

The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation

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INTRODUCTION

The 2008 presidential contest proved to be of historic proportions, resulting in the victory of Barack Obama, the nation's first black president. The contest itself played out in dramatic fashion, with a nontraditional slate of party candidates, exceptionally competitive party primaries, record levels of individual campaign contributions, aggressive grassroots mobilization efforts, spikes in voter registration, and high Election Day turnout and participation rates. Moreover, this was the first election since the adoption of the modern system of presidential nomination through primaries in which neither major party had an incumbent's name appear on the ballot.¹ Beyond its historical significance, Obama's victory has spawned a number of interesting debates on the issues of race and discrimination. Indeed, some commentators have begun pointing to Obama's presidential victory as singular evidence that we have overcome and resolved the problem of race in America.² In particular, some have suggested that his victory marks the beginning of a "post-racial" era in which race bears less significance or consequence.³

In this Article, I focus on a particular aspect of this ongoing debate—the presence of racially polarized voting in the 2008 presidential election cycle. The commentary surrounding Obama's electoral success provides some insights into prevailing attitudes about the pace of racial progress. But there is a more immediate and pragmatic issue for those who study and liti-

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¹ See *infra* note 55 and accompanying text.

² See *e.g.*, Abigail Thernstrom & Stephan Thernstrom, Op-Ed., *Racial Gerrymandering Is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15 (suggesting that an Obama victory means that "the doors of electoral opportunity in America are open to all" and arguing that "the Voting Rights Act should therefore be reconsidered").

³ See *e.g.*, Michael Crowley, *Post-Racial*, THE NEW REPUBLIC, Mar. 12, 2008, at 7; Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, at A31 (characterizing Obama as a post-racial candidate and pointing to an interview with former Klansman David Duke who found little difference between Hillary Clinton and Barack Obama); see Abigail Thernstrom & Stephan Thernstrom, Op-Ed., *Taking Race Out of the Race*, L.A. TIMES, Mar. 2, 2008, at M5.

gate vote dilution claims under Section 2 of the Voting Rights Act of 1965⁴: the probative value of the 2008 presidential contest on future efforts to measure racially polarized voting, one of the critical pieces of evidence that plaintiffs must offer to support traditional Section 2 vote dilution challenges.⁵ Some critics would argue that the success of a minority candidate for our nation's highest office should alter our approach to voting rights litigation and reshape our thoughts concerning the concept of racially polarized voting in these cases. Such arguments are erroneous under both the facts and the law.

I offer some preliminary observations regarding the implications of Obama's electoral success for voting rights litigants and find that no overarching conclusions about racially polarized voting can be drawn from it. Initial analysis of the 2008 presidential election outcome reveals a mixed pattern of racially polarized voting in some jurisdictions and significant cross-racial coalition building in others. Notably, exit polling results from the November 2008 general election reveal stark racial polarization in the Deep South states of Louisiana, Mississippi, Alabama, Georgia, and South Carolina alongside encouragingly high levels of white crossover voting in the New England states of Vermont, Massachusetts, Rhode Island, and Maine.⁶ While Obama's victory most certainly represents significant progress in the ongoing effort to achieve real political equality, courts should hesitate to substitute Obama's electoral success for a more localized inquiry into the possible existence of racially polarized voting.

Part I of this Article focuses on the important role that the Voting Rights Act has played in dealing with ongoing problems of voting discrimination while highlighting the evidentiary standards that must be satisfied by litigants in Section 2 cases. Given the important role that evidence of racially polarized voting plays in these cases, this section outlines key questions raised in the wake of Barack Obama's presidential victory. Part II examines and analyzes the role that race played in shaping voting patterns in the 2008 presidential election cycle based on available results from comprehensive exit polling conducted during the primary and general elections. Part III focuses on some of the complexities surrounding presidential contests that could complicate use of Obama's victory in cases brought in jurisdictions where he obtained crossover support among white voters. Here, I highlight a number of features of presidential elections that distinguish these contests from other elected offices at the local and state levels. Finally, Part

⁴ 42 U.S.C. § 1973(a) (2006).

⁵ See, e.g., *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1010 (D.S.D. 2004) (noting that racially polarized voting is ordinarily the "keystone of a vote dilution case" (quoting *Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5*, S.D., 804 F.2d 469, 473 (8th Cir. 1986)). See Ellen Katz, *Documenting Discrimination In Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 720 (2006) (conducting extensive examination of judicial findings concerning racially polarized voting between 1982 and 2005).

⁶ See *infra* Part II, Table 2.

IV further elaborates on the unique nature of presidential elections while considering the question of whether primary or general elections carry more probative value and weight.

Based on my review of the rules surrounding the conduct of the 2008 presidential election, an analysis of the prevailing jurisprudence governing Section 2 claims, and a careful review of exit polling data from these contests, I conclude that despite Obama's ultimate success in the 2008 presidential election cycle, courts must continue to make careful, case-by-case assessments and intensely localized appraisals about the level of racially polarized voting in those jurisdictions that may be subject to future Voting Rights Act claims.

I. GENERAL REQUIREMENTS OF STATUTORY VOTE DILUTION CLAIMS

No federal law has done more to address ongoing racial discrimination in the context of voting than the Voting Rights Act of 1965 ("the Act"). The Act is frequently credited as one of the most effective federal civil rights statutes passed by Congress because it has provided tools for tackling intractable problems of voting discrimination, resulting in dramatic increases in minority voter participation and electoral success rates.⁷ This comprehensive statute includes a number of prophylactic tools and remedial provisions designed to remedy voting discrimination in many of its most pervasive manifestations. One of the Act's central features, Section 2's general anti-discrimination provision, has long served as a statutory tool to challenge certain standards, practices, or procedures that result in a "denial or abridgment of the right to vote on account of race or color."⁸ By providing a means to contest those practices that "minimize or cancel out the voting strength and political effectiveness of minority groups,"⁹ Section 2 has helped ensure that minority voters are able to enjoy the same opportunities as non-minorities to participate in all phases of the political process.¹⁰

⁷ See, e.g., Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING* 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (observing that the Voting Rights Act is "one of the most effective instruments of social legislation in the modern era of American reform"); J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 53 (1999) (describing the relatedness of the purposes of the Voting Rights Act and the Fourteenth and Fifteenth Amendments); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (chronicling the legal and political history surrounding the struggle for suffrage rights among African Americans and other groups).

⁸ 42 U.S.C. § 1973(a) (2006). The central purpose of this statute is to enforce the guarantees of the Fifteenth Amendment, and thus the language of the statute simply tracks that of the Amendment.

⁹ *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (quoting S. REP. NO. 97-417, at 28 (1982)).

¹⁰ See S. REP. NO. 97-417, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 177 [hereinafter S. REP.]. Section 2 can also be used to bring challenges against practices or schemes that result in minority vote denial such as felon disenfranchisement statutes and exclusionary poll

Section 2 claims are generally focused on whether some contested practice or procedure denies minority voters equal opportunity to participate in the political process and elect candidates of their choice.¹¹ Although Section 2 can be used to challenge a range of potential discriminatory schemes, the vast majority of Section 2 claims involve challenges to multi-member governmental bodies such as city councils, schools boards, county commissions, and state legislatures.¹² Such dilution claims generally focus on the method of election employed by that body, looking to see, for example, whether the rights of minority voters are diluted if the body elects its members at-large, and white voters typically vote as a bloc to defeat minority voters' candidate of choice. Dilution claims might also focus on the way that district lines are drawn within that body, looking to see if the lines are drawn in such a way as to "pack" or "fracture" cohesive groups of minority voters.¹³ Where these claims are successful, plaintiffs generally seek the implementation of a remedy that will provide minority voters an equal opportunity to elect candidates of their choice; such relief might call for the replacement of an at-large system with fairly drawn single-member districts that do not unnecessarily concentrate minority voters. These are the kinds of Section 2 claims in which litigants must present evidence of racially polarized voting to support their claims and are therefore the underlying focus of this article.

worker laws. *See, e.g.*, *Harris v. Graddick*, 593 F. Supp. 128, 132–33 (M.D. Ala. 1984) (considering a claim concerning state hiring practices that resulted in a disproportionately small number of black poll workers); *Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1185, 1193 (D.S.D. 2006) (considering a claim that presented the failure to appoint American Indians as poll workers as evidence supporting a Section 2 violation). For a general discussion regarding the use of Section 2 as a tool to challenge rules or practices governing the administration of elections that result in minority vote denial, see Daniel P. Tokaji, *The New Vote Denial: Where Election Law Meets the Voting Rights Act*, 57 S.C. L. REV. 89 (2006).

