**Racially Polarized Voting**

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Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano[[1]](#footnote-1)

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**Abstract**. Whether voting is racially polarized has for the last generation been the linchpin question in vote dilution cases under the core, nationally applicable provision of the Voting Rights Act. The polarization test was created to solve a manageability problem, but its evolution belies the expectations of its creators. Today district judges have broad discretion to find or not find polarized voting as they see fit. Polarization findings also depend in subtle and not-so-subtle ways on strong, race-based assumptions, contrary to equal protection norms. We describe these problems and explain why they have proven so intractable. At their root lie two fundamental difficulties with modern vote dilution jurisprudence: normative disagreements (often covert) about the meaning of racial vote dilution, and a widely shared belief that polarization rulings should be grounded on “votes cast in actual elections.” We show that votes are only contingently related to underlying political preferences, and the estimation of candidates’ vote shares by racial group from votes cast in actual elections depends on racial homogeneity assumptions similar to those the Supreme Court has disavowed. We also explain that the competing normative theories of vote dilution have conflicting implications for the racial polarization test. Our analysis suggests (1) that contrary to recent intimations from the Supreme Court, judges *should not* establish bright-line, vote-share cutoffs for “legally significant” minority cohesion and white bloc voting; and (2) that courts should invite polarization showings based on survey data rather than “votes cast in actual elections.”

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# Introduction

Ever since the Warren Court constitutionalized the right to vote, judges have recognized that an electoral system in which every adult citizen votes without hindrance may nonetheless be fundamentally unfair, owing to the mechanisms for aggregating votes into outcomes. Votes cast by citizens with distinct political interests may be “diluted”—“minimized and canceled out”—by, for example, the design of legislative districts, or the choice between at-large and districted elections.[[2]](#footnote-2) Congress drew upon this insight in 1982 when it amended Section 2 of the Voting Rights Act to provide a statutory remedy for racial vote dilution.[[3]](#footnote-3)

At the heart of vote dilution law is the concept of racially polarized voting. According to Justice Brennan’s foundational opinion in *Thornburg v. Gingles*, polarized voting exists where politically cohesive racial minorities are consistently defeated by bloc-voting racial majorities. Since *Gingles*, plaintiffs have been required to prove racial polarization and to propose a remedial district at the outset of their case. Only if this threshold, “*Gingles*” showing has been made does the court apply the liability standard prescribed by statute: whether the “totality of circumstances” indicate that plaintiff-race voters “have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.”[[4]](#footnote-4)

The Supreme Court understands the polarization test to serve a dual purpose. The test keeps vote dilution law *manageable*,by limiting the number of cases in which courts must make politically delicate, totality-of-circumstances judgment calls about racial fairness in the distribution of political opportunity. Important to the manageability story is that the polarization test is objective and rule-like, and thus likely to be applied consistently by judges whose “personal political views” may diverge.[[5]](#footnote-5) The second purpose is *normative diagnosis*. The polarization test helps courts to make quick, rough judgments about whether serious harms within the meaning of Section 2 are likely to be present. It “ensures that clearly meritorious claims will survive summary judgment . . . while appropriately closing the courthouse to marginal cases.”[[6]](#footnote-6)

Implementation of the polarization test is subject to a constitutionally derived side constraint (or parallel objective): judges must not rely on “prohibited,” racially essentialist assumptions, e.g., assuming that voters of the same race “think alike, share the same political interests, and will prefer the same candidates at the polls.”[[7]](#footnote-7)

Responding to the Supreme Court, we argue that the lower courts *cannot*—under current conditions—implement the racial polarization test so as to satisfy the Court’s three objectives concurrently. The test cannot at once be diagnostic of liability, constraining of judicial discretion, and free of strong racial assumptions.

There are two reasons for this. One is the normatively unsettled state of vote dilution law. Several competing theories of racial vote dilution each find some support in Supreme Court precedent, and the theories have radically different implications for the racial polarization test. That there is no generally accepted theory of racial vote dilution is common knowledge among legal academics, but, with limited exceptions, academics have not considered how the absence of an accepted theory has hindered the development of a constraining, rule-like polarization test.[[8]](#footnote-8) If anything, law professors have tacitly assumed that the putatively objective polarization test covers for the lack of a theory, allowing judges who may have very different normative understandings of racial vote dilution (or no understanding at all) to make reasonably consistent decisions.[[9]](#footnote-9) This is mistaken. We show that the polarization test leaves trial judges with broad discretion, and that many of the lower courts’ disputes about how to exercise this discretion correspond to often-unspoken normative disagreements about the meaning of racial vote dilution.

The second problem is the long-established convention, encouraged though not compelled by the Supreme Court, of grounding racial polarization findings on “voting preferences expressed in actual elections.”[[10]](#footnote-10) Courts and academics alike have assumed that the *average* level of bloc voting among co-ethnic voters in some class of *typical* elections reliably indicates whether most members of the group have similar political preferences.

We show theoretically and with evidence from survey experiments that this “averaging approach” to the measurement of racial polarization can lead to serious mistakes. The root of the problem is strategic behavior by candidates, parties, donors, and voters. Because of strategic behavior, the relationship between polarization in vote shares and polarization in underlying political preferences is highly contingent. This threatens to render the polarization test almost laughably arbitrary, unless judges either make very strong racial assumptions, or else abandon the notion of an objective, quantitative polarization test in favor of a subjective inquiry that requires close attention to very thing the creators of the polarization test wanted the courts to ignore: “the political stories behind the election returns.”[[11]](#footnote-11) Thirty years of racial polarization law in the lower courts bear witness to this problem, even as commentators continue to describe the polarization test as objective and constraining.

Furthermore, so long as polarization findings continue to be based on “voting preferences expressed in actual elections,” those preferences must be estimated, and the estimation of candidates’ vote shares by racial group from ballots cast in actual elections depends on strong assumptions about political homogeneity of preferences within racial groups. These assumptions are kin to the racial homogeneity assumptions the Supreme Court has disavowed.

\* \* \*

What follows for vote dilution law? The most important implications concern the Supreme Court’s ongoing campaign to bolster the manageability of vote dilution claims, and to prevent the VRA from “infus[ing] race into virtually every redistricting.”[[12]](#footnote-12) The current strategy of the Court—or at least of a decisive plurality of the Justices—is to circumscribe the geographic reach of Section 2 through limiting, bright-line constructions of the *Gingles* conditions. In *Bartlett v. Strickland*,the controlling plurality held that vote dilution claims may be brought only by plaintiffs whose racial group would comprise a literal, numeric majority of the voting-age population in a compact remedial district. *Bartlett* further suggests, in dicta, that vote dilution claims should be foreclosed as a matter of law if white voters typically “cross over” and support minority-preferred candidates at levels exceeding some numeric threshold of legal significance.

If white crossover support exceeds the cutoff, the white community would be deemed non-cohesive under *Gingles*. Presumably a minority community would also be deemed non-cohesive if minority voters defect from minority-preferred candidates at similar rates. It remains to be seen where the numeric cutoff for group cohesion will be set, but five Justices in *Bartlett* voiced support for crossover voting cutoffs ranging from 15% - 40%.

Our analysis casts serious doubt on the value of *Bartlett*-style bloc voting cutoffs, and further suggests that if the Court does adopt such cutoffs, that will induce trial courts to delve ever more deeply into “the political stories behind the election returns,” or else to rely on very strong racial assumptions. As such, the establishment of vote-share cutoffs would in important respects hinder rather than advance the Court’s manageability and constitutional objectives for the racial polarization test.

But what’s the alternative? One option is for the Supreme Court to radically simplify the *Gingles* inquiry, requiring plaintiffs to prove at the threshold stage only that they could comprise a majority of a compact single-member district. In cases where this showing has been made, the trial court would be free to consider polarization in vote shares at the subsequent, “totality of circumstances” stage. The weight that the trial court gives to vote-share evidence could vary on a case by case basis, depending on whether (in the judge’s view) the evidence can be interpreted without digging too far into the political stories behind the election returns, or making excessively strong racial assumptions.

The radical simplification strategy is consistent with the goal of an objective, constraining, and racial-assumption-free threshold test. But the simplified test would not be diagnostic of liability, and, relative to the status quo, the test would expand rather than limit the reach of Section 2, which in the eyes of some Justices may raise “serious constitutional questions.”[[13]](#footnote-13)

The other, more ambitious solution is for the Supreme Court to initiate a redesign of the *Gingles* test, linking it expressly to normative theories of vote dilution and new kinds of data, such as political preferences revealed through surveys (rather than votes).

We proceed as follows. Part I traces the emergence of and justifications for the judicial inquiry into racially polarized voting. Part II documents the gap between the manageability story often invoked to justify the polarization test, and the practice on the ground. Relying on law-student coding of a large, random sample of published judicial opinions, Part II provides the most comprehensive analysis to date of judicial implementation of the polarization test.

Part III explains the fundamental difficulties with tying vote dilution adjudication to racially polarized voting as conventionally measured: the conflicting implications of various theories of vote dilution for the polarization test; the highly contingent relationship between “votes cast in actual elections” and underlying political preferences; and the need for racial homogeneity assumptions in order to estimate vote shares by racial group from aggregate data. We do not set up straw men. On the contrary, we offer guidance about how best to use vote-share estimates under the *Gingles* framework, given the contingent relationship between preferences and votes, and then consider the limits of these strategies. Our critique is internal; we work from the same normative theories of dilution and ideas about judicially manageable standards that courts and commentators have used to justify the *Gingles* test.

Finally, in Part III, we touch on possible ways out of the current dilemma.[[14]](#footnote-14) Part III is brief because this is mainly a foundation-laying paper. We are working on several empirical projects to develop alternative, survey-based estimates of racial polarization and minority political opportunity, but given space limitations we cannot get into the details here. This paper will have achieved enough if it helps courts, litigators, and law professors to understand the limits of the racial polarization inquiry as currently practiced, and if it forestalls the establishment of numeric vote-share cutoffs under *Gingles*.

# The *Gingles* Framework

This Part briefly reviews the development of the *Gingles* framework. We focus on the Supreme Court’s evolving conception of the role of the *Gingles* test under a statute that calls for “totality of circumstances” assessments of political inequality.

## Origins

The Supreme Court recognized racial vote dilution claims under the Equal Protect Clause in 1971.[[15]](#footnote-15) A free-form jurisprudence soon developed in the lower courts, with judges making “intensely local appraisals” of the “totality of circumstances” bearing on minority political opportunity and then simply pronouncing that the challenged electoral system did or did not dilute minority voting power.[[16]](#footnote-16) Nearly all of the cases concerned at-large elections. Appraising this first decade of racial vote dilution law, James Blacksher and Larry Menefee wrote:

Most of the cases concluding . . . that at-large [elections] were constitutional cannot be distinguished analytically from those reaching a contrary result on any basis other than the varying personal political views of the trial and appellate judges who decided them. Some capriciousness is an inherent risk of a standard calling for an “intensely local appraisal” of the “totality of circumstances” of each case.[[17]](#footnote-17)

This critique led Blacksher and Menefee to propose the racial polarization test. In lieu of open-ended balancing, courts would simply determine (1) whether the minority community was populous and geographically concentrated enough to comprise a majority of an ordinary single-member district, (2) whether the minority community was politically cohesive, and (3) whether the white community voted sufficiently as a bloc to usually defeat minority-preferred candidates under the status quo electoral system.[[18]](#footnote-18) “In terms of certainty and consistency,” Blacksher and Menefee asserted, this inquiry “promises to be nearly as manageable as the population equality rule” of *Reynolds v. Sims*.[[19]](#footnote-19) Key to their manageability claim was that “the problem [of vote dilution would be] observed solely on the basis of voting patterns; *there is no need to inquire into the political stories behind the election returns*.”[[20]](#footnote-20)

Blacksher and Menefee’s timing was propitious. In 1980, the Supreme Court rejected the constitutional vote dilution jurisprudence of the 1970s.[[21]](#footnote-21) Congress responded by amending Section 2 of the Voting Rights Act, creating a new “results test.”[[22]](#footnote-22) Amended Section 2 prohibits electoral structures “which result[]” in members of a class of citizens defined by race or color “hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”[[23]](#footnote-23) Nowhere does the statute or its legislative history provide a clear statement of what it means for a racial minority to have unequal political opportunity.[[24]](#footnote-24) All the enacting Congress bequeathed to the courts was a statutory directive to consider the “totality of circumstances,”[[25]](#footnote-25) and a committee report reciting a non-exhaustive list of factors to be weighed (gleaned from the constitutional vote dilution jurisprudence of the 1970s).[[26]](#footnote-26)

When amended Section 2 first reached the Supreme Court, in the 1986 case of *Thornburg v. Gingles*, a four-justice plurality sidelined this “totality of circumstances” analysis in favor of Blacksher and Menefee’s more streamlined inquiry into polarized voting.[[27]](#footnote-27) It is now well settled that vote dilution plaintiffs must establish the so-called *Gingles* conditions at the outset of their case. Specifically, plaintiffs must show:

First, [that] the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, [that] the minority group . . . is politically cohesive. [And, third,] that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.[[28]](#footnote-28)

The *Gingles* Court left some doubt, however, about the relationship between *Gingles* test and the statutory liability standard: whether plaintiff-race voters have “less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.” Does satisfaction of the *Gingles* conditions actually establish that plaintiffs lack equal political opportunity, or does it merely show that a lack opportunity, if any, could be remedied?

## Evolving Conceptions of the *Gingles* Test

Different Justices have understood the *Gingles* test in different ways, and as the balance of power on the Court has changed, so too has the dominant understanding of *Gingles*. Roughly speaking, we can divide the jurisprudence into three eras, although the divisions between them are not neat and tidy.

### In the Beginning (1986-1994): Gingles as Liability Standard

The originators of the *Gingles* test and its early defenders clearly saw it as the standard for liability.[[29]](#footnote-29) As Justice Brennan wrote, “[T]he most important Senate Report factors bearing on § 2 challenges to multimember districts are the ‘extent to which minority group members have been elected to public office in the jurisdiction’ and the ‘extent to which voting in the elections of the state or political subdivision is racially polarized.’”[[30]](#footnote-30) “Other factors may be supportive of, but [are] *not essential to*, a minority voter's claim.”[[31]](#footnote-31) This and other passages in the *Gingles* plurality opinion imply that the “totality of circumstances” referenced in the text of Section 2 and enumerated in its legislative history are essentially irrelevant to vote dilution claims—except, perhaps, if they undermine the initial inference of racial polarization.[[32]](#footnote-32) Picking up this thread, many lower court judges treated satisfaction of the *Gingles* conditions as basically decisive on the ultimate question of liability.[[33]](#footnote-33)

This practice cried out for justification, because as Justice O’Connor explained in her *Gingles* concurrence, neither the text nor the legislative history of Section 2 offered much support for the plurality’s liability standard. Commentators and judges defended the new approach on pragmatic and normative grounds. Echoing Blacksher and Menefee, they argued that the formulaic *Gingles* standard was needed to make politically sensitive vote dilution cases manageable.[[34]](#footnote-34) Professor Issacharoff, for example, emphasized that the easy-to-apply *Gingles* standard obviated any need for judges to assess “governmental responsiveness” to the “particularized needs” of the minority community.[[35]](#footnote-35) That issue had figured prominently in the constitutional vote dilution jurisprudence of the 1970s, but Issacharoff thought the question of responsiveness quintessentially political, one that courts ought to avoid if at all possible.[[36]](#footnote-36)

 Normative defenses of the *Gingles* standard were tied to the concept of polarized voting, which was believed to signify something important about political equality. Depending on the commentator or the moment, “polarized voting” was treated as a reliable indicator of minority exclusion from the normal push-and-pull of pluralist politics, or of intentional race discrimination against minority candidates (and possibly voters) by white voters and elites.

### The De Grandy Era (1994-2009): Gingles as Potential Remedy

Though plausibly about liability, the *Gingles* factors can also be understood as minimal conditions to establish the existence of a potential remedy. Unless it’s the case that minority voters in a defined geographic area are currently unable to elect the candidates they prefer, yet would become able to elect those candidates in the remedial district(s) they propose, their vote dilution claim is hopeless. Nothing a court could order would remedy the alleged dilution.[[37]](#footnote-37)

The Supreme Court’s decision in *Johnson v. De Grandy* invigorated this reading of *Gingles*. Justice Souter writing for the Court reversed and sharply criticized a lower court that had treated *Gingles* as a liability standard.[[38]](#footnote-38) Many lower courts understood *De Grandy* as a signal to revitalize the “totality of circumstances” rubric of 1970s vote dilution law,[[39]](#footnote-39) and as Adam Cox and Thomas Miles have shown, the relationship between satisfaction of the *Gingles* conditions and a finding of liability weakened in the *De Grandy* era*.*[[40]](#footnote-40)

Even so, some lower courts continue to say that “cases will be rare” in which the *Gingles* conditions are met but liability not found.[[41]](#footnote-41) These courts evidently believe that the *Gingles* conditions “point[] toward dilution” with some “force.” In short, though *De Grandy* threw cold water on the liability-standard interpretation of *Gingles*, it did not fully extinguish the notion that the *Gingles* conditions are at least somewhat diagnostic of racial vote dilution.

### The Bartlett Era (2009-?): Gingles as Curtailment

Justice Souter’s potential remedy theory of *Gingles* took a blow in *Bartlett v. Strickland*, a recent case about the first prong of *Gingles*. Was this prong to be read formally, such that plaintiffs must comprise a literal, numeric majority of voting age citizens in the proposed remedial district? Or functionally, to allow claims by minority voters who though comprising a numeric minority of the remedial district would be able to control it in coalition with sympathetic white voters? Justice Kennedy for the *Bartlett* plurality adopted the formal approach.

In dissent, Justice Souter bemoaned the Court for sapping the VRA of its integrative aspirations.[[42]](#footnote-42) States could now comply with Section 2 only by segregating minority voters into majority-minority districts, rather than drawing districts to empower cross-racial coalitions.[[43]](#footnote-43) Kennedy replied that Souter fundamentally misunderstood the plurality opinion.[[44]](#footnote-44) Certainly a state could *comply* with Section 2 by creating crossover districts in lieu of majority-minority districts.[[45]](#footnote-45) After *Bartlett*, crossover districts *voluntarily adopted by a state* may forestall Section 2 liability ex ante or remedy liability ex post, yet they cannot satisfy the first prong of *Gingles*. Thus does *Bartlett* sever *Gingles* from potential remedies.

What then is the point of the *Gingles*-*Bartlett* majority-minority requirement? Per Kennedy, it is not to hem in the states’ compliance efforts, but simply (1) to limit the reach of Section 2—lest it “unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions”[[46]](#footnote-46); and (2) to reduce the number of cases in which courts end up in the “untenable . . . position of predicting many political variables and tying them to race-based assumptions,”[[47]](#footnote-47) or otherwise making “highly political judgments.”[[48]](#footnote-48) (The Equal Protection Clause is generally understood to prohibit public officials, including judges, from relying on assumptions about the preferences, abilities, or behaviors of members of a class defined by race or ethnicity.[[49]](#footnote-49))

The notion that the *Gingles* conditions should be used to limit the geographic reach of Section 2 is also reflected in the *Bartlett* plurality’s discussion of white bloc voting, the third *Gingles* condition. Kennedy chided the state for conceding white bloc voting, expressing “skeptic[ism]” that this condition could be satisfied as to districts where 20% of white voters support minority-preferred candidates. Though Kennedy wrote for only three Justices, it appears from oral argument that at least five Justices supported numeric cutoffs for group cohesion. Suggested cutoffs ranged from 15%-40% crossover voting, or, equivalently, 60%-85% of whites voting against the minority-preferred candidate.

If the *Gingles* test is to be used to curtail vote dilution litigation, the test must be normatively diagnostic. It would be arbitrary and unlawful for the Court to foreclose consideration of the liability standard prescribed by statute without reference to whether that standard is likely to be satisfied.[[50]](#footnote-50) Justice Kennedy would not disagree. The *Gingles* conditions, he wrote in *Bartlett*, are tools “to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation.”[[51]](#footnote-51)

To summarize, *Bartlett* returned vote dilution law to something of a half-way point between the world of the *Gingles* plurality, wherein the *Gingles* test functions as a liability standard, and the world of *De Grandy*, wherein the test is just about remedies. In the post-*Bartlett* world, the *Gingles* test must be objective and clear-cut, and the test must also “point toward dilution” with considerable “force.”

It should be noted that although this dual-function conception of the *Gingles* test was crystalized in *Bartlett*, it is hardly idiosyncratic. Many Supreme Court and lower court opinions in the years between *Gingles* and *Bartlett* are premised on the idea that the *Gingles* test is or should be clear-cut, easy to administer, and normatively diagnostic.[[52]](#footnote-52)

# The Manageability Puzzle

As the evolution from *Gingles* to *De Grandy* and then *Bartlett* perhaps suggests, the Court has harbored some doubt about the extent to which the *Gingles* factors are diagnostic of liability. Later we will see that there are large, ongoing disagreements about the meaning of racial vote dilution, and that whether the *Gingles* factors are normatively diagnostic depends on both one’s theory of vote dilution and one’s gloss on the *Gingles* factors.[[53]](#footnote-53)

In contrast to the normative disputes, there is widespread judicial and academic agreement that the *Gingles* conditions serve an essential manageability function.[[54]](#footnote-54) The federal reports are littered with statements justifying *Gingles* or some gloss on *Gingles* as necessary to “rein[] in the almost unbridled discretion that [S]ection 2 gives the courts”;[[55]](#footnote-55) to “prevent vote dilution from becoming ‘an open-ended [concept] subject to no principled means of application’”;[[56]](#footnote-56) and to ensure[] that the federal courts do not end up in the “untenable . . . position of predicting many political variables and tying them to race-based assumptions,”[[57]](#footnote-57) or of otherwise deciding vote dilution cases on the basis of “highly political judgments.”[[58]](#footnote-58)

Similarly, legal academics from Blacksher and Menefee to the present have understood the *Gingles* conditions as clear-cut factors ascertained on the basis of objective demographic data and vote counts. But is the received wisdom correct? This Part argues otherwise. We begin with the empirical literature, and then turn to doctrine.

## Judicial Votes

Reflecting and reinforcing the conventional wisdom, an influential paper by Adam Cox and Thomas Miles presents judicial voting at the *Gingles* and totality-of-circumstances stages of Section 2 cases as a test of the hypothesis that doctrinal “rules” constrain judges more than “standards.”[[59]](#footnote-59) Cox and Miles show that Democratic and Republican judges vote to find the *Gingles* conditions satisfied at roughly the same rates. However, in the pre-1994 period, Democratic judges nearly always voted for liability conditionalon passing the *Gingles* test, whereas the probability of a Republican vote for liability (conditional on *Gingles*) was only about 0.5. In the post-1994 period, the Democratic-Republican gap in liability votes disappeared. Cox and Miles argue that changes in the mix of cases gave Democratic judges a partisan incentive to vote against liability in the post-1994 period. These judges were able to adjust their behavior at the unconstrained second stage of vote-dilution cases (the “totality of circumstances”), but not at the rule-like *Gingles* stage.

