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Touro Law Review

Volume 38 | Number 3 Article 4

2022

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Recommended Citation

Menter, Aviel and Evans, C.D. Alexander (2022) "Multiple Choice: How Instant Runoff Voting Improves Redistricting Under the Voting Rights Act," *Touro Law Review*: Vol. 38: No. 3, Article 4.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol38/iss3/4

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MULTIPLE CHOICE: HOW INSTANT RUNOFF VOTING IMPROVES REDISTRICTING UNDER THE VOTING RIGHTS ACT

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ABSTRACT

As currently interpreted, Section 2 of the Voting Rights Act ("VRA") can be a double-edged sword for minority representation. Although it gives protected minority groups their own majority-minority districts, this can dilute minority influence in other districts. Recently, however, many jurisdictions have begun to adopt Instant Runoff Voting ("IRV"), a ranked-choice voting system where voters rank multiple candidates in order of preference. By letting voters express support for multiple candidates, IRV provides useful information about the behavior of minority groups that courts can use when enforcing the VRA. Specifically, ranked-choice voting systems can better show when a winning candidate supported by a multi-racial coalition was preferred by members of one racial group. Courts can use this information in redistricting cases to help minority groups elect their preferred candidates—even when the minority group does so as part of a multi-racial coalition, in a district where minorities are less than a majority of the voting population. These "crossover" districts, enabled by IRV, help the VRA accomplish its goal of ensuring that minority voters can "elect representatives of their choice."

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I. INTRODUCTION

Section 2 of the Voting Rights Act (VRA) is supposed to ensure that voters in protected minority groups can "elect representatives of their choice."[1] Yet, as currently implemented, the VRA often fails to accomplish this goal.

As currently interpreted, Section 2 requires states to create "majority-minority" districts—election districts where the majority of the population belongs to a racial minority group—when voting is polarized on racial lines, and when drawing such a district is feasible.[2] This requirement was designed to address situations in which voter preferences are so sharply divided by race that members of a racial minority group can elect their preferred candidate only if they have their own district.[3]

In many cases, however, candidates are elected by multi-racial coalitions—supported not only by minority voters, but also by some "crossover" voters from the racial majority.[4] The creation of majority-minority redistricts is not only unhelpful to such candidates, it may actually be harmful.[5] "Packing" minority voters into majority-minority districts limits their ability to influence elections elsewhere.[6] And some state legislatures, seeking to dilute the influence of minority voters, have used the VRA as an excuse to draw district maps that

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[1] Voting Rights Act Amendments of 1982, Pub L. No. 97–205, 96 Stat. 134; (codified as amended at 52 U.S.C. § 10301b).

[2] *See* Thornburg v. Gingles, 478 U.S. 30, 48–51 (1986) (explaining the conditions under which the VRA requires a majority-minority district); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 425–27 (2006) (applying this test to single-member districts).

[3] *See Gingles*, 478 U.S. at 49 (explaining that a majority-minority district is required when "a bloc voting majority [is] *usually* . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group").

[4] *See* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1517 (2002).

[5] *See id.* at 1536 (explaining that overly "safe" majority-minority districts can dilute minority influence overall). *But see* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011) (arguing that the VRA's majority-minority requirement precludes some more effective *partisan* gerrymandering strategies that state legislatures might otherwise employ).

[6] *See* Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 IND. L.J. 1033, 1070 (2018) (describing the "packing" and "cracking" strategy).

confine minority voters to small numbers of isolated districts.[7] Many political scientists have therefore argued that the VRA's redistricting requirements may harm minority representation as much as help it.[8]

These difficulties, however, are not inevitable consequences of the VRA's promise of minority representation; they result in large part from our current election system. Today, the vast majority of legislative elections in the United States use simple plurality voting, where voters cast a vote for a single candidate.[9] The winner is the candidate receiving the most votes.[10] Simple plurality elections, however, create challenges for minority representation. In particular, they force voters to choose between one of only two candidates, no matter the voter's actual preferences.[11] In such elections, less popular candidates are often referred to as "spoilers," as a vote cast for a minor candidate deprives a more plausible candidate of a vote that might otherwise have helped him win.[12] A consequence of the spoiler effect is that races in simple plurality systems rarely feature more than two serious candidates.[13] Accordingly, one candidate must usually win either an outright majority, or something close, in order to win the election. This feature of simple plurality elections explains the VRA's

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[7] *See* Dale E. Ho, *Something Old, Something New, or Something* Really *Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887, 1911–18 (2018); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1850 (2018).

[8] *See* Cox & Holden, *supra* note 5, at 559 & n.21 (describing, though also disputing, the "general consensus" that majority-minority districts reduce the number of Democratic districts, even though minority voters tend to vote for Democratic candidates).

[9] *See* Erik. J. Engstrom, *The United States: The Past—Moving from Diversity to Uniform Single-Member Districts*, *in* THE HANDBOOK OF ELECTORAL SYSTEM CHOICE 155, 155 (Josep M. Colomer ed., 2004).

[10] Dan S. Felsenthal, *Review of Paradoxes Afflicting Procedures for Electing a Single Candidate*, *in* ELECTORAL SYSTEMS: PARADOXES, ASSUMPTIONS, AND PROCEDURES 19, 25 (Dan S. Felsenthal & Moshé Machover eds., 2012).

[11] Thomas Fujiwara, *A Regression Discontinuity Test of Strategic Voting and Duverger's Law*, 6 Q.J. POL. SCI. 197, 197 (2011) (finding that "single-ballot plurality rule causes voters to desert third placed candidates and vote for the top two vote getters").

[12] *See* Marek M. Kaminski, *Spoiler Effects in Proportional Representation Systems: Evidence from Eight Polish Parliamentary Elections*, 176 PUB. CHOICE 441, 442 (2018) (describing the spoiler effect in plurality election systems).

[13] *See, e.g.*, Fujiwara, *supra* note 11, at 228.

focus on majority-minority districts: without the support of a majority of a district's voting population, a minority-supported candidate in a racially polarized jurisdiction is unlikely to win.[14]

A recent trend in election administration, however, promises to ameliorate this problem. Over the past decade, some jurisdictions have adopted a different election system: "Instant Runoff Voting" (also often referred to as "Ranked Choice Voting").[15] Instant Runoff Voting (IRV) significantly mitigates the spoiler effect by allowing voters to rank multiple candidates in order of preference.[16] Because IRV elections typically involve several candidates, it is likely that no candidate will have a majority of first-preference votes after the first round of counting.[17] If a voter's preferred candidate does not initially receive the support of an outright majority, then the votes for that candidate are simply reallocated to the voters' next-preferred candidates.[18] This process continues until a single candidate has received a majority of votes.[19] As a result, IRV reduces the need to vote strategically.[20] Under IRV, a voter can more freely express a preference for a less popular candidate—because if that candidate loses, the vote is reallocated, not wasted.[21] IRV, therefore, carries potential benefits for minority representation. In a simple plurality

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[14] *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (explaining that, unless a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," it would be unlikely to win elections regardless of how districts are drawn).

[15] Though the term "Ranked Choice Voting" is more common, this Article uses the more precise term "Instant Runoff Voting." "Ranked Choice Voting" could refer to any number of election systems in which voters rank candidates in order of preference. "Instant Runoff Voting," however, refers to the specific single-member election system described in this Article.

[16] *See* Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHOENIX L. REV. 117, 118–21 (2012).

[17] For example, in the recent New York mayoral primary election for the Democratic Party, the top candidate, Eric Adams, received only 30.7% of the vote. Eight rounds of voting were required for Adams to win a majority. *See infra* Section II.C for a more detailed description of this election.

[18] Lewyn, *supra* note 16, at 118–20.

[19] *Id.*

[20] *See* Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (A.K.A. the Instant Runoff), Then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUD. 641, 651–52 (2004) (comparing IRV to another ranked-choice system, the Coombs' rule, and arguing that IRV is relatively more resistant to strategic voting than either plurality elections or Coombs' rule elections).

[21] *See id.* at 651.

system, minority voters with distinct preferences and interests may nevertheless feel pressured to support a compromise candidate palatable to a racial majority.[22] Accordingly, candidates elected by a multi-racial coalition may not represent every racial group's genuine and distinct preferences.[23] In a simple plurality system, support for such a candidate could mask behind-the-scenes compromises that take place well before election day.[24] But in an instant runoff election, there is little need for voters to tactically hide their preferences.[25] They can openly vote for their preferred candidate, without fear that their vote will be wasted.[26] Voter preferences therefore need not be obscured by pre-election strategizing—they're plainly visible in the official vote count.

This transparency has significant implications for redistricting under Section 2 of the VRA. As currently interpreted, the VRA only requires the creation of majority-minority districts, not "crossover" districts.[27] The Supreme Court has held that, if some members of the racial majority "cross over" to vote for the candidate supported by the racial minority, then there is no racial polarization—a threshold requirement to find that a district map violates the VRA.[28] But this interpretation disregards polarization that simple plurality elections can mask. In simple plurality "crossover" districts, members of one

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[22] *See* Regina P. Branton, *The Importance of Race and Ethnicity in Congressional Primary Elections*, 62 POL. RSCH. Q. 459, 461 (2009) (explaining that voters frequently support candidates of their own race but may compromise when voters of another race dominate the party primary).

[23] *See id; see also* David Lublin et al., *Minority Success in Non-Majority Minority Districts: Finding the "Sweet Spot"*, 5 J. RACE, ETHNICITY & POL. 275, 280–81 (2020) (finding that districts with only 40-50% minority populations may nevertheless elect their preferred candidate to office, even when party primaries are racially polarized, because crossover voters from the racial majority may support candidates that they might not have voted for in the primary).

[24] *See, e.g.*, Branton, *supra* note 22, at 461; Perry Bacon Jr., *Why Black Voters Prefer Establishment Candidates Over Liberal Alternatives*, FIVETHIRTYEIGHT (Oct. 2, 2019, 6:00 AM), https://fivethirtyeight.com/features/why-do-black-democrats-usually-prefer-establishment-candidates ("During the 2020 cycle, black voters have regularly told reporters that they like Sen. Kamala Harris and other Democratic candidates but view Biden as the person most likely to defeat Trump.").

[25] *See* Grofman & Feld, *supra* note 20, at 651–52.

[26] *Id.* at 651.

[27] Bartlett v. Strickland, 556 U.S. 1, 15 (2009) ("Section 2 [of the VRA] does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.").

[28] *See id.* at 16.

racial group may end up voting for a candidate that would not be their first choice, but that they think would be acceptable to members of other groups.[29] However, under IRV, voters from both groups can more freely express their distinct preferences. Recent evidence suggests that this freedom to vote one's conscience can reveal political disagreements obscured by simple plurality elections—disagreements that often fall on racial lines.[30]

In such a situation, the role of the VRA is clear—it must enable protected minority groups to "elect representatives of their choice."[31] In simple plurality elections, it may not be obvious whether a candidate supported by a multiracial electorate is truly the candidate preferred by the protected minority, or whether the candidate instead represents a coalition organized on other lines. But IRV makes it especially clear when a specific group particularly supports a candidate.[32] In these situations, courts should interpret the VRA to ensure that minority groups are able to elect a candidate they uniquely prefer, even if they have to rely on second- or third-choice votes from other groups. This interpretation would not privilege *majority*-minority districts—under IRV, a candidate supported by minority voters can still win, even if not initially supported by a majority of voters in the first round.[33] In a simple plurality regime, the VRA often serves to confine the influence of minority voters by packing them into majority-minority districts.[34] But under IRV, the VRA would encourage the creation of *any* district in which minority voters could successfully elect their preferred candidate—without requiring the district's population to be majority-minority.