¹¹ S. REP., *supra* note 10, at 30.

¹² *See e.g.*, *Jenkins v. Red Clay Bd. of Educ.*, 4 F.3d 1103 (3d Cir.1993) (black voters challenging at-large election of school board); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir.1993) (action challenging single-district system of electing state court judges); *Hines v. Mayor and Town Council*, 998 F.2d 1266 (4th Cir.1993) (blacks challenged at-large election of town council); *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir.1993) (alleging that majority vote system violates the Voting Rights Act); *Meek v. Metropolitan Dade County*, 985 F.2d 1471 (11th Cir.1993) (blacks and Hispanics challenged at-large elections of county commissioners); *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir.1990) (black citizens challenged at-large election system in county); *Overton v. City of Austin*, 871 F.2d 529 (5th Cir.1989) (at-large system for electing city council members diluted black and Mexican-American voting power); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir.1987) (at-large elections of Gretna aldermen violate § 2 of the Voting Rights Act); *Major v. Treen*, 574 F.Supp. 325 (E.D.La.1983) ("Redistricting plan which fragmented continuous, cohesive area of highly concentrated black population was violative of federal, state and constitutional law.").

¹³ *See Voinovich v. Quilter*, 507 U.S. 146, 153–54 (discussing the concept of packing minority voters into supermajority-minority districts). Packing entails the placement of as many minority voters into as few districts as possible in order to reduce their influence and minimize their overall voting strength. Cracking refers to the fracturing of viable and cohesive groups of minority voters in a manner that prevents them from exercising the ability to elect candidates of choice.

The Supreme Court set forth the prevailing and key legal standard for adjudicating Section 2 vote dilution claims in *Thornburg v. Gingles*, a case involving a Section 2 challenge to North Carolina's 1982 state legislative redistricting plan.¹⁴ The *Gingles* Court outlined a three-pronged inquiry to help determine liability under Section 2. This inquiry, also called the *Gingles* test, requires plaintiffs to demonstrate that (1) the minority community within the challenged jurisdiction is sufficiently large and geographically compact to constitute a majority in a single member district;¹⁵ (2) the minority group is politically cohesive;¹⁶ and (3) the majority generally votes as a bloc to defeat the minority group's candidate of choice.¹⁷ This three-pronged inquiry aims to determine whether some contested practice or procedure operates within an environment in which minority voters are politically cohesive, in which there is evidence of discriminatory voting behavior on the part of non-minorities, and in which the resulting discrimination can be remedied by some form of court-ordered relief. Satisfaction of the three *Gingles* factors serves as strong evidence that a jurisdiction employs a test or device that is discriminatory in purpose or effect, and it indicates that there is likely a way to modify the system to provide a more fair and equal opportunity for minority voters to participate.¹⁸

¹⁴ *Thornburg v. Gingles*, 478 U.S. 30 (1986). In 1982, Congress amended Section 2 to implement a discriminatory results standard that eliminated the requirement that litigants prove purposeful discrimination. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2000)).

¹⁵ See *Gingles*, 478 U.S. at 50 n.17; see also *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (noting the purpose behind the compactness inquiry is to determine whether minority voters can claim injury, which is directly connected to whether the minority group holds "the potential to elect representatives in the absence of the challenged structure or practice" (quoting *Gingles*, 478 U.S. at 50 n.17)); see also S. REP., *supra* note 10, at 5-6 (noting that if a contested electoral mechanism operates to dilute a minority group's voting power, the Voting Rights Act vests the court with the equity power to shape a remedy that will ensure members of the protected class equal access to the political process).

¹⁶ "Political cohesion" is generally found when the members of a protected minority group tend to vote consistently, or when they regularly back a "clear candidate of choice." Political cohesion can be evidenced through both statistical analysis of voting patterns and through anecdotal evidence provided by local individuals who have a personal knowledge of voting patterns and trends. Examination of both endogenous and exogenous elections can help determine the level of political cohesion among minority voters in a particular jurisdiction. A discussion of endogenous versus exogenous elections is presented below. In addition to strong statistical evidence, anecdotal testimony proffered by community leaders can also help confirm that there is generally a strong consensus regarding the candidate of choice among minority voters.

¹⁷ *Gingles*, 478 U.S. at 50-51.

¹⁸ The Supreme Court is currently reviewing the question of whether districts that are less than fifty percent minority in composition can be ones that provide minority voters an opportunity to elect candidates of their choice. *Bartlett v. Strickland*, 649 S.E.2d 364 (N.C. 2007), cert. granted 128 S.Ct. 1648 (No. 07-689, 2008 Term). The Court's ruling may have significant implications on the prevailing standards employed by most courts in determining whether litigants have satisfied their burden of proof under the first *Gingles* factor. The Court's ruling likewise may influence the way that critics and commentators analyze Obama's presidential victory. To the extent that the existence of racially polarized voting is one factor that must be considered in determining whether or not a district provides minority voters an opportunity to elect, some of the issues discussed in this paper could have bearing on the question of when we

In addition to these *Gingles* factors, Section 2 plaintiffs can also present other indicia of alleged vote dilution, demonstrating that, based on “the totality of the circumstances,” minority voters have less opportunity to participate than other voters.¹⁹ “The need for ‘totality’ review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power.”²⁰ During its 1982 reauthorization and modification of Section 2, Congress determined that “since the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength.”²¹

Another critical point underscored by the Supreme Court in the *Gingles* case is that liability determinations are “peculiarly dependent upon the facts of each case”²² and require “an intensely local appraisal of the design and impact” of the contested electoral mechanisms.²³ These longstanding prece-

deem a district viable for minority voters and therefore implications for the questions at hand in *Bartlett*.

¹⁹ In *Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994), the Court took the *Gingles* three-pronged inquiry further and required that courts also examine and consider the “totality of circumstances,” which includes a number of factors identified in the Senate Report that had accompanied the 1982 reauthorization of Section 2. See S. Rep., supra note 10, at 28–30. The Senate factors are aimed at looking beyond the particular voting practice at issue in order to explore the full extent of the barriers that stand in the way of minority voter access to the political process in a given jurisdiction. The factors include:

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

Id. at 28–29. The Senate Report states that, “[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.” *Id.* at 29. Instead of depending entirely on the enumerated factors, “[a]s the Court said in *White*, the question whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality.’” *Id.* at 30 (quoting *White v. Regester*, 412 U.S. 755, 769–70 (1973)).

²⁰ *De Grandy*, 512 U.S. at 1018.

²¹ S. REP., supra note 10, at 10 (1982); cf. *Gingles*, 478 U.S. 30, 46 (1986) (“[T]he results test does not assume the existence of racial bloc voting; plaintiffs must prove it.”).

²² *Rogers v. Lodge*, 458 U.S. 613, 621 (1982) (quoting *Nevett v. Sides*, 571 F.2d 209, 224 (5th Cir. 1978))

²³ *Rogers*, 458 U.S. at 622 (quoting *Regester*, 412 U.S. at 769–70).

dents underscore the argument set forth in this Article, which is that Obama's victory alone should not dispose of any future claim raised under the Voting Rights Act, and that courts must continue to make careful, case-by-case assessments to determine whether vote dilution or discrimination persists.

