

White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act

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INTRODUCTION

Since their inception, majority-minority districts¹ have been the subject of extensive, and often rancorous, critique and debate. In their prime, these districts nearly single-handedly changed the face of American politics by enabling racial minorities to elect their preferred candidates who reflected both

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1. I define majority-minority districts as they are popularly known to be—districts in which racial or ethnic groups that are a numerical minority of the national population form a majority of the district's population.

their interests and identity.² However, precisely at the point when these districts achieve an optimal balance of majority and minority populations and host multi-candidate competition, they reveal a frailty that not only thwarts their immediate purpose but contradicts both the express and implicit goals of their source: The Voting Rights Act of 1965 (the Act).³ Although created by the Voting Rights Act, majority-minority districts possess an inherent limitation that contradicts the Voting Rights Act's manifest purpose of safeguarding minority interests and creating electoral opportunity by facilitating minority voters' election of candidates of their choice. I argue that this limitation of majority-minority districts, defined by a team of social scientists as "the collective action problem,"⁴ lies in their general inability to withstand competition among multiple minority candidates and a white candidate while simultaneously preserving their function to elect minority voters' candidates of choice. More significantly, an inherent limitation of majority-minority districts also lies in their potential to produce a converse result—that is, to facilitate the election of a non-preferred candidate and, perhaps, the least-preferred candidate of minority voters.⁵

At its core, the Voting Rights Act aims to protect minority voting rights, and

2. More majority-minority districts were created in the 1990s than at any other time. There were four Black Congresspersons in 1963, seventeen by 1973, twenty by 1983, doubling to forty by 1993. Indeed, the redistricting that followed the 1990 Census produced a total of thirteen new majority-Black congressional districts in Southern states. Each of these districts elected an African-American to Congress in 1992, although five of these districts were later invalidated by the Court. *See* *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). Today, each of the twenty states with the highest total Black populations has a Black representative in Congress. The increase in Black elected officials, however, has not been a panacea for the political inequalities that the Voting Rights Act seeks to address. *See* LANI GUINIER, *TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 49 (1994) (noting that, although the number of Black elected officials has increased as a result of the Voting Rights Act, issues of voter participation, effective representation, and policy responsiveness remain). Moreover, some have argued that the decrease in Democratic seats and increase in Republican power allegedly caused by the creation of majority-minority districts decreases Democratic and, in turn, minority influence and policy representation. These results have been termed the "perverse-effect." *But see* Delia Grigg & Jonathan N. Katz, *The Impact of Majority-Minority Districts on Congressional Elections* (Apr. 4, 2005) (unpublished manuscript), available at http://www.stat.columbia.edu/gelman/stuff_for_blog/Grigg_Katz_MPSA2005.pdf (arguing that there is no evidence to support a perverse effects claim).

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

4. Matthew M. Schousen et al., *Representation and Ambition in the New African-American Congressional Districts: The Supply-Side Effects*, in *RACE AND REDISTRICTING IN THE 1990s* 39, 40 (Bernard Grofman ed., 1998) ("[I]ndividual politicians acting in their own self-interest create a collective action problem for a majority in the black community that may tip the balance of power to a minority of black voters and white moderates in the district, or in extreme cases undermine the central goal of electing black representatives."). Taking a "supply side" approach to analyzing how majority-minority districts function, a team of social scientists examined election outcomes from the 1970s, 1980s, and 1990s in districts with at least a thirty percent Black population to determine the effect of minority candidate's candidacy decisions on the ability of such districts to elect candidates of choice. *Id.*

5. I define the term "non-preferred candidate" as a candidate who does not receive a majority of votes from minority voters within a majority-minority district and the term "least-preferred candidate" as a candidate who receives the least number of votes from minority voters within a majority-minority district.

minority political participation more generally, against discrimination and ineffectiveness. Deemed by Congress “the most effective tool for protecting the right to vote,”⁶ the Voting Rights Act has come to embody a broad and powerful proclamation against both intended and inadvertent diminutions of electoral power based on race. Its purview is broad and decidedly not coterminous with the Fourteenth and Fifteenth Amendments. As a result, the Voting Rights Act has brought sweeping change in Black⁷ voter registration beyond that effected by the Reconstruction Amendments, and, in addition to vote denial claims, has evolved to encompass claims of vote dilution.⁸ Its current reach, extended by no less than half a dozen congressional amendments,⁹ is likely the most expansive and penetrating of all remedial legislation in force today.

However, in the face of statistics that show that, “in races for the House of Representatives, white Democrats are thirty-eight percent less likely to vote for their party’s candidate if that candidate is black,”¹⁰ the acute racism that continues to infect the American electoral process emphasizes the need for the Voting Rights Act’s breadth. Indeed, racially polarized voting persists in striking form. For example, whites of both the Republican and Democratic parties are less likely to vote for their party’s candidate when he or she is Black, regardless of the candidate’s qualifications.¹¹ Nationally, white Republicans are twenty-five percent more likely, on average, to vote for a Democratic senatorial candidate when the GOP candidate is Black.¹²

One of the key weapons in the Voting Rights Act’s arsenal of remedies to combat such racially polarized voting tendencies has been the creation of majority-minority districts. The function of majority-minority districts is most simply understood as a districting mechanism aimed to provide minority groups a viable shot at electing (also known as an “opportunity to elect”)¹³ a candidate of their choice through the purposeful aggregation of votes. But what happens when that goal is stymied by the convergence of the following five factors: (1) a

6. H.R. REP. NO. 97-227, at 3 (1981).

7. I have chosen to capitalize the word “Black” in this Article when it is used to refer to a racial group because “like Asians, Latinos, and other ‘minorities,’ [Blacks] constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); see also Trina Jones, *Shades of Black: The Law of Skin Color*, 49 DUKE L.J. 1487, 1490 n.9 (2000) (“To reflect my belief that Blacks continue to constitute a specific group with a shared (though not monolithic) history, . . . I shall capitalize the letter ‘B’ and use the word Black as a proper noun.”).

8. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 565–66 (1969) (holding that section 5 of the Voting Rights Act should apply not only to changes in electoral laws but to any practices that might dilute minority voting strength).

9. The Voting Rights Act of 1965 was amended in 1968, 1970, 1975, 1982, 1992, and 2006.

10. Mike Pesca, *Black Candidates, White Voters: A Numbers Game* (National Public Radio broadcast July 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5548757>.

11. *Id.*

12. *Id.*

13. An “opportunity to elect” refers to the existence of a situation or set of conditions that produce the ability, but not the requirement, of minority voters to elect a candidate of their choice.

majority-minority district (2) with a sizeable white population (3) in which there are multiple minority candidates and (4) one or more non-minority candidates (5) vying for an open seat?¹⁴ The short answer is the political and racially-charged controversy that enveloped New York's Eleventh Congressional District and Tennessee's Ninth Congressional District during the 2006 mid-term election cycle. The long, more complex answer is the focus of this Article, which begins to examine the paradox of achieving minimal minority population and multi-candidate competition in majority-minority districts at the expense of fulfilling the Voting Rights Act's promise when those districts confront the candidacy of white challengers.

How does the Voting Rights Act shape our expectations in these circumstances? To what extent, if any, does the Voting Rights Act contemplate and provide for this scenario? What role, if any, does it play in generating outcomes that contradict its stated purpose? These questions are examined against the backdrop of the Voting Rights Act's mandate, including the goals reflected in the legislative history of the 2006 amendments,¹⁵ and judicial interpretation of key provisions of the Act. I argue that, despite its goal of ensuring minorities an opportunity to elect their candidates of choice in majority-minority districts, the Voting Rights Act did not contemplate white "spoilers" in majority-minority districts and, consequently, does not provide meaningful protection against the resultant vote fragmentation that leads to electoral defeat of minority voters' candidate(s) of choice. I further posit that, absent a legislative or judicial mandate, this gap in the Voting Rights Act's goals and results can most readily be resolved only by a concerted effort on the part of minority communities to limit vote fragmentation through one or more means.