Part II of this Article describes the current state of redistricting law under the Voting Rights Act. Recognizing the VRA's risks and benefits, the Supreme Court's jurisprudence attempts to strike a careful balance—requiring the creation of majority-minority districts when doing so seems necessary for minority representation, but otherwise imposing serious limits on race-based redistricting. Under the current simple plurality regime, states are thus frequently faced with a difficult

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[29] *See supra* notes 22–24.
[30] *See infra* Section III.B (discussing racial polarization in party primary elections).
[31] 52 U.S.C. § 10301(b).
[32] *See* Section III.B *infra*.
[33] *See* Lewyn, *supra* note 16, at 118–20 (explaining IRV).
[34] *See infra* Part II (discussing the practical and interpretive challenges posed by the VRA).

question: is a majority-minority district necessary to ensure that a minority group receives representation, or does it instead dilute the influence of that minority group over elections in other districts?

Part III of this Article explains Instant Runoff Voting and briefly details its history in the United States. Currently, IRV is used in relatively few jurisdictions—mostly in municipal elections, though Alaska and Maine employ IRV in statewide elections. IRV's adoption has been primarily motivated by a desire to avoid the spoiler effect and to reduce the need for tactical voting. However, these features also provide benefits for minority representation, allowing minority voters to more freely express distinct preferences for their own candidates. This Part also examines New York City's 2021 mayoral primary election, which provides a helpful case study of the benefits instant runoff elections can provide in an ethnically diverse jurisdiction.

Finally, Part IV explains how Instant Runoff Voting affects redistricting under the Voting Rights Act. Current interpretation of the VRA emphasizes the creation of majority-minority districts because candidates in simple plurality elections tend to win only when they receive a majority or near-majority of votes. Under IRV, however, this need not be the case. Minority groups may be able to elect their preferred candidate even when that candidate receives a relatively smaller chunk of first-preference votes. And by allowing voters to list candidates in order of preference, IRV makes it clearer when one candidate is uniquely preferred by members of a protected group. Under IRV, the VRA need not confine minority voters to districts where they comprise a majority. Instead, IRV encourages the creation of any district that allows minority voters to elect their preferred candidate.

II. THE VOTING RIGHTS ACT AND MINORITY REPRESENTATION

Under certain circumstances, the VRA may require a majority-minority district—i.e., an election district in which the majority of the population belongs to a protected minority group.[35] These districts are designed to ensure that members of a minority group are able to elect their preferred candidate, even in political environments where voting

[35] *See* Thornburg v. Gingles, 478 U.S. 30, 47–51 (1986) (explaining the majority-minority district requirement).

is so racially polarized that they could not do so without their own district.[36] Because single-member districts in the United States traditionally use plurality elections, the Court has interpreted the VRA only to require districts in which the protected minority would comprise an absolute majority of voters.[37] Thus, under its current interpretation, the VRA does not require "crossover districts," where members of a minority group join with members of the racial majority to elect their preferred candidate.[38]

In some circumstances, however, a majority-minority district may do little to enhance minority representation. Although the current implementation of Section 2 of the VRA guarantees minority groups the right to elect representatives of their choice within their own district, it potentially limits the influence of minority groups in other districts.[39] Some state legislatures have seized on this effect, using the VRA as a pretext to create maps that deliberately "pack" minority voters into specific districts.[40] The Supreme Court has therefore struggled to strike a balance between ensuring minority representation within a district and preserving minority representation overall.[41]

A. The Majority-Minority District Requirement

Echoing the language of the Fifteenth Amendment, Section 2 of the Voting Rights Act prohibits state laws that "result[] in a denial or abridgement of the right . . . to vote on account of race or color."[42] At first, the Supreme Court interpreted this language to mean that state action violated the VRA only if it was intentionally discriminatory.[43]

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[36] *See id.* at 49–51.

[37] *See* Bartlett v. Strickland, 556 U.S. 1, 19 (2009) (plurality) (arguing that the 50-percent threshold has "special significance, in the democratic process"). Although Justice Kennedy's opinion suggests that the 50-percent threshold is important in any democratic system, the importance of majority rule is more nuanced, relevant particularly in simple plurality elections where only two viable candidates are likely to be running. *See infra* Section III.A, for more information.

[38] *Barlett*, 556 U.S. at 15–19.

[39] *See* Pildes, *supra* note 4, at 1536.

[40] *See* Ho, *supra* note 7, at 1911–18; Hasen, *supra* note 7, at 1850.

[41] *See* Hasen, *supra* note 7, at 1852 ("The most charitable thing to say about the current state of racial gerrymandering law is that it is a big mess.").

[42] *Compare* 50 U.S.C. § 10301(a), *with* U.S. CONST. amend. XV § 1.

[43] City of Mobile v. Bolden, 446 U.S. 55, 60–62 (1980) (plurality opinion) (holding that "action by a State that is racially neutral on its face" only violates the Fifteenth Amendment and the VRA "if motivated by a discriminatory purpose").

However, Congress quickly amended the VRA, clarifying that there was no intent requirement.[44] Accordingly, Section 2 is violated whenever "the totality of the circumstances" indicate that "the political processes leading to nomination or election . . . are not equally open to participation" by members of a protected class.[45] This Section explains how the Court has interpreted this language in the context of challenges to election district maps.

1. The Gingles Factors

The first case in which the Supreme Court considered the amended section 2 of the VRA was *Thornburg v. Gingles*.[46] The plaintiffs in *Gingles* challenged a North Carolina district map that had created six multi-member districts—i.e., districts in which more than one representative is elected.[47] Multi-member districts in the United States frequently use at-large plurality elections.[48] In these elections, voters can cast several votes for several candidates.[49] Whichever candidates receive the greatest total of votes win the election.[50] However, in some circumstances, this voting system can disadvantage minority groups with distinct preferences.[51] If voters in a majority bloc steer clear of minority candidates, then it will be difficult for minority voters to elect *any* candidates in the district, even if the proportion of minority voters would otherwise enable them to win a seat.[52]

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[44] *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; *See also* S. REP. NO. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07 (explaining factors the Senate expected courts to consider under the amended VRA).
[45] 50 U.S.C. § 10301(b).
[46] 478 U.S. 30 (1986).
[47] *Id.* at 35.
[48] *See* Josep M. Colomer, *On the Origins of Electoral Systems and Political Parties: The Role of Elections in Multi-Member Districts*, 26 ELECTORAL STUD. 262, 264–65 (2007) (describing multi-member plurality systems, and their use in various jurisdictions, including the United States).
[49] *Id.*
[50] *Id.*
[51] *See* Roy W. Copeland, *The Status of Minority Voting Rights: A Look at Section V Preclearance Protections and Recent Decisions Affecting Multi-Member Voting Districts*, 28 HOWARD L.J. 417, 423–25 (1985) (explaining how multi-member districts were used to suppress the minority vote).
[52] Richard L. Engstrom, *Modified Multi-Seat Elections Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743, 746–47 (1992) (describing how at-

Concerned about exactly this problem, Black voters in North Carolina challenged several multi-member state legislative districts, arguing that the districts "impaired black citizens' ability to elect representatives of their choice."[53] The District Court decided for the plaintiffs, requiring that North Carolina give Black citizens their own majority-minority districts.[54] North Carolina appealed, and the Supreme Court affirmed the District Court's judgment with respect to most of the challenged districts.[55]

The Supreme Court's opinion laid out a test to determine when Section 2 required the creation of a majority-minority district.[56] First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."[57] The Court explained that, if this were not the case, then the minority group would be unable to elect its preferred candidate even in a single-member district.[58] Second, the minority group must be "politically cohesive."[59] Section 2 of the VRA protects the ability of certain groups to "elect representatives of their choice."[60] If the group itself is not politically cohesive, then it has no distinct "choice" that the VRA needs to protect.[61] Third, the majority group must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[62] Were this not the case, a minority group might not even require the help of the VRA to elect the candidate of its choice.[63]

Gingles considered a challenge primarily to multi-member districts.[64] However, it has since been applied to single-member

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large plurality systems—particularly ones that prohibit "single-shot" voting—can shut out minority voters).

[53] Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

[54] *Id.* at 42.

[55] *Id.*

[56] *See id.* at 47–51.

[57] *Id.* at 50.

[58] *Id.*

[59] *Id.* at 51.

[60] 52 U.S.C. § 10301(b).

[61] *See Gingles*, 478 U.S. at 51 ("If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.").

[62] *Id.* at 51.

[63] *Id.*

[64] *Id.* at 35.

districting plans as well.[65] In such challenges, minority voters generally allege that a state has split a group of minority voters into several districts, even though the group could comprise a majority in one district.[66] Accordingly, the minority group has been denied the opportunity to elect the candidate of its choice, just as if its voting power had been overwhelmed in a multi-member district. Courts adjudicating these claims apply the *Gingles* test, ordering the creation of a majority-minority district when: (i) the relevant minority group is politically cohesive; (ii) the minority group is sufficiently large and geographically compact enough to comprise a majority in its own district; and (iii) bloc voting by the racial majority usually defeats the minority group's candidate.[67]

Section 2 has had a significant impact on states' redistricting processes.[68] Before *Shelby County v. Holder*[69] invalidated the VRA's preclearance coverage formula, the most common basis for a denial of preclearance was failure to comply with the VRA during redistricting.[70] And though the preclearance provisions of the VRA are no longer operative, Section 2 still applies to the redistricting process.[71] Therefore, in order to comply with the VRA, states drawing

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[65] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 425–27 (2006) [hereinafter *LULAC v. Perry*]. *See also* Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 297 (2015) ("The Court's interpretation of § 2 and § 5 [of the VRA] have resulted in challenge after challenge to the drawing of voting districts.") (listing cases).

[66] *See LULAC*, at 423–25.

[67] *See id.* at 425; *Ala. Legislative Black Caucus*, 575 U.S. at 297 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

[68] *See* Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 126 (2010) ("The majority-minority district is now an important feature of the landscape of American democracy.").

[69] 570 U.S. 529 (2013).

[70] *See* CHARLES S. BULLOCK ET AL., THE RISE AND FALL OF THE VOTING RIGHTS ACT 34 (2016).

[71] *See Shelby County*, 570 U.S. at 529-30 (invalidating the preclearance coverage formula in the Voting Rights Act); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2333 (citing, but distinguishing, *Gingles* when interpreting § 2 of the VRA). Some Justices of the Supreme Court have recently proposed limiting the application of Section 2 of the VRA to require majority-minority districts only when a "race-blind" districting process would produce one. *See* Jowei Chen & Nicholas Stephanopoulos, *The Race Blind Future of Voting Rights*, 130 YALE L.J. 862, 864 (2021). Such a test would significantly curtail the number of majority-minority districts that states are required—or even allowed—to draw. *See id.* at 867. Even

district maps must ensure that their maps contain the required number of majority-minority districts in the appropriate locations.