However, Cox and Miles’s “*Gingles* constraint” hypothesis is undermined by two very important results that appear in their regression results but are barely mentioned in the text of their paper. African-American judges diverge *more* from white judges when voting on the *Gingles* test, than when voting for or against liability conditional on the *Gingles* test being met. Similarly the effect of an African-American co-panelist on voting by non-black judges is *larger* at the *Gingles* than at the totality-of-circumstances stage. These results suggest that the *Gingles* “rules” are if anything lessconstraining than the totality-of-circumstances “standard” for liability.[[60]](#footnote-60)

Cox and Miles also ignore a very plausible legal explanation for the huge pre-1994 difference in Democratic and Republican voting for liability, conditional on the *Gingles* factors being met. During this period, it was open to lower courts to adopt either the liability-standard interpretation of the *Gingles* factors, or the potential-remedy interpretation.[[61]](#footnote-61) The Cox and Miles results suggest that Democratic judges initially adopted the former interpretation—in line with Brennan’s plurality opinion—whereas Republicans in the lower courts presumably emphasized that five justices in *Gingles* were not fully on board Brennan’s train. In 1994, the Supreme Court in *De Grandy* reversed a district court for treating *Gingles* as a liability standard. Cox and Miles’s demonstration of a marked post-1994 change in liability-stage voting by Democratic judges may reflect nothing more than *De Grandy*’s rejection of the liability-standard gloss on *Gingles*.

## Doctrine & Practice

Cox and Miles’s results on the direct and panel effects of judge race are surprising if one believes the *Gingles* conditions to be rule-like. But as this section will explain, the applicable law leaves judges with broad discretion under the second and third *Gingles* prongs.

The nuts and bolts of the racial polarization test represent something of a black box. The Supreme Court has said little about them since *Gingles*, and the leading casebooks treat the matter briefly or not at all. But this much is very well established: “[T]he issue of political cohesiveness [shall] be judged primarily on the basis of the voting preferences expressed in actual elections.”[[62]](#footnote-62) Defendants have occasionally tried to rebut vote-share evidence with survey or other data, but these efforts have almost universally failed. Anecdotal testimony is sometimes offered to reinforce or illuminate the voting data, but estimates of candidates’ vote shares by racial group in *usual* elections have since *Gingles* been the center of attention.

The “usual” caveat is important. The *Gingles* Court recognized that voting patterns in certain elections may be anomalous because of special circumstances, such as the presence of an exceptionally strong incumbent or the lack of a challenger.[[63]](#footnote-63) But the Court (like Blacksher and Menefee) apparently assumed that once these anomalous elections are excluded, everything a judge needs to learn about minority cohesion and white bloc voting can be learned from *typical* white and minority vote shares in the other elections.[[64]](#footnote-64)

The balance of this section summarizes judicial practice with respect to the core components of the racial polarization inquiry: the definition and measurement of minority cohesion, the definition and measurement of white bloc voting, the identification of “usual” or “probative” elections, and the geographic scale of the polarization inquiry. Two big themes emerge from this review. First, the courts have been very reluctant to establish bright-line rules about central questions such as the level of voting cohesion needed to satisfy prongs 2 and 3, and which past elections belong in the polarization analysis and how to weight the evidence from each election. Second, the courts seem torn between relatively simple, mechanical polarization inquiries, which invariably depend on strong, race-based assumptions, and more nuanced approaches, which entail considerable attention to the very thing that Blacksher and Menefee expected judges to ignore: “the political stories behind the election returns.” In Part III, we shall argue that the back-and-forth between these unacceptable poles is an inevitable consequence of the courts’ premise that racial polarization should be “judged primarily on the basis of the voting preferences expressed in actual elections.”[[65]](#footnote-65)

### Minority Cohesion

In a widely noted book published in 1992, Bernard Grofman, Lisa Handley, and Richard Niemi asserted that *Gingles* had settled the question of how to prove minority cohesion. Evidence of a *statistically significant* correlation between voter race and vote choice was both necessary and sufficient to establish minority cohesion.[[66]](#footnote-66) But it is of course true that statistical significance does not imply substantive importance, and notwithstanding Grofman et al.’s interpretation of *Gingles*, courts frequently ask whether minorities vote by large or “landslide” margins for minority-preferred candidates.

The landslide approach was urged by prominent litigator Gerry Hebert and expert witness Alan Lichtman in a 1993 paper.[[67]](#footnote-67) They proposed that if 60% or more of minority voters typically vote for the minority candidate in biracial, two-candidate elections, minority cohesion should be presumed as a matter of law.[[68]](#footnote-68) If minority in-group voting falls below 60%, then courts should consider whether “special circumstances” (such as a lack of “viable” minority candidates) might explain the apparent lack of cohesion.[[69]](#footnote-69)

Judicial practice comports with Lichtman and Hebert’s suggestion in one important respect: findings about minority cohesion—or its absence—are almost universally based on the typical rate of coethnic voting by the plaintiff-race citizens in elections contested by plaintiff-race candidates. We had law students code a random sample of Section 2 dispositions in which the court made findings about racial polarization.[[70]](#footnote-70) Minority political cohesion was conceded in most of these cases. In the roughly 40 cases where litigants disputed minority cohesion, judicial findings about minority cohesion were based almost entirely on estimates of minority vote shares for coethnic candidates (sometimes the court also considered anecdotal testimony about minority political organization and interests).[[71]](#footnote-71) In none of these cases did a lack of cohesive voting in elections *without* a minority-race candidate lead the court to conclude that the minority community was not cohesive.[[72]](#footnote-72)

Though courts often emphasize the percentage of minority voters who supported minority-preferred candidates, lower court judges have been very reluctant to establish quantitative cutoffs for what is, or is not, “legally significant” minority cohesion. To be sure, a few courts have treated 60% or 70% as presumptively cohesive.[[73]](#footnote-73) And some courts have posited as a corollary that if minority-preferred candidates do *not* typically win at least 60% of the minority vote in two-candidate races, the minority community is probably notcohesive.[[74]](#footnote-74) But as best we can tell, only a single district court has treated this as a categorical rule.[[75]](#footnote-75) In most courts there are no bright lines.[[76]](#footnote-76)

Considered in view of manageability concerns and the Supreme Court’s injunction against “race-based assumptions,” the lower courts’ handling of the minority-cohesion prong of *Gingles* invites two objections. First and most obviously, the courts have not set numeric cohesion cutoffs, as *Bartlett* suggests that they should. Second, the *de facto* definition of minority political cohesion as “consistent voting by large margins for coethnic candidates” rests heavily on racial assumptions. It presumes that minority voters who share the same political views will manifest their commonality by consistently voting for candidates of their race, essentially ignoring the issue positions and strengths and weaknesses of each minority candidate.[[77]](#footnote-77) It also presupposes that so far as minority voters are concerned, the candidates who face off against plaintiff-race candidates are just an undifferentiated mass, one no better than the next.[[78]](#footnote-78)

The fairly uniform judicial practice of disregarding white vs. white elections in judging minority cohesion is also curious in light of the relevant law. With the arguable exception of the Fifth and Seventh Circuits,[[79]](#footnote-79) every court to have expressly considered the issue agrees that white vs. white elections are relevant *in principle* to the assessment of racial group cohesion.[[80]](#footnote-80)

### White Bloc Voting

The *Gingles* plurality stated that white bloc voting is “legally significant” if whites vote sufficiently as a bloc to usually defeat the minority’s preferred candidates. Read literally, this implies that white bloc voting doesn’t have to be estimated. Rather, after determining that a minority community is cohesive, the court just has to establish which candidates count as “minority preferred” (a/k/a “minority candidates of choice”) and see whether they won or lost.

In point of fact, however, expert witnesses report and courts make findings on the share of the white vote that went to minority-preferred candidates. This coheres with the sentiment the Justices expressed in *Bartlett*, to wit, that substantial levels of white crossover voting may defeat a vote dilution claim, even if the whites do not cross over in sufficient numbers to usually elect the minority’s ideal candidates. A handful of district courts have deemed white bloc voting not to exist when more than 30% or 40% of whites support minority-preferred candidates.[[81]](#footnote-81) But most lower courts have refused invitations to set, as a matter of law, quantitative thresholds that preclude (or require) a finding of legally significant white bloc voting.[[82]](#footnote-82)

The lower courts’ discomfort with bright-line, vote-share cutoffs is even more apparent on the question of which candidates “count” as minority candidates of choice for purposes of determining whether whites vote sufficiently as a bloc to usually defeat the minority’s candidates. Courts almost always treat any minority-*race* candidate who won a majority of the minority vote as a “candidate of choice.”[[83]](#footnote-83) But judges have been much more reluctant to use vote shares alone to classify *white* candidates as minority candidates of choice.

In the Third and Tenth Circuits, defendants may present evidence from white vs. white elections to rebut the plaintiffs’ showing of minority cohesion and white-bloc voting in interracial elections.[[84]](#footnote-84) However, before crediting the rebuttal data, the judge must make a “detailed, practical evaluation” of whether particular white candidates are, “as a realistic matter,” champions of the minority community.[[85]](#footnote-85) Notice that this imports into the racial polarization analysis a candidate-level version of the 1970s-era“government responsiveness” inquiry. (Recall Issacharoff’s argument that the whole point of the *Gingles* framework was to obviate the need for any such inquiry.[[86]](#footnote-86))

The Second, Fourth, and Ninth Circuits have forcefully rejected the Third and Tenth Circuit’s “subjective” definition of minority candidate of choice, deriding the “detailed, practical evaluation” as “a dubious judicial task, and one that can degenerate into racial stereotyping of a high order.”[[87]](#footnote-87) The Second and Ninth Circuit’s “objective” alternative is to credit white vs. white elections, but only if at least one candidate was strongly preferred to the others by minority voters.[[88]](#footnote-88) The Fourth Circuit has gone a step further and now requires plaintiffs to present data from all or a “representative sampling” of elections in the defendant jurisdiction during the relevant time period.[[89]](#footnote-89) Any candidate who would have won if only minority-cast ballots were counted is presumed to be a minority candidate of choice, and there is “legally significant” white bloc voting only if such candidates usually lose.[[90]](#footnote-90)

Even more striking than the diversity of legal doctrine across the circuits with respect to white vs. white elections is its instability within circuits—and even within judicial opinions. Thus the Ninth Circuit, in the very same case where it vehemently rejected the Third and Tenth Circuit’s subjective definition of minority-preferred candidate, said that voting data from biracial elections generally deserves “more weight” in the polarization analysis.[[91]](#footnote-91) How much more weight? The court didn't say, and we don’t see how one could make this judgment without assessing whether the white vs. white elections were fought over issues that divided the white and minority communities—a question that can only be answered through the kind of contextual, stories-behind-the-elections inquiry favored in the Third and Tenth Circuits. The Ninth Circuit is not an outlier. Judges in the Second and Sixth Circuits, which nominally follow the objective approach, also generally give more weight to polarization evidence from interracial elections.[[92]](#footnote-92)

Even the Fourth Circuit has wavered. Initially it supported a version of the subjective approach.[[93]](#footnote-93) When the Fourth Circuit subsequently created the “representative sampling” requirement, the court spelled out bright-line, vote-share-based rules about which candidates are “minority preferred” in elections where several candidates are chosen concurrently.[[94]](#footnote-94) But the court also allowed that “individualized assessments” of particular candidates may be warranted in certain borderline cases.[[95]](#footnote-95) A decade later, the Fourth Circuit held that with respect to elections in which no candidate received a majority of the minority vote, the fact-finder should consider “testimony from political observers and the candidates themselves” in order to determine whether any of the candidates “can be fairly considered a representative of the minority community.”[[96]](#footnote-96) This is the crux of the subjective approach, as practiced in the Third and Tenth Circuits.

But it’s not as if the courts are generally converging on the subjective approach. We see just as much movement in the other direction. The Eighth Circuit, which initially embraced the subjective approach,[[97]](#footnote-97) subsequently upheld a district court’s definition of “minority candidate of choice” as “any candidate who gets enough votes to be elected if only minority ballots are counted.”[[98]](#footnote-98) A similar transition seems to have occurred in the Eleventh Circuit.[[99]](#footnote-99) In short, the courts are going in circles.

There is one other big disagreement concerning the white-bloc voting prong of *Gingles*: whether white opposition to minority-preferred candidates must be “caused” by race in order to satisfy *Gingles*. In the Fifth and First Circuits, causation must be shown at the *Gingles* stage; in most other circuits, this issue has been shunted to the totality-of-circumstances stage. The courts have been imprecise in explaining the causation requirement, sometimes talking about the effect of candidate race on vote choice, and in other cases suggesting that the requirement might be about the “effect” of voter race.[[100]](#footnote-100) The former interpretation is probably the better reading of the causation requirement, both because it draws support from a key concurrence in *Gingles*, and because, as Professor Greiner and other methodologists have emphasized, the causal effect of voter race on vote choice is unknowable. [[101]](#footnote-101)

### What Is a Usual Election?

As we noted earlier, the Supreme Court in *Gingles* distinguished “usual” elections from those with “special circumstances,” positing that in some atypical cases racial-group vote shares may not reflect underlying political differences. Given the manageability concerns, one might expect the class of “special circumstances” elections to be limited as a matter of law to elections with certain discrete, objectively defined characteristics, such as long-established incumbents, more than two challenger candidates, or candidacies which postdate the filing of the lawsuit.

But instead of firm rules, most courts have opted for loose guidelines tied to what the courts sometimes call “probativeness.” For example, inter-racial elections are generally regarded as more probative than mono-racial elections, and elections to the governmental body at issue in the case (so-called “endogenous” elections) are customarily given more weight than elections to other governmental bodies (“exogenous” elections).

Within this rubric, the courts continue to disagree about some very basic matters. For example, should primary elections be included in the analysis? If so, should they receive more or less weight than general elections? Most courts include primary elections,[[102]](#footnote-102) and often give them particular emphasis on the theory that voting patterns in such elections are uncontaminated by partisan cues and therefore more truly reflect racial polarization in the community.[[103]](#footnote-103) On the other hand, primary elections are usually low-turnout affairs, and judges have been wary of inferring polarization from low-turnout elections, reasoning that in such races the electorate may be unrepresentative of the entire political community.[[104]](#footnote-104) Other judges downplay primary-election voting patterns because of the Supreme Court’s statement that “minority [voters] are not immune from the obligation to pull, haul, and trade to find common political ground.”[[105]](#footnote-105) The thinking here is that a candidate who splits the minority vote in a primary still ought to qualify as a “candidate of choice,” if she can muster support from a broad coalition of white and minority voters in the general election.[[106]](#footnote-106) In short, not only are there no clear rules for excluding or weighting primary election data, there is not even a consensus about whether polarization findings from primary elections should be upweighted or downweighted relative to findings from general elections.[[107]](#footnote-107)

The fluidity of the special circumstances doctrine and the probativeness rubric also leaves fact-finders with broad leeway to heed (or to ignore) “the political stories behind the election returns.” Judges have discounted voting patterns in particular elections because of such “story-based” determinations as:

• The minority candidate was “an attractive, well-known incumbent whose appeal cut across racial lines.”[[108]](#footnote-108)

• The minority candidate was “weak.”[[109]](#footnote-109)

• The appearance of cohesive voting could have been due to a “friends and neighbors” effect, *i.e*., voting for a candidate because he’s the hometown guy, rather than meaningful political commonality within a racial group.[[110]](#footnote-110)

• Weak minority turnout suggests disinterest in the race.[[111]](#footnote-111)

• The election concerned a ballot measure that was not shown to be of particular interest to the minority community,[[112]](#footnote-112) or a government body other than the one at issue in the case.[[113]](#footnote-113)

• The minority candidate was backed by a local, predominantly white political faction.[[114]](#footnote-114)

• The minority candidate was “an ex-pro athlete.”[[115]](#footnote-115)

Notably, no court outside of the Fourth Circuit requires plaintiffs to estimate racial voting patterns in all or a representative sample of elections in the relevant time period. What counts as an “unusual” election is therefore in the eye of the beholder, and not determined with reference to the normal range of variation in local elections.

### Geographic Scale

Some courts assess racial polarization at the geographic scale of the polity as a whole, or at least over the same region that the court uses to gauge “proportionality” between the number of minority opportunity districts and the minority’s population share.[[116]](#footnote-116) (Proportionality is often a central consideration at the totality-of-circumstances stage of vote dilution cases.) Other courts focus more narrowly on the plaintiff’s electoral district.[[117]](#footnote-117) In cases about at-large elections, there is no daylight between these approaches; the plaintiff’s electoral “district” is geographically coterminous with the polity. But in the more typical case today, addressing the configuration of single-member districts rather than the choice between districted and at-large elections, the scale issue may be very consequential. It determines whether minority voters in locally polarized subsets of a generally non-polarized state or city can bring a vote dilution claim. It may also affect whether opportunity districts for minorities in a relatively non-polarized area can be used to remedy dilution in more polarized areas.[[118]](#footnote-118)

## Whither Manageability?

The racial polarization test falls far short of its manageability aspirations. As things stand today, there are no established quantitative cutoffs to distinguish polarized from non-polarized communities, and there are no clear-edged rules about which elections to include in the polarization analysis. Racial assumptions play critical roles in judicial fact-finding about minority cohesion and in the identification of minority candidates of choice. (Racial assumptions are also baked into the statistical tools for estimating candidates’ vote shares by racial group. More on this in a moment.[[119]](#footnote-119))

To be sure, some broad guidelines are well established—interracial elections are more probative than same-race elections, endogenous elections are more probative than exogenous elections. But these guidelines hem in judicial discretion only at the margins. Given the general directive to weigh voting data in view of its “probativeness,” taking account of pertinent “special circumstances,” fact-finders are encouraged and in some circuits required to pay close attention to “the political stories behind the election returns.”[[120]](#footnote-120)

Yet it’s not as if the manageability aspirations have been lost on the courts. We see them manifested in, for example, the Second, Fourth, and Ninth Circuits “objective” definitions of minority candidate of choice;[[121]](#footnote-121) in the Fourth Circuit’s “representative sampling” requirement;[[122]](#footnote-122) in the occasional attempts to define minority political cohesion or white bloc voting using quantitative thresholds;[[123]](#footnote-123) and in the occasional pushback against liberal use of the special circumstances doctrine.[[124]](#footnote-124) The convention of determining minority cohesion through a rote analysis of minority vote shares for coethnic candidates (without paying much attention to the particulars of those candidates and their opponents) can also be understood as one means by which courts have tried to accommodate concerns about manageability.[[125]](#footnote-125)

The puzzle of racial polarization law is not that manageability concerns have been ignored, but that the various judicial efforts to build doctrine responsive to these concerns have gotten so little traction. That is to say, there has been no general movement toward an objective definition of “minority candidate of choice,” toward bright-line racial polarization cutoffs, toward the representative sampling requirement, or toward a limiting construction of the special circumstances doctrine. This is in marked contrast to the lower courts’ development of the first prong of *Gingles*; nearly all courts anticipated the Supreme Court’s decision in *Bartlett*, holding that plaintiffs must comprise a literal, numeric majority of the proposed remedial district.[[126]](#footnote-126)

Why hasn’t the law of racial polarization developed in keeping with the Supreme Court’s expectations? We turn to this next.

# The Fundamental Problems

The racial polarization test is supposed to be informative about preferences and political opportunity. Polarized voting per *Gingles* signifies that voters within a racial group mostly want the same things in the political sphere (preference cohesion),[[127]](#footnote-127) that voters in different racial groups mostly want different things (distance),[[128]](#footnote-128) and that this distance coupled with jurisdiction’s demographics and electoral system means that minority voters have insufficient opportunities to elect their “candidates of choice.”[[129]](#footnote-129)

The racial polarization inquiry is also supposed to be free of racial assumptions. The judge’s task is to learn whether the racial groups are *in fact* relevantly cohesive, without stereotyping minority or white voters in the process.

But as this Part will explain, there are three massive obstacles to the development of polarization test that is at once objective and consistently applied, uncontaminated by “prohibited” racial assumptions, and diagnostic of racial group cohesion and political opportunity within the meaning of Section 2.

The first fundamental problem, addressed in Part III.A, is the lack of an agreed-upon normative definition of racial vote dilution. Several competing theories *with very different implications for the polarization test* each have some support in the case law.

Part III.B explains the second problem: polarization in vote shares is an undependable proxy for polarization in political preferences. Not merely noisy, the signal is confounded by strategic behavior on the part of candidates, political elites, and voters. It is a huge stretch to assume, in line with the *Gingles* Court and many judges and commentators since, that the *average* degree of polarization in *typical* elections for the government body at issue is highly probative of polarization in underlying political preferences.

The third problem, the subject of Part III.C and the Appendix, is a function of the data used to estimate polarization. Honoring the directive to identify “voting preferences expressed in actual elections,”[[130]](#footnote-130) expert witnesses try to infer candidates’ vote shares by racial group from precinct-level vote totals and demographics. This exercise in “ecological inference” depends on racial homogeneity assumptions, which resemble those the Supreme Court has deemed “prohibited.”

## Normative Theory and the Diagnostic Value of the Polarization Test

Professor Guinier once quipped that the Voting Rights Act is a “statute in search of a theory.”[[131]](#footnote-131) Her observation still rings true today.[[132]](#footnote-132) To be sure, it is well settled that plaintiffs bringing racial vote dilution claims must prove that the potential “voting power” of their group has been reduced below some benchmark, fair level,[[133]](#footnote-133) and that there exists a reasonable, practicable remedy.[[134]](#footnote-134) But deep fissures remain concerning the definition of “voting power,” and the kinds of power-deprivation that the VRA makes actionable. This much is well understood in the legal academy,[[135]](#footnote-135) but we shall recount the story briefly, as it is important for understanding both the difficulties the courts have had in implementing the racial polarization test, and the challenges the courts face going forward.

The separate opinions of Justices Brennan, O’Connor, and White in *Gingles* seeded three very different ideas about the meaning of racial vote dilution, which we shall call, respectively, the *proportional representation*, *coalitional breakdown,* and *voter discrimination* theories.[[136]](#footnote-136) Justice Kennedy’s opinion for five Justices in *LULAC v. Perry* gestured toward yet another theory, still dim in its outlines, which we’ll call the *Perry* theory.

Most judicial opinions in vote dilution cases are nominally atheoretical. The judge simply goes through the motions of applying *Gingles* and then reviewing the Senate Report factors and anything else that seems relevant as part of the “totality of circumstances.”[[137]](#footnote-137) Yet it doesn't follow that the theories are inconsequential. To the extent that judges exercise discretion when applying the *Gingles* test, that discretion is likely informed by whatever theory the judge finds intuitively congenial, even if she does not articulate it. And as we’ll see in a moment, the theories have strikingly different implications for how to implement the *Gingles* test.