I begin my analysis in Part I by setting forth what the Voting Rights Act intends to accomplish in terms of both protecting minority interests and creating minority opportunity. I explore the express and implied guarantees of the statute, with a particular focus on section 2 of the Voting Rights Act as the enabling legislation of majority-minority districts, the definition of "political cohesion," and the use of majority-minority districts to advance minority interests in the electoral process. In Part II, I examine the operation of majority-minority districts in the current political arena through the filter of two congressional races in which white candidates threatened to—and in one case, did—gain advantage in majority-minority districts because of racial splintering of the minority vote resulting from their candidacy. In Part III, I explore the role of minority communities in ensuring that majority-minority districts elect their candidates of choice, even when there are outside challengers. The Article concludes by framing queries as to what defeat in these districts could portend

14. An open seat created by a vacancy or by the new construction of a majority-minority district exposes the district to risk because no candidate has the advantage of incumbency.

15. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter VRA 2006 Amendments].

for the sustainability of majority-minority districts and other Voting Rights Act protections. To be sure, although the collective action problem is not epidemic, through isolated cases it contributes to the erosion of majority-minority districts by compromising minority voters' ability to meet the threshold requirement of political cohesion for the creation and maintenance of such districts. Also, as Black-majority districts have become increasingly difficult to create and maintain because of various population trends and stringent legal constraints, any encroachment on the Voting Rights Act's remedial potency in this area must be scrutinized carefully.

I. WHAT THE VOTING RIGHTS ACT PROMISES BLACK MAJORITIES

The Voting Rights Act is intended both to protect minority interests and create minority opportunity.¹⁶ Besides ensuring against overt forms of intentional and often institutional discrimination, the Voting Rights Act proscribes racially discriminatory results, sanctions broad remedial measures, and, in these ways, promises minority communities equal prospects at achieving meaningful representation through voting. On July 27, 2006, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 extended the temporary provisions of the Act for an additional twenty-five years, ensuring that their force will endure until at least 2032.¹⁷ In its findings in support of the 2006 Amendments, Congress lucidly acknowledged that "vestiges of discrimination in voting continue to . . . prevent minority voters from fully participating in the political process"¹⁸ and that "racial and language minorities remain politically vulnerable."¹⁹ In addition, Congress attested to the fact that,

[d]espite the progress made by minorities under the Voting Rights Act of 1965, . . . 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th [A]mendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.²⁰

Accordingly, Congress reauthorized and strengthened section 5 of the Voting Rights Act, which mandates federal preclearance of all voting laws sought to be adopted in certain "covered" jurisdictions with a proven history of discrimina-

16. The Voting Rights Act's race-conscious, non-limiting language ensures that it may be invoked to benefit any racial or ethnic group, as well as qualifying language groups where specified. However, its genesis, much of its jurisprudence, and its significant amendments are owing to efforts aimed at remedying past and present discrimination and inequality suffered by racial minorities in particular.

17. VRA 2006 Amendments, Pub. L. No. 109-246, § 7, 120 Stat. 577, 581 (2006).

18. *Id.* § 2(b)(2).

19. *Id.* § 2(b)(3).

20. *Id.* § 2(b)(7).

tion.²¹ Congress similarly reauthorized and amended sections 6 through 9, which appointed Federal Examiners or registrars;²² section 8, which authorizes the use of federal observers or poll watchers in covered jurisdictions;²³ and section 203, which provides for bilingual language assistance and election materials.²⁴ Each of these sections, along with section 5, were due to expire in 2007.²⁵ Racial and language minority²⁶ communities have consistently availed themselves of these provisions to bring greater equality and fairness to American democracy. These groups have also relied heavily on section 2 of the Voting Rights Act, which is a permanent provision and, consequently, was not up for renewal.

A. SECTION 2 AS ENABLING LEGISLATION FOR MAJORITY-MINORITY DISTRICTS

Section 2 is one of the most litigated provisions of the Act and is the enabling legislation of majority-minority districts. It imposes a perpetual, nationwide ban on all voting practices that result in a denial or abridgement of voting rights on account of race or color, and further expands the Act's protections and force by lowering the evidentiary standard for proving harm. Amended in 1982 to overrule the Supreme Court's ruling in *City of Mobile v. Bolden*²⁷ to include a "results test,"²⁸ section 2 permits plaintiffs to bring an action based on disparate

21. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified at 42 U.S.C. § 1973c (2000)).

22. *Id.* §§ 6-7, 79 Stat. 437, 439 (1965) (codified at 42 U.S.C. § 1973d-e (2000)). Federal examiners have been replaced by federal observers who, upon a showing that constitutional or Voting Rights Act violations are imminent, can be dispatched by the Attorney General to observe, investigate, and report election proceedings.

23. *Id.* § 8, 79 Stat. 437, 441 (1965) (codified at 42 U.S.C. § 1973f (2000)).

24. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400, 401-03 (codified as amended at 42 U.S.C. § 1973aa-1a (2000)).

25. Pub. L. No. 89-110, § 8, 79 Stat. 437, 439 (1965) (codified at 42 U.S.C. § 1973f (2000)). Additional, nonpermanent provisions of the Voting Rights Act include section 4, which suspends the use of literacy tests and other voter registration devices historically used to disenfranchise Black voters, *id.* § 4, 79 Stat. 437, 438 (1965) (codified at 42 U.S.C. § 1973b (2000)), and sets forth the coverage formula for section 5's application, and the "bailout" provisions through which covered jurisdictions can seek removal from section 5's purview.

26. This term "minority," while accurate in many instances, is becoming increasingly anachronistic in others as it fails to reflect the burgeoning population of Blacks, Latinos, and Asians who form a majority of the population in several U.S. cities and other jurisdictions.

27. 446 U.S. 55 (1980). *Bolden* involved a class action challenge brought by Black voters under section 2 of the Voting Rights Act to the City of Mobile's governmental organization. The Court held that, absent proof of intentional racial discrimination, a violation of section 2 could not be established. *Id.* at 61-65.

28. The results test was originally applied by the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973), and by other federal courts before it was struck down by *Bolden*, S. REP. NO. 97-417, at 27 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 205, and later resurrected by the 1982 Amendments. The test derives directly from the text of section 2 itself, which prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973c (2000) (emphasis added). Accordingly, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (quoting S. REP. NO. 97-417, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 177,

impact as well as intentional discrimination. Specifically, the 1982 Amendments removed the burden of proving intentional harm that *Bolden* read into the statute and permitted proof of discriminatory effects or “results” to establish a violation. Prior to this pivotal moment in the Voting Rights Act’s evolution, section 2, and by extension its brief legislative history, essentially mirrored the protections of the Fifteenth Amendment.²⁹ However, in its amended form, section 2 has been used to help reverse the effects of past and ongoing voting discrimination, contributing greatly to the “significant progress” the Voting Rights Act has made in eliminating voting barriers.³⁰ Moreover, the legislative history of the 1982 Amendments to section 2 demonstrates Congress’s intent to create opportunity throughout the various components of the electoral process, including the ability of minorities to seek and obtain elected office.³¹

The case law interpreting section 2 further refines the contours of the Voting Rights Act’s promise to minority communities by establishing that minorities are protected against election processes that afford them less opportunity than other members of the electorate “to elect representatives of their choice,”³² or, said differently, that afford minority voters less opportunity to elect their preferred candidates.³³ Although section 2 does not establish a right of minority communities to proportional representation,³⁴ it nonetheless secures them a place in the electoral process that is meaningful and free from discrimination by

206) (internal quotation marks omitted). In addition, the “results test” requires an inquiry into the totality of the circumstances to determine the extent to which minority voters have the opportunity to participate meaningfully in the political process and elect a candidate of their choice. There are several factors relevant to a totality of the circumstances analysis which were derived from the Supreme Court’s analytical framework in *White*, and first articulated by the Court in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff’d per curiam sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). Those factors were adopted by the Senate Report accompanying the 1982 amendments to the Act, S. REP. NO. 97-417, at 28–29 (1982), and are set forth, *infra*, at note 49.

29. Section 2, in its initial construction, read as follows: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” Pub. L. No. 89-110, tit. I, § 2, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2000)).

