The Committee doubted that records from the period in

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97 Id at 30, 36. Consideration of motivations of voter preferences may also help courts determine whether certain totality factors indicate that racial bias interacts with the challenged practice to dilute the minority vote. For example, a court might determine that successful officials are less likely to be responsive to minority needs and concerns if he or she were elected by a racially biased majority. Responsiveness to minority needs and concerns is one of the totality factors the Senate Report listed. Id at 29.

98 Id at 36.

99 S Rep No 97-417 at 36 (cited in note 2).

100 *Nipper*, 39 F3d at 1523.


102 S Rep No 97-417 at 37 (cited in note 2).

103 Id.
which many electoral practices were developed would be available or reliable. Furthermore, designers of electoral processes could prepare ahead for vote-dilution litigation by planting a false trail of evidence supporting acceptable objectives and covering up traces of racial discrimination.

If a court were permitted to consider evidence of the causes of voter preferences when a party chose to offer it, a plaintiff would not be forced to carry the burden of proof, and the burden would not be as heavy as the burden of proving legislative intent. A party would not need to review one hundred years of records to find evidence of factors currently influencing voter preferences in a community. In some cases this evidence would not be available, and the parties would have to use other totality factors to prove their theories. In other cases, like LULAC, where partisanship seemed to be the most obvious explanation for voter preferences, parties could assemble evidence without reaching back into history one hundred years. Evidence of voter motivations could be assembled through voter surveys that determine the familiarity of voters with the names of candidates and how voters made their decisions when they knew nothing about the candidates in a race. This evidence would be current and available, and could be gathered using reliable survey methods.

5. Gingles does not forbid consideration of the causes of majority voting preferences.

Like amended Section 2, the Supreme Court's decision in Gingles does not prohibit a court from considering the causes of majority voter preferences. The Supreme Court has not decided what constitutes appropriate evidence of racially polarized voting. The section of Gingles that discusses this evidence, did not gain the support of five Justices. Nevertheless, an examination of the causes of voter preference as part of the totality test may be compatible with the Gingles plurality opinion.

Whether the Gingles plurality believed that nonracial factors could be considered in the totality of the circumstances test is ambiguous. The plurality opinion clearly rejected consideration of the causes of voter preferences as a part of the Gingles test, but did not address whether consideration of voter preference causation would be appropriate as part of the totality of the circum-

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104 Id.
105 Id.
stances test.\textsuperscript{106} In fact, Justice Brennan, writing for the \textit{Gingles} majority, described the totality factors and the Senate Report's instruction that other factors "may also be relevant and may be considered."\textsuperscript{107} In the final section of the opinion, Justice Brennan summarized the district court's findings under the totality analysis with approval.\textsuperscript{108} Therefore, even the \textit{Gingles} plurality opinion did not prohibit the consideration of voter preference causation as part of the totality analysis.

B. Courts Should Consider Causes of Voter Preferences in the Totality Analysis

Given that courts should admit evidence of the causes of voter preferences in a vote-dilution inquiry, such preference causation should be examined in the totality analysis, not the \textit{Gingles} test. Examining the causation of voter preferences under the \textit{Gingles} test would increase the plaintiffs' difficulty in establishing a \textit{prima facie} case. Congress, however, amended Section 2 in order to mitigate the plaintiffs' burden in establishing a vote-dilution claim;\textsuperscript{109} rather than requiring proof of intent, which had been impossible for many plaintiffs, Congress found that such claims could be established by showing discriminatory effects. Furthermore, evidence of majority voter motivation is more relevant to the objectives of the totality analysis than of the \textit{Gingles} test.\textsuperscript{110} Finally, in \textit{Gingles} Justice Brennan expressed concern that some explanations for voter preferences may be racially motivated despite their appearance of race neutrality.\textsuperscript{111} By considering such motivations in the totality inquiry along with the other relevant factors, however, the underlying motivation can be identified and weighed along with other factors tending to prove or disprove community racial bias.