### Four Theories of Racial Vote Dilution

1. Proportional Representation Theory

Justice Brennan’s plurality opinion in *Gingles* embraced Blacksher and Menefee’s conception of vote dilution,[[138]](#footnote-138) which Justice O’Connor fairly characterized as “an entitlement to roughly proportional representation [for geographically and politically cohesive minority groups] within the framework of single-member districts.”[[139]](#footnote-139) On this view, voting power is defined in terms of the opportunity to elect ideally preferred representatives, and the fairness benchmark is proportionality: the ratio of the number of districts that provide the minority community with this opportunity to the total number of districts should roughly equal the ratio of the minority’s population to the total population.[[140]](#footnote-140)

Subsequent Supreme Court decisions, most notably *Johnson v. De Grandy* and *LULAC v. Perry*, strongly emphasize (without making decisive) the question of whether the minority community has the opportunity to elect “candidates of its choice” in rough proportion to its numbers. As for the lower courts, Professor Katz, after reviewing all published Section 2 cases through 2005, reports that liability rulings in the eighteen lawsuits where courts “made a finding on proportionality” were very highly correlated with that finding.[[141]](#footnote-141)

1. Coalitional Breakdown Theory

The coalitional breakdown theory begins with the premise that in a system of plurality-winner elections, there is nothing abnormal about a political minority being unable to elect its ideally preferred candidates.[[142]](#footnote-142) Political minorities obtain representation instead by banding together with others into an umbrella coalition that competes for control of the legislative body.[[143]](#footnote-143) A political minority’s vote is “diluted” if and only if it lacks the opportunities to participate in coalitional politics that political minorities normally enjoy. Racial vote dilution occurs when a racial minority that is also a political minority lacks such opportunities.

Rooted in the foundational 1970s cases of *Whitcomb v. Chavis*,[[144]](#footnote-144) and *White v. Regester*,[[145]](#footnote-145) as well as Justice Marshall’s dissent in *Mobile v. Bolden* (the case that Congress overruled in 1982),[[146]](#footnote-146)the coalitional breakdown theory found expression in *Gingles* through the concurrence ofJustice O’Connor. Criticizing Justice Brennan, O’Connor wrote that courts assessing the “voting strength” of a racial minority must consider “access to the political process generally,” not just opportunities to elect most-preferred candidates.[[147]](#footnote-147) She developed this idea further in *Georgia v. Ashcroft*, a case that arose under Section 5 rather than Section 2 of the VRA.[[148]](#footnote-148) Writing for five Justices, O’Connor held that minority voting power encompass all forms of actual or potential political influence, including the ability to elect minority “candidates of choice,” influence over other legislators, and opportunities for minority representatives to serve in legislative leadership positions as part of the majority coalition.[[149]](#footnote-149)

The Court’s post-*Georgia* decisions in *League of United Latin American Citizens (“LULAC”) vs. Perry*[[150]](#footnote-150) and *Bartlett v. Strickland*[[151]](#footnote-151)strongly suggest, however, that the coalitional breakdown theory may not be used as a sword by racial minorities.[[152]](#footnote-152) Per *LULAC*, vote dilution claims cannot be predicated on mere lack of “influence,” as opposed to the inability to elect “candidates of choice.”[[153]](#footnote-153) Similarly, the *Bartlett* plurality declares, “Nothing in § 2 grants special protection to a minority group’s right to form political coalitions [with majority-race voters].”[[154]](#footnote-154)

Yet the coalitional breakdown theory may still be available to defendants as a shield.[[155]](#footnote-155) Referencing *Ashcroft*’s discussion of “influence” and “crossover” districts, the *Bartlett* plurality states, “Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act.”[[156]](#footnote-156) The (arguable) implication is that defendants can escape liability under Section 2 by structuring electoral systems so as to integrate minority groups into competitive political coalitions. The VRA allows state and local governments to make the “political choice of whether substantive or descriptive representation is preferable.”[[157]](#footnote-157)

The coalitional breakdown theory nicely rationalizes a number of lower court decisions that reject liability even though the minority group was unable to elect a roughly proportional number of its candidates of choice, and more majority-minority districts could have been drawn. Courts finding for the defendant notwithstanding a lack of proportionality have often pointed to circumstances such as: robust mobilization of minority voters and rough parity in turnout rates, minority participation in candidate slating, the nomination and election of minority-race candidates (even if they are not minority “candidates of choice”), and government responsiveness to the particularized interests or needs of the minority community.[[158]](#footnote-158) Viewed together, such facts tend to indicate that the minority group has been incorporated into the normal push and pull of coalitional politics, even if it cannot usually elect a roughly proportional number of its ideal candidates.

1. Voter Discrimination Theory

In contrast to the proportional representation and coalitional breakdown theories of vote dilution, the voter discrimination theory emphasizes the *reasons* why minority-preferred candidates lost. The core issue is disparate treatment: whether white voters give less support to minority candidates than to otherwise similar white candidates.[[159]](#footnote-159)

Justice White’s concurring opinion in *Gingles* launched the voter discrimination theory.[[160]](#footnote-160) White joined most of Brennan’s opinion, but forcefully rejected Brennan’s premise that “there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates.”[[161]](#footnote-161) Justice White surmised that Brennan’s test would require a finding of polarization if whites vote as a bloc for Republicans and blacks for Democrats, even if whites are perfectly willing to support black Republicans.[[162]](#footnote-162) “This is interest-group politics,” he lamented, “rather than a rule hedging against racial discrimination.”[[163]](#footnote-163)

Riffing on Justice White’s opinion, influential judges on the First, Second, Fifth, and Eleventh Circuits have further developed the voter discrimination theory.[[164]](#footnote-164) But most courts have said that while evidence of voter discrimination deserves some weight[[165]](#footnote-165)—maybe *a lot* of weight[[166]](#footnote-166)—at the totality of circumstances stage of a vote dilution case, subjective discrimination by voters (or conventional state actors) is not a necessary condition for liability under Section 2.[[167]](#footnote-167) The notion of giving some, rather than decisive, weight to evidence of voter discrimination seems more in keeping with the coalitional breakdown theory, as voter discrimination is one of several factors that could make it difficult for racial minorities to participate in normal coalitional politics.[[168]](#footnote-168)

1. The *Perry* Theory?

Breaking with previous vote dilution jurisprudence, the Supreme Court in *LULAC v. Perry* held that Texas’s reconfiguration of an existing majority-minority district violated Section 2, even though Texas did not change the number of majority-minority districts, which remained proportional to the minority’s population share, and even though the trial court had found that the substantially reconfigured district was more likely to elect a minority candidate of choice than the previous district.[[169]](#footnote-169)

The reconfigured district was “not compact,” wrote Justice Kennedy, because it combined two geographically and socioeconomically distinct Latino communities. Because of this, he continued, it should not count in the proportionality analysis. But the really revolutionary idea came next. Even assuming that shortfall from proportionality was “insubstantial,” “that…would not overcome the other evidence of vote dilution *for Latinos in District 23*.”[[170]](#footnote-170)

Whereas the proportional representation, coalitional breakdown, and even, arguably, the voter discrimination theory focus on aggregate opportunities for the minority group throughout the defendant jurisdiction,[[171]](#footnote-171) the *LULAC* Court took the view that a particular geographic cluster of minority voters could suffer “dilution” irrespective of the representational opportunities available elsewhere to the minority group.

Yet since *De Grandy*, it’s been settled that majority-minority districts need not be created for every “potential majority” cluster of minority voters. So what exactly was the problem with Texas’s dismantling of District 23? Commentators and lower courts have puzzled over this question. One possibility is that *LULAC* turned on the appearance of intentional discrimination. Kennedy wrote that the state’s dismantling of a majority-minority district whose voters were about to unseat a disliked incumbent “b[ore] the mark” of intentional discrimination.[[172]](#footnote-172) Section 2 on this reading prohibits not only state actions that were in fact intentionally discriminatory, but also those as to which there is some visible (but perhaps equivocal) evidence of intentional or disparate-treatment discrimination.[[173]](#footnote-173)

*LULAC* can also be read for the proposition that Section 2 protects all “naturally occurring” majority-minority districts, i.e., those likely to be drawn by a politically neutral redistricter applying traditional criteria such as compactness, respect for communities of interest, and minimization of political subdivision splits.[[174]](#footnote-174) Building on this reading of *LULAC*, Judge Easterbrook for the Seventh Circuit recently wrote that the failure to draw a majority-minority district violates Section 2 only if the defendant created fewer compact majority-minority districts than a politically neutral computer algorithm likely would have drawn.[[175]](#footnote-175)

The “appearance of discrimination” and “naturally occurring opportunity district” glosses on *LULAC* are close kin, because reasonable observers may fairly wonder whether a state has acted for discriminatory reasons if it willfully departs from traditional districting principles and thereby fragments a cohesive minority community into districts where it is powerless.

### Implications for the Polarization Test

For the *Gingles* factors to speak to liability, they must say something about whether the distribution of political preferences in the defendant jurisdiction creates a risk of vote dilution, and, conditional on such a risk, about whether the state has done enough to mitigate it. (In the extreme case where the distribution of political preferences among white and minority voters is identical, there would be no possibility of racial vote dilution. The minority group would lack distinct political interests, and minority voters’ opportunity to elect representatives they prefer would be unaffected by the racial makeup of electoral districts.)

As this section explains, the four theories of racial vote dilution have quite different implications for what is a “legally significant” distribution of political preferences across racial groups—that is, a distribution that presents a significant risk of unlawful vote dilution—and also for the representational opportunities that state and local governments must provide where such preference distributions exist. We will also see that many of the lower courts’ disagreements about how to implement the racial polarization test are precisely the disagreements one would expect to find if different judges subscribed, *sub silentio*, to different normative theories of dilution.

1. Geographic Scale of the Polarization Inquiry

If the *Gingles* conditions were just about potential remedies, it would make sense to apply them at the scale of the plaintiff’s electoral district. Proof that that a geographic cluster of minority voters cannot now elect their preferred candidates but would be able to do so in the proposed remedial district establishes that minority “voting strength” can be increased, which is necessary for dilution to be remedied.[[176]](#footnote-176)

But if the *Gingles* test is to be diagnostic of liability, paring the universe of potential claims down to a smaller number presenting serious risks of a statutory violation, then the appropriate geographic scale will vary with one’s theory of dilution. The PR and coalitional breakdown theories require a polity-wide assessment of minority cohesion and white bloc voting, since the theories focus on the minority’s representational opportunities within the legislature as a whole.

The same may be true of the voter discrimination theory, although this is uncertain because the voter discrimination theory, though pellucid in what it condemns (voter discrimination), is less clear about what constitutes a “legally sufficient” representational opportunity for racial minorities in the teeth of voter discrimination. One might posit that an electoral system should be deemed compliant if the racial minority enjoys a realistic opportunity to elect a roughly proportional number of minority-race candidates in the jurisdiction as a whole, notwithstanding voter discrimination. Or the system might be held complaint if the number of districts where minority candidates are disadvantaged by voter discrimination is offset by an equal number where the median voter prefers minority-race candidates over otherwise similar white candidates.[[177]](#footnote-177) Then again, one might argue that if voter discrimination is particularly pronounced in certain neighborhoods or regions of the defendant jurisdiction, compliance with Section 2 should be assessed solely in terms of the representational opportunities provided for minority voters in the “problem” area.

The *Perry* theory, uniquely, compels a district-specific polarization inquiry. It is concerned with commonality among distinct territorial communities that could form local, district-level majorities. If Asian-Americans in one neighborhood are liberal Democrats and Asians in another are conservative Republicans, each Asian community could in principle claim dilution under the *Perry* theory, provided of course that it could form a majority of a “natural” legislative district. By contrast, the political distance between these Asian communities would preclude a vote dilution claim if political cohesion were assessed at the scale of the polity, as the PR and coalitional breakdown theories suggest.

Similarly, the *Perry* theory calls for “white bloc voting” to be assessed at the level of the plaintiffs’ current legislative district, rather than throughout the jurisdiction. If a district-level white majority has radically different political preferences than the minority voters, this implies that the district was not drawn in accordance with “community of interest” districting principles. By contrast, if the local white majority’s political aims are not so discordant with those of minority voters in the district, the state’s failure to draw the majority-minority district sought by plaintiffs is less likely to look like a grave, discriminatory departure from traditional districting criteria.

1. Forms of Racial Group Cohesion

Beyond the issue of geographic scale, the theories of dilution rest on different ideas about the type of preference cohesion within and divergence between racial groups that triggers state obligations under Section 2.

The sharpest contrast is between the PR and voter discrimination theories. The former requires the minority community to be strongly politically cohesive, to hang together not simply as Democrats or as Republicans but as a political faction that could be expected to form its own party in a system conducive to multi-party politics. The point of Section 2 under PR theory is to provide racial groups with the opportunity to elect authentic champions for their interests, and if a racial minority in the defendant jurisdiction has no distinctive interests beyond the commonalities it shares with the other members of a bridging, umbrella-like political party, there is no occasion for judicial intervention.[[178]](#footnote-178)

The voter discrimination theory, by contrast, is largely indifferent to minority cohesion. If the purpose of Section 2 is to remedy discrimination by majority-race voters, then any minority group whose members would prefer not to be discriminated against should be deemed cohesive. This minimal form of cohesion should probably be presumed as a matter of law. Notice too that under voter discrimination theory—unlike PR theory—there is not a monotonic relationship, *ceteris paribus*, between polarization on the relevant dimension of political preference (candidate race) and the strength of the plaintiff’s claim. Racial polarization with respect to candidate race could reflect minority voter discrimination against white candidates. While this need not foreclose a vote dilution claim under the voter discrimination theory of Section 2, presumably the theory would not reward it.

It should also be clear that under PR theory, polarization on the dimension of candidate race is neither necessary nor sufficient for the racial groups to be deemed cohesive. The existence of strong political commonality within and distance between racial groups might induce voter discrimination on the basis of candidate race, but then again it might not, and either way it’s the political commonality not the discrimination that matters under PR theory.

The hallmarks of a “legally significant” preference distribution are less clear under the coalitional breakdown and *Perry* theories of dilution. The *Perry* theory seemingly requires the minority and white communities to be sufficiently distinct such that their inclusion in the same district amounts to a serious departure from traditional, “community of interest” districting criteria. As for the coalitional breakdown theory, one might posit that because the theory aims to integrate minorities into broad coalitions, a minority group should be deemed cohesive if its members have enough in common for a partisan umbrella coalition (under “normal” conditions) to make a pitch for the minority’s support. Then again, a pragmatic court seeking to limit the reach of Section 2 might venture that the risks of race-related coalitional breakdowns are not severe unless white voters discriminate against the racial minority, or the minority has dramatically different political preferences from whites overall.

The competing normative theories make sense of several features of the law of group cohesion as it has developed in the lower courts. One is the conflict, noted earlier, about whether vote-share data from primary elections should receive more or less weight than data from general elections. Judges who subscribe to the PR theory naturally look to primary elections, to see whether the minority community hangs together within a political umbrella coalition, whereas judges who subscribe to the voter discrimination need not give primaries special emphasis.

Also illuminated is the circuit split about whether white bloc voting must be “caused” by the race to be legally significant (e.g., do minority candidates receive less white-voter support than otherwise similar white candidates?). The voter discrimination theory answers this question affirmatively; the proportional representation theory says it is immaterial; and the coalitional breakdown theory treats voter discrimination as relevant but not decisive and therefore, presumably, a factor to be weighed at the “totality of circumstances” stage of a Section 2 case (the position of most circuit courts).

1. Who Is a Minority “Candidate of Choice”?

White bloc voting per *Gingles* is legally significant only if it “usually” results in the defeat of minority candidates of choice, but who are these “candidates of choice”? Under PR theory, they are the ideal or nearly ideal champions of the minority community. But under the coalitional breakdown theory, most any candidate of the umbrella coalition preferred by the minority community should count as a minority candidate of choice—since compliance under this theory is signaled by the minority’s integration into a competitivepolitical coalition, rather than its ability to elect ideally preferred candidates.

The PR theory supports the Third and Tenth Circuit’s practice of considering only those elections contested by an authentic champion of the minority community, as determined by the court’s “detailed, practical” evaluation of the candidate’s campaign and positions.[[179]](#footnote-179) For courts that regard this inquiry as judicially unmanageable, the PR theory arguably suggests—in keeping with the Second Circuit—that a candidate is probably a “candidate of choice” only if she received very strong minority support in a primary election.[[180]](#footnote-180)

By contrast, the coalitional breakdown theory attaches no particular significance to the defeat of minority champions in primary elections. Seeking to maintain influence within a coalition, a political minority might from time to time field ideally preferred candidates in primary elections. Even if the primary challenge fails, it may signal that minority faction is a force to be reckoned with and thereby strengthen its position within the coalition. Polarized voting in primaries contested by a minority candidate of choice no more implies that the minority is excluded from the normal pull and push of coalitional politics than polarized primary voting between Tea Partiers and mainstream Republicans signals that Tea Partiers have inadequate sway within the Republican coalition.

The coalitional breakdown theory lends some support to the Fourth Circuit’s rule requiring plaintiffs to produce evidence from a “representative sampling” of elections, as well as the Fourth Circuit’s definition of minority “candidate of choice” as any candidate who won a majority of the minority votes. Since the theory presupposes that in a system of plurality-winner elections, no group gets to elect its ideal candidates, there is no need for a particularized judicial inquiry into *how* ideal a given candidate is. A breakdown in coalitional politics can be said to have occurred, however, if data from a representative sample of elections show that the minority community almost always votes cohesively for losing candidates. This would suggest that there is some significant barrier to the minority community forming potential-winning coalitions with other voters.

Consider next the voter discrimination theory. A judge who accepts this theory needs to learn whether non-plaintiff-race voters give less support to plaintiff-race candidates than to otherwise similar white candidates. It follows that *any* election with a minority-race candidate is at least potentially helpful for determining the legal significance of white bloc voting, regardless of whether the minority-race candidate has much backing in the minority community. The voter discrimination theory thus lends support to the Fifth and Seventh Circuit’s practice of equating “minority candidate of choice” with “minority-race candidate”[[181]](#footnote-181)—not because minority-race candidates necessarily are, in fact, preferred by minority voters, but because the central legal question concerns the response of other voters to minority candidates.[[182]](#footnote-182)[[183]](#footnote-183)

Similarly, because the voter discrimination theory aims to counteract voter discrimination against minority-race candidates but does not actually disallow such discrimination, it makes sense to assess compliance with Section 2 in terms of whether the defendant has structured its electoral system so as to enable the election of candidates who belong to the discriminated-against class, whether or not the candidate closely approximates the ideal candidate of the minority community.

What about the *Perry* theory? Because this theory as applied in the namesake case focuses on objective commonalities among minority voters rather than subjective preferences, it may not have much to say about the definition of minority “candidate of choice.” But, analogizing to the facts of *LULAC v. Perry*, one might venture that a minority candidate of choice is any candidate whom most minority voters in the district would prefer to the incumbent.

1. “Usual” Defeat of Minority-Preferred Candidates

*Gingles* tied thelegal significance of white-bloc voting to the “usual defeat” of minority-preferred candidates. “Usual defeat” is essentially a test of state accommodations for minority voters. Has the state done enough to enable minority representation (“voting strength”), given the distribution of preferences in the electorate?

The four theories of vote dilution put quite different obligations on the state, and therefore suggest different definitions of “usual defeat”—provided of course that *Gingles* test is meant to be diagnostic of liability.

Under the *Perry* theory, one might say that minority-preferred candidates are “usually defeated” whenever it is substantially harder for them to get elected in the challenged district than it would be in the “natural” remedial district that the plaintiffs propose.

Under the PR and coalitional breakdown theories, “usual defeat” must be assessed at a larger geographic scale—the polity as a whole—if the *Gingles* test is to separate strong from weak claims.[[184]](#footnote-184) Per PR theory, usual defeat means “defeated at such a rate as to signify that the minority lacks a fair opportunity to secure roughly proportional representation.” The coalitional breakdown theory asks instead whether minority-preferred candidates consistently fail to win *a majority of the seats* in the legislative body, as the purpose of the theory is to integrate racial minorities into competitive umbrella coalitions.

What about the voter discrimination theory? As we noted earlier, this theory leaves some ambiguity about what constitutes an adequate representational opportunity for minority voters in the face of white-voter discrimination. Perhaps proportional descriptive representation is enough, at least if the minority representatives aren’t stalking horses for a dominant political faction opposed to the minority’s agenda. Or perhaps the state must make some effort to offset white voter discrimination, e.g., by creating an equal, offsetting number of districts in which the median voter is likely to favor minority-race candidates, or by trying to design districts so that white-voter discrimination is unlikely to determine outcomes.

### Summary

We saw earlier that the lower courts have split on a number of recurring issues in the analysis of racially polarized voting, including the relevance of mono-racial elections, the weight to be given to polarization evidence from primary as opposed to general elections, the definition of minority “candidate of choice,” the proper geographic scale of the analysis, and whether white-bloc voting must be “caused” by race discrimination to be legally significant.[[185]](#footnote-185) Only the last of these issues is conventionally understood to reflect a core, normative disagreement over the meaning of racial vote dilution.[[186]](#footnote-186) But as this section has shown, the competing theories of racial vote dilution have conflicting implications on each of these fronts. To the extent that governing doctrine leaves fact-finders with discretion about which elections to include in the polarization analysis, how to weight them, and where to draw the line between polarized and nonpolarized voting, inconsistent applications of the polarization test are an inevitable byproduct the normatively unsettled state of vote dilution law.

## Votes and Preferences: Of Inferential Limits, Racial Assumptions, and “The Political Stories Behind the Election Returns”

Even if the Supreme Court were to announce that Section 2 supports only one theory of racial vote dilution, which the Court then carefully explained, it would still be extraordinarily difficult (we think impossible) for the courts to develop an objective, constraining threshold test based on crosstabs of vote shares by race—unless the courts rely very heavily on racial assumptions.

The root of the problem is a mistaken premise. The *Gingles* Court implicitly assumed that there is an approximately linear relationship between the average level of racial polarization in “usual” elections in the defendant jurisdiction, and the degree of racial polarization in underlying political preferences.[[187]](#footnote-187) Similarly, it has often been assumed that a candidate’s minority vote share signals how close she is to being the platonic candidate of the minority community.[[188]](#footnote-188)

These assumptions are untenable in a world of strategic political actors. Subsection (1) develops our point theoretically. Subsection (2) provides an illustration using data from a survey experiment. Subsection (3) considers how courts might reasonably use vote-share data, in light of the problems identified in the preceding subsections. Though we suggest a few ways to improve on current practices, the main takeaway is that the conflict we saw in the case law—between, on the one hand, the courts’ wish to avoid strong racial assumptions, and, on the other, the courts’ desire for an objective, easy to apply polarization test—is essentially unavoidable. And even if the courts were willing to make strong racial assumptions, *Bartlett*-style numeric polarization cutoffs would only succeed in targeting the most polarized communities under very unusual conditions. Specifically, the mix of observed candidate matchups in each community must be essentially identical.

### Candidate Attributes, Strategic Behavior, and Polarized Voting

There is no necessary, logical relationship between racial polarization in political preferences and polarization in vote shares. Extreme preference polarization is compatible with unpolarized voting, and minimally polarized preferences may sometimes yield extremely polarized voting.

