

# Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act

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\* Georgetown University Law Center, J.D. 2013; Haverford College, B.A. 2006. © 2014, John M. Powers. John M. Powers is a Senior Civil Rights Analyst in the Voting Section of the Department of Justice’s Civil Rights Division. This Note reflects his personal opinions and does not reflect the views of any other Section employee or the Department itself. He thanks Carmen and Jack Powers for their helpful, invaluable comments and suggestions, as well as a lifetime of support, wisdom, guidance, and love.

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#### INTRODUCTION

On November 6, 2012, President Barack Obama was elected to his second term in office, beating opponent Mitt Romney in the popular vote by a margin of four percent.<sup>1</sup> This marked the end of a campaign season in which both the races of the candidates<sup>2</sup> and their abilities to receive crossover support from other racial groups received significant media attention.<sup>3</sup> In the postelection analysis and handwringing, the popular media gave much attention to Obama's electoral performance among various constituencies—in particular the 71% of the vote he received from Hispanic voters.<sup>4</sup> News outlets characterized Romney's failure to win the Hispanic vote as a problem that played a crucial role in

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1. See *Election 2012: Results*, CNN POLITICS (Dec. 10, 2012, 11:22 AM), <http://www.cnn.com/election/2012/results/main>.

2. See, e.g., Lee Siegel, *What's Race Got to Do With It?*, N.Y. TIMES (Jan. 14, 2012, 2:49 PM), <http://campaignstops.blogs.nytimes.com/2012/01/14/whats-race-got-to-do-with-it/> (calling Romney “the whitest white man to run for president in recent memory”).

3. See, e.g., Halimah Abdullah, *Could Obama's Struggles with White Voters Cost Him the Election?*, CNN POLITICS (Oct. 26, 2012, 5:38 AM), <http://www.cnn.com/2012/10/25/politics/obama-40-percent/index.html>; see also Edward Klein, *Could the Black Vote Cost Obama the Election?*, FOXNEWS.COM (July 10, 2012), <http://www.foxnews.com/opinion/2012/07/10/could-black-vote-cost-obama-election/> (suggesting Romney has the opportunity to “make significant inroads in the president's once-solid black base”).

4. See, e.g., Julia Preston & Fernanda Santos, *A Record Latino Turnout, Solidly Backing Obama*, N.Y. TIMES, Nov. 7, 2012, [http://www.nytimes.com/2012/11/08/us/politics/with-record-turnout-latinos-solidly-back-obama-and-wield-influence.html?\\_r=0](http://www.nytimes.com/2012/11/08/us/politics/with-record-turnout-latinos-solidly-back-obama-and-wield-influence.html?_r=0).

costing him the White House,<sup>5</sup> perhaps inspiring the Republican Party to change policy positions on issues of interest to that community.<sup>6</sup>

Obama's struggle to gain support among white voters also received significant media coverage.<sup>7</sup> The discussion of the white vote was highly contextualized. It focused on the partisan divide among white voters (particularly those who skew Republican),<sup>8</sup> as well as geographic and socioeconomic differences between those white voters who tended to support Obama and those who did not.<sup>9</sup> While some attempt was made by outlets to characterize the fact that Obama received only 39% of the white vote as a result of racial bias against a black candidate,<sup>10</sup> other outlets noted that the percentage was not atypical for Democratic presidential candidates and was in fact higher than that received by several others, including Bill Clinton in 1992.<sup>11</sup>

The media noted that Obama won 93% of the black vote, acknowledging that black support for Obama was an important component of his victory.<sup>12</sup> At the same time, however, the media generally failed to give Obama much credit for earning the black vote, dismissing that electorate's significance<sup>13</sup> or characterizing the phenomenon as inevitable<sup>14</sup> due to mistakes Romney made on the

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5. See, e.g., Joshua Green, *The GOP's Hispanic Problem is Bigger Than They Think*, BLOOMBERG BUSINESSWEEK (Nov. 16, 2012), <http://www.businessweek.com/articles/2012-11-16/the-gops-hispanic-problem-is-bigger-than-they-think>.

6. See, e.g., Mara Liasson, *Post-Election, GOP's Immigration Message Evolves*, NPR (Nov. 28, 2012, 4:00 AM), <http://www.npr.org/2012/11/28/166054170/post-election-republicans-immigration-message-evolves>.

7. See, e.g., Abdullah, *supra* note 3.

8. See, e.g., Joshua Green, *White Male Democrats Fading in Congress*, BOSTON GLOBE (Aug. 3, 2012), <http://www.bostonglobe.com/opinion/2012/08/02/electorate-changes-partisan-divide-widens/rvqJoOT91aT8rN1AiF18fK/story.html> (noting that "86 percent of Republicans are white men").

9. See, e.g., Brett LoGiurato, *Barack Obama Never Had A Problem with White Voters*, BUS. INSIDER (Nov. 8, 2012, 11:58 AM), <http://www.businessinsider.com/obama-white-vote-exit-polls-election-ohio-wisconsin-iowa-2012-11> (stating that Obama's support from white voters in "Midwestern Rust Belt states" was key to his victory in 2012, although it dropped somewhat from 2008).

10. See, e.g., Jon Wiener, *The Bad News About White People: Romney Won the White Vote Almost Everywhere*, NATION (Nov. 7, 2012, 1:41 PM), <http://www.thenation.com/blog/171093/bad-news-about-white-people-romney-won-white-vote-almost-everywhere> (declaring that whites who opposed Obama in 2008 failed to "learn toleration and acceptance of racial difference after four years with a black president").

11. See, e.g., Chris Cillizza & Jon Cohen, *President Obama and the White Vote? No Problem.*, WASH. POST (Nov. 8, 2012, 4:08 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/08/president-obama-and-the-white-vote-no-problem/>.

12. See, e.g., Freddie Allen, *Blacks Key to Obama's Victory*, WESTSIDE GAZETTE, Nov. 15, 2012, <http://thewestsidegazette.com/blacks-key-to-obamas-victory/>.

13. *You Mad?? Faux News Contributor Says He's Not Surprised POTUS Obama Won Votes "In Central-City Black Ghetto Areas,"* BOSSIP (Nov. 13, 2012), <http://bossip.com/679147/you-mad-faux-news-contributor-says-hes-not-surprised-potus-obama-won-votes-in-central-city-black-ghetto-areas-43081/>.

14. See, e.g., David C. Wilson, *The Racial Bias in Dismissing Blacks Voters' Support for Obama*, HUFFINGTON POST (Oct. 26, 2012, 9:13 AM), [http://www.huffingtonpost.com/david-c-wilson/the-racial-bias-in-dismis\\_b\\_2022611.html](http://www.huffingtonpost.com/david-c-wilson/the-racial-bias-in-dismis_b_2022611.html).

campaign trail,<sup>15</sup> or black voters' supposed preference for Obama because of their shared race.<sup>16</sup> Some of the most incendiary debate surrounded intraracial attacks on actress Stacey Dash for publicly supporting Romney, and explicit racial appeals from pro-Obama celebrities such as Tom Joyner and Samuel L. Jackson.<sup>17</sup> Postelection events seem to confirm the conventional wisdom that there was a fundamental, perhaps unbridgeable, divide between most black voters and Romney—and perhaps Republicans generally.<sup>18</sup>

The different treatments given to the various racial groups could have reflected media bias or an acknowledgment that there is an actual, substantive difference between black and white voter behavior. Perhaps surprisingly, the general population believes the latter, according to the 2010 Cooperative Congressional Election Study.<sup>19</sup> That study asked if black and white voters vote for members of their own racial group or for the person they feel is the best candidate.<sup>20</sup> A plurality of the surveyed group believed that black voters cast ballots for their own group, while only 30% believed black voters tend to vote for the better candidate.<sup>21</sup> By comparison, 63% believed that white voters vote for the best candidate, and 70% believed women vote for the best candidate.<sup>22</sup>

This data raises important questions concerning black voters' overwhelming support for Obama and white voters' preferences for his white opponent in the 2008 and 2012 elections. This Note seeks to address two of these questions. First, do white voters and black voters quantitatively engage in the same or

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15. See, e.g., Rachel Weiner, *Why Was Mitt Romney Booed at the NAACP?*, WASH. POST (July 11, 2012, 2:05 PM), [http://www.washingtonpost.com/blogs/the-fix/post/why-was-mitt-romney-booed-at-the-naacp/2012/07/11/gJQA1X8NdW\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/why-was-mitt-romney-booed-at-the-naacp/2012/07/11/gJQA1X8NdW_blog.html).

16. See, e.g., Jesse Washington, *Do Black People Support Obama Because He's Black?*, YAHOO! NEWS (Oct. 13, 2012, 9:24 PM), <http://news.yahoo.com/black-people-support-obama-because-hes-black-180905648--election.html>.

17. See *id.*

18. See, e.g., Adolph L. Reed, Jr., *The Puzzle of Black Republicans*, N.Y. TIMES, Dec. 18, 2012, [http://www.nytimes.com/2012/12/19/opinion/the-puzzle-of-black-republicans.html?\\_r=0](http://www.nytimes.com/2012/12/19/opinion/the-puzzle-of-black-republicans.html?_r=0) (discussing the “cynical manipulation[”] of touting the appointment of Representative Tim Scott, whose policy positions “are utterly at odds with the preferences of most black Americans,” to fill former Senator Jim DeMint’s seat); Andrew Rosenthal, *Romney Blames Loss on Obama “Gifts,”* N.Y. TIMES (Nov. 14, 2012, 6:17 PM), <http://takingnote.blogs.nytimes.com/2012/11/14/romney-blames-loss-on-obama-gifts/> (discussing Romney blaming his loss on minority voters and female voters, among others); see also Rheana Murray, *House Republicans Focus On Minority Outreach at Former Slave Plantation During Annual Retreat*, N.Y. DAILY NEWS (Jan. 18, 2013, 1:07 PM) <http://www.nydailynews.com/news/politics/gop-retreat-slave-plantation-article-1.1242521> (noting GOP lawmakers’ discussion on successful communication with minority voters at a retreat at a former slave plantation).

19. See Wilson, *supra* note 14.

20. See *id.* Researchers asked:

Which of these statements comes closest to describing your feelings about why [\_\_\_\_\_] voted for Barack Obama—even if neither is exactly right? \_\_\_\_\_ voted for Barack Obama in the 2008 Presidential Election because he was African American, or \_\_\_\_\_ voted for Barack Obama in the 2008 Presidential Election because he was the better candidate.

*Id.*

21. See *id.* Approximately 46% believed that black voters cast ballots on the basis of race. *Id.*

22. See *id.* Only 17% of respondents believed white voters vote for their own group. *Id.*

different levels of racial bloc voting? Second, is polarized voting merely the product of correlation, or does race “cause” white or black voters to prefer members of their own race? A quick review of past electoral data indicates that black voter cohesion is, in most parts of the country, greater than cohesion amongst white voters. This Note concludes that racial bias has a measurable effect on white voter behavior, but partisan political beliefs more powerfully influence the vast majority of that electorate. The available social science data and the 2008 primary results raise the possibility that, in aggregate, race more strongly affects the behavior of black than white voters. More rigorous research into the effects of bias on black voters is required, however, before making any definitive conclusions.

The answers could have important implications for the application of Section 2 of the Voting Rights Act of 1965 (“Section 2”).<sup>23</sup> Section 2 provides a private right of action for plaintiffs to challenge voting qualifications, standards, practices, or procedures that deny or abridge the right to vote “on account of race or color.”<sup>24</sup> Additionally, plaintiffs making a vote dilution<sup>25</sup> claim under the statute must establish, among other things, that white voters in the jurisdiction generally vote as a bloc to defeat the minority group’s candidate of choice.<sup>26</sup> If returns from recent elections in a jurisdiction demonstrate an absence of white bloc voting, minority plaintiffs are precluded from succeeding in Section 2 vote dilution claims.<sup>27</sup> A Section 2 claim could fail even if white voters consistently vote as a bloc due to partisanship, incumbency, or other nonracial factors; the defeat of black-preferred candidates would not be “on account of race or color,” as required by the statute.<sup>28</sup> Furthermore, black voters may receive relief even if they are much more likely to engage in race-based voting behavior than white voters. The purposes of the statute could arguably be thwarted if white voters—making decisions based on (nonblameworthy) nonracial factors—are penalized at the expense of black voters who consistently vote based on racial factors.<sup>29</sup>

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23. 42 U.S.C. § 1973 (2006).

24. *Id.* § 1973a (2006) (“[N]o voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . .”). In addition to a private right of action, the Department of Justice may bring suit on behalf of the federal government. *Id.*

25. Vote dilution refers to a method of election that prevents minority voters from electing their preferred candidates because they are always outvoted by a white majority by splitting a minority community between several election districts, for example, or “submerg[ing]” minority communities in multimember districts or at-large elections. See Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1046 (2013).

26. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

27. *Id.* at 55–57. Section 2 vote dilution claims require a racially discriminatory effect. *Id.* at 35.

28. See, e.g., *League of United Latin Am. Citizens v. Clements (LULAC)*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc) (rejecting the Section 2 claim because “partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens”).

29. See *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) (criticizing Section 2 for “dividing the country into electoral districts along racial lines—an enterprise of segregating the races

Part I begins by describing the persistence of racial bloc voting and discussing why existing assumptions regarding polarization and causality are critical to the current analytical framework used in analyzing cases under Section 2. Part II utilizes past election returns and survey data to probe more deeply into the proclivities and preferences of white and black voters to assess the effects of race on voters' mental, psychological, and emotional responses to candidates, focusing on the 2008 and 2012 elections. Part III explicates several evidentiary and legal conclusions, returning to the concept of causality. A discussion of the implications for Section 2 explores the conflict inherent in imposing a race-based remedy—the creation of majority–minority single-member districts—due in large part to the outcome of a test that does not properly account for the effect of race on voter behavior.

## I. RACIAL VOTE DILUTION UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965

Section 2 of the Voting Rights Act of 1965 is the statute's general antidiscrimination provision that allows plaintiffs to challenge standards, practices, or procedures that result in a “denial or abridgement of the right . . . to vote on account of race or color.”<sup>30</sup> This Part addresses past challenges to Section 2 on constitutional grounds and describes the standard for reviewing evidence of racial bloc voting in Section 2 vote dilution cases, as set out in *Thornburg v. Gingles*.<sup>31</sup> It then assesses the dispute regarding race and causality by comparing the current majority standard, set out in Justice Brennan's plurality opinion, with the minority standard, as described in Justice O'Connor's concurrence and the Fifth Circuit's opinion in *League of United Latin American Citizens v. Clements (LULAC)*.<sup>32</sup>

### A. CONSTITUTIONAL CHALLENGES TO THE APPLICATION OF SECTION 2 IN VOTE DILUTION CASES

As amended in 1982, Section 2 not only provides a vehicle to challenge restrictions on access to the ballot, on the grounds they result in “vote denial,” but also methods of electing officials that dilute the minority vote.<sup>33</sup> By forbidding election systems that “minimize or cancel out the voting strength and

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into political homelands” based on the assumption that racial groups are equivalent to political interest groups). Black voters could receive relief *because* of their race-based voting behavior—if they are more cohesive it will be easier to draw a compact district in which minority voters have the ability to elect their candidate of choice. *See id.*

30. 42 U.S.C. § 1973 (2006) (“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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.”).

31. 478 U.S. 30 (1986).

32. Compare *id.* at 61–74 (plurality opinion), with *id.* at 83–105 (O'Connor, J., concurring), and *LULAC*, 999 F.2d 831 (5th Cir. 1993) (en banc).

