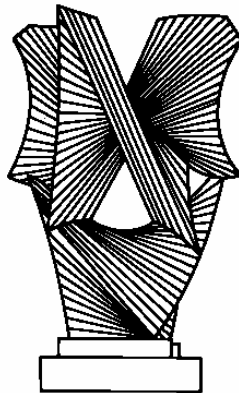


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JUDGING THE VOTING RIGHTS ACT

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JUDGING THE VOTING RIGHTS ACT

Adam B. Cox[†] & Thomas J. Miles[‡]

The Voting Rights Act has radically altered the political status of minority voters and dramatically transformed the partisan structure of American politics. Given the political and racial salience of cases brought under the Act, it is surprising that the growing literature on the effects of a judge's ideology and race on judicial decisionmaking has overlooked these cases. This Article provides the first systematic evidence that judicial ideology and race are closely related to findings of liability in voting rights cases. Democratic appointees are significantly more likely than Republican appointees to vote for liability under Section 2 of the Voting Rights Act. These partisan effects become even more prominent when judges appointed by the same president sit together on panels. Moreover, a judge's race appears to have an even greater effect on the likelihood of her voting in favor of minority plaintiffs than does her political affiliation: minority judges are more than twice as likely to favor liability. This finding contrasts starkly with prior studies of judicial decisionmaking – studies finding that, across a range of legal questions, a judge's race has only a weak effect, if any, on the resolution of cases. As with partisanship, the so-called “panel effects” of race are strong, as white judges become substantially more likely to vote in favor of liability when they sit with minority judges. These findings have significant implications for a number of controversies, including debates about which institutions are best situated to protect minority voting rights and disputes about the role of diversity within the federal judiciary.

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INTRODUCTION

The Voting Rights Act has dramatically reshaped the political landscape of the United States. In the four decades since its enactment, it has helped substantially expand political opportunities for minority voters and has contributed to the radical realignment of Southern politics.¹ Of course, the power of the Voting Rights Act to transform politics raises questions about the partisan implications of the Act. Some critics complain that it has systematically benefited Republicans; others have labeled the Act's prohibition on minority vote dilution a Democratic Party protection provision. Moreover, many commentators worry that its powerful political effects create incentives for courts and the Department of Justice to enforce the Act in a selective and partisan fashion. These concerns have been heightened by the Justice Department's recent approval under the Act of several controversial redistricting plans, including the Texas mid-decade redistricting plan orchestrated by Tom DeLay.²

To what extent does judicial ideology drive the adjudication of Voting Rights Act cases? Moreover, given the prominence of race in these cases, does a judge's race affect her likelihood of voting in favor of Voting Rights Act liability? This Article represents a first attempt to provide systematic answers to these questions.

¹ See, e.g., QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Davidson & Grofman eds. 1994); DAVID LUBLIN, THE REPUBLICAN SOUTH (2004).

² For a discussion of the mid-decade redistricting efforts in Texas and elsewhere, see Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004).

In recent years the legal academy has devoted substantial energy to investigating the impact of judicial ideology and demographics on decisionmaking in the federal courts.³ For all that attention, however, no one has focused on the role these characteristics might play in voting rights cases where the partisan and racial politics are, almost by definition, extremely salient. Voting rights cases are unique in that successful claims often have clear, direct implications for who will win and lose elections. And because race and partisanship correlate closely in the United States, the partisan and racial implications of voting rights cases are often plain on their face.

To study the role that political ideology and race play in the adjudication of voting rights disputes, we examine every published federal case decided under Section 2 of the Voting Rights Act since 1982. From this large dataset we draw three central conclusions.

First, judicial ideology significantly influences judicial decisionmaking in Voting Rights Act cases. Scholars often speculate that this is so, but no one has systematically studied the extent of this influence. Using the party of the appointing president as a rough proxy for ideology, we show that Democratic appointees are significantly more likely than Republican appointees to cast votes in favor of liability under Section 2 of the Voting Rights Act. Moreover, these party effects become even more prominent when judges appointed by the same president sit together on panels. A Democratic appointee sitting with two other Democratic appointees is much more likely to vote in favor of liability than a Democratic appointee sitting with two Republican appointees.

