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THE MINORITY-PREFERRED CANDIDATE IN
THORNBURG v. GINGLES: AN ARGUMENT FOR
COLOR-BLIND VOTING

LARRY J.H. LIU*

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

- James Madison

By making black the color of preference, these mandates have reburdened society with the very marriage of color and preference (in reverse) that we set out to eradicate. The old sin is reaffirmed in a new guise.

- Shelby Steele2

INTRODUCTION

As amended in 1982, section 2 of the Voting Rights Act3 prohibits electoral practices that effectively deny minority group members the equal opportunity “to participate in the political process and to elect representatives of their choice.”4 In Thorn-

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* B.A., 1991, University of California, Berkeley; J.D., 1994, Notre Dame Law School; Thos. J. White Scholar 1992-1994. I wish to thank Professor John Robinson for his constructive comments, Bob Badger and Kathleen Collins for their late-night editing, and my mother, Joanna Kuo, for her unwavering support.

1. THE FEDERALIST No. 10 (James Madison).
   (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
   (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
burg v. Gingles,\textsuperscript{5} the Supreme Court attempted to establish the standard for finding a voting rights violation under section 2. The Court adopted a three-part test to determine whether a violation of section 2 exists because of vote dilution. First, the plaintiff must show that the minority group is sufficiently large and compact to make up a majority in a single-member district. Second, the plaintiff must show that the minority group is politically cohesive. And third, the plaintiff must show that the majority group votes as a bloc to defeat the minority's candidate. To apply its test, the Court needed to define the "representative\[ ] of . . . choice",\textsuperscript{6} or what the Court called "the minority's preferred candidate."\textsuperscript{7} The Court failed, however, to agree upon a single, coherent definition of this minority-preferred candidate. As a result, since 1986 when the Court announced its decision in Gingles, the circuit courts have reached independent and contradictory conclusions in identifying the minority-preferred candidate.\textsuperscript{8}

The Gingles analysis continues to play an important role in civil rights litigation and promises to remain at the center of the voting rights debate. As it was amended in 1982, section 2 represented a response to vote-dilution claims in multimember districts, and at the time, most voting rights litigation, including Gingles, involved multimember, vote-dilution claims. Recent developments in voting rights litigation, however, show a shift in focus from vote-dilution claims in multimember districts to vote-fragmentation claims in single-member districts. The Gingles Court explicitly declined to decide whether its analysis applied to 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.

\textit{Id.} Section 1973b(f)(2) provides:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority.


7. 478 U.S. at 51.
8. See infra part II.D.
single-member districts. Recently, in Growe v. Emison, the Court finally concluded that Gingles does apply to vote-fragmentation claims in single-member district.

The question of who may be considered a minority-preferred candidate, or more specifically, the question of whether a candidate who is not a member of a particular minority group may (validly) be considered the minority-preferred candidate for that group, remains significant, especially since it has divided the circuit courts. This question itself is important because the answer dictates which elections may be examined under part three of the Gingles test. Finally, the question and its answer also involve the public's participation in and understanding of representative democracy in America.

This Note attempts to present an understanding of the minority-preferred candidate that is consistent with legislative history, flexible and therefore functional in actual application, and compatible with democratic political theory. Section I provides a brief history of the Voting Rights Act as amended in 1982. Section II examines the different opinions in Gingles written by Justices Brennan, White, and O'Connor and the splintered directions taken by various circuit courts since Gingles over the minority-preferred candidate. This section also explains the significant role played by the concept of a minority-preferred candidate in finding voting rights violations. Section III argues that the appropriate method of determining the minority-preferred candidate combines the position adopted by the Tenth Circuit with factors listed in the Senate Report accompanying the 1982 amendment to section 2 and that this method is consistent with legislative intent while responding to the concerns expressed by the Fifth Circuit. Section IV concludes that this amalgam of the Tenth Circuit and legislative factors is consistent with both an original understanding of and the underlying principles behind representative democracy in America.

I. History of Section 2

In 1982, Congress amended section 2 of the Voting Rights Act to address the problem of minority vote dilution. The amendment resulted from congressional reaction to the Supreme Court's decision in City of Mobile v. Bolden. In Bolden, the Supreme Court had greatly increased the burden on plaintiffs who challenged electoral practices under the Fourteenth or Fifteenth Amendments by requiring them to prove that discriminatory intent had motivated the adoption of the challenged practices. Prior to Bolden, the standard for evaluating voting rights violations had been the "totality of the circumstances" analysis formulated by the Court in White v. Regester. With the 1982 amendment, Congress intended to replace the intent-based test articulated in Bolden with the "totality of the circumstances" analysis previously set forth in White.

12. Chandler Davidson provides this definition of minority vote dilution:

Ethnic or racial minority vote dilution may be defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group. Thus conceived, it is a form of discrimination distinct from disfranchisement and candidate diminution. In its most easily recognizable forms - gerrymandering and multimember election systems - it was an important tool used by whites in the South both during and after Reconstruction to diminish the political strength of newly enfranchised blacks.


15. According to the Senate Report:

In Bolden, a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose. The committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.

In our view, proof of discriminatory purpose should not be a prerequisite to establishing a violation of section 2 of the Voting Rights Act. Therefore, the committee has amended section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process, i.e., by meeting the pre-Bolden results test.

S. Rep. No. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S.C.C.A.N. 177, 193. In discussing voter dilution cases before Bolden, the Senate Report states: The White decision did not analyze the motivation of the legislators. There was no discussion of the purpose behind the challenged system,
A. Early Standard: White and Zimmer

In *White*, the Supreme Court held a multimember voting district unconstitutional because it was "used invidiously to cancel out or minimize the voting strength of racial groups."\(^{16}\) The Court agreed with the district court's judgment ordering the disestablishment of multimember districts in Dallas and Bexar Counties, Texas. To succeed in a claim that a specific electoral practice violated the Equal Protection Clause of the Fourteenth Amendment, the Court stated that

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.'\(^{17}\)

Unfortunately, the Court failed to explain what evidence would support such findings.\(^{18}\) The Court did note the history of racial discrimination in Texas, the low number of minority representatives who had served on the Texas Legislature from the two counties in question, and the use of racial campaign tactics in recent elections, as well as other facts, but the Court failed to provide any meaningful guidance in evaluating these facts.\(^{19}\) The *White* opinion merely affirmed the district court's "ultimate assessment" which was based upon the "totality of the circumstances."\(^{20}\)

The seminal opinion by the Fifth Circuit in *Zimmer v. McKethen*\(^{21}\) attempted to find some order in the *White* decision. In considering claims of vote dilution from the at-large electoral practices of a Louisiana school board and police jury, the *Zimmer* court stated that

> where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large

\(^{16}\) 412 U.S. at 765.

\(^{17}\) *Id.* at 766.

\(^{18}\) The decision in *White* has been criticized for the lack of guidance it provided. *See generally* Davidson, *supra* note 12, at 32-34.

\(^{19}\) 412 U.S. at 766-69.