33. See S. REP. NO. 97-417, at 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205.

political effectiveness of minority groups,” this Section 2 “results test” allows a plaintiff to challenge methods of electing local, state, and federal officials.<sup>34</sup> The statute has effectively thwarted schemes that prevent large and geographically compact minority communities from having a meaningful say in the electoral process, whether through at-large elections, multimember districts, gerrymandering, or other methods.<sup>35</sup>

Although the Section 2 results test has had a significant impact on the American electoral landscape, the Supreme Court has never definitively addressed its constitutionality.<sup>36</sup> In 1984, the Court summarily affirmed a district court holding that Congress did not exceed the scope of its authority under the Fifteenth Amendment in adopting the amended Section 2.<sup>37</sup> A summary affirmation from the Supreme Court is, of course, binding on lower courts,<sup>38</sup> which have unanimously found Section 2 to be constitutional.<sup>39</sup> In relevant dicta, however, Justices Kennedy and O’Connor have explicitly noted that the Court has not confronted the issue,<sup>40</sup> and Justice Thomas has strongly criticized the use of the Section 2 results test in the vote dilution context.<sup>41</sup> Leading commentators have noted, “[T]hese signals might suggest that at least some Justices view the constitutional question as open and difficult.”<sup>42</sup> Subsequent developments—in particular the Court’s decisions to (1) adopt a “congruence and proportionality” test in *Boerne v. Flores*, and (2) find Section 4(b) of the Voting Rights Act unconstitutional in *Shelby County v. Holder*—lend credence to this hypothesis.<sup>43</sup>

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

35. *See, e.g.*, *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103 (3d Cir. 1993) (black voters challenge at-large school board elections); *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471 (11th Cir. 1993) (blacks and Hispanics challenge at-large elections for county commissioners); *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989) (blacks and Mexican-Americans challenge at-large elections for city council); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987) (black voters challenge at-large elections for board of aldermen); *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176 (D. Wyo. 2012) (Native American voters challenge at-large elections for county commissioners); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (Hispanic voters challenge at-large school board elections).

36. *See* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 758–59 (4th ed. 2012).

37. *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984), *aff’g* *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984).

38. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975).

39. *See, e.g.*, *United States v. Blaine Cnty.*, 363 F.3d 897, 903–04 (9th Cir. 2004); *United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1556–63 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364, 372–75 (5th Cir. 1984); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 869 (W.D. Wis. 1992) (3-judge district court).

40. *See* *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

41. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 891–946 (1994) (Thomas, J., concurring).

42. ISSACHAROFF ET AL., *supra* note 36, at 646–47.

43. *See id.* at 761 (noting that the Supreme Court’s Enforcement Clause decisions post-*Boerne* “may bear on the constitutionality of Section 2”); *see also* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Boerne v. Flores*, 521 U.S. 507 (1997).

B. THE STANDARD UNDER SECTION 2 FOR ASSESSING THE PRESENCE OF  
RACIAL BLOC VOTING

The Supreme Court has yet to definitively resolve (1) what, precisely and quantitatively, constitutes statistically significant bloc voting, and (2) whether statistical evidence of white bloc voting is not legally significant when it is largely explained by nonracial factors such as partisan affiliation.<sup>44</sup> Importantly, early challenges to at-large elections and multimember districts defining the current case law occurred prior to the emergence of a primarily white Republican Party in the south, which prevented jurisdictions from raising the partisan, political “we are hurting Democrats, not minorities” defense that is commonly used today.<sup>45</sup>

The Supreme Court’s 1986 decision in *Thornburg v. Gingles* interprets the plaintiff’s burden of proof in Section 2.<sup>46</sup> It requires the plaintiff to satisfy three “preconditions,” among other factors, to establish the presence of racial bloc voting.<sup>47</sup> Under the third *Gingles* precondition, “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate” in the jurisdiction being sued.<sup>48</sup> Bloc voting is an important component of the plaintiff’s larger showing that white voters prevent a large, geographically compact, and cohesive minority group from electing their candidates of choice.<sup>49</sup> In fact, whether racial bloc voting exists in a particular jurisdiction is frequently the most important issue in Section 2 litigation.<sup>50</sup>

*Gingles* advises that the amount of “white bloc voting that can generally ‘minimize or cancel’ black voters’ ability to elect . . . will vary” from case to

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44. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997, 1007–11 (1994) (omitting explicit decision on whether any of the three *Gingles* preconditions are satisfied); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (holding that *Gingles*’ third precondition was not satisfied because of insufficient white majority bloc voting).

45. See Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 314–20 (1997) (noting that early Section 2 victories occurred in the one-party, Democratic South or in one-party, Democratic cities).

46. 478 U.S. 30, 48–49, 56–58 (1986).

47. *Id.* at 50–51.

48. *Id.* at 51 (citations omitted). The first *Gingles* precondition requires that the minority group be “sufficiently large and geographically compact to constitute a majority in a single-member district.” *Id.* at 50. The second precondition requires the minority group be “politically cohesive,” consistently voting as a bloc. *Id.* at 51.

49. *De Grandy*, 512 U.S. at 1008 (finding no Section 2 violation because “Hispanics can be expected to elect their chosen representatives in substantial proportion to their percentage of the area’s population”).

50. See, e.g., *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1010 (D.S.D. 2004) (noting that racially polarized voting is ordinarily the “keystone of a vote dilution case” (quoting *Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5, S.D.*, 804 F.2d 469, 473 (8th Cir. 1986))); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992) (stating that “*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act”).

case or even “district to district according to a number of factors,” such as the nature of the electoral system.<sup>51</sup> Although the outcome of any single election is not conclusive evidence of polarization, “a pattern of racial bloc voting that extends over a period of time is more probative.”<sup>52</sup> Courts consider so-called white-on-white elections in addition to interracial contests, but a jurisdiction is not immune from Section 2 liability if “[c]andidates favored by blacks can win . . . only if the [favored] candidates are white.”<sup>53</sup> A plaintiff demonstrates “legally significant white bloc voting” that satisfies the precondition if it “normally will defeat the combined strength of minority support plus white ‘crossover’ votes” in relevant elections.<sup>54</sup> By definition, therefore, the third precondition cannot be satisfied if a majority of white and black voters usually prefer the same candidate.<sup>55</sup>

There is disagreement about whether it is necessary to establish that the white majority is voting against black-preferred candidates due to racial considerations, or whether evidence of a correlation between white voters and opposition to black-preferred candidates is sufficient. The conventional wisdom, and the position generally taken by the courts, is based on Justice Brennan’s plurality opinion in *Gingles*.<sup>56</sup> Under this view, the third *Gingles* precondition is satisfied by statistical evidence that white voters support different candidates than black voters and are sufficiently cohesive in their support to consistently prevail.<sup>57</sup> This standard does not require “patterns that are determined primarily by the voter’s race, rather than by the voter’s other socioeconomic characteristics.”<sup>58</sup> It can be satisfied through the use of bivariate statistical analyses such as extreme-precinct analyses or ecological regression, instead of multiple regression analyses that try to control for the influence of nonracial factors.<sup>59</sup> According to conventional wisdom, Section 2 should not make value judgments on individual voters’ intracranial thoughts, because “[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives.”<sup>60</sup> Moreover, straining out the influence of race alone is oftentimes impossible due to multicollinearity<sup>61</sup> between race and party, socioeco-

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51. *Gingles*, 478 U.S. at 56 (citations omitted).

52. *Id.* at 57.

53. *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988), *aff’d*, 488 U.S. 988 (1988).

54. *Gingles*, 478 U.S. at 56.

55. *See id.*

56. *See id.* at 61–74 (plurality opinion).

57. *Id.* at 56.

58. *Id.* at 64 (emphasis omitted).

59. *Id.* at 61–62.

60. *Id.* at 63.

61. “Multicollinearity” is a statistical phenomenon in a multiple regression model in which two or more variables are highly correlated with one another, negatively affecting the validity of predictive model results. *See generally* Ramona L. Paetzold, *Multicollinearity and the Use of Regression Analyses in Discrimination Litigation*, 10 BEHAV. SCI. & L. 207 (1992) (discussing “problems associated with multicollinearity and suggest[ing] possible sources of the multicollinearity”).

nomic status, and other factors.<sup>62</sup>

Justice O'Connor's concurrence takes a fundamentally different view of the linkage between white bloc voting and race.<sup>63</sup> She suggests that, for Section 2 purposes, legally cognizable white bloc voting must be caused by racial considerations, as opposed to other factors such as party affiliation, age, religion, income, incumbency, and campaign expenditures, among others.<sup>64</sup> Under this view:

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.<sup>65</sup>

Statistical evidence that white bloc voting consistently results in the defeat of black-preferred candidates is therefore insufficient by itself.<sup>66</sup> Section 2 plaintiffs would be required to run multiple regression analyses to establish that race is the sole causal factor behind the bloc voting patterns.<sup>67</sup>

The Fifth Circuit adopted Justice O'Connor's view in deciding *LULAC*.<sup>68</sup> The circuit held that Texas's system of electing state trial judges at-large in countywide elections did not violate Section 2 of the Voting Rights Act because plaintiffs could not satisfy the third *Gingles* precondition.<sup>69</sup> Despite strong evidence that white bloc voting caused the defeat of minority-preferred candidates, the court rejected the Section 2 claim, reasoning that "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens."<sup>70</sup> The court pointed out that black and Latino Republican nominees for judgeships were elected on the basis of white, Republican support even when they were not the candidates of choice of minority voters.<sup>71</sup> Further, white voters "supported the minority candidates slated by their parties at levels equal to or greater than those enjoyed by white candidates," reinforcing the notion that party caused the defeat of Democratic minority-preferred candidates.<sup>72</sup> Because Section 2 "extend[s] only to defeats experienced by voters 'on account of race or color,'" the plaintiffs failed to establish legally significant white bloc

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62. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1223-24 (1996).

63. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring).

64. See *id.*

65. *Id.*

66. See *id.*

67. *Id.* at 61-62 (plurality opinion).

68. 999 F.2d 831, 850-51 (5th Cir. 1993) (en banc).

69. *Id.* at 859.

70. *Id.* at 850.

71. *Id.* at 878, 887.

72. *Id.* at 861.

voting.<sup>73</sup>

*LULAC* represents the minority rule.<sup>74</sup> Plaintiffs generally do not need to use multiple regression analyses to isolate race as the cause of polarized voting behavior.<sup>75</sup> The linkage between voting patterns and race nonetheless remains relevant in Section 2 litigation.<sup>76</sup> Nine judicial circuits “expressly or implicitly incorporate causation when they assess racial bloc voting,” for example by considering minority-preferred candidates’ performances in nonpartisan contests.<sup>77</sup>

Understanding that racially polarized voting is not an aberration but a long-standing, pervasive, and continuing feature of numerous jurisdictions’ electoral histories—both at statewide and local levels—is a prerequisite to analyzing the 2008 and 2012 presidential elections. An overwhelming amount of data indicates that racially polarized voting patterns persist throughout the country.<sup>78</sup> During the 2006 reauthorization of Section 5, Congress amassed an impressive record demonstrating polarization—particularly in southern jurisdictions.<sup>79</sup> The evidence included judicial findings, scholarly studies, expert analyses, exit polls, and personal testimonies.<sup>80</sup> A finding of widespread racial bloc voting was a necessary component of a federal court’s 2012 denial of judicial preclearance to the State of Texas’s redistricting plans, on the basis that the plans had a retrogressive effect on minority voting strength.<sup>81</sup> Similarly, the Department of Justice has recently relied on findings of racially polarized voting to object to

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73. *Id.* at 850.

74. ISSACHAROFF ET AL., *supra* note 36, at 712 (discussing how the Second and Fourth Circuits decided that “causation—that is, the reason for divergent voting patterns—is irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry, a position that had been taken by several other circuits as well”) (citing *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476 (2d Cir. 1999); *Lewis v. Alamance Cnty.*, 99 F.3d 600 (4th Cir. 1996)).

75. *See, e.g.*, *Old Person v. Cooney*, 230 F.3d 1113, 1127–28 (9th Cir. 2000) (rejecting the contention that losses by Democratic Native Americans candidates are attributable to partisan politics when they lose in majority-Republican districts); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 492 (2d Cir. 1999); *Lewis v. Alamance Cnty.*, 99 F.3d 600, 609–10 (4th Cir. 1996).

76. Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1394 (2010).

77. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 671 (2006).

78. *See, e.g.*, *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005).

79. *See id.*

80. *Id.* at 4–6 (testimony of Laughlin McDonald, Dir., ACLU Voting Rights Panel) (discussing a 2002 decision in a statewide redistricting case finding that “[t]he disturbing fact of racially polarized voting has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree in all regions of the State.”); *id.* at 49–50 (testimony of Richard Engstrom, Professor, Univ. of New Orleans) (recounting expert findings that seventy-eight of ninety analyzed electoral contests in Louisiana between 1991 and 2002 had a high degree of racial divisions in candidate preferences).

81. *See Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (holding that Texas’s 2011 congressional plan was retrogressive with respect to Congressional Districts 23, 25, and 27 and because it did not draw an additional district in which Hispanic voters had the ability to elect, and the State House plan was retrogressive with respect to Districts 33, 35, 41, 117, and 149), *vacated*, 133 S. Ct.

retrogressive voting changes—such as redistricting plans—adopted by numerous southern local jurisdictions.<sup>82</sup>

Racially polarized voting is not, however, a problem unique to the south.<sup>83</sup> A total of 800 Section 2 cases have been resolved in the favor of plaintiffs since 1982, either as a result of settlement or judicial findings.<sup>84</sup> Although 701 of these cases were successfully litigated against jurisdictions formerly covered by Section 5, which are mostly located in the South, plaintiffs won 99 cases against jurisdictions located elsewhere.<sup>85</sup> In fact, courts have recently found racial bloc voting patterns in Section 2 cases litigated against jurisdictions in Wyoming, New York, and Ohio.<sup>86</sup>

The Section 2 results test remains constitutional, and the intracranial thoughts of voters are generally not considered in terms of racial causation, but these majority positions mask long-simmering disputes concerning the role of courts in adjudicating voting rights cases. Some judges and justices have expressed reservations about Section 2's constitutionality in the context of vote dilution cases because it uses an effects-based test to invalidate local jurisdictions' electoral systems. Regarding the standard for assessing racial bloc voting, some courts have objected to the rigid application of the *Gingles* preconditions when there is anecdotal evidence that racial animus is not the actual cause of polarized voting behavior.

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2885 (2013). The denial of judicial preclearance occurred under Section 5, not Section 2. The racial bloc voting analysis is similar under both statutes—correlation, not causation, is the touchstone.

82. Since 2006, the Department of Justice has interposed objections under such circumstances on at least seven occasions. *See, e.g.*, Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Melody Thomas Chappell, Esq., Well, Peyton, Greenberg & Hunt (Dec. 21, 2012) (Beaumont Independent School District, Texas) (on file with author); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Michael Crowell, Esq. (June 25, 2007) (City of Fayetteville, North Carolina) (on file with author); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Dennis R. Dunn, Esq., Deputy Attorney Gen., State of Ga. (Dec. 21, 2012) (the City of Augusta, Georgia) (on file with author); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Nancy P. Jensen, Garnet Innovations (Oct. 3, 2011) (East Feliciana Parish, Louisiana) (on file with author); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Andrew S. Johnson, Esq., Arnold, Stafford, & Randolph, and B. Jay Swindell, Esq., McCullough & Swindell (Aug. 27, 2012) (the Long County School District and Long County, Georgia) (on file with author); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to Robert T. Sonnenberg, Esq., In-house Counsel, Pitt Cnty. Schs. (Apr. 30, 2013) (the Pitt County School District in North Carolina) (on file with author); Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Justice, to James E. Trainor III, Esq., Beirme, Maynard & Parsons (March 5, 2012) (Galveston County, Texas) (on file with author).

83. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that racially polarized voting "is not a problem unique to the South" (citing Katz et al., *supra* note 77, at 665)).

84. *Shelby Cnty. v. Holder*, 679 F.3d 848, 875 (D.C. Cir. 2012) (citing the declaration of Dr. Peyton McCrary), *rev'd in part* 133 S. Ct. 2612 (2013).