Both the second and third *Gingles* factors turn upon the question of racially polarized voting. Indeed, under the second *Gingles* factor, courts must consider and determine the preferences among minority voters alongside the preferences of non-minority voters. Ultimately, the second *Gingles* factor is deemed satisfied when litigants demonstrate that the minority group "tend[s] to vote . . . consistently or regularly . . . [for] a 'clear candidate of choice.'"²⁴ In the 2008 presidential election cycle, the strong support levels for Obama, which ranged from a low of ninety percent in Indiana to a high of ninety-nine percent in Delaware, are certainly strong evidence of political cohesion among black voters and evidence that Obama was clearly the candidate of choice among them.²⁵

However, the focus here lies on the third *Gingles* prong, as this Article endeavors to analyze the role of the 2008 presidential election in determining whether or not white voters vote as a bloc to defeat minority voters' candidates of choice. The underlying purpose of the third *Gingles* prong is to determine whether the contested practice or procedure interacts with high levels of racially polarized voting in the jurisdiction at issue to make it particularly difficult for minority voters to participate equally in the political process. To that end, the third *Gingles* factor inquires whether there is some consistent and significant correlation between a voter's race and voting preference in elections, leading to non-minority voters generally being able to vote as a bloc to defeat minority voters' preferred candidates. Because measuring racial polarization is complex, this third *Gingles* factor often represents one of the most challenging features of Section 2 litigation.

The question of whether racially polarized voting exists in a given jurisdiction is best answered by statistical analysis of election data to determine whether non-minority voters in some particular geographical unit—precincts or districts—vote differently from minority voters. Litigants generally rely upon political scientists and statisticians to measure the level of racial polarization in a contested jurisdiction, while courts make the ultimate determina-

²⁴ *Mallory v. Ohio*, 38 F. Supp. 2d 525, 537 (S.D. Ohio 1997) (citations omitted). See also Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 5 (1993) (drawing upon the second prong in *Gingles* to conclude that "plaintiffs need to demonstrate a usual, but not a uniform, pattern of minority cohesion in past elections").

²⁵ See *supra* note 16 and accompanying text. The preferred candidate among minority voters need not be minority; rather, the key question is whether minority voters are politically cohesive in their support for a particular candidate. This point is important here, as Obama would not be deemed the preferred candidate of choice among minority voters merely because he is black. He is the preferred candidate because minority voters expressed a clear preference for him, and those levels of support seem to more than satisfy the threshold employed by courts in determining whether the second *Gingles* factor has been met.

tion as to whether the level of polarization is of legal significance. Comparing precincts or districts containing high percentages of non-minority voters with those precincts or districts containing high percentages of minority voters—a process called homogenous or extreme precinct analysis—is one particularly useful way of analyzing voting patterns.²⁶ Ecological regression analysis, which determines the correlation between race and voting preference by examining voting patterns in all precincts regardless of their particular racial composition, is another prevailing methodology.²⁷ Comprehensive exit polling conducted as voters leave polling sites has also proven to be a reliable indicator of voting patterns in a jurisdiction,²⁸ although experts retained to present evidence of racial polarization in Voting Rights Act litigation often use other methodologies. Historically, exit poll data (including that referenced in Part II of this Article) has proven to be the most insightful and comprehensive assessment of voting patterns that emerge in presidential elections, but not local elections as extensive exit polling is not frequently conducted for local or state contests.

Beyond selecting what kind of data to use, analysts must choose which set of elections to analyze in determining whether Section 2 litigants satisfy the third *Gingles* factor. Generally, elections for the office or jurisdiction that is the subject of the litigation (“endogenous elections”) are considered the most probative starting point for determining whether plaintiffs can satisfy the third *Gingles* prong.²⁹ Courts may also consider data from other contests within the jurisdiction (“exogenous elections”). As Section 2 liti-

²⁶ See Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, in *THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY* 43 (Nathaniel Persily ed., 2000).

²⁷ *Id.*; see also Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 *SOC. SCI. Q.* 826 (1991). For discussion of other methodologies, such as ecological inference, developed by political scientist Gary King, see Gary King, *A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA* (1997).

²⁸ See *Cottier v. City of Martin*, 445 F.3d 1113, 1120 (8th Cir. 2006) (crediting findings of an exit poll in concluding that plaintiffs satisfied their burden of showing racially polarized voting); *Harvell v. Blytheville Sch. Dist.*, 71 F.3d 1382, 1386 (8th Cir. 1995) (considering evidence including statistical analysis, exit polling, and lay testimony); *Hall v. Holder*, 955 F.2d 1563, 1571 (11th Cir. 1992) (finding a strong correlation between results of regression analysis and exit polling figures and crediting findings of exit poll data in determining that a jurisdiction experienced racially polarized voting), *rev'd on other grounds*, 114 S. Ct. 2581 (1994); *Romero v. City of Pomona*, 883 F.2d 1418, 1426–27 (9th Cir. 1989) (crediting findings from an exit poll from a city council primary election in concluding that the third *Gingles* precondition was not satisfied); *Chisom v. Roemer*, No. 86-4057, 1989 U.S. Dist. LEXIS 10816, at *14–15 (E.D. La. Sept. 13, 1989) (“In analyzing statistical data, the Court finds that the best available data for estimating the voting behavior of various groups in the electorate would come from exit polls . . . but such evidence is not available.”), *remanded*, 917 F.2d 187 (5th Cir. 1990), *rev'd on other grounds*, 501 U.S. 380 (1991). Exit poll data has proven particularly useful in jurisdictions that do not have reliable election data sufficient to conduct a regression analysis.

²⁹ See *Cane v. Worcester County*, 840 F. Supp. 1081, 1088 n.6 (D. Md. 1994) (stating that “[e]ndogenous elections include voting patterns in elections for offices the plaintiffs challenge in their § 2 suit”).

gation is generally directed at the local or state level, results from a presidential primary or general election would almost always constitute exogenous election data. In analyzing data from these exogenous elections, an expert would extract the election results that correspond with the boundaries of the jurisdiction at issue.

While courts typically consider data from endogenous elections to be the most valuable in analyzing the voting patterns of the jurisdiction at issue, courts are split on the value of looking at exogenous election data such as data from presidential contests.³⁰ In certain instances, however, exogenous elections may be all that is available to plaintiffs seeking to satisfy their burden of proof under the third *Gingles* factor. For example, some courts deem contests between a minority and a non-minority candidate to be the most probative evidence of racially polarized voting,³¹ which may require plaintiffs to turn to exogenous elections to find such a contest. History has shown that there may be few examples of minority candidates competing on a local level against non-minority candidates in those jurisdictions where the most potentially attractive and viable minority candidates (those with significant experience and leadership) are discouraged from running because of the futility of seeking election in a jurisdiction that conducts at-large elections or in a jurisdiction that has district configurations that pack or fracture minority voters. Thus, depending on the jurisdiction in question, exogenous elections may offer the sole source of evidence regarding the racial voting patterns that emerge in minority versus non-minority contests.³² With the 2008 presidential election, future Section 2 litigants will always have, at minimum, one recent example of a minority versus non-minority contest to point to when no such endogenous election exists.³³ Indeed, Jesse Jackson's presidential

³⁰ See *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021 (8th Cir. 2006) (noting that “[a]lthough they are not as probative as endogenous elections, exogenous elections hold some probative value”); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1375 (N.D. Ga. 2001) (allowing both exogenous and endogenous elections as evidence).

³¹ See, e.g., *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir. 1993) (finding that white versus white elections are less probative for the third *Gingles* prong); *League of United Latin Am. Citizens, Council No. 4344 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (finding that white versus white elections are less probative); *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989) (“[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates.”); *City of Carrolton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1559 (11th Cir. 1987). See also *Southern Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1303–04 (11th Cir. 1995), cert. denied, 516 U.S. 1045 (1996); *Nipper v. Smith*, 39 F.3d 1494, 1541 (11th Cir. 1994) (Tjoflat, C.J., joined by Anderson, J.) (finding that the most probative white versus white elections are ones “in which the candidate of choice of black voters differed from the candidate of choice of white voters”).

³² See, e.g., *Westwego Citizens*, 872 F.2d at 1209 (finding that, in a case with no available endogenous inter-racial elections, exogenous election data may be used to help prove racial voting patterns); *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (allowing use of exogenous elections to make a showing under the third prong of the *Gingles* test).