30. VRA 2006 Amendments, § 2(b)(1).

31. Congress explained that section 2’s language conferring a right to “participate in the political process and to elect representatives of their choice,” Act of June 29, 1982, § 3, 96 Stat. 131, 134 (1982) (codified as amended at 42 U.S.C. § 1973(b)) (amending section 2 of the VRA), encompassed participation in all “phase[s] of the electoral process.” S. REP. NO. 97-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207. This part of the section 2 test codified the Supreme Court’s holding in *White v. Regester*, 412 U.S. 755, 766 (1973) (“The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”).

32. 42 U.S.C. § 1973(b) (2000).

33. *Gingles*, 478 U.S. at 51 (1986) (“[T]he 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.”).

34. On its face, the Voting Rights Act states that it creates no “right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. § 1973(b).

banning discrimination through intent or effect and measuring violations of the statute by their impact on minority voters' electoral participation.

For all its breadth, however, the text of the Voting Rights Act, including section 2, provides little guidance on how an equal opportunity to elect candidates of choice meshes with the normative choices of a protected class. It does not expressly contemplate white "spoilers," internecine competition, or precipitous changes in minority populations. "Spoilers," in this instance, are minority voters' non- or least-preferred candidates who, because of fractured voting in a minority community, are elected, usually by a plurality of votes. Internecine competition results often when the inertia of incumbency or the entrenchment of legacy posts provide rare and episodic opportunities for new voices to compete for elected office. These factors, combined with numerical fluctuations of minority populations within districts because of migrations, relative growth or decline in numbers, or adherence to one person, one vote principles may cause a district that could safely elect the candidate of choice of minority voters paradoxically to elect their non- or least-preferred candidate. The Act's textual silence about these practical realities makes it vulnerable to failure at achieving its ultimate objectives. The extensive legislative history that came out of its original enactment and subsequent amendments in 1982 and, to a lesser degree in 2006, suggests that those who defined the contours of the Act would be deeply troubled by the paradox created by optimal competition among minority-preferred³⁵ candidates and the risk of a plurality vote electing the non- or least-preferred candidate of minority voters because of a splintered vote. I explore below the use of majority-minority districts as a tool to make good on the promise of the Voting Rights Act and the legal concepts that constrain the use and effectiveness of such districts in this challenging context.

B. MAJORITY-MINORITY DISTRICTS AS A TOOL TO MAKE GOOD ON THE VOTING RIGHTS ACT'S PROMISE

Following the decennial census, states must redistrict electoral lines to account for population growth and decline, migrations, topography, intrastate boundaries, partisan interests, and racial fairness.³⁶ The creation of majority-minority districts has been a primary tool used to achieve this last districting goal. Although not all majority-minority districts are created at the command of the Voting Rights Act, those that were not are nonetheless more than likely

35. I adopt the term "minority-preferred" to refer to the candidate or candidates who garner the largest percentage of minority votes and who are popularly regarded as viable representatives of the minority community at issue. *See Lewis v. Alamance County*, 99 F.3d 600, 614 (4th Cir. 1996) ("Candidates who receive less than 50% of the minority vote, but who would have been elected had the election been held only among Black voters, are presumed . . . to be *minority-preferred* candidates, although an individualized assessment should be made in order to confirm that such a candidate may appropriately be so considered." (emphasis added)).

36. Decennial redistricting is compelled by the "one person, one vote" principle which requires equipopulous districts at the federal and, to a somewhat lesser degree, state level. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

influenced by its broad remedial mandate to provide all voters an equal opportunity “to participate in the political process and to elect representatives of their choice.”³⁷ As noted earlier, majority-minority districts find their legal basis in section 2 of the Act, which specifically prohibits states and their political subdivisions from adopting any “voting qualification or prerequisite . . . or standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”³⁸ Compliance with section 2 is measured according to whether “the political processes leading to nomination or election . . . are . . . equally open to participation by members of a [protected class] . . . in that its members [do not] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³⁹

Majority-minority districts operate to enhance a minority community’s ability to elect a candidate of its choice by concentrating enough members of that community into a district so as virtually to guarantee electoral success when there is significant preference for a particular candidate. In the past few decades, majority-minority districts have come under severe scrutiny and attack in the courts and general public discourse.⁴⁰ Some have argued that such districts facilitate the “packing” or over-concentration of minority voters into districts that elect more Black and Latino representatives at the expense of the number of Democratic office holders overall.⁴¹ The *Shaw v. Reno*⁴² decision of the 1990s is an example of some of the judicial backlash against majority-minority districts. There, the Court cognized a new Equal Protection Clause claim in which challengers to redistricting plans could prevail by showing that, despite being race-neutral on its face, a plan “rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race.”⁴³ *Shaw* called into question the validity of majority-minority districts

37. 42 U.S.C. § 1973(b).

38. *Id.* § 1973(a).

39. Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (2000) (amending section 2 of the VRA).

40. For traditional critiques of majority-minority districts as remedial from opposite sides of the political spectrum, see generally Lani Guinier, ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 237–38 (1987), and *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1134–53 (1991).

41. In the 1990s thirteen majority-minority districts were drawn which some argue resulted in the net loss of roughly twelve Democratic seats, ceding the majority to Republicans in Congress. See David Lublin, *The Election of African Americans and Latinos to the U.S. House of Representatives, 1972–1994*, 25 AM. POL. Q. 269 (1997). For a moderately contrary view, see Bernard Grofman & Lisa Handley, *Estimating the Impact of Voting-Rights-Related Districting on Democratic Strength in the U.S. House of Representatives*, in RACE AND REDISTRICTING IN THE 1990s, *supra* note 4, at 60–61 (concluding that, on balance, most Democratic losses and Republican gains in the early 1990s were not causally related to the creation of majority-minority districts); see also *supra* note 2.

42. 509 U.S. 630 (1993).

43. *Id.* at 649. The plaintiff must also show that the separation lacks sufficient justification. *Id.*

although the Court expressly refrained from tackling that issue.⁴⁴

The most frequent and flagrant ideological missives against majority-minority districts suggest that these districts perpetuate racial divisions,⁴⁵ effect a form of reverse discrimination, and undermine core democratic principles.⁴⁶ Despite these criticisms, what is undeniable by opponents and supporters alike is the transformative effect majority-minority districts have had on the face of U.S. politics. Indeed, it is fair to say that no other legal or political consequence of the Voting Rights Act has so directly integrated the political spheres of America. However, it is their precarious nature as both a tool for electoral success and an opportunity for self-defeat, depending on the circumstances, that makes majority-minority districts the most interesting animal in the Voting Rights Act's pen.

C. THE LEGAL CONSTRAINTS OF MAJORITY-MINORITY DISTRICTS

Majority-minority districts have the potential to meaningfully affect the allocation of political power, but must operate within narrow and well-defined legal constructs. The first Supreme Court case to establish the parameters of section 2 of the Voting Rights Act as it pertains to majority-minority districts was *Thornburg v. Gingles*.⁴⁷ *Gingles* involved a challenge by Black voters to North Carolina's state legislative redistricting plan following the 1990 Census. In deciding this claim, the Court established a tripartite examination of vote dilution claims under section 2 of the Voting Rights Act. In short, groups alleging a violation must establish that they are (1) sufficiently large and geographically compact; (2) politically cohesive; and (3) routinely denied an equal opportunity to elect candidates of their choice because of racially polarized voting patterns.⁴⁸ If these "preconditions" are met, then the court must consider the challenged practice under "the totality of circumstances."⁴⁹

44. *Id.* at 649 (reserving the question of "whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim" (quoting *id.* at 668 (White, J. dissenting)); see also *Miller v. Johnson*, 515 U.S. 900 (1995) (holding that the motivation behind the construction of a redistricting plan trumps any inference drawn from its shape).

45. Notably, however, majority-minority districts are often the most racially diverse electoral districts in a given region. See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 293 (1995); Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 289 (1995).

46. Justices of the Supreme Court have been, in many ways, the most ardent and vociferous critics of majority-minority districts. See, e.g., *Shaw*, 509 U.S. at 647 (asserting that the creation of a majority-minority district in North Carolina bore "an uncomfortable resemblance to political apartheid"); see also *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring) ("[W]e have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts In doing so, we have collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation." (quoting *Shaw*, 509 U.S. at 657) (alteration in original)).