85. *Id.*

86. *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1207 (D. Wyo. 2010); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 443 (S.D.N.Y. 2010); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 613 (N.D. Ohio 2008).

## II. RACIAL BLOC VOTING IN THE 2008 AND 2012 PRESIDENTIAL ELECTIONS

Predictably, advocates on both sides of voting rights issues have tried to contextualize the election and reelection of our nation's first black president within their respective views of the utility of the Voting Rights Act.<sup>87</sup> Some claim that Obama's election is a game changer that marks the inauguration of a postracial world in which a majority-white electorate can elect black candidates, rendering the Voting Rights Act obsolete.<sup>88</sup> Others contend that this analysis is too simplistic and that no general conclusions can be drawn that are relevant to the searching, localized analysis required in Section 2 cases.<sup>89</sup>

This Part seeks to bring some methodological rigor to the larger political and legal debate. It uses statistical studies and other academic research to ask if the old assumptions regarding racial bloc voting, which undergirded the Section 2 results test, are breaking down. To make this determination, it is necessary to review analyses of election results, recent social science data, and legal materials to characterize current, polarized voting patterns. This Part begins by cataloguing and comparing white bloc voting and black voter cohesion during the 2008 and 2012 presidential elections. It then reviews recent experimental and statistical studies to assess the extent to which racial animus affects white voter behavior, focusing on recent successful hybrid approaches that creatively addressed the problem of response bias. Since white bloc voting patterns vary dramatically based on region, it considers geographic differences in white voter behavior. Finally, this Part reviews the available social science data regarding the extent to which race affects black voter behavior in an attempt to determine whether black voters are more or less "biased" than white voters.

### A. POLARIZED VOTING PATTERNS IN THE 2008 AND 2012 ELECTIONS IN HISTORICAL CONTEXT

In both 2008 and 2012, President Obama was the overwhelming candidate of choice of black voters, but white voters did not prefer him. In 2008, Obama

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87. See, e.g., Peter Wallsten & David G. Savage, *Conservatives Invoke Obama in Voting Rights Act Challenge*, L.A. TIMES, Mar. 18, 2009, <http://articles.latimes.com/2009/mar/18/nation/na-voting-rights18> (noting that conservative foundations and the former Republican governor of Georgia filed briefs in 2009 litigation stating that "Obama's victory heralded the emergence of a colorblind society in which special legal safeguards for minorities are no longer required"); Nathaniel Persily, *Is the Voting Rights Act Doomed?*, N.Y. TIMES (Nov. 14, 2012, 8:48 PM), <http://campaignstops.blogs.nytimes.com/2012/11/14/is-the-voting-rights-act-doomed/> (concluding that Obama's reelection in 2012 likely "spells doom" for Section 5 of the Voting Rights Act).

88. See ABIGAIL THERNSTROM, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 1–2 (2009) (declaring that "President Obama's victory is unmistakably the end of an era" and marked "the culmination of a quiet revolution in racial politics that had begun many decades before with the passage of the 1965 Voting Rights Act").

89. Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 60 (2009) (concluding that "no overarching conclusions about racially polarized voting can be drawn" from the 2008 presidential elections).

received 53% of the popular vote;<sup>90</sup> he received 44% of votes cast by white voters and 96% of the black vote.<sup>91</sup> In 2012, Obama received 51% of the overall vote, including 39% of the white vote and 93% of the black vote.<sup>92</sup> In both elections, Obama received a larger share of the popular vote than did any Democratic nominee since 1964, when Lyndon Baines Johnson received 61% of the vote.<sup>93</sup> Obama is the only Democrat since Franklin Delano Roosevelt to receive a majority of the vote when seeking reelection.<sup>94</sup> By comparison, exit polls indicate Democratic nominees for President between 1984 and 2004 received, on average, 39% of the two-party vote from whites.<sup>95</sup> John Kerry received 41% of the white vote in 2004.<sup>96</sup> Notably, in 2008, Obama was white voters' candidate of choice in eighteen states and the District of Columbia, winning that portion of the electorate.<sup>97</sup> He received a greater percentage of the votes cast by white voters than did any nonincumbent Democratic candidate since Jimmy Carter.<sup>98</sup>

The 93% and 96% of black support Obama received in 2008 and 2012, respectively, are higher than the 84% that white Democratic nominees received in general elections held between 1984 and 2004.<sup>99</sup> More than two million additional black voters participated in the 2008 election than in 2004, a sign of increased interest.<sup>100</sup> Approximately 13% of the electorate was black in both 2008 and 2012, a two percentage point increase from 11% in 2004.<sup>101</sup>

Analysis of the 2008 Democratic primary helps somewhat to control for the influence of party affiliation. Black voters preferred Obama to Hillary Clinton by an overwhelming margin in the 2008 primaries.<sup>102</sup> The 2008 Cooperative Congressional Election Study indicated that Obama received approximately

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90. *Election Center 2008: Exit Polls*, CNN POLITICS, <http://www.cnn.com/ELECTION/2008/results/polls/#USP00p1> (last visited Jan. 24, 2013).

91. Ansolabehere et al., *supra* note 76, at 1411–13.

92. *Election 2012: Results*, *supra* note 1.

93. John Nichols, *Obama's 3 Million Vote, Electoral College Landslide, Majority of States Mandate*, NATION (Nov. 9, 2012, 3:49 PM), <http://www.thenation.com/blog/171178/obamas-3-million-vote-electoral-college-landslide-majority-states-mandate>.

94. *Id.*

95. Ansolabehere et al., *supra* note 76, at 1402 tbl.1.

96. *Id.* at 1406 tbl.2.

97. *Id.* at 1422–23 tbl.9. Obama won the white vote in Colorado, Connecticut, Illinois, Iowa, Michigan, California, New York, Delaware, Minnesota, New Hampshire, Wisconsin, Washington, Oregon, Maine, Rhode Island, Massachusetts, Vermont, Hawaii, and the District of Columbia. *Id.*

98. Timothy Noah, *What We Didn't Overcome*, SLATE (Nov. 10, 2008, 8:05 PM), [http://www.slate.com/articles/news\\_and\\_politics/chatterbox/2008/11/what\\_we\\_didnt\\_overcome.html](http://www.slate.com/articles/news_and_politics/chatterbox/2008/11/what_we_didnt_overcome.html).

99. Ansolabehere et al., *supra* note 76, at 1402 tbl.1, 1406 tbl.2.

100. Press Release, U.S. Census Bureau, Voter Turnout Increases by 5 Million in 2008 Presidential Election, U.S. Census Bureau Reports (July 20, 2009), <http://www.census.gov/newsroom/releases/archives/voting/cb09-110.html>.

101. See Ansolabehere et al., *supra* note 76, at 1412 tbl.4 (providing turnout in 2004 and 2008); Nate Cohn, *What Black Turnout for Obama in 2012 Means for the GOP in 2016*, NEW REPUBLIC (Nov. 13, 2012), <http://www.tnr.com/blog/electionate/110068/the-overlooked-question-2016-the-future-black-turnout> (providing black turnout in 2012).

102. See Ansolabehere et al., *supra* note 76, at 1434 tbl.14.

84% of the black vote in states that held primaries, and an even higher percentage of the black vote in caucuses.<sup>103</sup> These figures correspond with CNN exit polls from primaries in individual states, which show that black voters' preferences for Obama were pervasive.<sup>104</sup> In states for which exit poll data was available, Obama received less than 70% of the black vote only in New York and Massachusetts.<sup>105</sup> He received 90% or more of the black vote in several mid-Atlantic, Midwestern, and southern states.<sup>106</sup>

Although black cohesion in the 2008 Democratic primary was not as high as in the 2008 and 2012 general elections, it was nonetheless extraordinary when compared to Obama's support from other racial groups.<sup>107</sup> The level of black cohesion was even more remarkable because Hillary Clinton, Obama's opponent, began the 2008 campaign as the front-runner with a significant advantage in name recognition, and—like Obama—was attempting to make history—in her case by becoming the first major-party female nominee for president.<sup>108</sup> Black support for Obama in the primary cannot be explained by partisan affiliation, name recognition, geographical region, or primary format.<sup>109</sup>

White voters were not unusually polarized in the 2008 primary. According to the 2008 Cooperative Congressional Election Study, white support for Obama approached, and in some cases exceeded, 50%.<sup>110</sup> He also won the white vote in the caucuses.<sup>111</sup> Because Obama's vote shares are slightly inflated due to a response bias, it is unlikely that he was the candidate of choice of white voters

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103. *See id.* Data compiled by the authors using data from the 2008 Cooperative Congressional Election Study indicates Obama received 91.0% of the black vote in caucus states formerly covered in Section 5 and 83.5% of the black vote in caucus states that were not covered. *Id.*

104. Clarke, *supra* note 89, at 74–75 tbl.3 (compiling data from *Election Center 2008*, *supra* note 90 (click the hyperlink “President Exit Polls” for each state)).

105. *Id.* Obama received 61% of the black vote in New York and 66% in Massachusetts. *Id.*

106. *Id.* Those states include Illinois, Kentucky, Mississippi, North Carolina, Pennsylvania, Virginia, and Wisconsin. *Id.*

107. *See* Ansolabehere et al., *supra* note 76, at 1433 (noting “whites and Hispanics did not differ much from each other in their support for Obama, but . . . they gave much less support to Obama than did African Americans”).

108. *The Democrats' Race to the White House: A Funny Thing Happened on the Way to the Coronation*, NAT'L ASS'N OF WHOLESALER-DISTRIBS., [http://www.naw.org/nawnews/news\\_article.php?articleid=522](http://www.naw.org/nawnews/news_article.php?articleid=522) (last visited Oct. 11, 2013) (noting that Clinton “had all the competitive advantages to which a candidate could aspire: name recognition, money, organization, the Democratic establishment, and Bill”).

109. *See* Ansolabehere et al., *supra* note 76, at 1388, 1434 tbl.14 (addressing the potential impact of partisan affiliation, applicable to general but not primary elections, and showing consistency in black support for Obama regardless of primary format or whether the state was formerly covered under Section 5); *The Democrats' Race to the White House*, *supra* note 108 (discussing Clinton's initial name recognition advantage).

110. *See* Ansolabehere et al., *supra* note 76 at 1434 tbl.14. Approximately 48% of whites voted for Obama in primary elections. *See id.*

111. *Id.* (indicating Obama received 50.3% of the white vote in caucus states formerly covered in Section 5 and 60.1% of the white vote in caucus states that were not covered).

nationwide in the 2008 primary cycle.<sup>112</sup> Of the thirty-six states for which exit poll data is available, Obama received a majority of the white vote in only seven.<sup>113</sup> Because Obama failed to receive a majority of the white vote in California, Texas, New York, and Florida,<sup>114</sup> the four most populous states in the Union, it is likely that Obama's white-vote share did not approach a share near 50%.

The exit poll data indicates a potentially significant difference in the voting behavior of white voters based on geographic region. Obama received less than 30% of the white vote in the Democratic primaries held in ten states—Alabama, Arkansas, Florida, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, Tennessee, and West Virginia—all of which are located in the South, as defined by the United States Census Bureau.<sup>115</sup> Meanwhile, of the seven states in which he received more than 50%, only Virginia is located in the South.<sup>116</sup>

Obama performed particularly poorly with white, southern voters. Of the eighteen states in which he received a majority of the white vote in the 2008 general election, none are located in the South.<sup>117</sup> Obama received 10% of the white vote in Alabama, 11% in Mississippi, and 14% in Louisiana.<sup>118</sup> In each of the five states constituting the Deep South—Alabama, Georgia, Louisiana, Mississippi, and South Carolina—he received at least 94% of the black vote but lost the state overall.<sup>119</sup> In all but five states, Obama received an equal or greater share of the white vote, compared to Kerry's 2004 numbers.<sup>120</sup> The five states in which Obama received less white support were Alabama, Arizona, Arkansas, Louisiana, and Mississippi.<sup>121</sup> The dramatic 6%, 9%, and 10% decreases from 2004 to 2008 in Arkansas, Alabama, and Louisiana, respectively, are particularly striking given the favorable results of the 2008 election for the Democratic Party everywhere else.<sup>122</sup>

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112. *Id.* at 1433 n.108. The Cooperative Congressional Election Study is based on self-reporting, and in 2008 there was a response bias in which more respondents stated they voted for Obama in the primaries and caucuses than actually did. *Id.*

113. Clarke, *supra* note 89, at 74–75 tbl.3. States without exit poll data include Colorado, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, North Dakota, South Dakota, Washington, and Wyoming. *See id.*

114. *Id.* He received 45% in California, 44% in Texas, 37% in New York, and 23% in Florida. *Id.*

115. *See id.*; Census Bureau Regions and Divisions with State FIPS Codes, U.S. CENSUS BUREAU, [http://www.census.gov/geo/maps-data/maps/pdfs/references/us\\_regdiv.pdf](http://www.census.gov/geo/maps-data/maps/pdfs/references/us_regdiv.pdf) (last visited Sep. 28, 2013).

116. Clarke, *supra* note 89, at 74–75 tbl.3. The remaining states are Illinois, New Mexico, Oregon, Utah, Vermont, and Wisconsin. *Id.*

117. Ansolabehere et al., *supra* note 76, at 1422–23 tbl.9.

118. *Id.*

119. Clarke, *supra* note 89, at 70 tbl.1.

120. *See* Ansolabehere et al., *supra* note 76, at 1422–23 tbl.9.

121. *Id.*

122. *Id.* at 1414 (discussing how the political context of the 2008 election was different than 2004 and “provided a wind at the Democrats’ back” reflected in Obama’s superior performance compared to Kerry outside of those states formerly covered under Section 5 of the Voting Rights Act).

## B. THE EXTENT TO WHICH RACE AFFECTS WHITE VOTER BEHAVIOR

Quantitative evidence of racially polarized voting describes voter behavior but provides little insight into the motivations driving it. Fortunately, academia is awash with studies of the effect of race on white voters. There are two traditional models: (1) experimental, research-based studies that control for the race of the candidate; and (2) nonexperimental, statistical analyses of the support received by white and black candidates in real elections.<sup>123</sup> These studies have supported two competing hypotheses. The white discrimination hypothesis holds that a measurable “racial animus under[ies] whites’ political thinking and voting behavior.”<sup>124</sup> The other hypothesis concludes the effect of race on white voter choice is minimal or indeterminate.<sup>125</sup> On balance, “[d]espite considerable effort by numerous researchers over several decades, there is still no widely accepted answer as to whether or not [white] prejudice against blacks remains a potent factor within American politics.”<sup>126</sup>

Experimental studies have provided lukewarm support for the white voter discrimination hypothesis. Moskowitz and Stroh determined that white voters evaluate black candidates more negatively than white candidates when the two are equally qualified.<sup>127</sup> Williams also found that whites, who voiced a willingness to support black candidates, were more likely to believe a white candidate would be more qualified and effective than a similarly described black candidate.<sup>128</sup> Sigelman, however, concluded that a candidate’s race had only a minor effect on white voters’ ultimate choices because its role was moderated by nonracial considerations such as perceptions of the candidate’s ideology, competency, and compassion.<sup>129</sup> Reeves found that vote margins were generally unaffected by a candidate’s race, although white respondents claimed they were “undecided” in their preferences more often when a black candidate was on the ballot.<sup>130</sup>

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123. Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 *POLITICAL BEHAVIOR* 1, 4–5 (2004).

124. See KEITH REEVES, *VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA* 9 (1997).

125. See, e.g., Highton, *supra* note 123, at 17.

126. Leonie Huddy & Stanley Feldman, *On Assessing the Political Effects of Racial Prejudice*, 12 *ANN. REV. POL. SCI.* 423, 424 (2009).

127. David Moskowitz & Patrick Stroh, *Psychological Sources of Electoral Racism*, 15 *POL. PSYCHOL.* 307, 325–26 (1994).