2. Crossover Districts

Gingles requires the creation of a majority-minority district when one is necessary to help a protected minority group elect the representative of its choice.[72] But what if the minority group can elect its preferred candidate with *less* than a majority? In some circumstances, for example, a minority group may only be large enough to comprise around 40% of the population of a single district.[73] But with the assistance of "crossover" voters from a small portion of the racial majority, the minority group may nevertheless be able to elect its preferred candidate.[74] Because the VRA protects the ability of certain minority groups to "elect representatives of their choice,"[75] it might therefore seem that Section 2 would sometimes require a legislature to draw a crossover district. However, the Supreme Court has ruled otherwise, holding that Section 2 never imposes such a requirement.[76]

In *Bartlett v. Strickland*, plaintiffs challenged a North Carolina district map that split a population of African American voters into several districts.[77] In a single district, Black voters could have comprised almost 40% of the voting age population.[78] Plaintiffs argued that this district plan violated Section 2 of the VRA, because it deprived them of a "crossover district," in which they could have elected their preferred candidate with the assistance of some white voters.[79] However, the Supreme Court held that Section 2 could not mandate the creation of crossover districts.[80] Writing for a plurality of the Court, Justice Kennedy argued that the VRA did not require states

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this more limited interpretation of Section 2 of the VRA, however, would require courts to decide whether states using IRV must draw crossover districts in addition to majority-minority districts.

[72] Thornburg v. Gingles, 478 U.S. 30, 47–51 (1986).

[73] *See* Pildes, *supra* note 4, at 1530–32.

[74] *See id.*

[75] 52 U.S.C. § 10301(b).

[76] *See generally* Bartlett v. Strickland, 556 U.S. 1 (2009) (plurality opinion).

[77] *Id.* at 6.

[78] *Id.* at 8.

[79] *Id.* at 14.

[80] *Id.*

to maximize protected groups' voting strength in all circumstances.[81] Instead, the fact that Black voters were able to join with some white voters indicated to the Court that Black voters had not been excluded from the political process in such a way as to require a remedy under the VRA.[82]

The plurality opinion gave several additional reasons for rejecting a requirement to create crossover districts. First, the opinion distinguished between "a racial minority group's 'own choice' and the choice made by a coalition."[83] A candidate elected by a multi-racial coalition, in the plurality's view, may not represent the distinct preferences of a minority racial group.[84] Second, the plurality argued that a crossover district claim could not satisfy *Gingles'* "majority-bloc-voting requirement."[85] After all, if enough white voters cross over to elect a minority group's preferred candidate, then no majority bloc voting has defeated that candidate.[86] Finally, the plurality defended the majority-minority requirement as more easily administrable.[87] According to the plurality, such a rule "relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?"[88] By contrast, courts would need to engage in "[a] high degree of speculation and prediction" to determine whether a proposed crossover district would actually allow a minority group to elect its preferred candidate.[89]

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer.[90] Justice Souter emphasized that the text of Section 2 made no reference to any majority-minority requirement—instead, it simply requires that protected minority groups be able to "elect representatives of their choice."[91] A crossover district does precisely

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[81] *Id.* at 15 ("Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.").
[82] *Id.*
[83] *Id.*
[84] *See id.*
[85] *Id.* at 16.
[86] *Id.*
[87] *Id.* at 18.
[88] *Id.*
[89] *Id.* at 19.
[90] *Id.* at 26.
[91] *Id.* at 26-28 (citing 52 U.S.C. § 10303, then-codified at 42 U.S.C. § 1973(b)).

that, permitting a minority group to elect its preferred candidate with the help of voters from the majority bloc.[92] The dissent also argued that crossover districts were, in many circumstances, preferable to majority-minority districts, giving states "greater flexibility to draw districting plans with a fair number of minority-opportunity districts," and reducing the kind of racial bloc voting that majority-minority districts tend to promote.[93] Finally, the dissent responded to the plurality's objections to a crossover district requirement.[94] The dissent argued that such a mandate was just as administrable as a majority-minority requirement because in either case, courts would need to assess the extent to which voting in the jurisdiction was racially polarized, and would need to determine whether the plaintiffs' requested district boundaries were necessary to ensure minority representation.[95]

B. Section 2 and Minority Representation

By some measures, the Voting Rights Act's redistricting precedents have been a remarkable success. After the 1982 Amendments and the Supreme Court's decision in *Thornburg v. Gingles*, states began regularly drawing majority-minority districts in their legislative maps.[96] The number of majority-minority districts sharply increased, as did the number of minority representatives.[97] Although racially polarized voting unfortunately persists in many jurisdictions, minority groups within those jurisdictions now frequently have the genuine opportunity to elect their preferred candidates.[98]

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[92] *See Bartlett*, 556 U.S. at 27.
[93] *Id.* at 34.
[94] *Id.* at 35-36.
[95] *Id.* at 39–40.
[96] *See* Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1288 n.2 (2007).
[97] *See* Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 65 (2004) ("[Majority-minority districts] ha[ve] been remarkably successful, at least descriptively, generally resulting in the election of minorities to legislative office.").
[98] *See id.*; Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5*

But the exclusive focus on *majority*-minority districts unnecessarily inhibits the VRA's goal of protecting distinctive minority political interests. In most jurisdictions, minority groups do not need an absolute majority of the voting-age population to elect their preferred candidate—some percentage between 40% and 50% will do.[99] A majority-minority district requirement is poorly suited to these jurisdictions. If there are too few minority voters to comprise a majority in a district, or if voting is insufficiently racially polarized, then the legislature need not provide minority voters with *any* district in which they can elect their preferred candidate.[100] On the other hand, if the legislature creates a majority-minority district, then that district will contain more minority voters than necessary to elect a minority-preferred candidate.[101] And, the more minority voters that district contains, the fewer minority voters are left to populate other districts. As a result, the minority group's influence on elections overall may be diminished.

For many years, this phenomenon so concerned political scientists that many concluded that the majority-minority district requirement was *harmful* to minority representation.[102] In the decades after the Supreme Court's decision in *Gingles*, the number of majority-minority districts increased, but minority groups' influence on the

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of the Voting Rights Act, 126 HARV. L. REV. F. 205 (2013) (finding that racial polarization persists in many jurisdictions).

[99] *See* Lublin et al., *supra* note 23, at 293 (finding that "districts that fall in the 40-50% minority range" are likely to elect minority candidates).

[100] *See* Bartlett v. Strickland, 556 U.S. 1, 14–16 (2009).

[101] Lublin et al., *supra* note 23, at 293.

[102] *See, e.g.*, Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169, 174 (1987) (finding that electoral geography explains "nearly all of the relationship between black elector success and Republican electoral success" in South Carolina redistricting maps"); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 794 (1996) (suggesting that majority-minority districts "may dilute minority influence in surrounding areas" and lead to an overall decrease in support for minority-sponsored legislation); Pildes, *supra* note 4, at 1536 (describing how "safe" majority-minority districts can reduce minority influence on politics overall); Nelson, *supra* note 96, at 1288 (arguing that unnecessarily homogenous majority-minority districts "thwart[] their immediate purpose" and "contradict[] both the express and implicit goals of" the VRA); John R. Petrocik & Scott W. Desposato, *The Partisan Consequences of Majority-Minority Redistricting in the South, 1992 and 1994*, 60 J. POL. 613 (1998) (finding that majority-minority districts contributed to, but did not entirely cause, Democrats' congressional defeats after the early 1990s round of redistricting).

overall composition of the legislature diminished.[103] Experts argued that because so many minority voters now resided in majority-minority districts, their ability to influence elections outside those districts declined.[104] As a result, districted elections ended up sending fewer Democrats to the legislature, even though minority groups tended to support Democratic candidates.[105]

More recent research, however, has cast doubt on the conclusion that a majority-minority districting requirement is harmful to minority representation overall.[106] Adam Cox and Richard Holden have argued that Republicans' optimal gerrymandering strategy does not involve "packing" minority voters into single districts—and that, as a consequence, the minority-majority districting requirement constrains Republican gerrymanders more than Democratic ones.[107] Consistent with this result, Jowei Chen and Nicholas Stephanopoulos deployed simulated redistricting algorithms to determine that a majority-minority district requirement results in more Democrats elected to office than a "nonracial" districting process.[108] But even if a majority-minority districting requirement is better than nothing at all, it still comes with meaningful drawbacks. A majority-minority district requirement fails to recognize that, often, minority voters do not require a majority to elect their preferred candidate.[109] As a result, it can encourage legislatures to pack minority voters into isolated enclaves, limiting minority influence on the legislature overall more than a crossover district would—even if the minority group's influence is less limited than it would be in an entirely race-blind districting process.[110]

Some state legislatures have sought to magnify this effect, using the Voting Rights Act as a pretext to pack minority voters into isolated districts, depriving them of influence over elections

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[103] *See generally* Cameron et al., *supra* note 102.
[104] *See supra* note 102.
[105] *See* Brace et al., *supra* note 102.
[106] *See* Holden & Cox, *supra* note 5, at 567.
[107] *See id.*
[108] Chen & Stephanopoulos, *supra* note 71, at 867.
[109] *See* Lublin et al., *supra* note 23, at 293.
[110] *See* Holden & Cox, *supra* note 5, at 597 (recognizing that the majority-minority requirement might encourage line drawers to "pack as many minority voters as possible into the majority-minority districts"); *but see* Chen & Stephanopoulos, *supra* note 71, at 944 (finding that majority-minority districts in certain jurisdictions were less overpacked than previously thought).

elsewhere.[111] In theory, Supreme Court precedent prohibits this kind of intentional racial gerrymandering.[112] However, the Court has also long assumed that states sometimes *must* consider race in order to comply with the VRA—if states remained entirely blind to racial considerations, they might accidentally break up a potential majority-minority district, in violation of Section 2.[113] The Court has therefore granted the states some wiggle room, letting states consider race to an extent when redistricting.[114] Such racial considerations are unlawful only when they "predominate" in the districting process—and only when they are not necessary to comply with the VRA.[115] This test gives states more leeway than they would have when legislating on the basis of race in other contexts.[116] Some states have attempted to use this leniency to push against the boundaries of the VRA and the Constitution, drawing unnecessary or overly homogenous majority-minority districts to dilute the influence of minority voters.[117]

Much of this difficulty could be alleviated if the VRA were less insistent on a *majority*-minority requirement, and instead sometimes

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[111] *See* Hasen, *supra* note 7, at 1850; Ho, *supra* note 7, at 1911–18.

[112] *See* Cooper v. Harris, 137 S. Ct. 1455, 1463–64 (2017) (explaining the Supreme Court's racial gerrymandering jurisprudence).

[113] *See id.* at 1464 (explaining that a state can justify race-based redistricting if it shows "that it had 'good reasons' to think that it would transgress the [VRA] if it did *not* draw race-based district lines") (citing *Ala. Legis. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1274 (2015)).

[114] *See* Miller v. Johnson, 515 U.S. 900, 915–16 (1995).