\(^{20}\) *Id.* at 769.

districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.\textsuperscript{22} The \textit{Zimmer} court continued that vote dilution could be established "upon proof of the existence of an aggregate of these factors," although "all these factors need not be proved in order to obtain relief."\textsuperscript{23} The standard which eventually evolved from \textit{White} with the refinements of \textit{Zimmer} was known as the \textit{Zimmer} test or the "totality of the circumstances doctrine."\textsuperscript{24} It provided the standard in voting rights jurisprudence until the Supreme Court decision in \textit{Bolden}.

\section*{B. City of Mobile v. Bolden}

The Supreme Court, in \textit{City of Mobile v. Bolden},\textsuperscript{25} rejected the evidentiary standard stated in \textit{Zimmer}.\textsuperscript{26} In a plurality opinion written by Justice Stewart,\textsuperscript{27} four of the Justices agreed that they

22. 485 F.2d at 1305.
23. \textit{Id.}

In criticizing the "totality of the circumstances" test, Samuel Issacharoff asserts that

neither \textit{White} nor \textit{Zimmer} could identify the operational mechanism for the unconstitutional dilution of minority voting strength \ldots \ldots . The \textit{White/Zimmer} "totality of the circumstances" test was static; its aim was to uncover the dynamic working of electoral systems, but it had no way to measure the operational features of challenged electoral practices.


26. According to Justice Stewart, \textit{Zimmer} "was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause - that proof of a discriminatory effect is sufficient." 446 U.S. at 71.

27. A divided Court in \textit{Bolden} produced six separate opinions. Justice Stewart wrote the plurality opinion. Justice Stewart was joined by Chief Justice Burger and Justices Powell and Rehnquist.

Justice Blackmun filed an opinion concurring in the result, and Justice Stevens filed an opinion concurring in the judgment.

Justices Brennan, White, and Marshall each filed separate dissenting opinions.
would require plaintiffs to show that a discriminatory purpose motivated the adoption of the challenged electoral practice in order to find vote dilution unconstitutional. According to Stewart, "[w]e have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." 28 He then added that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." 29

The plaintiffs in *Bolden* claimed that the at-large system in place in Mobile, Alabama, violated the Fourteenth and Fifteenth Amendments and section 2 of the Voting Rights Act. 30 The plaintiffs represented black voters in Mobile, and they argued that the city had violated their voting rights by using an at-large system of municipal elections which diluted the voting strength of black voters. 31 In his opinion, Justice Stewart began by dismissing the section 2 claim. According to Stewart: "it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." 32 As he understood earlier decisions by the Court, the Fifteenth Amendment protected only the "freedom to vote" or access to the polls. 33 Therefore, because black voters in Mobile could "register and vote without hindrance," Stewart declined to find a violation of the Fifteenth Amendment and, consequently, section 2 of the Voting Rights Act. 34

Justice Stewart then went on to consider the Fourteenth Amendment claim. The fundamental question was whether discriminatory intent must be shown in order to find a violation of the Fourteenth Amendment. Stewart argued that the Fourteenth Amendment required such a showing:

We have recognized, however, that such legislative apportionments [as multimember districts] could violate that Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or

28. 446 U.S. at 66.
29. *Id.*
30. *Id.* at 58.
31. *Id.* The plaintiffs had won in district court and in appellate court.
32. 446 U.S. at 60-61.
33. *Id.* at 64.
34. *Id.* at 65.
ethnic minorities. To prove such a purpose it is not
eough to show that the group allegedly discriminated
against has not elected representatives in proportion to it
numbers. A plaintiff must prove that the disputed plan was
"conceived or operated as [a] purposeful devic[e] to further
racial . . . . discrimination[.]"35

Since the plaintiffs in Bolden did not show that the at-large system
had been adopted with a discriminatory intent, Stewart saw no
vote dilution in violation of the Fourteenth Amendment.36

Although it was only a plurality opinion, the decision in Bolden had a detrimental effect on voting rights litigation.37

Bolden also received a great deal of criticism from both legal and
civil rights communities. In turn, civil rights advocates lobbied
Congress to amend section 2 of the Voting Rights Act to repair
the harm inflicted on the voting rights movement by Bolden.38

C. Congressional Response to Bolden: The 1982 Amendment

Prior to the 1982 amendment, claims that vote dilution vi-
olated voting rights relied on the Fourteenth and Fifteenth
Amendments.39 Bolden suggested that discriminatory intent
would be necessary to find a violation of the Fourteenth Amend-
ment. In response to Bolden, Congress provided a statutory basis
that did not require a showing of discriminatory intent in order
to claim vote dilution.40 The 1982 amendments created, in
effect, a "statutory bypass" around the Bolden decision.41

The Senate Report42 accompanying the 1982 amendment

35. Id. at 66 (citations omitted).
36. Id. at 70.
37. See Grofman et al., supra note 24, at 37.
38. See Davidson, supra note 12, at 38-40; Grofman et al., supra note 24, at 38.
40. In addition, Samuel Issacharoff believes that the 1982 amendment's
recognition of racially polarized voting patterns (as the second factor listed by
the Senate Report for consideration in vote dilution claims) had two major
accomplishments:
First, it began to give an operational meaning to vote dilution claims
. . . . Second, the new statutory standard provided federal courts with
a mechanism to inquire openly into the outcomes of actual voting
practices while circumventing . . . the "brooding omnipresence" of
proportional representation.
Issacharoff, supra note 24, at 1849. Cf. discussion supra note 24 (Issacharoff's
criticism of the shortcomings existing in the White/Zimmer analysis).
41. Grofman et al., supra note 24, at 38.
explained that section 2 "protects the right of minority voters to be free from election practices, procedures or methods that deny them the same opportunity to participate in the political process as other citizens enjoy." In view of this purpose, the Report concluded that the "intent test . . . places an unacceptably difficult burden on plaintiffs." The Report added that "the Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process, i.e., by meeting the pre-Bolden results test." It listed a number of typical factors which might be considered by courts assessing violations under the amendment's result-based test. This list replicates the factors considered in Zimmer.

43. Id. at 206.
44. Id. at 194.
45. Id. at 193.
46. Senate Report, supra note 42, at 206-07, noted seven typical factors and two additional factors which may show a violation of section 2:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiff's evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

47. See supra text accompanying note 24.
D. Thornburg v. Gingles

With its decision in *Thornburg*, the Supreme Court attempted to define the standard for establishing a voting rights violation under the amended section 2 of the Voting Rights Act. Rather than restate the statutory standard described in the Senate Report, the Court set forth a three-part test which focused on a racially-polarized voting inquiry.\footnote{48} First, the plaintiff must show that the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district."\footnote{49} Second, the plaintiff must show that the minority group is "politically cohesive."\footnote{50} Third, the plaintiff must show that the majority group votes as a bloc allowing the majority group "usually to defeat the minority's preferred candidate."\footnote{51}

Influenced by the Senate Report which emphasized a "functional" approach to redress inequality, Justice Brennan, who wrote the majority opinion,\footnote{52} believed that the degree to which minority groups members have been elected and the extent of racially polarized voting were "the most important Senate Report factors bearing on § 2 challenges to multimember districts."\footnote{53} This racially-polarized voting inquiry became the primary measure of vote dilution,\footnote{54} fundamental to meeting the second and third parts of the test. According to Justice Brennan, "[t]he pur-
pose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates."

