# THE INCOMPATABILITY OF COMPETITIVE MAJORITY-MINORITY DISTRICTS AND *THORNBURG V. GINGLES*

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## INTRODUCTION

The passage of the Voting Rights Act[1] ("VRA" or "the Act") in 1965 signaled an end to both de jure and de facto barriers to minority voting. The promise to protect minority voting rights and greater opportunities to elect minority candidates supplanted the seemingly impenetrable "political armor of Jim Crow."[2] Such "armor" included poll taxes, literacy tests, grandfather clauses,[3] the

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[1] 42 U.S.C. §§ 1973-1973aa-6 (1965).

[2] T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 629 (1993).

[3] *Id.*

white primary, felon disenfranchisement, at-large voting, and the expansion of administrative discretion.[4] Administrative discretion was the practice whereby officials could adopt informal discriminatory measures that would be tough to prove in court.[5] For example, even though the white primary was outlawed in 1944 in *Smith v. Allwright*,[6] white Southerners determined to disenfranchise black voters responded by privatizing the white primary.[7] With this commitment to racial disenfranchisement firmly in place, proponents of the 1965 VRA endeavored to ban all existing discriminatory measures and preclude circumvention of these new rules.[8]

Two key provisions of the VRA are Section 2 ("Section 2") and Section 5 ("Section 5"). The focus of Section 2 is the prohibition of election systems that are racially discriminatory or dilute the vote of minorities.[9] Section 2 enables majority-minority districts, which are districts where minorities comprise the majority or a sufficient percentage of a given district such that there is a greater likelihood that they can elect a candidate who may be racially or ethnically similar to them.[10] This Comment will focus

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[4] *J. Morgan Kousser, The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 679 (2008).
[5] *Id.*
[6] 321 U.S. 649 (1944).
[7] Kousser, *supra* note 4, at 679.
[8] *Id.* at 680.
[9] *See* Voinovich v. Quilter, 507 U.S. 146, 152-53 (1993).
[10] *See id.* at 153. There is considerable debate surrounding what percentage of minorities is "sufficient" to elect a candidate who is likely a minority. According to Kousser, what "sufficient" means depends on votes cast by other minorities and white cross over voting; sometimes, 50% is more than enough to elect a particular minority candidate and other times, 70% may be inadequate. J. Morgan Kousser, Shaw v. Reno *and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 633 n.30 (1995). David Lubin, Bernard Grofman, and Lisa Handley studied twenty congressional elections with black candidates that took place in the south in the 1990s and found that on a whole, if blacks constituted 33-39% of the voters, the black candidate could garner 50% of the votes. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1407-09 (2001).

on how minorities can establish vote dilution claims against electoral systems under Section 2.

Section 5 is more geographically focused than Section 2, based on the history of political discrimination in the South.[11] Section 5 requires the Justice Department to approve of any changes in the election systems or procedures in states where there has been a history of racial discrimination with regards to voting.[12] The goal of this requirement, known as the "preclearance"[13] requirement, is to ensure any change in voting procedures has neither discriminatory "purpose" nor "effect."[14] The burden of proof is on the jurisdiction that wishes to change its voting scheme to show a lack of discriminatory purpose or effect to obtain preclearance.[15] By making review of such proposals automatic, private parties and civil rights groups do not have to invest significant resources—financial or otherwise—to bring judicial challenges to measures it sees as biased.[16] Section 5 currently applies to "all or parts of the following states: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, [and] Virginia."[17]

When a court must determine whether minority disenfranchisement exists under Section 2 or Section 5, a court's analysis typically discusses three principal types of districts. The three types of districts most frequently discussed in judicial opinions and social science literature are: "safe," "coalitional" (also often known as "crossover") and "influence" districts.[18] In both crossover and

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[11] Kousser, *supra* note 4, at 680.
[12] *Id.*
[13] U.S. Department of Justice Civil Rights Division Voting Section ("Department of Justice"), *Frequently Asked Questions* http://www.justice.gov/crt/about/vot/misc/faq.php (last visited Mar. 4, 2011).
[14] Kousser, *supra* note 4, at 680.
[15] *Id.*
[16] *Id*.
[17] Department of Justice, *supra* note 13.
[18] Bartlett v. Strickland, 129 S. Ct. 1231, 1242 (2009).

influence districts, the number of minority voters does not amount to a majority of the voting-age population.[19] In a crossover district, an interracial voting base is necessary to elect a candidate preferred by the black community.[20] This is in contrast to a safe district in which minority voters are a majority and are able to elect their candidate of choice without any support from white voters.[21] Influence districts are districts in which the minority population is politically significant enough to influence who gets elected, but that influence alone cannot independently elect a candidate of their choice.[22] These district types weave throughout the opinions discussed in greater detail *infra*.

This Comment seeks to explore the contours of the VRA from its inception and stated goals through its present-day utility. It delves into judicial interpretations of the VRA and how the Supreme Court of the United States has endeavored to clarify the meaning of a Section 2 vote dilution claim through a tripartite test. The inquiry at the crux of this Comment is how the vote dilution criteria set forth by the Supreme Court in the seminal 1986 decision *Thornburg v. Gingles*[23] comports with modern-day political realities of increasingly diverse districts.[24]

This Comment reveals that there is a lack of judicial guidance on the issues that will increasingly face courts, such as whether two minority groups in a given district can be aggregated in order to make out a Section 2 claim. This Author argues that multi-candidate elections in majority-minority districts comport with—and further—the intent of the VRA and the competitiveness

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[19] *Id.*

[20] *Id.*; Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1518, 1540 (2002).

[21] Pildes, *supra* note 20, at 1540.

[22] *Id.* at 1539.

[23] 478 U.S. 30 (1986).

[24] "The Census Bureau estimated yesterday that from July 1, 2005, to July 1, 2006, the nation's minority population grew to 100.7 million from 98.3 million; that is about one in three of all Americans. The new figures also suggest that many states are growing more diverse as minorities disperse." Sam Roberts, *New Demographic Racial Gap Emerges*, N.Y. TIMES, May 17, 2007, at 21.

at the heart of the American political process.[25] Such elections provide voters with a multitude of candidates from which to choose and they compel candidates to form coalitions across racial and ethnic lines. A strict application of *Gingles* in this electoral context could lead to absurd results, just as an overly broad application could undercut its raison d'être. Trying to apply *Gingles* to today's political environment would be unworkable and comparable to trying to fit a square peg in a round hole. Either the Supreme Court or Congress should articulate standards that would govern if a vote dilution claim arose from a multi-candidate race in a majority-minority district. Absent such guidance, courts should only apply the totality of the circumstances test set forth in the 1982 amendments to the VRA.

This Comment begins in Part I by describing the judicial interpretations of the VRA, specifically focusing on Section 2, the 1982 amendments to the Act, the rise of the *Gingles* tripartite test, and the numerous questions that stem from the *Gingles* opinion.

Next, this Comment explores how courts have discussed or tried to apply each of the different *Gingles* prongs. This Comment also discuss how the Supreme Court encourages coalition building and promulgates the belief that white, not just minority, representatives can represent minorities' interests in a given district through substantive representation.

Part II discusses the election results of two different congressional races in majority-minority districts in which there

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[25] "The essence of any democratic regime is the competitive election of officeholders. It is only by making candidates compete for their seats that politicians can be held accountable by the public." THOMAS E. MANN & BRUCE E. CAIN, PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 1 (2005). *But see* THOMAS BURNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 113 (2008) ("Elections that provide real choices to voters remain critical in a democracy. . . . we need not maximize the level of competitiveness in electoral districts across the country in order to satisfy this condition of electoral choice" and proposing drawing "highly uncompetitive, ideologically homogenous districts.").

was a crowded field of minority candidates and a white challenger. These races, in New York's 11th and 12th Congressional Districts, both resulted in the victory of a minority woman over other candidates by a small percentage. Fractured voting among the majority population characterized both elections.

Part III of this Comment analyzes solutions proposed by a leading voting rights scholar to dampen the competition in majority-minority districts. According to that scholar, reducing competition is imperative to ensure that splintered voting does not lead to the election of a candidate who some would not consider "minority-preferred" due to their race (white). This Comment refutes the proposals on the grounds that they are unworkable if minority voters have nuanced political stances. In addition, adoption of these proposals would be contrary to the principle of competition at the core of the American electoral system. In so doing, this Author argues that races in which there are multiple minority candidates further the VRA's intent because minorities have the opportunity to meaningfully determine which of the candidates they prefer.

This Comment concludes by discussing how the application of *Gingles* in the context of majority-minority districts in which multiple candidates are running for election could exacerbate the confusion surrounding each of the three *Gingles* prongs. Rather than try to make *Gingles* fit the present electoral landscape, courts should only apply the totality of the circumstances test.

