

## The Relegation of Polarization

A Response to Christopher S. Elmendorf,  
Kevin M. Quinn, and Marisa A. Abrajano,  
*Racially Polarized Voting*,  
83 U Chi L Rev 587 (2016).

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### INTRODUCTION

Section 2 of the Voting Rights Act<sup>1</sup> (VRA)—the crucial provision banning racial vote dilution—does not mention racial polarization in voting.<sup>2</sup> Nor does polarization feature prominently in the list of factors included in the Senate report accompanying the Act; it is addressed by just one of the list’s ten or so items.<sup>3</sup> Nevertheless, thanks to the Supreme Court’s epochal 1986 decision construing the Act, *Thornburg v Gingles*,<sup>4</sup> polarization is “the undisputed and unchallenged center” of vote dilution law.<sup>5</sup> It accounts, in fact, for two of *Gingles*’s three preconditions for liability: a “minority group must be able to show that it is politically cohesive” and also “must be able to demonstrate that the white majority votes sufficiently as a bloc.”<sup>6</sup> Polarization is simply the difference between these quantities: minority support for a minority-preferred candidate minus white support for the candidate.

Despite its doctrinal centrality, polarization remains a mysterious concept, both in theory and in practice. As a theoretical matter, it is far from clear *why* a plaintiff must prove polarization to prevail in a vote dilution challenge. Is it because polarization

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<sup>1</sup> Pub L No 89-110, 79 Stat 437, codified as amended at 52 USC § 10101 et seq.

<sup>2</sup> See VRA § 2, 79 Stat at 437, codified as amended at 52 USC § 10301.

<sup>3</sup> See *Voting Rights Act Extension*, S Rep No 97-417, 97th Cong, 2d Sess 28–29 (1982), reprinted in 1982 USCCAN 177, 205–07 (listing racial polarization as the second of nine nonexhaustive factors that may be indicative of § 2 vote dilution).

<sup>4</sup> 478 US 30 (1986).

<sup>5</sup> Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich L Rev 1833, 1851 (1992).

<sup>6</sup> *Gingles*, 478 US at 50–51.

reveals discrimination by white voters against minority candidates of choice? Or because the pluralist marketplace is malfunctioning—the usual deals between groups not being made—when polarization is high? Or because certain electoral policies can interact with polarization to prevent minority-preferred candidates from winning office? And as a practical matter, it is even more obscure *how* polarization should be established. The lower courts are sharply divided as to the elections that are relevant, the levels of minority cohesion and white bloc voting that are sufficient, the way to identify minority candidates of choice, and many other issues.

In their important new article,<sup>7</sup> Professors Christopher Elmendorf, Kevin Quinn, and Marisa Abrajano thoroughly canvass these theoretical and practical ambiguities. They also *link* them; in their view, one reason why the mechanics of calculating polarization are so uncertain is the underlying confusion over why we care about the concept in the first place.<sup>8</sup> Another, even more fundamental reason is the gap the authors expose between candidates' vote shares (the input in almost all polarization analyses) and voters' political preferences (the actual metric of interest).<sup>9</sup> Candidates' performances are partly a function of voters' views—but only partly. They are also inevitably a function of candidates' own characteristics: their race, ideology, competence, and so on. Because of this gap, the authors recommend scrapping the usual methodology for computing polarization.<sup>10</sup> In its place, they tantalizingly hint that survey responses should be substituted for election results.<sup>11</sup>

In this brief response, I first highlight the contributions the authors have made to the understanding of racially polarized voting. Their most novel and penetrating insight—one that has escaped a generation of scholars and judges—is that, due to the non-random variation of candidate attributes, voter polarization cannot be assessed simply by comparing minority cohesion and white bloc voting in prior elections. Next, I offer some gentle rejoinders to the authors' relentlessly pessimistic account. The most notable of these is that, at least in Supreme Court decisions, there is actually a good deal of agreement that the basic aim of § 2 is to

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<sup>7</sup> See generally Christopher S. Elmendorf, Kevin M. Quinn, and Marisa A. Abrajano, *Racially Polarized Voting*, 83 U Chi L Rev 587 (2016).

<sup>8</sup> Id at 599–600 & nn 66–67.

<sup>9</sup> Id at 647.

<sup>10</sup> Id at 675.