\textsuperscript{106} \textit{Gingles}, 478 at 61-74.
\textsuperscript{107} Id at 45.
\textsuperscript{108} Id at 80.
\textsuperscript{110} De Grandy, 114 S Ct at 2656-58. The Court explained that the purpose of the \textit{Gingles} test was to demonstrate a lack of electoral success; the totality test, on the other hand, examines evidence relating to the extent of minority voters' opportunity to participate in electoral practices.
\textsuperscript{111} \textit{Gingles}, 478 US at 64-73.
1. **Consideration under the Gingles analysis would create a heavier burden for the plaintiff than Congress intended.**

Requiring plaintiffs to establish that racial bias motivates majority voter preferences as part of the Gingles threshold case would raise the plaintiffs' initial burden and make a *prima facie* case harder to establish. Instead of simply establishing that the minority group is geographically discrete, politically cohesive, and unable to elect its candidates, the plaintiffs would also need to show that the minority group's inability to elect candidates results from racially biased voting by the majority. Yet Congress designed the results test to make the plaintiff's burden easier to carry.\(^1\)

Some courts have construed the third Gingles requirement together with the VRA's language, "on account of race or color," to require a showing of racially biased voter preferences. However, "on account of race or color" could include many causes of vote dilution other than racially biased voter preferences.\(^2\) A minority group may have less opportunity to participate in the electoral process or to elect representatives of its choice "on account of": (1) a history of official discrimination in election processes; (2) the effects of past discrimination on the minority's socioeconomic status, education, and health; or (3) elected officials' lack of responsiveness to minority needs and concerns.\(^3\) Neither the VRA nor Gingles suggests that evidence of racially biased voter preferences, if considered, should be essential to a plaintiff's case or that this evidence would be more important than other evidence of racial bias in the community.\(^4\)

2. **Evidence of voter preference motivations is more relevant to the totality analysis than to the Gingles inquiry.**

In *Johnson v De Grandy*,\(^5\) the Supreme Court characterized the Gingles test as a threshold test that provided structure to the vote-dilution inquiry and determined whether plaintiffs

2. See Nipper, 39 F3d at 1497; LULAC, 999 F2d at 850.
3. These are three of the nine totality factors listed in the Senate Report. S Rep No 97-417 at 29 (cited in note 2).
4. The VRA itself merely prohibits practices that deny or abridge the right to vote "on account of race or color." 42 USC § 1973. This phrase, by itself, does not mean "because of racially biased majority voter preferences." What is more, the Senate Report emphasizes that courts should perform a thorough search and evaluation, which does not support the limitation of evidence of racial bias to one isolated factor. S Rep No 97-417 at 29 (cited in note 2).
5. 114 S Ct at 2647.
had established a lack of electoral success.\textsuperscript{117} Once the plaintiff has established a \textit{prima facie} case under \textit{Gingles}, the court must perform the totality analysis to determine whether the vote dilution is the result of the interaction of community racial bias with the challenged electoral practice and therefore legally significant. The Supreme Court has also described the totality test as serving Congress's objective that the courts' ultimate judgments about equality or inequality under Section 2 should rest on a "comprehensive, not limited, canvassing of facts."\textsuperscript{118}

Evidence of the causes of voter preferences does not help establish whether the minority has been unsuccessful in the electoral process, the central question of \textit{Gingles}. Instead, this evidence is relevant to understanding why the minority has been unsuccessful and whether it will continue to be unsuccessful if the electoral process is not changed, the inquiry for which Congress created the totality analysis. Thus, evidence of voter motivation, considered with other evidence of the presence or absence of racial bias in the community, is more relevant to the question whether the challenged electoral practice has interacted with racial bias to dilute the minority vote.

3. \textit{The dangers of considering causation of voter preferences can be avoided by use of the totality analysis.}

The \textit{Gingles} plurality expressed concern that some causes of voter preferences might appear to be the result of nonracial factors, even though these causes might actually be the result of racial discrimination.\textsuperscript{119} For instance, the plurality believed that preferences that result from socioeconomic status ought not to be a defense to vote dilution, because socioeconomic status may result from racial discrimination.\textsuperscript{120} A minority-preferred candidate might be defeated because her supporters were unable to contribute as much to her campaign as the supporters of a majority candidate. But the inability of minority voters to contribute financially may result from years of racial discrimination in hiring practices.