To see this, consider a simple model in which voters care about their representative’s ideology, race, and valence quality (e.g., probity, work effort, and intelligence). Imagine further that white and minority voters have exactly the same preferences for candidate ideology and valence traits, but that most voters slightly prefer coethnic representation. In a biracial election between two candidates of similar quality positioned at the midpoint of the ideological spectrum, extreme racial polarization is likely to occur. Because race is the only difference between the candidates, a slight preference for coethnic representation will translate into extremely polarized voting. Also, in this scenario, the difference between, say, bloc voting at the 60% level and at the 90% level, is a function not of the *intensity* of voters’ preference for coethnic representation, but rather of its within-group commonality*.*

Now imagine another world in which there is very strong racial polarization on the ideology and race dimensions. White voters prefer much more conservative candidates than do minority voters, and voters of both racial groups are also willing to sacrifice a lot of candidate quality in order to elect coethnic candidates. Will we observe strong racial polarization in voting? It depends. In an election between two candidates *of the same race* positioned at the ideological midpoint, polarization is unlikely—the candidates are differentiated only by their valence quality, which by construction all voters value similarly. In a race between a conservative minority candidate and a liberal white candidate, polarization is also unlikely; the matchup forces voters in each group to trade off their preferences for racial and ideological proximity. But if a liberal minority candidate faces off against a conservative white of similar quality, extreme racial polarization will result; minority (white) voters are closer to the minority (white) candidate on both the ideological and the race dimension, and the contest doesn’t require voters to make tradeoffs between their preferences for ideological and racial representation, and their preference for candidate quality.

Now, one might respond that these examples are unusual, and that unusual elections will not lead to mistaken polarization inferences so long as the court averages a large number of elections, or excludes outliers (as *Gingles* instructs). This response would be compelling if all elections took the form of two-candidate matchups in which the candidates’ attributes were determined by independent random draws from some pool of “potential candidate attributes,” and all voters had very good information about the candidates. In two-candidate, plurality-winner elections, there is no incentive for strategic voting, so votes can be interpreted as sincere expressions of preference.[[189]](#footnote-189) And if the candidate themselves are, in effect, just random clusters of attributes independently drawn from the pool of potential candidate attributes, then differences across jurisdictions and over time in the average level of racial bloc voting will correspond to differences in underlying political preferences.

To see the intuition here, imagine that candidates differ only on the dimension of ideology. If all elections were contests between a slightly left-of-center candidate and a slightly right-of-center candidate, then extremely polarized voting would be likely if (say) the vast majority of minority voters were slightly left of center and the vast majority of white voters were slightly right of center. The resulting inference of a “big difference” between white and minority voters on the ideology dimension would be mistaken. Now imagine a counterfactual world in which each candidate’s ideology is determined by a random draw from the uniform distribution on the interval of potential ideology.[[190]](#footnote-190) Some elections feature two conservative candidates; other elections involve two liberal candidates; still others a centrist and a liberal; others a conservative and a liberal; and so forth with no two candidates exactly alike. If minority voters are slightly left of center and white voters slightly right of center, racially polarized voting would not occur in most of these elections. Specifically, white and minority voters would back the same candidate in every election between a center-left and a far-left candidate, or a center-right and a far-right candidate.

In a world of randomized candidates without strategic voting, it would also be easy enough to say how close a candidate is to being the ideal candidate of the minority community. If a given candidate runs in many elections and usually gains a strong supermajority of the minority vote, she is almost certainly close to ideal. No matter whom she’s matched up against, she wins the minority vote in a landslide. Even if most candidates run only once, it would still be straightforward to estimate the minority community’s valuation of different candidate attributes, and to ground “candidate of choice” determinations on estimated preferences over attributes.[[191]](#footnote-191)

\* \* \*

The world of randomized candidates represents an interesting thought experiment, but it bears no resemblance to actual politics. Political scientists have long realized that electoral systems create incentives for strategic behavior—by voters, by candidates, by parties, and by other political elites.[[192]](#footnote-192) Observed, real-world candidates are strategically composed, as it were, by a variety of political elites seeking to advance their respective interests, including potential candidates, campaign donors, endorsers, political party organizations, and in some jurisdictions slating organizations. All of these actors operate in a strategic environment that is jointly determined by electoral institutions; the distribution of preferences within the eligible electorate; the distribution of civic engagement within the eligible electorate (interest in voting and attention to the campaign); and of course the existence and behavioral tendencies of other political elites.

Consider just a few examples of how these factors result in systematic differences across jurisdictions, districts, and types of elections in the candidate matchups that are observed, and in the balance between sincere and strategic voting.

*Primary vs. General Elections*. Primary elections are likely to present much stronger incentives for strategic voting than general elections, both because of the number of serious candidates in some primary races, and because many voters’ most-preferred primary candidate may be unelectable in the general election, given the distribution of preferences in the full electorate and the expected attributes of the other party’s nominee.

*Strong vs. Weak Slating Organizations*. In a world with powerful slating organizations, a strong candidate in each election is likely to hew to the slating organization’s positions. In a world without such gatekeepers, one may observe more diversity in candidates’ issue positions, or packages of positions.

*Nonpartisan vs. Partisan Elections*. Nonpartisan elections remove one of the primary centrifugal forces operating against the standard Downsian incentive for candidates to position themselves at the “ideal point” of the median voter. Because of this, there is likely to be less ideological distance on average between the candidates in a world of nonpartisan elections. On the other hand, there is likely to be greater heterogeneity in candidates’ positions, and also a greater failure on the part of voters to see and respond to candidates’ positions.[[193]](#footnote-193)

*Instant-Runoff vs. Plurality-Winner Elections*. Proponents of so-called “instant runoff” or “rank choice” voting have persuaded a number of cities to adopt this institution, arguing that it frees voters from the dilemma of choosing between their ideal candidate and some more electable but not very exciting alternative. If voters’ behave accordingly, then first-choice votes in RCV elections should tell more about preference polarization than votes in ordinary plurality-winner elections.

*Racist vs. Nonracist White Voters*. In a world in which white voters are reluctant to support minority-race candidates, minority candidates are less likely to run, and less likely to be successful raising money and garnering endorsements. Those minority candidates who do run are likely to be very different from “usual” minority candidates in an otherwise identical world without white voter discrimination.[[194]](#footnote-194)

\* \* \*

Further examples could be multiplied *ad infinitum*. But to see how these issues play out in a real-world setting, consider the well-known case of *LULAC v. Perry*, which nicely illustrates how strategic behavior may result in the most probative of candidate matchups not occurring, as well as the risk of mistaken inferences from vote shares in the races that do occur.

 At issue in *LULAC* was an unabashedly partisan gerrymander of Texas’s congressional districts.[[195]](#footnote-195) Among other things, the Republican gerrymander broke up a district with a substantial black population—but not a black majority—that the white Democrat Martin Frost had long represented.[[196]](#footnote-196) Black plaintiffs argued that Martin Frost was their “candidate of choice,” from which it followed that Frost’s district, though not majority-minority, was nonetheless a black opportunity district.[[197]](#footnote-197) (Assume for purposes of this discussion that the court follows the PR theory of vote dilution.)

The courts struggled with the question of whether Frost was a black candidate of choice. (They were unwilling to go on vote shares alone.[[198]](#footnote-198)) Frost had represented substantially the same district for more than 20 years and had never faced a black challenger.[[199]](#footnote-199) Local politicos offered inconsistent testimony about whether the black community *really* loved Frost or, if given a choice, would prefer some other champion of their community.[[200]](#footnote-200)

Why hadn’t plaintiffs been given that choice? One explanation is strategic abstention by would-be challengers. If Frost was the ideal or near-ideal candidate of the black community, no black politician worth his salt would bother mounting a primary challenge against him. The absence of black challengers is thus consistent with the plaintiffs’ argument that the black community was politically cohesive and that Frost was a minority candidate of choice.

But the absence of a black challenger is also consistent with the hypothesis that the black community was cohesive and that Frost was *not* a black candidate of choice (with candidate of choice defined per PR theory). Black voters were a numerical minority in Frost’s district. If they had sharply different preferences from other voters, their backing of an ideally preferred candidate in the primary—if successful—might well have resulted in a white Republican winning the general election, someone whom black voters would greatly disfavor relative to Frost. The prospect of strategic black voting for Frost could have led authentic black candidates of choice to abstain from running.

Assume for the sake of argument that the black community in Texas was politically cohesive (within the meaning of PR theory), and that an authentic black candidate of choice had emerged to challenge Frost. Assume further that the black community split its vote in this election. The divided black vote would count strongly against minority political cohesion if the judge follows the convention of measuring cohesion through vote shares in interracial elections, giving particular weight to primaries.[[201]](#footnote-201) Yet the split vote might well have been an artifact of divisions within the black community about whether to vote strategically or sincerely; or of heterogeneity within the black community with respect to knowledge about the ideally preferred black candidate’s prospects in the general election; or even of heterogeneity with respect to the tradeoff between representation by a senior, powerful Member of Congress, versus representation by a junior, less influential member whose policy positions are closer to the minority community’s. The split vote certainly would not establish that the black community lacked “common [political] beliefs, ideals, principles, and agendas”[[202]](#footnote-202); by hypothesis, the black community was cohesive in precisely this sense.

Even when voters have no incentive to vote strategically, strategic behavior by candidates and other elites such as major campaign donors can lead to badly mistaken inferences about preference distributions. Consider a stylized example, in which the elections are single-stage (no separate primary), only two candidates run in each election, the racial minority is a political minority, and white voters substantially prefer white candidates to otherwise similar minority candidates. There is a fixed pool of potential minority candidates, some of whom are good fundraisers with strong valence qualities, and others of whom are weak. Which minority candidates will select into running? If any run, it is likely to be the bad types. Strong potential candidates probably have better things to do with their time than run for office in districts they have little chance of winning. Faced with a choice between a bad-type minority candidate and a good-type white candidate, the minority community might split its vote, with some members voting their valence preference and others their preference for policy or descriptive representation. This split vote could occur even if all minority voters have exactly the same ideal point on the policy dimension and exactly the same preference for descriptive representation.

Moreover, if only weak minority candidates select into running, observed white voting patterns may suggest disparate treatment (the core question per voter discrimination theory) when in fact little or none occurs. Assume for example that white voters give less support to minority Democrats than to white Democrats—a phenomenon that courts and commentators have often treated as the *sine qua non* of voter discrimination.[[203]](#footnote-203) This might reflect disparate treatment, but it could also be an artifact of the observed minority candidates’ weak valence traits. Note that an incentive for strong potential minority candidates not to run can result from factors other than a white preference for white representation. For example, if white voters tend to be conservative and most potential minority candidates are very liberal, strong minority candidates may elect not to run because they are ideologically out of step. A court that inferred disparate treatment from white voters’ lack of support for minority Democrats relative to white Democrats could be doubly in error: white voting patterns may reflect ideological as well as valence differences between minority candidates and the white candidates whom the court treats as counterfactuals.

Then again, strategic behavior in anticipation of white voter discrimination may lead courts to make grave errors about who is a “high quality” or “low quality” candidate, and in consequence to badly understate white voter discrimination.[[204]](#footnote-204) Candidate quality—in the sense of innate appeal, work effort, intelligence, etc.—is difficult to gauge. So it is natural for judges to rely on proxies, *i.e.*, signals of quality from people with better information, such as major campaign donors and endorsers. But big donors and endorsers, being strategic, are unlikely to back a candidate who has little chance of winning. If white voters discriminate against minority-race candidates, minority candidates are unlikely to secure substantial financial support and important endorsements unless they are truly extraordinary.

If the court, trying to assess disparate treatment, were to compare white vote shares for minority candidates with a given level of financial/endorsement support, to white vote shares for white candidates with similar financial/endorsement support, the court would be treating intrinsically ordinary white candidates as counterfactuals for intrinsically extraordinary minority candidates.[[205]](#footnote-205) This would bias downward the estimate of disparate treatment. On the other hand, if the court were to ignore variation in financial support, the court might end up comparing intrinsically low-quality minority candidates with high-quality white candidates (because of selection effects), thereby overestimating the disadvantage that minority candidates suffer because of their apparent race or ethnicity.

Similar problems complicate efforts to infer polarization on the policy/ideology dimension, even if one conditions on same-race, two-candidate matchups. Strong candidates who are ideologically out of step with the district are unlikely to select into running. The true extent of polarization on the ideology dimension may be obscured by minority citizens’ failure to vote for weak candidates whose issue positions are actually closer to the minority median than the issue positions of his opponent.

Courts have long recognized that the inferences about racial polarization from any one election may be tenuous.[[206]](#footnote-206) Litigants are expected to present evidence from a number of elections over a period of time.[[207]](#footnote-207) But the problem we’re discussing arises from systematic political incentives, not random variation in candidate traits. Aggregating data from a number of elections over a period of years does not make it go away.

### Evidence from a Survey Experiment

To further illustrate the limits of inference from average vote shares, we report results from a series of experiments in which we created the counterfactual world of fully randomized candidates and no incentive for strategic voting.[[208]](#footnote-208) Candidates were represented with a name and photograph, chosen so as to clearly signal the candidate’s race or ethnicity (white, black, or Latino/Hispanic). Respondents were informed about the candidates’ education, military service, endorsements, and one additional piece of personal information. We established a set of possible values (“levels”) for each of attribute, and independently randomized attribute levels for each candidate. Figure 3 provides a screen shot of a hypothetical respondent’s choice task; Table 3 shows the possible levels for each attribute.

Our randomization protocol ensures that there is no systematic relationship between a candidate’s race and any of his other characteristics or any characteristics of his opponent. Randomization thus eliminates the problem of candidate selection effects from strategic behavior. Also, because respondents were asked to choose between pairs of candidates, they had no incentive to vote strategically.

Though each respondent saw only eight matchups, it follows from randomization that, in expectation, the distribution of white, black, and Latino voter preferences in each “election” (candidate matchup) is identical.

Let’s say we’re in a circuit—like the Third or the Tenth—in which judges focus the polarization analysis on races contested by minority candidates who are “sponsored” by the minority community.[[209]](#footnote-209) In our setup, this means black candidates with the NAACP endorsement, and Latino candidates endorsed by NCLR.

 Matched up against “fully randomized” white candidates—candidates who could have any level for any attribute other than race/ethnicity, these black candidates of choice on average earn about 54% of the black vote, 35% of the Latino vote, and 34% of the white vote. Latino candidates of choice earn 57% of the Latino vote, 47% of the black vote, and 36% of the white vote. (These results are from a convenience sample of Amazon Mechanical Turk workers, who are younger and more liberal than the national electorate. The vote shares we report here would no doubt be different if we had a more representative sample.)

For courts that treat “60%” as a rough threshold for group cohesion,[[210]](#footnote-210) these results suggest that the black and Latino communities in our sample are at best marginally cohesive. But these average vote shares conceal a lot of variation. Note, for example, that in our study most of the endorsers are liberal groups. This means that a “fully randomized” white candidate is on average moderately liberal. Minority race, minority endorsed candidates are also perceived as liberal.[[211]](#footnote-211) This may explain why the level of minority bloc voting in our study perhaps seems low.

How does bloc voting change if the white candidate pitted against the minority candidate of choice has a conservative endorsement? We can examine this by subsetting the data to cases where the white candidate matched up against a black or Latino “candidate of choice” was endorsed by the Republican Party or the Chamber of Commerce. In these matchups, Latino voters support their “candidate of choice” 76% of the time with white voters backing the white conservative 60% of the time. Black voters support their “candidate of choice” 57% of the time with white voters favoring the white conservative 62% of the time. In each case, the fraction of the minority vote going to the minority candidate of choice increased, and indeed in the Latino case the increase was a startling 19 percentage points. This despite the fact that voter preferences did not change. The only things that changed in the two examples were the characteristics of the electoral opponent. The 19 percentage point swing in this simple example with fixed voter preferences illustrates the extreme difficulty of inferring voter preferences from simple tabulations of vote share data—and the dubiousness of numerical bloc-voting cutoffs.

Finally, we can see the inferential problems that arise under conditions where only weak minority candidates select into running. In our study, candidates who did not graduate from college or who have been accused of sexual harassment or campaign finance violations were strongly disfavored by respondents in all racial/ethnic groups.[[212]](#footnote-212) We therefore treat the presence of one of these levels as indicating that the candidate is low-quality. Looking at matchups featuring “low-quality” black, NAACP-endorsed candidates against random white candidates we see that only 42% of black voters support the black candidate (down from 54% when the quality traits were randomized). In matchups between “low-quality” Latino, NCLR-endorsed candidates against random white candidates 39% of Latino’s support the Latino candidate (down from 57% when the quality traits were randomly assigned). Again, voter preferences did not change, but vote shares for nominal “candidates of choice” have changed dramatically.



**Figure 3.** Presentation of candidate profiles to respondents.

|  |  |
| --- | --- |
| **Attribute** | **Levels** |
| Race | Black White Latino |
| Education | “Did not graduate from college”“Graduated from a state university”“Graduated from a state university (with honors)” “Graduated from an Ivy League university”“Graduated from an Ivy League university (with honors)” |
| Endorsement | “The National Association for the Advancement of Colored People (NAACP), the largest African-American civil rights and advocacy organization in the United States”“The National Council of La Raza (NCLR), the largest Hispanic-American civil rights and advocacy organization in the United States”“The Democratic Party”“The Republican Party”“The AFL-CIO, the largest association of labor unions in the United States”“The Chamber of Commerce, the largest association of business groups in the United States”“The Coalition for Sound Government” |
| Military Service | “Served in military; honored for valor in combat” “Served in military”“No military service” |
| Other Information | “Honored as whistle-blower for exposing corruption at a public agency”“Serves as board chairman of a not-for-profit hospital” “Was the starting quarterback for college football team” “Volunteers with parent-teacher association”“Charged with violating campaign finance laws during previous run for office”“Accused of sexual harassment by several former employees” |

**Table 3.** Attributes and levels for randomized candidates.

### The Courts’ Dilemma

Once courts face up to the mistaken assumption of *Gingles*—that there is no consistent, monotonic relationship between racial polarization in political preferences and the average level of observed vote-share polarization in “usual” elections—what options are left? A very sensible response would be to abandon the proposition that racial polarization should be judged “primarily on the basis of votes cast in actual elections.” In Part III and in other work, we discuss alternative sources of evidence.

Before turning to those alternatives, it is worth considering how courts might best use the vote-share data that has been the staple of vote dilution litigation to date. This exercise will make sense of the tensions we observed in the case law.[[213]](#footnote-213) It should also prove helpful to judges and litigators insofar as they continue to rely on vote-share evidence. And it will provide a glimpse at possible futures, should the Supreme Court follow through on *Bartlett*’s dictum and establish numeric cutoffs for “legally significant” bloc voting.

Broadly speaking, we see two ways for courts to use vote-share data in full recognition of the contingent relationship between votes and preferences. One is to adopt a subjective, informal Bayesian approach to inferring preferences from votes. The other is to base polarization findings on a small number of “standard” elections—specifically, two-candidate, biracial, general-election matchups—which are assumed as a matter of law to be comparable across jurisdictions and over time. However, neither of these approaches would satisfy all the criteria that the racial polarization test is supposed to meet.

1. The Informal Bayesian Approach

Judges no doubt have prior beliefs about the distribution of political preferences within white and minority communities, and about the extent to which any given candidate is close-to-ideal for minority voters. Candidates’ vote shares by racial group also contain *some* information about these matters—depending on the candidates’ attributes, incentives for strategic voting, etc. So one way for judges to deal with the contingent relationship between votes and preferences is proceed as a good Bayesian would: learn everything you can about the backstory of each election presented to the court; ask yourself, in light of that backstory, whether the candidates’ respective vote shares by racial group say something meaningful about racial polarization in preferences on any latent dimension you believe to be legally relevant (candidate race, ideology, etc.); and then update your priors, and repeat this process with the evidence from the next election.[[214]](#footnote-214)

Which elections will prove most “probative” under the informal Bayesian approach depends on what the judge wants to learn. For example, if she wants to learn about racial polarization on the dimension of ideology, she could look for elections in which a moderate candidate faces off against an extreme candidate of the same race and of similar quality. If whites vote by large margins for very conservative candidates against centrists and there are no significant non-ideological differences between the candidates, it follows that most whites are conservative. Similarly, if minorities vote by large margins for a very liberal candidate against an otherwise similar centrist candidate, the minority voters have revealed themselves to be cohesively liberal.

If the judge wants to investigate polarization on the dimension of candidate race, she might look for races that pit a weak white candidate against a strong minority candidate who is ideologically similar, or a strong white candidate against a weak minority candidate who is ideologically similar. If voters choose a weak coethnic candidate over a strong non-coethnic opponent, this suggests that voters care a lot about descriptive representation. But the court should not attach any significance to particular quantitative thresholds. If a very weak minority candidate running against a very strong (and ideologically similar) white candidate wins, say, 50% of the minority vote, that signals not “lack of cohesion” but rather a strong minority preference for coethnic representation. Conversely, if 100% of whites vote for the white candidate in the same matchup, that says *nothing* about whether whites generally prefer own-race representation (or about white ideological cohesion), since the observed white vote share is readily explained by the valence gap between the candidates.

After considering all the vote-share data and reaching a conclusion about the important points of political commonality (if any) within the minority community, the informal Bayesian judge must determine which of the candidates in these elections were sufficiently close to the minority’s ideal as to be deemed “candidates of choice.” Having identified those candidates, she then asks whether they were elected in sufficient numbers as to preclude a finding of “legally significant” white bloc voting.

The informal Bayesian approach bears some resemblance to the Third and Tenth Circuit’s “subjective” take on the question of whether a particular candidate is a minority candidate of choice. But it also departs from current conventions in a number of respects.

For example, while the Third and Tenth Circuit pay close attention to the attributes of candidates who were supported by minority voters, the informal Bayesian judge—in keeping with our experimental results above—will pay just as much attention to the attributes of the minority-preferred candidate’s opponent. The courts to date have generally failed to consider the importance of opposing-candidate attributes for inferences about preference cohesion and electoral opportunity.

Second, the informal Bayesian attaches no particular importance to endogenous elections, or to “usual” elections. On the contrary, exogenous and unusual elections will often be especially informative, as the amount of *new* information (about preferences) in vote shares from any given election depends on how different the voters’ choice set in that election is from the choice set in previous elections that the court has investigated.

Finally, the informal Bayesian approach recognizes that the average rate of bloc voting within the minority and white communities should be regarded as legally unimportant, since the relationship between legally relevant quantities (preference polarization, and the identity of minority candidates of choice) and vote shares is so variable.

The problem with the informal Bayesian approach is that it cannot be squared with the Court’s manageability objectives. It puts front and center the very thing the courts were supposed to ignore—“the political stories behind the election returns.” And it cannot be implemented using numeric cutoffs that would separate polarized from non-polarized communities as a matter of law, or that label would candidates as minority candidates of choice.

1. Racial Assumptions “As a Matter of Law”

Let’s stipulate that the courts want an objective polarization test, one which can be implemented by comparing average vote shares by racial group to some *Bartlett*-style cutoff of legal significance. Can this be done in a non-arbitrary fashion, given the contingent relationship between votes and preferences?

Per our analysis in Part II.B.1, the following conditions must be satisfied for courts to reasonably conclude that the racial groups are more politically polarized in jurisdiction A than B because the average difference between observed vote shares by racial group was higher in A than in B.