47. 478 U.S. 30 (1986).

48. *Id.* at 50-51.

49. *Id.* at 79-80. The totality of the circumstances analysis typically relies on evidence of discriminatory electoral procedures as evidenced by one or more of the following non-exclusive factors, often referred to as the "Zimmer" or "Senate" factors:

Significant to the instant analysis is the understanding of the precondition of “political cohesion” under *Gingles*. Federal courts have measured political cohesion in subtly nuanced ways, including consistent racial bloc voting,⁵⁰ uniform political ideology,⁵¹ and allegiance against common discrimination.⁵² However, the most common measure of political cohesion is whether the group under consideration usually votes for the same candidate as demonstrated by statistical or anecdotal evidence of voting preferences in actual elections.⁵³ Moreover, how the term is applied may depend in part on the type of election involved—local, state, or national—because the electorate’s interests shift in

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

S. REP. NO. 97-417, at 28–29 (1982). The Senate Report also set forth two additional factors that, in some cases, would have probative value to establish a violation:

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

Id. at 29; *see also Gingles*, 478 U.S. at 61 (adopting these data inquiries from *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d per curiam sub nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976)).

50. *See Gingles*, 478 U.S. 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.”); *see also Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989) (holding that polarized voting by a minority community is proof of political cohesion); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding that a minority group is politically cohesive if it votes together); *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987) (holding evidence of polarized voting by minority community sufficient to establish minority political cohesion).

51. *See Monroe v. City of Woodville*, 881 F.2d 1327, 1331 (5th Cir. 1989) (holding that political cohesion implies unity within the minority community around a single political “platform” of common goals and common means by which to achieve them).

52. *See League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500–01 (5th Cir. 1987) (affirming district court’s finding that Blacks and Latinos within a Texas school district were politically cohesive based on, *inter alia*, “shared common experiences in past discriminatory practices”).

53. *See, e.g., Growe v. Emison*, 507 U.S. 25, 41 (1993) (holding that district court erred in finding political cohesion absent statistical or anecdotal evidence of voting preferences).

these contexts.⁵⁴ Despite the range of permissible proof of political cohesion, majority-minority districts in which voters demonstrate fragmented preferences among multiple minority candidates may not be deemed politically cohesive.⁵⁵ Those districts, and the creation of new majority-minority districts may consequently be subject to challenge as failing to meet the *Gingles* preconditions. These challenges may take the form of litigation, under section 2, of a covered jurisdiction's attempt to obtain preclearance of a districting plan that eliminates an existing majority-minority district, or of influence in state districting processes where plans are constructed under the threat of the Voting Rights Act.

Oddly, a finding that minority voters who spread their votes among multiple candidates are not politically cohesive would penalize minority voters for expressing nuanced ideologies and political preferences, and essentially, for defying the perception of Blacks as a monolithic body politic. For its part, the Supreme Court, through a majority opinion by Justice Sandra Day O'Connor, has recognized, albeit for suspect purposes, that the Black electorate is not monolithic. In *Shaw v. Reno*, for example, the Court likened a North Carolina redistricting plan aimed to maximize Black voting strength to "political apartheid" and suggested that, by purposefully aggregating minority voters in majority-minority districts, the plan "reinforce[d] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."⁵⁶ On this basis, the Court held that the plan could be challenged as an Equal Protection Clause violation despite its remedial aims. Although the idea that Black voters are not monolithic in their viewpoints is right-minded, *Shaw's* suggestion that a group-based remedy cannot be fashioned and pass constitutional muster where there is evidence of past and contemporary group-based discrimination, common goals, and a shared fate, is ill-considered and contrary to the premise and promise of the Voting Rights Act. The Court has yet to reconcile its laudable recognition of diverse viewpoints among minority voters with the *Gingles* prerequisite of political cohesion, the overarching goals of the Voting Rights Act, and the

54. See *Monroe*, 881 F.2d at 1331 n.7 ("'Political cohesion' may well embody different meanings at the local level as compared to the state or national level. For instance, three candidates for mayor, although members of the same party, may campaign on separate, indeed conflicting, views of the issues. It is too facile to conclude that because these candidates and their party members may support common candidates in races in a different subdivision, e.g. county, Congressional, or presidential, they are necessarily politically cohesive in a purely local election.").

55. See *id.* at 1331 ("[T]he black population of a district may vote in a racially polarized manner so as to overwhelmingly favor black candidates, but the group may lack political cohesion if it splits its vote among several different black candidates for the same office. Where the black voters overwhelmingly favor a particular black candidate to the exclusion of others, data on racial bloc voting will be more probative to determining political cohesiveness.").

56. *Shaw v. Reno*, 509 U.S. 630, 647 (1993); see also *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" (quoting *Shaw*, 509 U.S. at 647)).

extant need for continuing remedial solutions to racial inequality in the political process.

Similarly obscure is the meaning of “representatives of choice.”⁵⁷ *Gingles* established that the race of a candidate was not necessarily a relevant query in evaluating a section 2 claim: “[T]he fact that race of voter and race of candidate are often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the status of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.”⁵⁸ However, determining the representative of choice of minority voters among multiple minority candidates—each one garnering a plurality of the vote—is not straightforward. Even putting race to one side, it is difficult to identify a “chosen” candidate in a crowded field. Indeed, “[i]f there are several black candidates, each representing a different part of the ideological spectrum and pursuing different political coalitions, it may not be possible to define a single representative of choice.”⁵⁹ The *Gingles* guidelines, without deciding these issues, provide a roadmap for evaluating the potential effectiveness of majority-minority districts. In short, if a minority community is numerous and sufficiently compact and there is internal consistency in its voting choices, it should be able to elect its candidate of choice as a majority of the population in a district, even in the face of hostile bloc voting.⁶⁰ This theory only holds true, however, if the minority vote is monolithic; in other words, the standard works only in the absence of healthy competition and multiple viable minority-preferred candidates. Indeed, as one commentator has observed,

[T]he fact that almost all blacks would vote for a black candidate—or that almost all members of any other racial group would vote for a member of their own group—if he or she were facing a candidate of another race does not mean that all blacks prefer the same candidate. Often some members of a racial group will prefer one candidate who is of the same race, while other

57. See *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 (2d Cir. 1995) (noting that “[t]he Supreme Court has not defined the term ‘representatives of . . . choice’” (quoting *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986))).

58. *Gingles*, 478 U.S. at 68; cf. Guinier, *supra* note 40, at 1103 n.115 (“Authentic representatives [of the Black community] need not be black so long as the source of their authority, legitimacy and power base is the black community.”).

59. Schousen et al., *supra* note 4, at 42.

60. Alternatively, the effectiveness of majority-minority districts can be measured in two ways: (1) the ability of a minimally sufficient majority to elect a candidate of their choice in the face of racially polarized voting, and (2) the promotion of optimal electoral choice in the form of a robust competition among candidates who can provide both substantive and descriptive representation, regardless of their race. By this standard, it is unclear how many majority-minority districts are effective. Ideally, racial minorities could form districts in which their population is at the lowest possible level that would ensure the election of their preferred candidates without substantial crossover voting and be able to choose from a slate of qualified candidates that could provide descriptive and substantive representation. This would not exclude the presence of one or more white candidates who could provide substantive representation at a level that is competitive with their Black counterparts. See *infra* note 63 and accompanying text.

members of the group will prefer a second candidate who is also of the same race.⁶¹

Minority voters in majority-minority districts, however, are not allowed this luxury of choice without the risk of losing the office to a non-preferred or least-preferred candidate.

The collective action problem dictates that once minority voters are given meaningful candidate choice in a majority-minority district, the district is susceptible to electing, by plurality vote, a candidate who is not the choice of most minority voters. This outcome is especially so once the numbers of minorities in a district are lowered to enable the creation of more majority-minority, or even minority opportunity districts.⁶² This inherent paradox—the risk of spoilage as soon as multiple candidates appear on the scene—stands in the way of minority communities simultaneously achieving “descriptive” and “substantive” representation.⁶³ In simple terms, the former concept refers to representation by elected officials who share the same demographics of the voters, while the latter refers to representation by elected officials who may not share the same demographics of the voters but who represent their interests through shared values and policy perspectives.