³³ However, it is worth noting that most courts consider elections conducted within a ten year period to be the most probative of actual voting patterns in a jurisdiction. Thus, any

primary runs in 1984 and 1988 were occasionally used by litigants to demonstrate racially polarized voting in cases brought in the late 1980s and early 1990s. Where the prevailing jurisprudence within a circuit looks to minority versus non-minority contests for evidence of racially polarized voting, and where the 2008 presidential contest is the only such election available for a court's consideration, such factors could weigh in favor of careful interpretation of the election results to determine what weight they should carry. However, even under these circumstances, an Obama election, without more, should not defeat a Section 2 claim.

II. PRELIMINARY EVIDENCE FROM THE 2008 ELECTION CYCLE ILLUSTRATING THE ENDURING LEGACY OF RACE IN SOME JURISDICTIONS

Notwithstanding some of the factors, outlined in Sections III and IV of this Article, that could complicate traditional analysis of racially polarized voting in the 2008 presidential election, comprehensive exit polling data from the primary and general elections provide some preliminary insights into racial voting patterns. Exit poll data are generally considered very reliable evidence regarding racial bloc voting, but are usually only widely available for presidential elections.³⁴ These poll numbers reveal stark differences in the voting preferences exhibited by black and white voters in a number of jurisdictions, particularly in the Deep South.

Table 1 shows that voting patterns in the states stretching between Louisiana and Georgia reveal exceptionally high levels of political cohesion among African Americans in support of Obama, standing in marked contrast to bloc voting for McCain by white voters. Notably, many of these states are subject to the special Section 5 preclearance provision of the Voting Rights Act, which applies to a select number of jurisdictions that Congress determined to have very long and entrenched histories of voting discrimination.³⁵ The preclearance provision requires these select jurisdictions to obtain federal approval before implementing new voting changes.³⁶ Federal

evidence yielded by the 2008 election could become less probative over time, particularly in jurisdictions that experience significant demographic change.

³⁴ See *supra* note 28 and accompanying text; see also Warren J. Mitofsky, A SHORT HISTORY OF EXIT POLLS, IN POLLING AND PRESIDENTIAL ELECTION COVERAGE 83–99 (Paul J. Lavrakas & Jack K. Holley eds., 1991) (providing extensive overview on the process of exit polling).

³⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 309–315 (1966) (citing H.R. REP. NO. 89-439, at 8–16 (1965); S. REP. NO. 89-162, pt. 3, at 3–16 (1965)). Congress selected these jurisdictions by designing a coverage formula (based in part on turnout figures from presidential elections in 1964, 1968, and 1972, and on the presence of a prohibited device such as a literacy test), which effectively serves as a proxy for identifying jurisdictions with the longest and most egregious histories of entrenched voting discrimination. 42 U.S.C. §1973b(b) (2000).

³⁶ Jurisdictions can obtain Section 5 preclearance administratively by submitting the change to the Attorney General of the U.S. Department of Justice or judicially by means of a Section 5 declaratory judgment action filed in the United States District Court for the District

approval is contingent upon the jurisdiction's showing that the proposed voting change was not adopted with a discriminatory purpose and will not have a "retrogressive" or discriminatory effect. Indeed, the five states in which Obama attracted the lowest levels of crossover votes from white voters—Louisiana, Alabama, Mississippi, Georgia, and South Carolina—are all fully covered under Section 5 of the Voting Rights Act. In addition, these five states also have relatively high percentages of African-American citizens. In these states, it is more likely that the results from the 2008 presidential election will prove consistent with existing levels of racially polarized voting, which historically have been particularly severe.

Political scientists generally employ the term "landslide" to describe those elections in which a candidate secures around or more than sixty percent of the vote.³⁷ Thus, most political scientists interpreting white voting preferences in this election would likely conclude that McCain defeated Obama by landslide proportions in every single one of the fully covered Section 5 states. These landslide victories even took place in states in which white Democrats have recently been elected to statewide office, further illustrating the strong influence of race on white voters' candidate preferences in these regions of the country. Further, not only is white crossover support for Obama minimal at best in the Section 5 covered states, but the final results reveal that Obama lost outright in every one of these states. Indeed, the election outcomes in the fully covered Section 5 states reflect the very definition of racially polarized voting, which is a term that describes those jurisdictions in which white voters vote sufficiently as a bloc to defeat minority voters' candidates of choice.

of Columbia. Until the voting change is precleared as non-retrogressive, the change is deemed legally unenforceable. See *South Carolina v. United States*, 589 F.Supp. 757 (D.D.C. 1984) (the District Court for the District of Columbia can enjoin any attempt to implement the change prior to granting of a declaratory judgment of preclearance). Changes that are retrogressive are ones that worsen the position of minority voters.

³⁷ See Allan J. Lichtman & J. Gerald Herbert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 5 (1993) (observing the sixty percent "landslide standard" for elections).

Table 1. Support for Barack Obama in States Fully Covered Under Section 5 of the Voting Rights Act in the 2008 General Election³⁸

Section 5 Covered State	% of White Vote for Obama	% of Black Vote for Obama
AL	10	98
MS	11	98
LA	14	94
GA	23	98
SC	26	96
VA	39	92
TX	26	98
AK	33	Not available (—)
AZ	40	—

The exit polling results of those states that are fully covered by Section 5 of the Voting Rights Act are consistent with other evidence of significant voting discrimination in these particular regions of the country. A recent study conducted by Ellen Katz examined Section 2 lawsuits filed between 1982 and 2006 and identified 105 published cases in which there was evidence of racially polarized voting or racial bloc voting.³⁹ Katz determined that there was a strong link between this evidence and the probability of success on the merits and observed that plaintiffs prevailed in 73.3% of those cases in which courts credited the evidence of racial bloc voting, or in 77 of the 105 lawsuits. The vast majority of the successful suits, 52 of 77, were in jurisdictions covered under the special Section 5 preclearance provision of the Act. It would appear that using 2008 presidential election results to examine the existence of racially polarized voting in the Section 5 covered states is unlikely to contradict pre-existing evidence of voting discrimination.

³⁸ Data From CNN Election Center 2008—National Exit Polls, <http://www.cnn.com/election/2008/results/polls.main> (follow the hyperlink “President Exit Polls” for each state) (last visited Nov. 5, 2008). It is important to note that the exit poll data used for purposes of this Article look only at voting patterns for black and white voters. No doubt, a more thorough review, which also considered the voting patterns of Latinos, Asians, and Native Americans, among others, would yield more comprehensive findings and conclusions that would extend beyond the analysis presented here. For instance, while Latino voters supported Clinton over Obama during the primaries, they backed Obama over McCain during the general election. Voting patterns among Latino voters during the general election can be attributed, in part, to considerable resentment towards the Republican Party given its recent stance on immigration issues.

³⁹ Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 657 (2006).

Despite the stark levels of polarized voting revealed by exit polling results from the Section 5 covered states, it remains clear that there are no generalized presumptions that can be drawn regarding the level of racially polarized voting in any given jurisdiction.⁴⁰ In two of the five states that are partially covered under the Section 5 preclearance provision, California and New York, about fifty-two percent of white voters supported Obama. In the partially covered state of North Carolina, Obama lost by landslide proportions among white voters, securing only a thirty-five percent share of their votes.⁴¹ While cursory examination of these results would suggest that racially polarized voting may not be deeply entrenched in the partially covered states of California and New York, nothing conclusive can be drawn from those numbers, as voting discrimination against minority voters persists in all three of these states.⁴² Therefore, it is important that, regardless of Obama's overall success in a particular state, courts continue to conduct very careful, jurisdiction-specific analyses of voting patterns in those areas that are subject to future Section 2 suits.⁴³

Available exit polling data reveal some other notable patterns. Obama was clearly the preferred candidate of choice among African Americans, but he enjoyed support from a majority of white voters in only eighteen of the fifty states. Political cohesion among African Americans appears unquestionably high, with over ninety-five percent of African Americans supporting Obama in most states in which reliable data was available.