## I. THE VOTING RIGHTS ACT AND JUDICIAL INTERPRETATION: HOW CAN A MINORITY VOTE DILUTION CLAIM SUCCEED?

The year after the VRA passed, the Supreme Court faced the question of whether the VRA was constitutional. In *South Carolina v. Katzenbach*,[26] South Carolina challenged the constitutionality of the VRA and sought an injunction against the Attorney General's enforcement of its provisions.[27] In holding the VRA

[26] 383 U.S. 301 (1966).
[27] *Id.*

was constitutional, the Court discussed the VRA's intent and the history compelling its passage.[28] The Court noted two important issues arising from the legislative history of the Act.[29] First, Congress perceived an "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[30] Second, Congress realized that its past measures to remedy voting discrimination needed strengthening in order to comport with the Fifteenth Amendment's requirement that the right to vote shall not be abridged by the government on the basis of one's race.[31] Chief Justice Warren, writing for the majority, described the multitude of devices employed to deprive blacks of their voting rights—grandfather clauses, procedural obstacles, white primaries, voting tests—and the Court's subsequent invalidation of such procedures.[32] The Court therefore concluded that Congress could employ rational means such as the VRA to enforce the Fifteenth Amendment's ban on racial bias in voting.[33]

In the wake of the VRA, *Katzenbach* and the subsequent political empowerment of minorities, numerous states enacted measures to mitigate this new exercise of federal power.[34] These states endeavored to ensure that rights recognized in the law were not exercised by minorities, and used numerous methods to achieve this goal. For example, "[e]lective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; [and] at-large elections were substituted for election by

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[28] *Id.* at 308-317.
[29] *Id.* at 309.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 311-13.
[33] *Id.* at 324.
[34] *See* George Bundy Smith, *The Multimember District: A Study of the Multimember District and the Voting Rights Act of 1965*, 66 ALB. L. REV. 11, 15 (2002).

single-member districts."[35] To combat this "second generation" of efforts to impede the exercise of minority voting rights,[36] minorities were concentrated into districts so they could elect a minority candidate. Such changes to voting power compelled judicial challenges, and the Supreme Court had to determine what the Constitution allowed and provide guidelines to state legislatures about when the alteration of district lines would or would not pass constitutional muster.[37]

In *City of Mobile v. Bolden*,[38] the Supreme Court contemplated minority vote dilution and established a high threshold for plaintiffs to meet in order to prevail on a claim of minority vote dilution.[39] In that case, black voters from Mobile, Alabama alleged that the city's practice of at-large minority voting to elect City Commissioners unfairly diluted black votes and therefore violated the Fourteenth and Fifteenth Amendments.[40] Both the district court and Court of Appeals for the Fifth Circuit found for the plaintiffs, but the Supreme Court reversed.[41] The Supreme Court's holding had two key components: first, the Fifteenth Amendment only precludes the government from purposefully denying or abridging the right to vote on account of race;[42] and second, an apportionment scheme does not run afoul of the Fourteenth Amendment's Equal Protection Clause unless it is intentionally discriminatory.[43] Hence, even though the City had never elected a black citizen to the City Commission, the Commission was more responsive to white citizens' concerns than black citizens' concerns, and official discrimination pervaded Alabama's history, the Supreme Court refused to find that the at-large voting

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[35] *Id*.
[36] Aleinikoff & Issacharoff, *supra* note 2, at 629.
[37] *See id.* at 590.
[38] 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act of 1982, 42 U.S.C. §§ 1973-1973aa-6, *as recognized in* Thornburg v. Gingles, 478 U.S. 30 (1986).
[39] *Id.* at 58, 79-80.
[40] *Id.* at 58.
[41] *Id.* at 58-59, 80.
[42] *Id.* at 61.
[43] *Id.* at 66.

scheme violated equal protection.[44] Unless the plaintiffs could show that the voting system in place was conceived to further racial discrimination, their challenge could not succeed.[45]

In response to the Supreme Court's ruling requiring that plaintiffs prove government officials' invidious intent,[46] Congress amended the VRA in 1982.[47] These amendments made it easier for plaintiffs to make out claims of minority vote dilution, as they eliminated the *Bolden* requirement that a plaintiff would need to show intentional discrimination by the government.[48] Instead, the amendments established a "results test" whereby a plaintiff, who can show that discrimination resulted from a voting scheme, can make a claim under Section 2 of the VRA.[49] The "results test" requires an investigation into the totality of circumstances in order to determine whether minority voters had less of an "opportunity than other members of the electorate to participate in the political process and elect representatives of their choice."[50] The Senate Committee on the Judiciary, in a report that complemented the 1982 amendments, proffered numerous factors for courts to

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[44] *Id.* at 73-74.
[45] *Id.* at 74.
[46] The Court labeled intentional vote dilution as "invidiously discriminatory" because such a districting plan's purpose is "'to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 69 (quoting Gaffney v. Cummings, 412 U.S. 735 (1973) (citing Fortson v. Dorsey, 379 U.S. 433, 439 (1965)) (internal quotations omitted).
[47] 42 U.S.C. § 1973c (2006).
[48] *Id.* at § 1973c(b); Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1292-93 (2007).
[49] "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 abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (emphasis added).
[50] Sec. 1973: Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation, http://www.justice.gov/crt/voting/42usc/subch_ia.php.

consider when determining whether electoral devices are discriminatory or not. These factors include:

1. the history of official voting-related discrimination in the state or political subdivision;
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 of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[51]

[51] S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 28-29 ("Senate Report") *Available at* http://www.justice.gov/crt/voting/sec_2/about_sec2.php. These factors are also known as the Zimmer factors; *See* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*14 CARDOZO L. REV. 1237, 1240 n.12 (1993) (describing how the label "Zimmer factors" attached to the factors the Fifth Circuit considered in Zimmer v. McKeithen, 485 F.2d 1297, 1305-08 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976). In that Fifth Circuit case, the court applied the guidelines in the Supreme Court case White v. Regester, 412 U.S. 755 (1973), to determine "when racial vote dilution in the context of an at-large or multimember district election rose to the level of a constitutional violation." *Id.* The factors the *Zimmer* court evaluated enabled it, and subsequent courts, to ascertain whether there was vote dilution).

In order to prevail in a vote dilution claim, a plaintiff need not establish a majority of the aforementioned factors or even a certain number of factors.[52] The 1982 amendments also expanded the scope of the VRA to encompass another protected class—language minorities.[53] The first case decided following passage of the 1982 amendments, *Gingles*,[54] further defined the meaning of Section 2 and established a three-part test that has permeated analyses of coalition and crossover district voting ever since.[55]

In *Gingles*, a group of black citizens from North Carolina alleged that the State of North Carolina diluted the vote of black citizens and therefore impeded their ability to elect representatives, in violation of Section 2 of the VRA of 1965.[56] The Supreme Court, in the majority opinion written by Justice Brennan, held that multimember districts do not impede the voting power of blacks unless a three-part test is satisfied.[57] First, the minority group must show "that it is sufficiently large and geographically compact" such that it would "constitute a majority in a single-member district."[58] Second, "the minority group must be able to show that it is politically cohesive."[59] One way of doing this is by "showing that a significant number of minority group members usually vote for the same candidates." [60] Third, the minority group must demonstrate that the white majority votes as a bloc and that bloc can "defeat the minority's preferred candidate."[61] In other words, the group needs to show that racially polarized voting precludes minorities from electing candidates of their choice. A way to determine whether legally significant white bloc voting exists is by

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[52] Senate Report, *supra* note 51.
[53] Nixon v. Kent County, 76 F.3d 1381, 1390 (6th Cir.1996) (en banc).
[54] 478 U.S. 30 (1986).
[55] *See id.* at 46-51.
[56] *Id.* at 35.
[57] *Id.* at 50-51.
[58] *Id.* at 50.
[59] *Id.* at 51.
[60] *Id.* at 56.
[61] *Id.* at 51.

looking at whether those votes trump minority votes plus "cross-over" white votes.[62] Although Justice Brennan proffered this tripartite test, he made clear there were limits on the scope of his opinion, as it did not endeavor to determine "whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections."[63] In sum, the crux of *Gingles* is the belief that "if a minority community is numerous and sufficiently compact and there is internal consistency in its voting choices, it should be able to elect its candidate of choice as a majority of the population in a district, even in the face of hostile bloc voting."[64] Theoretically, *Gingles* sets brightline rules, but in practice, the conditions for a minority vote dilution claim are just as muddled as they were pre-*Gingles*.

