Causation or Correlation? The Impact of LULAC v. Clements on Section 2 Lawsuits in the Fifth Circuit

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NOTE
CAUSATION OR CORRELATION? THE IMPACT OF LULAC v. CLEMENTS ON SECTION 2 LAWSUITS IN THE FIFTH CIRCUIT

Elizabeth M. Ryan*

Under section 2 of the Voting Rights Act, illegal vote dilution exists when an electoral standard, practice, or procedure results in a denial or abridgement of the right to vote on account of race or color. Plaintiffs demonstrate vote dilution by introducing evidence regarding a variety of objective factors, including whether voting in the jurisdiction in question is polarized along racial lines. In 1993, the Fifth Circuit adopted a new standard for section 2 plaintiffs trying to prove racially polarized voting. The Fifth Circuit held that demonstrating a mere correlation between race and vote was insufficient to establish racially polarized voting when some factor other than race might explain an apparent divergence in voter preferences. Instead, plaintiffs must show that race-based considerations caused the polarized voting pattern. Many commentators lamented the decision and predicted that the new standard represented the death knell for section 2 lawsuits in the Fifth Circuit. This Note examines the history of section 2 as amended and concludes that the Fifth Circuit's standard is inconsistent with congressional intent and misconstrues Supreme Court precedent. This Note reviews Fifth Circuit case law applying the new standard and finds that it may be outcome determinative when applied, but that few cases actually turn on the application of the standard, which suggests that its impact has been less pervasive than commentators feared.

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INTRODUCTION

In 1993, the Fifth Circuit issued an opinion that reinvented plaintiffs’ burden under section 2 of the Voting Rights Act of 1965 ("VRA"). League of United Latin American Citizens v. Clements ("LULAC") answered a question left unresolved by the Supreme Court—whether a vote dilution claimant must show racial bias among voters to be successful—in the affirmative. Vote dilution "is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group." The LULAC court demanded an express inquiry into the causal relationship between the challenged electoral scheme and the alleged vote dilution. Statistical evidence indicating a correlation between race and voting preferences no longer sufficed to prove racial bloc voting if some factor other than race, such as party affiliation, could also explain the divergence.

Aggressively applied, the LULAC standard had the potential to radically alter section 2 litigation because it inserted an individual-intent element into an analysis that previously focused on effect. The Fifth Circuit required direct evidence revealing a race-based explanation for voters’ choices at the

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1. Section 2 provides, in part:

   No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....


2. 999 F.2d 831 (5th Cir. 1993) (en banc).

3. See infra text accompanying notes 54–62 (discussing Thornburg v. Gingles, 478 U.S. 30 (1986)).

4. Chandler Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 21, 22 (Chandler Davidson & Bernard Grofman eds., 1994); see also Gingles, 478 U.S. at 46 n.11 ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.").

5. See infra Section II.C.

6. See infra Section II.C.

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polls, rather than general evidence of starkly divergent candidate preferences among white and non-white voters. In short, the LULAC court rejected the notion that a mere correlation between race and vote could demonstrate legally significant racial bloc voting. Instead, the court demanded evidence of the causes behind those voting patterns.

Many commentators responded to the decision with urgent criticism, arguing that the opinion gutted the VRA and imposed an "unbearable burden on plaintiffs to defeat every possibility other than race for denial of their right to vote." The LULAC court's dissenters were more precise, noting that the majority's holding "eviscerated section 2 of the VRA in communities where there is any measurable crossover voting by whites." These critics argued that the Fifth Circuit's definition of racial bloc voting was incompatible with Supreme Court precedent and congressional intent.

When applied, the LULAC standard may be outcome determinative. Fifth Circuit case law reveals that most plaintiffs fail to present sufficient evidence of racially motivated voting patterns to prove racial bloc voting under the LULAC standard, a crucial element of the section 2 vote dilution analysis. As other circuits followed the Fifth Circuit's lead, a similar trend emerged around the country: when courts adopt a LULAC-like causation requirement—inquiring into the causes of polarized voting patterns—plaintiffs struggle to make out section 2 claims.

Evaluating case law from the Fifth Circuit is instructive because LULAC announced a particularly stringent causation rule with sweeping implications for plaintiffs, although the circuit subsequently refined the standard to impose a narrower, yet still significant, burden. But the relationship between plaintiff losses and the LULAC causation principle is not entirely clear: Are they merely correlated, or does an obligation to prove that racial considerations caused polarized voting fatally impair a vote dilution lawsuit? In the fourteen years following

8. See infra Section II.C. Typically, non-white voters are the minority population that invokes section 2 to remedy vote dilution. This Note uses this white/non-white terminology for the sake of simplicity, but section 2 also protects white voters when they are the minority population suffering vote dilution. E.g., United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007).


12. See infra Part III.


14. See infra Section III.A.
the *LULAC* court’s opinion, plaintiffs in the Fifth Circuit won about half as many section 2 lawsuits as they had between 1982 and 1993, but a variety of factors could reasonably explain this trend. In fact, most plaintiff losses in the years following *LULAC* did not clearly turn on the question of causation. In many cases, the causation issue was absent entirely from the court’s analysis.

Nevertheless, a review of published section 2 opinions from the Fifth Circuit reveals a striking pattern and suggests that a stringent application of the *LULAC* standard threatens the framework Congress constructed for section 2 lawsuits. In cases where the court expressly addressed causation, plaintiffs won only if the record before the court was silent on causation. In this way, even if it has not changed the calculus of every vote dilution case in the circuit, the *LULAC* causation standard inflicts a greater burden on plaintiffs than Congress imposed and than the Supreme Court endorsed.

Part I of this Note introduces the VRA and tracks the history and development of racially polarized voting as an element of a section 2 vote dilution claim. Part II argues that the standard enunciated in *LULAC* is inconsistent with the purpose and intent of the 1982 Amendments to the VRA. It undermines a congressional compromise that struck a balance between competing interests: a vote dilution standard that neither required plaintiffs to produce evidence of discriminatory intent nor amounted to guaranteed proportional representation. Part II also explores Supreme Court case law interpreting the 1982 Amendments and concludes that the *LULAC* majority misconstrued Supreme Court precedent. Part III reviews the decisions published by the courts in the Fifth Circuit in the years since *LULAC*, demonstrating that the *LULAC* standard, when invoked, frustrates minority plaintiffs’ success under section 2 by demanding evidence that Congress and the Supreme Court did not require. The total number of cases that turned on the application of this standard, however, is quite small, which suggests that the issue of causation has had a less pervasive effect than some commentators initially anticipated.

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15. This Note considers cases decided through 2007.
16. See infra Part III.
17. See infra Part III.
18. See infra Section II.A (discussing the 1982 Amendments to the VRA).
19. See infra Section III.B. One of the Fifth Circuit’s refinements to the *LULAC* standard established that the defendant bore the initial burden of raising the causation issue by offering a non-race-based explanation for racially divergent voting patterns. If the defendant failed to introduce such evidence, the plaintiff could establish racially polarized voting simply by demonstrating a correlation between race and vote. See Teague v. Attala County, 92 F.3d 283, 290 (5th Cir. 1996); see also infra Section III.A.
I. BACKGROUND

Congress enacted the VRA\(^{20}\) "to banish the blight of racial discrimination in voting."\(^{21}\) Authority for its passage rests in Section 2 of the Fifteenth Amendment.\(^{22}\) Laws explicitly prohibiting black citizens from voting had been unconstitutional since the states ratified the Fifteenth Amendment in 1870, but state and local governments employed alternate techniques to impede access to the polls, usually by restricting black voter registration.\(^{23}\) Congress passed the VRA after the Department of Justice concluded that individual enforcement actions to enjoin these discriminatory practices were inadequate.\(^{24}\)

A. Early Implementation of the VRA

The VRA's initial purpose was to eliminate persistent barriers to the minority franchise, but Congress and the Supreme Court understood that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."\(^{25}\) In response to successful minority registration efforts, local political jurisdictions adopted an array of dilution schemes to minimize the impact of minority votes.\(^{26}\) These schemes included reclassifying elected posts as appointed posts, gerrymandered election boundaries, replacing single-member-district systems with at-large elections, and imposing majority runoff requirements where the previously existing plurality system had enabled minority victories.\(^{27}\) By the 1970s, plaintiffs were using the VRA to successfully challenge these practices.\(^{28}\)

During the 1970s, courts presented with vote dilution cases typically considered a series of evidentiary factors to determine whether electoral schemes had "invidious effects."\(^{29}\) Two key cases\(^{30}\) established this multifactor framework by articulating what came to be known as the "White-Zimmer

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22. U.S. CONST. amend. XV, § 2 (providing Congress the power to enforce the Amendment "by appropriate legislation"); Katzenbach, 383 U.S. at 308.
24. Id.
25. Id. at 6 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969)).
26. Id.
27. Id.
28. See Davidson, supra note 4, at 22.
29. Whitcomb v. Chavis, 403 U.S. 124, 177 (1971) (Douglas, J., dissenting in part and concurring in the result in part); see also White v. Regester, 412 U.S. 755, 766-70 (1973) (surveying the district court's review of the evidence and affirming its conclusion that the political process in two Texas counties was not equally open to blacks and Mexican-Americans).
standard." Through this inquiry, courts sought to determine whether the "totality of circumstances" indicated that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." This standard did not require proof of discriminatory intent.

In 1980, the Supreme Court's decision in *City of Mobile v. Bolden* provided the impetus for a new phase in this nation's voting rights history, spurring Congress to amend section 2 of the VRA. In *Bolden*, the Court concluded that, without evidence of purposeful, official discrimination, the multifactor evidentiary test embraced by federal courts during the 1970s was insufficient to sustain a voting rights claim under the Fourteenth or Fifteenth Amendment. The Court required plaintiffs to prove intentional, official discrimination. The *Bolden* standard, requiring proof of purposeful discrimination, imposed a greater burden on plaintiffs than the White-Zimmer standard had.