1. The candidate matchups (“elections”) that go into the averages must be similar in both jurisdictions.

2. The elections must be substantially free of strategic voting.

3. The candidates in each election must differ from one another in ways that correspond to hypothesized differences in white and minority voter preferences.

4. The “packages” of traits in each candidate must not run against the grain of latent preference correlations in the electorate. (A contest between a black conservative and a white liberal may not induce polarized voting if most black voters prefer black over white candidates, and liberal over conservative candidates, and most white voters prefer white over black candidates, and conservative over liberal candidates.)

5. The candidates must be roughly equivalent in terms of attributes that are valued similarly by all voters (“valence traits”).

These conditions suggest that an objective polarization test should be grounded on voting data from partisan, two-candidate, general elections, not primaries or nonpartisan contests. Only in two-candidate, general-election matchups can the court be reasonably confident—without any further background information—that citizens are voting sincerely rather than strategically. Also, because the Democratic and Republican parties are ideological, a court relying on data from partisangeneral elections can be fairly confident that that two candidates are distinct from one another along policy/ideology dimensions that may matter to the voters.[[215]](#footnote-215)

By restricting the analysis to general elections, it also becomes possible to identify and exclude elections with “against the grain” candidates, e.g., black Republicans, on the basis of objective criteria. The court just needs to identify the political party preferred by most plaintiff-race voters, and then exclude those inter-racial general election matchups in which the minority-race candidates was nominated by the minority-disfavored party.

Finally, though reliance on general election matchups hardly guarantees that the candidates are similar in terms of their valence attributes, the fact that the candidates have survived one screening test (the primary) means that extremely low-quality candidates are less likely to be part of the mix than if the court were using matchups from primary elections or nonpartisan races with low barriers to entry.

In summary, the polarization analysis would run roughly as follows:

1. Determine the political party preferred by most minority voters, based on vote shares in mono-racial, two-candidate, general election matchups.

2. Estimate vote shares by race for each candidate in inter-racial, two-candidate general election matchups in which the minority candidate is the nominee of the minority-preferred party. Average the estimates over all elections in the analysis.

3. Make findings on minority cohesion. Cohesion might be said to exist if and only if the minority candidates in step 2 received on average more than X% of the minority vote, or if the average gap between those candidates’ minority and white vote shares exceeds some threshold of legal significance. (The latter approach would be preferable, as to some extent it controls for unmeasured differences in the quality of the minority and non-minority candidates in each matchup.[[216]](#footnote-216))

4. Make findings on the legal significance of white bloc voting, as appropriate. Under the *Gingles* plurality approach, this step reduces to asking whether the minority candidates considered at step 2 were usually defeated. Under the *Bartlett* “cutoff” approach, legal significance also requires that the average crossover voting rate not exceed some fixed level established as a matter of law. Alternatively, in those circuits where voter discrimination must be shown, a court might hold that white bloc voting is legally significant only if white candidates of the minority-preferred party received a higher proportion of the white vote than minority candidates of the minority-preferred party.

We’ll call this the “minority-race/minority-party” protocol for quantifying racial polarization. While it avoids some of the central problems with relying on data from primaries and nonpartisan elections, it remains deeply problematic, for several reasons.

First, it severely winnows the universe of elections which may be included in the polarization analysis. If local white co-partisans of the minority community generally oppose minority-race candidates, minority candidates are unlikely to win local primaries, so the polarization findings will have to be based on elections to offices responsible for a much larger geographic area (e.g., governor, senator, or president). In some cases, particularly for Latino and Asian plaintiffs, there may not be *any* elections in which voters in the defendant jurisdiction had the opportunity to vote for a plaintiff-race candidate who won the primary of the plaintiff group’s preferred party. In other cases the polarization estimates will simply be noisy, affected in unknown ways by idiosyncratic features of the small number of elections that make it into the analysis. And in many cases the estimates will be of questionable relevance. Racial polarization with respect to Barack Obama (for example) may or may not be highly correlated with latent racial polarization with respect to, say, local school board or county commission elections.

Second, the minority-race/minority-party protocol assumes that the mix of candidate matchups in each racial polarization analysis is comparable.[[217]](#footnote-217) The assumption of candidate-matchup comparability would not be problematic if the analysis were restricted to data from presidential elections, because in presidential elections voters in every jurisdiction choose between the same candidates. But relying on presidential election data will not work for cases brought by Latino or Asian American voters, and even for black vote dilution claims we cannot be sure whether between-jurisdiction variation in racial polarized voting in the 2008 and 2012 presidential elections was due to between-jurisdiction variation in latent polarization on the race and ideology dimensions, or to idiosyncratic differences in how voters evaluate other traits of Obama, McCain, or Romney (military service? professorial mannerisms? Mormonism?).

Also, with just a single matchup between a center-left black candidate and a center-right white, one cannot learn much about the distribution of voter preferences within racial groups. Extremely polarized voting will be observed in *both* (1) a community in which white voters are slightly right of center and slightly prefer white to black candidates, and black voters are slightly left of center and slightly prefer black to white candidates, and (2) a community in which white voters are extremely conservative and hate black candidates, and black voters are extremely liberal and strongly prefer black to white candidates.

Beyond presidential elections, the assumption of candidate-matchup comparability is extremely tenuous. There are likely to be systematic, between-jurisdiction differences partisan nominees for Congress, governor, state legislature, city council, and the like, depending on the partisan and ideological composition of the electorate. In states or districts where a party has little chance of winning general elections, high quality candidates are less likely to seek the party’s nomination. In jurisdictions that are much more conservative or liberal than the national norm, party elites and primary voters may try to push through relatively “electable” candidates who deviate from the party orthodoxy in important respects. In low-profile elections, the candidates are less likely to be vetted by party elites. And so forth.

Moreover, as we discussed previously, the white and minority candidates of a given party are likely to differ from one another in systematic ways even within a jurisdiction, due to selection effects.[[218]](#footnote-218) Because of this, one cannot safely infer voter discrimination—or its absence—from the average difference in white support for white and minority candidates of the minority-preferred party (as the minority-race/minority-party protocol supposes).

The third serious vulnerability of the minority-candidate/minority-party protocol is that it presumes as a matter of law that only minority-race candidates can be minority “candidates of choice.” This proposition has been strenuously rejected by nearly all courts, on the ground that it reflects “prohibited” racial assumptions.[[219]](#footnote-219)

Might there be an objective, race-neutral alternative to the minority-race/minority-party protocol? One could posit, like Blacksher and Menefee and more recently the Second Circuit, that any candidate who receives strong minority support in the primary should be deemed a “candidate of choice.”[[220]](#footnote-220) Or one might define “minority candidates of choice” as those candidates who were nominated in a racially polarized primary.[[221]](#footnote-221) Group cohesion findings under prongs 2 and 3 of *Gingles* would then be based on voting patterns in general elections contested by winners of racially polarized primaries (without regard to the candidate’s race).

But this race-neutral simplification could lead to verymisleading conclusions. Racial polarization in the primary is only a signal of minority voters’ preference for one candidate *relative to the other available choices*, not a signal of how much minority voters like the preferred candidate is in any absolute sense. Even as a signal of relative preference, primary polarization—or its absence—is hard to interpret because the mix of sincere and strategic voting is unknown. Lest one think this inconsequential, recall that during the 2008 primaries, most blacks did not support Obama over Clinton until he won the Iowa caucus and proved himself electable with whites. A rigid insistence that minority candidates of choice are those (and only those) who won polarized primaries in the defendant jurisdiction would lead to the conclusion that Obama was not a black candidate of choice in \_\_\_, but was a black candidate of choice in \_\_\_.

Bear in mind too that if white general election voters strongly oppose minority-*race* candidates and the minority’s political agenda, polarization estimates that derived from general elections without a minority-race candidate may substantially understate latent preference divergence between white and minority voters.[[222]](#footnote-222) To point this point differently, if the court quantifies “minority cohesion” and “white bloc voting” in terms of the average general election vote share (by racial group) of minority-preferred candidates who won a racially polarized primary election, there will be arbitrary differences across similarly polarized communities in the “court-found” level of polarization. In those communities where the candidates who won polarized primaries with minority backing were often racial minorities, the observed level of general election polarization is likely to be higher, other thing equal, than in communities where the candidates who won polarized primaries with minority support were usually white.

1. The Upshot

The highly contingent relationship between vote shares and political preferences has the courts in a bind. There is simply no way to concurrently satisfy the principal criteria that the *Gingles* test is supposed to meet. The courts *could* make the test objective and clear-cut, but if the test is not to become absurd in the process, the courts must embrace racial assumptions that the law has long disavowed, and further assume that the distribution of observed general-election matchups is the same across jurisdictions when it is almost certainly not.

Alternatively, the courts could make the polarization inquiry expressly dependent on “the political stories behind the election returns,” in line with the informal Bayesian approach. This approach cannot be squared with the Supreme Court’s manageability objectives.

Given these choices, the current state of the “law” of racially polarized voting is perhaps unsurprising. The courts as we have seen rely heavily on vote-share data from inter-racial elections, but insist—perhaps for the sake of appearances—that these are not the only relevant, probative elections. And the courts fill their opinions with vote-share estimates—creating the appearance of an objective, even mathematical inquiry—without actually limiting their discretion to interpret those numbers however they wish.

## Race-Based Assumptions and Statistics

The discussion of normative uncertainty and the contingent relationship between votes and preferences in Sections III A and III B implicity assumed that it is possible to use statistical method to estimate minority and white support for candidates running in arbitrary elections. This is true, but only if one is willing to pay a very high price. The statistical tools used to infer candidates’ vote shares by racial group depend on assumptions about political homogeneity within racial groups. This is in considerable tension with the anti-essentialist strains of equal protection law.

The Appendix explains this point in detail. For readers averse to formal notation, we offer a brief, intuitive explanation here. The data in vote dilution cases typically consists of precinct-level election returns, and estimates of precinct-level demographics from the Census. The race and the vote of individual citizens are not observed. (Exit poll data—with individual-level observations on race and vote choice—have rarely been available.[[223]](#footnote-223)) To estimate candidates’ vote shares by racial group, the analyst assumes that the proportion of white and minority voters who support each candidate is about the same in each precinct, subject to random noise.

This isn’t the same as assuming that all minority voters “think alike, share the same political interests, and will prefer the same candidates at the polls”[[224]](#footnote-224)—the model is agnostic on the proportion of minority voters who support each candidate. Nor does the model constrain the level of minority support for minority candidates to be the same in each precinct; random fluctuations from the estimated baseline level of support are allowed. But the model does assume, critically, that minority (and white) support for each candidate does not vary in any systematic way across precincts. For example, minorities in relatively affluent and racially integrated precincts are treated as politically indistinguishable from minorities in poor, racially homogeneous precincts.

This assumption, which has been overlooked or even denied (perhaps inadvertently) in the legal-academic literature,[[225]](#footnote-225) is not innocuous. Consider it in light of Justice Kennedy’s opinion for the Court in *LULAC v. Perry*.[[226]](#footnote-226) Kennedy wrote that a particular, disputed majority-minority district should not count in the analysis of minority political opportunity, because the district combined two geographically and socioeconomically disparate clusters of Latino voters.[[227]](#footnote-227) The notion that these two Latino populations were jointly politically cohesive, wrote Kennedy, reflected the “prohibited assumption” of political homogeneity within ethnic groups.”[[228]](#footnote-228) Justice Roberts answered:

It is important to be perfectly clear about the following, out of fairness to the District Court if for no other reason: No one has made any “assumptions” about how voters in District 25 will vote based on their ethnic background. Not the District Court; not this dissent. There was a trial. At trials, assumptions and assertions give way to facts. … The District Court, far from “assum[ing]” that Latino voters in District 25 would “prefer the same candidate at the polls,” concluded that they were likely to do so *based on statistical evidence of historic voting patterns*.[[229]](#footnote-229)

Roberts’s premise that “statistical evidence” is assumption-free is simply wrong, and the assumptions used in ecological inference are particularly strong—embodying precisely the within-race/across-space political homogeneity premise to which Kennedy took offense.

In principle, an expert witness could relax the assumption of spatial homogeneity within racial groups by conducting separate ecological inference analyses on discrete geographic clusters of socioeconomically homogeneous voters. For example, the expert witness in *LULAC v. Perry* might have fitted the EI model initially with the precincts at the northern end of District 25 (the Austin area), and then re-run the model with the precincts at the southern end of the district, along the Texas-Mexico border. Latino voters in District 25 would be deemed cohesive only if the separately fitted models showed them to have voted for the same candidates by similar margins.

However, the logic of litigation encourages pooling rather than sequential estimation. The less pooling the analyst does, the less statistically “precise” (maybe falsely precise) are the resulting estimates, and a court faced with imprecise estimates may well conclude that the evidence does not support a finding of minority cohesion or white bloc voting.[[230]](#footnote-230) Also, the separate-estimation strategy requires a method for partitioning the defendant jurisdiction into subregions within which the racial/ethnic groups are reasonably homogenous, and it’s not clear how one would do this.[[231]](#footnote-231)

# Updating *Gingles*

Racial vote dilution law has reached a crossroads. The Supreme Court has been persistently chipping away it, using two propositions as hammer and chisel: first, that judicial involvement in the business of adjudicating vote dilution claims requires clear rules and objective standards (at least at the screening stage);[[232]](#footnote-232) and, second, that Section 2 must be construed narrowly lest it “unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”[[233]](#footnote-233)

These propositions are life threatening to the law of vote dilution as it has developed to date. Rather than being objective and rule-like, the judicial inquiry into racially polarized voting requires trial courts to make the kinds of “highly political”[[234]](#footnote-234) and “race based”[[235]](#footnote-235) judgments that the Supreme Court has warned against. Regarding the constitutional question, it is difficult to keep Section 2 from “infus[ing] race into virtually every redistricting,” or to gauge whether the Section 2 results test is “necessary” to prevent or remedy constitutional violations, unless courts first structure the doctrine so that it provides more guidance to trial judges and defendant jurisdictions.

Once the chasm between how the racial polarization test was expected to work and how it actually works becomes apparent, something has to give: Either the Justices accept the doctrinal status quo and revise their views about judicially manageable standards and racial assumptions, or they change the doctrine so that it better conforms to their expectations.

One way to change doctrine is to convert *Bartlett*’s dictum into law, requiring plaintiffs to show that plaintiff-race voters typically vote together at rates exceeding X%, and that other voters “cross over” and vote for minority-preferred candidates at rates of less than Y%. But this is a fool’s errand, given the contingent relationship between preferences and votes, and given the flexibility that lower courts otherwise enjoy. Lower courts could work around the thresholds of legal significance by upweighting or discounting evidence from particular elections on the basis of the election’s supposed “probativeness,” or by invoking the special circumstances doctrine. Judges who want to find for the plaintiffs in a given case will just have to dig more deeply into the stories behind the election returns in order to “confirm,” as it were, that the elections in which voting was most polarized are in fact the most probative, and that the elections with less polarized voting are unrevealing.

To be sure, the Court in adopting numeric polarization cutoffs could warn against this sort of cherry picking.[[236]](#footnote-236) But if the lower courts must adopt bright-line rules regarding which elections to include in and exclude from the polarization analysis, the only remotely sensible choice is, as we have seen, to restrict the analysis to two-candidate, biracial, partisan, general-election matchups. Yet even this solution is deeply problematic, for reasons we have canvassed.[[237]](#footnote-237) And it does nothing to reduce the dependence of vote dilution cases on statistical techniques that depend on the within-race/across-space political homogeneity assumption.

The bottom line is that if the Court wants an objective threshold test that does not depend on strong racial assumptions, it needs to ground the test on something other than “voting preferences expressed in actual elections.” There are two paths forward. One is to simply eliminate prongs 2 and 3 from the *Gingles* framework. Plaintiffs would have to show a potential majority-minority remedial district at the outset of their case (prong 1), after which the court would jump ahead to the “totality of circumstances” analysis. Estimates of candidates’ vote shares by racial group could be considered as part of the “totality,” but the stakes of the polarization showing would be much reduced because it would no longer function as a gatekeeper.

In cases where the vote-share data seem relatively reliable and probative, and where the estimates do not depend on strong racial assumptions, the judge could weight this evidence very heavily at the totality-of-circumstances stage. To illustrate, imagine for example a case about statewide congressional redistricting, where it is shown based on exit polls (no within-race/across-space homogeneity assumption required) that the state’s white voters were less likely to vote for Barack Obama than the white voters in almost every other state, and that the state’s white voters were much less likely to vote for Obama in 2008 and 2012 than for Kerry in 2004 or Gore in 2000. By contrast, in a case about nonpartisan school board elections, the court might discount the voting data, emphasizing instead the evidence (or absence of evidence) of racial discrimination and persistent inequalities in the school system.

Of course, if the Court simply drops prongs 2 and 3 from the *Gingles* framework, it would become much easier than it is today for plaintiffs to satisfy the threshold test, and the test would not be probative of liability. This may be problematic insofar as the Court understands the manageability or even the constitutionality of the “totality of circumstances” liability standard to depend on the frequency with which it must be applied,[[238]](#footnote-238) or on the number of state and local governments whose decisions are affected by the prospect of Section 2 litigation.[[239]](#footnote-239)

The other path forward is for the Supreme Court to adopt a theory (or set of theories) of racial vote dilution under Section 2, and then invite litigants to make the associated showings of political cohesion, lack of electoral opportunity, and/or voter discrimination using *individual-level data*, such as survey-based evidence of political preferences. Surveys can be used to measure racial polarization in policy preferences, general political ideology, racial attitudes, or even preferences over race and other candidate attributes as revealed by choices among randomized, hypothetical candidates. Because survey researchers are not limited to asking about vote intentions, survey-derived measures of racial polarization need not fall victim to the contingent relationship between preferences and votes. (We are currently working on several projects to develop survey-based estimates of group political cohesion and voter discrimination, but owing to space limitations we cannot get into the details here.)

Back when *Gingles* was litigated, it would have been risible to think that racial polarization could be established through surveys. Surveys were expensive to conduct, and the available evidence from exit polls suggested that white voters often lied to survey-takers about their support for black candidates. But times have changed. A number of important developments in the years since *Gingles* have made survey evidence much more appropriate for vote dilution litigation.

First, whites no longer over-report voting for minority candidates in opinion polls.[[240]](#footnote-240) This is not to deny that “social desirability” bias can contaminate responses to particularly sensitive survey questions. But researchers have developed a number of ingenious techniques for eliciting truthful answers.[[241]](#footnote-241) For example, respondents may be told to flip a coin, answering Question 1 if the coin comes up heads and Question 2 if it is tails. (Question 1 is innocuous, while Question 2 is very sensitive.) The respondent answers “yes” or “no” without telling the researcher which question he is answering; the researcher later backs out population-level estimates of support for the socially sensitive proposition based on the known probability of answering that question, and the known level of support for the innocuous proposition.

Another hugely important development is the emergence of low-cost, internet-based survey methods. Over the last decade, political scientists have regularly fielded massive, cooperative surveys of the American electorate, using opt-in Internet samples that are reweighted to approximate the voting-eligible population. These surveys have been validated against a number of objective benchmarks,[[242]](#footnote-242) and for some purposes they can be pooled.[[243]](#footnote-243) Because the sample sizes are an order of magnitude larger than most previous national surveys, researchers can use the data to estimate opinion within subnational geographic units, such as states or congressional districts. Also, on-line surveys are less affected by social desirability biases than in-person surveys.[[244]](#footnote-244)

New statistical techniques for modeling local public opinion as a function of demography and geography have emerged in tandem with the on-line surveys.[[245]](#footnote-245) These statistical techniques have been used to estimate public opinion within cities, counties, state legislative districts, and even school districts, using existing national datasets.[[246]](#footnote-246) Political scientists have also demonstrated that relatively inexpensive, on-line surveys of the voting public within small geographic units can be conducted by sampling from voter registration files in proportion to estimated turnout propensities, and then mailing invitations to participate in the on-line survey.[[247]](#footnote-247)

Finally, statisticians and computer scientists have made enormous strides in machine learning, the science of making predictions while remaining agnostic about how best to model the event or outcome one wishes to predict. Machine learning sounds almost magical, but the workhorse concept—cross-validation—is intuitive. The data are partitioned into *K* chunks, or “folds”; prediction models or algorithms are fitted sequentially to the data with one fold left out; prediction error is calculated on the left-out fold; and the process is repeated. The average prediction error across all *K* folds approximates true out-of-sample prediction error, and the researcher can then choose among or weight the various prediction algorithms using the cross-validated estimate of out-of-sample prediction error. Of course, for this process to be used to estimate the distribution of political preferences within and across racial groups, one must have individual-level observations of voting-age citizens’ demographic traits and preferences.

For VRA purposes, machine-learning tools are important not simply because they usually enable one to make betterpredictions than would otherwise be the case, but also because they allow one to predict the political preferences of citizens with known demographic profiles (e.g., age, sex, education, race, income, marital status, community of residence, etc.), *without making strong assumptions about political homogeneity within racial groups*, or even about the utility of race as a predictor of political preference. One can throw into the mix of prediction algorithms a model that assumes homogeneity within racial groups, but that model will only be chosen or weighted heavily if it does a *better job* predicting “left-out fold” opinions than the algorithms that make no assumptions about the nature of the correlation between race and political preference.

With a set of predictions in hand, one can estimate political opinion by racial group in any geographic unit for which the Census releases microdata, i.e., demographic traits for each respondent in a small sample of the unit’s population.

\* \* \*

Notwithstanding the many advantages of survey data for making the *Gingles* showing of racial polarization and (lack of) minority opportunity, updating the *Gingles* framework along these lines would present significant challenges for the courts. The current convention of basing minority cohesion and white bloc voting findings on estimates of vote shares by racial group has the not-insignificant advantage, from a manageability perspective, of strictly limiting the universe of evidentiary materials. As well, statistical conventions for estimating candidates’ vote shares by racial group from aggregate data have become pretty well established—even if not well justified, or free of strong racial assumptions.[[248]](#footnote-248)

If litigants were invited to make polarization showings using survey data, the universe of potentially relevant data sources and statistical techniques would explode. Given this wide-open universe, it’s a fair question whether the courts could develop clear-edged rules regarding data sources, modes of data analysis, and quantitative cutoffs to be used at the screening stage of vote dilution cases. The task seems better suited to administrative agencies, but Congress has not authorized any agency to issue rules with the force of law under Section 2. It may be possible for the Department of Justice to help out by issuing advisory guidelines, but the Supreme Court has often seemed distrustful of DOJ in civil rights cases.[[249]](#footnote-249)

The other great challenge is choosing a theory (or set of theories) of racial vote dilution under Section 2. As we have seen, it is impossible to develop a threshold test that is diagnostic of liability without a theory of dilution, and any residual discretion that trial courts enjoy in implementing the threshold test is unlikely to be exercised consistently unless the Supreme Court provides normative guidance. Yet the Supreme Court has been deciding racial vote dilution cases for forty-five years without a clearly articulated theory of dilution. Mustering a five-Justice majority for a theory would seem particularly difficult in the present era, where the Court is closely divided between two factions with very different understandings of race discrimination law;[[250]](#footnote-250) where the swing Justice often favors gnomic hedges over clear rules;[[251]](#footnote-251) where the Chief Justice embraces the rhetoric of minimalism;[[252]](#footnote-252) and where two Justices typically refuse to join *any* vote dilution opinion because of their long-stated and utterly implausible belief that Section 2 does not address vote dilution at all.[[253]](#footnote-253)

In the near term, then, any progress on the conceptual and evidentiary fronts is more likely to occur in the Courts of Appeal than in the Supreme Court. But for this progress to occur, the Supreme Court must *refrain* from taking what the Justices probably believe to be the next logical step in their vote dilution jurisprudence: the establishment of numeric, vote-share cutoffs for “legally significant” minority cohesion and white bloc voting. By walking back *Bartlett*’s dictum and acknowledging the problems we have described, the Court could free litigants and lower courts to explore alternatives.