On the surface, the three-pronged *Gingles* test appears to specify and clarify when a situation will likely fail the "results test" of VRA Section 2 and therefore validate a plaintiff's claim of minority vote dilution. Yet a more thorough examination of the factors reveals some ambiguity. For example, the definition of "majority" in Prong 1 has caused confusion. J. Morgan Kousser notes "majority" can mean myriad things: majority of the total population, voting-age population, registered voters, or the people who show up at their polling places to vote.[65] The picture is even more complicated when one views *Gingles* in the context of diverse districts. Trying to apply *Gingles* when there is more than one large minority group in a given district gives rise to numerous questions about each of the prongs. This Comment demonstrates that these questions lack answers. For example, what does "majority" mean when no one minority group is over fifty percent of the population? Can minority groups be aggregated in order to

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[62] *Id.* at 56.
[63] *Id.* at 46, n. 12 (italics in original).
[64] Nelson, *supra* note 48, at 1299.
[65] J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 562 (1993).

constitute a majority? If there is aggregation that rises to the level of a "majority," what happens when there is a lack of political cohesion because minorities spread out their votes among different minority candidates? Does satisfaction of Prong 1 necessarily come at the expense of satisfying Prong 2? Alternatively, is the threshold for Prong 2 so low that as long as minorities are voting for minority candidates, cohesion is demonstrated? Regarding Prong 3, how does a court determine who is a "minority-preferred candidate," particularly in the scenario of minority voters spreading out their votes among different minority candidates?[66]

These questions give rise to the conclusion that on a macro level, application of *Gingles* to today's modern electoral climate—consisting of increasingly diverse districts and candidates of different races and ethnicities—resemble trying to make a square peg fit into a round hole. In other words, whether majority-minority districts in which minorities' votes are spread out among multiple candidates would satisfy *Gingles* is unclear. Because of the uncertainty surrounding each of the prongs, either Congress or the Supreme Court should develop clearer standards that would govern if a vote dilution claim arose from a multi-candidate race in a majority-minority district. In doing so, these guidelines should ensure that competition, the bedrock of the American electoral system, is fostered and not mitigated.

### A. Judicial Consideration of Minority Group Aggregation: Spotlight on *Gingles* Prongs 1 and 2

There is no judicial or legislative guidance on the acceptability of aggregation of minority groups in order to state a vote dilution claim. Neither the VRA itself nor its legislative history indicates whether Congress contemplated the aggregation of different minorities. For opponents of aggregation, the silence

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[66] *See infra* Part I.C.

on the issue demonstrates congressional opposition to the idea.[67] Supporters note that because the VRA does not indicate a stance on minority coalitions means that Congress did not prohibit or mean to prohibit their existence.[68] Moreover, if the intent of the 1982 amendments was to expand the VRA's application, then allowing coalitions would be consistent with that objective.[69] Exacerbating the ambiguity, the Supreme Court has acknowledged that aggregation may occur, but the Court has not definitively decided whether cobbling together minority groups is acceptable for determining Section 2 compliance.[70] Circuit courts looking at the issue of aggregation have also disagreed about whether such combinations are within the purpose of the VRA. The thrust of circuit court opinions indicates support for the notion that if the *Gingles* factors can be satisfied, then coalitions of minority groups may bring a vote dilution claim together.[71]

For instance, in *Campos v. City of Baytown*,[72] the Fifth Circuit Court of Appeals found that the aggregation of black and Hispanic voters was acceptable based on the groups' shared history of political repression.[73] Blacks and Hispanics challenged Baytown's at-large election system in a class action lawsuit on the grounds that the at-large voting system violated Section 2 of the VRA. The court stated that no law spoke to the issue of aggregation,[74] and then proceeded to analyze whether the groups together

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[67] Christopher E. Skinnell, *Why Courts Should Forbid 'Minority Coalition' Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, U. CHI. LEGAL F. 363, 365 (2002).
[68] *Id.*
[69] *Id.* at 365-66.
[70] Growe v Emison, 507 U.S. 25, 41 n.5 (1993). In that case, the Court refrained from deciding whether "ethic and language minority groups" could be combined. *Id.* at 41.
[71] Nixon v. Kent County, 76 F.3d 1381, 1383 (6th Cir. 1996) (en banc) (citing cases in the Second, Ninth, and Eleventh Circuits for the proposition that coalition claims under Section 2 are permissible if the G*ingles* tests are satisfied).
[72] Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988).
[73] *Id.* at 1244.
[74] *Id.*

would satisfy the *Gingles* factors.[75] As to factor one, that the minority group be "sufficiently large and geographically compact to constitute a majority in a single member district,"[76] the court combined percentages of minority populations in order to show that a district could have a majority of voters who were black or Hispanic.[77] Next, in "determin[ing] whether the minority group [was] politically cohesive,"[78] the circuit court agreed with the district court that the evidentiary focus must be on the races in which there is a minority candidate.[79] The Fifth Circuit found support for this conclusion in *Gingles* because in *Gingles*, the only elections examined were those in which there were black candidates.[80] Hence, according to the court, the test for cohesion was whether minority groups together vote for a minority candidate,[81] which was satisfied in the case of *City of Baytown*.[82] The third prong of *Gingles*, white bloc voting, was satisfied because the white voters were able to defeat the power of minority plus white crossover votes.[83] In addition, the "occasional win by a minority's preferred candidate would not preclude the finding of racially polarized voting."[84] The court examined the aforementioned seven factors in the Senate Committee on the Judiciary report, also known as the *Zimmer* factors,[85] and determined that, based on a totality of circumstances, Baytown violated Section 2.[86]

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[75] *Id.*
[76] *Id.* (internal quotations marks omitted).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 1245.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1249.
[84] *Id.* at 1249-50.
[85] *See* Senate Report, *supra* note 51.
[86] *Baytown*, 840 F.2d at 1249-50.

In marked contrast to the Fifth Circuit ruling in *City of Baytown*, eight years later, in *Nixon v. Kent County*,[87] the Sixth Circuit explicitly rejected aggregation of minority groups for vote dilution claims.[88] In that case, three black and three Hispanic individuals filed a class action suit against Kent County, alleging that the post-1990 census redistricting plan proposed by the county violated Section 2 of the VRA.[89] The question before the court on appeal was whether two minority groups, "each of insufficient numbers individually to make a prima facie case of voting dilution under the Voting Rights Act, may collectively seek § 2 protection by forming a 'coalition' of minorities."[90] Although the district court held that the VRA allows minority group aggregation,[91] the Sixth Circuit disagreed.[92]

In reaching its decision, the court examined both the plain language of Section 2 and policy considerations.[93] The court found that coalitions were impermissible because the statute was void of any "word or phrase which reasonably supports combining separately protected minorities."[94] Even though the 1982 amendments expanded the protections afforded by Section 2, this expansion was not meant to be a "broad and boundless 'trend' to expand the Act to protect classes not described in the Act, or to protect combinations of classes not described in the Act, including coalition minorities."[95] Further, the Sixth Circuit reasoned that congressional findings that black and Hispanic Americans faced discrimination did not mean that together they were a protected minority group that faced inequality.[96] Because the Sixth Circuit did not agree that the two protected minority groups together constituted a protected group under the VRA, the Court dismissed

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[87] 76 F.3d 1381 (6th Cir. 1996) (en banc).
[88] *Id.* at 1387-90.
[89] *Id.* at 1383.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 1393.
[93] *Id.* at 1390-92.
[94] *Id.* at 1387.
[95] *Id.* at 1390.
[96] *Id.* at 1391.

the plaintiffs' suit.[97] The *Kent County* decision leaves the question unanswered of whether aggregation and judicial protection are mutually exclusive.

The *City of Baytown* and *Kent County* decisions demonstrate a chasm in opinion on the issue of aggregation. Both cases illustrate concepts that inform present-day discussions of minority group coalitions. The *City of Baytown* decision is instructive for two key reasons. First, it indicates that aggregation may be appropriate if all minority groups have faced discrimination, particularly in the political realm.[98] Second, it indicates that if minorities together vote for a minority candidate, they satisfy the *Gingles* cohesiveness standard.[99] Conversely, *Kent County* demonstrates two crucial principles: minority group distinctiveness and limitations on the protections afforded pursuant to Section 2. For the Sixth Circuit, protected minority groups are distinguishable and should be kept separate for the purposes of a vote dilution claim.[100] Protection for each group individually did not mean protection for an amalgamation of the two.[101] This anti-coalition stance is consistent with the court's view that there are limits to the VRA's scope.[102]

Both the Fifth and Sixth Circuits failed to present a standard for other courts to follow when faced with the possibility of minority group aggregation. The primary difference between these cases appears to be their interpretations of "majority" in the

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[97] *Id.* at 1393. The exact procedural history is the Sixth Circuit reversed the district court's dismissal of the county's motion to dismiss the plaintiffs' class action suit. *Id.*

[98] *See* Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988).