<sup>11</sup> Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 675–76 (cited in note 7).

provide descriptive representation to geographically concentrated minority groups. Lastly, I tentatively explore a future even more radical than any contemplated by the authors: one in which vote dilution could be proven with only the most cursory of polarization showings. This future, I suggest, is both true to the statutory text and consistent with the predominant theory of § 2.

## I. CONTRIBUTIONS

The mark of a great idea is that it changes how you see the world. After being exposed to it, you can't go back to how you previously understood something. The authors' observation that voter polarization is a function of *both* voters' own political preferences *and* candidates' characteristics<sup>12</sup> is exactly such an idea. After thinking it through, it becomes impossible to look at statistics about minority or white support for a candidate and conclude that they capture the extent to which voters' views actually vary.

For a nice illustration, consider the polarization calculations that Professors Samuel Issacharoff, Pamela Karlan, and Richard Pildes (all preeminent voting rights scholars) present in their casebook. In a 1980 city council election in Norfolk, Virginia, a bivariate ecological regression indicated that 98 percent of black voters supported a black candidate named Evelyn Butts, compared to just 5 percent of white voters.<sup>13</sup> According to the editors, these figures mean that polarization in Norfolk was "quite high."<sup>14</sup> Black and white voters' preferences diverged by more than ninety points.

But did they really? They certainly did *in that particular election*—at least if the ecological regression was trustworthy, which Professor James Greiner has shown the technique often is not.<sup>15</sup> But that election featured a black candidate who was "a civil rights activist" (in fact, a plaintiff in the case that toppled Virginia's poll tax) and a founder of the Concerned Citizens for

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<sup>12</sup> Id at 646–47, 652–60.

<sup>13</sup> Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 679–81 (Foundation 4th ed 2012). See also Brent Tarter, *Evelyn Thomas Butts (1924–1993)* (Encyclopedia Virginia, Nov 2, 2015), archived at <http://perma.cc/FE5A-5N6V>.

<sup>14</sup> Issacharoff, Karlan, and Pildes, *The Law of Democracy* at 679–81 (cited in note 1).

<sup>15</sup> See, for example, D. James Greiner, *Re-solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 Ind L J 447, 464–65 (2011) (describing ecological regression as "fragile" because it can, and often does, produce physically impossible estimates).

Political Education, “the most influential African American political organization in Norfolk during the 1970s.”<sup>16</sup> What if a black candidate less associated with civil rights activism had run in Butts’s place? Would Norfolk’s voters still have been as racially divided?<sup>17</sup> Butts’s opponents also included a white candidate endorsed by the Concerned Citizens (who won a seat) as well as several more conservative white candidates (two of whom were elected too).<sup>18</sup> Would Norfolk’s voters have sorted into the same stark racial pattern if Butts had faced different opposition?

The answers to these questions are largely unknowable. And that is precisely the authors’ point. Observed levels of minority cohesion and white bloc voting depend on both voters’ political preferences and candidates’ attributes. Observed levels are therefore an unreliable measure of voters’ preferences, because candidates’ attributes always intervene to some degree. Once this insight is absorbed, it destabilizes all efforts to compute polarization using actual election results. There is an unbridgeable gulf—who happens to be running in the election and how appealing they are—between these results and voters’ underlying views.

This argument is powerful in principle. It remains possible, though, that at least in areas with substantial minority populations, a candidate’s minority-preferred status overrides all other drivers of vote choice. In that case, observed levels of minority cohesion and white bloc voting (in an election involving a minority candidate of choice) *would* be an accurate measure of voters’ political preferences. Other candidate characteristics would not affect voters’ decisions.

In a second major contribution, the authors empirically dismiss this possibility. They conduct a series of experiments in which candidates’ attributes (race, education, endorsements, military service, and so on) are either set or varied randomly, and subjects are then asked which candidate they would vote for.<sup>19</sup>

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<sup>16</sup> Tarter, *Evelyn Thomas Butts (1924–1993)* (cited in note 13).

<sup>17</sup> The answer is probably no. A different black candidate received about 30 percent support from white voters in both 1978 and 1982. See *Collins v City of Norfolk, Virginia*, 605 F Supp 377, 388 (ED Va 1984).

<sup>18</sup> See *Collins v City of Norfolk, Virginia*, 883 F2d 1232, 1238–39, 1241 (4th Cir 1989). The election was at-large and for three seats. See *Collins*, 605 F Supp at 382.