As the district court in McNeil v. City of Springfield explained:

Without establishing the first condition, the minority group cannot show that it has even the potential to elect the candidate of its choice in the absence of the alleged discriminatory practice. The final two requirements comprise the foundation for a finding that racial vote polarization exists. Establishment of these two conditions demonstrated that the black minority usually votes for one candidate, and the white majority votes for and elects a different candidate. If this racial vote polarization exists, then the minority voters have shown that "submergence in a white multi-member district impedes its ability to elect its chosen representatives." In Gingles, Justice Brennan attempted to construct, in pragmatic fashion, a methodical test from the Senate Report factors.

II. Split Over the Minority-Preferred Candidate

The third part of the Gingles test requires a section 2 plaintiff to show that the majority group votes as a bloc allowing the majority group "usually to defeat the minority's preferred candi-

55. 478 U.S. at 56. Bernard Grofman observes that in Gingles "[t]he Court also accepted the distinction between the existence of racial polarization per se and the nature of that polarization being of practical or legal significance." As a result, Grofman states:

In [Gingles] the inquiry into polarization was thus effectively bifurcated. The first part was the judgment of whether polarization existed. The second part was whether it was legally significant. Moreover, this second inquiry was itself bifurcated. It required two "discrete inquiries," the first into minority voting practices, the second into white voting practices.

Bernard Grofman, Expert Witness Testimony and the Evolution of Voting Rights Case Law, in Controversies in Minority Voting 197, 211 (Bernard Grofman & Chandler Davidson eds., 1992). The inquiry into minority voting practices corresponds to determining whether the minority group is politically cohesive. The inquiry into white voting practices corresponds to determining whether the majority group votes as a bloc as to usually defeat the minority's preferred candidate.


57. 658 F. Supp. at 1019 (quoting Gingles, 478 U.S. at 51) (citations omitted) (emphasis in original).
The absence of a single definition for the minority-preferred candidate presents a simple problem: which elections may be examined to show a violation of section 2? Because part three of the Gingles test requires the plaintiff to show that the majority group votes as a bloc to defeat the minority-preferred candidate, the appropriate elections to examine are elections where a minority-preferred candidate exists.\(^5\) But where does a minority-preferred candidate exist; that is, who is qualified to be a minority-preferred candidate?

As explained, the minority-preferred candidate must be identified in order to satisfy this part of the test. The Gingles Court failed to agree upon a definition of the minority-preferred candidate, and the circuit courts have drawn independent and contradictory conclusions.\(^6\) In particular, many courts differ over whether the race of the candidate is relevant to finding a minority-preferred candidate.

\(^5\) 478 U.S. at 51.

\(^6\) Buchanan v. City of Jackson, 683 F. Supp. 1515 (W.D. Tenn. 1988), provides an example of how different conclusions may be reached because different elections were used in collecting statistical evidence.

Dr. James Loewen, the expert witness for the plaintiffs, analyzed five elections between 1967 and 1983 that involved black and white candidates for City Commissioner of Jackson. Based upon these five elections, Dr. Loewen concluded that black voters had been unable to elect their preferred candidate.\(^7\) Id. at 1528-29.

However, Dr. Charles Bullock, the expert witness for the defendants, analyzed fourteen elections between 1967 and 1983. Besides elections that involved black and white candidates, the defendants also included elections that involved only white candidates. Dr. Bullock concluded that black voters had been able to elect their preferred candidate in seven of the fourteen elections.\(^8\) Id. at 1529.

The court noted:

The reason for the different conclusions reached by the experts is that Dr. Loewen considered only elections in which a black candidate opposed a white candidate while Dr. Bullock considered all contested elections, including elections in which there was no black candidate. Consequently, plaintiffs contend that the court should consider only elections in which black candidates opposed white candidates as being probative on the issue of the ability of blacks to elect candidates of their choice, while defendants contend that the court must consider all elections.

\(^7\) Id. at 1529. The court held that, while it may consider all elections, it does not need to give equal weight to those elections in reaching its decision.\(^9\) Id. at 1529. After considering the circumstances surrounding the elections, the court concluded that blacks had less opportunity than white voters to elect representatives of their choice.\(^10\) Id. at 1531.

\(^8\) See infra part II.D.
A. Justice Brennan: Candidate’s Race as Irrelevant

Justice Brennan argued that the race of the minority-preferred candidate was irrelevant to the Gingles analysis. Brennan firmly held the belief that a mere correlation between the voting minority group and a candidate defeated by a majority bloc satisfied part three of the Gingles test. For Brennan, this application of section 2 was consistent with its statutory language and prevented the re-emergence of the intent-based test rejected by the Senate Report in response to Bolden.

In Part III-C of Gingles, a plurality opinion, Justice Brennan wrote that "both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate per se is irrelevant to the racial bloc voting analysis." Brennan noted that "[b]ecause both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks while a white candidate is the choice of whites," but he added:

Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, 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. Brennan relied on a plain reading of section 2 which uses the phrase "representatives of their choice" without further elaboration.

In addition, Brennan argued that "only the race of the voter, and not the race of the candidate, is relevant to racial bloc voting."

Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representative of their choice.

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61. 478 U.S. at 67. Part III-C obtained only a plurality. Justice Brennan was joined by Justices Blackmun, Marshall, and Stevens. Justice White, who had joined the others with respect to parts I, II, III-A, III-B, IV-A, and V, filed a concurring opinion in which he voiced his disagreement with respect to Part III-C.

62. Id. at 68 (emphasis in original).


64. 478 U.S. at 68.

65. Id.
He rejected the suggestion that "racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spend more on their campaigns . . . ." Brennan responded that

[t]his argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. When Brennan referred to "the argument that the race of the voter must be the primary determinant," he was discussing the notion that "voting refers to voting patterns that are in some way caused by race, rather than to voting patterns that are merely correlated with the race of the voter." As Brennan explained in an earlier passage of Part III-C:

Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice in unclear . . . In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. Brennan may have feared that allowing courts to consider the race of the candidate (or even the race of the voters in some causal sense, beyond mere correlation) would somehow provide a loophole through which the discriminatory-intent requirement could return.

B. Justice White: Interest Group Politics

Justice White disagreed with Justice Brennan's proposition that the race of the candidate is irrelevant. White believed that vote dilution analysis which focused only on the race of the voter would result in "interest-group politics rather than a rule hedg-
ing against racial discrimination.” While Brennan focused on section 2 as a statutory response to the intent-based test of *Bolden*, White emphasized the need to connect racial discrimination to the challenged practices. According to White, “I doubt that this is what Congress had in mind in amending § 2 as it did, at it seems quite at odds with the discussion in *Whitcomb v. Chavis.*”

To illustrate his point on interest-group politics, White used a hypothetical eight-member multimember district with a 60% white and 40% black vote. He reasoned that if eight Republican candidates, including two blacks, win election, but 80% of the blacks vote Democratic, a section 2 violation would exist under Brennan’s scheme. White added that a section 2 violation would also exist if “in a single-member district that is 60% black . . . enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters.”