[99] *See id.* at 1245.

[100] *Kent County*, 76 F.3d at 1387 ("A textual analysis of § 2 reveals no word or phrase which reasonably supports combining separately protected minorities").

[101] *See id.* at 1401-02 (Keith, J., dissenting) (asserting that the effect of the *Kent County* majority's decision is a "racial purity test" and the VRA should be interpreted as protecting Blacks and Hispanics separately as distinct groups but also collectively as an amalgamated group).

[102] *See id*. at 1390.

first prong of *Gingles*. However, trying to apply either court's framework to competitive majority-minority districts illustrates how the difficulties associated with one prong may spill over into the other prongs. Moreover, satisfaction of one prong does not ensure satisfaction of the other two.

For instance, it is ambiguous whether minority groups must be a coalition for a certain period of time in order to jointly bring a vote dilution claim, or how many people from each minority group together must vote for a given candidate in order to be considered cohesive. Even if minority groups are aggregated in order to constitute a majority under Prong 1, does their claim fail if individuals cast their votes among multiple minority candidates in the field (because this renders them not cohesive under Prong 2)? In addition, if minority groups are not cohesive in their voting because they spread their votes among minority candidates, how does a court determine the minority-preferred candidate pursuant to Prong 3? This circuit split and the questions it raises demonstrates the imperativeness of clearer standards from either Congress or the Supreme Court on the issue of vote dilution when there is more than one sizable minority group in a given district.

### B. Descriptive Versus Substantive Representation

*Georgia v. Ashcroft*,[103] decided in 2003, focused on Section 5 of the VRA,[104] but it is pertinent to this Comment's exploration of Section 2 and the ways in which minority voters may elect a candidate of their choosing, minority vote empowerment, the *Gingles* factors, and descriptive versus substantive representation. At issue was a Georgia State Senate plan that would change three districts following the 2000 census.[105] The plan endeavored to keep majority-minority districts in place but also increase the number of "'influence' districts, where black voters would be able to exert a significant-if not decisive-force in the election

[103] 539 U.S. 461 (2003).
[104] *Id.* at 465-66 (discussing the specific issue before the court).
[105] *Id.* at 469-71.

process."[106] When Georgia sought a declaratory judgment that the proposed plan would not constitute a violation of the VRA, the Department of Justice disagreed on the grounds that these three district changes would impede the ability of black voters to elect their candidate of choice.[107]

According to *Ashcroft*, one way to ensure such candidates get elected is to create majority-minority districts, which Justice O'Connor's majority opinion referred to as "safe districts."[108] In safe districts, "it is highly likely that minority voters will be able to elect the candidate of their choice."[109] Although there may be "descriptive representation" because the elected candidates are almost certainly the same race as the voters in one of these districts, the drawback is that minority voters may be isolated from the state as a whole and political influence may be confined to that group of districts.[110] Alternatively, by distributing minority voters across more districts, these voters may still have the opportunity to elect their preferred candidates by forming coalitions with other ethnic and racial groups.[111] In these "influence districts . . . minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[112] This aggregation with other minority groups in order to elect a given representative may increase "substantive representation" because representatives will be responsive to the needs of blacks or other minority groups in their districts who helped facilitate their election.[113]

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[106] *Id.* at 470.
[107] Alvaro Bedoya, *The Unforeseen Effects of* Georgia v. Ashcroft *on the Latino Community*, 115 YALE L.J. 2112, 2120 (2006).
[108] *Ashcroft*, 539 U.S. at 480.
[109] *Id*.
[110] *Id.* at 481.
[111] *Id.*
[112] *Id*. at 482.
[113] *Id.* at 481-83; *see* Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 293 (2005).

In stating that minority voters may possess significant voting power, even if they are less than fifty percent of a given district,[114] the Court made clear that the traditional belief that majority-minority districts are the key to "maximiz[ing] minority voting strength" was no longer valid. [115] Hence, preclearance pursuant to Section 5 may be granted if "influence or coalitional districts" are created because they are means to achieving minority voting strength.[116] In other words, a state has the freedom to choose which type of districts it prefers—based on whether it perceives descriptive or substantive representation as more desirable—and either district type would pass muster under Section 5.[117]

*Ashcroft* is notable for three main reasons. First, *Ashcroft* evidences strong judicial support for voter coalitions.[118] Second, the holding demonstrates a potential shift away from the deep-rooted belief that the political empowerment of minorities depends upon the existence of majority-minority districts.[119] Third, it indicates that the minority-preferred candidate may not necessarily be a minority, due to the concept of substantive representation.[120] It remains to be seen if and how the Court's reasoning will be used in a vote dilution claim under Section 2. If a given district need

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[114] Luke P. McLoughlin, *Note, Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312, 314 (2005).
[115] *See Ashcroft*, 539 U.S. at 482.
[116] *Id.*
[117] *Id*. at 483.
[118] *See id.* at 482 (Various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.").
[119] If minorities can form coalitions and elect representatives who are receptive to their needs, even if the elected individual is not the same race as the group that helps ensure his or her election, this is another route to the end goal majority-minority districts seek to achieve—minority representation in government.
[120] *Ashcroft*, 539 U.S. at 483 ("The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.").

not contain a majority of minority voters in order to pass muster under Section 5, how does that mesh (or not) with a Section 2 and *Gingles* analysis?

The *Ashcroft* opinion may be viewed as the Section 5 counterpart to the recent Section 2 decision in *Bartlett v. Strickland*.[121] In *Bartlett*, decided in 2009, the Supreme Court had to decide whether Section 2 mandated the creation of a district where the racial minority population was less than 50% of the voting-age population but, with sufficient crossover votes, could elect its candidate of choice.[122] The Court held that Section 2 did not require the drawing of such a district where black citizens were only 39% of the voting-age population in the district.[123] The Court reasoned that allowing a Section 2 claim to stand when a minority group required crossover votes to elect a given candidate would be contrary to Section 2's mandate, which requires a showing that minorities do not have the same opportunities as other citizens to elect their candidates of choice.[124] In addition, crossover-district claims would necessarily conflict with Prong 3 of *Gingles* because the majority bloc requirement could not be satisfied "in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate."[125] The Court concluded by stating that unless the voting-age population of a minority group in a given district exceeds 50% and therefore satisfies *Gingles* Prong 1, that group cannot state a claim of minority vote dilution.[126] However, the Court expressly abstained from addressing the kind of coalition district at issue in *Kent County* and the question of whether two groups that together exceed 50% can state a claim.[127]

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[121] 129 S. Ct. 1231 (2009).
[122] *Id.* at 1238.
[123] *Id.*
[124] *Id.* at 1243.
[125] *Id.* at 1244.
[126] *Id.* at 1249.
[127] *Id.* at 1242-43.

It is reasonable to think of *Georgia v. Ashcroft* and *Bartlett v. Strickland* as a pair because both cases evidence support for the idea that minorities, because of crossover voting, do not need the utmost judicial protection in order to be politically strong. A corollary to this reasoning is the idea that the political landscape is marked by a decrease in racially polarized voting, a decrease that allows such crossover votes to be cast.[128] As such, it would be fair for one to conclude that the VRA is working to effectively breaking down the barriers between different segments of society.[129]

Despite their similarities, the two cases diverge in terms of their application. *Ashcroft* stated that coalitional districts are acceptable for preclearance pursuant to Section 5, whereas *Bartlett* refused to allow a claim of vote dilution unless the minority on its own is 50% of the voting age population. The Court evidenced adherence to *Gingles* by attempting to set a rule regarding Prong 1. However, by acknowledging—and even encouraging—coalitions and influence districts, the Court clouded the clarity of the other prongs, such as vote cohesion in Prong 2. Moreover, the Court did not address the fact that all districts, including majority-minority districts, are increasingly diverse and coalitions of voters may want to state a vote dilution claim. The Supreme Court was unable to reconcile the history of minority voter disenfranchisement and the increasing prevalence of voting across traditional racial and ethnic lines. As such, the Court failed to articulate standards that would incorporate both recognition of the past and the present-day (and future) realities of an electorate that is less racially polarized than it was when the VRA became law.