# Conclusion

Voting rights law has reached a turning point. The Supreme Court recently enjoined the Voting Rights Act’s preclearance regime, which required many state and local governments to obtain federal approval before implementing changes to their election laws.[[254]](#footnote-254) The principal remaining safeguard is the “results test” of Section 2. But Section 2 is also under assault, with critics—including the Supreme Court’s median Justice—questioning both its manageability and its constitutionality. Whatever one makes of the constitutional question, the manageability objection has force, at least if one accepts the ideas about manageability traditionally invoked to justify the *Gingles* framework. We have shown that in its present incarnation the test for racially polarized voting is deeply discretionary, dependent on race-based assumptions, and untethered from normative accounts of the purpose of racial vote dilution law. Now and then judges have tried to make the polarization inquiry more rule-like, but these efforts have been largely unavailing.

The discretionary nature of the threshold test is an ironic byproduct of the courts’ decision to make candidates’ vote shares by racial group the central factor in screening vote-dilution claims. This was supposed to make the test objective and constraining, but because candidate attributes mediate the relationship between racial polarization in political preferences and polarization in vote shares, and because observed candidate attributes reflect strategic choices by candidates and other actors, the screening test cannot be made constraining without also becoming absurd*—*unless it is rebuilt on new evidentiary foundations. This Article has, we hope, made the problem clear, but the task of rebuilding the *Gingles* framework remains a project for another day—one which will require the sustained collaboration of courts, legal academics, statisticians and political scientists, and perhaps the Department of Justice.

# Appendix

This Appendix presents a more precise and modestly technical explanation of the racial assumptions used to estimate vote shares by racial group from aggregate, precinct-level data. It also explains how individual-level data would allow political preferences by racial group to be estimated using weaker assumptions.

Let’s start with an example. Consider the hypothetical data[[255]](#footnote-255) from three precincts presented in Table 1 (page 39). Voters in precinct 1 are overwhelmingly members of the minority group and, in the aggregate, 85% of precinct 1 voters voted for candidate A. Precinct 3 is a near mirror image of precinct 1. Precinct 3 voters are 95% white and, in the aggregate, only 25% of precinct 3 voters voted for candidate A. Precinct 2 falls somewhere in between. Here 60% of the voters are white and 50.5% of the votes cast went to candidate A. This much we know with certainty.

However, what we want to know for the purpose of determining whether voting is racially polarized are the number of minority voters who voted for candidate A (the unknown entries in the upper left corners of the sub-tables) and the number of white voters who voted for candidate B (the unknown entries in the lower right corners of the sub-tables). Empirical claims about these quantities depend upon racial assumptions.

Why do racial assumptions play a role and how do they enter into the standard ecological regression analyses? Let’s begin by examining what we know about the relevant internal cells without making any assumptions. While we do not know the exact values of the internal cells in Table 1, we do know that these internal cell entries must sum up to the values on the margins of the table. This allows us to calculate, with no assumptions, logical bounds for each of the internal cell entries. These bounds are presented in Table 2 (page 40). Note that we know quite a bit about the voting behavior of minority voters in Precinct 1 and about the voting behavior of white voters in Precinct 3. Without further assumptions, we know very little about the other internal cells.

|  |
| --- |
| **Precinct 1** |
|  | **Candidate A Votes** | **Candidate B Votes** |  |
| **Minority Voters** | ? | ? | **900** |
| **White Voters** | ? | ? | **100** |
|  | **850** | **150** | **1000** |

|  |
| --- |
| **Precinct 2** |
|  | **Candidate A Votes** | **Candidate B Votes** |  |
| **Minority Voters** | ? | ? | **400** |
| **White Voters** | ? | ? | **600** |
|  | **505** | **495** | **1000** |

|  |
| --- |
| **Precinct 3** |
|  | **Candidate A Votes** | **Candidate B Votes** |  |
| **Minority Voters** | ? | ? | **50** |
| **White Voters** | ? | ? | **950** |
|  | **250** | **750** | **1000** |

Table 1. Hypothetical Voting Behavior by Race of Voter in Three Precincts Using Aggregate Data.

Putting the relevant pieces together, we can calculate from Table 2 no-assumption bounds on the fractions of minority (white) voters who voted for candidate A (B). These bounds are the following.

Minimum minority support for candidate A:

(750 + 0 + 0)/(900 + 400 + 50) = 0.556

Maximum minority support for candidate A:

(850 + 400 + 50)/(900 + 400 + 50) = 0.963

Minimum white support for candidate B:

(0 + 95 + 700)/(100 + 600 + 950) = 0.482

Maximum white support for candidate B:

(100 + 495 + 750)/(100 = 600 + 950) = 0.815

|  |
| --- |
| **Precinct 1** |
|  | **Candidate A Votes** | **Candidate B Votes** |  |
| **Minority Voters** | [750, 850] | [50, 150] | **900** |
| **White Voters** | [0, 100] | [0, 100] | **100** |
|  | **850** | **150** | **1000** |

|  |
| --- |
| **Precinct 2** |
|  | **Candidate A Votes** | **Candidate B Votes** |  |
| **Minority Voters** | [0, 400] | [0, 400] | **400** |
| **White Voters** | [105, 505] | [95, 495] | **600** |
|  | **505** | **495** | **1000** |

|  |
| --- |
| **Precinct 3** |
|  | **Candidate A Votes** | **Candidate B Votes** |  |
| **Minority Voters** | [0, 50] | [0, 50] | **50** |
| **White Voters** | [200, 250] | [700, 750] | **950** |
|  | **250** | **750** | **1000** |

Table 2. Logical Bounds on Internal Cells of Voting Behavior by Race of Voter for Hypothetical Aggregate Data 3 Precinct Example.

Maximizing white support for candidate B implies that minority support for candidate A is also at its upper limit. Similarly, minimizing white support for candidate B implies that minority support for candidate A is also at its lower limit. So, our observed data are logically consistent with *either* a highly polarized world where 81.5% of white voters support candidate B and 96.3% of minority voters support candidate A, *or* a non-polarized world where 48.2% of whites favor candidate B and 55.6% of minority voters support candidate A. *Racial assumptions must be invoked to get beyond this indeterminacy.*

A commonly invoked assumption is that which motivates ecological regression, also known as Goodman’s regression; namely that the fraction of minority voters who support candidate A does not vary by precinct and that the fraction of white voters who support candidate B does not vary by precinct.[[256]](#footnote-256) This is a racial assumption in that it posits that average, within-race political behavior does not vary by geography. Minority group voters in precinct 1 vote the same, on average, as minority group voters in precinct 2 or 3. The same sort of assumption is made about white voters. In view of the concerns expressed by the Supreme Court in *LULAC v. Perry*, these are not innocuous assumptions.[[257]](#footnote-257) There is an uncomfortable resemblance between the within-race homogeneity assumption used in ecological inference and the constitutionally “prohibited” assumption that voters of the same race “think alike, share the same political interests, and will prefer the same candidates at the polls.”[[258]](#footnote-258)

What does the homogeneity assumption buy us? To see, let’s introduce some notation. Let $y\_{i}$ denote the votes received by candidate A in precinct *i* as a fraction of the total votes cast in precinct *i*. Also, let $w\_{i}$ denote the fraction of voters in precinct *i* who are white. Because our example features two candidate and two racial groups, it follows that $1-y\_{i}$ is the fraction of total votes in precinct *i* going to candidate B and that $1-w\_{i}$ is the fraction of precinct *i* voters who are minority group members. Given this notation and our assumption about the constancy of within-group voting behavior across precincts we can write the following identity:

$y\_{i}=π\_{m}(1-w\_{i})+π\_{w}w\_{i}$ *i*=1,2,3

where $π\_{m}$ is the fraction of minority group voters who voted for candidate A (assumed to be constant across all precincts), and $π\_{w}$ is the fraction of white voters who voted for candidate A (assumed to be constant across all precincts). A bit of simple algebra allows us to rewrite this as:

 $y\_{i}=π\_{m}+(π\_{w}-π\_{m})w\_{i}$ *i*=1,2,3

If the assumption that $π\_{m}$ and $π\_{w}$ are constant across precincts holds exactly, then we can simply solve for $π\_{m}$ and $π\_{w}$. In actual applications, this assumption does not hold exactly and one instead works with

 $y\_{i}=α+βw\_{i}+ϵ\_{i}$ *i*=1,2,3

where $α=π\_{m}$, $β=(π\_{w}-π\_{m})$, and $ϵ\_{i}$ is a disturbance term that is assumed to be uncorrelated with $w\_{i}$. Least squares regression of *y* on *w* can then be used to obtain estimates of $α$ and $β$. With these in hand, it is straightforward to obtain $π\_{m}$ and $π\_{w}$ using the identities $π\_{m}=α$ and $π\_{w}=α+β$. The fraction of white voters who support candidate B is simply $1-π\_{w}$. This procedure of using linear regression to estimate $π\_{m}$ and $π\_{w}$ is known as *ecological regression* or *Goodman’s regression*.[[259]](#footnote-259)

Figure 1 plots *y* on *w* for our three precincts and superimposes the ecological regression line. Note that the regression line fits the three points nearly perfectly. The estimates of $α$ and $β$ are 0.92 and $-0.71$ respectively. Under the assumptions posited by the model, this implies that 92% of minority voters supported candidate A and 79% of white voters supported candidate B.

One might be tempted to think that these estimates are highly reliable—after all the regression line fits the data points almost perfectly. That would be a mistake though, as nothing in the scatterplot narrows the logical bounds discussed above. The quality of the inferences from ecological regression depend entirely on the racial assumption that $π\_{m}$ and $π\_{w}$ are constant across precincts (or the weaker assumption that they are each uncorrelated with *w*). This assumption is what allows us to go from $π\_{m}\in [0.556, 0.963]$ to $π\_{m}=0.92$ and from $(1-π\_{w})\in [0.482, 0.815]$ to $(1-π\_{w})=0.79$, but nothing in the scatterplot logically implies the assumption. Put another way, the data in Figure 1 are just as compatible with a world where 56 percent of minority voters supported candidate A and 48% of white voters supported candidate B—obviously this would imply a very different level racial polarization.



Figure 1. Ecological Regression for the Three-Precinct Example. The intercept $α=0.92$ and the slope $β=-0.71$. Under the assumptions posited by the model, this implies that 92% of minority voters supported candidate A and 79% of white voters supported candidate B.

There is an alternative to making strong, within-race homogeneity assumptions—but it requires *individual-level data on vote choice and demographics*, as might be generated through an exit poll or pre-election survey.

If one is able to draw a random sample of voters from the jurisdiction of interest and measure their political preferences through a well-designed instrument, then, in essence, no racial homogeneity assumptions need to be made. Random sampling allows for principled, design-based statements about the proportion of citizens of group *X* who support candidate *Y*, and about the uncertainty of the estimates.[[260]](#footnote-260) If the number of sampled voters is large, the survey estimates will be quite accurate.

Complications arise when it is not feasible to draw a large random sample from the jurisdiction in question. Estimates of jurisdiction-specific quantities of interest—such as the fraction of African American voters who support a particular candidate—that are based solely on a small number of responses from the jurisdiction in question will tend to have so much sampling variability as to be of little practical use.

In situations such as this, it is common for survey researchers to move away from the relatively assumption-free world of design-based inference to an inferential stance that relies—to varying degrees—on statistical models.[[261]](#footnote-261) Statistical models can be thought of as collections of substantive and statistical assumptions that provide inferential leverage. The stronger the assumptions the greater the inferential leverage. The problem, of course, is that when modeling assumptions are doing much of the inferential work, the accuracy of one’s inferences depends heavily on the assumptions being at least approximately correct.

The assumptions that are often employed can be seen to be particular forms of racial homogeneity assumptions. For instance, if very few African American voters were surveyed in region 1, then a researcher may assume that African American voter behavior in region 1 is roughly similar to African American voter behavior in regions 2 through 20. This assumption allows the research to statistically pool information from all 20 regions when estimating the quantity of interest for region 1.

However, there are two important respects in which such “survey data homogeneity assumptions” are weaker than the “aggregate data homogeneity assumptions” traditionally used in vote dilution cases. First, insofar as the survey captures non-racial demographic covariates, such as age, sex, income, marital status, occupation, religion, geographic location, and the like, the researcher can build a prediction model to estimate the political preferences of (for example) African American voters in particular geographic units that does not rely heavily on race as a predictor.[[262]](#footnote-262)

Second, the pooling assumptions generally can be evaluated in a principled way with the data at hand, using “cross-validation.”[[263]](#footnote-263) Cross-validation works by repeatedly leaving out small chunks of data, fitting the statistical model to the non-left-out data, and then evaluating the model’s ability to predict the left-out data. Cross-validation is widely used in the fields of statistics and machine learning to make near optimal data pooling assumptions.[[264]](#footnote-264) In principle, then, an expert witness with survey data should be able to construct an ensemble of political-preference prediction models, some of which rely heavily on race and others of which use race in different ways or not at all, and then employ cross-validation to choose among or weight the models in proportion to their predictive accuracy.[[265]](#footnote-265)

Cross-validation is not an option, however, if the expert only has the aggregate, precinct-level data that has been the workhorse of vote dilution litigation to date, because these data do not reveal the actual choices of individual voters, which is what the researcher needs to test the predictive accuracy of her model.

1. Elmendorf is Professor of Law, UC Davis; Quinn is Professor of Law, UC Berkeley, and President of the Society for Political Methodology; Abrajano is Associate Professor of Political Science, UC San Diego. For helpful feedback we thank Jack Chin, Bertrall Ross, David Schleicher, Doug Spencer, Nick Stephanopoulos, faculty workshop participants at UC Davis School of Law, and the Articles Editors of the *University of Chicago Law Review*. [↑](#footnote-ref-1)
2. *See*, *e.g.*,Fortson v. Dorsey, 379 U.S. 433, 438-39 (1965); White v. Regester, 412 U.S. 755, 765 (1973). [↑](#footnote-ref-2)
3. [cite S. Rep.]] [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. [Blacksher & Menefee] [↑](#footnote-ref-5)
6. McNeil v. Springfield Park Dist., 851 F.2d 937, 942-43 (7th Cir. 1988). *See also* Hall v. Virginia, 385 F.3d 421, 423 (4th Cir. 2004); Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 852 (5th Cir. 1999); McGhee v. Granville Cnty., 860 F.2d 110, 116 (4th Cir.1988) (explaining that the *Gingles* numerosity condition is necessary to prevent vote dilution from becoming “an open-ended [concept] subject to no principled means of application”); Meza v. Galvin, 322 F. Supp. 2d 52, 57-58 (D. Mass. 2004) (*Gingles* conditions must have “clarity and prescriptiveness,” lest they themselves collapse into a totality-of-circumstances judgment call); Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) (“an unrestricted breach of the Gingles single-district majority precondition will likely open a Pandora's box of marginal Voting Rights Act claims….”). [↑](#footnote-ref-6)
7. *Id.* at 433 (quoting earlier cases). Despite the Supreme Court’s use of the word “prohibited,” it is not clear whether the injunction against racial assumptions is an absolute side constraint, or rather an objective (“minimization of racial assumptions”) to be pursued concurrently with the manageability and normative-diagnosis goals. [↑](#footnote-ref-7)
8. The one widely recognized exception concerns the split in the lower courts over whether white bloc voting must be “caused” by voter discrimination to be legally significant. [cites] [↑](#footnote-ref-8)
9. [explain basis for claim--logic] [↑](#footnote-ref-9)
10. Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988).The courts have consistently rejected efforts to rebut vote-share evidence of polarization with survey or other data on the political preferences and interests of racial communities. *See*, *e.g.*, *Gomez*, 863 F.2d at 1080; U.S. v. Blaine Cnty., Mont., 363 F.3d 897, 910 (9th Cir. 2004). [↑](#footnote-ref-10)
11. [↑](#footnote-ref-11)
12. Bartlett v. Strickland, 556 U.S. at 22 (*quoting* LULAC v. Perry, 548 U.S. at 446). [↑](#footnote-ref-12)
13. (We think these concerns unwarranted. *See* Elmendof, Making, at ) [↑](#footnote-ref-13)
14. We note in passing that broadly similar prescriptions also emerge from an *external* critique of legal doctrine under the “results test” of Section 2. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After* Shelby County, 115 Colum. L. Rev. (forthcoming 2015) (arguing that new evidentiary presumptions, designed to reduce the cost and increase the predictability of litigation under Section 2 and implemented with survey data, would help Section 2 to fill the gap left by the Supreme Court’s evisceration of the VRA’s preclearance regime). [↑](#footnote-ref-14)
15. Whitcomb v. Chavis, 403 U.S. 124 (1971). [↑](#footnote-ref-15)
16. Blacksher & Menefee, *supra* note **Error! Bookmark not defined.**, at 23 (*quoting* White v. Regester, 412 U.S. 755, 769 (1973)). [↑](#footnote-ref-16)
17. *Id.* at 43. [↑](#footnote-ref-17)
18. *Id.* at 50-64. [↑](#footnote-ref-18)
19. *Id.* at 57. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), requires electoral districts to be as nearly equal in population as is “practicable.” [↑](#footnote-ref-19)
20. Blacksher & Menefee, *supra* note **Error! Bookmark not defined.**, at 53 (emphasis added). [↑](#footnote-ref-20)
21. Mobile v. Bolden, 446 U.S. 55 (1980). [↑](#footnote-ref-21)
22. See generally Thomas M. Boyd & Stephen J. Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash & Lee L. Rev. 1347 (1983) [↑](#footnote-ref-22)
23. 52 U.S.C. § 10301. [↑](#footnote-ref-23)
24. The legislative history is recounted in Boyd & Markman, *supra* note 21. [↑](#footnote-ref-24)
25. 52 U.S.C. § 10301(b). [↑](#footnote-ref-25)
26. S. Rep. No. 97-417, at 28-29 (1982). [↑](#footnote-ref-26)
27. 478 U.S. 30, 48-51 (1986) (opinion of Brennan, *J.*). [↑](#footnote-ref-27)
28. *Id.* at 50-51 (internal citations and cross-references omitted). [↑](#footnote-ref-28)
29. [Issacharoff, Blacksher & Menefee, Brennan] [↑](#footnote-ref-29)
30. *Gingles*, 478 U.S. at 48 n. 15. [↑](#footnote-ref-30)
31. Id. [↑](#footnote-ref-31)
32. As Justice O’Connor remarked in her concurrence, the plurality opinion “creates what amounts to a right to *usual*, *roughly proportional* representation on the part of sizable, compact, cohesive minority groups.” 478 U.S. at 91.  [↑](#footnote-ref-32)
33. *See*, *e.g.*, Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469, 471-73 (8th Cir. 1986);Collins v. City of Norfolk, 816 F.2d 932, 935-38 (4th Cir. 1987); 4 F.3d 1103, 1135 (3rd Cir. 1993). *Cf.* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act*, 39 U. Mich. J. L. Ref. 643, 660 (2006) (noting that plaintiffs prevailed in 57 of the 68 reported decisions between 1982 and 2005 in which the court found the *Gingles* conditions to be satisfied).

[add cite to Grofman et al., Minority] [↑](#footnote-ref-33)
34. [↑](#footnote-ref-34)
35. [↑](#footnote-ref-35)
36. [↑](#footnote-ref-36)
37. This assumes that courts are limited to compact, single-member district remedies. [↑](#footnote-ref-37)
38. 512 U.S. 997, 1013, 1018 (1994). [↑](#footnote-ref-38)
39. *See*, *e.g.*, N.A.A.C.P. v. Fordice, 252 F.3d 361, 373-74 (5th Cir. 2001) (relying on *De Grandy* to reject plaintiffs’ presumptive-liability gloss on the *Gingles* factors). [↑](#footnote-ref-39)
40. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 76 U. Chi. L. Rev. 1493, 1530-35 (2008). Of course, it’s possible that this is an artifact of the changing mix of cases, rather than the *De Grandy* decision. [↑](#footnote-ref-40)
41. [↑](#footnote-ref-41)
42. *Id.* at 32-34 (Souter, *J.* dissenting). [↑](#footnote-ref-42)
43. *Id.* at 42-44 (Souter, *J.*, dissenting). [↑](#footnote-ref-43)
44. *Id.* at 23-24. [↑](#footnote-ref-44)
45. Id. [↑](#footnote-ref-45)
46. *Id.* at 21-22 (2008) (*quoting* LULAC v. Perry, 548 U.S. 399, 455-46 (2006)). [↑](#footnote-ref-46)
47. *Id.* at 16. [↑](#footnote-ref-47)
48. *Id.* at 18. [↑](#footnote-ref-48)
49. *See*, *e.g*., LULAC v. Perry, 548 U.S. 399, 433 (2006) (“a State may not assume from a group of voters’ race that they think alike, share the same political interests, and will prefer the same candidates at the polls”) (internal citations and quotation marks omitted); Johnson v. California, 543 U.S. 499 (2005) (applying strict scrutiny to California’s practice of initially segregating inmates by race during a 60-day evaluation period, notwithstanding undisputed record evidence concerning violent prison gangs organized on racial lines). [↑](#footnote-ref-49)
50. FN re: CL statutes [↑](#footnote-ref-50)
51. 556 U.S. at 21. [↑](#footnote-ref-51)
52. [↑](#footnote-ref-52)
53. *See infra* Part \_\_. [↑](#footnote-ref-53)
54. For judicial statements to this effect, see *infra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.**. For academic accounts of *Gingles* emphasizing manageability, see, e.g., Karlan, *supra* note **Error! Bookmark not defined.**, at 177-79; Issacharoff, *supra* note **Error! Bookmark not defined.**, 1859-71; Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 1990s*, 80 N.C. L. Rev. 1517, 1563-73 (2002). [↑](#footnote-ref-54)
55. McNeil v. Springfield Park Dist., 851 F.2d 937, 942-43 (7th Cir. 1988). [↑](#footnote-ref-55)
56. McGhee v. Granville Cnty., 860 F.2d 110, 116 (4th Cir.1988). [↑](#footnote-ref-56)
57. Bartlett v. Strickland, 556 U.S. 1, 16 (2009). [↑](#footnote-ref-57)
58. Bartlett v. Strickland, 556 U.S. 1, 18 (2008). [↑](#footnote-ref-58)
59. [FN explaining rather dubious premise of the “test”] [↑](#footnote-ref-59)
60. Though the point estimates suggest that the direct and panel effects of judge race are larger at the *Gingles* than at the totality-of-circumstances stage, the difference between the point estimates may not be statistically significant. [↑](#footnote-ref-60)
61. [supra TAN] [↑](#footnote-ref-61)
62. Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988).The courts have consistently rejected efforts to rebut vote-share evidence of polarization with survey or other data on the political preferences and interests of racial communities. *See*, *e.g.*, *Gomez*, 863 F.2d at 1080; U.S. v. Blaine Cnty., Mont., 363 F.3d 897, 910 (9th Cir. 2004). [↑](#footnote-ref-62)
63. Thornburg v. Gingles, 478 U.S. 30, 51, 54, 57 (1986). [↑](#footnote-ref-63)
64. *See id.* at 56 (“A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim.”), 57 (“[I]n a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting”).