According to White, “[t]his is interest group politics rather than a rule hedging against racial discrimination.” Regardless of whether a minority candidate was elected by the majority, or what non-racial reasons might exist for a minority-preferred candidate’s failure to be elected, minority voters were entitled to win. As White saw it, minority voters were being granted a preferred status.

Justice White viewed section 2 as a response to racially discriminatory practices, leading him to focus on the voting behavior of majority groups. In the first hypothetical, the white majority’s election of two black candidates would disprove the presence of racial discrimination. In the second hypothetical, the majority of black voters failed to elect their candidate

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71. 478 U.S. at 83 (White, J., concurring).
72. Id. at 83 (citing to *Whitcomb v. Chavis*, 403 U.S. 124, 149-60 (1971) (contrasting the permissible purpose of constitutional remedies to protect civil rights with the impermissible purpose of addressing electoral defeat by a particular interest group)).
73. Id.
74. Id.
75. Lani Guinier discusses the problem surrounding a black candidate elected by a white majority:

Authentic leaders are those elected by black voters. In voting rights terminology, electoral ratification from majority-black, single-member districts establishes authenticity. These facts distinguish the authentic representatives from those officials who are handpicked by the “establishment,” or who must appeal to white voters in order to get elected. Establishment-endorsed blacks are unlikely to be authentic because they are not elected as the representatives of choice of the black community. In addition, these officials are often marginal members whose only real connection with black constituents is skin color.
because of black cross-over, not racial discrimination by whites. In essence, White was asking whether white voting behavior suggest racial discrimination resulting in the minority-preferred candidate's defeat. White implies that a section 2 violation could exist only where the minority-preferred candidate is a minority member.\textsuperscript{76}

White thought Brennan's scheme conferred to minorities a right to elect its minority-preferred candidate. If the minority-preferred candidate fails to be elected, regardless of the cause and however removed from the taint of racial discrimination, a section 2 violation would exist.\textsuperscript{77} As a result, section 2 promotes interest group politics rather than combats racial discrimination.

C. Justice O'Connor: Candidate's Race as Relevant

Justice O'Connor agreed with Justice White. In complete variance from Justice Brennan, Justice O'Connor believed that a section 2 defendant should be allowed to show that the majority bloc voted to defeat a minority-preferred candidate for reasons other than race.

Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for rea-

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\textsuperscript{76} This proposition is a simple extension of the hypothetical already given by Justice White. In his first hypothetical, White would argue that a section 2 violation does not exist because the white majority voted for and elected two black candidates. The white voters did not act with racial animus.

Now consider the following hypothetical. A multimember district is 60% white and 40% black. Five candidates run for office. "A" is white, "B" is white, "C" is white, "D" is black, and "E" is black. Black voters overwhelmingly support C, but white voters overwhelmingly support A and B, who are therefore elected. In this case, Justice White would not find a violation of section 2 since the white voters did not racially discriminate against the minority-preferred candidate, i.e., white voters did not decline to vote for C because he is black ... since C is not black. (Note - Since neither D nor E received a majority of the black vote, they are not the minority-preferred candidate although both are black.) Therefore, White's concurring opinion implies that only when the minority-preferred candidate is a minority member can a violation of section 2 exist. Only where black voters voted for a black candidate, D or E, but white candidates were elected could black voters claim racial discrimination.

\textsuperscript{77} As Sushma Soni notes, "Thus Justice White appears to be concerned with the prospect that plaintiffs can and will allege section 2 violations whenever their preferred candidate loses for reasons unconnected with race — in other words, for reasons such as party affiliation, electoral experience, or even socioeconomic status." \textit{See} Soni \textit{supra} note 70, at 1663. Soni observes that "Justice White seems to fear that Justice Brennan's formulation confers a 'right to win' upon the minority candidate and her constituency, rather than the right to a 'level political playing ground.'" \textit{Id}. 
sons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether block voting by white voters will consistently defeat minority candidates.\(^7\)

Consider an example where the minority group voted for a candidate because the candidate is a member of that minority group. The candidate's race made him "the preferred choice of the minority group." However, assume that the majority group voted as a bloc to defeat this candidate. The majority group may defend its voting behavior by providing evidence that it voted against the candidate because of a factor other than the candidate's race (e.g., the candidate's position on taxes).\(^7\) In this way, the race of the candidate may be relevant to prove a violation of section 2 under O'Connor's scheme. O'Connor concluded by saying, "I agree with Justice W[hite] that Justice B[rennan's] conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with Whitcomb . . . ."\(^8\)

In their concurring opinions, Justices White and O'Connor criticized Justice Brennan's position regarding minority preferred candidate. Furthermore, they believed that Brennan's discussion of the minority-preferred candidate's race was not necessary to the disposition of Gingles. According to White, "on the facts of this case, there is no need to draw the voter/candidate distinction."\(^8\) O'Connor agreed, "Justice B[rennan's] conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with Whitcomb and is not necessary to the disposition of this case."\(^8\) In Gingles, all the elections examined involved minority-preferred candidates who were minority members. Therefore, White and O'Connor believed that the issue of the minority-preferred candidate's race

\(^7\) 478 U.S. at 100 (O'Connor, J., concurring).

\(^7\) Justice Brennan may have feared that this argument too closely approached a requirement that plaintiffs show discriminatory intent. Indeed, plaintiffs would be required to show that the majority voted against the candidate because of the candidate's race, and not other political factors. See note 70 and accompanying text.

As amended, section 2 no longer requires plaintiffs show discriminatory intent. However, Justice O'Connor suggested that defendants can avoid violating section 2 by showing that reasons beside race resulted in the defeat of the minority-preferred candidate. Her argument seems to retain an intent-based test, but shifts the burden of proof: from plaintiffs having to prove discriminatory intent to defendants having to disprove such intent.

\(^8\) 478 U.S. at 101 (citations omitted).

\(^8\) Id. at 83 (White, J., concurring).

\(^8\) Id. at 101 (O'Connor, J., concurring).
need not be addressed. But, the disarray in the circuit courts demonstrates that the issue did need to be addressed as a precursor to consistent application of Gingles.

D. Circuit Courts Divided

While the Tenth Circuit has adopted Justice Brennan’s position and considered elections where no minority candidate ran for office, the Fifth Circuit has taken the contrary position and stated that “implicit in the Gingles holding is the notion that black preference is determined from elections which offer the choice of a black candidate.” Between these extremes, the Fourth and Eleventh Circuits have not clearly decided whether the candidate’s race is relevant. The Supreme Court’s failure to decide this question in Gingles has yielded a split in the circuit courts.