Courts can avoid this pitfall by allowing either party to offer and rebut nonracial evidence to explain voter preferences as part of the totality analysis, without permitting these explanations to

\begin{itemize}
  \item \textsuperscript{117} Id at 2656-57.
  \item \textsuperscript{118} Id at 2657.
  \item \textsuperscript{119} \textit{Gingles}, 478 US at 67-70.
  \item \textsuperscript{120} Id at 64-67.
\end{itemize}
be dispositive of the vote-dilution claim. The inability of candidates to gain support due to voter motivations or to problems the candidate faces in campaigning may be avoided if the fact finder listens to each party's case and determines whether the fundamental cause of the majority voter preferences is racial bias. Congress directed courts to use the totality factors to perform a thorough evaluation, so an ostensibly nonracial cause of voter preferences would not defeat the plaintiff's claim where other totality factors suggested that the challenged electoral practice had interacted with community racial bias to defeat the minority group's vote. For example, a showing that the majority preferred the candidate because she had better campaign resources would be unconvincing where the evidence also showed a history of official racial discrimination, a lack of responsiveness to minority needs by elected officials, and racially polarized voting. Congress was confident that courts would be able to evaluate the existence of racial bias taking all relevant factors into account.

The Fifth Circuit addressed the related problem of causation as a proxy for racial discrimination in LULAC. The LULAC court discussed the possibility that partisanship could operate as a proxy for "illegitimate racial considerations." The court observed that a careful review of the facts of the electoral processes in question would show whether partisanship was a legitimate explanation for voter preferences, or operated as a sham to conceal racial bias in the electorate. In performing this evaluation, the Fifth Circuit found that partisanship had not operated as a proxy in LULAC because a substantial percentage of Democrats, the party preferred by minority voters, consisted of white voters. Because one-third of Democrats in the county were white, the court did not believe that, in defeating the Democrats, the Republicans were motivated by an antiminority agenda. In performing the fact-intensive inquiry that Congress mandated, other courts would similarly be able to evaluate whether partisan explanations for voting are sincere or are proxies for racial bias.

121 S Rep No 97-417 at 29 (cited in note 2).
122 Congress noted that courts had weighed the totality factors in "dozens" of cases prior to City of Mobile v Bolden, 446 US 55 (1980). S Rep No 97-417 at 23 (cited in note 2).
123 LULAC, 999 F2d at 860.
124 Id at 860-61.
125 Id.
126 Id.
CONCLUSION

In its 1986 amendments to Section 2 of the VRA, Congress rejected the requirement that plaintiffs in a vote-dilution claim prove that election officials intended to dilute a minority group's vote. Instead, Congress permitted plaintiffs to prevail if they could show that the interaction of community racial bias and the challenged electoral practice effectively diluted minority voting strength. However, the amendments to Section 2 left unresolved the question of exactly what evidence should be considered in determining whether the requisite community racial bias existed. One question that courts have considered is whether causation of voter preferences, such as partisanship or other ostensibly nonracial factors, may be considered in a vote-dilution inquiry. The Supreme Court has not determined whether courts should consider the causes of voter preferences in a vote-dilution inquiry. Divided circuit courts have taken one of three approaches: (1) admitting this evidence as determinative of the vote-dilution allegation; (2) admitting this evidence as relevant to the vote-dilution inquiry; or (3) refusing to admit evidence of voter motivations.

The best approach is to consider evidence of the causation of voter preferences as part of the court's consideration of the totality of the circumstances, rather than to reject this evidence or to consider it as part of the plaintiff's threshold showing of vote-dilution results under *Gingles*. Considering the factors that motivate voters to choose certain candidates over others will enable a court to conduct the fact-intensive inquiry that Congress mandated in amending the VRA, without reintroducing the intent requirement that Congress prohibited by means of those amendments. By considering evidence of voter motivations as part of the totality analysis, courts can weigh the relevance of this evidence without permitting voter preference motivation to determine the outcome of vote-dilution litigation, and without allowing defendants to conceal community racial bias behind a mask of nonracial motivations. Because evidence of voter motivations is both relevant and permissible, courts should consider such evidence as another factor in the analysis when parties offer it in vote-dilution inquiries.