128. Linda F. Williams, *White/Black Perceptions of the Electability of Black Political Candidates*, 2 *NAT’L POL. SCI. REV.* 45, 47–49 (1989).

129. See Carol K. Sigelman et al., *Black Candidates, White Voters: Understanding Racial Bias in Political Perceptions*, 39 *AM. J. POL. SCI.* 243, 262 (1995) (concluding that race played a role in voter perceptions but did not ultimately exert “a substantial influence one way or the other on voting preferences” in the study).

130. REEVES, *supra* note 124, at 87–89 (interpreting the larger number of undecided voters as evidence of the “strong disinclination on the part of some whites to support the black” candidate, indicating white discrimination). Highton criticizes Reeves’ conclusion as “overstated,” particularly given that Reeves added the entire undecided vote to the total white vote, driving down the relative percentage received by black candidates. Highton, *supra* note 123, at 21 n.6.

Several nonexperimental studies indicate a negative relationship between race and white support for black candidates. Bullock and Dunn, who analyzed the Democratic vote in ninety congressional elections in the South between 1992 and 1998, found that white candidates received an estimated ten percentage points more of the white vote than black candidates.<sup>131</sup> As another example, Gay, who analyzed 1994 congressional election results in five states, found white Democratic candidates received 10% higher support from white voters than black candidates, all of whom were incumbents.<sup>132</sup>

Highton's 2004 study of the 1996 and 1998 U.S. House elections was innovative because it sought to simultaneously address shortcomings of the experimental and nonexperimental approaches.<sup>133</sup> He found that when a Democratic candidate faced a white, Republican opponent, the Democrat fared 14 percentage points better among white voters (averaging 58%) when he or she was black.<sup>134</sup> Yet the regression analysis, accounting for nonracial factors, indicated that candidates' races had virtually no predictive effect or statistical significance.<sup>135</sup> Highton concluded "African American Democratic candidates were neither favored nor discriminated against by white voters" and that the results "provide little support for the hypothesis that white voters discriminate against black candidates in House elections," contradicting the white discrimination hypothesis.<sup>136</sup>

The social science arena has exploded with analyses of white voter behavior during the 2008 election. The most powerful studies avoided social desirability bias—that is, peoples' unwillingness to report their own socially unacceptable attitudes—by finding creative mechanisms of gauging racial animus among white voters.<sup>137</sup> Stephens-Davidowitz gauged an area's racial animus by measuring the prevalence of a proxy, the word "nigger" or "niggers," in aggregated data of Google search queries from 2004 to 2007.<sup>138</sup> Pasek measured "implicit racism" by asking respondents to categorize photographs of white and black faces as "more pleasant" or "less pleasant."<sup>139</sup> Finally, Schaffner gathered

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131. See generally Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1250 (1999).

132. Highton, *supra* note 123, at 5 (citing Claudine Gay, *Choosing Sides: Black Electoral Success and Racially Polarized Voting*, Presentation at the Annual Meeting of the American Political Science Association (1999)).

133. *Id.* at 3.

134. *Id.* at 8.

135. *Id.* at 11.

136. *Id.*

137. Brian F. Schaffner, *Racial Salience and the Obama Vote*, 32 POL. PSYCHOL. 963, 966–67 (2011). Social desirability bias refers to the tendency of individuals to overreport the extent to which they engage in desirable activities such as voting.

138. Seth Stephens-Davidowitz, *The Effects of Racial Animus on a Black Presidential Candidate: Using Google Search Data to Find What Surveys Miss 2* (June 9, 2012), <http://ssrn.com/abstract=2050673>.

139. Josh Pasek et al., *Determinants of Turnout and Candidate Choice in the 2008 U.S. Presidential Election: Illuminating the Impact of Racial Prejudice and Other Considerations*, 73 PUB. OPINION Q.

survey data about voters' views on race-related issues such as affirmative action, and asked them to rank the importance of race to their voting decisions with other factors such as party, gender, and whom their friends supported.<sup>140</sup> Each of the researchers also used multiple regression techniques to control for nonracial factors such as party affiliation.

The Pasek study found that 3.6% of white voters who would have voted for Obama absent the influence of racism instead voted for someone else.<sup>141</sup> Additionally, 0.5% of white voters who would otherwise have voted for Obama decided not to vote due to anti-black bias, while 1.0% of those who otherwise would not have voted for a major-party candidate instead voted for John McCain.<sup>142</sup> The study concluded that racism negatively affected Obama's share of the vote among white voters by 5.2 percentage points in aggregate.<sup>143</sup> In sum, "anti-African-American racism may have played a substantial role in affecting the outcome of the 2008 election" by "considerably reducing Obama's share of the vote."<sup>144</sup> Even after accounting for pro-black racism as a mitigating factor,<sup>145</sup> Obama still lost 2.5 percentage points of the total, two-party vote.<sup>146</sup>

Schaffner found that race was salient to many white voters in the 2008 election, although party and ideology were strong predictors of voter preference.<sup>147</sup> Among white opponents of affirmative action, Obama received 36% of the vote from people who ranked race as the least important factor in deciding for whom to vote, but he received only 11% from people who ranked race fourth or higher in importance.<sup>148</sup> Schaffner concluded "racial conservatism among Whites acted as a barrier to voting for Obama, but that barrier was less pronounced for those voters who placed less importance on race."<sup>149</sup> He

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943, 943, 949 (2009). The study claims to be the first pertaining to the impact of candidate race on white voters to employ a subtler measurement of white racial animus while analyzing the 2008 election results. *Id.* at 945. Voters conducted the first portion of the survey in early September, and the second portion following the November election. *Id.* at 947.

140. Schaffner, *supra* note 137, at 968–69.

141. Pasek et al., *supra* note 139, at 979 tbl.7.

142. *Id.*

143. *Id.*

144. *Id.* at 980, 982. The study notes that its conclusions have significant *p*-values but acknowledge two important limitations: (1) multicollinearity among predictors might make it difficult to disassociate race with related factors; and (2) conducting portions of surveys in September, well before the election, creates a time lag between measuring the predictors and voters' actual behavior on election day. *Id.* at 981–82.

145. The effect of race on black voter behavior is discussed in more detail in section II.D, *infra*. In this particular instance, the Pasek study estimated how much Obama's share of the two-party vote was increased as the result of pro-black sentiment as registered by the study's racism measures. *Id.* at 980. The net changes range from approximately 4.6 to 1.5 points. *Id.*

146. *Id.*

147. Schaffner, *supra* note 137, at 975, 979. For example, Obama received 88% of the vote from "strong Democrats" and 96% from people who are "very liberal," while only 6% from people who are "very conservative." *Id.* at 976.

148. *Id.* at 978. By contrast, there was an insignificant change in Obama's support among affirmative action supporters between those who ranked race fourth (82%) or last (86%). *Id.*

149. *Id.*

determined that Obama would have performed about 3 percentage points better among white voters absent the influence of racial bias.<sup>150</sup>

The Stephens-Davidowitz study concluded that a racially charged Google search is a robust negative predictor of Obama's vote share.<sup>151</sup> He found that racial animus cost Obama 3.1–5.0 percentage points of the white national popular vote.<sup>152</sup> Comparing the percentage of the electorate who were white Obama supporters to the percentage of whites who would have supported a Democrat, absent prejudice, Stephens-Davidowitz concluded that 6.7% to 10.7% of white Democrats refrained from supporting Obama because of his race.<sup>153</sup>

C. THE DIFFERENT WHITE VOTER BEHAVIOR IN STATES FORMERLY SUBJECT TO SECTION 5

White voters are less homogeneous in their voting behavior than black voters, a reality made obvious by differences in white voters across different regions of the country. The lack of uniformity in polarized voting behavior suggests that the degree to which racial bias affects voter behavior also likely varies significantly across geographic areas. Blanket, nationwide assumptions about the effect of race on voting should be viewed suspiciously.

An important study by Ansolabehere, Persily, and Stewart employed a series of multiple regression analyses to corroborate the hypothesis that race had a statistically significant impact on the white vote for Obama in the South—but not elsewhere.<sup>154</sup> The Ansolabehere study used publicly available, national surveys, including the 2008 Cooperative Congressional Election Study and the 2004 and 2008 American National Election Studies, to compare white voter behavior in the 2004 and 2008 elections.<sup>155</sup> These surveys strained out the influence of race by controlling for party choice, ideology on a liberal to conservative spectrum, religion, church attendance, wealth, education, age, union membership, and gender.<sup>156</sup> The study compared states formerly covered under Section 5 of the VRA—seven southern states, Arizona, and Alaska—with all other states.<sup>157</sup>

The Ansolabehere study found that “[t]he differences between whites in the [formerly] covered and noncovered states could be attributed to such demographic and ideological variables” in 2004, but “[t]he same cannot be said when

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150. *Id.* at 983.

151. *See* Stephens-Davidowitz, *supra* note 138.

152. *Id.* at 10, 18.

153. *Id.* at 22.

154. Ansolabehere et al., *supra* note 76, at 1424–30.

155. *Id.* at 1425.

156. *Id.*

157. *Id.* at 1388 & n.10 (citing *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited Sept. 15, 2013) (listing as covered states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia)). Note that the former Section 5 coverage formula was not tailored to the states where racially polarized voting is the most pervasive.

Barack Obama ran against John McCain” in 2008.<sup>158</sup> In particular, in formerly covered states, white voters supported Obama at a level almost 8 percentage points lower than those in the rest of the country, after controlling for party, gender, education level, income level, religious convictions, political ideology, and marriage status.<sup>159</sup> The Ansolabehere study also analyzed the 2008 Democratic primary. Controlling for party, ideology, demographics and other non-racial factors, it found that white voters in formerly covered states supported Obama at lower rates than white voters in the rest of the country—and by statistically significant margins.<sup>160</sup>

Donovan compared responses to survey questions asking white voters in the 2008 primaries about hypothetical, head-to-head matchups of Obama or Clinton versus McCain.<sup>161</sup> Nationwide, Obama received 1.4 percentage points more support from white respondents than Clinton, in a hypothetical matchup against McCain.<sup>162</sup> There were vast differences in white voter preferences between the states. Obama received at least 14 percentage points more support than Clinton in ten states, none of which are located in the South.<sup>163</sup> Obama performed much worse in the South: Clinton received 12–38 percentage points more support than Obama among white voters in Florida, Mississippi, Kentucky, Louisiana, Alabama, Ohio, Tennessee, Oklahoma, West Virginia, and Arkansas.<sup>164</sup>

#### D. THE EXTENT TO WHICH RACE AFFECTS BLACK VOTER BEHAVIOR

There has been far less research into black voter behavior than white voter behavior.<sup>165</sup> For decades, “the voting behavior of blacks in particular [has been] largely ignored because they have mostly homogeneous partisan preferences,” reliably supporting Democratic candidates.<sup>166</sup> Early research assumed black voters use group interests as proxies for individual self-interests, and support black candidates due to their group identification.<sup>167</sup> Researchers believed blacks’ personal views on political matters (such as economic policy and government support programs) are also inexorably linked to group identifica-

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158. *Id.* at 1425.

159. *Id.* at 1429 tbl.12. Obama received a 15% lower vote share among whites in covered jurisdictions than in noncovered jurisdictions, without controlling for nonracial factors; controlling for those factors, Obama received a 7.8% lower vote share, which is statistically significant. *Id.* at 1427, 1429 tbl.12.

160. *Id.* at 1433.

161. Todd Donovan, *Obama and the White Vote*, 63 POL. RES. Q. 863, 866 (2010).

162. *Id.* at 866 tbl.2.

163. *Id.*

164. *Id.*

165. Quentin Kidd et al., *Black Voters, Black Candidates, and Social Issues: Does Party Identification Matter?*, 88 SOC. SCI. Q. 165, 165 (2007).

166. *Id.*

167. See, e.g., MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994); Pamela Johnston Conover, *The Influence of Group Identifications on Political Perception and Evaluation*, 46 J. POL. 760 (1984).

tion.<sup>168</sup> Studies therefore focused on blacks' collective interests, yet "[i]ronically, few studies have been devoted to examining black vote choice at the individual level."<sup>169</sup>

A classic example of the conventional wisdom surrounding black voters' desire for descriptive representation<sup>170</sup> is Dawson's analysis of the 1993–1994 National Black Politics Study.<sup>171</sup> In particular, approximately 65% of black respondents said "no" when asked if "[w]hite officials elected from predominantly black communities represent black interests just as well as black elected officials."<sup>172</sup> Dawson also notes that most black respondents agree that "no candidate deserves support just because they are black," but it is inescapable that, as a general matter, blacks believe blacks better represent blacks than anyone else.<sup>173</sup> Looking at the same set of survey data, Davis and Brown found that approximately 27% of black respondents agreed or strongly agreed with the statement "African Americans should always vote for a black candidate."<sup>174</sup>

A prominent 1993 study by Tate reflects the common view of how blacks' preferences are channeled into actual voter behavior.<sup>175</sup> She studied a "feeling thermometer" from the 1984 National Black Election Study<sup>176</sup> and found that presidential candidate Jesse Jackson received a much higher favorability rating from black than white respondents, and a strong majority of blacks supported him over Walter Mondale in the Democratic presidential primary.<sup>177</sup> This research explains the relationship between group consciousness and support for Jesse Jackson in a contentious Democratic primary, but it does not adequately address black voters' failure to support black Republican candidates such as Lynn Swann, Michael Steele, Alan Keyes, Ken Blackwell, Tim Scott,

168. See Conover, *supra* note 167, at 777 (arguing that "group identification helps define what is personally relevant, which in turn shapes the nature of political perception").

169. Tasha S. Philpot & Hanes Walton, Jr., *One of Our Own: Black Female Candidates and the Voters Who Support Them*, 51 AM. J. POL. SCI. 49, 50 (2007).

170. Descriptive representation refers to "the actual presence of minorities in political office." ISSACHAROFF ET AL., *supra* note 36, at 1198 (quoting Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 277).

171. MICHAEL C. DAWSON, *BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES* (2001).

172. *Id.* at 328 tbl.A1.1.

173. *Id.* at 109.

174. Darren W. Davis & Ronald E. Brown, *The Antipathy of Black Nationalism: Behavioral and Attitudinal Implications of an African American Ideology*, 46 AM. J. POL. SCI. 239, 242 (2002).

175. KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* (1993).

176. *Id.* at 128–31. The study scored white and black respondents' warmth, or favorability, toward presidential candidate Jesse Jackson, on a score of 0 to 100. *Id.* A rating between 50 and 100 degrees meant the respondent felt warm, or favorably, toward the person; a rating between 0 and 50 degrees indicated a lack of warmth or favorability. *Id.*

177. *Id.* Amongst blacks, 57% voted for Jackson and 27% voted for Mondale, with the remainder undecided. *Id.* Black respondents gave Jackson an average thermometer score of 74, compared to 40 among whites. *Id.*

and Alan West.<sup>178</sup>

Kidd's study of the 2004 congressional election in Virginia's Third Congressional District suggests that it is difficult to break the tether between black voters and the Democratic Party.<sup>179</sup> Winsome Sears, a black Republican and former state delegate, challenged black Democratic incumbent Bobby Scott.<sup>180</sup> The Third District contained a large number of church-attending, socially conservative black voters, and Sears appealed to them by promoting her faith and antigay marriage and antiabortion views, which Scott opposed.<sup>181</sup> Scott nonetheless received 83.5% of the black vote, while Sears received 16.1%, a lower percentage than she obtained from white voters.<sup>182</sup> Kidd concluded that "despite the concerns many black voters have for social issues, the pull of the Democratic Party on black voting is still overwhelming, even in . . . an ideal context for Republican candidates."<sup>183</sup>

Ardoin suggests that the attachment between black voters and the Democratic Party is not strongly correlated with black individuals' level of black group identification.<sup>184</sup> He compared black-Democrat and black-Republican respondents' "feeling thermometer" score of blacks as an entire racial group, which

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178. Wilson, *supra* note 14. Lynn Swann ran for Governor of Pennsylvania in 2006; Michael Steele ran for the U.S. Senate in 2006; Ken Blackwell ran for Governor of Ohio in 2006. *See Democrat Cardin Wins Open Senate Seat in Maryland, Defeating Republican Steele*, FOXNEWS.COM (Nov. 7, 2006), <http://www.foxnews.com/story/2006/11/07/democrat-cardin-wins-open-senate-seat-in-maryland-defeating-republican-steele/>. Alan Keyes was the Republican nominee for the Illinois U.S. Senate seat in 2004. *Alan Keyes Concedes Defeat in Illinois*, BALTIMORE SUN (Nov. 5, 2004), [http://articles.baltimoresun.com/2004-11-05/news/0411050363\\_1\\_alan-keyes-chicago-tribune-evil](http://articles.baltimoresun.com/2004-11-05/news/0411050363_1_alan-keyes-chicago-tribune-evil). Tim Scott is currently a U.S. Senator in South Carolina. Jeff Zeleny, *Congressman is Chosen to Succeed DeMint as South Carolina Senator*, N.Y. TIMES, Dec. 17, 2012, <http://www.nytimes.com/2012/12/18/us/politics/congressman-picked-for-south-carolina-senate-seat.html>. Alan West served one term as U.S. Congressman for Florida's Twenty-Second Congressional District. Josh Hicks, *Allen West's Comparison to One-Term Congressman Abraham Lincoln*, WASH. POST (Dec. 5, 2012, 6:02 AM), [http://www.washingtonpost.com/blogs/fact-checker/post/allen-wests-comparison-to-one-term-congressman-abraham-lincoln/2012/12/04/f95ee278-3cfe-11e2-ae43-cf491b837f7b\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/allen-wests-comparison-to-one-term-congressman-abraham-lincoln/2012/12/04/f95ee278-3cfe-11e2-ae43-cf491b837f7b_blog.html).

179. *See* Kidd et al., *supra* note 165.

180. *Id.* at 167–68.

181. *Id.* at 170–71. A survey of black voters in the Third Congressional District found that 79% opposed or strongly opposed gay marriage and 46% believed abortion should be illegal. *Id.* Blacks were more conservative than nonblack respondents, on the issue of gay marriage, and closely reflected the views of nonblacks, on the issue of abortion. *Id.* A Sears supporter described the campaign's approach: "When you take the civil rights movement out of the equation, what else do we have in common with the Democratic Party?" *Id.* at 168. In fact, while the candidates differed on other issues, Sears succeeded in making social issues the focus of the campaign. *Id.*

182. *Id.* at 170. By comparison, George Bush received 9.5% of the vote from black voters. *Id.* at 169. Sears received 22.0% of the vote from all respondents, compared to 16.1% of black respondents. *Id.* at 170.

183. *Id.* at 174.

184. *Cf.* Phillip J. Ardoin & Ronald J. Vogel, *African Americans in the Republican Party: Taking the Road Less Traveled*, AM. REV. POL., Spring/Summer 2006, at 1, abstract, available at <http://libres.uncg.edu/ir/asu/listing.aspx?id=4439> (concluding that "we find African American Republicans feel less warmth toward blacks than the majority of their brethren and are less likely to view race or social welfare issues as significant problems in America").

could range from 0 to 100.<sup>185</sup> The average favorability—or warmth—score towards blacks was 82% for black Democrats and 79% for black Republicans, the difference of which was not statistically significant.<sup>186</sup> The study suggests that race has salience only at the margins of extreme pro- or anti-black sentiment.<sup>187</sup>

Since black voters tend to be extremely cohesive, researchers should consider alternative methods of gauging the salience of race. One effective mechanism measures black “residual” votes—the number of voters who refrained from voting in a particular contest.<sup>188</sup> Herron presents powerful evidence of the extent to which black voters valued black representatives in the November 1998 general election, where the rate of black voters who refrained from voting was much higher in contests where there was no black candidate.<sup>189</sup> The black residual rate, or undervote rate, was extremely low in the U.S. Senate and Illinois Secretary of State races, both of which included black candidates.<sup>190</sup> The black residual rates were much higher in the Illinois gubernatorial contest and all other contests that did not include a black candidate.<sup>191</sup>

Whitby and others suggest that black empowerment can have a positive effect on turnout.<sup>192</sup> Whitby notes that for every additional percentage point of black representation in a governing body, black turnout increases by 0.23%, a statistically significant result.<sup>193</sup> However, this conclusion is disputed.<sup>194</sup> Gaddie and Bullock, and Gay, for example, found that black turnout did not increase when black voters were located in a majority-minority district or were represented by

185. *Id.* at 12. He pooled the American National Election Surveys from 1992 until 2002 to aggregate a sufficient number of total black (1112) and black Republican (99) respondents. *Id.* at 9.

186. *Id.* at 16 tbl.1.

187. *Id.* at 12 (stating that for “every 25 point drop in the feeling thermometer toward Blacks, an African Americans’ average probability of identifying with the Republican Party increases by five percent”).

188. Michael C. Herron & Jasjeet S. Sekhon, *Black Candidates and Black Voters: Assessing the Impact of Candidate Race on Uncounted Vote Rates*, 67 J. POL. 154, 154 (2005).

189. *Id.* at 173. Herron assessed voter behavior in Cook County. *Id.* at 158. The 1998 general election included seven major state or federal races, two of which featured black candidates. *Id.* at 161–62. They included a state constitutional amendment and the positions of U.S. Senator, Illinois Governor, Illinois Attorney General, Illinois Secretary of State, State Comptroller, and State Treasurer. *Id.* The U.S. Senate race included an incumbent black candidate, Carol Moseley Braun, and the Illinois Secretary of State race included a nonincumbent black candidate, Jesse White. *Id.*

190. *Id.* at 162 tbl.2. Among all black voters who cast ballots, 6.3% did not vote for U.S. Senator, and 6.5% did not vote for Illinois Secretary of State. *Id.* at 164.

191. *Id.* at 164. Among all black voters, 13.5% did not vote in the very competitive Illinois gubernatorial contest, which included no major-party black candidates, and more than 70% did not vote on the constitutional amendment. *Id.*

192. Kenny J. Whitby, *The Effect of Black Descriptive Representation on Black Electoral Turnout in the 2004 Elections*, 88 Soc. Sci. Q. 1010, 1012, 1016, 1018 (2007).

193. *Id.* at 1018.

194. See, e.g., KATHERINE TATE, *BLACK FACES IN THE MIRROR: AFRICAN-AMERICANS AND THEIR REPRESENTATIVES IN THE U.S. CONGRESS* 141 (2003); Phil Duncan, *Minority Districts Fail to Enhance Turnout*, 51 CONG. Q. WKLY. REP. 798, 798 (1993).

minority congressmen.<sup>195</sup>

Research into black voter behavior in the 2008 election has failed to employ the hybrid experimental–nonexperimental approaches used on white voters. The most simplistic approach to estimating the influence of race on black voters compares black vote share and turnout rates from 2004 and 2008, assuming any difference is solely due to Obama’s race.<sup>196</sup> For instance, Stephens-Davidowitz compared the known levels of support for Kerry and Obama and then multiplied them by black voters’ share of the electorate.<sup>197</sup> He found that increased black support for Obama added 1.2 percentage points to Obama’s national popular vote total.<sup>198</sup> This approach does not account for the influence of nonracial factors because it assumes black voter turnout and support for the Democratic nominee in 2008 would have been exactly the same as 2004 if Obama were white.<sup>199</sup>

Block measured black and white voters’ views on a battery of questions about racial topics and found “clear evidence of racial difference in attitudes about Obama’s race.”<sup>200</sup> Black respondents were 40.4% more comfortable than whites with Obama’s race.<sup>201</sup> When asked generally about their optimism regarding future race relations, white respondents scored 23.3% higher than blacks.<sup>202</sup> Black respondents were more comfortable with Obama’s race but relatively pessimistic about race relations generally, while whites “tend[ed] to see more progress but want[ed] less change.”<sup>203</sup> Attitudes about Obama’s race had a positive and statistically significant effect on black voters’ likelihood of voting for him.<sup>204</sup> By contrast, optimism about race *generally* did not have a significant

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195. Ronald Keith Gaddie & Charles S. Bullock III, *Voter Turnout and Candidate Participation: Effects on Affirmative Action Districting*, in SOUTHERN PARTIES AND ELECTIONS: STUDIES IN REGIONAL POLITICAL CHANGE 37 (Robert P. Steed et al., eds., 1997); Claudine Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 AM. POL. SCI. REV. 589, 589 (2001).

196. Stephens-Davidowitz, *supra* note 138, at 3 (stating that “[b]lack-of-the-envelope calculations suggest Obama gained at most only about one percentage point of the popular vote from increased African-American support” and that “[t]he effect was limited by African-Americans constituting less than 13 percent of the population and overwhelmingly supporting every Democratic candidate”).

197. *Id.* at 21. About 89% of black voters supported Kerry in 2004, and 96% supported Obama in 2008. *Id.* at 20.

198. *Id.* at 21. The pro-black effect is limited by blacks constituting only 13% of voters in the 2008 presidential election and their overwhelming support of all Democratic candidates, including Kerry. *Id.*

199. *See id.* at 20–21 (calculating a “ballpark estimate” of increased support for Obama by black voters by assuming “black support would have been the same [in 2008] as in 2004” if the Democratic candidate had been white).

200. Ray Block Jr., *Backing Barack Because He’s Black: Racially Motivated Voting in the 2008 Election*, 92 Soc. Sci. Q. 423, 431–32 (2011). Block used survey data of white voters and black voters, from the Time Magazine Race Poll, a nationally representative phone survey of 1509 adults, conducted from September 26–29, 2008. *Id.* at 430.

201. *Id.* at 433.

202. *Id.* White respondents had a score of 0.74; black respondents had a score of 0.60. *Id.*

203. *Id.* at 428.

204. *Id.* at 437. Blacks who scored the lowest on “attitudes about Obama’s race” had a probability of voting for Obama of 0.10, whereas those that scored the highest had a probability of 0.78, which is 680% higher. *Id.*

effect on the preferences of black respondents.<sup>205</sup> Feelings about Obama's race mattered less to black than white respondents.<sup>206</sup> The difference in the support rate for Obama between whites who were the most and the least comfortable with his race was 92 percentage points, which was significantly greater than the difference among black voters (68 percentage points).<sup>207</sup>

A Philpot study compares survey data to assess whether racial identity, heightened interest, efficacy, or other factors contributed to the surge in black voter turnout.<sup>208</sup> It indicated a counterintuitive result: black group identification was markedly lower in 2008 than in both 1984 and 1996.<sup>209</sup> Further, Obama's candidacy did not increase interest in the 2008 election among black voters.<sup>210</sup> The influence of racial identity and attitudinal factors generally "appear to have been less robust in this election than one would assume."<sup>211</sup>

Data from the Schaffner study, however, indicated that race was a salient factor in the 2008 election for black voters—or at least more important for black than white voters.<sup>212</sup> Approximately 30% of blacks ranked race as the first- or second-most important factor, while only about 45% ranked it fifth or sixth.<sup>213</sup> The percentage of black respondents who ranked race highly was far higher than the percentages of white or Latino respondents.<sup>214</sup> In fact, Schaffner notes that black respondents were more likely to rate race as a salient factor, indicating that the ranking instrument was successful in minimizing social desirability bias.<sup>215</sup>

A McKee study overcomes potential social-desirability-bias issues by examining individual-level registered voter data broken down by race, provided by the state of Georgia.<sup>216</sup> Black voter turnout in Georgia increased to 68.7% in 2008

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205. *Id.* at 435.

206. *Id.*

207. *Id.* at 437.

208. Tasha S. Philpot et al., *Winning the Race: Black Voter Turnout in the 2008 Presidential Election*, 73 PUB. OP. Q. 995, 995 (2009). They compared data from the 1984 and 1996 National Black Election Studies and the 2008 American National Election Study. *Id.*

209. *Id.* at 1007–08. In the 1984 and 1996 surveys, 74% and 88% of black respondents, respectively, stated that what happens to other blacks as a group is relevant to their own lives. *Id.* By contrast, only 66% of black respondents held this view in 2008. *Id.* Philpot notes that this finding is "preliminary," and more research is necessary. *Id.*

210. *Id.* at 1007. In 2008, 43% of black respondents stated they were at least quite a bit attentive and 41% said they were "not at all" or "very little" attentive to the presidential campaign. *Id.* In 1996, by contrast, 43% said they were at least quite a bit attentive but only 21% were very little or less attentive. *Id.*

211. *Id.* at 995.

212. See Schaffner, *supra* note 137, at 971–72.

213. *Id.* at 970 fig.1. About 5% of black respondents did not rank race at all. *Id.*

214. *Id.* By comparison, about 5% of white voters listed race as the first or second more important factor, 15% listed it third or fourth, and 70% listed it fifth or sixth. *Id.*

215. *Id.* at 972.

216. Seth C. McKee et al., *Achieving Validation: Barack Obama and Black Turnout in 2008*, 12 ST. POL. & POL'Y Q. 3, 4–5 (2012). The study only provides data regarding one state because few states provide this information and survey data concerning self-reported turnout was found to be unreliable. *Id.*

from 60.6% in 2004, an 8.1% increase.<sup>217</sup> The study used a multiple regression analysis to determine what factors influenced the likelihood of black voting.<sup>218</sup> It found that 43% of black voters in Georgia who participated in the 2008 election were new or nonhabitual voters—a testament to the election’s salience to this group.<sup>219</sup>

This section reviewed some of the patterns relating to bloc voting in the most recent two elections—most notably the measureable impact of racial bias on voting patterns and the difference in polarization levels amongst black and white voters, particularly outside of states that were previously subject to the Section 5 preclearance requirement. Part III will discuss the implications these patterns may have for Section 2 litigation.

### III. COMPARING BLACK AND WHITE VOTER BEHAVIOR, AND THE IMPLICATIONS FOR SECTION 2

The recent academic research and presidential election results, analyzed together, permit several inferences regarding changes to racially polarized voting patterns, the role of racial bias in white and black voters’ decisionmaking processes, the implications for Section 2, and potential avenues of inquiry for future academic research. These inferences are distilled into nine major conclusions. Most notable among these conclusions are that partisan affiliation, more than race, explains the national general election results of 2004 and 2008; that black voters engaged in more racial bloc voting than white voters in the 2008 primaries; that racially polarized voting does not necessarily reflect racially motivated voting; and that rigorous social science research is needed to know definitively whether black or white voters are more affected by racial bias. Ultimately, this Part concludes that the current majority approach to Section 2 racial bloc voting analysis should be reconsidered, given that the social science evidence indicates that racial bias does not determine the vast majority of white voter behavior. Proponents of the Section 2 results test must counter the argument that evidence of racial bloc voting does not support the imposition of race-based remedies because the polarized voting patterns used as the basis for liability are, to a large extent, not caused by racial bias.