1. Race Not Determinative

The Tenth Circuit has considered whether a candidate who is not a member of a particular minority group may be considered the minority-preferred candidate for that group. In Sanchez v. Bond, the appellate court affirmed the district court’s finding that the at-large electoral process used by Saguache County, Colorado, to elect county commissioners did not violate section 2. According to the district court, Hispanic voters in Saguache County failed to show that the at-large electoral practice prevented them from electing a candidate of their choice. To make this finding, the district court considered “the election of three Anglo Democrats to the county commission as evidence of the Hispanics’ ability to elect candidates of their preference.” Before making this finding, Hispanic voters questioned whether “it [was] inappropriate to consider candidates who are not themselves minorities in determining whether racial bloc voting exists and in determining whether the minority group has been able to elect candidates of their preference.” The appellate court deemed this question to be important because it believed that

84. Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 503 (5th Cir. 1987).
85. See Collins v. Norfolk, 883 F.2d 1232 (4th Cir. 1989); City of Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987).
86. See generally Grofman et al., supra note 24, at 76-80.
87. 875 F.2d 1488 (10th Cir. 1989).
88. Id. at 1494.
89. Id.
"the success of certain Anglo candidates played a significant part in the [district] court’s finding that vote dilution had not occurred."90

The appellate court in Sanchez denied that a minority-preferred candidate must be a member of that minority group. It noted that "[t]he Gingles opinion offers little guidance on what significance the race of the candidates is to be given in assessing a § 2 claim."91 The court observed that "[n]othing in [section 2] indicates that the chosen representative of a minority group must be a minority."92 It reasoned that section 2 "requires that the district court make a determination from the totality of the circumstances, not from a selected set of circumstances. Accordingly, we conclude that there is no rule of law prohibiting the district court from examining those elections having only Anglo candidates."93 The appellate court recognized that the district court could find under section 2 that a candidate who was not a member of a minority group was the minority-preferred candidate of that group.

The Tenth Circuit’s position parallels that of Justice Brennan in Gingles. The statutory language does not require the minority-preferred candidate to be a minority member, and the appellate court accepted the district court’s reliance on the “totality of the circumstances” to guide its decision in what elections to examine.

2. Race Determinative

The Fifth Circuit has also considered whether a candidate who is not a member of a particular minority group may be considered the minority-preferred candidate for that group. In Citizens for a Better Gretna v. City of Gretna,94 black voters challenged the city’s at-large alderman elections. The appellate court in

90. Id.
91. Id.
92. Id. at 1495. The Sanchez court said:
   We do not believe that a per se rule against examining races that have only white candidates is implicit in Gingles. Such a rule would be clearly contrary to the plurality opinion, which views the race of the candidates as irrelevant in voting analysis. Moreover, such a rule is questionable in light of the language of § 2, which seeks to give minorities equal opportunity to “elect representatives of their choice.” Nothing in the statute indicates that the chosen representative of a minority group must be a minority.

Id. (citation omitted).
93. Id. at 1495.
94. 834 F.2d 496 (5th Cir. 1987), reh’g denied, 849 F.2d 1471 (5th Cir. 1989), cert. denied, 492 U.S. 905 (1989).
Gretna affirmed the district court’s finding that the at-large elections violated section 2. As part of its argument, the City of Gretna claimed that the district court had erred in finding racial bloc voting because the district court had considered only those elections involving black candidates.

The Gretna court stated:

Mindful of [the dangers in advancing interest group politics or enforcing proportional representation], we conclude that Gingles is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter — but only within the context of an election that offers voters the choice of supporting a viable minority candidate.95

Although the court acknowledged Justice Brennan’s emphasis of the race of the voter over the race of the candidate, it limited the definition of the minority-preferred candidate. The court restricted the definition by stating that “implicit in the Gingles holding is the notion that black preference is determined from elections which offer the choice of a black candidate.”96 In essence, the Gretna court equated “the context of an election that offers voters the choice of supporting a viable minority candidate” with the presence of candidate who is a member of that minority group.

The Fifth Circuit in Gretna held that the race of the candidate was relevant. It based its decision on reasoning somewhat different from that of either Justices White or O’Connor in Gingles to argue that the minority-preferred should be a minority member. According to the court, this requirement insures that the minority-preferred candidate is the minority voter’s true “candidate of choice.”

3. Race and Indecision

The Fourth and Eleventh circuits have failed to take decisive positions on whether the candidate’s race is relevant to finding a minority-preferred candidate. Their opinions fail to provide any direction, and suggest somewhat contradictory messages.

In a case challenging the at-large elections for city council members in Norfolk, Virginia, the Fourth Circuit in Collins v. Norfolk97 did not reject the idea that a non-minority member could be the minority-preferred candidate. The appellate court, however, did find that the district court had erred in considering a

95. 834 F.2d at 503 (emphasis added).
96. Id. at 503-04.
successful non-minority candidate to be the minority-preferred candidate. Although the successful candidate had received over 50% of the minority vote, the Collins court found that he was not the minority-preferred candidate since other minority candidates in the same election had received a greater percentage of the minority vote but were defeated. The Fourth Circuit opinion stated that "support for some successful candidates by a majority of minority voters in multimember district races does not prove that the successful candidates were the chosen representatives of the minority when a candidate who received much greater minority support was defeated." In reaching this conclusion, the court noted with acceptance the Fifth Circuit decision in Gretna. The Collins court's acceptance of Gretna and rejection of the district court's notion of a minority-preferred candidate suggest that only minority candidates can qualify as the minority-preferred candidate, but its position is not clear.

Likewise, the Eleventh Circuit has failed to make its position clear. In City of Carrollton Branch of the NAACP v. Stallings, the Eleventh Circuit reversed the district court's judgment that a single commissioner form of government for Carroll County, Georgia, did not violate the Voting Rights Act by diluting minority voting strength. The Carrollton court deemed the district court's failure to find racially polarized voting in the county-wide elections to be "clearly erroneous," and held "that there [was] substantial evidence in the record to indicate that Carroll County experience[d] racially polarized voting in county-wide elec-

98. The court considered the following situation:
   In 1974 Lenious G. Bond [black] received 73.4% of the black vote; he was defeated. Elizabeth M. Howell [white] received 58.2% of the black vote; she was elected. Claude J. Staylor, Jr., [white] received 56.5% of the black vote; he was elected. The district court held that Howell and Staylor, rather than Bond, were the minority's representatives of choice. A similar situation arose in the 1980 election. Evelyn T. Butts [black] received 92.9% of the black vote; she was defeated. Howell [white] received 72.9% of the black vote; she was elected. The district court held that Howell, rather than Butts, was the minority's representative of choice.

99. Id. at 1238.

100. "Thus it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting." Id.


tions."\(^{103}\) In reaching this holding, the *Carrollton* court considered only elections which involved black candidates. Nonetheless, the it also stated that “[u]nder Section 2, it is the status of the candidate as the chosen representative of a particular group, not the race of the candidate that is important.”\(^{104}\) Therefore, the Eleventh Circuit in *Carrollton* suggests that the race of the candidate is not essential in qualifying as the minority-preferred candidate, but only considered elections which involved minority candidates.