[115] *See* Cooper, 137 S. Ct. at 1464 (explaining that compliance with the VRA may justify a racial gerrymander); *Miller*, 515 U.S. at 916 (1995) (explaining that racial gerrymanders are unconstitutional only when race is "the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district") (emphasis added).

[116] *Compare* Easley v. Cromartie, 532 U.S. 234, 241 (2001) ("Race must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision . . . .") (internal quotations and citations omitted), *with* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (explaining that a decision violates the equal protection clause when made "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

[117] *See, e.g.*, *Cooper*, 137 S. Ct. at 1468–72 (invalidating a deliberately-drawn majority-minority district as unconstitutional and unjustified by the need to comply with the VRA); Ala. Legis. Black Caucus v. Ala., 575 U.S. 254, 274-79 (2015) (invalidating legislative districts that sought to maintain minority populations well above the 50% threshold).

required the creation of crossover districts.[118] A crossover district requirement would put less pressure on states to create unnecessarily "safe" majority-minority districts. Without a strict majority requirement, states would not need to fill a district with a sufficient number of minority voters to cross an arbitrary 50% threshold.[119] The district would only need to contain the number of minority voters necessary to allow them to elect the candidate of their choice—a quantity likely closer to 40% of the district's voting age population.[120] Similarly, a crossover district requirement could lower the stakes for judicial determinations of VRA compliance. Courts would not necessarily face the harsh dichotomy of either mandating a potentially unnecessary and overly homogenous majority-minority district, or leaving minority voters without any judicial remedy to ensure representation.[121] A crossover district requirement would allow courts to calibrate their remedies more closely to the specific needs of the voters in the relevant jurisdictions.

Second, a crossover district requirement would give states less leeway to invidiously pack minority voters into isolated districts under the pretense of VRA compliance. Current law prohibits states from intentionally creating entirely unnecessary majority-minority districts.[122] But it also grants states some flexibility, allowing states to create more homogenous majority-minority districts than may be strictly necessary.[123] A crossover district requirement would likely give states less opportunity to over-pack minority voters into single districts. The Supreme Court has upheld 55%-minority districts in racially polarized jurisdictions, deferring to the state legislature's judgment that the preservation of minority representation required more than 50% of the district's population to belong to a minority group.[124] But if a required crossover district could likely elect a minority-preferred candidate with only a 43% minority voting-age

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[118] *See* Pildes, *supra* note 4, at 1552 (explaining that social scientists researching the issue support coalitional districts).
[119] *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 801–02 (2017) (allowing a state to create a majority-minority district with a 55% Black Voting Age Population in order to ensure a safe minority district).
[120] *See* Lublin et al., *supra* note 23, at 293 (finding that "districts that fall in the 40-50% minority range" are likely to elect minority candidates).
[121] *See* Bartlett v. Strickland, 556 U.S. 1, 33–34 (2009) (Souter, J., dissenting).
[122] *See Cooper*, 137 S. Ct. at 1455, 1468–72 (2017).
[123] *See Bethune-Hill*, 137 S. Ct. at 801–02.
[124] *See id.*

population, for example, the state would have much less justification to pack far more minority voters into a single district.[125]

III. VOTING SYSTEMS AND MINORITY POLITICS

Traditionally, almost all elections in the United States have used some form of plurality voting.[126] Recently, however, several jurisdictions have begun to adopt Instant Runoff Voting.[127] This Part provides a background explanation for these two voting systems, and discusses the features of IRV beneficial to the administration of the VRA. Plurality elections tend to feature competition between just two viable candidates, requiring voters to cast their vote only for a single one.[128] By contrast, IRV lets voters express their ranked preference for multiple candidates, significantly expanding their options.[129] IRV is also resistant to tactical voting, giving voters more freedom to express their genuine preferences.[130] Accordingly, minority voters are more likely to cast a vote for their preferred candidate, even if that candidate wouldn't be viable in a plurality election.[131] New York City's recent Democratic Mayoral Primary election provides an illustrative example, showcasing many of these features. IRV can thus provide courts with insight into minority politics that they otherwise might not have—insight that can help enforce the VRA.

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[125] This effect becomes especially pronounced if a given minority population is large enough to support *two* crossover districts, but only one majority-minority district. If there are enough minority voters to comprise 90% of a district's voting age population, for example, this might require the creation of a single majority-minority district under the current interpretation of the VRA. But, if only 10% of white voters cross over to support the minority-preferred candidate, this same population could support two crossover districts, each with a 45% minority voting age population.

[126] *See Electoral Systems in the United States*, FAIRVOTE, https://www.fairvote.org/research_electoralsystemsus (last visited Nov. 27, 2021) ("Plurality voting . . . is the most common and best-known voting method currently in use in America.").

[127] For a map of such locations, see *id.* *See also infra* Section III.B.

[128] *See* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 217 (1964).

[129] *See* Lewyn, *supra* note 16, at 118–20 (describing IRV).

[130] *See* Grofman & Field, *supra* note 20, at 651–52.

[131] *See* Sarah John et al., *The Alternative Vote: Do Changes in Single-Member Voting Systems Affect Descriptive Representation of Women and Minorities?*, 54 ELECTORAL STUD. 90 (2018).

A. Simple Plurality

In a single-member simple plurality election, a voter can cast only a single vote for a particular candidate.[132] Whichever candidate receives the most votes wins.[133] Although states used a number of systems for selecting legislators shortly after the country's founding, today almost all legislative elections in the United States use simple plurality voting.[134] Simple plurality voting has some intuitive appeal. It is one of the simplest election systems, and provides the only reasonable method to determine election outcomes if voters are only allowed to cast a single vote.[135] But simple plurality voting is also one of the most flawed election systems, reinforcing a two-party system that limits the ability of minority groups to express their distinct preferences.[136]

1. The Spoiler Effect

Plurality voting is one of the voting systems most vulnerable to the spoiler effect.[137] In a simple plurality election, a voter can only cast her vote for a single candidate.[138] Naively, the voter might want to cast her vote for the candidate she most prefers. But this strategy could be self-defeating. Imagine an election between three candidates, in which a voter prefers candidate A to candidate B, and candidate B to candidate C. The voter may wish to cast her vote for candidate A. But if candidates B and C are way ahead in the polls, perhaps leaving

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[132] *See* Falsenthal, *supra* note 10, at 25 (describing plurality voting).
[133] *See id.*
[134] *See* Stephen Calabrese, *Multimember District Congressional Elections*, 25 LEGIS. STUD. Q. 611, 629 (2000) (describing election systems used at the time of the founding); 2 U.S.C. § 2c (requiring single-member districts in federal elections).
[135] *See* Robert E. Goodin & Christian List, *A Conditional Defense of Plurality Rule: Generalizing May's Theorem in a Restricted Informational Environment*, 50 AM. J. POL. SCI. 940, 940 (2006) (finding that plurality voting "uniquely satisfies" certain formal conditions of fairness when "a society's balloting procedure collects only a single vote from each voter.").
[136] *See* DUVERGER, *supra* note 128, at 217 (explaining that plurality voting favors two-party systems). *See also Comparison of Electoral Systems*, WIKIPEDIA (Nov. 25, 2021), https://en.wikipedia.org/wiki/Comparison_of_electoral_systems (comparing different election systems according to a variety of formal criteria and showing that simple plurality is one of the most flawed).
[137] *See* Kaminski, *supra* note 12, at 442.
[138] *See* Goodin & List, *supra* note 135, at 940.

candidate A with only a few percent of the vote, then the voter knows that a vote for candidate A is almost certain to be "wasted." A vote for candidate A deprives the voter of an opportunity to express her preference between candidates B and C—a preference that is likely to be much more important, as those are the two candidates most likely to win.

This is more than just a theoretical concern. The spoiler effect can cost relatively popular candidates the election—just ask Al Gore.[139] A simple plurality system therefore strongly incentivizes voters to hold their nose and vote for one of the two most popular candidates, even if they don't particularly like either.[140] As a result, plurality elections in the United States are likely to feature only two viable candidates.[141] This frequently leads to entrenched two-party systems, in which voters are faced with the same binary choice in every election—a phenomenon known as Duverger's Law.[142]

2. Race and the Two-Party System

Consistently dichotomous elections mask significant diversity within each party. Minority voters, and particularly African American voters, exhibit a strong preference for candidates from the Democratic

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[139] *See* Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore's Presidential Bid? A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election*, 2 Q.J. POL. SCI. 205 (2007) (finding that Ralph Nader likely "spoiled Gore's presidency," though "only because the 2000 presidential race in Florida was unusually tight").

[140] *See* David P. Myatt & Stephen D. Fisher, *Tactical Coordination in Plurality Electoral Systems*, 18 OXFORD REV. ECON. POL'Y 504, 504 –05 (2002) (explaining how plurality systems encourage voters to vote tactically).

[141] Shigeo Hirano & James M. Snyder, Jr., *The Decline of Third-Party Voting in the United States*, 69 J. POL. 1, 12–13 (2007) (finding that third parties rarely win a significant percentage of the vote in U.S. elections, and recognizing the role that single-member plurality elections play in deterring third parties).

[142] *See* DUVERGER, *supra* note 128, at 217; *see also* Myatt & Fisher, *supra* note 140, at 504 ("Political scientists . . . generally agree that simple plurality . . . electoral systems tend to be associated with the dominance of two main political parties."). Although some scholars dispute this consensus, pointing to robust multi-party systems in other plurality democracies like India and the United Kingdom, even its critics seem to acknowledge that the trend holds in the United States. *See, e.g.*, Patrick Dunleavy, *Duverger's Law is a Dead Parrot. Outside the USA, First-Past-the-Post Voting has No Tendency at All to Produce Two Party Politics*, LSE (June 18, 2012), https://blogs.lse.ac.uk/politicsandpolicy/duvergers-law-dead-parrot-dunleavy.

party.[143] And a party's voters are likely to support that party's candidates in any election.[144] But this does not mean that voters within a party are monolithic. Voters identifying with a party frequently have differing opinions, often breaking down on racial lines.[145] These differences of opinion manifest themselves during party primaries. For example, during the 2020 Democratic primary for President, Senator Bernie Sanders was much more likely to attract the support of young Hispanic voters, whereas then-former Vice President Joe Biden received more support from Black voters.[146] And in general, racial polarization within primary elections means that districts with large minority populations are much more likely to elect minority candidates than districts with smaller minority populations—even among districts that elect Democrats.[147]

Plurality elections make it difficult for courts enforcing voting rights law to see this ideological diversity. Supreme Court decisions applying the VRA to redistricting have often implicitly assumed a simple dichotomy: minority voters support one candidate, while white voters support the other.[148] After all, in a plurality system, general

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[143] According to one recent survey, Hispanic voters prefer the Democratic party by a 29-point margin, while Black voters prefer the Democratic party by a 76-point margin. *Trends in Party Affiliation Among Demographic Groups*, PEW RSCH. CTR. (Mar. 20, 2018), https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups.

[144] *See Large Shares of Voters Plan to Vote a Straight Party Ticket for President, Senate and House*, PEW RSCH. CTR. (Oct. 21, 2020), https://www.pewresearch.org/politics/2020/10/21/large-shares-of-voters-plan-to-vote-a-straight-party-ticket-for-president-senate-and-house.