**B. Reaffirming the "Effects Test"**

Congress responded quickly, amending the VRA in 1982 to explicitly authorize a results-based inquiry, akin to the White-Zimmer test of the previous decade. The amended law has been a powerful tool for minority voters seeking to remedy racially discriminatory voting practices. While the original statutory text mirrored the language of the Fifteenth Amendment, section 2 of the VRA now takes a two-part approach. Paragraph (a) states the rule, and paragraph (b) defines its scope:

37. *Id.* at 67–68; *S. REP. No. 97-417*, at 24.
38. *See, e.g.*, *S. REP. No. 97-417*, at 16; Davidson, supra note 4, at 34 ("The intent requirement seemed to be the straw that would break the camel’s back in voting rights cases, where the load borne by the plaintiffs’ camel was already heavy.").
40. *See Katz et al., supra note 13*, at 649–50.
41. As enacted in 1965, section 2 stated: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Voting Rights Act of 1965*, *Pub. L. No. 89-110*, § 2, 79 Stat. 437, 437 (current version at 42 U.S.C. § 1973(a) (2000)); see also *Bolden*, 446 U.S. at 60–61 ("[T]he . . . legislative history of § 2 makes
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

(b) A violation of subsection (a) . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.42

The crucial change in language is the focus on results, which clarifies that the language "on account of race or color" does not "connote any required purpose of racial discrimination" but rather means "with respect to race or color." Congress intended this language to return voting rights jurisprudence to its pre-Bolden form.43 The Senate Committee Report accompanying the legislation was explicit:

In our view, proof of discriminatory purpose should not be a prerequisite to establishing a violation of Section 2 of the Voting Rights Act. Therefore, the Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process . . . .45

The Report restated the results-oriented White-Zimmer test as the appropriate standard for judging vote dilution claims under section 2, identifying nine factors for courts to consider.46 Evaluating these factors enables courts

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43. S. REP. No. 97-417, at 28 n.109 (internal quotation marks omitted).
45. S. REP. No. 97-417, at 16. The Senate Report focused on explaining why it rejected the Supreme Court's intentional official discrimination test, but its language embraced a broader vision for the results test. For example, the Senate Report declared that "the specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." Id. at 28 (emphasis added); see infra Section II.A (discussing Congress's rejection of the Bolden intent test).
46. The nine factors are:

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;
to assess the "total circumstances of the local electoral process," which in
turn permits them to determine whether minority voters enjoy an equal op-
portunity to participate in the political process.\textsuperscript{47} One of the nine factors
considers the extent to which voting in the community is racially polarized,\textsuperscript{48}
and with Congress's rejection of the \textit{Bolden} official-intent test the debate
turned to whether, for purposes of section 2, racially polarized voting incor-
porated an individual discriminatory-intent element.

In 1986, the Supreme Court considered the amended section 2 for the
first time. In \textit{Thornburg v. Gingles}, the Court divided on some key points,
but a majority embraced the \textit{White-Zimmer} totality of circumstances test and
created an additional threshold test for lawsuits arising under section 2.\textsuperscript{49} To
pass the threshold, plaintiffs must show the following: (1) the minority
group bringing the challenge "is sufficiently large and geographically comp-
act to constitute a majority in a single-member district"; (2) the minority
group "is politically cohesive"; and (3) "the white majority votes sufficiently
as a bloc to enable it . . . usually to defeat the minority's preferred can-
didate."\textsuperscript{50} If the plaintiffs meet the three preconditions, the court then proceeds
to a totality of circumstances analysis, guided by the \textit{White-Zimmer} factors.

Both the second and third prongs of the \textit{Gingles} test explore whether
voting is racially polarized: the second prong considers whether the minority
group votes cohesively in favor of certain candidates; the third considers
whether majority voters vote cohesively in opposition to those candidates.\textsuperscript{51}
Racially polarized voting "exists where there is a consistent relationship

\begin{itemize}
\item 3. the extent to which the state or political subdivision has used unusually large election dis-

\item 4. if there is a candidate slating process, whether the members of the minority group have been
denied access to that process;

\item 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;

\item 6. whether political campaigns have been characterized by overt or subtle racial appeals;

\item 7. the extent to which members of the minority group have been elected to public office in the
jurisdiction[;]

\item[8.] whether there is a significant lack of responsiveness on the part of elected officials to the
particularized needs of the members of the minority group[; and]

\item[9.] whether the policy underlying the state or political subdivision's use of such voting quali-
fication, prerequisite to voting, or standard, practice or procedure is tenuous.
\end{itemize}

\textit{S. REP. No. 97-417}, at 28–29 (footnotes omitted).

\textsuperscript{47} \textit{Id. at 16; see also Gingles}, 478 U.S. at 35–36.

\textsuperscript{48} \textit{S. REP. No. 97-417}, at 29.

\textsuperscript{49} \textit{See Gingles}, 478 U.S. at 48–51.

\textsuperscript{50} \textit{Id. at 50–51}.

\textsuperscript{51} Katz et al., \textit{supra} note 13, at 664.
between [the] race of the voter and the way in which the voter votes.\textsuperscript{52} Although the \textit{Gingles} preconditions were originally conceived to apply to challenges to multi-member districting schemes, the Supreme Court has since applied them to cases challenging single-member districts as well.\textsuperscript{53}

\textbf{C. Deciphering Gingles—Causation Versus Correlation}

In \textit{Gingles}, despite adopting the threshold test discussed above, the Supreme Court failed to obtain a clear majority in support of a mechanism or standard for identifying legally significant racially polarized voting, a critical component of the threshold test and of the \textit{White-Zimmer} multifactor analysis.\textsuperscript{54} A majority agreed that “in general, a white bloc vote that normally will defeat the combined strength of minority support plus white ‘crossover’ votes rises to the level of legally significant white bloc voting.”\textsuperscript{55} But the Justices were conflicted about whether the forces driving polarized voting patterns were relevant to this finding. The defendants argued that statistical analysis revealing a correlation between race and vote was insufficient to demonstrate racially polarized voting because it failed to evaluate the impact of other variables—for example, class, party, education, and age—on voter preference.\textsuperscript{56} Justice Brennan, joined by three other Justices,\textsuperscript{57} concluded that a correlation between race and voting preference satisfied the section 2 racially polarized voting standard; the causes behind

\textsuperscript{52} \textit{Gingles}, 478 U.S. at 53 n.21 (alteration in original) (internal quotation marks omitted).

\textsuperscript{53} See Voinovich v. Quilter, 507 U.S. 146, 157-58 (1993); Growe v. Emison, 507 U.S. 25, 39-40 (1993). In a multi-member districting system, more than one candidate for a seat on a governmental body, such as city council, is elected from a single district. A multi-member districting system is similar to an at-large system, in which “all the contested seats on a governmental body . . . are filled by voters in the jurisdiction at large.” Chandler Davidson & Bernard Grofman, Editors’, \textit{Introduction, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990}, supra note 4, at 3, 7. Under a single-member districting scheme, the jurisdiction “is divided into geographical districts, and voters in each district . . . are limited to a vote for a single candidate running to represent their district.” Id.

\textsuperscript{54} Compare \textit{Gingles}, 478 U.S. at 74 (Brennan, J., plurality opinion) (“[T]he legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.”), \textit{with id.} at 83 (White, J., concurring) (rejecting Brennan’s determination that “the race of the candidate is irrelevant” to the polarized voting inquiry but not elaborating on a more appropriate standard), \textit{and id.} at 100 (O’Connor, J., concurring) (“Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.”).

\textsuperscript{55} Id. at 56 (majority opinion).

\textsuperscript{56} \textit{Id.} at 61–62 (Brennan, J., plurality opinion); Scott-McLaughlin, \textit{supra} note 9, at 957 n.58.

\textsuperscript{57} Justices Marshall, Blackmun, and Stevens joined this portion of Justice Brennan’s opinion. \textit{Gingles}, 478 U.S. at 34.
the correlation were irrelevant. Justice O'Connor, with an additional three Justices, rejected Justice Brennan's rigid three-part threshold test and his view that cause was always irrelevant under section 2. In her view, evidence explaining why white votes diverged from minority votes could be relevant in some circumstances. Justice White, who joined Justice Brennan's opinion for the Court but not his discussion of what evidence supported a finding of racially polarized voting, filed a one-paragraph concurring opinion explaining that he disagreed with Justice Brennan's conclusion that the race of the candidate was always irrelevant under section 2. Although many voting rights attorneys welcomed the Gingles threshold test because it "streamlined the evidentiary requirements for minority plaintiffs," the lower courts responded to the Supreme Court's internal indecision by adopting varied interpretations of the Gingles test and imposing varied standards. Some courts sought evidence revealing the causes behind racially polarized voting, whereas others shied away from this element.

The Fifth Circuit's case law is illustrative because it presents a transformation over time culminating in one of the federal judiciary's strongest statements on the role of causation in the racial bloc-voting inquiry. A

58. Id. at 62 (Brennan, J., plurality opinion) ("For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent."); id. at 63 ("[U]nder the 'results test' of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.").

59. Chief Justice Burger and Justices Powell and Rehnquist joined Justice O'Connor's concurrence. Id. at 83 (O'Connor, J., concurring).

60. See supra text accompanying note 50 (describing Justice Brennan's three-part test).

61. Gingles, 478 U.S. at 100 (O'Connor, J., concurring) ("Evidence that a candidate preferred by the minority group . . . was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.").