Table 2. Racially Polarized Voting in the 2008 General Election⁴⁴

State	% of White Vote for Obama	% of Black vote for Obama
Alabama	10	98

⁴⁰ *Cf. Houston v. Lafayette County*, 56 F.3d 606, 612 (5th Cir. 1995) (holding that the district court should have focused for evidence of racially polarized voting on particularized findings instead of broad evidence); *Clark v. Calhoun County*, 21 F.3d 92, 93 (5th Cir. 1994) (remanding because of the district court's lack of particularized findings regarding racially polarized voting); *Teague v. Attala County*, 17 F.3d 796, 798 (5th Cir. 1994) (holding that the lower court should have evaluated statistical evidence concerning racially polarized voting more comprehensively).

⁴¹ A county-by-county analysis of the vote in North Carolina reveals that Obama received fifty percent or more of the overall vote in twenty-two of the state's thirty-eight covered counties. Losses in the non-covered counties were relatively deeper, perhaps illustrating the success of the Voting Rights Act in bringing about greater potential for multi-racial coalitions.

⁴² *See, e.g., United States v. Village of Port Chester*, 2008 WL 190502 (S.D.N.Y. Jan. 17, 2008) (holding that the at-large method of election maintained by officials in Port Chester, N.Y., violated the Section 2 vote dilution provision of the Voting Rights Act and resulted in voting discrimination against Latino voters).

⁴³ *See Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (recognizing that the "ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts").

⁴⁴ Data From CNN Election Center 2008—National Exit Polls, *supra* note 38.

Alaska	33	Not available (—)
Arizona	40	—
Arkansas	30	95
California	52	94
Colorado	50	—
Connecticut	51	93
Delaware	53	99
Florida	42	96
Georgia	23	98
Hawaii	70	—
Idaho	33	—
Illinois	51	96
Indiana	45	90
Iowa	51	93
Kansas	40	—
Kentucky	36	90
Louisiana	14	94
Maine	58	—
Maryland	47	94
Massachusetts	59	—
Michigan	51	97
Minnesota	53	—
Mississippi	11	98
Missouri	42	93
Montana	45	—
Nebraska	39	—
Nevada	45	94
New Hampshire	54	—
New Jersey	49	92
New Mexico	42	—
New York	52	100
North Carolina	35	95
North Dakota	42	—
Ohio	46	97

Oklahoma	29	—
Oregon	57	—
Pennsylvania	48	95
Rhode Island	58	—
South Carolina	26	96
South Dakota	41	—
Tennessee	34	94
Texas	26	98
Utah	31	—
Vermont	68	—
Virginia	39	92
Washington	55	—
West Virginia	41	—
Wisconsin	54	91
Wyoming	32	—

In some instances, courts will reject Section 2 vote dilution claims where the evidence suggests that partisanship, not race, was the preliminary factor shaping voting preferences.⁴⁵ Indeed, some might attribute Obama's victory to widespread disaffection with the Republican Party and a national shift in the political tide that is the direct result of poor economic conditions and a protracted war in Iraq and Afghanistan, among other things. Some claim that this deep-seated disaffection, reflected by historically low approval ratings for George W. Bush, created an opening for a Democratic candidate that benefited Obama's candidacy. Despite these claims, analysis of the 2008 Presidential primary exit polling results reveals that the vast majority of white voters extended their support to Hilary Clinton. This intra-party analysis neutralizes some of the concerns regarding the influence of partisanship and provides another way to assess the influence of race during the 2008 election cycle. Indeed, a majority of white voters extended their support to Clinton during the Democratic primaries, with a majority voting for Obama only in his home state of Illinois, Wisconsin, Virginia, Vermont, Utah, Oregon, and New Mexico. Obama's losses in the primaries among white voters would be considered of landslide proportions voters in twenty-four of the thirty-six states in which exit polling data is available.

⁴⁵ See *Charleston County Litig. (SC)*, 365 F.3d 341, 353 (4th Cir. 2004) (holding that it was not clearly erroneous for the district court to conclude that "even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County"); *Reed v. Town of Babylon*, 914 F. Supp. 843, 877 (E.D.N.Y. 1996) (stating that losses attributable to partisanship voting rather than racial bias would not constitute legally significant bloc voting).

Table 3. Voting Patterns in the 2008 Democratic Presidential Primary Election⁴⁶

STATE	% of White Vote for Obama	% of Black Vote for Obama
Alabama	25	84
Alaska	Not available (—)	—
Arizona	38	79
Arkansas	16	74
California	45	78
Colorado	—	—
Connecticut	48	74
Delaware	40	86
Florida	23	73
Georgia	43	88
Hawaii	—	—
Idaho	—	—
Illinois	57	93
Indiana	40	89
Iowa	33	72
Kansas	—	—
Kentucky	23	90
Louisiana	30	86
Maine	—	—
Maryland	42	84
Massachusetts	40	66
Michigan	—	—
Minnesota	—	—
Mississippi	26	92
Missouri	39	84
Montana	—	—
Nebraska	—	—
Nevada	34	83

⁴⁶ Data From CNN Election Center 2008—National Exit Polls, *supra* note 38.

New Hampshire	36	—
New Jersey	31	82
New Mexico	55	—
New York	37	61
North Carolina	37	91
North Dakota	—	—
Ohio	34	87
Oklahoma	29	—
Oregon	57	—
Pennsylvania	37	90
Rhode Island	37	—
South Carolina	24	78
South Dakota	—	—
Tennessee	26	77
Texas	44	84
Utah	55	—
Vermont	60	—
Virginia	52	90
Washington	—	—
West Virginia	23	—
Wisconsin	54	91
Wyoming	—	—

In addition, data from the 2004 election reveals that, in some states, white voters supported former Democratic presidential candidate, John Kerry, at far higher percentages than they supported Obama in the 2008 general election. Although this evidence is not entirely dispositive, it does suggest that race played a far greater role in shaping voting preferences than partisanship in 2008. Indeed, an analysis of exit polling data reveals that there were notable declines in white voter support for the Democratic presidential nominee between 2004 and 2008—declining from nineteen to ten percent in Alabama, fourteen to eleven percent in Mississippi, and twenty-four to fourteen percent in Louisiana.⁴⁷ Indeed, the fact that Obama performed worse than Kerry among white voters in a number of states, particularly in the Deep South, at a time period marked by a historically unpopular

⁴⁷ See 2004 Election Results, available at <http://www.cnn.com/ELECTION/2004/pages/results/president/>.

presidency,⁴⁸ is strong evidence that race likely played a significant role in shaping preference in these states.

Finally, it is worth noting that Obama had mixed success between the primary and general elections when examined on a state-by-state basis. Such an analysis reveals that Obama won the Democratic primary but then lost the general election in fourteen states⁴⁹; lost the primary but won the general election in twelve states⁵⁰; and lost both the primary and the general election in eight states.⁵¹ Interestingly, there are sixteen states in which Obama was successful during both the primary and general election⁵²; only two of these are states that are subject to Section 5 of the Voting Rights Act—North Carolina and Virginia.

III. DETERMINING THE PROBATIVE VALUE OF PRESIDENTIAL ELECTION DATA

Preliminary analysis of the 2008 election results certainly underscores the differences between those jurisdictions covered under the Section 5 preclearance provision of the Voting Rights Act and those that are not, serving as further validation of the coverage formula devised by Congress to identify those jurisdictions throughout the United States in which voting discrimination has proved to be particularly entrenched. With unquestionably high levels of polarized voting established in the covered jurisdictions, the central question then turns on the role of the 2008 presidential election in Section 2 claims that may be brought in those non-covered jurisdictions where Obama sustained enough white crossover support to help him carry the state. In this section, I argue that there are a number of distinguishing and unique features about the office of president, and the experience of running for it, that significantly distinguish it from other local and state elected positions throughout the country, which are most often the focus of typical Section 2 litigation. Indeed, these unique features illustrate the exceptionalism of the office of president and provide additional bases for continuing to

⁴⁸ Susan Page, *Disapproval of Bush Breaks Record*, USA TODAY (April 22, 2008) (noting results of a 2008 Gallup Poll, which revealed that sixty-nine percent of Americans disapproved of the job Bush was doing; noting that the disapproval rating set a new high for any president since Franklin Roosevelt; and observing that the previous record of sixty-seven percent was reached by Harry Truman in January 1952, when the United States was enmeshed in the Korean War).