Some argue that increased descriptive representation of Black voters cannot be decoupled from decreased substantive representation.⁶⁴ This critique is not

61. Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2225 (2003). Whether such fragmentation of the vote would threaten a finding of cohesion in a section 2 analysis is unclear. Certainly, evidence that the Black vote unites only against a white candidate may prove racial bloc voting more than it does cohesion. Moreover, the necessarily restrictive competitive context of a primary election makes such assessments more difficult to make.

62. “Minority opportunity districts” refer to districts in which racial minorities need not comprise any particular percentage of voters, adults, or total population and may not be able to elect the candidate that they prefer with their vote alone, but which, nonetheless, have the opportunity to elect their preferred candidate with other minority or white crossover voting. See J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 633 n.30 (1995); see also J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 51 (1993).

63. “Descriptive representation” and its seeming counterpoint “substantive representation” are both phrases that were coined by political theorist Hanna Fenichel Pitkin. See generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60–91, 112–43, 182 (1967) (discussing various meanings of representation). Descriptive representation has also referred to representation by “individuals who in their own backgrounds mirror some of the more frequent experiences and outward manifestations of belonging to the group.” Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POLITICS 628, 628 (1999). This more nuanced definition highlights the overlap between substantive and descriptive representation.

64. See Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 794–95 (1996) (arguing that districting measures that increase minority representation have the effect of diminishing broader substantive representation of minorities); see also CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS* 200–05 (1993) (discouraging use of majority-minority districts as a means of remedying underrepresentation of African-Americans in the political sphere). But see David Lublin, *Racial Redistricting and African-American Representation: A Critique of “Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?”*, 93 AM. POL. SCI. REV. 183, 186 (1999) (noting that racial-conscious redistricting measures

necessarily a commentary on the values and perspectives of Black elected officials, but rather it is a reflection of entrenched partisan allegiance in the Black community where, more than any other racial or ethnic group, Blacks vote for Democratic candidates. Indeed, majority-minority districts are the most Democratic districts as well as the least competitive.⁶⁵ Consequently, when Blacks are concentrated in a small number of majority-minority districts, they cannot be spread across several districts to form coalitional districts in which Blacks could join with white Democrats to elect primarily white Democratic candidates. However, both descriptive and substantive representation are important to minority communities as is supported by findings that, as opposed to white representatives, Black elected officials can better represent a duality of racial interests, balancing the diverse needs of Black and white constituents.⁶⁶ In addition to the quality of representation, it is important that minority communities have some measure of descriptive representation in order to establish demonstrably their capacity to lead and govern themselves (and others) and to protect their own interests.⁶⁷ This representation is especially imperative in light of the history of slavery and other longstanding, institutional subjugation of minority communities in the United States. Moreover, the benefits of descriptive representation of racial and ethnic minorities are not restricted to those groups. Democracy as a whole profits in this context from increased legitimacy of the electoral system,⁶⁸ improved quality of deliberation by virtue of having an insider perspective,⁶⁹ and enhanced communication.⁷⁰

Vote fragmentation, the attendant threat to descriptive and possible substantive representation of minority voters that is the natural result of the collective action problem, compels an inquiry as to what are the limits and contours of political cohesion. Can competitive majority-minority districts still meet the *Gingles* standard if the minority vote is disaggregated among multiple candidates? More importantly, can these districts fulfill the promise of the Voting Rights Act? The following two case studies suggest that majority-minority districts may in fact be too fragile to withstand real competition without certain safeguards in place.

are "vital" to electing African-American representatives). See generally DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1997).

65. Michael P. McDonald, *Redistricting and Competitive Districts*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 233 (2006).

66. See David T. Canon, *Electoral Systems and the Representation of Minority Interests in Legislatures*, 24 *LEGIS. STUD. Q.* 331, 363 (1999) (concluding, based on a study of congressional Representatives' sponsored legislation, floor speeches, committee work, and other features, that "black members of Congress do a better job of representing a balance of racial interests than do white members").

67. Indeed, through descriptive representation, racial and ethnic minority groups demonstrate an "ability to rule" where that ability has been historically subject to question. See Mansbridge, *supra* note 63, at 628, 648–50.

68. See *id.* at 650–52.

69. See *id.* at 643–48.

70. See *id.* at 641–48.

II. WHITE CANDIDATES IN MAJORITY-MINORITY DISTRICTS: SELECTED EXAMPLES

The presence of white candidates in majority-minority districts is neither a new nor entirely novel occurrence. As such districts have proliferated, white candidates have slowly tested the political waters to see if winning in majority-Black or majority-Latino districts is possible where the opportunity has presented itself. The opportunity is typically, though not exclusively, created when there is an open seat in a majority-minority district and multiple minority candidates are vying for office. The success of white candidates in these atypical election arenas has varied.

The 2006 mid-term primary and general elections presented two contemporary examples of the phenomenon considered above—the elections of New York’s 11th Congressional District and Tennessee’s 9th Congressional District, respectively. Each a Voting Rights Act district in its own right, these districts aim to fulfill the Voting Rights Act’s goals and aspirations of empowering historically disenfranchised groups by enabling minority voters to elect candidates of their choice. Moreover, New York’s 11th Congressional District is covered by section 5 of the Act and therefore, its configuration was necessarily measured by its effect on the electoral power of racial minorities.⁷¹ However, the outcome of the primary and general elections in both districts demonstrates the fragility of their power.

A. NEW YORK’S ELEVENTH CONGRESSIONAL DISTRICT RACE

In the district that elected the first Black woman to Congress, racial tensions peaked in response to the candidacy of David Yassky, a white Democratic city councilman who moved into the district last year to effectuate his candidacy and challenge three Black candidates for an open seat.⁷² The vacancy was created by Congressman Major Owens who represented this Voting Rights Act district for over two decades and decided not to seek re-election.⁷³ However, the district that elected Owens was not the district that went to the polls for the September primary. The district’s lines were changed following the 2000 census, and what was once a seventy-five percent Black district had become fifty-seven percent Black, twenty-four percent white, twelve percent Latino, and four percent

71. Section 5 requires three counties in New York, as well as other covered jurisdictions, to submit all voting changes for federal review prior to their implementation in order to determine whether the proposed law or practice has a racially discriminatory purpose or effect. *See* 42 U.S.C.A. § 1973c (West Supp. 2006). This evaluation process, called “preclearance,” is aimed at preventing jurisdictions with a history of discrimination and low minority voter registration from implementing voting procedures that would worsen the voting strength of their minority citizens, or, in other words, that would cause “retrogression.” *See id.*

72. The three Black challengers were Yvette Clarke, Clarence Norman, and Christopher Owens, the incumbent’s son.

73. Diane Cardwell, *In Shirley Chisholm’s Brooklyn, Rancor over White Candidacy*, N.Y. TIMES, June 25, 2006, at 11.

Asian.⁷⁴ It is likely that those numbers have changed further in the six years following the 2000 census because of increasing gentrification within the district. In the absence of David Yassky, the white candidate, the 11th Congressional District primary election ostensibly satisfied many of the goals of the Voting Rights Act: Black voters had an opportunity to choose among three candidates, each of whom had respectable credentials and, more than likely, would have been the preferred candidate in the district if running against Yassky alone.⁷⁵ However, the fragmentation of the Black vote nearly spelled defeat for each of the Black candidates, as Yassky was successful at garnering some crossover votes from the Black community and received a majority of the votes from predominantly white precincts.⁷⁶ Referred to by his most ardent detractors as a racial carpetbagger, parachute candidate, or colonizer,⁷⁷ Yassky was criticized by some in the Black community for his bid for Owens's seat and pressured to withdraw from the race in order to ensure that a Black candidate would be elected. By contrast, the three Black candidates were criticized for not selecting a frontrunner to challenge Yassky alone and thereby all but guarantee the election of a Black representative.⁷⁸ In the end, Yvette Clarke, one of the

74. The district's white population has increased by 69% from 1990 to 2005 and its Black population has decreased by 12% for the same time period. The intraracial composition of the district has changed as well. The number of Caribbean-Americans has grown by 29% from 1990 to 2005 as well. See Elizabeth Hays, *Major Political Change: Clarke Set to Replace Owens in the 11th District*, DAILY NEWS (N.Y.), Sept. 23, 2006, at Suburban 1 (citing census figures analyzed by the Department of City Planning).