62. Id. at 82-83 (White, J., concurring).

63. Davidson, supra note 4, at 35; see also Bernard Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?, 14 CARDOZO L. REV. 1237, 1240 (1993).

64. See Katz et al., supra note 13, at 660-75 (surveying courts' applications of the three Gingles factors). Some courts responded to the Court's opinion with humor. See, e.g., League of United Latin Am. Citizens v. Midland Indep. Sch. Dist., 648 F. Supp. 596, 597 (W.D. Tex. 1986) ("[T]he court has been requested to 'Gingleize' (pronounced gin-gu-eyz) it previous decision. At the outset, the Court recalls a song fairly popular in the late 30's or early 40's that went in part as follows: I've got spurs that jingle, jangle, 'Gingle', I'm going merrily along/And they say 'Oh ain't you glad you're single' And that song's not so very far from wrong." (paragraphing altered)), aff'd 812 F.2d 1494 (5th Cir. 1987).

65. See Katz et al., supra note 13, at 670-71; Scott-McLaughlin, supra note 9, at 960-77 (exploring different judicial responses to the conflicting opinions presented in Gingles); Sushma Soni, Note, Defining the Minority-Preferred Candidate Under Section 2, 99 YALE L.J. 1651, 1657-60 (1990) (exploring various approaches to identifying the minority-preferred candidate, a critical element of the racial bloc-voting inquiry).

survey of section 2 lawsuits in the Fifth Circuit reveals that courts in the circuit were initially uncertain of the precise parameters of the Gingles racial bloc-voting test. In some cases, courts relied on evidence indicating a correlation between the voter's race and choice of candidate, and remained silent on the question of causation. In these instances, the court typically accepted statistical evidence demonstrating divergent voting patterns by race—for example, evidence that minority candidates received consistent electoral support in primarily minority precincts and minimal support in primarily white precincts. In at least one case, a panel of the Fifth Circuit admitted its uncertainty about the appropriate standard. By the early 1990s, the Fifth Circuit began to settle on a version of the approach Justice O'Connor described in Gingles. The court required "an inquiry into the causal relationship between the challenged practice and the lack of electoral success by the protected class voters."

This causation versus correlation debate came to a head with the Fifth Circuit's en banc decision in LULAC, where the court held that when "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens," plaintiffs' section 2 claims must fail. The court found that where partisan politics could explain minority losses, section 2 had no place because the VRA protects racial minorities, not political parties. The Fifth Circuit expressly rejected the district court's conclusion that "plaintiffs need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting" under the third prong of Gingles. Rather, the district court was wrong to

to "Racially Polarized Voting", 65 Miss L.J. 345, 382 (1995) (distinguishing the racial animus model presented in LULAC from approaches adopted by other circuits).

67. While causation is relevant to both the second and third Gingles preconditions, the debate played out most clearly where courts applied Gingles's white bloc-voting prong.

68. See, e.g., Campos v. City of Baytown, 696 F. Supp. 1128, 1134 (S.D. Tex. 1987) (finding the third prong of Gingles satisfied based on: (1) evidence that "in all city council races in which a minority candidate ha[d] run, the minority candidate ha[d] lost"; (2) evidence of a "correlation between votes for minority candidates and proportion of minority population"; and (3) data analysis indicating the degree of "white support for minority candidates ranging from 2% to 41%"); aff'd 840 F.2d 1240 (5th Cir. 1988); Midland Indep. Sch. Dist., 648 F. Supp. at 601-03, 607 (relying on a correlative showing of voting preferences by race to conclude that voting in the district was racially polarized).


70. Overton v. City of Austin, 871 F.2d 529, 538 (5th Cir. 1989) (noting the uncertainty surrounding "what constitutes evidence of legally significant, racially polarized voting" and affirming the district court's methodology while acknowledging that "it is not the only permissible way to approach § 2 claims").

71. Salas v. Sw. Tex. Junior Coll. Dist., 964 F.2d 1542, 1554 (5th Cir. 1992). The court noted that the third Gingles precondition "aims at determining whether it is racial voting patterns, along with other objective factors, rather than some other set of causes, that explain the lack of electoral success of voters within the protected class." Id.


73. See infra Section II.C.

74. LULAC, 999 F.2d at 850.
exclude evidence attributing polarized voting patterns to nonracial causes, such as party affiliation. 75 At the very least, plaintiffs must be prepared to "negate partisan politics as an explanatory factor for the consistent defeat of their preferred candidates." 76

The Fifth Circuit did not explain exactly what a plaintiff had to prove in order to satisfy the Gingles racial bloc-voting standard, 77 but after LULAC it appeared that statistical evidence of racially divergent voting was no longer sufficient. 78 The decision may have raised more questions than it answered. The court did not decide whether plaintiffs must affirmatively disprove all possible nonracial causes behind divergent voting patterns. 79 Nor did it explain precisely where the evidentiary burdens lay or how plaintiffs might rebut suggestions that partisanship drove voting preferences. 80 The opinion even left open the possibility that minority plaintiffs may have to prove racial animus in the electorate in order to demonstrate legally significant white bloc voting. 81

II. LULAC: THE NEW INTENT REQUIREMENT

Under the LULAC majority's conceptualization of the Gingles threshold test, minority plaintiffs must be able to demonstrate that partisan affiliation is not the cause underlying racial polarization in voting and resulting minority electoral losses. 82 The flaw in the court's construction is not that it requires courts to consider the causes underlying minority-preferred candidates' persistent electoral losses. Rather, it incorrectly isolates this causation element from the complete section 2 vote dilution analysis. 83 Given persistent correlations between race and vote, 84 isolating the causation inquiry from a broader analysis of the "local political landscape" 85 and requiring

75. Id.
76. Id. at 902 (King, J., dissenting); see also Pamela S. Karlan & Daryl J. Levinson, Why Voting is Different, 84 Calif. L. Rev. 1201, 1223 (1996).
77. See O'Donnell, supra note 66, at 369.
78. See LULAC, 999 F.2d at 850.
79. Id. at 860 ("[W]e need not resolve the debate today. Whether or not the burden of the plaintiffs to prove bloc voting includes the burden to explain partisan influence, the result is the same. This is so even if the partisan voting is viewed as a defensive parry."); see also Teague v. Attala County, No. CIV.A.1:91CV209-D-D, 1995 WL 1945393, at *7 (N.D. Miss. Mar. 20, 1995) (concluding that plaintiffs failed to show racially polarized voting because the record was void of any discussion of the potential impacts of factors other than race), rev'd, Teague v. Attala County, 92 F.3d 283 (5th Cir. 1996).
80. LULAC, 999 F.2d at 859–60, 860 n.27; Scott-McLaughlin, supra note 9, at 963.
81. LULAC, 999 F.2d at 860; O'Donnell, supra note 66, at 369.
82. See LULAC, 999 F.2d at 861; O'Donnell, supra note 66, at 374.
84. See infra notes 219–222 and accompanying text.
85. LULAC, 999 F.2d at 912 (King, J., dissenting).
plaintiffs to establish that partisanship is not the "true" cause of polarized voting enhances the Gingles threshold burden. In this way, LULAC disrupts the balance that Congress constructed to preserve section 2 as an effective tool against vote dilution. This Part argues that the LULAC court's holding contravenes the 1982 Amendments to the VRA by effectively imposing a stand-alone intent test in the racial bloc-voting prong of the vote dilution analysis. Section II.A analyzes the 1982 Amendments and explains the vote dilution standard Congress endorsed: a totality of circumstances analysis through which courts collect evidence to support an implicit inference about causation without requiring an express or independent causation analysis. Section II.B argues that in Gingles, the Supreme Court respected congressional intent and sustained this standard. Finally, Section II.C demonstrates the extent to which the LULAC majority departed from this precedent.

A. Congressional Intent and the 1982 Amendments

Although Congress's attention in 1982 was focused on reversing the official discrimination standard that the Supreme Court had adopted in Bolden, the plain language of the statute and the committee report accompanying the amendments demonstrate that an individual-intent standard of the sort adopted by the LULAC majority is also inconsistent with congressional intent. Amending section 2, Congress was guided by an awareness of the subtlety and complexity of the issues raised in vote dilution cases and by the underlying purpose of the VRA. Congress expressly targeted electoral systems that "result[ed] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." The committee report accompanying the amendments stressed that the results test codified in the amendments was consistent with the original legislative intent behind the VRA and with judicial precedent prior to Bolden. It also explained the rationale behind Congress's decision to reject the Bolden standard in favor of the results test, which did not require evidence of discriminatory purpose, but also did not guarantee proportional representation based on race. As Justice Brennan recognized in Gingles, many of the reasons that Congress identified for rejecting the Bolden official-intent test apply equally to a racially polarized voting standard that requires plaintiffs to prove individual voter intent.

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86. Id. at 901 ("[T]he majority has distorted Congressional intent, rejected Supreme Court precedent, and completely altered the focus of the section 2 inquiry.").
89. See S. REP. No. 97-417, at 16; see also supra notes 44-46 and accompanying text.
90. S. REP. No. 97-417, at 16 (summarizing key congressional findings underlying the committee's rejection of the intent test).
91. Thornburg v. Gingles, 478 U.S. 30, 70-73 (1986) (Brennan, J., plurality opinion) ("Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order
Congress deemed an intent test "inappropriate as the exclusive standard for establishing a violation of Section 2" because that test did not adequately account for the complex realities facing minority plaintiffs. First, Congress believed that the *Bolden* intent test was "an inordinately difficult burden for plaintiffs in most cases," in part because it required them to seek records proving that state or local officials acted with discriminatory purpose. In lawsuits challenging laws enacted many decades prior, those records may no longer exist; in lawsuits challenging recent or future laws, they may never exist. Particularly in the context of recent or future enactments, the intent requirement was more likely to result in an easy out for defendants who could "offer a non-racial rationalization for a law which in fact purposely discriminate[d]." Similarly, in order to show that racial considerations caused individual voter selections at the ballot box, "it would be necessary to demonstrate that other potentially relevant causal factors, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior." While certain sophisticated statistical analyses attempt to isolate race from other potentially relevant factors, the complex relationships among the various factors make these efforts theoretically complicated and, often, indeterminate in practice.