⁴⁹ Those states are Alabama, Alaska, Georgia, Idaho, Kansas, Louisiana, Nebraska, Missouri, North Dakota, Montana, Mississippi, South Carolina, Utah, and Wyoming.

⁵⁰ Those states are California, Florida, Indiana, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island.

⁵¹ Those states are Arizona, Arkansas, Kentucky, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia.

⁵² Those states in which Obama was successful both in the primary and general elections include Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, North Carolina, Oregon, Virginia, Vermont, Washington, Washington, D.C., and Wisconsin.

conduct case-by-case analysis and localized assessments of voting patterns in those jurisdictions subject to future Section 2 suits.

In many contexts, presidential contests may not prove to be the best metric of racially polarized voting at the local level, because these elections are unique in form and method of conduct and are easily distinguishable from other kinds of positions or offices generally at issue in Section 2 litigation. Thus, depending on the particular jurisdiction or voting practice at issue, results from any presidential contest, and especially this most recent one, may not, by themselves, provide the most probative evidence of local voting patterns.

In certain instances, Obama's electoral success may stand in stark contrast to an otherwise consistent and sustained pattern of racially polarized voting. In such instances, evidence of Obama's electoral success could be deemed aberrational or inconsistent with prevailing voting patterns.⁵³ Although some courts are reluctant to discount evidence of minority electoral success, in certain communities Obama's success may stand in stark contrast to the fates and experiences of other minority candidates who have run unsuccessfully in the local jurisdiction at issue in a Section 2 suit. In those instances, the singular evidence of minority electoral success in the exogenous 2008 presidential election should not negate litigants' ability to demonstrate racially polarized voting for the endogenous elections. On the other hand, in those regions of the country where Obama was unsuccessful, the data might confirm existing patterns of racially polarized voting. This evidence alone may not be enough to satisfy the third *Gingles* factor, but it may help tilt the scales where other endogenous or other local contests yield evidence of racially polarized voting. In the remainder of this section, I will consider other aspects of the 2008 presidential election that may require further consideration and analysis by political scientists. Those aspects may make it more difficult for litigants to rely upon the 2008 presidential election, without more, to prove or disprove the existence of racially polarized voting in a jurisdiction.

A. *Special Circumstances*

Courts have found liability for Section 2 claims even where there are some examples of minority electoral success resulting from white crossover voting. In limited instances, courts may dismiss these isolated victories as attributable to "special circumstances." Examples of the kind of facts that may be recognized as special circumstances include the absence of an opponent, a candidate's incumbency status, or the utilization of bullet or straight-

⁵³ *Cf., e.g.,* Magnolia Bar Ass'n, Inc. v. Lee, 994 F.2d 1143, 1149 (5th Cir. 1993) (finding that it is "entirely reasonable to permit [a] district court to examine the election results offered by both sides, as well as the circumstances surrounding those elections . . . [to determine] which elections are aberrational").

ticket voting.⁵⁴ Of course, incumbency will play no role in a court's interpretation of Obama's victory, because no incumbent ran in the race.⁵⁵ However, in certain instances, a court might view Obama's exceptional name recognition—attributable largely to his status at the time as the sole black member of the U.S. Senate—as a special circumstance making his success more unusual than the kind of success that a typical minority candidate would likely achieve in a local or state contest in the relevant jurisdiction.⁵⁶ However, courts may view this contention with skepticism, as every presidential candidate arguably enjoys some level of stature and public name recognition—prerequisites that are debatably necessary in order to mount a viable bid for president. Another factor which might be given some consideration as a special circumstance is Obama's status as a biracial candidate, with a father of African descent and a white mother from Kansas.⁵⁷ Imagery from the 2008 election cycle included various photos of Obama alongside members of his family on his mother's side, and this may have been one of a number of factors that made some white voters more inclined to support him.⁵⁸ Moreover, the facts that Obama's father was from outside the Americas and

⁵⁴ See *Gingles*, 478 U.S. at 57 (noting that success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest). *But see* *Bradley v. Work*, 916 F. Supp. 1446, 1469 (S.D. Ind. 1996) (refusing to find special circumstances based on "bare conclusory assertions that [a black candidate] was elected as part of a political deal," without any explanation of the relevance of the "deal").

⁵⁵ Indeed, another factor which made this presidential election historic was that it was the first in forty years in which neither the sitting President's nor sitting Vice President's name appeared on the ballot. For more discussion regarding courts' treatment of incumbency as a special circumstance, see *Anthony v. Michigan*, 35 F. Supp. 2d 989, 1006 (E.D. Mich. 1999) (providing limited examples of successful, non-incumbent African-American candidates who were considered subject to "unique circumstances" but not "special circumstances"); *Clarke v. City of Cincinnati*, 40 F.3d 807, 813 (6th Cir. 1994) (finding that "incumbency plays a significant role in the vast majority of American elections," and "[t]o qualify as a 'special' circumstance . . . incumbency must play an unusually important role in the election at issue").

⁵⁶ *Cf. Brown v. Bd. of Comm'rs of Chattanooga, Tenn.*, 722 F. Supp. 380, 394 (E.D. Tenn. 1989) (recognizing that most African Americans in Chattanooga could not achieve the success of a certain black candidate).

⁵⁷ Barack Obama, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* (1995) (describing both his African lineage on his father's side and his white mother's family, which traces back from Hawaii to a small town in Kansas); Colm Tóibín, *James Baldwin & Barack Obama*, N.Y. REV., Oct. 23, 2008, at 18 ("When Obama was a child, he wrote, 'my father . . . was black as pitch, my mother white as milk.'").

⁵⁸ See Chris Edley, Keynote Address, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 151 (describing a problem he labels "racial exhaustion" in the American public and recounting a conversation concerning Barack Obama's appeal among many white voters, which was attributed to the fact that he did not talk all that much about race, producing a comfort level with his candidacy that was helping to propel him politically); see also Amos N. Jones, *Black Like Obama: What the Junior Illinois Senator's Appearance on the National Scene Reveals about Race in America, and Where We Should Go from Here*, 31 T. MARSHALL L. REV. 79, 80 (2005); *The Identity Card*, TIME, (November 30, 2007) (noting that there were constant reminders of Obama's biracial identity throughout the election cycle and observing that Obama's interracial background puts him at cross purposes and gives him a racelessness that is politically appealing to whites), available at <http://www.time.com/time/magazine/article/0,9171,1689619-2,00.html>.

that Obama was raised in Hawaii, markedly unlike many other black Americans, may also have served as points of demarcation that made some white voters more comfortable and willing to support him, despite being less willing to support minority candidates generally. However, there is no empirical study known to the author that has assessed how white voters perceived Obama or that has looked at how many white voters supported Obama because they did not view him as a traditional black candidate.

Nevertheless, where courts are willing to look to exogenous elections for evidence of racially polarized voting, they should carefully consider (1) whether Obama's success is the product of special circumstances (a question that can only be answered by comparing Obama's candidacy with those of other minority candidates in a given jurisdiction) and (2) whether Obama's success can disprove the existence of polarized voting notwithstanding any special circumstances that might be recognized by a court.

B. Ballot Drop-Off

Comparing voting patterns in presidential contests with patterns that emerge in local and state contests may also be complicated by what political scientists call "ballot drop-off" (also referred to as "voter drop-off"), a phenomenon whereby voters vote for the most prestigious offices at the top of the ballot but not for those offices appearing lower on the ballot.⁵⁹ History has shown that presidential and gubernatorial elections draw the highest levels of voter turnout.⁶⁰ These special factors provide yet other reasons to explain why the presidential election may not be the best gauge of racially polarized voting in a particular jurisdiction. Significant population differences between those who participated in the 2008 presidential election and those who participate in the particular local or state contests that may be at issue in a future Section 2 suit provide additional reasons for a court to give the 2008 election less probative value in any analysis of racially polarized voting.