### C. Who is the Minority-Preferred Candidate?

From the jurisprudence regarding Prongs 1 and 2, which may be perceived as more objective tests aimed at determining the standing of a group to bring a claim, the analysis in this subsection shifts to examine Prong 3. Prong 1 is an objective determination

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[128] *Id.* at 1249.
[129] *Id.*

about a group's standing because a court can take either of two roads in determining whether Prong 1 is established. A court can assess whether a particular minority population, standing alone, is the majority in a given district, or it can aggregate multiple minority groups, as the Fifth Circuit did in *City of Baytown*.[130] Prong 2 depends on an examination of voting patterns and discerning whether a minority group tends to vote as a unit or whether non-whites coalesce behind candidates that are distinguishable from those supported by white voters.[131] The difficulty of a Prong 3 analysis—which slides into Prong 2—is determining the identity of the "minority-preferred candidate" or "candidate of choice" when there is more than one minority candidate in the race and different minority group members cast their votes among those candidates.[132]

Part of the confusion surrounding Prong 3 is the Court's failure to set forth a clear standard in *Gingles* about what it means to be the "minority-preferred candidate." There are three different approaches suggested by the Court in the opinion: Justice Brennan's plurality opinion,[133] Justice White's concurrence,[134] and Justice O'Connor's concurrence.[135] Each opinion sought to address whether a court, in determining who the minority-preferred candidate is, can consider the race of the candidates.

For Justice Brennan, race should not play a role in ascertaining the identity of the minority-preferred candidate; in

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[130] 840 F.2d 1240 (5th Cir. 1996).

[131] *See* Gomez v. City of Watsonville, 863 F.2d 1407, 1412 (9th Cir. 1988).

[132] *Id.*

[133] Thornburg v. Gingles, 478 U.S. 30, 34 (1986). Although Justice Brennan wrote the majority opinion for the Court, where he discusses the meaning of "minority-preferred candidate," in Part III C, only Justices Marshall, Blackmun, and Stevens joined. *Id.*

[134] Justice White joined the Opinion of the Court, but wrote a separate concurrence to disagree with the plurality opinion in Part III-C. *Id*. at 82-83.

[135] Justice O'Connor wrote separately in order to explicate why she agreed with the Court's judgment. Chief Justice Burger, in addition to Justices Powell and Rehnquist, joined. *Id*. at 83.

fact, "the race of the candidate *per se* is irrelevant to racial bloc voting analysis."[136] Because a candidate of choice need not be the same race or ethnicity as the group alleging vote dilution, vote dilution and racial identity are distinct concepts.[137] According to this plurality opinion, although voters usually choose people of the same race as their preferred candidate, this frequent correlation is immaterial when considering the viability of a Section 2 claim.[138] Premised on the notion that "members of the white majority are not only capable of ably representing minority communities, but are willing to do so,"[139] the plurality seemed to foreshadow *Ashcroft*, specifically its support for the notion of substantive representation.

Both Justices White and O'Connor rejected the race-neutral approach taken by the plurality and argued that race must be considered. For Justice White, plaintiffs could allege violations of Section 2 whenever their candidate lost.[140] He interpreted the Brennan plurality opinion to mean that the minority candidate would possess an entitlement to victory rather than simply the ability to compete on the same level as other candidates in the race.[141] Justice White argued that voter race is not the key to understanding racially polarized voting because whites vote for black candidates.[142] Voting across racial lines demonstrates that these voters cast their ballots according to their political leanings rather than their race. When a white citizen votes in favor of a minority candidate, based on "some shared social, economic, religious, political, or other factor common to the white voters and the minority candidate[,]" [143] this is "interest-group politics."[144]

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[136] *Id*. at 67.
[137] *See id.* at 68.
[138] *Id.*; Sushma Soni, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651, 1656 n.25 (1990).
[139] Soni, *supra* note 138, at 1657.
[140] *See Gingles*, 478 U.S. at 83 (White, J., concurring).
[141] Soni, *supra* note 138, at 1663 n.64.
[142] *See Gingles*, 478 U.S. at 83 (White, J., concurring).
[143] Scott Yut, *Using Candidate Race to Define Minority-Preferred Candidates Under Section 2 of the Voting Rights Act*, 1995 U. CHI. LEGAL F. 571, 581 (1995).

Hence, if racially polarized voting results from interest-group politics, it is not actionable as a Section 2 vote dilution claim.[145] For Justice White, to determine the identity of the minority-preferred candidate, race *must* be considered; otherwise, it would be unclear when claims of racially polarized voting are actionable.[146] In other words, knowing the race of the candidate when racially polarized voting occurs helps courts distinguish between interest-group politics and politics driven by racial considerations.

Similarly, Justice O'Connor suggested that courts should examine the reason that voting is divided along racial lines.[147] When faced with a vote dilution claim, courts should inquire into whether party affiliation or electoral experience, rather than simply race, influenced white voters.[148] Even if voters cast their ballots based on party affiliation and political background, satisfying these two elements is necessary but not sufficient to defeat a claim of racially polarized voting. However, an analysis of these factors can help determine courts ascertain whether a white voting bloc "will consistently defeat minority candidates" or whether "another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections."[149] As such, race would be just one factor that could help in determining the minority-preferred candidate.[150] Justice O'Connor's concurrence can be contrasted with that of Justice White, who argued that race may be a controlling—rather than just influential—factor in a vote dilution claim.[151]

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[144] *Gingles*, 478 U.S. at 83 (White, J., concurring).
[145] Yut, *supra* note 143, at 581.
[146] *See id.* at 580.
[147] *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring); Soni, *supra* note 139, at 1663.
[148] Soni, *supra* note 138, at 1663.
[149] *Gingles*, 478 U.S. at 100 (O'Connor, J. concurring).
[150] *See* Soni, *supra* note 138, at 1663.
[151] *See Gingles*, 478 U.S. at 83 (White, J., concurring). Some commentators argue that Justice O'Connor's multi-factor framework would create severe difficulties for lower courts trying to ascertain the identity of the minority-

These different interpretations of Prong 3, when applied to the situation of a crowded field of minority candidates, exacerbate the uncertainty surrounding the definition of "minority-preferred." Even without considering race, in a race with many candidates, it may be difficult to determine the "chosen" candidate of a given election.[152] Applying Justice Brennan's perspective, courts endeavoring to determine the minority-preferred candidate would need to assess how *any* candidate fared in an election, because a candidate need not be a minority in order to be minority-preferred.[153] Justice White's perspective on minority-preferred candidates would be difficult to apply to a multi-candidate field because any of the minority candidates could be "minority-preferred."[154] Similarly, Justice O'Connor's opinion would result in lower court judges having the discretion to decide the identity of the minority-preferred candidate on the basis of "ideology, party affiliation, or even education," which would lead courts into determining "the minority-preferred candidate on the basis of the judge's conception of the prevalent political ideology of a potentially diverse, even fractured, minority community."[155] The lack of judicial guidance on the issue of competitive majority-minority districts compels re-asking the question at the crux of this Comment: if votes of minorities within a given district are cast among different minority candidates, can the *Gingles* prongs be met? Do such districts frustrate or fulfill the aims of the VRA?

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preferred candidate. *See, e.g.*, Soni, *supra* note 138, at 1664. Such lower courts would consider "ideology, party affiliation, or even education; this would usher courts into the dangerous realm of divining the minority-preferred candidate on the basis of the judge's conception of the prevalent political ideology of a potentially diverse, even fractured, minority community." *Id.* (internal citations omitted).

[152] Nelson, *supra* note 48, at 1299.

[153] *See Gingles*, 478 U.S. at 68.

[154] *See id.* 478 U.S. at 83 (White, J., concurring); Yut, *supra* note 143, at 580.

[155] Soni, *supra* note 138, at 1664 (internal citations omitted).

## II. CASE STUDIES: FRACTURED VOTING AMONG MINORITIES IN MAJORITY-MINORITY DISTRICTS

One of the best ways to examine the implications of competitive majority-minority districts and answer the questions at issue is to see who gets elected from these districts. This Comment examines two elections in New York for three main reasons. First, its Northern location sets it apart from the traditional bastion of almost totally Southern Section 5 preclearance states.[156] Parts of New York are subject to Section 5, including Bronx, Kings, and New York counties.[157] Because both the 11th and 12th Congressional Districts of New York encompass pieces of Kings County and are therefore subject to Section 5,[158] this means that the district lines were drawn in the shadow of the preclearance requirement and assurances of minority vote protection. Second, both the 12th Congressional District in 1992 and the 11th Congressional District in 2006 witnessed races in which numerous minority candidates and a white male ran for office. Third, in both cases minority women emerged victorious from crowded fields

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[156] U.S. Department of Justice Civil Rights Division Voting Section, *Coverage under the Special Provisions of the Voting Rights* Act, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Mar. 5, 2011). The seven states originally covered in their entirety were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Parts of other states were covered by Section 5, such as Arizona, Hawaii, Idaho, and North Carolina. *Id*.

[157] U.S. Department of Justice Civil Rights Division Voting Section, *Section 5 Covered Jurisdictions*, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Mar. 5, 2011) (these are the three counties in New York that are covered by Section 5 although the state is not covered as a whole; California, Florida, North Carolina, and South Dakota also have counties covered under Section 5 although the state as a whole is not).