75. Although often touted as a "Voting Rights Act district," New York's 11th Congressional District was not created pursuant to the Voting Rights Act. Rather, the district's configuration is the result of a 1968 federal court-ordered statewide redistricting resulting from a one person/one vote violation. See *Wells v. Rockefeller*, 394 U.S. 542 (1969). New York did not become covered under the section 5 Voting Rights Act provisions until the 1970s. See *Determination Regarding Literacy Tests*, 35 Fed. Reg. 12,354 (1970). Section 5 now protects racial and language minorities in all of Brooklyn, Manhattan, and the Bronx against retrogressive election procedures.

76. Notably, had Yassky won the district, he would not have been an anomaly in his congressional delegation. There are three House delegates from New York State who are white and represent districts in which Blacks and Latinos collectively form a majority of the districts' population: Representatives Larry Seabrook (12th Congressional District), Eliot Engel (17th Congressional District), and Joseph Crowley (7th Congressional District). By contrast, in the House, the only Black representatives who have represented white-majority districts in the past are Reps. Sanford Bishop (D-GA) and Julia Carson (D-IN), and they are joined in the 109th Congress by Emmanuel Cleaver (D-MO) and Gwen Moore (D-WI). There is only one white representative of a majority-Black district: Robert Brady (D-PA) of Pennsylvania's First District. The at-large election of Black representatives such as Illinois Senators Carol Mosley Braun and Barack Obama, former Virginia Governor L. Douglas Wilder, Ohio Treasurer J. Kenneth Blackwell, and New York Comptroller Carl McCall are encouraging examples of relatively recent Black electoral success among white voters, but still do not counterbalance the effects of extant pervasive racially polarized voting.

77. See Michael Cooper, *Councilwoman Wins Divisive House Primary*, N.Y. TIMES, Sept. 13, 2006, at B1 (noting that some Black leaders called Yassky an opportunist and that incumbent Major Owens referred to him as a "colonizer").

78. Ironically, less than ten years ago, New York's 11th Congressional District was cited as a district in which the collective action problem was not evident because of its high concentration of African-Americans, comprising seventy percent of the district's population. See Schousen et al., *supra* note 4, at 41.

Black candidates, defeated Yassky by five percentage points⁷⁹ of a plurality vote and, given that there were no certified challengers in the general election, she became the next congressperson for the 11th Congressional District.

B. TENNESSEE'S NINTH CONGRESSIONAL DISTRICT RACE

Tennessee's 9th Congressional District, the state's only district in which Black residents form a majority of the population, had an overcrowded slate of twenty-one candidates, including two white candidates in its primary elections. Steve Cohen, a white challenger, eked out a six percentage-point victory over the leading Black candidate and now represents the roughly sixty percent Black district, making it the first time since the 1960s that the predominantly Black city of Memphis does not have Black representation in Congress.⁸⁰ As in the Brooklyn race, there was an unanswered call for some of the dozen or so Black candidates to abandon their campaigns in an effort to increase the chances of a Black candidate winning the seat.

Tennessee's 9th Congressional District, which was created under the Voting Rights Act, was most recently represented by Harold Ford, Jr., an African-

79. In the 2006 11th Congressional District Democratic primary, Yvette Clarke, David Yassky, Carl Andrews, and Chris Owens won 31.2%, 26.2%, 22.9%, and 19.6% of the vote respectively. *See* Cooper, *supra* note 77.

80. The election results for the 2006 9th Congressional District primary elections in Tennessee are as follows:

Candidate	% of Vote
Steve Cohen	31%
Nikki Tinker	25%
Joseph Ford Jr.	12%
Julian Bolton	11%
Ed Stanton	9%
Ron Redwing	3%
Marvell Mitchell	2%
Ralph White	2%
Joseph Kyles	2%
Joe Towns Jr.	0.9%
Lee Harris	0.8%
Jesse Blumenfeld	0.5%
Bill Whitman	0.4%
Tyson Pratcher	0.2%
Ruben Fort	0.2%

2006 Primary Election Results—Tennessee, EMILY'S LIST, Aug. 3, 2006, <http://www.emilyslist.org/election2006/tennessee.html>. In the November general elections, Cohen faced a Republican challenger, Mark White, and a Black independent, Jake Ford, who is the younger brother and son of the past two officeholders.

American Democrat who succeeded his father, Harold Ford, Sr., in 1997 and was recently defeated in a race for a Senate seat. That neither Tennessee nor New York requires a run-off election in the event that no candidate wins a majority of votes further exacerbated the risk of losing those districts to a non-preferred candidate. Furthermore, in Tennessee, the primary is an open one, which means that white candidates could benefit from the participation of white conservatives who would normally vote Republican.

C. OTHER EXAMPLES

Within the last two decades, there have been other instances in which majority-minority districts have faced similar challenges in fulfilling their intended purpose. In 1992, a white candidate nearly won a bid in the six-way Democratic primary for Congresswoman Nydia Velasquez's seat in New York's predominantly Latino 12th Congressional District. The tri-borough district is approximately forty-five percent Latino, twenty-seven percent white, seventeen percent Asian, and eight percent Black, encompassing parts of Brooklyn, Queens, and the Lower East Side of Manhattan. Velasquez ran against four other Latino challengers and one white challenger, Stephen Solarz, an incumbent who had been redistricted into the 12th Congressional District. Amid accusations of opportunism and a checkered record, Solarz, who was not the minority-preferred candidate, lost by a narrow margin of five percentage points. It is debatable as to whether race, marred reputation, or a combination of the two led to his defeat.⁸¹ It is clear, however, that the fragmented vote of Latinos and other minorities in the district nearly cost Velasquez her seat in a district drawn expressly to allow Latinos to elect their candidate of choice.

It is not necessary, however, that the "spoiler" of a majority-minority district be white or of a race different from that of the majority in the district. For example, in the 2002 midterm elections, Cynthia McKinney of Georgia's 4th Congressional District and Earl Hilliard of Alabama's 7th Congressional District lost their seats to moderate Black challengers. McKinney, who was up for re-election again this September after regaining the seat abandoned by Denise Majette when the latter ran for Senate, lost this time to Black Democratic challenger Hank Johnson. The open primary laws in Georgia⁸² further enabled McKinney's defeats by permitting voters from any party to vote in the election. Hilliard, a veteran civil rights incumbent, lost to political newcomer Artur Davis in a 56-44 run-off vote after they tied in the primary. As in the Velasquez race, there were other factors particular to the two incumbent candidates that likely

81. Solarz was identified as one of the worst offenders in the House banking scandal of 1992. *See* LOUIS R. MIZELL, JR., *MASTERS OF DECEPTION: THE WORLDWIDE WHITE-COLLAR CRIME CRISIS AND WAYS TO PROTECT YOURSELF* 219-20 (1997).

82. In Georgia, anyone who votes in the Democratic or Republican primary must vote in that same primary in the runoff. Voters who do not vote in the primary may select either ballot in a runoff election. *See* GA. CODE ANN. § 21-2-224(d) (2003).

contributed to their defeat.⁸³

Additional defeats may be on the horizon.⁸⁴ As the election outcomes of New York's Eleventh and Tennessee's Ninth Congressional Districts and others demonstrate, the ideals of the Voting Rights Act often fail or threaten to fail in practice when the concentration of minority voters leads to fragmentation of allegiances among multiple minority candidates, and a white challenger is elected in a district expressly created and maintained to remedy past and present wrongs against minority voters.