[145] *See Beyond Red vs. Blue: The Political Typology—The Democratic Coalition*, PEW RSCH. CTR. (Nov. 9, 2021), https://www.pewresearch.org/politics/2021/11/09/the-democratic-coalition/ (describing how different ideological blocs within the Democratic party have different racial composition).

[146] Perry Bacon Jr., *Will the Democratic Primary Remain Split Along Racial Lines?*, FIVETHIRTYEIGHT (Mar. 10, 2020), https://fivethirtyeight.com/features/will-the-democratic-primary-remain-split-along-racial-lines ("The [Democratic] party's black voters have been decidedly with one candidate (former Vice President Joe Biden), its Hispanic voters have been leaning toward another (Sen. Bernie Sanders), and white voters have been more evenly divided between the two.").

[147] *See* Branton, *supra* 22, at 461–71; Nelson, *supra* note 96, at 1289 (describing racially polarized voting in party primaries).

[148] *See* Nelson, *supra* note 96, at 1298 (explaining that, under the VRA as currently interpreted, "majority-minority districts in which voters demonstrate fragmented

elections will rarely feature more than two viable candidates.[149] And, although primary elections may involve more complex contests, they too are usually governed by plurality voting rules.[150] Primaries therefore add little complexity in districts where voting is racially polarized. After all, in an area with racially polarized voting, and a large enough minority population to support a majority-minority district, the minority bloc is almost certain to elect its preferred candidate within the Democratic primary.[151] Courts therefore have little reason to closely examine intra-party politics, as the only question before them is whether to create a majority-minority district.

All of this leaves redistricting under the Voting Rights Act with an unseemly partisan tinge. When voting is racially polarized, a majority-minority district may be a safe Democratic district—but only by drawing Democratic voters from surrounding districts.[152] Majority-minority districts therefore often give rise to bipartisan objections. Republicans object that a federal statute effectively requires some states to draw at least a certain number of Democratic districts.[153] Meanwhile, Democrats object that Section 2 gives Republicans a pretext for partisan gerrymanders, creating unnecessarily "safe" minority districts in order to reduce Democratic influence elsewhere.[154] Unfortunately, these consequences are difficult to avoid when voters face the same choice between the same two parties in every general election. If voting in a two-candidate race is racially polarized, then race and party will necessarily be difficult to untangle.[155]

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preferences among multiple minority candidates may not be deemed politically cohesive.").

[149] *See supra* notes 140–142 and accompanying text.

[150] *See Primary Election Vote Requirements by State*, BALLOTPEDIA, https://ballotpedia.org/Primary_election_vote_requirements_by_state (last visited Nov. 28, 2021) (listing party primary election systems by state).

[151] Lublin et al., *supra* note 23, at 280–81.

[152] *See supra* note 102 and accompanying text.

[153] Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 223–25 (2007) (describing this objection).

[154] *See* Hasen, *supra* note 7, at 1850–53.

[155] *See* Aviel Menter, Note, *Calculated Discrimination: Exposing Racial Gerrymandering Using Computational Methods*, 22 COLUM. SCI. & TECH. L. REV. 346, 369–71 (2021) (describing the close connection between racial and partisan redistricting in jurisdictions where politics is racially polarized).

B. Instant Runoff Voting

Instant Runoff Voting is a ranked-choice voting system—it allows voters to cast not just one vote per race, but one vote per candidate, ranking each candidate in order of preference.[156] Under IRV, the winner of the election is determined by a series of virtual runoffs.[157] In each round, the candidate with the lowest number of first-choice votes is eliminated. The votes of voters supporting that candidate are reallocated to that voters' next choice.[158] For example, if a voter prefers candidate A to B, and candidate B to C, but A is eliminated in the first round, then the voter's vote would be reallocated to candidate B. If candidate B is later eliminated, that vote would be reallocated to candidate C. This process repeats until one candidate has a majority of available votes.[159] That candidate wins.[160]

IRV is much more resistant to the spoiler effect.[161] A voter who supports an unpopular candidate can still vote for that candidate without wasting her vote. If a voter prefers unpopular candidate A to popular candidate B, and prefers B to popular candidate C, then she can list A as her number one choice, with B as her number two choice. Candidate A will then be eliminated in the first round, and the vote will be reallocated to candidate B, who might benefit from it. For similar reasons, IRV is also highly resistant to tactical voting.[162] No voting system completely precludes tactical voting.[163] But tactical voting is usually much more complicated in IRV, requiring difficult predictions

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[156] For a more detailed explanation of how IRV works, see Lewyn, *supra* note 16, at 118–20.
[157] *Id.* at 118–19.
[158] *Id.*
[159] *Id*. at 119.
[160] *Id.*
[161] Robert Richie, *Instant Runoff Voting: What Mexico (and Others) Could Learn*, 3 ELECTION L.J. 501, 507 (2003).
[162] *See* Grofman & Feld, *supra* note 20, at 651–52.
[163] Specifically, in any single-winner, ranked-choice, non-dictatorial election system, there are always some conditions under which a voter can achieve a better outcome by submitting a ranking that does not reflect her actual preferences. Allan Gibbard, *Manipulation of Voting Schemes: A Gen. Result*, 41 ECONOMETRICA 587, 587 (1973); Mark Allen Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procs. and Soc. Welfare Functions*, 10 J. ECON. THEORY 187 (1975).

about which candidates are likely to win which rounds.[164] Voters are unlikely to be willing to execute the sophisticated strategies IRV requires, even if they want to vote tactically.[165]

These properties explain why Instant Runoff Voting has become more popular in the United States. Though several local jurisdictions have used instant runoff elections for years, IRV has recently begun to pick up steam at the state level as well.[166] Maine, for example, adopted IRV after a gubernatorial election where unpopular candidate Paul LePage won with a relatively small plurality of the vote because opposition was divided among too many other candidates.[167] Alaska also adopted IRV after similar struggles with multi-candidate races.[168] In 2010, incumbent Senator Lisa Murkowski lost the Republican party primary, but nevertheless won the general election as a write-in candidate, attracting the votes of many Democratic voters who did not want the Republican nominee to win.[169]

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[164] Indeed, determining whether tactical voting will help in an IRV election is a computationally intractable problem for which only complicated and approximate solutions are available. *See* Michelle Blom et al., *Efficient Computation of Exact IRV Margins*, 285 FRONTIERS IN ARTIFICIAL INTELLIGENCE AND APPLICATIONS 480, 480 (2016). However, tactical voting to avoid spoilers may still be feasible in relatively simple three-candidate elections, such as in the 2009 Burlington mayoral race. *See The Spoiler Effect*, CTR. ELECTION SCI., https://electionscience.org/library/the-spoiler-effect (last visited Nov. 30, 2021). Nevertheless, IRV still "does a decent job at mitigating the spoiler effect," at least relative to plurality voting, in most situations. *Id.*

[165] *See* Grofman & Feld, *supra* note 20, at 652 (explaining tactical voting in IRV "requires a certain level of sophistication to implement such a strategy, i.e., to persuade supporters that, 'in order to help B win,' they must 'vote for D'").

[166] *See Where Ranked Choice Voting is Used*, FAIRVOTE, https://www.fairvote.org/where_is_ranked_choice_voting_used (last visited Nov. 30, 2021); Richard H. Pildes & G. Michael Persons, *The Legality of Ranked Choice-Voting*, 109 CAL. L. REV. 1773, 1775–76 (2021).

[167] Ella Nilsen, *Maine Voters Blew Up Their Voting System and Started from Scratch*, VOX (June 12, 2018, 7:00 AM), https://www.vox.com/2018/6/12/17448450/maine-ranked-choice-voting-paul-lepage-instant-runoff-2018-midterms.

[168] *See* James Brooks, *Judge Says Alaska's New Ranked-Choice Voting System is Legal*, ANCHORAGE DAILY NEWS (July 29, 2021), https://www.adn.com/politics/2021/07/29/judge-says-alaskas-new-ranked-choice-voting-system-is-legal (explaining Alaska's IRV system).

[169] Patti Epler, *Alaska Senate Race: The Untold Story of Lisa Murkowski's Write-In Decision*, ANCHORAGE DAILY NEWS (Nov. 11, 2010), https://www.adn.com/politics/article/alaska-senate-race-untold-story-lisa-murkowski-s-write-decision/2010/11/12.

As Instant Runoff elections are relatively new to the United States, there are few data about IRV's effect on minority politics. However, early research suggests that IRV can provide better insight into whether different racial groups have distinct political preferences. IRV elections likely encourage minority candidates to run for office, and make it more likely that they will win.[170] Though causation is difficult to trace, this may be because IRV is "less prone to the spoiler effect and vote splitting," encouraging minority candidates to run who might otherwise have been scared of "spoiling" the election.[171] Nevertheless, minority voters in jurisdictions using IRV still seem to express distinct preferences—racial polarization does not appear to decrease under IRV.[172] IRV therefore appears to encourage minority voters to openly express a preference for their favorite candidates.[173] And when those candidates are ultimately elected by a multi-racial coalition, IRV helps show how that coalition actually formed—and whether the candidate is really supported more by one racial group than another.[174]

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[170] *See* John et al., *supra* note 131, at 93 (finding that IRV leads to more minority candidates running for office); FairVote, *Ranked Choice Voting and Racial Minority Voting Rights: An Analysis of Representation of People of Color in the Bay Area*, INFOGRAM (Nov. 2019), https://infogram.com/ranked-choice-voting-and-racial-minority-voting-rights-1hxr4zgwmpk52yo?live (finding that more minority candidates won races in San Francisco after the city adopted IRV); Sara T. Hall, The Interaction Between Ranked-Choice and Minority Voter Turnout in California Mayoral Elections (2019) (unpublished Ph.D. dissertation, University of North Carolina) (finding that adoption of IRV led to more minority candidates in San Francisco, but not Oakland). Ultimately, it is not yet clear whether IRV increases or decreases minority turnout, and whether minority voters are more or less likely to exhaust their ballots. *See* Sonja Hutson, *Researchers Are Split on Whether Ranked-Choice Helps or Hurts Minority Voters*, KUER 90.1 (May 26, 2021, 5:00 AM), https://www.kuer.org/politics-government/2021-05-26/researchers-are-split-on-whether-ranked-choice-helps-or-hurts-minority-voters.

[171] John et al., *supra* note 131, at 100.

[172] Yuki Atsusaka & Theodore Landsman, *Does Ranked-Choice Voting Reduce Racial Polarization? A Clustering Approach to Tanked Ballot Data*, NEW AM., Mar. 2021, at 7.

[173] *See* John et al., *supra* note 131, at 100.

[174] Atsusaka & Landsman, *supra* note 172, at 6–8 (explaining how racial polarization is measured).

Of course, no election system is perfect.[175] Tactical voting is always possible in any ranked choice system, including in IRV.[176] And ultimately, any statement about a group's ranked preferences between different options is necessarily simplified—neither group nor individual preferences need be transitive.[177] Nevertheless, voters can express more detailed preferences in instant runoff elections than they can in a plurality system.[178] By allowing voters to support multiple candidates—and to do so at least relatively free of tactical considerations—IRV provides courts with more information about minority voting that they can use to enforce the VRA.