Second, the *Bolden* intent test diverted "the judicial [inquiry] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives." Congress sought to avoid the divisiveness that would result from requiring plaintiffs to lodge "charges of racism on the part of individual officials or entire communities." Testimony before the Subcommittee on the Constitution of the Senate Judiciary Committee indicated that "[s]uch inquiries can only be divisive, threatening to destroy any existing racial progress in a community." The official discrimination test required plaintiffs to demonstrate that a few elected officials intentionally discriminated against minorities. Under an individual voter-intent test, plaintiffs would have to prove that

to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies.

92. S. REP. No. 97-417, at 36.
93. *See id.* at 36-37.
94. *Id.* at 36.
95. *Id.* at 36-37.
96. *Id.* at 37.
100. *Id.* at 36.
101. *Id.*
scores of individuals expressed racial bias through their votes. "It is difficult to imagine a more racially divisive requirement."102

Finally, either intent test impeded the goals the VRA was designed to achieve.103 Because Congress sought to eradicate electoral schemes that resulted in unequal participation in the political process, it concluded that the Bolden intent test "ask[ed] the wrong question."104 Congress was determined to provide a tool for ensuring minority voters a "fair opportunity to participate" in the political process and to elect candidates of their choice.105 This opportunity was absent when "discriminatory election systems or practices . . . operate[d], designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups."106 Congress intended to eradicate electoral schemes that, in operation, impermissibly burdened minority groups, regardless of the purposes behind those schemes.107 "Focusing on the discriminatory intent of the voters, rather than the behavior of the voters," similarly distracts from the functional, results-oriented evaluation that Congress adopted.108

It is critical to recognize that, while Congress explicitly rejected the Bolden intentional discrimination test in favor of a results-based standard, the amended standard is not free from an inquiry into the causes behind a minority group's apparent inability to participate equally in the political process. The totality of circumstances language included in section 2(b)109 yields a vote dilution standard that implicitly considers the causes behind minority electoral losses as part of the overall analysis, without requiring plaintiffs to offer direct evidence of purposeful discrimination.110 Plaintiffs must demonstrate that minority electoral failures occur "on account of race or color."111 The Senate Report directs the courts to make this determination by "assess[ing] the impact of the challenged structure or practice on the basis of

102. Gingles, 478 U.S. at 72 (Brennan, J., plurality opinion).
103. See S. Rep. No. 97-417, at 5–6. See generally Davidson, supra note 4 (exploring the history informing passage of the VRA in 1965 and subsequent amendments to the law). Although the law is commonly associated with minority registration efforts, Congress recognized that "registration is only the first hurdle [sic] to full effective participation in the political process." S. Rep. No. 97-417, at 6. Congress constructed the VRA to provide "a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally." Id. at 5.
105. Id.
106. Id. at 28 (emphasis added).
107. Id. at 36.
109. See supra text accompanying note 42 for the complete text of section 2(b).
objective factors," specifically the White-Zimmer factors. Through evidence presented under the White-Zimmer test, the court constructs a full picture of the relationship between race and political participation in the jurisdiction in question.\textsuperscript{115} Most of the factors invoke the relationship between race and voting specifically. The Senate Report instructs courts to consider the following factors: evidence indicating any history of official discrimination in voting, whether the locality employs a candidate slating process that has excluded minority candidates, the extent to which voting is racially polarized in the community, and the degree of electoral success achieved by minority candidates.\textsuperscript{114} Other factors address more general considerations, such as lingering socioeconomic effects of past racial discrimination and the extent to which elected officials are responsive to the "particularized needs of the members of the minority group."\textsuperscript{115} Evidence accumulated through this inquiry paints a picture of "the past and present reality of the local political landscape."\textsuperscript{116} Exploring this reality through the totality of circumstances analysis incorporates an inquiry into cause—it indicates whether and why a local political process has failed to serve all races equally without scrutinizing the express purposes behind electoral schemes or individual ballot selections.

This totality of circumstances approach permits courts to consider whether race impacts political participation in a manner that discriminates against racial minorities under the challenged electoral scheme without requiring plaintiffs to prove individual discriminatory intent. It reflects the legislative compromise that congressional leaders struck to resolve concerns that the results test effectively granted a right to proportional representation for minority populations.\textsuperscript{117} The totality of circumstances language included in section 2(b) "maintain[s] the integrity of the results test while at the same time alleviating fears about proportional representation."\textsuperscript{118} By demonstrating the existence of several of the White-Zimmer factors, minority plaintiffs carry their burden of proving that "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{112} S. REP. No. 97-417, at 27.
\item \textsuperscript{113} See Bolden, 446 U.S. at 102–03 (White, J., dissenting).
\item \textsuperscript{114} S. REP. No. 97-417, at 28–29.
\item \textsuperscript{115} Id. at 29; see also supra note 46 (quoting the nine factors listed in the Senate Report).
\item \textsuperscript{116} League of United Latin Am. Citizens v. Clements (LULAC), 999 F.2d 831, 912 (5th Cir. 1993) (en banc) (King, J., dissenting) (emphasis omitted).
\item \textsuperscript{117} S. REP. No. 97-417, at 193 (additional views of Senator Robert Dole); see also McKaskle, supra note 110, at 14.
\item \textsuperscript{118} S. REP. No. 97-417, at 194 (additional views of Senator Robert Dole).
\item \textsuperscript{119} Thornburg v. Gingles, 478 U.S. 30, 47 (1986); see also LULAC, 999 F.2d at 912 (King, J., dissenting). The Senate Report makes clear that the nine enumerated factors are not necessarily the only relevant factors, and plaintiffs are not required to prove any particular number of them, not even a majority, to make out a claim. S. REP. No. 97-417, at 29.
\end{itemize}
B. The Supreme Court’s Approach

Supreme Court precedent reflects Congress’s decision to identify cause through a holistic analysis of the evidence. The Supreme Court cases upon which the LULAC majority primarily relied,\(^\text{120}\) *Whitcomb v. Chavis*\(^\text{121}\) and *Thornburg v. Gingles*,\(^\text{122}\) do not endorse a judicial standard that discontinues the vote dilution inquiry after a brief exchange of statistics. Rather, they reflect Congress’s commitment to a determination based on a review of “the total circumstances of the local electoral process.”\(^\text{123}\)

*Whitcomb* is evidence that the White-Zimmer test, carefully applied, is not a cover for proportional representation, even when polarized voting exists. The plaintiffs in *Whitcomb* failed not simply because partisan affiliation explained minority electoral losses, but because the totality of the evidence presented convinced the Court that black voters had equal opportunity to participate in the political process.\(^\text{124}\) The evidence failed to indicate any structural barriers to minority participation and demonstrated that black residents in the challenged district as a whole were frequently successful in electing representatives of their choice, even though they did not achieve proportional representation.\(^\text{125}\) As the LULAC dissent explained:

*Whitcomb* stands for the proposition that where there is evidence of partisan voting or interest group politics *and no evidence* that members of the minority group have an unequal opportunity to participate in the political process on account of race or color, the minority group’s vote dilution claim will fail.\(^\text{126}\)

Despite legitimate confusion and disagreement about the precise standard the Court was adopting, the *Gingles* Court clearly respected the balancing act embraced by pre-*Bolden* precedent and the 1982 Amendments. Some commentators have suggested that Justice O’Connor’s *Gingles* concurrence established the standard that the LULAC majority ultimately adopted,\(^\text{127}\) but a close review of her concurring opinion demonstrates that she advocated a different approach. In *Gingles*, the defendants argued that the term “racially polarized voting” must “refer to voting patterns for which

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120. See LULAC, 999 F.2d at 851-59.
121. 403 U.S. 124 (1971).
122. 478 U.S. 30.
124. See Whitcomb, 403 U.S. at 149-53.
125. See id. at 150 n.29.
127. See Karlan & Levinson, supra note 76, at 1223; E. Jaynie Leung, Page v. Bartels: A “Total Effects” Approach to Evaluating Racial Vote Dilution Claims, 21 L. & INEQ. 192, 201 n.62 (2003); Scott-McLaughlin, supra note 9, at 963 (commenting that the LULAC majority adopted Justice O’Connor’s approach to the causation issue).
the principal cause is race.” \(^{128}\) Justice O’Connor disputed Justice Brennan’s assertion that evidence attributing divergent racial voting patterns to factors other than race “can never affect the overall vote dilution inquiry.” \(^{129}\) She did not, however, embrace a standard that precludes a finding of legally significant racially polarized voting merely because partisan affiliation is shown to affect voter preferences. \(^{130}\) In keeping with congressional intent, Justice O’Connor advocated a comprehensive review of “all relevant factors bearing on whether the minority group has ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” \(^{131}\) She agreed with Justice Brennan to an extent:

Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. \(^{132}\)

Explanations behind white voters’ preferences are relevant to evaluations of minority electoral success and the responsiveness of elected officials, two of the factors courts review under the totality of circumstances analysis. \(^{133}\) In Justice O’Connor’s view, the congressional compromise—permitting a remedy under section 2 without direct evidence of intent but denying a right to proportional representation—required consideration of the factors influencing voter selections without overly burdening plaintiffs. \(^{134}\) Respecting this compromise, Justice O’Connor declined “to establish intent as an element of a plaintiff’s case in chief . . . [but] was willing to allow such evidence into the record for the courts to consider in determining the ultimate question.” \(^{135}\)

C. LULAC’s Shifted Focus

The LULAC standard abandons Gingles’s holistic approach, essentially isolating causation in the racially polarized voting analysis. While Congress and the Supreme Court instructed the courts to assess the cumulative impact of numerous factors, including the “role of racial political considerations in

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129. Id. at 100 (O’Connor, J., concurring).
130. See LULAC, 999 F.2d at 906 (King, J., dissenting); Grofman & Handley, supra note 11, at 229; McKaskle, supra note 110, at 33–34; Paula W. Render, Comment, Straight Party Tickets and Redistricting Thickets: Nonracial Motivations for Voter Preferences, 1995 U. CHI. LEGAL F. 505, 512.
132. Id. at 100.
133. See id. at 100–01.
134. See id. at 84, 100–01; Scott-McLaughlin, supra note 9, at 959–60.
135. Scott-McLaughlin, supra note 9, at 960; see also Grofman & Handley, supra note 11, at 228–29.
a particular community,' under LULAC courts must inquire into the motivations behind voter preferences as part of a dispositive threshold test, isolated from the overall vote dilution inquiry.