Since *Thornburg v. Gingles* was decided, circuit courts have remain divided over whether a candidate's race is relevant in finding a minority-preferred candidate. While the Fifth Circuit has stated that the candidate's race is relevant and the Eleventh Circuit has stated that the candidate's race is irrelevant, the other circuits remain undecided. This circuit split is a result of the *Gingles* Court's failure to resolve the question. Justices Brennan, White, and O'Connor each offered divergent arguments to support different positions. With the continuing importance of the *Gingles* analysis in multimember and single-member districts, these different positions on who may be the minority-preferred candidate promise to aggravate the circuit split and complicate voting rights litigation.

### III. Suggested Analysis

Section 2 of the Voting Rights Act explains that a violation exists if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens [on account of race or color] . . . 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.\(^{105}\)

From this language and the legislative history, the Supreme Court constructed the three-part test in *Gingles*. The Court announced the three-part test in an attempt to outline a methodical approach which would guide the circuit courts in considering claims of section 2 violations in voting rights cases. Part three of the *Gingles* test requires that the plaintiff show that

\(^{103}\) 829 F.2d at 1559.

\(^{104}\) *Id.* at 1557. The Eleventh Circuit did note that only a plurality of the *Gingles* Court agreed with this position espoused by Justice Brennan. *Id.* at 1557 n.12.

the majority group votes as a bloc allowing it to defeat the minority-preferred candidate. Unfortunately, the Court did not explain how to identify the minority-preferred candidate. The legislative history surrounding the 1982 amendments to the Voting Rights Act provides a possible solution to this unanswered question.

A. Expanding on the Tenth Circuit

Simplified, the question is whether a person who is not a member of a particular minority group may be considered the minority-preferred candidate for that group. The statutory language and the legislative history include no such restriction. The statute refers only to "representatives of choice." In holding that the minority-preferred candidate must be a member of the minority group, the Fifth Circuit understands "choice" to exist only where a member of that minority group is a candidate. The Fifth Circuit has (arbitrarily) established the presence of a minority candidate as a threshold requirement for the ability to choose. In addition, the positions taken by Justices White and O'Connor threaten to return section 2 analysis back to the intent-based test that was expressly rejected by Congress in 1982.

Rather than accept the pronouncement of the Fifth Circuit, this Note argues that the Tenth Circuit correctly stated that "[n]othing in [section 2] indicates that the chosen representative of a minority group must be a minority." The Senate Report accompanying the 1982 amendments and the amended section 2 itself, consistent with the Tenth Circuit's statement, do not indicate that a minority-preferred candidate must be a member of the minority group. According to the Senate Report and Justice Brennan, section 2 focuses on the minority voter, not the candidate.

106. 875 F.2d at 1495.
107. "Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy." Senate Report, supra note 42, at 206 (emphasis added).

The Senate Report recognizes that the section 2 plaintiff is the minority voter, not the candidate. "If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section." Id. at 206 (emphasis added).

108. In Gingles, Justice Brennan also wrote:

Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having

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Although the Tenth Circuit in *Sanchez* correctly held that a candidate who is not a member of a particular minority group may be considered the minority-preferred candidate for that group, it nonetheless failed to provide any meaningful guidance in identifying the minority-preferred candidate. The court merely offered the broad instruction that section 2 "requires that the district court make a determination from the totality of the circumstances."\(^{109}\)

The factors listed in the Senate Report provide the guidance that is missing in the Tenth Circuit's position. The factors that the Senate Report lists (as typical) are: (1) whether there exists a history of official discrimination affecting the ability of the minority to participate politically; (2) whether voting is racially polarized; (3) whether electoral practices that allow discrimination have been used; (4) whether the minority has access to the candidate slating processes (if one is present); (5) whether the minority has suffered discrimination in areas such as education, employment, and health which hinder the ability of the minority to participate politically; (6) whether political campaigns have used racial appeals; and (7) whether members of the minority group have been elected to office.\(^{110}\) As "additional factors that in some cases have had probative value," the Senate Report adds: (8) whether elected officials have been unresponsive to the needs of the minority and (9) whether the policy underlying the use of the questioned electoral practice is tenuous.\(^{111}\) Without either inventing a method for determining the minority-preferred candidate that lacks any judicial as well as statutory basis\(^{112}\) or accepting a method that sacrifices statutory language by considering the race of the candidate,\(^{113}\) the factors in the legislative history may be used to identify the minority-preferred candidate. They provide a flexible but non-ambiguous rubric for district courts.

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less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.  
478 U.S. at 63. He also wrote that "[u]nder § 2, it is the status of the candidate as the chosen representative of a particular racial group, and not the race of the candidate, that is important." *Id.* at 68 (emphasis in original).  
109. 875 F.2d at 1495.  
110. *Senate Report, supra* note 46 (reprinting the factors in full).  
111. *Id.*  
113. See Soni, *supra* note 70.
B. Application of the Senate Report Factors

The factors in the Senate Report can be applied to the situation surrounding a candidate to determine whether that candidate should be considered a minority-preferred candidate. Consider the following hypothetical example: Plaintiffs who are black voters in St. Joseph County allege that the electoral procedure used to elect county commissioners violates section 2. The county offers evidence that, in a recent election, “A” received 73% of the black vote and was elected as a county commissioner. “A” is white and a Democrat. There were no minority candidates running in that election. Is “A” the minority-preferred candidate?

1. “A” Is Not the Minority-Preferred Candidate

In an election without non-white candidates, it is inevitable that a white candidate will receive a majority of the non-white vote. The fact that in some situations “it [is] virtually unavoidable that certain white candidate [will] be supported by a large percentage of . . . black voters”114 may have prompted the Fifth Circuit to conclude that only a minority candidate can qualify as a minority-preferred candidate. Bernard Grofman has remarked:

In so holding, the Fifth Circuit acknowledged the problem with designating a white candidate as “minority preferred” - the fear that courts will fail to recognize situations in which neither candidate was truly a candidate of choice. For instance, certain circumstances (such as the fact that a black has never been elected to office) may dissuade minority candidates from running for office. When no viable minority candidates compete for office, should the fact that blacks vote anyway, and therefore some candidate will, simply by default, receive more of the black vote than any other candidate, automatically render that candidate the “minority-preferred” candidate?115

In this passage, Grofman has identified the main underlying concern: that in identifying a candidate who is not a member of a particular minority group to be the minority-preferred candidate for that group, courts will fail to recognize situations in which an elected candidate who received a sizable portion of the minority


115. Grofman ET AL., supra note 24, at 76-77.
vote was not truly a candidate of choice. In the attempt to find some additional guarantee of genuineness, some courts have accepted the questionable inference that a candidate's minority status insures the minority voters' preference. By this reasoning, "A" cannot be the minority-preferred candidate.

2. "A" May or May Not Be the Minority-Preferred Candidate

The factors listed in the Senate Report provide assurance that the candidate is really chosen by the minority voters. To be the minority-preferred candidate requires more than having obtained a majority of the minority vote. The candidate is screened by the Senate factors to ask whether the minority voters identify with the candidate: whether the minority voters really have had any opportunity to choose candidates and whether the minority voters have actually chosen this candidate. In the above hypothetical, the additional fact that minority voters maintain significant influence in the Democratic Party and therefore have a substantial say as to who may run on the Democratic ticket gives "A" credibility as the minority-preferred candidate. This falls within the fourth factor which asks whether the minority has access to the candidate-slating process. In fact, the Tenth Circuit in *Sanchez* accepted the district court's finding that several Anglo county commissioners had been the minority-preferred candidate for Hispanic voters where "Hispanics controlled the Democratic party . . . [and] had a very strong say as to which candidates could run on the Democratic ticket."