 Blacksher and Menefee did recognize that voting patterns may not be probative of underlying polarization unless one of the candidates is “publicly identified with the interests of” the minority community. Blacksher & Menefee, From, at 51. However, they believed that such candidates could be identified by courts objectively, on the basis of their minority vote share. *Id.* at 59 (“Receipt of the racial minority's bloc support would be the best, and necessary, indication that a candidate is identified with the minority's particular interests.”). [↑](#footnote-ref-64)
65. Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988).The courts have consistently rejected efforts to rebut vote-share evidence of polarization with survey or other data on the political preferences and interests of racial communities. *See*, *e.g.*, *Gomez*, 863 F.2d at 1080; U.S. v. Blaine Cnty., Mont., 363 F.3d 897, 910 (9th Cir. 2004). [↑](#footnote-ref-65)
66. Grofman et al., Minority, at 83-84. The authors do note that in a small number of post-*Gingles* decisions, lower courts looked beyond voting patterns, *see id.* at 68-69. However, based on their discussion of *Gingles* at 83-84, they seem to view those decisions as misreadings of *Gingles*. [↑](#footnote-ref-66)
67. Lightman & Hebert, A General, at [↑](#footnote-ref-67)
68. [↑](#footnote-ref-68)
69. [↑](#footnote-ref-69)
70. 120 of these were selected from the Katz database of “final disposition” opinions in Section 2 cases decided between 1982 and 2005. We then had our assistants augment the Katz database with dispositions on Westlaw through June 2014 (adding another 156 cases to the dataset), and selected 30 of the more recent cases to be coded. When sampling from the Katz dataset, we conditioned on “GC” and “c2,” i.e., we only looked at cases coded as having considered *Gingles* or considered Senate Report factor 2 (racial bloc voting). Note that under the Katz coding protocol, which we followed, minority cohesion is “conceded” in a case that was appealed if it was conceded on appeal, even if it was disputed at trial. [↑](#footnote-ref-70)
71. One of us (Elmendorf) read every disposition that the students coded as having a dispute about minority political cohesion. [↑](#footnote-ref-71)
72. We did find one case outside of this sample in which a court largely ignored the race of candidates in judging minority cohesion. *See* Johnson v. Hamrick, 155 F.Supp.2d 1355, 1370 (N,D. Ga. 2001), *aff'd*, 296 F.3d 1065 (11th Cir. 2002) (basing cohesion determination on results from all endogenous elections presented to the court, none of which were interracial). [↑](#footnote-ref-72)
73. Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 999, 1016 (D.S.D. 2004) (“Factoring in the margin of error and the arbitrary nature of setting a specific point, the court holds that cohesion exists at levels above 60 percent and may exist, albeit more weakly, at lower levels.”); Johnson v. Hamrick, 155 F.Supp.2d 1355, 1370 (N,D. Ga. 2001) *aff'd*, 296 F.3d 1065 (11th Cir. 2002) (stating that minority bloc voting above 70% establishes cohesion as a matter of law, while finding cohesion on facts where minority group sometimes but not always voted that cohesively). [↑](#footnote-ref-73)
74. Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1056 (D. Md. 1994) (three-judge court) (adopting 60% rule); Cane v. Worcester Cnty., Md., 840 F. Supp. 1081, 1088 n. 5 (D. Md. 1994) (endorsing 60% rule of thumb); Garza v. County of Los Angeles, Cal., 756 F.Supp. 1298, 1335-36 (C.D. Cal. 1990) (emphasizing “landslide” results, without making this a formal requirement for proving minority cohesion). *See also* Rodriguez v. Pataki, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), a case in which the plaintiffs’ expert applied the 60% rule in his polarization analysis. *Cf.* Allan J. Lightman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 5 (1993) (positing that where “voting reaches landslide proportions: a majority of about 60% or greater in a contest for a single position,” minority political cohesion is “beyond dispute”). [↑](#footnote-ref-74)
75. Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1056 (D. Md. 1994) (three-judge court). [↑](#footnote-ref-75)
76. *See*, *e.g*., U.S. v. City of Euclid, 580 F. Supp. 2d 584, 596 (N.D. Ohio 2008) (“There are no bright line absolutes…”); U.S. v. Village of Port Chester, 2008 WL 190502 (S.D.N.Y. Jan. 17, 2008), at \*11 (“To determine whether minority voters vote cohesively, [the court and expert witnesses] will look to the gap between the percentage of votes for the minority-preferred candidate and the non-preferred candidate rather than using a particular bright-line threshold….”); Brown v. Bd. of Comm'rs of City of Chattanooga, Tenn., 722 F. Supp. 380, 392 (E.D. Tenn. 1989) (interpreting *Gingles* as rejecting rigid doctrinal tests for racial group cohesion); Fabela v. City of Farmers Branch, Tex., No. 3:10-CV-1425-D, 2012 WL 3135545, at \*10-12 (N.D. Tex. Aug. 2, 2012) (weighing point estimates and confidence intervals); Williams v. City of Dallas, 734 F. Supp. 1317, 1391 (N.D. Tex. 1990).  [↑](#footnote-ref-76)
77. [infra] [↑](#footnote-ref-77)
78. *Cf.* Mallory v. Ohio, 173 F.3d 377, 382-84 (6th Cir. 1999) (approving district court finding of no minority cohesion based on widely varying minority vote shares for minority candidates, without addressing whether variation in vote shares might be due to attributes of the candidates in the race). [↑](#footnote-ref-78)
79. *See* Campos v. City of Baytown, Tex., 840 F.2d 1240, 1245 (5th Cir. 1988) (suggesting that racial polarization analysis should be based on elections in which voters have the choice of a “viable” minority candidate who is “sponsored” by the minority community); Barnett v. City of Chicago, 141 F.3d 699, 702 (7th Cir. 1998) (defining “polarized voting” as “members of various racial or ethnic groups hav[ing] a strong preference for a candidate that belongs to their group”); Gonzales v. City of Aurora, 535 F.3d 594, 598 (7th Cir. 2008) (characterizing “candidate of choice” as a euphemism for “minority candidate”). [↑](#footnote-ref-79)
80. *See*, *e.g.*, N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002, 1018-19 (2d Cir. 1995); Ruiz v. City of Santa Maria, 160 F.3d 543, 551-52 (9th Cir. 1998); Lewis v. Alamance County, N.C., 99 F.3d 600, 605-11 & n. 8 (4th Cir. 1996); Sanchez v. Colo, 97 F.3d 1303, 1319-21 (10th Cir. 1996); Jenkins v. Red Clay Consol. School Dist. Bd. of Educ., 4 F.3d 1103 (3d Cir. 1993); Clarke v. City of Cincinnati, 40 F.3d 807, 810 n.1 (6th Cir. 1994); Uno v. City of Holyoke, 72 F.3d 973, 988 n. 8 (1st Cir. 1995).

 The issue of white vs. white elections has generally come up in the context of the third *Gingles* prong (white bloc voting), which is disputed more often than the second (minority cohesion). See, e.g., N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002, 1018-19 (2d Cir. 1995); Ruiz v. City of Santa Maria, 160 F.3d 543, 551-52 (9th Cir. 1998); Lewis v. Alamance County, N.C., 99 F.3d 600, 605-11 & n. 8 (4th Cir. 1996); Sanchez v. Colo, 97 F.3d 1303, 1319-21 (10th Cir. 1996); Jenkins v. Red Clay Consol. School Dist. Bd. of Educ., 4 F.3d 1103 (1993). But because courts generally use the same set of elections to gauge minority cohesion and white bloc voting when neither *Gingles* prong has been conceded, judicial rulings on the relevance of white vs. white elections for assessing white bloc voting presumably extend to the evaluation of minority political cohesion. The Third Circuit recognizes this expressly. *See* Jenkins v. Red Clay Consol. School Dist. Bd. of Educ., 4 F.3d 1103 (1993) (allowing that evidence from white vs. white elections can be used to rebut minority cohesion). *But see* Lewis v. Alamance Cnty., N.C., 99 F.3d 600, 610 n. 8 (4th Cir. 1996) (suggesting that white vs. white elections *might* be more relevant to the question of legally significant white bloc voting). [↑](#footnote-ref-80)
81. *See*, *e.g.*, Old Person v. Cooney, 230 F.3d 1113, 1122 (9th Cir. 2000) (noting that district court “had considered white bloc voting to be probative only if the white-preferred candidate won with a minimum of 60% of the white vote,” and assuming without deciding that this was correct); Meza v. Galvin, 322 F. Supp. 2d 52, 66-67 (D. Mass. 2004) (deeming evidence of white bloc voting “equivocal,” given that 30-40% of whites supported minority-preferred candidates); Session v. Perry, 298 F.Supp.2d 451, 484 (E.D. Tex. 2004) (three-judge court) (suggesting that 30% white crossover voting would preclude finding of racial polarization); Rodriguez v. Pataki, 308 F.Supp.2d 346, 390 (S.D.N.Y. 2004) (defining “white bloc voting” as 60% white support for same candidate). [↑](#footnote-ref-81)
82. D. James Greiner, *Re-Solidifying Racial Bloc Voting: Emprics and Legal Doctrine in the Melting Pot*, 86 Ind. L.J. 447, 456 (2011) (“Lower courts mostly interpreted Justice Brennan’s opinion in *Gingles* as foreclosing reliance on . . . numerically defined thresholds or rule of thumb [to delimit legally significant white bloc voting]”).  [↑](#footnote-ref-82)
83. Though on occasion courts have disregarded elections where the minority candidate was backed by a local, predominantly white political faction—as opposed to being “sponsored” by the minority community. Collins v. City of Norfolk, Va., 883 F.2d 1232 (4th Cir. 1989). *See also* Sanchez v. Colo, 97 F.3d 1303 (10th Cir. 1996) (stating that courts should look only to elections where candidate is “sponsored” by minority community); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (1993) (same). [↑](#footnote-ref-83)
84. Sanchez v. Colo, 97 F.3d 1303 (10th Cir. 1996) (stating that courts should look only to elections where candidate is “sponsored” by minority community); Jenkins v. Red Clay Consol. School Dist. Bd. of Educ., 4 F.3d 1103 (1993) (same). [↑](#footnote-ref-84)
85. Id. [↑](#footnote-ref-85)
86. *See supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text. [↑](#footnote-ref-86)
87. Ruiz v. City of Santa Maria, 160 F.3d 543, 552 (1998) (*quoting* N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002, 1018 (2nd Cir.1995)). *See also* U.S. v. Blaine Cnty., Mont., 363 F.3d 897, 910 (9th Cir. 2004) (stating that courts should not go beyond vote shares in judging cohesion because to ask about interests is to ask an “inherently political question”). [↑](#footnote-ref-87)
88. N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002, 1018-19 (2d Cir. 1995); Ruiz v. City of Santa Maria, 160 F.3d 543, 552 (9th Cir. 1998). *See also* Martinez v. Bush, 234 F.Supp.2d 1275, 1280 n.6 (S.D. Fla. 2002) (same). [↑](#footnote-ref-88)
89. Lewis v. Alamance Cnty., N.C., 99 F.3d 600, 608 (4th Cir. 1996). [↑](#footnote-ref-89)
90. *Id.* at 611-15. The nominal difference between the Fourth Circuit’s approach and that of the Second and Ninth Circuits is that the Fourth Circuit does not ignore same-race elections lacking polarized voting. Minority cohesion and white bloc voting can in theory be disproven in the Fourth Circuit with reference to non-polarized white vs. white elections. [↑](#footnote-ref-90)
91. Ruiz, 160 F.3d at 552-54. [↑](#footnote-ref-91)
92. *See*, *e.g.*,Clarke v. City of Cincinnati, 40 F.3d 807, 810-13 (6th Cir. 1994) (insisting that white vs. white elections are relevant to gauging minority cohesion and white bloc voting, but reversing district court because it gave equal weight to evidence from interracial and monoracial elections); Reed v. Town of Babylon, 914 F. Supp. 843, 879 (E.D.N.Y. 1996) (stating that multi-racial elections are “most probative”); U.S. v. Village of Port Chester, 704 F. Supp. 2d 411, 427-29 (S.D.N.Y. 2010) (sorting elections by probativeness and giving most weight to multiracial elections where race/ethnicity of minority candidate was widely known). [↑](#footnote-ref-92)
93. *See* Collins v. City of Norfolk, Va., 883 F.2d 1232, 1238-40 (4th Cir. 1989) (holding that two white candidates who received minority interest group endorsements were not true candidates of choice, because, inter alia, they failed to adopt certain issue positions that the court believed to be important to minority voters). [↑](#footnote-ref-93)
94. Lewis v. Alamance County, N.C., 99 F.3d 600, 614 (1996) (“in multi-seat elections in which voters are permitted to cast as many votes as there are seats, at the very least any candidate who receives a *majority* of the minority vote and who finishes behind a *successful* candidate who was the first choice among the minority voters is automatically to be deemed a black-preferred candidate, just like the successful first choice”). [↑](#footnote-ref-94)
95. Id. [↑](#footnote-ref-95)
96. Levy v. Lexingon Cnty, S.C., 589 F. 3d 708, 717 (4th Cir. 2009). [↑](#footnote-ref-96)
97. Harvell v. Blytheville Sch. Dist. No. 5, 71 F.3d 1382, 1386 (8th Cir. 1995) [↑](#footnote-ref-97)
98. Clay v. Bd. of Educ. of City of St. Louis, 90 F.3d 1357, 1361-62 (8th Cir. 1996). [↑](#footnote-ref-98)
99. *Compare* Askew v. City of Rome, 127 F.3d 1355, 1377-82 (11th Cir. 1997) (adopting a “somewhat subjective,” “totality of circumstances” approach to the definition of minority preferred candidate), *with* Johnson v. Hamrick, 296 F.3d 1065, 1074-81 (8th Cir. 2002) (sustaining district court decision premised on idea that any candidate who wins a majority of the minority vote is by construction a minority candidate of choice). [↑](#footnote-ref-99)
100. [Greiner] [↑](#footnote-ref-100)
101. [Greiner, Rubin, Sen] [↑](#footnote-ref-101)
102. *See generally* Katz et al., *supra* note 32, at 668-70. [↑](#footnote-ref-102)
103. *See*, *e.g.*, Black Pol. Task Force v. Galvin, 300 F.Supp.2d 291, 305-06 (D. Mass. 2004); Perry Litig., 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); Bone Shirt v. Hazeltine, 336 F.Supp.2d 976, 1008-09 (D.S.D. 2004); Sanchez v. Colo., 97 E3d 1303, 1317 n.25 (10th Cir. 1996); LULAC v. Clements, 999 F.2d 831, 883-84 (5th Cir. 1993) (en banc); Bradford Cnty NAACP v. City of Starke., 712 E Supp. 1523, 1534 (M.D. Fla. 1989). *See also* N.A.A.C.P. v. City of Niagara Falls, NY, 65 F.3d 1002, 1017-19 (2d Cir. 1995) (indicating that success of candidate backed by minority voters in general election is not probative of minority’s opportunity to elect if same candidate did garner strong minority support in primary); Katz et al., *supra* note 32, at 669 (“Many courts . . . discount minority support for a particular candidate in the general election where minority voters supported another candidate in the primary.”). [↑](#footnote-ref-103)
104. *See*, *e.g.*, U.S. v. Alamosa Cnty, 306 F. Supp. 2d 1016, 1033 (D. Colo 2004) (“the Court finds general elections to be more probative because they involve all voters in the county”); Meza v. Galvin, 322 F.Supp. 2d 52, 65 (D. Mass. 2004). [↑](#footnote-ref-104)
105. Johnson v. De Grandy, 521 U.S. at 1020 (1994). [↑](#footnote-ref-105)
106. *See*, *e.g.*, Askew v. City of Rome, 127 F.3d 1355, 1378 (11th Cir. 1997) (“Black preferred candidates . . . are not only those who are perfectly ideologically in tune with the prevailing political sentiment in the black community. To so hold would . . . raise the possibility that none of Rome's current black officials were truly black preferred because they are too moderate.”); Lewis v. Alamance Cnty, N.C., 99 F.3d 600, 615 (4th Cir. 1996) (“the proposition that success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater minority support was defeated in the primary . . . is grounded in the belief that minority voters essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share”); Rural West Tenn. African-Am. Council, Inc. v. McWherter, 877 F.Supp. 1096, 1100-07 (W.D.Tenn. 1996) (addressing place of “influence districts” in evaluation of minority political opportunity), *See also* Texas v. U.S., 887 F. Supp. 2d 183, 175 (2012), *vac’d on other grounds* 133 S.Ct. 2885 (2013) (“[R]equiring cohesion in the primary election distorts the role of the primary. Although minority groups sometimes coalesce around a candidate at that point in time, minority voters, like any other voters, use the primary to help develop their preferences.”); Corbett v. Sullivan, 202 F. Supp. 2d 972, 984 (E.D. Mo. 2002) (deeming African Americans cohesive because they usually vote for Democrats). [↑](#footnote-ref-106)
107. A judge might also reasonable decide to downplay polarization evidence from primary elections (particularly same-race primary elections) because voters tend to be less informed about primary election than general election candidates. *See generally* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2012 U. Ill. L. Rev. 363, 388-90 (2012). [↑](#footnote-ref-107)
108. Black Political Task Force v. Galvin, 300 F.Supp.2d 291 (D. Mass. 2004). *But see* Clarke v. City of Cincinnati, 40 F.3d 807, 813 (6th Cir.1994) (“To qualify as a ‘special’ circumstance . . . incumbency must play an unusually important role in the election at issue.”) [↑](#footnote-ref-108)
109. Meza v. Galvin, 322 F. Supp .2d 52, 67 (D.Mass. 2004). *See also* Cane v. Worcester Cnty., Md., 840 F. Supp. 1081, 1088 (D. Md. 1994) (ignoring election in which per lay testimony the minority candidate “did not attempt to win”). [↑](#footnote-ref-109)
110. Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court) [↑](#footnote-ref-110)
111. Sanchez v. Colo, 97 F.3d 1303 (10th Cir. 1996); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (1993); Rodriguez v. Pataki, 308 F .Supp. 2d 346, 392 n. 59 (S.D.N.Y. 2003) (three-judge court). [↑](#footnote-ref-111)
112. Bone Shirt v. Hazeltine, 336 F.Supp.2d 976 (D.S.D. 2004). [↑](#footnote-ref-112)
113. Montano v. Suffolk Cnty Legis., 268 F.Supp.2d 243 (E.D.N.Y.,2003) [↑](#footnote-ref-113)
114. Collins v. City of Norfolk, Va., 883 F.2d 1232 (4th Cir. 1989). *See also* Sanchez v. Colo, 97 F.3d 1303 (10th Cir. 1996) (stating that courts should look only to elections where candidate is “sponsored” by minority community); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (1993) (same). [↑](#footnote-ref-114)
115. Gunn v. Chickasaw Cnty., Mississippi, No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at \*4 (N.D. Miss. Oct. 28, 1997). [↑](#footnote-ref-115)
116. Solomon v. Liberty Cnty Comm'rs, 221 F.3d 1218, 1220 (11th Cir.2000) (polity-wide); African Amer. Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345 (8th Cir. 1995) (same); Old Person v. Brown, 312 F.3d 1036, 1047-48 (9th Cir. 2002) (holding that racial polarization analysis should take place at same geographic scale as proportionality analysis); Rural West Tenn. African-Am. Affairs Council v. Sundquist, 209 F.3d 835, 840-41 (6th Cir. 2000) (same). [↑](#footnote-ref-116)
117. *See*, *e.g*., Cano v. Davis, 211 F.Supp.2d 1208, 1239-40 (C.D. Cal. 2002) [↑](#footnote-ref-117)
118. *See* LULAC v. Perry, 548 U.S. 399, 430 (“the State’s creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right”). [↑](#footnote-ref-118)
119. *See infra* Part \_\_. [↑](#footnote-ref-119)
120. This is a requirement in those circuits that use the subjective definition of “minority candidate of choice.” *See supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text. [↑](#footnote-ref-120)
121. *See supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text. [↑](#footnote-ref-121)
122. *See supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text. [↑](#footnote-ref-122)
123. *See supra* Part II.A.1. [↑](#footnote-ref-123)
124. *See*, *e.g.*, Clarke v. City of Cincinnati, 40 F.3d 807, 813 (6th Cir.1994) (restricting arguments based on incumbency); U.S. v. Alamosa Cnty, Colo., 306 F.Supp.2d 1016, 1032-33 (D. Colo. 2004) (rejecting argument that elections involving Hispanic candidate who downplayed his ethnicity, and Hispanic Republican, should be excluded or down-weighted in analysis of white bloc voting). [↑](#footnote-ref-124)
125. *See supra* text accompanying notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.**. [↑](#footnote-ref-125)
126. [↑](#footnote-ref-126)
127. 478 U.S. 30, 51 (1986) (“If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.”) [↑](#footnote-ref-127)
128. *Id.* at 48 (“The theoretical basis for [racial vote dilution] is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.”) [↑](#footnote-ref-128)
129. *Id.* at 51 (“the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate”). [↑](#footnote-ref-129)
130. [↑](#footnote-ref-130)
131. [↑](#footnote-ref-131)
132. [↑](#footnote-ref-132)
133. *See* Georgia v. Ashcroft, 539 U.S. 461, 477-91 (2003) (addressing “effective exercise of the electoral franchise,” a synonym for voting strength); Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (noting that vote dilution cases concern electoral institutions that “operate to minimize or cancel out the voting strength of racial minorities”) (internal citations and quotation marks omitted), Gerken, *supra* note **Error! Bookmark not defined.**, at 1786-81. [↑](#footnote-ref-133)
134. *See* Growe v. Emison, 507 U.S. 25, 40 (1993) (explaining that first prong of *Gingles* is necessary to establish that there “can be a remedy”). [↑](#footnote-ref-134)
135. *See infra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-135)
136. [FN on academic elaborations of each theory] [↑](#footnote-ref-136)
137. *See*, *e.g.*, Old Person v. Brown, 312 F.3d 1036, 1042-50 (9th Cir. 2002). [↑](#footnote-ref-137)
138. *Gingles*, 478 U.S. at 48-51 (Brennan, *J.*). [↑](#footnote-ref-138)
139. *Gingles*, 478 U.S. at 93 (O’Connor, *J.*, concurring in the judgment). [↑](#footnote-ref-139)
140. *See*, *e.g.*,Johnson v. De Grandy, 512 U.S. 997, 1013-17 (1994) (treating “proportionality” as key consideration in totality-of-circumstances analysis); African Am. Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345, 1355-57 (8th Cir. 1995) (characterizing *De Grandy* as giving “extremely heavy weight” to proportionality). [↑](#footnote-ref-140)
141. Ten courts found proportionality and no liability. Four of the five courts that found a lack of proportionality found liability. (No information on the remaining three decisions is reported.) *See* Katz et al., Documenting, at 730-31. [↑](#footnote-ref-141)
142. *See* Whitcomb v. Chavis, 403 U.S. 124, 156 (1971) (rejecting “general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat….”). [↑](#footnote-ref-142)
143. *See generally* Dennis C. Mueller, Public Choice III, at 271-76 (2003) (discussing empirical evidence for Duverger’s law).  [↑](#footnote-ref-143)
144. 403 U.S. 124 (1971). [↑](#footnote-ref-144)
145. 412 U.S. 755 (1973). [↑](#footnote-ref-145)
146. 446 U.S. 55, 122 (1980) (Marshall, *J.*, dissenting) (“The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them.”) [↑](#footnote-ref-146)
147. 478 U.S. at 105 (O’Connor, *J.*, concurring in the judgment). [↑](#footnote-ref-147)
148. 539 U.S. 461 (2003). [↑](#footnote-ref-148)
149. *Id.* at 479-91. [↑](#footnote-ref-149)
150. 548 U.S. 399 (2006). *See also* Johnson v. De Grandy, 512 U.S. 997, 1013-17 (1994) (introducing proportionality as a totality-of-circumstances consideration). [↑](#footnote-ref-150)
151. [↑](#footnote-ref-151)
152. *Bartlett*, 553 U.S. at 15 (*quoting* Hall v. Virginia, 385 F.3d 421, 431 (4th Cir. 2004)). [↑](#footnote-ref-152)
153. *Id.* at 445-46. [↑](#footnote-ref-153)
154. 556 U.S. at 15. [↑](#footnote-ref-154)
155. *Cf.* Kareem Crayton, Swords (discussing use of racial polarization data for offensive and defensive purposes). [↑](#footnote-ref-155)
156. 553 U.S. at 23. [↑](#footnote-ref-156)
157. Georgia v. Ashcroft, 539 U.S. 461 (2003). [↑](#footnote-ref-157)
158. *See*, *e.g.*, N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y., 65 F.3d 1002 (2d Cir. 1995); Solomon v. Liberty County, Fla., 957 F. Supp. 1522 (N.D. Fla. 1997). *See also* Harvell v. Blytheville School Dist. No. 5, 71 F.3d 1382, 1395 (8th Cir. 1995) (Loken, *J.*, dissenting) (“I am particularly distressed by the court's . . . criticism of the manner in which successful African–American candidates ‘managed to obtain and retain their seats’ [in coalition with whites]”) (internal citations omitted);U.S. v. Alamosa County, Colo., F. Supp. 2d 1016, 1031 n. 39 (D. Colo. 2004) (“[A] mix of elections, some between Hispanic candidates, some between Anglo candidates, and some with both Hispanic and Anglo candidates suggests substantial political participation by Hispanic residents and voter preferences that extend beyond ethnic identity. [C]andidates must factor into their campaign strategies the practical knowledge that all voters, whether members of a minority or majority group, must seek out common political ground . . . in order to advance a political agenda.”). [↑](#footnote-ref-158)
159. The theory may be extended to cover discrimination by conventional state actors as well. *See generally* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 417-48 (2012).  [↑](#footnote-ref-159)
160. *Gingles*, 478 U.S. at 83 (White, *J.*, concurring). [↑](#footnote-ref-160)
161. *Id*. [↑](#footnote-ref-161)
162. *Id*. [↑](#footnote-ref-162)
163. *Id*. [↑](#footnote-ref-163)
164. Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F.3d 476, 502-03 (1999) (Leval, *J.*, concurring in the judgment); Nipper v. Smith, 39 F. 3d 1494, 1524 (11th Cir. 1994) (en banc) (opinion of Tjoflat, *J.*); Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir. 1995);; Vecinos De Barrio Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir.1995); LULAC v. Clements, 989 F.2d 831, 849-63 (5th Cir. 1993) (en banc).  [↑](#footnote-ref-164)
165. Katz et al., *supra* note 32, at 670-72. [↑](#footnote-ref-165)
166. *See*, *e.g.*, U.S. v. Charleston Cnty, S.C., 365 F.3d 341, 349 (4th Cir. 2004) (“the reason for polarized voting is a critical factor in the totality analysis”). [↑](#footnote-ref-166)
167. The only circuit courts to have made this a necessary condition in vote dilution cases are the First, Fifth, and Eleventh. *See* *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-167)
168. *See generally* John Hart Ely, Democracy and Distrust 145-70 (1980); T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. Colo. L. Rev. 325, 355-64 (1992); Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 732-33 (1985). [↑](#footnote-ref-168)
169. [Roberts opinion] [↑](#footnote-ref-169)
170. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 438, 126 S. Ct. 2594, 2621, 165 L. Ed. 2d 609 (2006). [↑](#footnote-ref-170)
171. [infra] [↑](#footnote-ref-171)
172. *See* *LULAC*, 548 U.S. at 540 (“This bears the mark of intentional discrimination that could give rise to an equal protection violation.”); Elmendorf, Making, at \_\_ (arguing that *LULAC* was a case in which the intentional discrimination question was close, and where there is a significant likelihood of intentional discrimination, that is enough to invalidate the state action under Section 2.). [↑](#footnote-ref-172)
173. [Elmendorf, Making] [↑](#footnote-ref-173)
174. Pildes [↑](#footnote-ref-174)
175. Gonzales v. City of Aurora, 535 F.3d 594, 599-600 (7th Cir. 2008). [↑](#footnote-ref-175)
176. [Roberts dissent in LULAC] [↑](#footnote-ref-176)
177. Then again, the voter-discrimination theory could also be implemented on a sub-polity scale, on the theory that harms must be assessed and remedies provided in sub-polity locales where voter discrimination is particularly pronounced. [↑](#footnote-ref-177)
178. FN on South (extreme racial polarization in partisanship) [↑](#footnote-ref-178)
179. *See supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text. [↑](#footnote-ref-179)
180. In Part III.B, we argue that voting patterns in primary elections are *not*, in general,a reliable signal of whether minority voters have distinct political preferences from other members of the partisan coalition. But if primary voting is in fact racially polarized, this is *some* evidence of distinctiveness—although what it actually says about distinctiveness depends on the attributes of the candidates, voters’ awareness of those attributes, and the balance between sincere and strategic voting. [↑](#footnote-ref-180)
181. *See supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-181)
182. *Cf.* N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y. 65 F.3d 1002, 1015 (2d Cir. 1995) (noting that “appropriate weight to afford white-white elections in § 2 cases” is “part of a broader debate about the extent to which plaintiffs must prove racial bias to prevail under § 2”); Williams v. City of Dallas, 734 F. Supp. 1317, 1388 (N.D. Tex. 1990) (“elections [with minority candidates] provide the most direct test of the hypothesis that race is a factor in the election system under scrutiny”). [↑](#footnote-ref-182)
183. That said, courts that subscribe to the voter discrimination theory have not fully assimilated the fact that voter discrimination (in the sense of disparate treatment) cannot be estimated without a counterfactual. White bloc voting against a minority-race candidate is “legally significant” only if the candidate would have fared better among whites were she perceived to be white. Insofar as courts rely on observational data, the screening test under the voter-discrimination theory ought to involve a comparison of the white vote share of minority-race candidates with the white vote share of similar non-minority candidates matched up against similar opponents. The need for a counterfactual or comparison candidate is overlooked by the common convention of rebuttably presuming white voter discrimination from a substantial divergence between white and minority vote shares for minority-preferred candidates