[158] *Id.*; 108th Congressional Districts, U.S. Census Bureau, *New York Congressional Districts by County*, http://www.census.gov/geo/www/cd108th/NY/dist_c8_36.pdf at 1 (last visited Mar. 5, 2011).

that included white males who seemed bound to win.[159] Although neither won by a significant margin, what is noteworthy is that these women prevailed, propelled to victory by a combination of significant minority support and coalition building with powerful unions.

The elections discussed here suggest that, in competitive elections with multiple minority candidates, a candidate who wins likely shares the race or ethnicity of the majority population in that district *and* has worked to garner support from organizations, such as unions, that deliver votes. These two case studies suggest fulfillment of the promise of the VRA and the intent of majority-minority districts. Minorities in these districts not only had the opportunity to elect their candidate of choice but had many options from which to choose, ensuring descriptive and/or substantive representation.

In 1992, in New York's 12th Congressional District, there was a six-way Democratic primary. Comprised of parts of Brooklyn, Queens, and Manhattan's Lower East Side, the district included a population that was 45% Latino, 27% white, 17% Asian, and 8% black.[160] The six candidates running for election included five Hispanics and one white male named Stephen Solarz. He was a nine-term incumbent from Brooklyn who had over $2 million in campaign funds—a war chest larger than all of the other candidates' funds combined.[161] Pursuant to the state's redistricting

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[159] In the 12th Congressional District, Nydia Velazquez prevailed and in the 11th Congressional District, Yvette Clarke won. Interestingly, in the United States, "minority groups of all kinds seemed to offer women more rather than fewer opportunities for election. Majority-minority districts designed to elect African Americans, Hispanics, and Asians all significantly outperformed the average percentage of women elected in general seats (13%)." Stephanie S. Holmsten & Robert G. Moser, *Do Majority-Minority Districts and Reserved Seats for Minorities Undermine the Election of Women?* 15 (Paper presented at the Annual Meeting of the American Political Science Association (Sept. 4-8, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451030.

[160] *See* Nelson, *supra* note 48, at 1305.

[161] Alison Mitchell, *The 1992 Campaign: 12th District; Rep. Solarz Loses in a New District*, N.Y. TIMES, Sept. 16, 1992 at A1.

initiatives, recently drawn district lines designed to maximize Hispanic voting strength had fundamentally altered the district he had represented in Brooklyn, which was split into six parts.[162] Solarz decided to run in the newly configured district and was expected to benefit from the competition among his five Hispanic opponents.[163]

However, one of these opponents greatly weakened Solarz's support base. Elizabeth Colon garnered numerous white and Asian votes upon which Solarz relied to win. In the end, Nydia Velazquez won the election due to "overwhelming Hispanic support in Brooklyn and strong support from the black community."[164] In addition, Valezquez built strong ties with unions, such as Local 1199, a politically powerful health-care workers union, whose members' votes helped her prevail.[165] When votes were counted, Velazquez won 33% of the vote, Solarz garnered 27%, Colon obtained 26%, and each of the other three candidates had a combined 14%.[166] Velazquez's victory made her the first Puerto Rican woman to serve in the House of Representatives,[167] the first Hispanic woman to represent a New York City district in Congress,[168] and the second Hispanic woman in Congress.[169] Presently, Velazquez is in her tenth term as representative of New York's 12th Congressional District.[170]

Similarly, in another New York district whose lines were drawn in order to ensure and increase the voting power of a minority group, the 2006 Democratic primary in the 11th

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[162] *Id.*
[163] *Id.*
[164] Mary B. Tabor, *The 1992 Campaign: 12th District Woman in the News; Loyalty and Labor; Nydia M. Velazquez*, N.Y. TIMES, Sept. 17, 1992, at B6.
[165] *See id.*
[166] Mitchell, *supra* note 161.
[167] Congresswoman Nydia M. Velazquez, *Biography*, http://www.house.gov/velazquez/about/bio.html (last visited Mar. 5, 2011)
[168] Mitchell, *supra* note 161.
[169] *See* Tabor, *supra* note 164.
[170] Velazquez, *supra* note 167.

Congressional District entailed multiple minority candidates and one white male challenger. The district, whose boundaries were reconfigured in the 1990s to include more of the Park Slope, Cobble Hill and Brooklyn Heights areas of Brooklyn, witnessed a large shift in racial composition following the change in district lines.[171] Whereas "[b]efore the redistricting, blacks made up almost three-quarters of the district's voters," the district changes resulted in a new ethnic makeup of approximately 58.5% black and 21.4% white.[172] When Congressman Major Owens, who represented the district for more than two decades, decided not to pursue re-election, three black challengers and a white Democratic City Councilman named David Yassky ran for his position.[173] Since the 1968 victory of Shirley Chisholm, the first black woman elected to Congress, Black representatives held this seat.[174]

Following Yassky's declaration of candidacy, there was rancor from the black community because "[s]ome black leaders labeled Mr. Yassky an opportunist for moving into the district to run for the seat, and complained that he was trying to take advantage of a divided black vote."[175] Owens called him a "colonizer"[176] and a number of black leaders tried to convince Yassky's minority opponents, Yvette Clarke, Carl Andrews, and Christopher Owens, to withdraw from the race so the black community could coalesce around one candidate.[177] All refused to withdraw.[178] Even the Reverend Al Sharpton participated in the discussion of Yassky's candidacy, meeting with the hopeful repre-

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[171] Michael Cooper et al., *Councilwoman Wins Divisive House Primary*, N.Y. TIMES, Sept. 13, 2006, at B1.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] Diane Cardwell, *In Shirley Chisholm's Brooklyn, Rancor Over White Candidacy*, N.Y. TIMES, June 25, 2006, §1, at 1.
[178] *Id.*; NPR, *Race Plays Part in Congressional Race.* July 23, 2006, *available at* http://www.npr.org/templates/story/story.php?storyId=5576482 ("Some [B]lack leaders have asked the [B]lack candidates to rally around one consensus candidate, but so far nobody's willing to drop out.").

sentative to convince him not to run. Sharpton stated, "[g]iven our underrepresentation in terms of this state in terms of blacks we can't afford not to try and keep a voter-rights seats [sic] in the hands of who it was designed for."[179] In the end, Clarke won the primary.[180]

Because of the "support of several powerful unions adept at turning out voters," the lack of organizational support for Owens, and rumors surrounding Andrews's close relationship with Clarence Norman Jr. (a former Democratic leader in Brooklyn who was convicted the prior year on corruption charges), Clarke was able to win the primary.[181] She garnered 31.2%, Yassky obtained 26.2% (a majority from predominantly white areas plus some black crossover votes), Andrews received 22.9%, and Owens received 19.6% of the vote.[182] Subsequently, Clarke became the 11th Congressional District's Representative,[183] thus preserving the status quo of black representatives in that seat.[184]

## III. THE IMPLICATIONS OF THE 11TH AND 12TH CONGRESSIONAL DISTRICT RACES FOR MAJORITY-MINORITY DISTRICTS AND THE *GINGLES* ANALYSIS

For some, such as Professor Janai Nelson, election results comparable to those in the 11th and 12th Congressional Districts suggest "the ideals of the Voting Rights Act often fail or threaten to fail in practice when the concentration of minority voters leads

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[179] Cardwell, *supra* note 177.
[180] Cooper, *supra* note 171.
[181] *Id.*
[182] *Id.*
[183] Congresswoman Yvette Clark, *Biography* http://clarke.house.gov/Biography/ (last visited Mar. 5, 2011).
[184] Tanangachia Mfuni, *Clarke Wins in Contentious N.Y. Congressional Race* CAPITAL OUTLOOK Sept. 28, 2006–Oct. 4, 2006, at 3A ("While some [B]lack Brooklynites are breathing easier after Clark's win, others mull over how the [B]lack community could come so close to losing the historic seat.").

to fragmentation of allegiances among multiple minority candidates."[185] As a remedy for vote fragmentation among minority communities, she proposes that minorities better organize in order "to limit competition within the district by uniting behind a single frontrunner minority candidate in advance of the election to preserve the promise of the district and, by extension, the Voting Rights Act."[186] Unpacking her proposal suggests two things. First, satisfaction of the VRA requires that a minority represent a majority-minority district. As such, descriptive rather than substantive representation is necessary for fulfillment of the VRA's aims. Second, minority candidates who wish to be elected in a primary should go through a two-step process: compete to be the minority frontrunner and then, if chosen, compete against the white candidate. Nelson's analysis misses the mark. Instead, this author's contention is that multiple minority candidates in a majority-minority district are beneficial for both minorities specifically and the American political process generally.