C. Instant Runoff Voting in New York City's Mayoral Primary Election

New York City's recent Democratic mayoral primary—probably the highest profile use of IRV so far in the United States[179]—provides an illustrative example. New York is the largest city in the United States[180] and is heavily Democratic.[181] It was consequently clear from the start of the 2021 campaign that the winner of the

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[175] Specifically, Arrow's impossibility theorem shows that no ranked-choice system can perfectly reflect a group's preference between any two presented options, while also remaining unaffected by alternative options and non-dictatorial. KENNETH ARROW, SOC. CHOICE AND INDIVIDUAL VALUES 59 (1963).

[176] Gibbard, *supra* note 163, at 587; Satterthwaite, *supra* note 163, at 188.

[177] *See* David Butler & Pavlo Blavatskyy, *The Voting Paradox . . . With a Single Voter? Implications For Transitivity in Choice Under Risk*, 36 ECON. & PHIL. 1, 1 (2020) (discussing the non-transitivity of both group and individual preferences).

[178] *See* Lewyn, *supra* note 16, at 118–19.

[179] Rebecca C. Lewis, *How Ranked Choice Voting Will Work in New York City*, CITY & STATE (Feb. 4, 2020), https://www.cityandstateny.com/politics/2020/02/how-ranked-choice-voting-will-work-in-new-york-city/176443 ("While several cities and municipalities use the voting system, none even come close to the size of New York City. . . . Certainly, the implementation of ranked-choice in New York will be its biggest test yet and will likely be closely watched by the rest of the country.").

[180] *See U.S. Census Quickfacts*, CENSUS, https://www.census.gov/quickfacts/newyorkcitynewyork (last visited Jan. 29, 2022) (identifying New York as the most populous city in the United States).

[181] Nathaniel Rakich, *The 5 'Political Boroughs' of New York City*, FIVETHIRTYEIGHT (June 21, 2021), https://fivethirtyeight.com/features/the-5-political-boroughs-of-new-york-city (describing New York City as "heavily Democratic").

Democratic Primary would become the next Mayor.[182] Term limits prevented the incumbent mayor, Bill de Blasio, from running for reelection.[183] This left an open political field, and several candidates decided to run. In a complex and dynamic race, the major candidates were Brooklyn Borough President Eric Adams, former commissioner Kathryn Garcia, attorney Maya Wiley, and former presidential candidate Andrew Yang.[184]

Perhaps no campaign was hurt more by IRV than Andrew Yang's.[185] Yang was an internet phenomenon who raised an enormous sum of money and generated great publicity throughout the campaign.[186] Had he run in a plurality election, he could well have won, backed as he was by high name recognition and strong Asian-American support.[187] Indeed, Yang led in the polls for most of the

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[182] Jonathan Allen & Joseph Ax, *Adams Leads, Yang Concedes, But Outcome Uncertain in New York City Mayoral Primary*, REUTERS (June 23, 2021), https://www.reuters.com/world/us/nyc-faces-steep-recovery-voters-head-polls-mayoral-election-2021-06-22 ("The winner of Tuesday's Democratic contest to succeed term-limited Mayor Bill de Blasio will be an overwhelming favorite in November's general election, given the city's heavily Democratic lean.").

[183] Emma G. Fitzsimmons, Dana Rubinstein and Jeffery C. Mays, *Who Will Succeed Mayor de Blasio? New York's Future May Ride on the Answer*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/nyregion/mayor-election-nyc.html ("It will be only the fourth time in roughly a half century that the ballot will not include an incumbent mayor seeking re-election: Mayor Bill de Blasio, who is in his seventh year in office, is barred by term limits from running again.").

[184] *See New York City Primary Results*, WASH. POST (July 20, 2021), https://www.washingtonpost.com/elections/election-results/new-york/nyc-primary.

[185] *See New York City Poll: Yang, Adams, Wiley Lead Crowded Mayoral Democratic Primary Field*, EMERSON C. POLLING, https://emersonpolling.reportablenews.com/pr/new-york-city-poll-yang-adams-wiley-lead-crowded-mayoral-democratic-primary-field (last visited July 31, 2022) (finding that Yang had a substantial lead in voters' first-choice preferences earlier in the race).

[186] Laura Marsh and Alex Pareene, *Andrew Yang Takes New York*, NEW REPUBLIC (May 5, 2021), https://newrepublic.com/article/162287/andrew-yang-new-york-city-mayor.

[187] *See* Raeedah Wahid, *Adams Won by Betting on a New York Divided by Race and Income*, BLOOMBERG (July 21, 2021), https://www.bloomberg.com/graphics/2021-nyc-mayoral-analysis/ (describing Yang's support among Asian voters); *see also* Sally Goldenberg, *Yang Tops Latest Poll in Mayor's Race*, POLITICO (Feb. 10, 2021, 8:50 AM), https://www.politico.com/states/new-york/albany/story/2021/02/10/yang-tops-latest-poll-in-mayors-race-1362601 (describing Yang's "high recognition").

campaign.[188] In the end, though, Yang was few voters' second choice.[189] After it became clear that he had little chance of winning, Yang cross-endorsed Garcia as a joint number two choice, shortly after Garcia was endorsed by the influential *New York Times* editorial board.[190] Likely because Yang and Garcia endorsed each other, when Yang was eliminated in Round 6 with 14.8% of the vote, his voters primarily shifted to Garcia and Adams.[191]

Yang certainly intended this cross-endorsement to benefit Garcia—but it helped Adams more.[192] From the beginning of the campaign, Adams had a clear path to victory.[193] Adams was Borough President of Brooklyn, the most populous New York borough.[194] He also received significant support from Black voters across the city.[195] These two facts provided Adams with a stable, robust base of support: Brooklynites, and Black voters.[196] Black voters throughout the City had a strong preference for Black candidates like Adams, Wiley and

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[188] *See, e.g.*, Marsh & Pareene, *supra* note 186. *See also* Mihir Zaveri, *Andrew Yang ends his campaign after a poor showing.*, N.Y. TIMES (June 22, 2021), https://www.nytimes.com/2021/06/22/nyregion/andrew-yang-concedes.html (describing Yang's polling lead throughout the campaign).

[189] Yang gained the support of less than 3% of voters between the first round and the round in which he was eliminated. *Compare* New York City Primary Results, *supra* note 184 (showing that Yang had 12.2% of first-choice votes), *with* Wahid, *supra* note 187 (showing that Yang had the support of 14.8% of voters in the round in which he was eliminated).

[190] *See* N.Y. Times Editorial Board, *Kathryn Garcia for NYC Mayor*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/10/opinion/kathryn-garcia-nyt-endorsement-nyc-mayor.html; Emma Fitzsimmons et al., *Yang and Garcia Form Late Alliance in Mayor's Race, Drawing Adams's Ire*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/19/nyregion/yang-garcia-endorsement.html.

[191] See *Wahid*, *supra* note 187.

[192] *See id.*

[193] *See NYC Mayoral Poll: Adams New Leader in NYC Mayor Race as Field Remains Open*, EMERSON C. POLLING, https://emersonpolling.reportablenews.com/pr/nyc-mayoral-poll-adams-new-leader-in-nyc-mayor-race-as-field-remains-open (last visited July 31, 2022) (finding that Adams was the most common first choice for voters, and that he would gain the most support in later rounds).

[194] The Associated Press, *Eric Adams Wins the Democratic Primary in New York's Mayoral Race*, NAT'L PUB. RADIO (July 6, 2021), https://www.npr.org/2021/07/06/1013586197/new-york-city-mayor-race-eric-adams (describing Adams' political background and prior elected roles).

[195] *Wahid*, *supra* note 187.

[196] *See* Rakich, *supra* note 181 (identifying what Rakich calls the "Black Bloc"—Black voters and residents of Brooklyn who seem to vote with them—as a strong base of support for Mayor Adams).

Ray McGuire.[197] This preference likely had little to do with the candidates' politics, as Wiley, Adams, and McGuire were spread wide across the political spectrum.[198]

Wiley, a Black woman and an attorney with a strong history of progressive activism, built her coalition around Black voters and progressives.[199] As a committed and ideological candidate who had never held elected office, Wiley benefited from the increased ideological polarization of primary voters and would have likely been a dominant candidate in a plurality system.[200] Even under IRV, she finished Round Six in second place, with 26.1% of the vote (behind Adams).[201]

Had Yang's voters primarily gone to Wiley, she would have advanced to a one-on-one race against Adams—and she might well have prevailed. Instead, Yang's votes primarily went to Garcia, catapulting her from third place in Round Six (with 24.4%) to second place in Round Seven (with 30.5%).[202] This enabled Garcia to narrowly pass Wiley, who was eliminated in Round Seven (with 29.1%).[203] Wiley and Garcia shared support from similar groups and voters, and 75% of Wiley voters ultimately broke for Garcia in the final round.[204] Black voters, however, still overwhelmingly preferred Adams.[205] Ultimately, this let Adams' coalition of Black voters,

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[197] *See id.*; Emma G. Fitzsimmons, *How Adams Built a Diverse Coalition That Put Him Ahead in the Mayor's Race*, N.Y. TIMES (Oct. 5, 2021), https://www.nytimes.com/2021/06/23/nyregion/nyc-eric-adams-primary-results.html.

[198] *But see* Jeffery C. Mays, *Ray McGuire, Wall Street Executive, Enters NYC Mayor's Race*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/10/15/nyregion/ray-mcguire-mayor-nyc.html (contrasting McGuire's positions with more progressive candidates like Wiley).

[199] *See* Fitzsimmons, *supra* note 197.

[200] *See* Lauren Cook & Henry Rosoff, *PIX11 Mayor's Race Poll: Adams Leads; Wiley Jumps to 2nd After AOC Endorsement, Rival Scandals*, PIX11 (June 9 2021, 7:03 PM), https://pix11.com/news/politics/new-york-elections/pix11-mayors-race-poll-adams-leads-wiley-jumps-to-2nd-after-aoc-endorsement-rival-scandals/ (finding that Wiley attracted votes from "other candidates running campaigns similar in ideology").

[201] 2021 New York City Primary Results, *supra* note 184.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Wahid*, *supra* note 187; *see also* Jeffrey C. Mays, *Battle for Black Voters in N.Y.C. Mayor's Race Centers on Policing*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/15/nyregion/eric-adams-maya-wiley-black-

Brooklyn voters, working-class voters, and other outer-borough voters narrowly overcome Garcia's coalition of progressives, Manhattan voters, high-income voters, and white voters.[206]

A few themes emerge from this complex campaign. First, IRV favored coalitional candidates like Adams and Garcia over polarizing but popular candidates like Yang and Wiley.[207] Second, tactical voting proved very difficult, and often failed—Wiley's voters ultimately failed to elect their second-choice candidate, and Yang's endorsement of Garcia caused Wiley's elimination, resulting in Adams' ultimate victory. Third, strong preferences for certain candidate characteristics carried over from round to round, significantly influencing the ultimate outcome. In particular, Black voters expressed a clear preference for Black candidates, and were ultimately able to coalesce behind Adams in the final round of voting.[208]

IV. INSTANT RUNOFF VOTING AND THE VOTING RIGHTS ACT

So far, jurisdictions using IRV have generally been too small or too racially homogenous to give rise to redistricting challenges under the VRA.[209] As adoption of IRV becomes more widespread, however, courts will have to apply the VRA to ranked-choice elections with multiple candidates. In such elections, measurements of racial polarization do not just ask which voters cast votes for which candidates—after all, any voter can cast a vote for many candidates.[210] Instead, the key question is whether members of certain minority groups tend to rank certain candidates *higher* than other voters do. This understanding of racial polarization conveys more nuance, helping to separate issues of race from confounding variables, like party affiliation.[211] It also makes clear when minority groups have

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voters.html ("43 percent of likely Black primary voters said they planned to rank Mr. Adams first; Ms. Wiley was a distant second with 11 percent.").