The screening begins with a presumption that vote dilution exists. First, the plaintiffs present their evidence supporting a vote-dilution claim. With respect to part-three of the *Gingles* test, the plaintiffs must show that the majority group votes as a bloc, and that this bloc voting allows the majority group to defeat a candidate who the plaintiffs claim is their minority-preferred candidate. This is merely an application of the racially-polarized voting factor. The elections submitted and minority-preferred candidates claimed by the plaintiffs are presumed to support the plaintiffs' claim of vote dilution. The Senate factors are then used either to rebut or support this presumption. In addition, the plaintiffs' claim that certain elections or candidates should not be considered may also be evaluated in light of the Senate factors.

The nine Senate factors provide criteria by which to evaluate defendants' claims. Where the defendants suggest that other
elections should be considered because a minority-preferred candidate was elected, the defendants may show that a candidate qualified as minority-preferred candidate. This occurred in Sanchez v. Bond.118 In short, the Senate factors provide a means by which to examine a candidate where his or her status as a minority-preferred candidate is in dispute.

For example, in cases where plaintiffs claim that certain elections lacked a minority-preferred candidate, the fact that no minority member has ever been elected and therefore minority candidates who would be truly preferred by the minority are dissuaded from running for office (as suggested by Grofman) may be considered using the seventh Senate factor, whether members of the minority group have been elected to office. It may also involve the first or fifth factors, "any history of official discrimination . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process" or "the extent to which member of the minority group . . . bear the effects of discrimination . . . which hinder their ability to participate effectively in the political process," either of which may have submerged the minority's presence in the district. Whether an elected official has been responsive to the needs of the minority may have probative value in determining whether he or she was a minority-preferred candidate. Here, one is asking whether the candidate's actions reflect his or her being the minority's candidate. This relies on the likely inference that a minority-preferred candidate will be attentive to the needs of his or her constituency. Although this method of screening still relies on judicial discretion and a balancing of circumstances, the Senate factors provide reasonable guidelines for the courts.

IV. Policy Concerns

Three comments remain to be made about section 2 of the Voting Rights Acts. First, section 2 is consistent with Madison's understanding of representative democracy. Second, in the confusion over defining the minority-preferred candidate, there exists a tension between protecting the right of minority voters to have an equal voice and limiting the freedom of minority voters to choose among candidates. Third, holding that the race of a minority-preferred candidate is relevant contradicts the notion of intrinsic equality that justifies democratic government.

118. See supra text accompanying notes 116-17.
A. Madison: Pluralist . . . and Republican?

James Madison set forth his understanding of representative democracy in *The Federalist* Nos. 10 and 51. There exist a number of inconsistencies in Madison's reasoning, but his ideas have become so ingrained in the American psyche that they cannot be ignored. In an effort to avoid tyranny by the majority, Madison urged that the governmental system adopted in America embrace a diversity of interests and groups. This pluralist conception views politics as mediating "the struggle among self-interested groups for scarce social resources." According to Cass Sunstein, pluralists see the common good as a result of "uninhibited bargaining among the various participants, so that numbers and intensities of preferences can be reflected in polit-


120. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956). In a detailed analysis of Madisonian thought, Dahl uncovers a number of logical inconsistencies. For example, he writes:

[B]ecause majorities are likely to be unstable and transitory in a large and pluralistic society, they are likely to be politically ineffective; and herein lies the basic protection against their exploitation of minorities. This conclusion is of course scarcely compatible with the preoccupation with majority tyranny that is the hallmark of the Madisonian style of thought.

*Id.* at 30. Dahl attributes the "logical and empirical deficiencies of Madison's own thought" to Madison's "inability to reconcile two different goals," the "assignment of equal rights" to all adult citizens and the "guarantee the liberty of certain [privileged] minorities." *Id.* at 31.

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*Id.* at 30-31.

ical outcomes. The common good amounts to an aggregation of individual preferences." Robert Dixon remarks that [a] primary safeguard against "factionalism," that is, against the rise of dominant interests "adverse to the rights of other citizens," is provision of channels for the representation of the maximum number of interests so that policy decisions will reflect views and interests of a broad cross-section of society. Therefore, Dixon believes that "a Madisonian theorist would tend to view with suspicion a frequent use of 'winner-take-all' systems such as apportionments into large, multimember districts, which make it difficult for minority interests, even when relatively concentrated, to elect representatives." As a result, a real threat exists of majority tyranny and disregard for the common good.

At the same time that Madison embraced pluralism, he continued to adhere to certain beliefs of classical republicanism. According to Cass Sunstein:

To the republicans, the prerequisite of sound government was the willingness of citizens to subordinate their private interests to the general good. Politics consisted of self-rule by the people; but it was not a scheme in which people impressed their private preferences on the government. It was instead a system in which the selection of preferences was the object of the governmental process. Preferences were not to be taken as exogenous, but to be developed and shaped through politics. Classical republicans view politics as dialogic, and direct political participation by citizens was essential. "The republican conception carries with it a particular view of human nature; it assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good." As a result of this belief in direct (or nearly direct) participation, many classical republicans held a microcosm view of representation. According to John Adams, the legislature

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124. See Sunstein, supra note 123, at 32-33.
125. ROBERT G. DIXON, REAPPORTIONMENT IN LAW AND POLITICS 41 (1968).
126. Id. at 42.
127. For discussion of simultaneous classical liberal and republican traditions in American political development, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 3-29 (1993), and MORONE, supra note 123, at 15-19.
128. See Sunstein, supra note 123, at 31.
129. See id. at 31; see also MORONE, supra note 123, at 41-42.
“should be an exact portrait, in miniature, of the people at large . . . it should think, feel, reason and act like them.” Madison rejected this microcosm view of representation, but continued to believe that representatives should exercise their independent judgment and act through collective reasoning directed toward realizing the common good. In essence, Madison believed that representatives should advocate the interests of their constituents, yet continue to exercise their independent judgment.

Section 2 attempts to remedy situations of vote dilution that submerge minority interests. The long tradition of discrimination against certain minorities has seriously hindered their ability to participate in the political process. As a result, these minorities have been unable to introduce their interests into the public forum. Rejecting classical republicanism, Madisonian democracy relies on the concept of pluralism in order to prevent majority tyranny and to obtain a common good. Section 2 attempts to insure that the exclusion of minority interests from politics, resulting from past and present discrimination, does not continue and to rectify situations where such exclusion does exist.