Judicial opinions adopting this convention include: Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F.3d 476, 502-03 (1999) (Leval, *J.*, concurring in the judgment); Vecinos De Barrio Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir.1995); Nipper v. Smith, 39 F.3d 1494, 1524-26 (11th Cir. 1994) (en banc) (opinion of Tjoflat, *J.*); Teague v. Attala Cnty, Miss., 92 F.3d 283, 290 (5th Cir. 1996).

 We note in passing that *perhaps* this convention can be justified on the ground that it is extremely difficult to identify appropriate counterfactual elections. The problem, as Jim Greiner has explained, is that voters, donors, endorsers, and others become aware of a candidate’s apparent race or ethnicity at different times, and many candidate attributes (e.g., financial resources) are “post treatment,” in the sense that they are affected by peoples’ perception of the candidate’s race. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533, 590-97 (2008). [↑](#footnote-ref-183)
184. As the De Grandy Court emphasized, “usual defeat” at the level of a particular legislative district says nothing about whether the minority community enjoys roughly proportional representation. [↑](#footnote-ref-184)
185. *See supra* Part II.B. [↑](#footnote-ref-185)
186. [IKP] [↑](#footnote-ref-186)
187. [supra] [↑](#footnote-ref-187)
188. [Blacksher & Menefee, CA2] [↑](#footnote-ref-188)
189. [FN on possible incentive for strategic voting based on composition of legislative body. Directional voting hypothesis. Evidence in Van Howeling & Tomz] [↑](#footnote-ref-189)
190. Under the uniform distribution, every possible value is equally likely to be drawn. The domain of “potential ideology” could be defined on the interval from the most liberal to the most conservative member of the electorate. [↑](#footnote-ref-190)
191. [JELS paper] [↑](#footnote-ref-191)
192. *See* Cox, *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-192)
193. [party cues lit] [↑](#footnote-ref-193)
194. [see infra] [↑](#footnote-ref-194)
195. *Id.* at 411-13. [↑](#footnote-ref-195)
196. *Id.* at 443-44. [↑](#footnote-ref-196)
197. 548 U.S. at 443. [↑](#footnote-ref-197)
198. [cross-refernence caselaw discussion] [↑](#footnote-ref-198)
199. Session v. Perry, 298 F. Supp. 2d 451, 484 (2006). [↑](#footnote-ref-199)
200. 548 U.S. at 444-45. [↑](#footnote-ref-200)
201. *Cf.* Mallory v. Ohio, 173 F.3d 377, 382-84 (6th Cir. 1999) (upholding finding of no cohesion where minority vote shares varied widely across elections). [↑](#footnote-ref-201)
202. LULAC v. Clements, 986 F.2d 728, 744 (5th Cir. 1993). [↑](#footnote-ref-202)
203. [judicial opinions; Pildes, Is] [↑](#footnote-ref-203)
204. For a related discussion of this point, see Greiner, *supra* note **Error! Bookmark not defined.**, at 596. Curiously, in a subsequent paper, Greiner assumes that candidates’ vote shares by racial group in interracial elections provide a lot of information about voters’ preference orderings over candidate race (though he recommends supplementing the traditional vote-share data with new quantitative and qualitative evidence). *See* Greiner, *supra* note **Error! Bookmark not defined.**, at 477-87. [↑](#footnote-ref-204)
205. [Pildes] [↑](#footnote-ref-205)
206. *See* Thornburg v. Gingles, 478 U.S. 30, 57. [↑](#footnote-ref-206)
207. *Id.*; Hebert et al., *supra* note **Error! Bookmark not defined.**, at 55-56. [↑](#footnote-ref-207)
208. For a fuller description of the experiments, seeAbrajano et al., *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-208)
209. [cites] [↑](#footnote-ref-209)
210. [Hebert & Lightmant, see infra] [↑](#footnote-ref-210)
211. *See* Abrajano et al., *supra* note **Error! Bookmark not defined.**. [↑](#footnote-ref-211)
212. Id. [↑](#footnote-ref-212)
213. *See infra* TAN\_\_. [↑](#footnote-ref-213)
214. [FN on Bayes’s Rule and relationship to statistics] [↑](#footnote-ref-214)
215. Although basing the analysis on general election data may make it hard to determine whether the minority community is politically distinct from white co-partisans—an important question under the PR theory, *see supra* TAN \_\_--the risk of mistaken inferences from primary elections are so severe (*see supra* TAN \_\_) that we think primaries should be excluded from the analysis unless the court is willing to closely investigate the political stories behind the election returns. Note also that general election results data will sometimes shed light on within-party differences, as reflected in, for example, differential rates of white and minority “defection” from various nominees of the minority-preferred party. [↑](#footnote-ref-215)
216. [explain] [↑](#footnote-ref-216)
217. Only if the underlying candidate matchups are the same or very similar can a court conclude that jurisdiction A is more polarized than B because the average difference between white and minority vote shares for minority-race candidates of the minority preferred party is higher in A than in B. [↑](#footnote-ref-217)
218. [TAN \_\_\_] [↑](#footnote-ref-218)
219. [↑](#footnote-ref-219)
220. Blacksher & Menefee, From, at 59 (“Receipt of the racial minority's bloc support would be the best, and necessary, indication that a candidate is identified with the minority's particular interests.”); NAACP v. City of Niagara Falls, NY, \_\_. [↑](#footnote-ref-220)
221. [explain why this is more plausible—basically goes to valence vs. other traits] [↑](#footnote-ref-221)
222. [explain—basically this is a point about voter information] [↑](#footnote-ref-222)
223. [Grofman] [↑](#footnote-ref-223)
224. LULAC v. Perry, 548 U.S. 399, 433 (2006) (*quoting* Miller v. Johnson, 515 U.S. 900, 920 (1995), which in turn quotes Shaw v. Reno, 509 U.S. 630, 647 (1993)). To be clear, the models used to infer candidates’ vote shares by racial group from aggregate data allow for some random variation in vote totals by racial group—it is not assumed that *every* voter of a racial group has *exactly* the same political preference—but the propensity of a voter of a given race to support a given candidate must be independent of any geographic “community of interest” to which he or she may be belong. [↑](#footnote-ref-224)
225. In their influential book, Grofman, Handley, and Niemi acknowledge that “homogeneous precinct analysis” (estimating minority or white vote shares as the average vote share in racially homogeneous precincts) may yield misleading inferences because of systematic differences in political preferences between voters of the same race who live in homogeneous as opposed to integrated neighborhoods. Grofman et al., Minority, at 85. But the authors state that the “plausibility of the assumption” that homogeneous-precinct voters are indistinguishable from voters of the same race in heterogeneous precincts can be “checked” “by comparing results from a homogeneous precinct analysis with those from an ecological regression (which, of course, includes data from racially mixed precincts).” *Id.* at 85. The authors fail to note that ecological regression estimates depend on the very same homogeneity assumption. Grofman et al.’s mistake is repeated in the leading casebook on election law and the Voting Rights Act, and in subsequent papers by legal academics. *See* Issacharoff, Karlan, and Pildes, The Law of Democracy, at \_\_; Crayton, Sword, at \_\_ [cites] [↑](#footnote-ref-225)
226. 548 U.S. 399 (2006). [↑](#footnote-ref-226)
227. 548 U.S. 399, 433-34. [↑](#footnote-ref-227)
228. *Id.* at 433 (quoting earlier cases). [↑](#footnote-ref-228)
229. *Id.* at 500 (Roberts, *J.*, dissenting in part) [↑](#footnote-ref-229)
230. In a draft paper designed to pick up within-race differences in vote choice in the 2012 presidential election, the authors divide precincts into four categories— rural, urban, South, and non-South—and then pool across the entire United States (within each category) to estimate Obama’s vote share by racial group. Michael McDonald & Brian Amos, Racially Polarized Voting and Roll Call Behavior in the U.S. House (unpublished manuscript, April 13, 2015), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546384>. [↑](#footnote-ref-230)
231. We tried to obtain the experts’ reports to the district court in *LULAC* to figure out the geographic region over which they pooled, but the reports are not available free of charge. The portions of the record provided on appeal to the Supreme Court do not address the pooling issue. [↑](#footnote-ref-231)
232. *See Bartlett*, 556 U.S. at 17-20 (adopting literal rather than functional view of “potential majority minority district” requirement for bringing a Section 2 claim); Holder v. Hall, 512 U.S. 874, 881 (1994) (ruling out Section 2 challenges to the size of a legislative body, for want of an “objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice”). *See also LULAC*, 548 U.S. at 485-86 (Souter, *J.*, dissenting) (acknowledging need for “clear-edged rules” to govern threshold stage of vote dilution cases). [↑](#footnote-ref-232)
233. *See* LULAC v. Perry, 548 U.S. 399, 455-46 (2006). *See also* Bartlett v. Strickland, 556 U.S. 1, 21-22 (2008). [↑](#footnote-ref-233)
234. Bartlett v. Strickland, 556 U.S. 1, 17 (2008). [↑](#footnote-ref-234)
235. *Id.* at 19. [↑](#footnote-ref-235)
236. Compare the Fourth Circuit’s “representative cross section” requirement. *See \_\_*. [↑](#footnote-ref-236)
237. *See supra* Part \_\_\_. [↑](#footnote-ref-237)
238. [Cf. Fallon] [↑](#footnote-ref-238)
239. [Cf. LULAC, Bartlett “infusing race”] [↑](#footnote-ref-239)
240. [↑](#footnote-ref-240)
241. [↑](#footnote-ref-241)
242. Stephen Ansolabehere & Douglas Rivers, *Cooperative Survey Research*, 16 Ann. Rev. Pol. Sci. 307 (2013); Stephen Ansolabehere & Bryan F. Schaffner, *Does Survey Mode Still Matter? Findings from a 2010 Multi-mode Comparison*, 22 Pol. Analysis 285 (2013). [↑](#footnote-ref-242)
243. *See*, *e.g.*,Chris Tausanovich & Christopher Warshaw, *Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities*, 75 J. Pol. 330 (2013). [↑](#footnote-ref-243)
244. [↑](#footnote-ref-244)
245. Andrew Gelman & Jennifer Hill, Data Analysis Using Regression and Multilevel/Hierarchical Models (2007); Elmendorf & Spencer, *supra* note **Error! Bookmark not defined.**; Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County, 102 Cal. L. Rev. 1123 (2014); Yair Ghitza & Andrew Gelman, *Deep Interactions with MRP: Election Turnout and Voting Patterns Among Small Electoral Subgroups*, 57 Am J. Pol. Sci. 762 (2013); Jeffrey R. Lax & Justin H. Phillips, *How Should We Estimate Public Opinion in the States?*, 53 Am. J. Pol. Sci. 107 (2009) (hereinafter, *How Should We Estimate?*); Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness,* 103 Am. Pol. Sci. Rev. 367 (2009); Juliana Pacheco, *Using National Surveys to Measure Dynamic U.S. State Public Opinion: A Guideline for Scholars and an Application*, 11St. Pol. & Pol’y Q. 415 (2011); David K. Park, Andrew Gelman & Joseph Bafumi, *Bayesian Multilevel Estimation with Poststratification:* *State-Level Estimates from National Polls,* 12 Pol. Analysis 375 (2004). [↑](#footnote-ref-245)
246. See references cited in note 237, *supra*. [↑](#footnote-ref-246)
247. Michael J. Barber, Christopher B. Mann, J. Quinn Monson & Kelly D. Patterson, *Online Polls and Registration-Based Sampling: A New Method for Pre-Election Polling*, 22 Pol. Analysis 321 (2014). [↑](#footnote-ref-247)
248. [Greiner, Jurimetrica paper] [↑](#footnote-ref-248)
249. [Pitts] [↑](#footnote-ref-249)
250. [↑](#footnote-ref-250)
251. [↑](#footnote-ref-251)
252. [↑](#footnote-ref-252)
253. [↑](#footnote-ref-253)
254. Shelby Cnty v. Holder, 133 S.Ct. 2612 (2013). [↑](#footnote-ref-254)
255. In actual vote dilution cases the data would typically include many more precincts (more tables) and the numbers of rows and columns in the tables would typically be larger. The conceptual points we draw from this example are not affected by the simplicity of the hypothetical. [↑](#footnote-ref-255)
256. These particular constancy assumptions can be weakened. In particular, one could also assume that minority support for candidate A varies by precinct but that minority support or candidate A is statistically independent of the fraction of voters who are members of the minority group. Note that this weaker assumption is still a racial assumption in that it posits political behavior to be statistically independent of geography given voter race. We focus on the stronger constancy assumption because it is easier to present to non-technical readers.

 Still another racial assumption is that minority voters and white voters within the same precinct support candidate A at the same rate (and thus both groups within a precinct also support candidate B at an equal rate). This is the assumption underling the so-called neighborhood model. *See* D.A Freedman, S.P. Klein, J. Sacks, C.A Smyth & C.G. Everett, *Ecological Regression and Voting Rights*, 15 Evaluation Rev. 659 (1991). This might not seem like a racial assumption because it assumes that geography trumps race. Nonetheless, assuming that minority group members behave the same as geographically proximate whites is still an *assumption* about the political behavior of racial groups—not empirical evidence in its own right. [↑](#footnote-ref-256)
257. See *supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and **Error! Bookmark not defined.**-**Error! Bookmark not defined.**, and accompanying text. *Cf.* Lewis v. Alamance Cnty., N.C., 99 F.3d 600, 605 n. 3 (4th Cir. 1996) (cautioning against “against overreliance on bivariate ecological regression analysis in the estimation of voter preferences,” because “assuming that the level of minority support for the candidate is fairly constant across precincts . . . runs counter to the common sense observation that blacks and whites who live in integrated neighborhoods are more likely to vote for candidates of another race”). [↑](#footnote-ref-257)
258. LULAC v. Perry, 548 U.S. 399, 433 (2006) (*quoting* Miller v. Johnson, 515 U.S. 900, 920 (1995), which in turn quotes Shaw v. Reno, 509 U.S. 630, 647 (1993)). To be clear, the models used to infer candidates’ vote shares by racial group from aggregate data allow for some random variation in vote totals by racial group—it is not assumed that *every* voter of a racial group has *exactly* the same political preference—but the propensity of a voter of a given race to support a given candidate must be independent of any geographic “community of interest” to which he or she may be belong. [↑](#footnote-ref-258)
259. Leo A. Goodman, *Ecological Regression and the Behavior of Individuals*, 18 Am. Soc. Rev. 663 (1953). [↑](#footnote-ref-259)
260. One can also make principled statements about many other quantities of interest beyond population means, using a family of statistical techniques known as the bootstrap.  [↑](#footnote-ref-260)
261. For examples, see *infra* note 237. [↑](#footnote-ref-261)
262. Indeed, if only data from African American survey respondents are used to fit the model, race will not enter the model as a predicator at all. For an example, see Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After* Shelby County, 115 Colum. L. Rev. (forthcoming 2015), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414652> (manuscript at 46-59). [↑](#footnote-ref-262)
263. *See* Trevor Hastie, Robert Tibshirani & Jerome Friedman, Elements of Statistical Learning: Data Mining, Inference, and Prediction*,* ch. 7, (2nd ed. 2009). [↑](#footnote-ref-263)
264. *Id.* at 241. [↑](#footnote-ref-264)
265. Two of the authors of this paper are currently working on a study implementing this idea. [↑](#footnote-ref-265)