[206] *Wahid*, *supra* note 187.

[207] *Id.*

[208] *Id.*; Mays, *supra* note 205.

[209] For a list of jurisdictions using IRV, see *Where Ranked Choice Voting is Used*, FAIRVOTE, https://www.fairvote.org/where_is_ranked_choice_voting_used (last visited Nov. 30, 2021).

[210] Michael Lewyn, *supra* note 16, at 118–20 (describing IRV).

[211] *See* Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 651–52 (2016) (suggesting that preferences in IRV may provide better evidence of racial polarization).

distinct and strong preferences for certain candidates—even if those candidates end up winning the support of other voters in later rounds.[212] As a result, courts can order the creation of districts that are better targeted at helping minority voters elect their preferred representatives.

A. Measuring Racial Polarization

The Voting Rights Act is designed to help protected minority groups "elect representatives of their choice."[213] As the Supreme Court has explained, however, the VRA only comes into play when a candidate represents a minority group's *distinct* choice. After all, if a candidate is preferred not only by the minority group, but also by everyone else, then the minority group doesn't need the VRA's help—the candidate is going to win regardless.[214] Accordingly, the threshold inquiry in any Section 2 challenge is racial polarization.[215] In other words, the plaintiff must show that the protected minority group tends to prefer different candidates from the racial majority.[216]

Because the race of voters is not recorded in an election, it is not possible to directly measure the amount of racial polarization in an election.[217] Instead, social scientists frequently use ecological regression to determine how polarized a jurisdiction's politics are.[218] Ecological regression attempts to measure polarization by using precinct-level data, rather than data about individual voters.[219] It works by measuring the vote share a given candidate receives from different precincts with different racial compositions.[220] If a candidate tends to receive the same vote share from precincts with large minority populations and large white voting populations, then voting is not racially polarized.[221] But if the candidate tends to receive more votes

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[212] *See infra* Section IV.B.
[213] The Voting Rights Act, 52 U.S.C. § 10301(b).
[214] *See* Thornburg v. Gingles, 478 U.S. 30, 49–50 (1986).
[215] Elmendorf, *supra* note 211, at 589.
[216] *Id.*
[217] *Id.* at 670–71.
[218] *See id.* at 671; Ansolabehere et al., *supra* note 98, at 211–12.
[219] Elmendorf et al., *supra* note 211, at 670–71 (describing how racial polarization is inferred from precinct-level data).
[220] *Id.* at 671.
[221] *See* Ansolabehere et al., *supra* note 98, at 211.

from precincts with large minority populations (or large white populations), then voting is more likely polarized.[222]

Though commonly employed in voting rights litigation, ecological regression comes with significant limitations. Some of these limitations are difficult to alleviate so long as courts insist on using data from actual elections in voting rights litigation.[223] But others are more specific to plurality voting. In particular, in races between just two candidates, ecological inference regresses against a single Bernoulli independent variable.[224] In other words, ecological inference in a two-candidate race asks voters a simple binary question: did you vote for one candidate or the other?[225] But this can mask important nuance. It might be the case, for example, that voters are weakly racially polarized on the basis of a candidate's race, but strongly racially polarized on the basis of a candidate's party.[226] This would lead to different levels of polarization in different elections and could obscure the extent to which race really determines election outcomes.[227]

Instant Runoff Voting makes measurement of racial polarization a little more complicated, but potentially much more powerful. In instant runoff elections, voters do not simply cast a single vote for a single candidate.[228] Instead, each voter's vote reflects a

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[222] *Id.*

[223] For example, ecological regression assumes that voters of a given race in a given precinct will vote for a given candidate at the same rate as voters of the same race in other precincts, even if those precincts are dissimilar in other ways. This assumption seems to conflict with the Supreme Court's distaste for racial essentialism in voting rights cases—even though the Supreme Court continues to rely on ecological regression when enforcing Section 2. *See* Elmendorf et al., *supra* note 211, at 671–73.

[224] *See id.* at 670–71 (describing ecological regression); *see also* Nicholas O. Stephanpoulos, *The Relegation of Polarization*, 83 U. CHI. L. REV. ONLINE 160, 160 (2017) (describing racial polarization as a function of different groups' support for a single minority-preferred candidate).

[225] Stephanopoulos, *supra* note 224, at 160 ("Polarization is simply the difference between . . . minority support for a minority-preferred candidate minus white support for the candidate.").

[226] *See generally* Elmendorf et al., *supra* note 211, at 645–60 (demonstrating theoretically and empirically that racial polarization can vary in response to different candidate traits).

[227] *See id.* at 656.

[228] Lewyn, *supra* note 16, at 118–19.

ranking of multiple candidates.[229] It can be tricky to identify correlations based on these rankings.[230] Consider a race between five candidates (A, B, C, D, and E), in which only candidates A and B belong to a racial minority group. One might be interested to know whether minority voters are more likely to support minority candidates. But it is not feasible to try and make predictions based on each distinct ranking.[231] Even disregarding the empirical problems with gathering such precise data, such a method would be uselessly particular. A voter with preference A→B→C→D→E clearly prefers minority candidates to the same extent as a voter with preference A→B→C→E→D, and much more than a voter with preference C→E→A→B→D. But how do you compare, for example, a preference A→C→E→B→D with a preference C→A→B→E→D?

Rather than making inferences based on distinct rankings, social scientists can use statistical techniques to identify clusters of rankings.[232] For example, in a four-candidate race, large numbers of voters might prefer A→B→C→D or D→C→B→A, but not very many vote for D→A→C→B, or any number of other permutations. Social scientists can then make inferences based on these clusters, asking, for example, how frequently minority voters (or, more technically, voters in precincts with a large minority population) tend to fall within one cluster or another.[233] These statistical techniques also help group voters with slightly anomalous preference orders into more general clusters, making predictions more broadly applicable.[234] For example, a voter with preference B→A→C→D likely belongs in the A→B→C→D cluster rather than the D→C→A→B cluster. These clustering techniques therefore allow for general inferences about which voters support which candidates.[235]

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[229] *Id.*
[230] *See* Atsusaka & Landsman, *supra* note 172, at 6.
[231] *Id.* (explaining that, in a multi-candidate race, there are thousands, if not millions, of distinct possible rankings).
[232] *See* Wenpin Tang, *Mallows Ranking Models: Maximum Likelihood Estimate and Regression* (Proceedings of the 36th Int'l Conf. on Machine Learning, 2019), http://proceedings.mlr.press/v97/tang19a/tang19a.pdf (explaining that certain models can be used to compare ranked data in IRV); Atsusaka & Landsman, *supra* note 172, at 6–7.
[233] Atsusaka & Landsman, *supra* note 172, at 7–8.
[234] *Id.* at 8 (describing the algorithm for determining the probability that a voter in a cluster will have a certain preference order).
[235] *Id.* at 8–9.

Importantly, these clusters need not map onto any particular set of candidate characteristics. It might be the case that candidates A and C are Democrats, and candidates D and B are members of racial minority groups—meaning that no cluster is a simple proxy for partisan affiliation or racial preference. Instant runoff elections can therefore give clearer information about the bases on which voters may be racially polarized.[236] For example, in the New York City Mayoral Primary, many voters showed a clear preference for Black candidates, with weaker preferences based on candidate ideology—a distinction that could not have been revealed by a two-candidate race.

IRV allows more than just two candidates to receive nontrivial quantities of votes.[237] It therefore becomes less likely that racial polarization will be obscured because no candidate happens to have some polarizing characteristic, or exaggerated because no candidate has some unifying characteristic. And indeed, IRV appears to encourage a more diverse set of candidates to run, potentially expanding the number of candidate characteristics represented in the election.[238] Under IRV, courts can therefore make more meaningful inferences about which candidate characteristics—and consequently, which candidates—minority groups will tend to distinctly prefer.

B. Identifying the Candidate of Choice

Measures of racial polarization can help identify what preferences members of a racial group are more likely to express.[239] But courts then still need to decide which candidates are actually the candidates "of their choice."[240] This inquiry essentially comprises the latter two *Gingles* factors.[241] Under *Gingles*, a minority group must be "politically cohesive"—meaning that it must have a shared set of preferences for some candidate or candidates.[242] And the majority group must "usually be able to defeat" minority candidates through

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[236] *See* Elmendorf et al., *supra* note 211, at 651–52.
[237] *See supra* Section III.A.
[238] *See* John et al., *supra* note 131, at 99 (finding that IRV "encouraged more minorities to run").
[239] *See, e.g.*, Ansolabehere et al., *supra* note 98, at 211.
[240] The Voting Rights Act, 52 U.S.C. § 10301(b).
[241] Stephanopoulos, *supra* note 224, at 160.
[242] *Id.*; Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

"bloc voting."[243] In other words, under *Gingles*, the minority group must prefer one set of candidates, and the majority group must prefer another.

In a single-winner plurality election, this inquiry is relatively straightforward. Such elections rarely involve more than two viable candidates.[244] Accordingly, these *Gingles* factors are satisfied if minority voters tend to prefer one candidate, and voters from the racial majority prefer the other.[245] In IRV, however, voters do not express only a single preference for a single candidate.[246] To determine whether there is racial bloc voting, courts therefore can't just ask whether members of a given group tend to cast a vote for a given candidate. Instead, what matters is whether members of the racial minority group tended to give a set of candidates a higher rank than members of the racial majority group.

Information about a minority group's relative ranking of a given candidate can provide useful insights into that group's preferences not available in a plurality election. First, because tactical voting is less common in IRV, a voter's high rank for a candidate more likely expresses a genuine preference for that candidate over other candidates than a vote cast in a plurality election does.[247] Additionally, by showing how different groups of voters ranked different candidates, IRV can make clear whether a candidate was elected as the result of a true coalition, or whether one group merely settled for another group's preference.

Consider, for example, a district with two ethnic groups, the Blues and the Greens, in a three-candidate race between A, B, and C. In this example, the district is 40% Green, and 60% Blue. The following Sankey chart represents one way the race might go:

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[243] *Gingles*, 478 U.S. at 49–50.
[244] *See supra* note 142 and accompanying text.
[245] *See* Stephanopoulos, *supra* note 224, at 160.
[246] Lewyn, *supra* note 16, at 118–19.
[247] *See* Grofman & Feld, *supra* note 20, at 651–52 (explaining how tactical voting is difficult in IRV elections).