<sup>19</sup> See Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 656–59 (cited in note 7). These experiments are described in more detail in a subsequent paper. See generally Marisa A. Abrajano, Christopher S. Elmendorf, and Kevin M. Quinn, *Using Experiments to Estimate Racially Polarized Voting* (UC Davis Legal Studies Research Paper No 419, Feb 2015), archived at <http://perma.cc/P8ED-NFCH>.

The results leave no doubt that factors other than minority-preferred status influence vote choice. For example, Latino-white polarization jumps from 21 percent to 36 percent when the opponent of the Latino candidate of choice is a white *conservative* (rather than a randomized white candidate).<sup>20</sup> Similarly, black support for a “low quality” black candidate is only 42 percent, compared to 54 percent for a randomized black candidate.<sup>21</sup>

To be sure, this is not the first time that surveys have appeared in the literature on polarization. In earlier work, Greiner and Professor Quinn showed how polls could be combined with, or substituted for, ecological regression to counteract the method’s drawbacks and produce more accurate estimates.<sup>22</sup> But the authors’ use of surveys is different. Their polls are not just a way to generate individual-level data and thus to circumvent the problems that afflict ecological analysis. Rather, their polls are a response to an even more vexing difficulty: the disjunction between election results and voters’ political preferences. By setting or varying *hypothetical* candidates’ characteristics, these experiments enable voters’ underlying views to be determined more accurately than through any approach that relies on *actual* candidates—whether ecological analysis or more conventional surveys. This is a significant advance that, if implemented in litigation, would revolutionize the field. It would sweep away the innumerable issues with which courts currently struggle when assessing polarization and replace them with an elegant technique fully adaptable to the case at hand.

## II. CRITICISMS

It should be clear from the preceding discussion that I think very highly of the authors’ article. I would say, in fact, that it is the finest piece of legal scholarship to date on racial polarization in voting—an impressive doctrinal, theoretical, and empirical achievement. However, it does seem to me that the authors paint an overly gloomy picture at times. With respect to the lower courts’ methodological disagreements, the entire judiciary’s supposed “normative dissensus,”<sup>23</sup> and the feasibility of just muddling

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<sup>20</sup> See Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 659–60 (cited in note 7).

<sup>21</sup> Id at 660.

<sup>22</sup> See D. James Greiner and Kevin M. Quinn, *Exit Polling and Racial Bloc Voting: Combining Individual-Level and  $R \times C$  Ecological Data*, 4 Annals Applied Stat 1774, 1787–93 (2010). See also Greiner, 86 Ind L J at 487–96 (cited in note 15).

<sup>23</sup> Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 679 (cited in note 7).

through, the situation is not as dire as the authors claim. Disruptive change may still be the best course, but if so, this is because there is much room for improvement, not because the status quo is so calamitous.

#### A. Doctrinal Confusion

Start with the diverging approaches taken by the lower courts to many of the components of the polarization inquiry—ground previously covered by Professor Ellen Katz and her coauthors,<sup>24</sup> but more thoroughly plowed here. According to the authors, this divergence has a dramatic explanation: a bitter dispute over the very meaning of vote dilution, leading judges in each camp to adopt the interpretations most consistent with their conception of the harm.<sup>25</sup> Here, on the other hand, is a more anodyne story: since *Gingles* itself, the Supreme Court has never commented on minority cohesion or white bloc voting at any length. It has occasionally touched on these topics,<sup>26</sup> but it has never answered any of the questions that have preoccupied the lower courts.

Faced with the justices' silence, the lower courts have done what lower courts do. They have decided hundreds of cases as best they could, each one involving different facts, different experts, different evidence on polarization, and so on. They have decided these cases, moreover, not as one undifferentiated judicial cohort, but rather as distinct circuit and district courts (and often without the possibility of intermediate appellate review).<sup>27</sup> It is no surprise that a good deal of doctrinal confusion has arisen from all of this activity. A good deal of doctrinal confusion *generally* arises when the lower courts are left to their own devices for decades, churning through cases without any guidance from above.

I can't be sure that my more prosaic explanation is correct. A point in its favor, though, is that the same kind of legal muddle has emerged in several other areas of voting rights doctrine. Prior

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<sup>24</sup> See Ellen Katz, et al, *Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act since 1982; Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U Mich J L Ref 643, 663–75 (2006).