Rather than infer racial bias through a "searching practical evaluation of the past and present reality" under the totality of circumstances test, LULAC demands a narrower analysis that requires a showing of purposeful discrimination on the part of individual voters. The LULAC court's application of the new standard to the vote dilution claims before it illustrates this point. The plaintiffs in LULAC challenged Texas's system of electing state trial judges. Specifically, they argued that county-wide, at-large election of district judges in nine Texas counties violated section 2 by "impermissibly diluting the voting power of Hispanics and blacks." They sought single-member districting, which would allow for majority-minority judicial districts in which minority voters would have an improved opportunity to elect their candidates of choice. The district court, and a panel of the Fifth Circuit on appeal, agreed with the plaintiffs, concluding that the at-large system resulted in impermissible vote dilution in all nine of the challenged counties. A majority of the Fifth Circuit Court of Appeals, sua sponte, ordered en banc reconsideration of the panel decision. Despite undisputed evidence that the majority of white voters consistently rejected the candidate favored by minority voters, the Fifth Circuit en banc

136. S. REP. No. 97-417, at 34 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 212; see also Gingles, 478 U.S. at 101 (O'Connor, J., concurring) ("The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns.").

137. See infra notes 145-151 and accompanying text (discussing the LULAC majority's analysis of the plaintiffs' vote dilution claims); infra notes 169-176 and accompanying text (discussing Armstrong v. Allain, 893 F. Supp. 1320 (S.D. Miss. 1994)); infra notes 219-228 and accompanying text (discussing Harris v. City of Houston, 10 F. Supp. 2d 721 (S.D. Tex. 1997) and Rollins v. Fort Bend Indep. Sch. Dist., 89 F.3d 1205 (5th Cir. 1996)); see also O'Donnell, supra note 66, at 374 ("[LULAC] did decide that, at the very least, a plaintiff must negate partisan politics as the cause of defeat in order to satisfy the third Gingles precondition.").

138. SEN. REP. No. 97-417, at 30 (quotation marks omitted).

139. See League of United Latin Am. Citizens v. Clements (LULAC), 999 F.2d at 831, 909 (5th Cir. 1993) (en banc) (King, J., dissenting); see also Grofman & Handley, supra note 11, at 222 ("LULAC, in shifting the focus to a determination of whether there are non-racial reasons for the observed racial differences in voting patterns, reintroduced considerations of intent into a section 2 vote dilution challenge."); Scott-McLaughlin, supra note 9, at 963 ("[In LULAC,] the Fifth Circuit adhered to the view that the words 'on account of race or color' meant that, despite the Senate Report's rejection of the intent test, plaintiffs had to prove some form of purposeful discrimination.").

140. LULAC, 999 F.2d at 838.

141. Id. at 838. On appeal, the panel affirmed with respect to eight of the nine counties. See League of United Latin Am. Citizens v. Clements, 986 F.2d 728 (5th Cir. 1993), rev'd, 999 F.2d 831 (5th Cir. 1993) (en banc).

142. LULAC, 999 F.2d at 839.

143. E.g., id. at 891 ("Anglo voters always opposed the candidate preferred by the geographically compact and cohesive combined minority population in the general elections."); id. at 892 ("There is . . . no dispute that the majority of Anglo voters did not support the candidate favored by the minority voters in Lubbock County in any of the elections studied.").
concluded that the plaintiffs failed to establish racial bloc voting and rejected their claims with respect to each of the nine counties. 144

The LULAC majority credited the defendants' statistical evidence indicating a correlation between race and party affiliation and concluded that white voters' ballot box selections were politically, not racially, motivated, and therefore the plaintiffs had not satisfied Gingles's white bloc-voting precondition. 145 Evaluating electoral results for low profile judicial elections in Dallas, Midland, Lubbock, and Ector counties, for example, the court considered evidence indicating that white voters consistently defeated the minority-preferred candidate, that minority voters consistently preferred Democratic candidates, and that white voters consistently supported Republican candidates, including the occasional minority candidate. 146 The majority cited expert testimony arguing that, in low profile judicial elections, voters "make their choice based upon the information that the ballot contains—party affiliation." 147 "[U]nable to find the requisite presence of race in this data," the majority concluded that the persistent electoral losses sustained by minority-preferred candidates in these counties were attributable to partisan affiliation, and thus the challenged practice did not violate section 2. 148

The court was too quick to interpret Democratic primary results as demonstrating that partisan affiliation, not race, determined electoral outcomes. For example, in Lubbock and Ector counties, a minority-preferred candidate won one of two relevant Democratic primaries, leading the court to reject the notion that "the minority-preferred candidate was consistently defeated within the meaning of Gingles," and hold that the plaintiffs could not "establish dilution." 149 In contrast, the court downplayed evidence of polarization in the Bexar County Democratic primary because "primary elections do not provide a reliable guide where, as here, both parties are competitive, since

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144. Id. at 877 (Dallas County); id. at 886–87 (Tarrant County); id. at 891–92 (Midland County); id. at 892–93 (Lubbock County); id. at 893 (Ector County). The majority rejected the plaintiffs' vote dilution claims with respect to all nine challenged counties. In the five counties listed above, the court made an express finding that the plaintiffs failed to meet the racial bloc-voting preconditions of the Gingles threshold test. In two counties, the court spoke more broadly about the plaintiffs' failure to demonstrate racially polarized voting but did not make an express Gingles determination. See id. at 889–90 (Bexar County); id. at 890–91 (Jefferson County). In two counties, the court concluded that the plaintiffs established only a weak vote dilution claim, which the state overcame in the totality of circumstances analysis. Id. at 885 (Harris County); id. at 887–89 (Travis County).

145. See supra text accompanying note 50 (providing the language of the Gingles threshold test).

146. LULAC, 999 F.2d at 877, 891–93. In three of the nine counties the Fifth Circuit considered, a single instance of majority Anglo support for a Hispanic Republican over an Anglo Democrat (the 1986 race for Attorney General) satisfied the court that voting patterns were unaffected by the race of the candidates. See id. at 891–93.

147. Id. at 879.

148. Id. at 879, 891–93.

149. Id. at 893.
they involve only a fraction of the electorate." 150 As the LULAC dissenters argued, the majority's approach is inconsistent with the Supreme Court's framework, which "presupposes partisan voting" and finds vote dilution when the votes of a politically cohesive minority combined with white crossover votes are insufficient to prevail over a dominant white majority. 151

Subsequent decisions in the Fifth Circuit similarly rejected vote dilution claims for failure to satisfy Gingles's white bloc-voting precondition when plaintiffs' statistical evidence did not appropriately address the reasons behind racially polarized voting patterns. 152 In these cases, a correlation between race and voting preference did not satisfy the Gingles threshold test. In short, under LULAC, plaintiffs must be prepared to prove race-based motivations in the electorate as part of the Gingles threshold requirement.

The LULAC holding does not overlap precisely with the intent requirement expressly rejected by Congress in the 1982 Amendments, 153 but it embraces a standard that is arguably just as difficult to meet and provokes some of the same objections that inspired Congress to reject the Bolden standard in 1982. 154 Particularly considering the close relationship between race and party affiliation, 155 endorsing a scheme in which plaintiffs must negate partisan politics as an explanation for racially divergent voting patterns allows courts to avoid an analysis of the entire political landscape and undermines the congressional compromise. 156 Although the LULAC majority warned that "courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation," 157 it established and implemented a standard that subordinates the totality of circumstances review to a selective reliance on a very narrow inquiry. The majority's emphasis on evidence indicating that blacks tended to vote for Democrats while whites tended to vote for Republicans and that black

150. Id. at 889.
151. Id. at 909–10 (King, J., dissenting).
152. See infra Part III.
153. Compare LULAC, 999 F.2d at 861 ("Because . . . divergent voting patterns among white and minority voters are best explained by partisan affiliation, we conclude that plaintiffs have failed to establish racial bloc voting . . . "), with City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote . . . ").
154. See LULAC, 999 F.2d at 909 (King, J., dissenting) ("Unless minority plaintiffs can successfully establish that voters in the controlling political party are racially motivated—either through the use of questionable voting statistics or by calling people from that party and asking them why they voted the way they did— their claim will fail." (footnote omitted)); see also Scott-McLaughlin, supra note 9, at 958 (discussing Justice Brennan's argument that requiring plaintiffs to prove white voters were motivated by racial bias created the same divisiveness as the Bolden official-intent test rejected in the 1982 Amendments).
155. See Grofman & Handley, supra note 11, at 233; Karlan & Levinson, supra note 76, at 1220–22; infra notes 220–223 and accompanying text.
156. See supra Section II.A.
157. LULAC, 999 F.2d at 860–61.
candidates enjoyed some electoral successes within Democratic primaries permitted the majority to overcome "substantial" evidence of vote dilution:

This evidence include[d]: a geographically compact and politically cohesive minority group; a white bloc vote that is usually sufficient to defeat the combined strength of minority and white crossover votes; a history of official discrimination against the minority group; the lingering socioeconomic effects of discrimination against the minority group; structural mechanisms, including giant election districts, that tend to enhance the dilutive nature of at-large election schemes; and an appalling lack of minority representation on the district court bench.¹⁵⁸

This devotion to partisanship as the explanation for consistent minority losses in an electoral system that otherwise evoked illegal vote dilution undermines the framework that Congress selected to achieve "full effective participation in the political process" for all Americans.¹⁵⁹

III. POST-LULAC: SECTION 2 CLAIMS IN THE FIFTH CIRCUIT

Reviewing Fifth Circuit case law since LULAC reveals the degree to which the LULAC standard burdens plaintiffs when defendants invoke it. Specifically, in cases in which the defendant introduced evidence suggesting that nonracial factors impacted voter preferences, plaintiffs lost.¹⁶⁰ Plaintiffs won when the record contained evidence of intentional discrimination and when the case proceeded without any real consideration of the causes behind voter preferences.¹⁶¹ Although it is impossible to isolate the presence or absence of a causation inquiry as the sole reason for the outcome in these cases,¹⁶² the pattern is unmistakable. In effect, the Fifth Circuit has embraced an intentional discrimination standard in a narrow class of cases—those in which the defendants' evidence raises the possibility that some factor other than race explains voting preferences that appear to diverge along racial lines.

¹⁵⁸. LULAC, 999 F.2d at 901 (King, J., dissenting).
¹⁵⁹. S. REP. No. 97-417, at 6 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 183; see Karlan & Levinson, supra note 76, at 1224; see also Scott-McLaughlin, supra note 9, at 960 (explaining the problems associated with a standard that permits "defendants to offer nonracial explanations for divergent voting patterns"); Tucker, supra note 9, at 591–92 (criticizing the LULAC majority's decision for narrowing the inquiry such that it "only affords section 2 protection to individual ballot access").
¹⁶⁰. See infra notes 170–176, 219–231 and accompanying text. But see infra note 167 (discussing Jamison v. Tupelo, 471 F. Supp. 2d 706 (N.D. Miss. 2007)). One case may suggest that evidence of racial animus among the electorate overcomes the defendants' argument that party affiliation could explain voting preferences, but the court did not expressly develop this reasoning. See infra note 210 (discussing St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd., No. CIV.A 02-2209, 2002 WL 2022589 (E.D. La. Aug. 26, 2002)).
¹⁶¹. See infra notes 209–214 and accompanying text (evaluating plaintiff wins).
¹⁶². See infra notes 165, 234–236 and accompanying text (discussing other potential explanations for certain losses).
The significance of this heightened burden is tempered by the small number of cases in which it comes into play: The number of post-LULAC decisions that turn on the causation issue is quite small. Between 1982 and 1993, Fifth Circuit courts found a violation of section 2 in seventeen out of thirty published opinions that considered racially polarized voting, roughly fifty-seven percent. Between 1993 and 2007, after the Fifth Circuit's opinion in LULAC, these courts found a violation in eight out of twenty-two similar lawsuits considering racially polarized voting, roughly thirty-six percent. While these figures represent a marked decline in plaintiff success rates, LULAC causation was not an explicit factor in most of these decisions. Only three of the fourteen opinions that found no section 2 violation mentioned evidence that addressed the causes behind divergent voting patterns. As the Fifth Circuit refined the LULAC standard during the mid-1990s, it became clear that in order to invoke that standard, defendants had to come forward with probative evidence indicating that some factor other than race explained racially divergent voting. The challenge of meeting

163. See Appendix. For the period between the Gingles decision and LULAC (1986–1993), the percentage remains about the same: courts in the Fifth Circuit found violations in roughly fifty-eight percent of published opinions that considered racially polarized voting. The numbers discussed in this Part include cases in which the court considered the existence of racially polarized voting either under the Gingles threshold test or as part of the totality of circumstances analysis. The numbers include cases in which the court made a final determination on liability; they exclude preliminary decisions such as orders granting or denying preliminary injunctions. A searchable database, prepared by the Voting Rights Initiative at the University of Michigan Law School, categorized published opinions in section 2 lawsuits between 1982 and 2006. Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://www.votingreport.org (follow “Master List.xls” hyperlink under “Final Report” menu). The Appendix is an excerpt from that database, with the addition of more recent cases to bring the complete list up to date through 2007.


165. Rollins v. Fort Bend Indep. Sch. Dist., 89 F.3d 1205 (5th Cir. 1996); Harris v. City of Houston, 10 F. Supp. 2d 721 (S.D. Tex. 1997); Armstrong v. Allain, 893 F. Supp. 1320 (S.D. Miss. 1994). A thorough analysis of why the remaining thirteen lawsuits failed is beyond the scope of this Note. Several courts concluded the plaintiffs presented insufficient evidence of white bloc voting without any discussion of the quality of the evidence. See, e.g., League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist., 123 F.3d 843 (5th Cir. 1997); Rangel v. Morales, 8 F.3d 242 (5th Cir. 1993). Others lost on the first prong of Gingles (requiring a minority population sufficiently large and geographically compact that a viable single-member district could be drawn). See, e.g., Sensley v. Albritton, 385 F.3d 591 (5th Cir. 2004); Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368 (5th Cir. 1999). Others failed under the totality of circumstances analysis. See, e.g., NAACP v. Fordice, 252 F.3d 361 (5th Cir. 2001).

166. See infra Section III.A.
this initial burden may partially explain why the causation issue is absent from many of decisions.

This Part evaluates Fifth Circuit case law post-LULAC, highlighting some notable trends. Section III.A explains that the Fifth Circuit has effectively narrowed the LULAC causation standard so that it does not impose the impossible burden on plaintiffs that some commentators had feared. Section III.B argues that, nevertheless, the LULAC standard, when invoked, inserts a substantial obstacle into the racial bloc-voting analysis. In the face of a statistical correlation between race and vote, when defendants produced evidence that race-neutral factors influenced voting patterns, plaintiffs lost their section 2 claim.167

A. Refining the LULAC Standard

As commentators feared,168 shortly after the Fifth Circuit decided LULAC, two district courts, in three lawsuits, embraced an expansive interpretation of the LULAC standard.169 The first, Armstrong v. Allain, illustrates the heavy burden the original LULAC causation standard imposed on plaintiffs: the district court's strict application of the standard was fatal to the plaintiffs' vote dilution claim. The district court noted that, under LULAC, plaintiffs must do more than show a correlation between race and vote in order to satisfy the third Gingles precondition. White bloc voting is not legally significant "unless race is shown to be the reason for that bloc voting."170 The Armstrong plaintiffs challenged a state law requiring school bond referenda to pass by a sixty percent vote, arguing that the supermajority requirement diluted black voting strength.171 Black residents tended to vote cohesively, and when they voted in favor of school bond referenda, white bloc voting in opposition frequently frustrated their efforts.172

Because it applied a standard that demanded that the plaintiffs' evidence demonstrate a direct causal link between race and vote, the court was able to overcome statistical evidence exhibiting a correlation between race and vote. The court sought "the reason for the difference in [voting] choices" between blacks and whites.173 The plaintiffs tried to provide one: Presenting

167. Jamison v. Tupelo is a perplexing exception to this pattern. Jamison, 471 F. Supp. 2d at 713–14; see also infra notes 216–219 and accompanying text.

168. See, e.g., Johnson, supra note 9, at 75 (characterizing the holding in LULAC as requiring plaintiffs "to defeat every possibility other than race for denial of their right to vote").


171. Id. at 1321.

172. Id. at 1322.

173. Id. at 1331.
statistical evidence identifying racially polarized voting patterns, they argued that white voters tended to oppose school bond referenda because they "perceive[d] public schools as black institutions which they [chose] not to support." The court rejected this argument because it found that, statewide, black students comprised only a bare majority of public school students, and in many of the school districts where school bond issues failed, black students accounted for significantly less than fifty percent of the student population.

This case illustrates the challenge plaintiffs face when they are required to disprove all causal factors other than race or to present conclusive evidence of discriminatory intent among voters. Despite an absence of evidence demonstrating that other, race-neutral factors explained the pattern of polarized voting, the court rejected the plaintiffs' claim because it concluded that race was not the "predominant determinant" of voting behavior. The court noted that whites owned the majority of owner-occupied property in the state and—although the defendants failed to present evidence to this effect—speculated that, while the "[p]laintiffs view the issue in terms of black and white, . . . it is just as plausible, if not more so, to view the issue as a tax/no-tax issue." The district court's approach in this case implemented the LULAC causation standard expansively. It placed the burden on the plaintiffs to disprove other plausible explanations for racially polarized voting patterns, even though the defendants did not offer evidence to raise the issue. This decision lent credence to commentators' fears that, with LULAC, the Fifth Circuit had eviscerated the VRA.

The Fifth Circuit did not consider Armstrong v. Allain on appeal, but soon after that decision came down, it rejected a similar analysis in two separate cases, both on appeal from the Northern District of Mississippi: Houston v. Lafayette County and Teague v. Attala County. In these two cases, the Fifth Circuit moderated the potential impact of its original opinion in LULAC by effectively narrowing the scope of the LULAC court's holding.