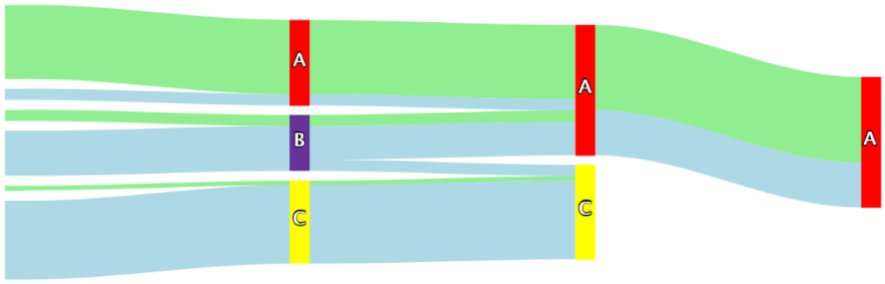

Figure 1.

In this example, candidates A and C are the most popular, with B trailing behind. Green voters generally like candidate A, and Blue voters generally like candidate C, though some also favor B. Candidate B's supporters generally prefer candidate A as their next choice. Because candidate B has the least support, she is eliminated in the first round. And because most of her supporters liked candidate A as their next choice, candidate A wins. In the final round of this election, candidate A wins with support from mostly Green voters, but also some Blue voters. Yet candidate A is still clearly the Greens' candidate of choice. Not only do most Green voters prefer candidate A, but almost no Blue voters do—at least, not until their candidate is eliminated. And if Green voters had preferred some other candidate to candidate A, they likely could have ranked that candidate first instead.[248]

But the winning coalition need not have formed this way. Consider the following alternative scenario:

[248] *See id.*; Blom et al., *supra* note 164, at 480.

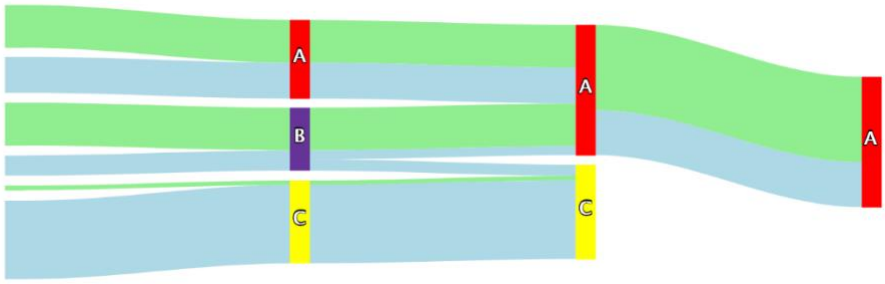

Figure 2.

In this election, A wins with the exact same coalition of mostly Green and some Blue voters. Yet candidate A in this scenario is likely *not* the Green candidate of choice. Here, many Green voters preferred candidate B, who just didn't have enough support to make it past the first round. In an election with more Green voters, things might have been different.

This is not to say that voters of a given racial group must all give the exact same candidate the exact same rank to demonstrate political cohesion. It may be the case that members of different groups prefer different *sets* of candidates, but that the preference order within those sets varies. For example, if a minority group consistently prefers candidates A and B, and the majority prefers candidates C and D, then the minority group can fairly be described as politically cohesive[249]—and will be defeated by a bloc-voting majority[250]—even if each group is divided as to *which* of their preferred candidates is the best.[251] In the New York City Mayoral Primary, for example, Black voters had a distinct preference for Wiley or Adams, even though their preference

[249] *See* Thornburg v. Gingles, 478 U.S. 30, 51 (1986) (explaining that the political cohesion criterion is supposed to determine whether there are "distinctive minority group interests" at stake).

[250] *See id.* at 49–50. (In other words, without a district for the minority group, one of the candidates supported by the cohesive majority group is likely to win.).

[251] Additionally, even when minority groups have distinct preferences, they may not coalesce around a single candidate until later rounds of the election, after other candidates have been eliminated. The New York City Mayoral Primary again provides an illustration of this phenomenon—Black voters clearly preferred Wiley and Adams to other candidates, but the winner between those two candidates was not determined until the final round.

between those candidates was less clear.[252] The following chart illustrates this scenario:

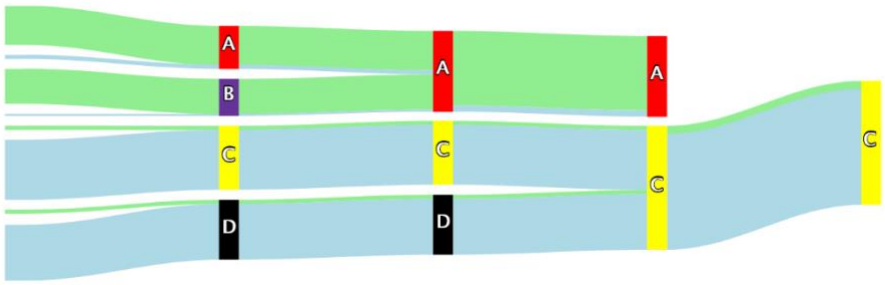

Figure 3.

The distinctions revealed by these scenarios are important for identifying a minority group's distinct political preferences. But they would likely be obscured in a plurality election. For example, if either of the first two scenarios were run in a plurality system, it is likely that voters would recognize candidate B as a spoiler, and her supporters would throw their weight behind candidate A instead.[253] All that would be visible in a plurality system is the outcome of the final round, but the final round doesn't reveal whether the winning candidate was supported by a multiracial coalition all along, or whether one group settled.

This is not to say, of course, that only the first-choice votes matter either. It could be the case, for example, that the winning candidate has a "come-from-behind" victory; that this candidate was initially supported by a small number of voters from multiple groups; but that the candidate ultimately won by amassing second-choice votes from only one group. In this scenario, first-choice votes would make it look like *no* racial group had a strong or distinct preference for that candidate. But later rounds of voting would reveal that the candidate won only because almost all members of a particular group preferred that candidate to almost any other candidate.

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[252] *See supra* Section III.C.

[253] *See* Myatt & Fisher, *supra* note 140, at 504–05 (explaining how the spoiler effect works in plurality elections).

C. Crossover Districts Under Instant Runoff Voting

Under *Gingles*, the fundamental question in a Section 2 claim is whether giving a minority group its own district will actually help the group to elect their own preferred candidates.[254] As the previous examples illustrate, the answer to this question may be "yes" even when a minority group does not constitute a majority in a district.[255] In an IRV election, a minority group can express a distinct preference for a given candidate, but that candidate can still win because voters from the racial majority crossed over in later rounds.[256] Accordingly, drawing a district for the minority group would still help it elect the candidate of its choice.

Current case law, however, has held that the VRA only requires courts to grant minority groups their own district if minority voters would comprise a majority in that district.[257] The Supreme Court has given several justifications for its emphasis on a majority threshold. In *Gingles*, the Court explained that, unless the minority group can constitute a majority in a district, it cannot blame the existing district lines for its inability to elect its preferred candidate.[258] And in *Bartlett*, the Court emphasized the "special significance" of a majority, distinguishing between "a racial minority group's 'own choice' and the choice made by a coalition."[259] The Court also argued that it would be too difficult for courts to make "predictive political judgments not only about familiar, two-party contests[,]" but also about more complex multi-candidate races, in which smaller pluralities could conceivably win an election.[260]

These considerations do not apply, however, to instant runoff elections. Although Justice Kennedy is somewhat unclear about where the "special significance" of the majority comes from, it is at least true that, in a "familiar, two-party contest," one side ultimately needs a

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[254] *See Gingles*, 478 U.S. at 48–49 (asking whether the use of a challenged districting plan would "impede the ability of minority voters to elect representatives of their choice.").
[255] *See also* Lublin et al., *supra* note 23, at 280–81 (finding that minority groups can elect preferred candidates with 40-50% of a district's voting age population).
[256] *See supra* Section III.B.
[257] Bartlett v. Strickland, 556 U.S. 1, 14 (2009).
[258] *Gingles*, 478 U.S. at 50–51.
[259] *Bartlett*, 556 U.S. at 15, 19.
[260] *Id.* at 18.

majority to win.[261] However, IRV elections generally involve multiple candidates, and frequently, even the winning candidate lacks a majority of the vote in the first round.[262] Courts enforcing the VRA in jurisdictions using IRV will therefore be required to make predictions about multi-candidate races, whether or not they adopt a majority threshold.

More importantly, however, IRV helps distinguish between "a racial minority group's 'own choice' and the choice made by a coalition," even in districts where the minority group does not comprise a majority of the voting population.[263] If a candidate is ultimately elected by a multi-racial coalition, but only because voters from the racial majority supported that candidate in *later* rounds of the election, a court can infer that this candidate was the candidate of the minority group's choice. Given their own district—even a district in which they comprised a majority—the minority group would continue to vote for and elect that candidate. After all, if they preferred another candidate, they could have given that one a higher rank.[264]

Because IRV can distinguish this situation, a crossover districting requirement in IRV jurisdictions does not "entitle[] minority groups to the maximum possible voting strength," as the Court feared.[265] In some situations, a candidate might be elected by a multi-racial coalition even though minority voters did *not* initially support the candidate. In those circumstances, a court should not infer that this is the candidate of the minority group's choice, even if most of the candidate's supporters in the final round end up being minority voters. After all, given a district with a greater minority population, minority voters might have elected a different candidate.[266] The VRA does not

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[261] *See id.* at 18, 19. *See also* Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680, 680–84 (1952) (finding that simple majority voting is the only system to select between two options satisfying certain formal fairness criteria).

[262] *See, e.g.*, *supra* note 170 (describing IRV elections in the bay area); *supra* Section III.C (describing the New York City 2021 Democratic Party Mayoral Primary election).

[263] *Bartlett*, 556 U.S. at 15.

[264] *See* Grofman & Feld, *supra* note 20, at 651–52 (arguing that it would be difficult to determine under IRV when to rank higher a candidate a voter likes less).

[265] *Bartlett*, 556 U.S. at 15–16.

[266] *See* Branton, *supra* note 22, at 461 (describing how voters might support a candidate of a race they prefer less if there's no viable candidate of a race they prefer more).

give minority groups the opportunity to affect the outcomes of as many elections as possible—but it does guarantee minority voters the opportunity to elect *their* preferred candidates.[267] And as IRV elections can demonstrate, minority voters may be able to do so even when they do not comprise a majority in a district.

V. CONCLUSION

In the context of plurality elections, at least, the Supreme Court has held that the Voting Rights Act does not require the creation of crossover districts.[268] But whatever force the Court's reasoning might have when applied to plurality elections, a crossover district requirement is as natural as a majority-minority district requirement in jurisdictions using Instant Runoff Voting. IRV lets minority voters express their genuine and distinct preferences for their own candidates. Courts can therefore identify when minority voters are able to elect their preferred candidates, even if those candidates do not receive a majority in the initial round. In such circumstances, courts should enforce the promise of the Voting Rights Act, and ensure that minority voters can "elect representatives of their choice."[269]

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[267] *See* 52 U.S.C. § 10301(b).
[268] Bartlett v. Strickland, 555 U.S. 1, 15 (2009).
[269] 52 U.S.C. § 10301(b).