<sup>25</sup> See Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 636–45 (cited in note 7).

<sup>26</sup> See, for example, *League of United Latin American Citizens v Perry*, 548 US 399, 427 (2006) (“LULAC”) (briefly noting that the second and third *Gingles* prongs were satisfied); *Abrams v Johnson*, 521 US 74, 92–93 (1997) (briefly noting that the second and third prongs were not satisfied).

<sup>27</sup> See 28 USC § 2284(a) (requiring three-judge district courts when congressional or state legislative districts are challenged); 28 USC § 1253 (providing for direct appeal to the Supreme Court from decisions of three-judge courts in many cases).

to *Gingles*, for instance, the Supreme Court recognized a constitutional cause of action for racial vote dilution but said little about the theory's contours.<sup>28</sup> In response, as the authors themselves note, "[a] free-form jurisprudence soon developed in the lower courts," with judges unpredictably nullifying or upholding different electoral policies.<sup>29</sup> Likewise, there is just as much uncertainty over *Gingles*'s first prong—especially its geographic compactness requirement—as over its second and third elements. Some courts essentially ignore compactness; others examine it spatially; still others conflate it with traditional districting criteria; and the Supreme Court, on one occasion, construed it in terms of cultural commonality.<sup>30</sup>

And over the last few years, doctrinal chaos has ensued on a whole new front: the validity under the VRA of measures that make it more difficult to vote, most notably photo ID requirements. The Supreme Court has yet to wade into this debate. Lacking a definitive pronouncement from it, the lower courts have hopelessly splintered. Some have focused on discriminatory intent,<sup>31</sup> others on discriminatory effect.<sup>32</sup> Among those prioritizing effect, an array of tests has been mooted but no consensus has been reached. Additional disputes rage over the right benchmarks for comparison, the most probative types of evidence, and several other issues.<sup>33</sup> Once again, the judicial disagreements the authors identify seem typical rather than exceptional—par for the course when subordinates in a hierarchical system proceed without instructions from their superior.

## B. Vote Dilution Theories

Next, take the vote dilution theories the authors discuss: the proportional representation, coalitional-breakdown, voter-discrimination, and *League of United Latin American Citizens v Perry*<sup>34</sup> ("LULAC") models. The authors present these theories as

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<sup>28</sup> See *White v Regester*, 412 US 755, 764 (1973).

<sup>29</sup> Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 595 (cited in note 7).

<sup>30</sup> For a description of the lower courts' approaches to compactness, see Katz, et al, 39 U Mich J L Ref at 662–63 (cited in note 24). For the Supreme Court's embrace of cultural compactness, see *LULAC*, 548 US at 423–43.

<sup>31</sup> See, for example, *North Carolina State Conference of NAACP v McCrory*, App No 16-1468, slip op at 11 (4th Cir July 29, 2016).

<sup>32</sup> See, for example, *Veasey v Abbott*, No 14-41127, slip op at 32–33 (5th Cir July 20, 2016) (en banc).

<sup>33</sup> For a good snapshot of this litigation, see *Major Litigation That Could Impact Voting Access* (Brennan Center for Justice, Oct 13, 2016), archived at <http://perma.cc/D9CJ-K4Z2>.

<sup>34</sup> 548 US 399 (2006).

if they all stand on similar footing—comparable in their doctrinal and academic support.<sup>35</sup> But one of the accounts, the proportional representation theory (about whose title more in a moment), is clearly predominant, and by comparison, the other models are mere sideshows. In *Gingles* itself, an outright majority stated that “[t]he *essence* of a § 2 claim is . . . an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”<sup>36</sup> That vote dilution is above all the denial of minority voters’ representation by their candidates of choice was recognized by Justice Sandra Day O’Connor in *Gingles*,<sup>37</sup> by Justice Clarence Thomas in a fire-and-brimstone opinion eight years later,<sup>38</sup> and by Chief Justice John Roberts in *LULAC*<sup>39</sup>—all jurists who might have preferred a different theory. The ascendancy of this view is also common knowledge among scholars; in Professor Karlan’s words, it enjoys “talismanic status.”<sup>40</sup>

In contrast, the other theories represent minor, even discarded, strands of vote dilution doctrine. For example, the coalitional-breakdown model focuses on minority voters’ ability to participate in the political process and this process’s responsiveness to their substantive interests. Both participation and responsiveness were important elements of the pre-*Gingles* case law.<sup>41</sup> Post-*Gingles*, though, they have been demoted to mere entries in the list of Senate factors, divorced from the crucial preconditions for liability.<sup>42</sup> The Supreme Court has also rejected § 2 claims for influence districts<sup>43</sup>—even though these districts, which require

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<sup>35</sup> See Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 629–36 & nn 220, 226, 242, 248 (cited in note 7).