⁵⁹ THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 67 (1989) (explaining that while "voter falloff is typical, voter 'turnon' occurs when controversial and highly visible issues are placed on the ballot"); *id.* at 66–67 (discussing studies that show a five to fifteen percent drop-off in voter participation, which means that voters come to the polls but fail to vote on candidates or issues at the bottom of the ballot). See also R. Darcy & Anne Schneider, *Confusing Ballots, Roll-Off, and the Black Vote*, 42 W. POL. Q. 347, 348 (1989).

⁶⁰ Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1358–59 (1985) (book review) (observing that the candidate contests with the highest turnouts are presidential and gubernatorial elections); see HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS, 2001–2002*, 13 tbl.1-1 (2001) (observing that since 1980, voter turnout in presidential election years has hovered above fifty percent, while during the same period voter turnout in non-presidential election years (i.e., years in which elections for state offices need share the ballot only with federal congressional or senatorial races) has on only one occasion been as high as forty percent, and typically hovers in the mid-thirties).

C. *The Impact of a Presidential Running Mate*

In addition to considering the special circumstances that may explain Obama's performance as a minority candidate, any empirical analysis of the 2008 presidential race should also take into account the impact of the vice presidential candidate on the level of public support that Obama received in the November general election. Some scholars and analysts have expressed skepticism about whether the naming of a vice presidential nominee affects the prospects of a presidential contender.⁶¹ The general view is that voters cast their ballots for presidential candidates, giving little attention to that candidate's choice of a vice-presidential running mate. However, the 2008 presidential election presents the first opportunity to gauge meaningfully the influence that a non-minority vice presidential candidate can have on a minority presidential candidate's prospects for success. Thus, any analysis of Obama's success should attempt to measure the impact that Joe Biden had on Obama's ability to attract white crossover support.⁶² By contrast, no typical minority candidate running for a city council, a school board, a state legislature, or the United States Senate or House of Representatives has the opportunity to run alongside a running mate who might help that candidate attract a broader level of public support.⁶³

D. *National Fundraising During Presidential Elections*

The ability to fundraise on a national stage is most certainly another feature that distinguishes the experience of presidential candidates from

⁶¹ See, e.g., Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 314 (2003) (arguing that "[v]oters cannot cast a separate vote for vice president, and it is unlikely that the vice presidential candidate's presence will affect the decision to vote for the presidential candidate at the head of the ticket"); David W. Romero, *Requiem for a Lightweight: Vice Presidential Candidate Evaluations and the Presidential Vote*, 31 PRESIDENTIAL STUD. Q. 454, 462 (2001) (finding that vice presidential nominees have little impact on voters' choices in their presidential vote); Nelson Polsby, *A Safe Choice, But Edwards Is on the Sidelines*, FIN. TIMES (U.K.), July 8, 2004, at 19 (concluding that "US public opinion surveys and exit polls have pretty much established that the identity of a vice-presidential candidate has little or no effect on the outcome of a US presidential election").

⁶² A number of commentators opined that Obama needed to select a white male running mate in order to increase his prospects for success in the November 2008 general election. See e.g. Transcript, *Seattle Times Political Caucus: Who would make the best running mate?*, SEATTLE TIMES (July 9, 2008) (quoting Tim Clark of Mountlake Terrace who observed that "Obama needs to pick a white conservative Christian from the south"), available at http://seattletimes.nwsourc.com/html/localnews/2008042301_vpcaucus.html

⁶³ Some might equate the impact of a vice presidential candidate on the prospects of a presidential candidate to the impact that endorsements generally have on any candidate for elective office, or the impact of placing a candidate on a slate where they run alongside other major party candidates. Arguably, the endorsements and slating processes can significantly bolster a candidate's prospects for success. However, vice presidential candidates would appear to have more significance and impact than endorsements, in that the vice presidential candidate exercises actual power and responsibility during the course of a president's term in office. See, generally U.S. CONST. ART. II, § 1, cl. 6; Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703 (1988).

those seeking election to local and state bodies. Federal Election Commission Chairman Michael E. Toner indicated that viable, major party candidates would have needed to raise at least \$100 million by the end of 2007.⁶⁴ Indeed, final estimates revealed that Obama raised nearly \$750 million during the course of the 2008 election cycle, after being the first major party candidate to bypass public financing.⁶⁵ Presidential candidates work to meet these substantial campaign finance expectations by fundraising around the country, strategically focusing on those areas where they may have a loyal and wealthy support base. In the 2008 election, Obama was able to strategically focus on and fundraise among existing and loyal supporters around the country. However, most candidates running for small, local, and state positions are not able to turn to or rely upon outside sources of funding, or strategically fundraise among non-minority voters in other parts of the country who might be willing to extend crossover support. This leverage allowed Obama to institute an unprecedented grassroots mobilization effort. Overall, there is far less national interest in local and state positions, which further suggests the importance of conducting very localized analyses in future Section 2 suits.

IV. DETERMINING THE PROBATIVE VALUE OF PRESIDENTIAL PRIMARIES VIS-À-VIS THE GENERAL ELECTION

When assessing the degree of racial polarization in a given jurisdiction for the purposes of a Section 2 claim, a court must not only determine what weight to attribute to Obama's success; they must also decide the relative significance to be given to the primary and general elections. This balancing test will vary by jurisdiction, given factors such as the nature of partisanship in each jurisdiction and the design of the ballot. A discussion of some of these factors and how they should inform particularized findings regarding racial polarization follows.

A. *Heavy Democratic Registration Rates*

Initially, in jurisdictions with high Democratic registration rates, courts might consider placing more probative value on the racial bloc voting patterns that emerged during the primaries than those that emerged during the general election. A court may determine that real electoral competition occurs at the primary level in such jurisdictions. In communities where the vast majority of voters are Democrats, the general election may merely func-

⁶⁴ David D. Kirkpatrick, *Death Knell May Be Near for Public Election Funds*, N.Y. TIMES, at A1 (Jan. 23, 2007) (quoting Toner observing that “[t]op-tier candidates [were] going to have to raise \$100 million by the end of 2007 to be a serious candidate,” which essentially amounted to what he described as “a \$100 million entry fee”).

⁶⁵ Michael Luo, *Obama Hauls in Record \$750 Million for Campaign*, N.Y. TIMES, at A29 (Dec. 4, 2008).

tion as a “rubber stamp” for Democratic nominees. Straight ticket voting in these communities could further enhance the influence of partisanship during the general election.⁶⁶ Partisanship may be a stronger determinant of how voters in these communities vote in the general election, particularly in jurisdictions in which the opposing party is historically weak and generally fields candidates not deemed viable. Therefore, a court analyzing the results of racial bloc voting in a one-party district might place more value on the voting patterns that emerge during primary contests. In these areas, race is more likely to shape voting preferences during the primaries than during the general elections.

B. DNC Proportional Representation Rules & Complex Primary Rules

Moreover, many of the Democratic presidential primary contests that ultimately produced an Obama victory were conducted in ways that were very atypical of elections generally, with caucuses in some states⁶⁷ and Democratic National Committee (DNC) proportional representation rules in effect throughout the country. As per the DNC rules, the Democratic presidential candidate was selected through a rather complex series of primaries and caucuses⁶⁸ through which delegates were selected for the 2008 Democratic National Convention.⁶⁹ In states where voters selected their delegates for the Democratic National Convention by caucus, votes were cast

⁶⁶ A straight ticket ballot is one that allows the voter to cast a vote for every candidate whose name is printed in the column of a given political party merely by selecting that column. In jurisdictions that use ballots of this nature, a voter who wished to vote a straight ticket could: (1) mark the party circle printed at the top of the party column; (2) mark the voting square appearing to the left of the name of every candidate of the same party; or (3) mark the party circle in addition to marking some or all of the candidates' names appearing in that column. In states that use straight ticket voting in the general election, the general election may be deemed to have little probative value on the question of racially polarized voting, given the premium placed on partisanship. In other words, white voters who cast a vote for Obama by marking the Democratic Party circle cannot necessarily be considered crossover voters to the same degree as white voters who chose to vote for Obama specifically.