174. Id. at 1328-29.
175. Id. at 1331.
176. Id.
177. See supra notes 77-81 and accompanying text.
180. See supra note 9 and accompanying text.
181. 56 F.3d 606 (5th Cir. 1995).
182. 92 F.3d 283 (5th Cir. 1996).
183. See Teague, 92 F.3d at 295 (reversing the lower court opinion and entering judgment for the plaintiffs); Houston, 56 F.3d at 613 (vacating the lower court's judgment with respect to the Gingles preconditions and remanding for additional findings).
First, the Fifth Circuit reaffirmed that statistical evidence indicating a correlation between race and voting preference was probative of racial bloc voting, even when that evidence failed to indicate why people voted along racial lines. In Houston, the Fifth Circuit criticized the lower court for summarily rejecting the plaintiffs’ statistical evidence of polarized voting merely because the evidence “look[ed] strictly at how, rather than why, people vote the way they do.” 184 Quoting LULAC, the court reiterated that evidence attributing polarized voting patterns “to partisan affiliation or perceived interests rather than race [is] quite probative on the question of a minority group’s future success at the polls.” 185 It then clarified the scope of that statement, stating that “evidence that lacks such evaluation of the voters’ possible motivations still carries probative value.” 186 Provided the evidence has “facial plausibility,” the court should consider it, and at the very least, “the district court must ensure that it thoroughly discusses its reasons for rejecting that evidence.” 187 The court of appeals remanded the case for further clarification on the issue of racially polarized voting. 188 On remand, with no discussion of causation, the district court concluded that the plaintiffs’ evidence satisfied the second and third Gingles preconditions. 189 The court, after considering the White-Zimmer factors briefly, found a section 2 violation. 190

A year later, the Fifth Circuit further refined the LULAC holding by addressing the placement and scope of the burdens of production and persuasion in the causation inquiry. In Teague, the district court concluded that the plaintiffs failed to prove racially polarized voting because the evidence in the record failed to address the reasons behind voter preferences. 191 The district court opined that “factors other than race influence voters in Attala County” 192 and noted that “[c]onspicuously missing from the record in this cause is any proof to the contrary.” 193 In fact, there was “no proof in the record that in any way compare[d] the candidates on any basis other than race.” 194 Thus, giving the plaintiffs the burden of either affirmatively proving that racial considerations caused white voters’ votes or disproving all other

184. Houston, 56 F.3d at 612 (alteration in original) (quoting the district court).
185. Id. (alteration in original) (quoting League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 859 n.26 (5th Cir. 1993) (en banc)).
186. Id.
187. Id.
188. Id. n.6 (quoting Clark v. Calhoun County, 21 F.3d 92, 96 (5th Cir. 1994)).
189. Id. at 613.
191. See id. at 1003.
192. See Teague v. Attala County, 92 F.3d 283, 290 (5th Cir. 1996).
194. Id.
195. Id.
potential explanations for voting patterns that clearly diverged along racial lines, the district court concluded that the plaintiffs had failed to prove racial polarization.196

The Fifth Circuit flatly rejected this approach to the racially polarized voting analysis and held that defendants bore the burden of demonstrating that a perceived correlation between race and vote was attributable to some nonracial factor. The court explained that the district court “err[ed] by placing the burden on plaintiffs to disprove that factors other than race affect voting patterns.”197 Rather, the statistical evidence, which “favor[ed] a finding of racial bloc voting in Attala County,”198 should have raised a presumption in the plaintiff’s favor, which the defendant could then rebut by showing that race-neutral factors explained voting patterns.199 An absence of contradictory evidence favors the plaintiff, and when faced with a strong statistical case, anecdotal lay testimony asserting that “race played no role at the polls carr[ies] little weight.”200 The Fifth Circuit’s decision in Teague clarified that when the defendant produces “no real evidence that factors other than race [are] at work,” plaintiffs are not required to disprove all non-racial explanations for election results.201 Together, Houston and Teague established that, in the absence of defense evidence revealing that some factor other than race caused polarized voting, a vote dilution claimant may prevail with evidence revealing only a correlation between race and vote.

Nevertheless, these cases left some critical questions unresolved. Perhaps because the defendants in Teague failed to introduce any substantial evidence contradicting the plaintiffs’ racial bloc-voting claim,202 the Fifth Circuit did not evaluate precisely what kind of defense evidence would shift the burden to the plaintiffs.203 In addition, neither of these two decisions resolved the questions that arise when defendants do introduce such evidence. Most importantly, how do plaintiffs successfully respond to evidence suggesting that race-neutral factors influenced divergent voting patterns?204 The court’s choice of language suggests that it envisioned a comprehensive review of the local facts: “Plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the Gingles factors. Defendants may then rebut the plaintiffs’ evidence by showing that no such

196. See id.
197. Teague, 92 F.3d at 290.
198. Id. at 291 (quoting the district court).
199. Id. at 290-91.
200. Id. at 291.
201. Id.
202. See id.
203. Proceeding to the totality of circumstances analysis, the court suggested that defendants “try to rebut plaintiffs’ claim of vote dilution via evidence of ‘objective, nonracial factors under the totality of the circumstances standard.’” Id. at 292 (quoting Nipper v. Smith, 39 F.3d 1494, 1513 (11th Cir. 1994)).
204. The Fifth Circuit also did not address when, if ever, a court would demand explicit evidence of racial animus.
bias exists in the relevant voting community." Although this description of the respective burdens reflects Justice O'Connor's language in *Gingles*, and more closely adheres to Congress's instructions than the standard applied by the district court in *Teague*, subsequent cases do not confirm that the court has shifted from the court's initial position in *LULAC*, which established causation as a discrete inquiry for plaintiffs to overcome in the racial bloc-voting analysis.

In *Houston* and *Teague*, the Fifth Circuit backtracked from the sweeping implications of *LULAC*. It clarified that, at the very least, defendants must make a plausible showing that some force other than race is in play before plaintiffs must prove that race is *in fact* the cause driving racially polarized voting. The fact that the initial burden lies with the defendant may explain why only a few cases turn on the *LULAC* causation issue. Yet cases decided after *Houston* and *Teague* show that even this refined causation standard imposes a nearly insurmountable burden on plaintiffs.

**B. Causation in the Courts**

Even as moderated by *Houston* and *Teague*, the *LULAC* standard may prove outcome determinative. In the years following *LULAC*, plaintiffs lost nearly every case in which the defendants offered evidence that factors other than race caused racially polarized voting. Between 1993 and 2007, courts in the Fifth Circuit found a violation of section 2 in eight of twenty-two published opinions that considered racially polarized voting. Two of the eight decisions involved evidence of racial animus either among the electorate or among local officials. In three of the eight opinions, the court expressly noted the defendants' failure to introduce any probative evidence indicating that nonracial considerations explained voter preferences, and

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206. See supra notes 129–135 and accompanying text.
207. See infra Section III.B.
208. See infra Section III.B.
209. See supra note 164 and accompanying text.
210. See St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd., No. CIV.A. 02-2209, 2002 WL 2022589 (E.D. La. Aug. 26, 2002). In that case, the district court noted widespread electoral support, among both Republicans and Democrats, for a candidate who was a known white supremacist and member of the Ku Klux Klan. It added that "[i]t is also worth noting that [St. Bernard Parish] is . . . nearly 65 percent registered Democrat and just 19.5 percent registered Republican." Id. at *7. This is the extent of the court's discussion of party affiliation. It may indicate that the court considered the role of party in explaining voter choices and found it unpersuasive in this case. The district court did not explain the significance it attached to the community's support for a white supremacist, but it seems reasonable to consider it evidence of racial animus in the electorate.
two more decisions made no reference to causation.\textsuperscript{213} These five cases may reflect the impact of the Fifth Circuit's decision in \textit{Teague}, which clarified that the \textit{LULAC} causation inquiry will proceed only if the defendant has met its initial burden of production on causation.\textsuperscript{214} Together, these seven cases suggest that in order for plaintiffs to win a section 2 claim, they may have to present evidence of racial animus in the community, or the case must proceed without evidence suggesting a race-neutral explanation for racially divergent voting patterns.

One decision in which the court found a violation of section 2, \textit{Jamison v. Tupelo}, does not fit the pattern.\textsuperscript{215} It seemed to ignore \textit{LULAC} altogether, inexplicably concluding that the defendants' evidence attributing racially polarized voting to partisanship, not racial bias, was irrelevant because "[t]he reasons that black and white voters vote differently have no relevance to the central inquiry of § 2, but the correlation between the race of the voter and the selection of certain candidates is crucial to that inquiry."\textsuperscript{216} In \textit{Jamison}, the plaintiffs met their \textit{Gingles} burden by "show[ing] a correlation between race [of the voter] and candidate choice."\textsuperscript{217} The court went on to consider the \textit{White-Zimmer} factors under the totality of circumstances analysis, included no further discussion of causation, and found a violation of section 2.\textsuperscript{218}

Apart from the anomaly of \textit{Jamison}, plaintiffs lost every case in which the defendants presented credible evidence that factors other than a candidate's race could explain voter preferences. When the evidence demonstrates a general correlation between race and party among the electorate, the search for the \textit{LULAC} brand of causation—essentially, evidence that party affiliation is not the cause of racially divergent voting preferences—is an enormous evidentiary hurdle. For example, in \textit{Harris v. City of Houston}, the court rejected the plaintiffs' vote dilution claim because the defendants presented persuasive evidence indicating that residents in the contested area voted according to political affiliation, not race.\textsuperscript{219} This result minimizes the role that race plays in determining party affiliations and fails to account for the