<sup>36</sup> *Gingles*, 478 US at 47 (emphasis added).

<sup>37</sup> See *id* at 93 (O’Connor concurring in the judgment) (“[E]lectorate success has now emerged, under the Court’s standard, as the linchpin of vote dilution claims.”).

<sup>38</sup> See *Holder v Hall*, 512 US 874, 899 (1994) (Thomas concurring in the judgment) (“[T]he Court has determined that the purpose of the vote . . . is controlling seats.”).

<sup>39</sup> See *LULAC*, 548 US at 494 (Roberts concurring in part, concurring in the judgment in part, and dissenting in part) (“[T]he concern of the Voting Rights Act [is] to ensure minority voters an equal opportunity ‘to elect representatives of their choice.’”).

<sup>40</sup> Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va L Rev 1, 29 (1991). See also, for example, Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U Chi L Rev 1493, 1500 (2008) (“The *Gingles* framework focused . . . on the electoral success of minority-preferred candidates.”); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich L Rev 1077, 1078 (1991) (“The belief that black representation is everything has defined litigation strategy under the Voting Rights Act.”).

<sup>41</sup> See, for example, *White*, 412 US at 765–70; *Zimmer v McKeithen*, 485 F2d 1297, 1305–07 (5th Cir 1973) (en banc).

<sup>42</sup> See *Voting Rights Act Extension* at 28–29 (cited in note 3).

<sup>43</sup> See *LULAC*, 548 US at 445–46.

minority voters to work with other voters to elect mutually acceptable candidates, are the ones most consistent with a coalitional approach.

Similarly, the voter-discrimination theory holds that the defeat of minority-preferred candidates is most troublesome when they lose because of voter prejudice (not partisanship, socioeconomic status, or some other factor). But in *Gingles*, the plurality declared that “[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference”—that matters legally.<sup>44</sup> The plurality’s position was implicitly endorsed by a majority of the Court in 1997 and again in *LULAC*. On both of those occasions, the Court took polarization statistics at face value, without ever asking what might account for the figures.<sup>45</sup>

And as for the *LULAC* theory, it is a stretch to call it a full-blown model of vote dilution. *LULAC*’s key holdings were that a minority population is not “compact” when its members are culturally and socioeconomically dissimilar, and that a district enclosing such a population is not a valid § 2 remedy.<sup>46</sup> These are notable glosses of *Gingles*’s first prong and of the proper remedies in § 2 litigation. But that is all they are. They imply nothing about *Gingles*’s second and third prongs, about the list of Senate factors—or about the real meaning of vote dilution.

The proportional representation theory is thus, at the very least, first among equals. Given this status, it is important to be clear about what exactly the theory specifies. And on this front, I think the term *proportional representation* is inapt, as is the authors’ claim that “[o]n this view . . . the ratio of the number of [minority-opportunity] districts . . . to the total number of districts should roughly equal the ratio of the minority population to the total population.”<sup>47</sup> As I have explained elsewhere, a more accurate statement of the theory is that minority voters should be able to elect their preferred candidates to the extent permitted by their geographic distribution, up to a ceiling of proportionality.<sup>48</sup> This version acknowledges the vital role played by minority voters’ spatial patterns. It is also truer to the Court’s view of proportionality, which boosts plaintiffs’ cases when it is absent and undercuts them when it is present.<sup>49</sup>

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<sup>44</sup> *Gingles*, 478 US at 63 (Brennan) (plurality).

<sup>45</sup> See *Abrams*, 521 US at 93; *LULAC*, 548 US at 427.

<sup>46</sup> See *LULAC*, 548 US at 423–43.

<sup>47</sup> Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 630 (cited in note 7).

<sup>48</sup> See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan L Rev 1323, 1333–39 (2016).

<sup>49</sup> See *Johnson v De Grandy*, 512 US 997, 1013–17 (1994).