III. WHAT BLACK MAJORITIES MUST PROMISE THEMSELVES

The congressional races described above demonstrate how the legal operation of majority-minority districts does not always comport with the normative behavior of minority groups within the district. Indeed, while the Voting Rights Act aims to protect minority communities against direct and inadvertent forms of discrimination in the electoral process, internecine conflicts, and outside interests can serve to frustrate these goals to the point of failure. And, in the absence of any specific legal protections against that outcome, minority communities must actively use majority-minority districts to their advantage and institute appropriate safeguards. It can be argued that Blacks or Latinos who comprise the majority population in majority-minority districts still have an equal (if not greater) opportunity to elect a candidate of their choice but have chosen to squander that opportunity by spreading their vote among multiple candidates.⁸⁵ This might be attributed to the "pent-up supply" of minority candidates who have not had an opportunity to serve because of the inertia of

83. In 2002, McKinney was politically marginalized because of remarks she made concerning President Bush's alleged prior knowledge that the September 11th attacks were forthcoming. In 2006, her candidacy was surrounded by controversy arising from an altercation with a U.S. Patrol Officer. Similarly, Hilliard had been involved in a scandal involving the House Ethics Committee the year before the election. In addition, both candidates were viewed as unsupportive of Israel and were unable to raise as much money as their challengers. See Jonathan Allen, *McKinney Opponent Rakes in Pro-Israel Cash*, THE HILL, Aug. 2, 2006, <http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/080206/mckinney.html>; *Georgia Congresswoman Scuffles with Capitol Police*, USATODAY.COM, Mar. 31, 2006, http://www.usatoday.com/news/washington/2006-03-29-mckinney-scuffle_x.htm; Terry M. Neal, *McKinney's Loss Points to Larger Change: Moderate Black Politicians Continue Historical Rise*, WASHINGTONPOST.COM, Aug. 23, 2002, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A53533-2002Aug23¬Found=true>.

84. Another interesting and recent case study is the state legislative race in Alabama's 54th District. There, Patricia Todd, an openly gay white woman, was the victor in the five-way primary where she faced four Black challengers, and in the subsequent run-off she defeated the leading Black candidate by fifty-nine votes. Subsequent challenges to her election based on technical grounds were unsuccessful but amplified tensions within the gentrifying, majority-Black district (52% Black and 42% white) concerning whether a white candidate should fill the vacancy left by Black legislator George Purdue, who served the district for more than twenty years. See Zachary A. Goldfarb, *Head Democrats in Alabama Restore White Nominee*, WASH. POST, Aug. 27, 2006, at A4.

85. In many ways, the quandary presented here can also be seen as a contest between the minority group that forms a majority in a majority-minority district, on the one hand, and the group of other individuals that comprise the district often referred to as the "filler people," on the other. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *The Future of Voting Rights after Shaw v. Reno*, 92 MICH.

incumbency.⁸⁶ Put another way, majority-minority districts may necessarily impose a practical constraint on competition within the district by forcing minority voters to coalesce behind one candidate to prove political cohesion and maintain enough numerical voting power to overcome racial bloc voting.

Regardless of the cause, it is clear that, in the face of declining Black populations within certain districts, the challenges of amassing concentrated citizen voting age populations in others,⁸⁷ and the general ideological assault on majority-minority districts, those that exist must operate at their highest level of effectiveness in order to demonstrate their utility and to effectuate what change they can while they lawfully exist. And although some may argue that vote fragmentation among minority voters is evidence that majority-minority districts have lived out their usefulness and that minority voters do not speak in one voice, the silent refusal of minority voters in majority-minority districts to cast a meaningful number of votes for white candidates is a deafening statement of their will to achieve increased descriptive representation.

The potential solutions to limit harmful vote fragmentation are multiple and, in most instances, mutually reinforcing: (1) increased political organization of minority communities; (2) instant run-off voting; (3) cumulative voting; (4) closed primaries; and (5) super majority-minority districts.⁸⁸ I explore each of these solutions briefly in turn.

First, minority communities, including minority candidates, need to think strategically about the extent to which they will entertain multiple minority candidates in the face of a white challenger.⁸⁹ When there is a clear risk of

L. REV. 588, 630–31 (1993) (defining the term and analyzing the role of “filler people” in remedial redistricting).

86. Schousen et al., *supra* note 4, at 41; see also DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 96 (1999).

87. See Alvaro Bedoya, Note, *The Unforeseen Effects of Georgia v. Ashcroft on the Latino Community*, 115 YALE L.J. 2112, 2136–67 (2006) (discussing the necessity of majority-Latino districts to Latino electoral success and the challenges in creating such districts because of “high rates of ineligibility,” “low participation rates,” “noncitizenship,” “age ineligibility,” “geographic dispersion,” and new legal barriers).

88. Super majority-minority districts are typically defined as those with a concentration of minority voters of sixty-five percent or higher. See Angelo N. Ancheta & Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 867 (1993) (“The 65% rule, which curiously has been elevated by the courts from a simple rule of thumb to an operative rule of law, has been endorsed by numerous courts in the creation of super-majority-minority districts, ranging from remedial districts to newly judicially reapportioned congressional districts.” (footnotes omitted)).

89. An unrealistic sixth possibility is to convince white candidates not to run in majority-minority districts where there are multiple minority candidates because their candidacies might be harmful to broader democratic ideals. The impact of white candidates in such majority-minority districts is not limited to the threat of defeat. At least one analysis has shown that their presence may shape which minority candidates compete and what platforms they advance. CANON, *supra* note 86, at 94–96. Black candidates running only against one another will adhere to a “politics of commonality” approach to representation. Confronted by a white contender, Black candidates will employ a “politics of difference” approach to representation. *Id.* at 94. Furthermore, the harm of white candidacy in a majority-minority district as a whole is illustrated by the finding that Blacks react to white candidacy with a

losing both descriptive and substantive representation, unless other safeguards are in place, minority communities should make a collective decision to limit competition within the district by uniting behind a single frontrunner minority candidate in advance of the election to preserve the promise of the district and, by extension, the Voting Rights Act.⁹⁰ This decisionmaking process can take the form of a political action committee or an informal sociopolitical organization that uses community organizing and engagement strategies to arrive at a consensus position. At bottom is the need to address the gap between voting rights, voter education, and political strategy so that there is a true prospect for minority political empowerment.

Second, minority communities can advocate for the broad use of alternative voting systems, such as instant run-off voting (IRV).⁹¹ Instant run-off voting is a voting mechanism for single office elections, whereby voters rank the candidates in order of their preference. Their vote is initially allocated to their most-preferred candidate, and then subsequently transferred to other candidates according to a voter's stated preferences if her most-preferred candidate is eliminated for not garnering a threshold number of votes.⁹² If no candidate receives an overall majority of votes as the voters' first preference, the candidates with the fewest votes are eliminated one by one, and their votes are transferred according to voters' second and third preferences, until one candidate achieves a majority of the votes. IRV, and even traditional run-off elections in which voters choose from the top two vote-getters of an election where no candidate received a majority of votes, eliminate the prospect of a candidate winning with only a plurality of the vote. Under the current scheme, white voters in a majority-minority district, either alone or with the assistance of a small Black crossover vote, can elect by a mere plurality the representative for the entire district when there is vote fragmentation among minority voters. IRV or traditional runoff elections would force a direct challenge between top vote-getters, limiting vote fragmentation among minority voters. Although run-

politics of difference approach that is less inclusive of the white minority in the district. *Id.* However, the opportunism that infects the political arena irrespective of race makes it unlikely that any of these arguments would carry the day in persuading candidates of any race or color not to run.

90. Although it may be against their immediate self-interest to withdraw their candidacy in a highly competitive race, minority candidates facing these circumstances, if they are sincere about serving the broader interests of the community they seek to represent, should be amenable to such strategies as a last resort. See Schousen et al., *supra* note 4, at 41 ("In such cases, the collective good for the African-American community can only be provided if the individual ambitions of various politicians can be controlled."); see also Posting of Terry Smith to Blackprof.com, http://www.Blackprof.com/archives/2006/09/politics_race_and_overambition.html (Sept. 15, 2006, 21:12 EST) (arguing that Black politicians in these contexts be forced to answer the question of why they put their "personal ambitions ahead of the greater goal of Black representation for Black people").