Although the intent of a majority-minority district is to facilitate the election of a minority who is racially or ethnically similar to the residents within a district, it is debatable whether a white candidate who amassed votes across racial and ethnic lines will not substantively represent those groups that enabled victory. As the Supreme Court discussed and endorsed in *Georgia v. Ashcroft*, coalition building by candidates and voters can lead to greater substantive representation.[187] A representative will serve the interests of those who enabled electoral victory. Beyond the election, the representative will need to substantively represent his or her district in order to assure reelection in subsequent races.

Given the hostility Yassky witnessed in his campaign, one may speculate whether he would need to work twice as hard while in office to ensure that voters would choose him in the next election. Furthermore, studies suggest that, contrary to Nelson's stance regarding the priority of descriptive representation,

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[185] Nelson, *supra* note 48, at 1306.
[186] *Id*. at 1308.
[187] Georgia v. Ashcroft, 539 U.S. 461, 481 (2003).

"maximizing the number of minority representatives does not necessarily maximize minority representation."[188] In fact, "a trade-off does exist between substantive and descriptive representation,"[189] and somehow a balance must be found "between electing minority representatives to office and enacting legislation favored by the minority community."[190] Hence, prioritizing one type of representation to the detriment of the other may be harmful to minorities' political interests. If the VRA's goal is protection of minorities' political interests, then the possibility of substantive representation through a white representative is not antagonistic to those interests; in fact, such representation could further those interests because once in office, the representative would likely want to maintain his or her seat by catering to constituents' needs.[191]

Nelson espouses the belief that the division of votes among minority candidates may lead to the election of "non- or least-preferred" candidates of minority voters (such as a white representative),[192] which would be contrary to the VRA's goals of safeguarding "minority voting rights, and minority political participation more generally, against discrimination and ineffectiveness."[193] As the Supreme Court made clear in *Gingles*, figuring out the identity of the minority-preferred candidate is a challenging, if not

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[188] Charles Cameron et al., *Do Majority-Minority Districts Maximize Black Representation?* 90 AM. POL. SCI. REV. 794, 810 (1996).
[189] *Id.*
[190] *Id.*
[191] *See* John D. Griffin & Brian Newman, *Are Voters Better Represented?*, 67 J. Pol. 1206, 1207-08 (2005) (discussing the three main theories scholars have developed to explain why officials respond to voters' preferences, including the "reelection hypothesis." According to this theory, "reelection-minded representatives must cast their ballots with an eye toward their Constituency. . . . [E]lection-minded officials will focus on voter preferences when they make policy decisions.").
[192] Nelson, *supra* note 48, at 1294. Nelson labels White candidates in majority-minority districts as "spoilers." *Id.*
[193] *Id*. at 1288-89.

impossible, task.[194] Under the race-conscious approach of Justices White and O'Connor,[195] however, both Velazquez and Clarke would appear minority-preferred. Even though neither won by more than a handful of percentage points and vote fracturing almost led to the victory of a white male,[196] both wins helped assure both descriptive and substantive representation for voters in their respective districts. Even under Justice Brennan's race-neutral framework, in which he stated that "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,"[197] Velazquez and Clarke would be minority-preferred because minorities voted in sufficient numbers to make these women winners of their respective primaries.

These victories are not only consistent with the VRA's intent, but also with the American political system's general aims. American politics entails campaigning, coalition building,[198] working to obtain endorsements,[199] and seeking support from groups who will mobilize their members to cast votes a certain way.[200] Elections in majority-minority districts are no different. As the Supreme Court stated in *Johnson v. De Grandy*,[201] when discussing *Gingles*, although majority-minority districts may be necessary "to ensure equal political and electoral opportunity,"[202]

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[194] *See generally* Thornburg v. Gingles, 478 U.S. 30, 68-71 (1986) (discussing the relationship between a candidate's race and voter behavior).
[195] *See supra* Part I.C.
[196] Velazquez won by six percentage points. Mitchell, *supra* note 161. Clarke won by five percentage points. Cooper, *supra* note 171.
[197] *Gingles*, 478 U.S. at 68.
[198] George C. Edwards III, *Building Coalitions*, 30 PRESIDENTIAL STUD. Q. 47, 47 (2000) ("Building coalitions is at the core of governing in America. The necessity of forming coalitions is inevitable in a large, diverse nation in which political power is fragmented both vertically and horizontally.")
[199] Gene M. Grossman & Elhanan Helpman, *Competing for Endorsements*, 89 AM. ECON. REV. 501, 501 (1999). "If groups of voters use endorsements as cues—as the evidence suggests—then candidates and parties may well have incentives to compete for these endorsements." *Id.*
[200] *Id.* at 517.
[201] 512 U.S. 997 (1994).
[202] *Id.* at 1020.

minority voters are not "immune from the obligation to pull, haul, and trade to find common political ground . . . ."[203] Here, Velazquez and Clarke did that pulling and hauling. Both could attribute their success in large part to garnering the backing of strong unions who helped assemble voters.[204] These two races strongly suggest that in a crowded field of minority candidates, one who wishes to be elected must not only campaign amongst voters of every race and ethnicity contained in the district, but should also obtain strong institutional support.[205] This need is likely even more acute when there is a white challenger who is an incumbent[206] and will receive crossover votes from different minority groups in addition to the backing of many white voters.

Nelson believes that competition in majority-minority districts is counterproductive for minorities and to reduce that competition, a frontrunner should be chosen to face off against a white candidate in the primary.[207] This proposal would be unwise.

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[203] *Id.*

[204] In the case of Nydia Velazquez, Representative Jose E. Serrano of the Bronx observed that Velazquez's success "was as much a statement about her strength as a candidate as about coalition building with Mayor Dinkins and his allies, including Borough President Ruth W. Messinger of Manhattan and Dennis Rivera, the head of Local 1199, the politically powerful health-care workers union, whose members were everywhere on Primary Day, boosting Ms. Velazquez at the polls." Tabor, *supra* note 164. Efforts by Change to Win's union members greatly aided Yvette Clarke's victory by providing information to its rank-and-file. *Change to Win Unions Put Yvette Clarke Over the Top*, U.S. NEWSWIRE, Sept. 13, 2006 ("Grassroots efforts of its CtW local affiliates ensured that every one of those [thousands of] members was provided with information in support of Clarke's candidacy by mail, phone or by in-person contacts.").

[205] *See* U.S. NEWSWIRE, *supra* note 205; *see generally* Grossman & Helpman, *supra* note 200 (discussing the importance of endorsements and how there can be fierce competition for certain endorsements).

[206] Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75, 77 (2006) (describing the reelection rates of incumbents as "extraordinarily high").

[207] *See* Nelson, *supra* note 48, at 1308.

It would force voters to decide before the real race even begins whom they support, leaving them without other minority candidate options when the real race commences. It is quite clear that the premise of this idea is that people's preferences will not change as the election unfolds; this would effectively lock voters into their choices. The VRA is intended to give minorities electoral opportunities, but if this proposal were implemented, opportunities to change their minds up until the voting booth would be foreclosed. The proposal presumes that voters' choices could—or should be—as simple as minority versus white candidate. This fails to account for the varied positions candidates take, the nuanced opinions of voters, and the multiple ethnic groups that may reside in a majority-minority district. When there are multiple candidates running for the same position, each of those candidates need to "pull, haul, and trade to find common political ground" in order to garner votes and stand out from the others.[208] These candidates must build multiracial coalitions. Contrast a situation in which two candidates of different races run against each other and may harp on racial issues as the easiest way to distinguish themselves.

In sum, a plan whereby there is a minority frontrunner does two things. First, it puts descriptive representation on a pedestal. Second, it ignores the Supreme Court's endorsement in *Ashcroft* and *Bartlett* of voting coalitions and the American voting public's movement away from racially polarized voting.[209]

Furthermore, if the chosen minority frontrunner is from the minority group that is the highest percentage of citizens in a given district, that choice may adversely affect the political participation of other ethnic or racial groups in that district. This notion is supported by studies that show a racial group that inhabits a majority-minority district may be less politically active when it is not the same race as the majority racial group.[210] Other studies suggest a broader impact on political participation in majority-minority districts: "low levels of competition in majority minority

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[208] Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).
[209] *See supra* Part I.B.
[210] *See* Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004).

districts, coupled with disappointment associated with the lack of perceived policy effects from increased descriptive representation, serve as dual disincentives to participation."[211] If there are extant concerns about political participation in majority-minority districts generally, and the participation of non-majority minorities specifically, such worries would only be exacerbated by reducing elections to two candidates.