Are these just semantic differences? No, because when geography is taken into account, minority voters do not (and should not be expected to) achieve proportional representation. The problem for minority voters is that, in most jurisdictions, they are not allocated efficiently enough to attain proportionality. Rather, they tend to be too concentrated in a few areas and not concentrated enough in many other regions. At present, consequently, minority voters are underrepresented in Congress and in nearly every state legislature.<sup>50</sup> In many states, moreover, there are no more geographically compact, minority opportunity districts that can be drawn.<sup>51</sup> *Proportional representation* is thus a misleading label for the leading theory of vote dilution because it implies that minority voters can and should be proportionally represented. *Representation to the extent allowed by geography* is the clunkier, but more correct, term.

### C. Exogenous Data

There is one last reason why I am somewhat more sanguine than the authors about the current state of racial polarization doctrine. It is that while the authors focus on *endogenous* election results (for the institution at issue in the litigation), *exogenous* results (for other offices) can also be used to calculate polarization. True, exogenous results are just as vulnerable to the authors' central criticism—they too are a function of both voters' preferences and candidates' characteristics. And, true, voting at other governmental levels may involve different issues and concerns. Nevertheless, exogenous data has significant advantages over endogenous data: it enables litigants to compute polarization for many jurisdictions simultaneously, to compare the resulting estimates, and to reach conclusions about where voting is more and less polarized.<sup>52</sup> Exogenous data thus makes possible the analysis of *Gingles*'s second and third prongs even after the authors' point about candidates' attributes has been grasped.

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<sup>50</sup> See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U Chi L Rev 769, 834 (2013).

<sup>51</sup> See Nate Silver, *Geography, Not Voting Rights Act, Accounts for Most Majority-Minority Districts* (FiveThirtyEight, June 25, 2013), archived at <http://perma.cc/48DK-LFQ2> (describing the “tendency of racial minorities to be concentrated in a group of overwhelmingly Democratic districts” and how “most [majority-minority districts] arise as a result of the geographic distribution of minority voters”).

<sup>52</sup> See, for example, *Texas v United States*, 887 F Supp 2d 133, 142 (DDC 2012), vacd and remd, 133 S Ct 2885 (2013) (noting that exogenous data “allow[] comparison between benchmark and proposed districts”).

An example may be helpful here. In the 2004 presidential election, President George W. Bush faced off against Senator John Kerry, and in 2008, Senator Barack Obama opposed Senator John McCain. Measured at the state level, black-white polarization in voting was somewhat higher in 2008 than in 2004 (53 percent versus 48 percent). This rise does *not* mean that voters' underlying preferences were more divergent in 2008; the larger gap could also have stemmed from the candidates' idiosyncratic features (in particular, Obama's race). But while inter-*temporal* comparisons are suspect, inter-*jurisdictional* comparisons are quite feasible. For instance, Alabama was much more polarized than Alaska in both 2004 and 2008 (74 percent versus 54 percent; 87 percent versus 62 percent). So was Mississippi relative to Missouri, Virginia relative to Vermont, and so on.<sup>53</sup>

By relying more heavily on exogenous data, then, it becomes more realistic than the authors believe to just muddle through. As I have stressed, exogenous data is not without its flaws. But by keeping the candidates *constant* from one jurisdiction to the next (in the context of a particular election), it allows judgments about relative polarization to be made. And for litigation purposes, such judgments are all we really need. They are enough to analyze *Gingles's* second and third prongs even if they do not reveal the true polarization of voters' preferences.

### III. IMPLICATIONS

Suppose I'm wrong, though, about the usefulness of exogenous data. Suppose also that courts deem opinion surveys—especially surveys involving randomized attributes of hypothetical candidates—too fanciful to be admissible. What happens then to the analysis of polarization? The authors offer a series of ideas. Polarization could become part of the totality-of-circumstances inquiry rather than a precondition for liability. Polarization could be replaced by some proxy for intentional discrimination. Or it could be replaced by relative minority turnout.<sup>54</sup>

These are all interesting suggestions. But to conclude this piece, I want to consider an even more radical idea: *eliminating* rather than *amending Gingles's* second and third prongs. In this case, the only precondition for liability would be a showing that at least one more reasonably compact majority-minority district

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<sup>53</sup> Polarization figures are on file with the author and are the basis for Stephanopoulos, 68 Stan L Rev at 1358 (cited in note 48).