#### A. PARTISAN AFFILIATION, MORE THAN RACE, EXPLAINS THE ELECTION RESULTS

It is tempting to look at the differences in levels of support for Obama in the 2008 and 2012 general elections amongst black voters (96% and 93%, respec-

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217. *Id.* at 11 tbl.2. White turnout, by contrast, increased 0.6 percentage points, from 69.2% to 69.8%. *Id.*

218. *Id.* at 9. The American National Election Survey reported validated turnout from 1976 until 1988. *Id.* at 6. Blacks’ self-reported turnout was 64.2% and their validated rate was 51.5%. *Id.* Whites’ self-reported turnout was 74.2% and their validated rate was 69.3%. *Id.*

219. *Id.* at 16. The study does not tell us how many black persons voted in 2004 but not in 2008. Additionally, the author credits “the mobilization efforts of the Obama campaign” as well as “the significance of the opportunity to elect the first African American president” for these results. *Id.*

tively) and white voters (43% and 39%, respectively) out of context and conclude that race had an important influence on the elections' outcomes.<sup>220</sup> The disparities, however, are better explained by partisan affiliation at the national level. That Obama received average (in 2012) and above-average (in 2008) support amongst white voters for a Democratic nominee suggests that race-based "white flight" largely did not occur.<sup>221</sup> If most white voters were racially biased, it would have been mathematically impossible for Obama to receive as a high percentage of the white vote in 2008 as any Democrat since Jimmy Carter in 1976—which he did.<sup>222</sup>

This does not preclude the possibility that a white Democrat would have received a greater percentage of the white vote, had he or she been in Obama's place. Obama's superior performance in 2008 compared to past Democratic candidates, however, means that any decrease in the white vote due to racial bias was at least neutralized by economic, geopolitical, and other nonracial factors. In the far less favorable political circumstances of 2012, Obama received a level of white support only slightly less than that of John Kerry in 2004 and comparable to other Democratic candidates.<sup>223</sup> Such results seemed unfathomable when Jesse Jackson ran for president in 1984.<sup>224</sup>

Obama's near-universal support among black voters seems less remarkable when compared to the 87% of black support Kerry received in 2004 or the 90% received by Al Gore in 2000.<sup>225</sup> Black voters have long been a core constituency for the Democratic Party, and perhaps it is most surprising that Obama received only a few percentage points more of the black vote than did Kerry or Gore. This does not preclude the possibility that race had a significant effect on black voter behavior; black voters' significantly increased turnout rate is a promising indicator of the potential salience of race to these voters in the general election.

B. BLACK VOTERS ENGAGED IN MORE RACIAL BLOC VOTING IN THE 2008 DEMOCRATIC PRIMARY THAN DID WHITE VOTERS

Black voters' general preference for Obama proved to be exceptionally

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220. *Election 2012: Results*, *supra* note 1.

221. Kirsten West Savali, *Election 2012: The '47 Percent' Leads President Obama to a Second Term*, NEWS ONE (Nov. 7, 2012), <http://newsone.com/2076368/election-results/>.

222. John Sides, *Does Obama Have White Voter "Problem"?*, MONKEY CAGE (Oct. 28, 2012), <http://themonkeycage.org/2012/10/28/does-obama-have-white-voter-problem/>.

223. Scott Clement & Jon Cohen, *2012 Voters: The Deepest Racial Split Since '88*, WASH. POST (Oct. 25, 2012, 11:12 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/25/2012-voters-the-deepest-racial-split-since-88/>.

224. Tony Biasotti, *Obama's Run Once 'Unimaginable,'* VENTURA CNTY. STAR, Jan. 21, 2008, <http://www.vcstar.com/news/2008/jan/21/obamas-run-once-unimaginable/?print=1>.

225. Ansolabehere et al., *supra* note 76, at 1406 tbl.2 (share of the black vote received by Kerry); Gregg Carlstrom, *African-American Voters Weigh in on Obama*, AL JAZEERA (Nov. 3, 2012, 5:58 PM), <http://www.aljazeera.com/indepth/spotlight/us2012/2012/10/201210543310186209.html> (share of the black vote received by Gore).

durable during the 2008 Democratic primary campaign. He received approximately 84% of the black vote in the primaries and 85% in the caucuses against Hillary Clinton, an opponent who began the campaign as a well-funded and popular frontrunner.<sup>226</sup> His high level of support from black voters was consistent across all parts of the country and different polling instruments.<sup>227</sup> By contrast, Obama received either a significant minority or nearly a majority of white voters' support in the primaries, depending on the polling data used.<sup>228</sup> Based on CNN exit polls, which provided the lowest estimates of Obama's white and black support, he won a majority of the white vote in seven of thirty-six states, while Clinton did not receive a majority of the black vote in any state.<sup>229</sup> If uniform, nationwide anti-black bias existed amongst white Democrats, Obama would not have won the white vote in so many states.<sup>230</sup> Given the ideological similarities between the candidates, the lack of the partisan cue in the primaries, the historic nature of Clinton's own presidential campaign, Clinton's early advantages in cash and name recognition, and several racially charged moments during the campaign, black cohesion was a remarkable (not to mention essential) component of Obama's victory. Obama won in part because black voters were significantly more cohesive in supporting him than were white voters for Clinton.

According to conventional wisdom, the question of which race engages in the most bloc voting is a purely academic argument that will have no practical impact on future Section 2 claims.<sup>231</sup> Under the majority approach, it is irrelevant who engaged in *more* bloc voting, so long as both black and white voters cohesively support different candidates. The *Gingles* preconditions will be satisfied so long as the white-preferred candidate defeats minority voters' candidate of choice.<sup>232</sup> Black voters could conceivably engage more frequently in racially motivated bloc voting in support of their preferred candidate yet still lose due to their status as a numerical minority (thereby satisfying *Gingles*).

Section 2 treats the same behavior by black and white voters oppositely. By providing for additional majority-minority districts as a remedy for a statutory violation, Section 2 can reward black voters for engaging in the same behavior that is deemed blameworthy and punishable when engaged in by white voters. Although seemingly inequitable if black cohesion is motivated by blameworthy racial bias, such a result is justifiable if the cohesion is instead motivated by other factors, such as responding to discrimination from the white majority, or a

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226. See Ansolabehere et al., *supra* note 76, at 1434 tbl.14 & n.110 (noting that the data was compiled by the authors using data from the 2008 Cooperative Congressional Election Study).

227. *Election Center 2008*, *supra* note 90 (click the hyperlink "President Exit Polls" for each state).

228. *Id.*

229. *Id.*

230. *Id.*

231. See *supra* section I.B.

232. See *supra* section I.B. The court would then proceed to the remaining elements necessary to make a successful Section 2 case.

desire to preserve legislative and other achievements of the civil rights movement. From a policy perspective, the motivations for racially polarized voting should matter. Without an empirical anchor there is no basis for distinguishing between blameworthy and legitimate, even laudable, voting behavior. Statistics of racial polarization during the 2008 primary alone cannot help us distinguish one from the other. It is possible that using the *Gingles* preconditions as the touchstone for Section 2 claims could, in some cases, reward black voters who may be at least as strongly influenced by racial animus as white voters.

C. THE ELECTION RESULTS COULD NEGATIVELY IMPACT POTENTIAL SECTION 2  
LITIGATION IN SOME JURISDICTIONS

In the 2008 general election, Obama won a majority of the white vote in eighteen states, including Colorado, Connecticut, Illinois, Michigan, California, and New York.<sup>233</sup> Obama was therefore the candidate of choice of white voters in these states and, if sued under Section 2, the states may be able to establish the absence of racially polarized voting. Absent evidence that the result was a fluke or an aberration, Section 2 plaintiffs may be precluded from satisfying the third *Gingles* precondition<sup>234</sup> if there is no legally cognizable racial bloc voting in the relevant area. If white voters fail to vote sufficiently as a bloc to defeat the minority's preferred candidate,<sup>235</sup> there would be no polarization for purposes of Section 2 because both white and minority voters supported the same candidate. For example, in Virginia, although a majority of white voters did not support Obama in the 2008 general election,<sup>236</sup> he did receive a majority of the white vote in the 2008 Democratic primary.<sup>237</sup> Causation—in particular the relative importance of race versus partisan affiliation—hangs over any potential statewide Section 2 litigation in Virginia.

Section 2 claims can still be made within subjurisdictions located within a state. Racially polarized voting patterns occur in local jurisdictions in states as wide-ranging as California, New York, Ohio, and Wyoming.<sup>238</sup> Although Obama may have received a majority of white support at the statewide level, he may not have received a majority or even a significant portion of the white vote in subsections of that state. Section 2 inquiries are local and case specific.<sup>239</sup> If, hypothetically, white voters engaged in high levels of bloc voting in only one

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233. Ansolabehere et al., *supra* note 76, at 1422–23 tbl.9.

234. *See supra* section I.B.

235. *See supra* section I.B.

236. Ansolabehere et al., *supra* note 76, at 1422 tbl.9.

237. Clarke, *supra* note 89, at 75 tbl.3.

238. *See, e.g.*, *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

239. *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (plurality opinion) (concluding that making a finding of vote dilution “is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms”) (citations and internal quotation marks omitted).

city or county, that jurisdiction is not safe from Section 2 litigation just because a majority of white voters elsewhere in that state supported the minority-preferred candidate.<sup>240</sup>

#### D. WHITE BLOC VOTING STILL EXISTS IN PARTS OF THE COUNTRY

Obama received a significantly smaller proportion of the white vote in elections held in southern states.<sup>241</sup> In the primaries, Obama received less than 30% of the white vote in nine states, all of which are located in the South.<sup>242</sup> Further, only one of the seven states in which Obama won the white vote in the primary is located in the South.<sup>243</sup> In the 2008 general election, he received his lowest share of the white vote from southern states; meanwhile, none of the eighteen states where Obama won the white vote are in the South.<sup>244</sup> Further, four of the five states in which he performed worse among white voters than Kerry in 2004 are located in the South.<sup>245</sup>

Obama's poor performance among southern white voters was statistically significant and could not be accounted for by nonracial factors such as partisan affiliation and ideology.<sup>246</sup> Socioeconomic, partisan, and ideological differences explained Kerry's white-vote share in the South in 2004, but not Obama's share in 2008.<sup>247</sup> When controlling for nonracial factors, Obama received a statistically significant 4 percentage points less of the white vote in primaries and caucuses, in the (predominantly southern) states formerly covered by Section 5, than in the states not covered.<sup>248</sup> Donovan's analysis of survey data from February 2008 shows that, among white voters, Obama performed favorably against Clinton everywhere but the South in a hypothetical matchup against McCain.<sup>249</sup> Donovan finds that a "racial threat thesis"—not regional differences—drives the results,<sup>250</sup> but there could be a multicollinearity problem because most of the twelve states with the largest black population percentages are in the South.<sup>251</sup>

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240. *Id.*

241. See generally Ansolabehere et al., *supra* note 76; Clarke, *supra* note 89.

242. Clarke, *supra* note 89, at 74–75 tbl.3.

243. *Id.*

244. Ansolabehere et al., *supra* note 76, at 1422–23 tbl.9.

245. *Id.*

246. *Id.* at 1424–30.

247. *Id.* at 1425.

248. *Id.* at 1433.

249. Donovan, *supra* note 161, at 866.

250. *Id.* at 864, 870 (“The racial threat thesis, or white backlash hypothesis, proposes that whites are more likely to fear social, economic, or political advances by minorities when they reside in jurisdictions where the minority group’s population share is larger.”).

251. U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, C2010BR-06, THE BLACK POPULATION: 2010 8 (2011). According to the 2010 Census, the largest black population percentages are in Mississippi (37.6%), Louisiana (32.8%), Georgia (31.5%), Maryland (30.9%), South Carolina (28.8%), Alabama (26.8%), North Carolina (22.6%), Delaware (22.9%), Virginia (20.7%), Tennessee (17.4%), Florida (17.0%), and Arkansas (16.1%). *Id.*

Although the data reflects statistically significant white-southern voter patterns that are unexplained by certain nonracial factors, it does not establish that racial bias causes that behavior.<sup>252</sup> To equate correlation with causation is not methodologically sound. Dangers include the multicollinearity problem and the potential omission of relevant nonracial factors from the multiple regression analysis. In this vein, a conservative commentator asserts that nonracial differences between the candidates, such as particular policy positions, caused many southern whites to view Obama's campaign differently from other whites.<sup>253</sup> Stephens-Davidowitz's conclusion that—at least with regard to Google searches—"[s]outhern states do have, on average, higher racial animus" suggests, however, that a correlation between racial bias and white-southern voter behavior may be durable.<sup>254</sup> Only academic research attempting to discern white voters' intracranial thoughts can determine the exact role of racial bias with more precision. Politics are local, and the similarity or dissimilarity in white and black voter behavior must be measured over time in numerous elections held in various jurisdictions across the country.

E. WHITE RACIAL BIAS HAD A MEASUREABLE EFFECT ON THE 2008 ELECTION RESULTS, BUT IT DID NOT DRIVE THE BEHAVIOR OF THE VAST MAJORITY OF THAT ELECTORATE

Academic research into white voter behavior employs creative ways of assessing whites' racial attitudes. Examples include Pasek's use of black and white ideographs to measure implicit racism, Schaffner's use of ranking criteria for choosing candidates, and Stephens-Davidowitz's use of racially charged Google search queries.<sup>255</sup> These studies were successful in part because they either controlled for response bias in self-reported turnout results or used actual returns from the 2008 election. Stephens-Davidowitz concluded that racial animus cost Obama 3.1%–5.0% of the white national popular vote,<sup>256</sup> Schaffner said it cost Obama about 3%,<sup>257</sup> and Pasek said it cost Obama 5.2% of the white, two-party vote.<sup>258</sup> These conclusions do not vary significantly from models created by statisticians, based on the economy's fundamentals or the comparable dynamics of past presidential elections.<sup>259</sup> One study, conducted by

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252. Ansolabehere et al., *supra* note 76, at 1429.

253. THERNSTROM, *supra* note 88, at 201 (stating that Obama might have been uniquely affected in the South by his policies on national defense and health care and his relationship with Reverend Jeremiah Wright, "a figure surely more off-putting to southern whites than to, say, Massachusetts voters").

254. Stephens-Davidowitz, *supra* note 138, at 15.

255. See generally Pasek et al., *supra* note 139; Schaffner, *supra* note 137; Stephens-Davidowitz, *supra* note 138.

256. Stephens-Davidowitz, *supra* note 138, at 18.

257. Schaffner, *supra* note 137, at 983.

258. Pasek et al., *supra* note 139, at 980.

259. See Michael S. Lewis-Beck et al., *Obama's Missed Landslide: A Racial Cost?*, 43 PS: POL. SCI. & POL. 69 74 TBL.4 (2010); Simon Jackman & Lynn Vavreck, *How Does Obama Match-Up? Counterfactuals & the Role of Obama's Race in 2008* 27 (unpublished manuscript) (Aug. 31, 2011), <http://jackman.stanford.edu/papers/download.php?i=0>.

Mas and Moretti, conflicts with these findings, but its results are questionable due to a poor mechanism for assessing white racial attitudes.<sup>260</sup> In total, the evidence weighs strongly in favor of the conclusions made in the Pasek, Schaffner, and Stephens-Davidowitz studies: that racial animus cost Obama measurable and statistically significant support from white voters.

The significance of these findings depends partly on how voting patterns are measured and framed. Considered as a whole, the possibility that only 3% of all white voters' decisions in the 2008 election were based on racial considerations can be perceived as a major historical achievement and, indeed, a harbinger of a postracial world. If 97% of white voters were not making their voting choice on the basis of race, in the first election with a major-party, black presidential candidate, it seems difficult to conclude that electoral systems are denying minority voters an equal opportunity to elect candidates of choice on account of race. Black-preferred candidates are not losing because of race but because they are in the minority, and it is generally accepted that mere electoral defeat at the polls does not give rise to a cognizable claim.<sup>261</sup> The lack of racially motivated voting by whites could, according to this line of thinking, force supporters of Section 2 to reevaluate the utility of the results test.

On the other hand, racial bias appears to be a bigger problem when it is measured differently. For example, Stephens-Davidowitz's finding that as many as 10.7% of white Democrats did not support Obama in the 2008 general election because he was black is very concerning.<sup>262</sup> Moreover, estimates of how many white voters changed their preferences, based on Obama's race, do not contemplate all voters affected by racial bias. These estimates do not include voters who harbored racial animus against black candidates but who would have voted for the Republican candidate anyway. Although bias is not a "Republican" or "Democratic" problem, the percentage of the vote affected by race does not equal the percentage of voters who are racially biased.