⁶⁷ For strong analysis regarding the role of caucuses in helping propel Obama to success during the primary election, see Steve Kornacki, *Where Would Obama Have Been Without Caucuses?*, THE NEW YORK OBSERVER (May 16, 2008), <http://www.observer.com/2008/where-would-obama-have-been-without-caucuses> (last visited Dec. 20, 2008).

⁶⁸ In order to secure the nomination at the convention, the candidate had to receive at least 2117 votes from delegates (a simple majority of the total 4233 delegate votes). Delegates, not voters themselves, decided the nomination at the Convention. Ultimately, delegates from forty-eight U.S. states, the District of Columbia, and Puerto Rico had a single vote each, while delegates from the protectorates and from Florida and Michigan had one-half vote each. See generally Democratic Nat'l Comm., Delegate Selection Rules for the 2008 Democratic National Convention (2006), available at http://www.demconvention.com/a/2007/03/delegate_select.html.

⁶⁹ *Id.* Pledged delegates were allocated according to two main criteria: (1) the proportion of votes each state gave to the Democratic candidate in the last three presidential elections, and (2) the percentage of votes each state has in the Electoral College. In addition to delegates, each state was allotted some number of super delegates who were free to vote for any candidate of their choice at the Convention.

by voice in public.⁷⁰ Additionally, DNC proportional representation rules resulted in tremendous variance in the weighting of votes, which determined how delegates were to be selected and distributed for purposes of participating in the National Convention.⁷¹

The complex rules and mechanisms governing the selection of a Democratic presidential candidate are unlike the relatively simple direct voting methods used to elect candidates for the vast majority of other local and state offices. These facts would also seem to complicate use of traditional methodologies to measure racially polarized voting during the presidential primaries, and they provide yet another reason to give the 2008 presidential election less probative value in any localized analysis of racially polarized voting. However, the complexity of the system for selecting a candidate may not necessarily warrant altogether discounting presidential primary results, but may instead warrant placing more weight on exit polling data—which best reflect voting preferences—in assessing the existence of racially polarized voting.

C. Closed Primaries

A number of states conduct closed primary elections. Closed primaries restrict voters from voting for candidates outside of their party of registration and thereby eliminate the likelihood that white voters in a jurisdiction (whether majority black or majority white) would cross party lines to support a candidate from another party. Thus, closed primaries decrease the significance of partisanship by essentially neutralizing this as a factor in a voter's selection of a candidate. Courts may be inclined to place greater significance on the racially polarized voting analysis yielded from closed primary states.⁷²

⁷⁰ Some political scientists braced themselves for what has come to be known as the Bradley effect—a phenomenon by which white voters' actual levels of support for black candidates, once they go behind the curtain to cast a secret ballot, prove far lower than the levels of support they reported to pollsters. To date, there has been little evidence that the Bradley effect materialized during the 2008 election cycle, as there was general consistency between the results of pre-election polls and Election Day outcomes.

⁷¹ See Richard Hasen, "*Too Plain For Argument?*" *The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NORTHWESTERN UNIV. L. REV. 2009–10 (2008) (observing that the hotly contested 2008 presidential primary election for the Democratic Party nomination was likely to lead to future calls for reform because of critics' arguments that the caucus system used in some states is unfair and poorly administered; that the unequal weighting of votes for purposes of delegate selection violates democratic principles; and that the fate of the Democratic Party presidential nomination should not turn on the votes of unelected "superdelegates."); William G. Mayer & Andrew E. Busch, *Can the Federal Government Reform the Presidential Nomination Process?*, 3 ELECTION L.J. 613, 613–14 (2004).

⁷² Further complicating this analysis is the fact that in some states, including Oklahoma, Arkansas, Louisiana, and Tennessee, many more voters voted Republican in the 2008 general election than in 2004, indicating that Democrats may have crossed party lines in these states at exceptionally high rates. One explanation for this may be particularly acute racial polarization in these jurisdictions, where white voters were unwilling to extend support to Obama during the general election, perhaps because of race. See Shan Carter et al., *Electoral Shifts*, N.Y.

Again, only a careful, case-by-case inquiry can help determine what probative value, if any, the 2008 presidential election should have in any future analyses of racially polarized voting. A fact-intensive inquiry is particularly necessary because, in certain instances, the presidential primary and presidential general elections may have been conducted under very different factual circumstances. For example, in states that conduct closed primary contests, where the impact of partisanship may be deemed somewhat neutralized, racial bloc voting patterns in the primaries may be particularly probative. However, in closed primary states where minority voters disproportionately comprise the electorate of a particular party, the general election may present a better opportunity to gauge racial voting patterns among non-minority voters.⁷³ In short, it is clear that there are no obvious rules shaping the role that 2008 presidential election data should have on assessments of racially polarized voting, and political scientists will need to scrutinize Obama's November 2008 victory carefully to determine what role partisanship played vis-à-vis race in shaping voters' choices.

CONCLUSION: ANALYZING RACIAL POLARIZATION OUTSIDE THE CONTEXT
OF THE 2008 ELECTION

What did Barack Obama's decisive victory in the 2008 election have to say about racial polarization in American politics? Most certainly, Obama's victory provides strong reason to believe that we are moving towards a more open and equal Democratic process. However, we have not yet moved beyond the problem of race, as careful analysis of the 2008 presidential election outcome reveals notable patterns of racially polarized voting, particularly in those jurisdictions covered by the special Section 5 provision of the Voting Rights Act.

Indeed, race proved to be a factor throughout the 2008 presidential election cycle—at some times sparking interesting debate and hopeful discussion about signs of racial progress, and at other times serving as a stinging reminder of the enduring legacy of racism and voting discrimination. Alongside the victory of the nation's first African-American president stands significant evidence that both racial polarization and voting discrimination persist in many communities throughout this country. The weight of this evidence is not trumped by the outcome of the 2008 presidential election cycle alone. While this most recent presidential election suggests that, in some areas of the country, discriminatory voting patterns may not be as entrenched as in others, there is a much longer record of evidence that voting discrimination continues to stand as a significant barrier to equal political participation.

TIMES, Nov. 5, 2008, http://www.nytimes.com/interactive/2008/11/05/us/politics/20081104_ELECTION_RECAP.html (last visited Dec. 18, 2008).

⁷³ In a number of states in the South, African Americans make up nearly half of registered Democratic voters. Juan Williams, Op-Ed., *The Race Issue Isn't Going Away*, WALL ST. J., Aug. 4, 2008, at A13.

Indeed, strong evidence was presented to Congress during the recent 2006 reauthorization of the expiring provisions of the Voting Rights Act that significant levels of racially polarized voting still exist in the covered jurisdictions, particularly in the Deep South.⁷⁴ This evidence—which includes judicial findings, scholarly studies, expert analyses, exit polls, and personal testimonies—illustrates that high levels of polarized voting remain a significant obstacle, and that the protections afforded by Section 5 and other key provisions of the Voting Rights Act, such as Section 2, remain necessary. Thus, Obama’s electoral success in the 2008 presidential election should not, without more, serve as a basis for precluding or defeating litigants seeking to demonstrate the extent of racially polarized voting in future Section 2 Voting Rights Act litigation.

⁷⁴ For a general discussion of the legislative history of the 2006 Section 5 reauthorization, see Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385 (2008); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007). For information concerning evidence of racially polarized voting presented to Congress during the reauthorization, see *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 49–50 (2005) (statement of Richard Engstrom, Professor, The University of New Orleans) (sharing findings from his expert analysis of elections in Louisiana between 1991 and 2002; concluding that seventy-eight of ninety electoral contests revealed high levels of racial divisions in candidate preferences); *id.* at 4–6 (statement of Laughlin McDonald, Director, ACLU Voting Rights Project) (recounting a Section 2 case against Charleston County, South Carolina, concerning their at-large election system, and findings from a 2002 three-judge court decision, concerning statewide redistricting and concluding that “[t]he disturbing fact of racially polarized voting has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree in all regions of the State.”).