As revealed in this author's critiques of Nelson's stance on the issue of competition in majority-minority districts, this Comment suggests that competition fulfills the promise of the VRA because minorities have the opportunity to elect the candidate of their choice among many candidates who would provide descriptive and substantive representation. As the races in New York's 11th and 12th Congressional districts show, crowded fields compel the creation of voting coalitions across racial and ethnic lines and campaigning to garner institutional support. This author's argument about the benefits of competitive majority-minority districts in turn compels the question of whether a plaintiff could state a Section 2 claim, employing *Gingles*, if fractured voting among a given district's minorities resulted in the election of a white representative. Using the aforementioned New York races as examples, it is apparent that it would be very difficult to apply the *Gingles* tripartite test to such a situation. As such, the query about the viability of a Section 2 claim lacks an answer.

The 11th Congressional District would meet Prong 1 of *Gingles* and satisfy the *Bartlett v. Strickland* requirement that a vote dilution claim can only stand if the minority on its own is more than half of the voting age population, because the district's

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[211] Gary M. Segura & Nathan D. Woods, *Majority-Minority Districts, Co-ethnic Candidates, and Mobilization Effects* 1, Paper presented at the University of California, Berkeley, Warren Institute on Civil Rights Conference (Feb. 9, 2006) (unpublished paper) (on file with the University of California, Berkeley Warren Institute on Civil Rights Conference) (citing Lani Guinier, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)).

voting population was 58% black.[212] However, the 12th Congressional District would not meet Prong 1 because the percentage of registered Hispanic voters did not meet the *Bartlett* 50% or greater threshold.[213] This situation raises the issue of minority group aggregation. A court would face the issue of whether a district whose population is over two-thirds minority can state a claim, even if none of the minority groups on its own surpassed 50% of registered voters.

A challenging inquiry in majority-minority districts, where there are multiple minority candidates running for election, is how to determine if there is political cohesion. The Supreme Court set forth a vague standard in *Gingles* when the Court stated that the test could be satisfied by "[a] showing that a significant number of minority group members usually vote for the same candidates,"[214] which is proved through evidence of statistical or anecdotal voting patterns.[215] The New York races in the 11th and 12th Congressional Districts demonstrate the difficulty of definitively establishing cohesion. On the one hand, an argument for cohesion is that in both situations, the primary winners won more than 30% of the vote, and their support came in large part from people who were the same race. The evidence against cohesion is the fact that neither Velasquez nor Clarke won a majority of the votes cast. In addition, each of their opponents also won a considerable number of votes from the districts' minority voters.

A court facing a situation such as the 11th or 12th Congressional District would need to address the following question: can there be political cohesion when the electorate is fractured to the point that each candidate receives the support from a considerable segment of the electorate? In multi-candidate elections, how does a court define "a significant number of minority group members"?[216] Can this "significant number" include members of

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[212] Bartlett v. Strickland, 129 S. Ct. 1231, 1249 (2009).
[213] Lynda Richardson, *Hispanic District's Makeup is Challenged*, N.Y. TIMES, July 2, 1996, at B3.
[214] Thornburg v. Gingles, 478 U.S. 30, 56 (1986).
[215] Growe v. Emison, 507 U.S. 25, 41(1993).
[216] *Gingles*, 478 U.S. at 56.

any minority group (based on the Fifth Circuit's reasoning in *Campos v. City of Baytown* about minorities' shared history of oppression[217]) or must a court only examine the votes cast by the group from which the person bringing the claim is a member? The *Gingles* political cohesion test raises more questions than it answers in the context of majority-minority districts in which voters divide their support among multiple minority candidates.

*Gingles* Prong 3—denial of the equal opportunity to elect minorities' preferred candidates due to white bloc voting—would be thorny in a district where some would say any minority candidate would be minority-preferred by virtue of their receipt of a plurality of votes and their race or ethnicity. This Prong 3 inquiry is further complicated by *Bartlett*, in which the Court stated that Prong 3 could not be satisfied where white voters join minority voters in ample numbers to help elect the minority-preferred candidate.[218] Hence, it appears the Prong 3 analysis in a competitive majority-minority district would involve two parts: first, determining the minority-preferred candidate when almost all of the candidates are minorities; and second, ascertaining whether the white voters' support of that candidate facilitated electoral success.

Applying these principles to a variation of the 2006 11th Congressional District Democratic primary illustrates that the existing framework is unworkable. If, hypothetically, Yvette Clarke won 20% minority and 11.2% white votes (she won 31.2% total in the election), and David Yassky won 22% minority and 4.2% white votes (he won 26.2% total), and the rest of the minority votes were spread out among other candidates, who would be the minority-preferred candidate? One could argue that, even though Yassky is white, he is minority-preferred because he won more minority votes and Clarke received too many white crossover votes to pass muster under the *Bartlett* rule. Conversely, one could say

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[217] 840 F.2d 1240, 1244 (5th Cir. 1988).
[218] Bartlett v. Strickland, 129 S. Ct. 1231, 1244 (2009).

that Clarke is minority-preferred because she is likely of the same race or background as most of the minorities who elected her.[219] Furthermore, this situation raises the question of whether the determination of the minority-preferred candidate should include factors other than the percentage of minority votes received, especially in districts in which votes are spread out among multiple candidates. For instance, would it be material if Clarke received the support of a local union whose membership was almost entirely black, but she still only obtained 20% of the minority vote? The uncertainty surrounding the meaning of "minority-preferred" is compounded by the difficulties associated with the other piece of *Gingles* Prong 3—"legally significant white bloc voting"[220] that defeats said preferred candidate.[221]

In terms of bloc voting, Justice White perceived Justice Brennan's test as suggesting that there is polarized voting whenever "the majority of white voters votes for different candidates than the majority of the blacks . . . ."[222] Under that notion, this hypothetical of Clarke with 20% and Yassky with 22% minority votes would not amount to racial bloc voting, but the inverse of the traditional formulation.[223] In other words, *Gingles* assumes white voters would be the ones who form a racial voting bloc[224] and fails to contemplate what would happen if there is a minority bloc voting (as would be the case in this hypothetical).

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[219] Clarke is of Jamaican heritage. Clarke, *supra* note 184. She was able to shore up the support of Caribbean and black voters. *See also* Jen Chung, *Clarke Wins Brooklyn Congressional Primary*, GOTHAMIST, Sept. 13, 2006 http://gothamist.com/2006/09/13/clarke_wins_bro.php ("A political consultant told the Post that Clarke's late momentum in the race helped her win: 'She was able to unite the Caribbean voters with the African-American voters and her momentum in the last moments put her over the top.'"). Because of the support she received from the Caribbean community, in addition to a health care union which has many members from the Caribbean, Clarke had a strong support base. *AP Election Guide*, NATIONAL PUBLIC RADIO, a*vailable at* http://hosted.ap.org/dynamic/external/pre-election/bios/32471.html? (last visited Mar. 5, 2011).

[220] Gingles, 478 U.S. at 56.

[221] *Id*. at 50-51, 56.

[222] *Id.* at 83 (White, J., concurring).

[223] *See id.*

[224] *Id.* at 50-51, 56.

This scenario helps shed light on the complexity of trying to harmonize *Gingles* with elections in majority-minority districts with multiple minority candidates and at least one white challenger.

Because a court's application of *Gingles* in this context would be chaotic and unpredictable at best, a court should refrain from even trying to mold *Gingles* to fit the present electoral landscapes in competitive majority-minority districts. Instead, absent a decision of the Supreme Court or legislative enactments, a court should only look to the factors contained in the 1982 amendments to the VRA and ascertain the totality of the circumstances. Application of these seven factors in the face of a Section 2 challenge in a crowded field of minority candidates would help determine whether, if a white challenger won, the result was due to insufficient campaigning by the minority candidates or whether some form of discrimination is to blame. To answer this question, a court could look at all factors, but especially factors two (extent of racially polarized voting) and six (the use of overt or subtle racial appeals in political campaigns).[225] A court should also look to a state's electoral system and determine whether procedures such as run-offs[226] or open primaries would help or impede minorities' chances of winning.

## CONCLUSION

As electoral districts in the United States experience increasing diversity of voters therein, courts will face judicial challenges that diverge from the traditional vote dilution claims. Section 2 claims have usually focused on two different racial or ethnic groups contained in a district, but the reasoning of those

[225] *See supra* note 51 and accompanying text for the other five Zimmer factors and the fact that there is no set number of factors that a plaintiff must meet to make out a claim.

[226] Nelson proposes instant run-off voting as a solution to vote fragmentation in majority-minority communities. Nelson, *supra* note 48, at 1307.

opinions—including the application of *Gingles*—seems inapposite in today's political environment. As New York's 11th and 12th Congressional District races show, there will be times when multiple minorities are running to represent a majority-minority district. This is a reality that the judiciary or legislature has failed to consider. These two branches of government have yet to address this issue, which has significant implications for minority voting rights.