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 197–201 and accompanying text (discussing \textit{Teague}).
\item 471 F. Supp. 2d 706 (N.D. Miss. 2007).
\item Jamison, 471 F. Supp. 2d at 713–14.
\item Id. at 714.
\item Id. at 715–16. The defendant, the city of Tupelo, Mississippi, did not appeal the court's decision in this case. Instead, it agreed to adopt and submit to the Department of Justice for approval a redistricting plan that complied with the court's decision. See Agreed Order, Jamison v. Tupelo, No. 1:04cv366-M-B (N.D. Miss. March 5, 2007). On February 12, 2008, Chief Judge Mills dismissed the case without prejudice after Tupelo submitted a redistricting plan to the Department of Justice. Order, Jamison v. Tupelo, Civil Action No. 1:04cv366 (N.D. Miss. Feb. 12, 2008).
\item 10 F. Supp. 2d 721, 726 (S.D. Tex. 1997). The city's expert argued that race did not drive voter preferences; rather, "Democrats [were] 'the minority that the Kingwood voters [would not] support.'" \textit{Harris}, 10 F. Supp. 2d at 726.
\end{enumerate}
\end{footnotesize}
difficulty of separating out racial from partisan concerns. Because “race and political affiliation are ... substantially correlated[,] [i]t is ... impossible to determine which of the two is a better explanation ... of voting patterns.” In light of this correlation, evidence that the political party preferred by minority voters consistently lost elections is “indeterminate with respect to the causal role of race in affecting voting behavior.” Yet under the Fifth Circuit’s causation standard, this evidence seems to be dispositive. It will consistently defeat plaintiffs’ efforts to demonstrate racial bloc voting, without which their claim is almost certain to fail, thereby perpetuating “precisely the sort of racial exclusion that section 2 and Gingles sought to remedy.” Permitting partisanship to “explain away” racially polarized voting is a step backward, not a step toward greater equality in political participation.

The second case, Rollins v. Fort Bend Independent School District, illustrates the extent of the LULAC burden. It suggests that a plaintiff’s failure to identify a causal relationship between race and voting patterns under the racial bloc-voting inquiry may tip the evidentiary scales in favor of defendants when each side has presented a viable theory to explain a history of minority electoral losses. In Rollins, the court of appeals noted that the district court found that the parties presented very similar statistical evidence, which their respective experts interpreted quite differently. In part because the plaintiffs’ statistics failed to “isolate the impact of race on election results as compared to other potential factors entering into a citizen’s voting decision,” the district court discounted the plaintiffs’ interpretation of the evidence. The defendants’ statistical evidence did not expressly address causation either; rather, it indicated that “the white vote is much more randomly distributed [than the black vote] with respect to race.” The court concluded that these deviations “recognize[d] the frequent presence of reasons other than a candidate’s race to explain the defeat of that candidate.”

On appeal, the Fifth Circuit noted that it was “curious that only three minorities in the last twenty years [had] successfully been elected to the
board of trustees for the [Fort Bend Independent School District].\textsuperscript{229} In light of the plaintiffs’ “facially persuasive statistics,” the court concluded that it could not “say unequivocally that the [Fort Bend Independent School District] system does not in fact violate the Voting Rights Act.\textsuperscript{230} Nevertheless, under the clearly erroneous standard of review, it affirmed the district court’s determination that the plaintiffs had “failed to establish a violation with the evidence they presented in this case.”\textsuperscript{231}

At first glance, this reasoning is similar to that employed by the district court—and rejected by the Fifth Circuit—in the \textit{Houston} and \textit{Teague} cases.\textsuperscript{232} The plaintiffs presented statistical evidence of racially polarized voting, and the defendants failed to advance a persuasive race-neutral explanation for the pattern,\textsuperscript{233} yet the district court, noting the absence of a causation element in the plaintiffs’ evidence, found no violation of section 2. The accuracy of this analogy is obscured by the Fifth Circuit’s emphasis on the weaknesses in the plaintiffs’ presentation of their evidence.\textsuperscript{234} \textit{Rollins} may be most accurately categorized as a case in which the district court so thoroughly discounted the plaintiffs’ testimony because of error and inconsistency that no presumption of polarization could arise. On the other hand, one of the “flaws” the Fifth Circuit identified was the plaintiffs’ failure to present a multivariate regression analysis that considered the influence of nonracial factors on voter behavior.\textsuperscript{235} This criticism suggests that the district court placed significant weight on the plaintiffs’ failure to present evidence of race-based causation.

Although these two cases illustrate how the \textit{LULAC} causation inquiry has been applied to the detriment of section 2 plaintiffs, failure to demonstrate a causal relationship between race and vote was not the only factor at work in these decisions. In both \textit{Harris v. City of Houston} and \textit{Rollins}, the district court discounted the plaintiffs’ evidence because of its poor quality

\begin{itemize}
\item\textsuperscript{229} \textit{Id.} at 1214.
\item\textsuperscript{230} \textit{Id.} at 1219.
\item\textsuperscript{231} \textit{Id.}
\item\textsuperscript{232} \textit{See supra} Section III.A. Note that the Fifth Circuit issued its decision in \textit{Teague} about a month after its resolution of the \textit{Rollins} appeal.
\item\textsuperscript{233} The Fifth Circuit opinion indicates that the school district argued in district court that minority electoral losses were caused by an absence of “‘serious’ candidates,” judged by the amount of money raised and spent by the campaign, but the Fifth Circuit rejected the suggestion that a causal connection existed between funding and defeat at the polls. \textit{Rollins}, 89 F.3d at 1215 \\& n.20.
\item\textsuperscript{234} \textit{See id.} at 1214, 1217–19. The Fifth Circuit, hesitant to deny that vote dilution occurred in the school district, was persuaded by the record, which was “replete with examples of contradicted testimony, inadequate evidence, errors, and concessions that permitted the district court to discount the plaintiffs’ evidence and, consequently, their legal theories.” \textit{Id.} at 1214.
\item\textsuperscript{235} \textit{See id.} at 1217 n.23. The court found that “although the plaintiffs were not required under existing case law to present a multi-variate regression analysis comparing the impact of other factors affecting voting, had they done so this evidence may have helped them to prove the existence of a significant bloc vote in the present case.” \textit{Id.} at 1219.
\end{itemize}
generally, not just because it omitted evidence of cause.\textsuperscript{236} Furthermore, although each decision noted that the plaintiffs' failure to establish the Gingles preconditions relieved the court of its obligation to further pursue the vote dilution analysis, both conducted a cursory review of the White-Zimmer factors, concluding that even under the totality of circumstances analysis, the plaintiffs failed to establish vote dilution.\textsuperscript{237} But where the courts weigh counterevidence impeaching the plaintiffs' statistical analysis on causation grounds and decide that the plaintiffs' evidence is insufficient to support a finding of legally significant white bloc voting, the rest of their analysis may be biased in favor of the defendant.\textsuperscript{238}

Moreover, the fact remains that when challenged to prove causation in the face of a correlation between race and party, plaintiffs have failed to convince the court that a demonstrated correlation between race and vote is the more persuasive explanation for racially divergent voting patterns. It remains to be seen what kind of evidence—perhaps apart from evidence of intentional discrimination at work in the community\textsuperscript{239}—would establish legally significant racial bloc voting when the defense has presented a correlation between race and party.

**CONCLUSION**

The standard enunciated by the Fifth Circuit in *LULAC*, which effectively requires an inquiry into individual voters' intent in the voting booth, misinterpreted both congressional intent and Supreme Court precedent. The published opinions of Fifth Circuit courts since *LULAC* demonstrate that the *LULAC* causation inquiry is not the only reason why plaintiffs lose in the circuit—but it may be true that in order to win in the Fifth Circuit, a case must proceed without any inquiry into causation. Although only a small number of cases raised the issue of *LULAC* causation, decisions that found a violation of section 2 are notably devoid of evidence debating the causes behind polarized voting patterns. Whenever a defendant introduced evidence

\textsuperscript{236} *Id.* at 1214; Harris v. City of Houston, 10 F. Supp. 2d 721, 725–26 (S.D. Tex. 1997) (explaining that the testimony of plaintiffs' expert witness "lacked probative value" because his opinions were "based on flawed assumptions and questionable methodology").

\textsuperscript{237} *Rollins*, 89 F.3d at 1214 (noting that the Fifth Circuit did not need to review the district court's discussion of the White-Zimmer factors because it concluded the court had correctly applied the Gingles threshold test and ruled against the plaintiffs); *Harris*, 10 F. Supp. 2d at 728 ("[P]laintiffs have failed to prove that, under the totality of the circumstances, minorities do not possess the same opportunities to participate in the City political process and to elect representatives of their choice . . . ").

\textsuperscript{238} See *Rollins*, 89 F.3d at 1214 n.13. Although the plaintiffs argued that the district court's misapplication of the white bloc-voting legal standard affected its discussion of the White-Zimmer factors, the Fifth Circuit decided not to address this argument because it determined that the lower court applied the correct legal standard. *Id.*

of nonracial factors not necessarily limited to party affiliation, plaintiffs generally lost. It is impossible to draw a definitive conclusion, but this pattern suggests that the standard, when it is invoked, severely burdens section 2 plaintiffs who must struggle to demonstrate racial bias in the electorate.

**APPENDIX**

**FIFTH CIRCUIT SECTION 2 CASES CONSIDERING RACIALLY POLARIZED VOTING, 1986–2007**

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241. *See supra* notes 163–164 for further information on the cases included in this Appendix.
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<td>Dillworth v. Clark</td>
<td>129 F. Supp. 2d 966</td>
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<td>NAACP v. Fordice</td>
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<td>Sensley v. Albritton</td>
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