91. Political expediency and constitutional concerns suggest that the remedies of instant run-off voting, cumulative voting, and closed primaries could not be limited to majority-minority districts only and, to take hold, would require broad-based, multi-racial, multi-ethnic coalitional advocacy.

92. Instant run-off voting is used in certain elections in jurisdictions such as Australia, the Republic of Ireland, Northern Ireland, the Fiji Islands, and New Zealand. ANDREW REYNOLDS ET AL., ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 71 (2005).

off elections have been used in some contexts to disfranchise racial minorities, in this narrow setting such a mechanism may prove to advance their interests. The shift to a majority-win requirement that runoff elections cause, as opposed to a setting in which a plurality vote in a majority-minority district can determine the outcome of an election, puts the power of determining election outcomes back in the hands of minority voters whom the district was intended to benefit. While in at-large elections, pure majoritarianism tends to disfavor the interests of minority voters because of the inherent numerical limitation on their voting power, it could ensure, in a majority-minority district, that a sizeable number of minorities contribute to the election of any representative of the district.

A third measure, cumulative voting, can be used with or without a districting scheme. Cumulative voting refers to the method of vote casting, whereby voters are allocated a number of votes equal to the number of offices being voted for, which they can cast in any manner they choose, including splitting their vote among multiple candidates or casting all their votes in a bloc for one candidate.⁹³ A system of cumulative voting would allow minority voters to pool votes in support of more than one candidate and not necessarily risk defeat by white voters. This system makes it less likely that minority votes would be diluted by submerging them in those of the majority. In addition, minority voters do not have to be a majority of the voters in order to elect a candidate or candidates of their choice. Moreover, cumulative voting promotes proportional representation. The strength of both IRV and cumulative voting is typically augmented when issue-based coalitional relationships are formed across racial lines. Indeed,

[i]f the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from

93. Cumulative voting has been used in local government elections in a small number of jurisdictions in the United States. *See, e.g.*, *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988) (approving the use of limited and cumulative voting systems to remedy past discrimination against African Americans); KATHLEEN L. BARBER, *A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY* 66, 150–51 (2000) (“[I]n 1995 a state law was enacted [in Texas] specifically permitting school districts to adopt [cumulative voting] . . . for election of members of local school boards [This law was a result of the settlement of a federal voting rights lawsuit, brought by the NAACP, LULAC, and individual voters]”). *But see, e.g.*, *Cane v. Worcester County*, 35 F.3d 921, 929 (4th Cir. 1994) (striking down district court’s efforts to impose cumulative voting); *McGhee v. Granville County*, 860 F.2d 110, 118, 120 (4th Cir. 1988) (same). For a discussion of cumulative voting by a long-time proponent of this voting system and other non-traditional approaches to achieving inclusive democracy, see generally GUINIER, *supra* note 2; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135–37 (1993).

other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.⁹⁴

Both IRV and cumulative voting allow minority voters to express their preference among minority candidates without sacrificing their ability to elect a minority.

Fourth, closed primaries, which restrict voter participation according to party affiliation, serve to limit the intrusion of ill-intentioned voters who might cross party lines in order to defeat minority voters' candidates of choice. While closed primaries do not, by themselves, guarantee the election of minority voters' candidate of choice, they shut off a potential avenue that could be used to frustrate that goal.

Finally, majority-minority districts can be packed with such large numbers of minority voters so as to make it virtually impossible for a white challenger to win by a plurality even if the minority vote is fragmented.⁹⁵ However, for the reasons noted above and widely analyzed in voting rights scholarship, the ancillary consequences of creating super-majority-minority districts are equally problematic. Indeed, the arguments against creating districts with a large majority of minority group members are manifold and include concerns that a concentrated minority population will allow for the creation of additional Republican districts while most minorities prefer Democratic candidates, will hinder the formation of interest-based coalitions, will further segregate the electorate, and will produce fewer Democratic representatives, thereby decreasing the substantive representation of minorities overall.

To be sure, none of the proposed solutions is easy to bring about, and some are more within the control of minority communities than others. However, it seems that, at the very least, minority communities and others concerned with ensuring that the promise of the Voting Rights Act is realized, must recognize what is at stake in potentially losing a grip on majority-minority districts without alternative remedies in place.

CONCLUSION

The legislative history of the Voting Rights Act, including its contemporary

94. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). It is important to note that such coalition building may in itself lead to the dismantling of a majority-minority district because evidence of Black crossover voting, whereby Blacks vote in some instances for white-preferred candidates, may be probative of a lack of political cohesion among Blacks in the face of a challenge to the district. However, in this circumstance the Black community would presumably be in a stronger political position having built strategic, multiracial alliances and coalitions than if it had simply lost the district to a white candidate without building those relationships.

95. Alternatively, at least one scholar has advocated that majority-minority districts should be created outside the traditional constraints of the one person, one vote rule so that minority percentages within districts can be adjusted on a case-by-case basis to ensure the election of their representatives of choice. See generally Grant Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589 (2004).

charge, makes clear that its mission to eradicate enduring racial disparities in political power and electoral access looms large and remains unfulfilled. Racial minorities in majority-minority districts are left with the dilemma of forcibly uniting behind a single candidate in order to demonstrate political cohesion and avoid fragmentation of their vote or voting their consciences and, thereby, risking absolute defeat in the collective. The latter option gives voice to the voluntary sub-aggregation of the minority vote, whereas the former preserves the rights of the group as a whole while potentially denying the true political will of the individual. Normatively, this Catch-22 is, in large part, a function of the ever-shrinking percentage of minorities used to constitute majority-minority districts⁹⁶ and racial bloc voting of those populations within the district who do not form the majority. Doctrinally, the Voting Rights Act allows minorities an opportunity to aggregate their votes as a group and attain electoral success, but in doing so, does not safeguard against defeat in which the non- or least-preferred candidate wins because of vote fragmentation.

Choosing the lesser of these challenges is not easy and requires open and candid community-level dialogue. These considerations are important not simply for what they could mean in specific, isolated races, but because of what defeat in majority-minority districts could portend for the sustainability of majority-minority districts in general and other Voting Rights Act protections. It remains unclear whether majority-minority districts that do not elect a candidate of choice will be vulnerable to challenges during the next decennial redistricting in 2010 or subsequent redistricting cycles. It is equally uncertain whether minorities can successfully advocate for the sustained operation of such districts in the face of attacks on majority-minority districts specifically and race-based remedies in general if they do not serve their intended purpose.⁹⁷ Finally, whether the election practices that contribute to this result can be challenged

96. In an effort not to “pack” minority communities into districts in order to maximize their ability to elect candidates of choice in as many districts as possible and in response to decreased racially polarized voting in Black incumbent elections, there has been an effort to minimize the population of minority communities in majority-minority districts and, even in some instances, to create influence districts. Peyton McCrary, *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965–2005*, 57 S.C. L. REV. 785, 820–21 (2006) (“[Although] recent studies indicate that majority-minority districts continue to provide the optimal opportunity to elect candidates who are racial minorities to public office . . . , it may be possible to elect African American candidates, and on some occasions Hispanic candidates with between forty and fifty percent of the voting age population.”). The danger in these actions is the opportunity they create for white challengers to win on a plurality vote if the minority vote is fragmented by multiple minority candidates. See Schousen et al., *supra* note 4, at 41 (noting that the collective action problem is most acute in districts where Blacks have a slim majority).

97. The ability to enforce the laws that protect majority-minority districts depends in large part on the conviction of minority communities to join the force of the law with the power of their actions. See SAMUEL ISSACHAROFF ET AL., *LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 789–90 (2d ed. 2002) (“[I]f the minority community is unable to unite behind a candidate, even a majority-Black district may be unable to elect a minority-preferred candidate. And to the extent that voting rights lawyers rely on community involvement in the litigation process, the time and trouble litigating a case on behalf of a fractured community may be too high.”).

under the Voting Rights Act and what leverage, if any, is added to a section 2 claim where there are allegations of political opportunism and “racial carpetbagging” is an open question. The mixed outcome of the past midterm elections and the upcoming redistricting cycle make the resolution of these issues all the more pressing.