130. See Morone, supra note 123, at 40 (quoting John Adams).
131. See Sunstein, supra note 123, at 41-42 (citing to The Federalist No. 10 & 57 (James Madison)); see also Morone, supra note 123, at 63 (discussing Madison's notion of "refining the popular appointments by successive filtrations" to produce "men who possess the most attractive merit" as representatives).
132. In Daniel D. Polsby & Robert D. Popper, Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act, 92 Mich. L. Rev. 652 (1993), the authors argue that the Voting Rights Act is inconsistent with Madison's scheme of government when applied to single-member districts. Id. at 663-71. According to the authors, "Disabling factions, not empowering them, lay at the heart of Madison's constitutional idea." Id. at 668. Madison accomplished this in the following way:

If a faction consists of less than a majority, it can be controlled by the operation of "the republican principle" of voting in the legislative body, i.e., the majority can vote down the minority.

. . . The development of majority faction can be limited if the electorate is numerous, extended, and diverse in interests.

Id. (quoting Robert Dahl). The authors further explain:

The single-member district system accepts what might be called the Madisonian Wager - that the compromise policies that emerge from a system that rewards the "center" candidates and ignores the fringes will in the long run be more respectful of the rights and liberties of the people than will those compromises that emerge from a system in which faction is allowed its full, vigorous, and in some ways satisfying play. The Madisonian Wager is, in effect, a form of poker in which each player must discard his strongest cards - his one-issue preferences - before starting to bet.

Id. This position fails to recognize the fact that vote-dilution and vote-fragmentation prevent minorities from participating in political decision. Using the
In turn, section 2 advances the pluralist goals of preventing majority tyranny and obtaining a *truly* common good.

These pluralist goals do not support the proposition that only minority representatives can represent minority groups. Madison rejected the microcosm view which might have suggested that an "exact portrait" include racial qualities. Instead, he focused on the representation of interests which can exist regardless of the representative’s race. As a republican, Madison urged the exercise of individual and collective reasoning to further a common good. This belief in reason and common good deny the idea of entrenched, unbreachable racial barriers to mutual understanding. Therefore, Madisonian democracy or pluralism does not insist that the minority-preferred candidate be a minority member.

B. Confounding the Freedom to Choose

Many commentators have begun to equate the success of minority candidates with the effectiveness of section 2. They have begun to reform section 2 into an affirmative action statute. The position that a non-minority cannot be the minority-preferred candidate limits the full range of voter choice. In essence, the minority-preferred candidate becomes the minority-preferred minority candidate.

Criticism of this position exists on two levels. First, the introduction of the candidate’s race into the analysis tends to distract from the true purpose of the inquiry, to protect voter preference. The full range of minority-voter choice is restricted to minority candidates. A simple question captures the dilemma: should minority voters simply have been denied a seat in game. The Voting Rights Act represents a response to this anti-democratic situation. As Samuel Issacharoff comments, “It is, in Madison’s words, ‘a republican remedy for the diseases most incident to republican government.” Issacharoff, *supra* note 24. See generally Issacharoff, *supra* note 24, at 1871-91.

133. See generally Guinier, *supra* note 75.

134. Lani Guinier recognizes that “[a]uthentic representatives need not be black as long as the source of their authority, legitimacy, and power base is the black community. White candidates elected from majority-black constituencies may therefore be considered ‘black’ representatives.” See Guinier, *supra* note 75, at 1103 n.115.


136. Steele writes: “Racial representation is not the same thing as racial development, yet affirmative action fosters a confusion of these very different needs.” Steele, *supra* note 2, at 116.
black voters be prevented from claiming a white candidate, whom the black voters roundly supported, as their minority-preferred candidate?

Second, the introduction of the candidate's race as a variant on affirmative action has detrimental long-term consequences. In his book *The Content of Our Character*, Shelby Steele identified what seems to be the inherent problem with this position. He observed:

But the essential problem with this form of affirmative action [that makes black the color of preference] is the way it leaps over the hard business of developing formerly oppressed people to the point where they can achieve proportionate representation on their own (given equal opportunity) and goes straight for the proportionate representation. This may satisfy some whites of their innocence and some blacks of their power, but it does very little to truly uplift blacks.137

The use of section 2 merely to increase minority officeholders without a concurrent increase in minority participation in political affairs is merely a "quick fix," glossing over the deeper problems of racial inequality.138 Section 2 was designed to remove barriers to minority-voter participation, and the focus of its continued use should remain on raising the minority voter from submergence, not differential treatment of the candidates.

C. *Intrinsic Equality*

The idea of intrinsic equality is a fundamental assumption justifying democratic government. It states that all persons "are, or ought to be considered, equal in some important sense,"139 and it implies that "no one is naturally entitled to subject another to his or her will or authority."140 As Robert Dahl notes,

[h]istorically, the idea of intrinsic equality gained much of its strength, particularly in Europe and the English-speaking countries, from the common doctrine of Judaism and Christianity (shared also by Islam) that we are equally God's children. Indeed it was exactly on this belief that

137. See Steele, supra note 2, at 115. Steele also adds: "Another liability of affirmative action comes from the fact that it indirectly encourages blacks to exploit their own past victimization as a source of power and privilege . . . . The obvious irony here is that we become inadvertently invested in the very condition we are trying to overcome." Id. at 118.

138. See generally Abrams, supra note 48.


140. See id. at 85 (defining intrinsic equality in Lockean terms).
Locke grounded his assertion of the natural equality of all persons in a state of nature.\textsuperscript{141} The idea of intrinsic equality forms the foundation for proclaiming that "all men are created equal," and it provides basis for finding racial discrimination to be wrong.

Section 2 of the Voting Rights Act built upon this idea of intrinsic equality. But requiring that the minority-preferred candidate be a minority member does harm to this very idea. Rather than tearing down barriers to voting equality, it reifies the ideas behind racial discrimination. It claims that racial differences go so deep that they prevent any mutual understanding between or among racial groups. In essence, it denies the human capacity to think, feel, and care for another beyond/ regardless of racial lines.

**Conclusion**

The language and legislative history of section 2 of the Voting Rights Act do not indicate that the minority-preferred candidates should be limited to minority members. Section 2 focuses on minority voters' rights "to participate in the political process and to elect representatives of their choice," regardless of the candidate's race. Recognizing that a non-minority candidate may be minority preferred merely follows the language of section 2.

A number of courts have held that a minority-preferred candidate must be a minority member in order to guarantee that the candidate is truly the minority's chosen representative.\textsuperscript{142} This unnecessary restriction limits the full range of voter choice. It creates tension between the purpose and the application of section 2, and as a result, section 2 attempts to protect the freedom of minority voters to have an equal voice while actually limiting their ability to choose among candidates. Screening the candidates against the Senate Report factors provides the additional security without placing this unreasonable restriction on minority voters.

In spirit, section 2 relies on a Madisonian understanding of representative democracy, an understanding according to which a multitude of interests prevents oppression by a single majority. Through use of section 2, minority groups can address the history of discrimination and the current electoral practices that

\textsuperscript{141} See id. at 85-86. For an interpretation of John Locke's significant contribution to American political development, see Louis Hartz, The Liberal Tradition in America (1955).

\textsuperscript{142} See supra part II.B.2.
have prevented their full political participation. But Madisonian democracy does not require that the minority-preferred candidate be a minority member. In fact, such a requirement shackles minority voters and contradicts the idea of intrinsic equality that justifies democracy.