<sup>54</sup> See Elmendorf, Quinn, and Abrajano, 83 U Chi L Rev at 675 (cited in note 7).

could be drawn. As soon as a plaintiff made this showing, the spotlight would shift immediately to the list of Senate factors, without any consideration of polarization.

Interestingly, even this extreme a tactic—collapsing *Gingles*'s three prongs into one—would not eradicate all traces of polarization from the doctrine. A court would presumably want some assurance that any new district it constructed would actually elect a minority candidate of choice. But how a district is likely to perform can be determined only by studying the voting patterns of minority and white voters—in short, by studying polarization. Likewise, a court would want to know to what extent minority voters are *already* represented by their preferred candidates. Figuring out who these preferred candidates are also requires understanding minority voters' behavior at the polls.

These points, though, should not be overstated. In most cases, it is reasonably clear whether a newly drawn district will elect a minority candidate of choice. A district with a small minority population (say, below 25 percent) usually will not; a district with a large minority population (say, above 45 percent) usually will; and only in the space between these lines—a space now occupied by very few districts<sup>55</sup>—is there substantial uncertainty. Similarly, minority voters' representation by their candidates of choice is rarely hard to assess. Most of these candidates both are readily identifiable (thanks to their race or ethnicity) and represent minority-heavy districts.<sup>56</sup> The kind of polarization analysis that would have to be conducted in a one-prong world, then, would be much simpler and lower-stakes than that undertaken today. It would never be dispositive for purposes of liability. In essence, it would just amount to a check that judicial intervention would, in fact, promote minority representation.

So conceived, why would a one-prong world be attractive? One reason is its greater simplicity. With a single precondition for liability rather than three, there would be two fewer issues for litigants to brief, for experts to opine on, and for courts ultimately to resolve. Another reason is closer fidelity to the statutory text. The language of § 2 never mentions polarization, nor did the concept play a major role in the pre-*Gingles* case law. *Gingles*'s elevation of polarization to linchpin status is thus odd and hard to defend on conventional interpretive grounds.

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<sup>55</sup> See Nicholas O. Stephanopoulos, *The South after Shelby County*, 2013 S Ct Rev 55, 89, 100–01.

<sup>56</sup> See *id.* at 87–90.

Perhaps the most important reason, though, is theoretical. *Gingles*'s second and third prongs conflict in certain cases with the model I described earlier: minority voters' representation by their preferred candidates, to the extent permitted by geography, up to a ceiling of proportionality. Specifically, a clash ensues whenever another geographically compact, minority opportunity district *could* be drawn—but *isn't* because a court finds insufficient minority cohesion or white bloc voting. In these situations, the polarization requirement frustrates § 2's representational goal, and the goal could be furthered if the requirement were waived.

On the other hand, the one remaining prong in a one-prong world would assume even greater significance. And that prong's centerpiece, geographic compactness, is just as untethered from the statutory text as polarization, and in even starker tension with minority voters' representation by their candidates of choice. Many minority populations are spatially *dispersed* and thus unable to win vote dilution claims despite being as morally worthy of representation as more concentrated groups.<sup>57</sup> Additionally, if it were simpler for § 2 to be satisfied, concern would mount that minority voters' improved descriptive representation would come at a substantive cost. Minority voters' descriptive and substantive representation are inversely related in certain circumstances,<sup>58</sup> meaning that an easier-to-prove vote dilution action is not an unalloyed good.

#### CONCLUSION

Because the arguments in both directions are strong, I'm not yet sure whether polarization should be relegated to the sidelines of vote dilution doctrine. I *am* sure, though, that the authors deserve a good deal of credit for broaching this possibility—for highlighting the flaws in how polarization is calculated and thus prompting scholars and judges to reconsider *Gingles*'s second and third prongs. Ever since *Gingles*, there has been a tendency in the voting rights community to take the case as gospel, to operate entirely within its framework notwithstanding the strangeness of that structure. The authors are among the first to contemplate a

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<sup>57</sup> See Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U Chi L Rev 1329, 1384, 1388 (2016).

<sup>58</sup> See Stephanopoulos, 68 Stan L Rev at 1392–93 (cited in note 48) (empirically documenting this tradeoff when Republicans—but not Democrats or a nonpartisan body—are responsible for redistricting).

post-*Gingles* legal landscape, and for that they should be congratulated.