Schaffner's and Stephens-Davidowitz's estimates of the effect of white, racial bias on Obama's white vote share are both conservative.<sup>263</sup> Studies using self-reported turnout results may underestimate social desirability bias, meaning that the actual effect of racial bias was larger than it appeared. It is quite possible, therefore, that these studies underestimate the effect of white racial bias. This does not mean that race is actually affecting the behavior of most white voters. Further refinement of the research methodologies, however, will

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260. Alexandre Mas & Enrico Moretti, *Racial Bias in the 2008 Presidential Election*, 99 AM. ECON. REV. 323, 326 (2009). Mas and Moretti's study used a survey measure of support for a law banning interracial marriage from the General Social Survey as their proxy for racial attitudes, which contained data for only forty-four states and included relatively small sample sizes for several of those that were included. Stephens-Davidowitz, *supra* note 138, at 8 (noting how the inclusion of only eight white respondents from Wyoming likely led to the state being ranked as "significantly more racially prejudiced" in the Mas and Moretti study than in his own).

261. *See, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

262. Stephens-Davidowitz, *supra* note 138, at 22.

263. *See, e.g.*, Schaffner, *supra* note 137, at 983.

help social scientists provide greater clarity on the effect of bias.

Whatever weight is given to assessments of the 2008 and 2012 presidential elections, racial bias is not necessarily affecting white voters in other contests. We should also look with skepticism at studies that seek to aggregate many elections. For example, Highton considered individual-level variables, but each election is different, and examining enough variables to control for all nonracial factors is difficult. Highton could be correct in concluding that race did not significantly affect interracial congressional elections in 1996 and 1998.<sup>264</sup> Because each contest had unique dynamics and was held in a distinct district containing different voters, however, it is hard to be certain.<sup>265</sup>

#### F. RACIALLY POLARIZED AND RACIALLY MOTIVATED VOTING ARE DISTINCT CONCEPTS

Researchers' difficulty in determining how racial bias influences voting behavior stands in stark contrast with the simplicity of the current Section 2 racial bloc voting standard. The traditional Section 2 analysis asks only "who" black and white voters prefer and if white bloc voting defeats a cohesive black minority.<sup>266</sup> To be sure, the inquiry is detailed and case specific in Section 2 litigation; it is capable of determining whether bloc voting is durable and persists across endogenous, exogenous, partisan, and nonpartisan elections. It is, however, limited. The current standard does not inquire into why whites might prefer nonblack candidates.

Asking *why* black voters and white voters behave differently is a significantly more difficult question than asking whether or not they support the same candidates. Most courts' decision to adopt Brennan's standard for assessing a white bloc voting under the third *Gingles* precondition<sup>267</sup> can be viewed as a pragmatic policy judgment. Courts and litigants need manageable standards. A manageable racial bloc voting standard enables plaintiffs to make claims when they do not have the resources to hire social science experts to conduct sophisticated multiple regression analyses.<sup>268</sup> This is particularly helpful to plaintiffs suing small jurisdictions, where there are insufficient numbers of voters and precincts from which to collect the volume of data necessary to run reliable multiple regression analyses.

Courts employing the majority standard have tacitly decided these considerations outweigh the value of conducting a more searching inquiry into causality like the one employed by the Fifth Circuit in *LULAC*.<sup>269</sup> They assume that

264. Highton, *supra* note 123, at 11.

265. *Cf. id.* at 6–7. In particular, it is difficult to believe that black Democrats would receive 14 percentage points more of the white vote than white Democrats in a neutral environment in the aggregate, which they did in the 1996 and 1998 interracial congressional contests. *Id.* at 8. This input significantly affected the output of Highton's model.

266. *See Thornburg v. Gingles*, 478 U.S. 30, 55–58 (1986) (plurality opinion).

267. *See supra* notes 56–60 and accompanying text.

268. Karlan & Levinson, *supra* note 62, at 1223–24.

269. *See* 999 F.2d 831, 850 (5th Cir. 1993).

if white bloc voting defeats black voters' candidate of choice, the outcome must be on account of race. The assumption is not necessarily true, however. For example, suppose that 5% of whites vote against a black candidate on account of race; 50% do so because of partisan affiliation; 25% do so because of particular policy positions; and 20% do so because of gender. The remaining 5% of the white vote against the black candidate is explained by race only. That 5% difference may not affect the outcome. A minority candidate who would have received 15% of the white vote absent racial bias, but instead only received 10%, would probably lose anyway in a majority-white jurisdiction. In this example, race was neither the cause of nor a significant factor in the black-preferred candidate's defeat. The presence or absence of actual racial bias, however, has no bearing on whether the third *Gingles* precondition has been satisfied.

This outcome is inconsistent with the foundational underpinnings of Section 2 because the statute seeks to remedy the defeat of black-preferred candidates precisely when race causes their defeat. Section 2 claims cannot succeed if black candidates generally win in nonpartisan elections and lose in partisan elections because that evidence indicates party affiliation, not race, is causing the level of polarization resulting in the candidate's defeat.<sup>270</sup> This reflects the sound judgment that only election systems impeding minority voters' ability to elect on the basis of race should be condemned. The current approach to racial bloc voting, however, may obfuscate the actual cause of black-preferred candidates' defeat. By ignoring this element, courts may allow any minority-preferred candidate's loss—no matter the basis—to support a finding that the third *Gingles* precondition is satisfied when he or she is opposed by most white voters. The statute thus automatically penalizes white voters' opposition to those candidates, even if based on nonracial political or personal preferences.

By providing a remedy in these situations, the current Section 2 standard makes a value judgment. Racial and language minority groups deserve a remedy—such as specially carved-out majority-minority districts and representation on elected bodies—while all other minorities (religious, ethnic, ideological, and geographical, for instance) do not. This remedy is not functionally available to white voters; white plaintiffs have never successfully made a vote dilution claim under Section 2.<sup>271</sup> Considering the effect of racial bias on white voting

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270. *See id.*

271. *United States v. Brown*, 494 F. Supp. 2d 440, 443 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009) (describing the use of Section 2 by white plaintiffs as “unconventional, if not unprecedented”); *see also id.* at 444–46 (establishing that Section 2 provides protection to white voters without citing any prior Section 2 cases). White plaintiffs have successfully made a vote *denial* claim under Section 2. *See Brown*, 561 F.3d 420, 427, 431 (5th Cir. 2009) (holding that black defendants violated Section 2 by obtaining large numbers of defective absentee ballots from black voters, counting those votes, and permitting the improper assistance of black voters). The Fifth Circuit's determination that *Brown* involved a vote dilution case was incorrect. *Cf.* 561 F.3d at 432 (describing *Brown* as a vote dilution case). Vote denial claims are correctly understood as protecting “individual citizens casting individual ballots,” whereas vote dilution claims pertain to the drawing of electoral districts so as to

behavior in the 2008 presidential election, Justice O'Connor's admonishment that courts should more closely consider the influence of nonracial factors on election outcomes seems prescient.<sup>272</sup> If racially-motivated bloc voting is not causing the defeat of black-preferred candidates, and they are losing for the same reasons as, for example, Hasidic Jews in Brooklyn, we must ask why one group is entitled to a remedy and the other is not.

The role of causality in voting behavior is important because the most common remedy to a Section 2 violation is the adoption of a districting plan that includes one or more "majority-minority" districts.<sup>273</sup> Drawing majority-black districts has the advantage of maximizing minority voting strength for a particular seat (or seats), but it does so while segregating the races for purposes of voting.<sup>274</sup> Achieving a sufficient black population percentage is prioritized over "traditional districting principles" such as hewing to natural geographic boundaries, grouping communities of interest, and drawing compact districts.<sup>275</sup> At its most extreme, a race-based redistricting plan that is "so bizarre on its face that it is 'unexplainable on grounds other than race'" must be reviewed under strict scrutiny and can be struck down as a violation of the Fourteenth Amendment's Equal Protection Clause.<sup>276</sup> In *Shaw v. Reno*, the Supreme Court struck down on this basis two state legislative districts drawn by North Carolina to cure a purported Section 5 violation, comparing one to a "bug splattered on a windshield," while noting the other "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas" to maximize the black population.<sup>277</sup>

Remedial single-member districting plans, created in large part on the basis of race, remain valid in Section 2 cases so long as they are drawn more carefully than the one at issue in *Shaw*.<sup>278</sup> Under the majority standard, however, plaintiffs need not establish that race is causing the defeat of minority-preferred candidates. Justice Thomas once commented on the potential for perverted consequences emanating from this arrangement:

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maintain "an electoral majority in a disproportionate share of districts" at the expense of minority voters. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–72 (2001). The claims in *Brown* involve the former, not the latter; there was no dispute over the drawing of district boundaries. See generally *Brown* 561 F.3d 420.

272. See *Thornburg v. Gingles*, 478 U.S. 30, 100 (1986) (O'Connor, J., concurring).

273. *Holder v. Hall*, 512 U.S. 874, 897 (1994) (Thomas, J., concurring) (noting that single-member districting schemes have been employed as the typical remedy in vote dilution decisions).

274. *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

275. *Id.* at 646–47. Many argue that traditional districting principles have failed to prevent a proliferation of partisan gerrymandering, particularly in statewide redistricting plans. See, e.g., Primo J. Cruz, *Pols Gone Wild: Why State Constitutional Equality Provisions are a Proper Solution to Partisan Gerrymandering*, 42 RUTGERS L.J. 927, 938–40 (2011).

276. *Shaw*, 509 U.S. at 644.

277. *Id.* at 635.

278. See *Hall*, 512 U.S. at 904–05 (Thomas, J., concurring).

There is no set standard defining how strong the correlation must be, and an inquiry into the cause for the correlation (to determine, for example, whether it might be the product of similar socioeconomic interests rather than some other factor related to race) is unnecessary. Thus, whenever similarities in political preferences along racial lines exist, we proclaim that the cause of the correlation is irrelevant . . . .

. . . And operating under that assumption, we have assigned federal courts the task of ensuring that minorities are assured their “just” share of seats in elected bodies throughout the Nation. To achieve that result through the currently fashionable mechanism of drawing majority-minority single-member districts, we have embarked upon what has been aptly characterized as a process of “creating racially ‘safe boroughs.’”<sup>279</sup>

Thomas concludes that the use of single-member districting remedies to ameliorate Section 2 violations under a *Gingles* analysis conflicts with the theory of the “color-blind Constitution” he and other conservative members of the Court propound.<sup>280</sup> Section 2 does not employ the same racial classifications as those animating the Court’s decisions in, for example, its affirmative action jurisprudence.<sup>281</sup> Remedies under Section 2, however, could potentially create the same risk of stigmatizing individuals and inciting racial hostility as the Section 5 remedy condemned by the *Shaw* Court.<sup>282</sup>

Before rushing to condemn Section 2, two rejoinders are necessary. First, as Justice Thomas and Justice O’Connor noted in *Holder v. Hall* and *Branch v. Smith*, respectively, courts may order the use of alternative election systems, such as choice voting or cumulative voting, to remedy Section 2 violations.<sup>283</sup> These systems do not separate voters into different districts, thereby avoiding

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279. *Id.* (citations omitted).

280. *Id.* at 905–06 (“The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”).

281. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 249–50 (2003) (discussing a University of Michigan undergraduate affirmative action policy); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 200 (1995) (discussing a federal government policy of giving general contractors on government projects financial incentives to hire subcontractors controlled by “socially and economically disadvantaged individuals”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989) (discussing a Richmond affirmative action program requiring that 30% of contractors be certified as belonging to a menu of traditionally disadvantage populations).

282. *See Shaw v. Reno*, 509 U.S. 630, 643 (1993).

283. *See Branch v. Smith*, 538 U.S. 254, 309–10 (2003) (O’Connor, J., concurring in part and dissenting in part); *Hall*, 512 U.S. at 909–10 (Thomas, J., concurring). Choice voting has also been called “preference voting” or “single transferable vot[ing],” among other names. It allows voters to rank candidates in order of preference and transfers their votes to the second-ranked candidate once the first-choice candidate reaches the so-called “threshold of exclusion” and is therefore elected. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 341–42 (1998). With cumulative voting, each voter casts an equal number of votes to the number of open seats, and he or she can give more than one vote to a single candidate. Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1878 (1999).

segregating on the basis of race and triggering strict scrutiny.<sup>284</sup> While long eschewed, these remedies are gaining credence at the local level; district courts recently ordered the use of cumulative voting in Port Chester, New York, and the use of limited voting by a school board in Euclid, Ohio, as Section 2 remedies.<sup>285</sup> Eliminating the possibility of any stigmatic injury for white voters at the remedy stage could make reviewing courts less concerned about causality at the liability stage.

More importantly, Section 2 has been a vital tool for increasing minority representation in Congress, state legislatures, and local, elected bodies—particularly in the South.<sup>286</sup> No black persons have *ever* been elected to statewide office in Mississippi, Louisiana, or South Carolina, and only two have been elected in Alabama, reflecting a compelling absence of minority representation at the at-large level.<sup>287</sup> The creation of majority-minority districts, however, has led to the election of black congresspersons in all four of those states, as well as Florida, Georgia, Illinois, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, and Virginia.<sup>288</sup> There is no denying the existence of racially polarized voting, and the elimination of majority-minority districts could cause an immediate and dramatic rollback in minority representation in elected bodies across the country.<sup>289</sup> In the absence of a strong Section 2, neither statutory nor constitutional remedies would fill the gap. The Fourteenth and Fifteenth Amendments only prohibit racially dilutive election schemes motivated by a discriminatory purpose,<sup>290</sup> a difficult standard that the Supreme Court has only deemed satisfied once.<sup>291</sup>

Section 5 of the Voting Rights Act was a powerful prophylactic measure that required all jurisdictions within a subset of predominantly southern states to obtain federal preclearance prior to implementing all voting-related changes.<sup>292</sup>

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284. Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959, 998–99 (2013).

285. *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 453 (S.D.N.Y. 2010); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 613 (N.D. Ohio 2008).

286. *See* ISSACHAROFF ET AL., *supra* note 36, at 758 (noting that “amended Section 2 has spawned a torrent of litigation that has dramatically reshaped the American electoral landscape”).

287. *See* *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 469 (D.D.C. 2011), *rev’d*, 133 S. Ct. 2612 (2013). Tim Scott was appointed, not elected, to the position of United States Senator representing the State of South Carolina in December of 2012. Jeff Zeleny, *Congressman is Chosen to Succeed DeMint as South Carolina Senator*, N.Y. TIMES, Dec. 17, 2012, <http://www.nytimes.com/2012/12/18/us/politics/congressman-picked-for-south-carolina-senate-seat.html>. He must seek election to the seat in 2014. *Id.*

288. REEVES, *supra* note 124, at 96–97 tbl.6.1.

289. *See id.* at 99–104.

290. *City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980).

291. *See* *White v. Regester*, 412 U.S. 755, 769–70 (1973).

292. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. § 51.52 (2013). Covered changes range from redistricting plans to moving a polling place to changing a registration form. *Id.*

The Supreme Court recently rendered Section 5 virtually inoperative,<sup>293</sup> however, by holding in *Shelby County v. Holder* that the formula used to determine which jurisdictions must seek preclearance was not “sufficiently related to the problem that it targets” because it was based on “decades-old data and eradicated practices.”<sup>294</sup> While efforts are underway in both the legislative and judicial arenas to bring at least some jurisdictions back within Section 5’s purview, Section 2 is currently the only game in town.<sup>295</sup>

*Shelby* provides insight into the Supreme Court’s current views about Section 2. Chief Justice Roberts’ majority opinion, although arguing times have changed sufficiently since the Voting Rights Act’s enactment in 1965 to render the coverage formula in Section 4(b) unconstitutional, acknowledges that “voting discrimination still exists; no one doubts that.”<sup>296</sup> To reassure those who might be concerned about an expansion of racially discriminatory voting practices in the wake of an inoperative Section 5, the *Shelby* Court emphasized that Section 2 remains an effective means of combating discrimination.<sup>297</sup> These statements indicate the *Shelby* majority views Section 2 as playing an important practical role in combating and deterring discrimination in a world without Section 5.

The *Shelby* Court’s repeated emphasis on Section 2’s permanence and nationwide application bodes well for its prospects in the event of a future constitutional challenge. Those features contrast starkly with aspects of Sections 4(b) and 5 criticized by Chief Justice Roberts. Although Section 2 applies nationwide, Section 4(b)’s coverage formula required a “disparate treatment of the

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293. The State of Arkansas continues to be subject to the preclearance requirement because it has been bailed in under Section 3(c) of the Voting Rights Act. See *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990) (bailing in Arkansas for voting changes “imposing or relating to a majority-vote requirement in general elections”). Numerous other jurisdictions have also been bailed in under Section 3(c) at various times—sometimes on a temporary basis. See Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 992, 2010–14 (2010) (describing the bailing in of jurisdictions such as the State of New Mexico, Los Angeles County in California, the City of Chattanooga in Tennessee, and counties in South Dakota, Nebraska, and Florida).

294. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013) (citation omitted) (quoting in part *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009)) (holding that the Section 4(b) coverage formula, subjecting specific states and subjurisdictions to the Section 5 preclearance requirement, is unconstitutional).

295. *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2013 WL 4784195, at \*4 (W.D. Tex. Sept. 6, 2013) (plaintiffs seeking to “bail in” the State of Texas under Section 3(c)); see also, e.g., Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, NATION (Jan. 16, 2014, 11:53 AM), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#>; Josh Gerstein, *Congress Mulls Fix to Voting Rights Act Ruling*, POLITICO (July 17, 2013, 3:29 PM), <http://www.politico.com/blogs/under-the-radar/2013/07/congress-mulls-fix-to-voting-rights-act-ruling-168600.html>.

296. *Shelby Cnty.*, 133 S. Ct. at 2619.

297. See *id.* at 2631. The Court noted at the outset of the *Shelby* opinion that “Section 2 is permanent, applies nationwide, and is not at issue in this case.” *Id.* at 2619. The Court later reiterated that “[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.” *Id.* at 2631.

States,” a “dramatic departure from the principle that all States enjoy equal sovereignty.”<sup>298</sup> Similarly, Section 2 is permanent, but Section 5, despite repeated extensions by Congress, was originally “set to expire after five years.”<sup>299</sup> Finally, whereas Section 2 simply bans any racially discriminatory voting standard, practice, or procedure, Section 5’s preclearance requirement was an “extraordinary measure[]” adopted under “unique circumstances” that—according to the majority—could lead to absurd results in its application.<sup>300</sup> These distinctions indicate the Roberts Court views Section 2 as less constitutionally problematic than Sections 4(b) and 5. Congress’s determination with respect to Section 2 may therefore be afforded the level of deference typical of its protections of minority citizens’ fundamental rights.<sup>301</sup> Until *Shelby*, it was axiomatic that congressional power is at its constitutional maximum when acting to protect minority voting rights.<sup>302</sup>

#### G. RACE HAS SOME CURRENTLY UNQUANTIFIED EFFECT ON BLACK VOTER BEHAVIOR

Research indicates that race has a significant effect on black voter behavior, although no study has precisely defined the extent of its impact. Davis and Brown demonstrated that, according to the 1993–1994 National Black Election Study, 27% of black respondents agreed or strongly agreed with the statement “African Americans should always vote for a black candidate.”<sup>303</sup> Similarly, Schaffner’s study shows that many black voters find a candidate’s race to be important in deciding which candidates to support.<sup>304</sup> Herron shows that the mere presence on the ballot of a minority candidate, sometimes even if unopposed,<sup>305</sup> can meaningfully affect black voters’ decision to vote in a particular race.<sup>306</sup> Whitby’s exploration of the effect of descriptive representation on black turnout also corroborates this conclusion.<sup>307</sup>

No study has determined what percentage of black voters decided to participate in the 2008 election or to support Obama because he is black. Block, however, shows that black voters who held the most negative attitude about

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298. *Id.* at 2618–19.

299. *Id.* at 2625.

300. *Id.* at 2619, 2624, 2627 (supporting the assertion that “considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5” (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring))).

301. *Id.* at 2644 (Ginsburg, J., dissenting) (criticizing the majority in *Shelby* for “hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments” and failing to engage the legislative record).

302. See *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4–5 (2006) (statement of Pamela S. Karlan, Professor of Pub. Interest Law and Assoc. Dean, Stanford Univ. Sch. Of Law).

303. Davis & Brown, *supra* note 174, at 242.

304. See Schaffner, *supra* note 137, at 970.

305. Herron & Sekhon, *supra* note 188, at 166 (discussing the black residual vote rate in the 1998 Democratic senatorial primary election, in which Carol Moseley Braun ran unopposed).

306. *Id.* at 173.

307. See Whitby, *supra* note 192, at 1010.

Obama's race were significantly less likely to vote for him than those who held the most positive attitude about Obama's race.<sup>308</sup> On the other hand, Block found that black voters' feelings about race generally had little effect on their support for Obama.<sup>309</sup> Similarly, Philpot's 2009 study found that black voters were no more interested in the 2008 election than voters of other races, and black voters were less interested in the 2008 election than they were in the 1984 and 1996 elections.<sup>310</sup> The findings call into question the hypothesis that black voters were uniquely empowered by Obama's candidacy or felt a heightened sense of racial consciousness. Most striking is how little the available literature tells us about the influence of racial bias on black voters.

Academic research indicates the linkage between black voters and the Democratic Party is based on more than notions of "black pride" or some other race-related motivation. Ardoin's study of survey data shows that average black Democrats and black Republicans score similarly regarding how favorably they feel about blacks as a group.<sup>311</sup> It appears pro-black or anti-black sentiments may be present only at the extreme margins, among the most liberal or conservative voters.<sup>312</sup> For most black voters, however, racial consciousness has no meaningful effect on their partisan affiliation.<sup>313</sup> Kidd's study of the congressional election face-off between black Republican Winsome Sears and black Democrat incumbent Bobby Scott demonstrates the challenge for black Republicans in attracting black voters.<sup>314</sup> Sears articulated an arguably stronger pro-black social agenda than her Democratic opponent but was still unable to gain a meaningful amount of black support.<sup>315</sup> Black voters' lack of responsiveness to black Republicans indicates their preference for black candidates is limited to those who are Democrats.

#### H. COMPARING THE KNOWN EFFECT OF RACIAL BIAS ON BLACK AND WHITE VOTERS

The absence of rigorous comparative analyses or other social science research renders impossible any definitive contrast of the effect of racial bias on white and black voters. One study indicates that feelings about race generally—and Obama's race in particular—had a more profound effect on whites than

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308. Block, *supra* note 200, at 437. The margin was 68 percentage points. *Id.*

309. *Id.* The relationship between Block's conclusions is intriguing, and one can only speculate about the underlying dynamics motivating black voters. Were some black voters who generally may not hold strong feelings about race uniquely moved in 2008 by Obama being the first black major-party nominee for president? Were those who felt negatively about Obama's race concerned about Obama being half-white or "not black enough"? More research is necessary to answer these difficult questions.

310. Philpot et al., *supra* note 208, at 1007–08.

311. Ardoin & Vogel, *supra* note 184, at 16 tbl.1.

312. *Id.* at 12 ("[F]or every 25 point drop in the feeling thermometer toward Blacks, an African Americans' average probability of identifying with the Republican Party increases by five percent.')

313. *See id.* at 16 tbl.1.

314. *See generally* Kidd et al., *supra* note 165, at 170–71.

315. *Id.* at 168.

blacks.<sup>316</sup> Positive feelings about race relations generally had a statistically significant effect on whites but not on blacks, and voting patterns varied more among white than black voters based on how they felt about Obama's race.<sup>317</sup> By contrast, although Herron found the race of candidates affected both the white and black residual vote rate,<sup>318</sup> the effect of candidate race on black voter behavior was more consistent and extreme.<sup>319</sup> Schaffner's study indicates that black voters believe a candidate's race is more important in deciding who to support than do white voters.<sup>320</sup>

These conflicting results may reflect a difference in the effect of social desirability bias between races; one race may feel more uncomfortable admitting the influence of race on their thinking than another. The academic orientation of the researchers may also be relevant. The two papers principally devoted to black voter behavior found race to be more influential on white voters, while the paper primarily concerned with white voter behavior found race is more salient to black voters. Regardless, more research is required—particularly into black voter behavior—to provide sufficiently robust data for a comparative analysis.

#### I. RESEARCHERS MAY BE RELUCTANT TO INVESTIGATE THE INFLUENCE OF RACIAL ANIMUS ON THE INDIVIDUAL-LEVEL BEHAVIOR OF BLACK VOTERS

The academic research into the influence of race on black voter behavior has been significantly less robust than that for white voters. Recent hybrid studies by Pasek, Schaffner, and Stephens-Davidowitz show that analyses of the salience of race to any group of voters must incorporate both election-level and individual-level variables.<sup>321</sup> These analyses only concern white voter behavior, however, and there is no comparable research of black voter behavior. Mean-

316. See Block, *supra* note 200, at 437.

317. *Id.* Whites who felt most positively were more likely to vote for Obama than those who felt the worst, by a 92 percentage point margin—far larger than the 68 point margin amongst black respondents. *Id.*

318. Herron & Sekhon, *supra* note 188, at 173 (stating that “the behavior of both African Americans and whites leads us to conclude that many voters would prefer to give up some substantive representation in order to elect officials who look like themselves”).

319. See *id.* at 165 (discussing how white residual vote rates in the 1998 congressional races in Illinois increased from between .04 and .10 in races without dominant minority candidates to between .14 and .21 in races with one, whereas the black residual vote rate increased from between .08 and .14 in races with a prominent minority candidate to frequently greater than .72 in races without one); see also *id.* (stating that “Table 4 shows that the maximum black residual vote rate in Contest 2 (and similarly for Contest 5) [races with prominent black candidates] is lower than the minimum black residual vote rate in contests that lacked prominent African-American candidates. We see no such pattern for whites”).

320. Schaffner, *supra* note 137, at 970 fig.1. While about 30% of blacks said race was the first or second most important criterion for evaluating a candidate, out of a list of six factors, only about 5% of whites did the same. *Id.*

321. Compare Pasek et al., *supra* note 139, at 949–50 (measuring “implicit racism” by asking respondents to categorize photographs of white and black faces), with Schaffner, *supra* note 137 at 966–67 (describing the use of a ranking mechanism and views on affirmative action as a proxy for

while, traditional notions of black empowerment or descriptive representation fail to fully explain why black voters prefer black candidates.<sup>322</sup> Social scientists agree that additional research is required into the relationship between racial considerations and voter choices.<sup>323</sup>

In the future, researchers should employ the sort of hybrid, experimental–nonexperimental approaches used to assess white voters. Hybrids address the shortcomings of both (1) experimental studies, which do not use actual elections and therefore cannot account for the nuances of campaign politics or the subtle influences of messaging, ideology, and partisan affiliation; and (2) nonexperimental studies, which often try to compare different elections by presuming their dynamics are the same and making generalized assumptions regarding nonracial factors. By utilizing hybrid models, which use reliable indicia of racial bias and voter behavior in a real election, researchers like Schaffner avoid such problems.

Some researchers engaged in the debate regarding black empowerment, group consciousness, and descriptive representation shy away from the conclusions implicated by their findings. Their reticence is significant because there has been no rigorous analysis of the effect of racial animus on individual-level black voter behavior. For example, Dawson’s survey data indicates that some black respondents believe black voters should always vote for a black candidate.<sup>324</sup> Rather than press further as to the respondents’ reasoning, Dawson hedged by noting that other blacks say no candidate deserves support solely because he or she is black.<sup>325</sup> Similarly, Herron demonstrated certain black voters vote more frequently when black candidates run unopposed than in a competitive election lacking a minority candidate; then, he stated that he is “agnostic as to why black voters prefer black candidates” and speculated that the phenomenon may be related to mobilization or policy positions.<sup>326</sup> Although Dawson’s and Herron’s conclusions are constrained by methodological limitations, because they do not rely on individual-level voter data, additional research can fill this gap. Because sophisticated hybrid studies of white voters exist, however, it is curious that no comparable study has probed more deeply into black voter behavior.

One impediment is that the high level of cohesion in black voting patterns makes it more difficult to tease out the forces influencing that behavior. For example, assessing the role of bias is complicated if 96% of black voters supported Obama in an election, but more than 90% would have supported a

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racial salience), and Stephens-Davidowitz, *supra* note 138, at 1–2 (describing the use of racially charged Google searches).

322. See *supra* section II.D (discussing the shortcomings of early research).

323. Block, *supra* note 200, at 439 (stating that “these possibilities can inspire additional work on the link between racial considerations and vote choice”); Philpot et al., *supra* note 208, at 1012–13 (noting that “these findings clearly point out the need for additional study of the psychological underpinnings of the turnout decision among Blacks”).

324. Dawson, *supra* note 171, at 109.

325. *Id.*

326. Herron & Sekhon, *supra* note 188, at 173 & n.8.

white Democrat anyway. Black voters' attachment to the Democratic Party may transcend race, and the relationship between the two is complicated. Using black turnout as the dependent variable, rather than using the percentages of blacks that vote for particular candidates, could solve this analytical problem. One model could measure black respondents' feelings about black empowerment and anti-white bias, and run a regression to determine if these affect black turnout.

Any inquiry, regardless of methodology, raises thorny questions such as whether pro-black sentiment and support for Black Nationalism or black empowerment, can be neatly separated from anti-white bias. Researchers may feel uncomfortable making a value judgment as to whether pro-black bias amongst black voters is equivalent to pro-white bias among white voters—and if not, identifying the reason for differentiating the two. It will also be difficult to create an accurate measurement of animus while avoiding problems of social desirability bias.

#### CONCLUSION

The 2008 and 2012 presidential elections provide a wealth of data, permitting many substantive conclusions regarding racially polarized voting and the effect of racial bias. This Note primarily sought to address two questions: (1) whether white and black voters quantitatively engage in the same or different levels of bloc voting; and (2) whether the current racially polarized voting patterns are the result of mere correlation or racial animus. Regarding the first question, black and white voters do behave differently from each other. The 2008 Democratic primary demonstrated black voters' remarkable cohesion, which was consistent nationwide and far outpaced white bloc voting. As for the second question, although racial bias played a role in the racially polarized presidential election results, it affected a smaller proportion of white voters than some might have imagined. And although there is a dearth of research into the numerical effect of Obama's race on black turnout or the percentage of the black vote he received, the evidence indicates race is a salient and important factor to that electorate. This Note also made findings relevant to the scholarship of racially polarized voting patterns and the Voting Rights Act. In particular, partisan affiliation, not race, best explains white voter behavior, but white bloc voting remains pervasive in southern states that were previously subject to the Section 5 preclearance requirement. As the Supreme Court stated in *Shelby*, racial discrimination in voting persists and Section 2 is a vital legal tool necessary to prevent inequities in this area of the country.

The most important lesson is that both social science research and substantive Section 2 law consider black and white voters differently. If researchers and courts explicitly define the basis on which black and white voters should be treated differently—due to continuing effects of the legacy of racial discrimination, for example—then different treatment will be perfectly acceptable. In approaching Section 2 claims, the law must either require actual evidence that race caused the defeat of black-preferred candidates, or articulate why causation

does not matter. Similarly, social science researchers should investigate the effect of racial bias on individual voters of all races and move beyond limiting their findings to broad theories concerning collective action. Doing so will be difficult; race, bias, and voting are sensitive subjects that are difficult for lawyers, social scientists, and the public to debate in an open and nuanced manner. Ultimately, however, intellectually honest and principled engagement by the courts and academia will further minority interests in a more durable manner than doctrinaire employment of an unstated double standard.