This basic finding about the role of political ideology is extremely important to any understanding of modern Section 2 jurisprudence. But its significance is not limited to this (central) provision of the Voting Rights Act; it is also important to our evaluation of other provisions of the Act, as well as to our understanding of how Article III judges approach voting rights cases more generally. For example, this finding has potentially important implications for the ongoing debates about the future of Section 5 of Voting Rights Act. Section 5 of the Act – which requires “covered” governmental bodies to pre-clear any changes to their voting rules with the federal government – was reauthorized last summer after being set to expire in 2007.⁴ During the reauthorization debates some commentators and members of Congress expressed concerns about the fact that the preclearance process is run by the potentially partisan Justice Department.⁵

³ See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); see also sources cited *infra* notes 47, 50, 51.

⁴ See *infra* note 37 and accompanying text.

⁵ See, e.g., MARK A. POSNER, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? (2006), <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>; see also Dan Eggen, *Staff Opinions Banned In Voting Rights Cases: Criticism of Justice Dept.'s Rights Division Grows*, WASH. POST, Dec. 10, 2005, at A03.

Some prominent scholars even suggested that the scope of Section 5 should be scaled back to limit this threat.⁶ An implicit assumption of this argument is that there is less risk that partisanship will influence the application of other Voting Rights Act tools that protect minority voting rights. But our findings show that this assumption must at least be qualified, as ideology appears to play a substantial role in the operation of these other tools as well. This does not mean that Section 2 should be abandoned in order to eliminate the ideological temptation that Republican and Democratic judges might face when they adjudicate such claims. For one thing, the disaggregated institutional structure of the federal judiciary channels partisanship in a way differently than does the centralized bureaucratic structure of the Justice Department. It does reveal, however, that it is a mistake to judge the efficacy and neutrality of Section 5 against an idealized system, rather than against the actual alternative institutional mechanisms embodied in the Voting Rights Act.

Second, we show that a judge's race influences her voting pattern even more than the judge's political affiliation. After controlling for other factors, an African-American judge is more than *twice as likely* as a non-African-American judge to vote for Section 2 liability. While the number of African-American judges in our data is relatively small, the size of this effect is striking. Moreover, there is substantial evidence that the race of other panel members may influence the votes of judges in Voting Rights Act litigation. When a white judge sits on a panel with at least one black judge, she becomes at least 20 percentage points more likely to find a Section 2 violation.

These findings are perhaps the first to document a strong connection between a judge's race and her judicial decisions – let alone the first to do so in the area of minority voting rights litigation. Over the past several decades, extensive empirical research has concluded that a judge's race has little, if any, impact on decisionmaking in a variety of types of criminal and civil rights litigation.⁷ In stark contrast, our analysis reveals extremely large differences in the behavior of African-American and non-African-American judges. These differences have potentially important implications for debates about the role of diversity in the federal judiciary. Many commentators have suggested that minority judges provide “descriptive” but not “substantive” representation within the judiciary – changing the face of federal courts but not their actual operation.⁸ But our data show that, at least in voting rights cases, African-American judges appear to bring a systematically different perspective to the bench.

Third, our findings cast doubt on some conventional wisdom about litigation under Section 2 of the Voting Rights Act. Recent work on the Act has suggested

⁶ See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success*, 104 COLUM. L. REV. 1710 (2004).

⁷ See sources cited *infra* notes 76-80.

⁸ See sources cited *infra* note 78. For the seminal discussion of the relationship between descriptive and substantive representation, see HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

that Section 2 lawsuits have been markedly more successful in jurisdictions that have been singled out by Section 5 of the Voting Rights Act for additional federal oversight known as “preclearance.”⁹ The possibility that Section 5 coverage is closely related to the likelihood of Section 2 liability could be important for current debates about Section 5. Congress recently reauthorized the special oversight provisions of Section 5, an extension justified in part by the idea that the jurisdictions covered by Section 5 still have more voting rights problems than uncovered jurisdictions. Higher rates of Section 2 liability in Section 5 jurisdictions might be taken as support for the conclusion that covered jurisdictions do have more problems. But our analysis finds that, once one controls for other influences on liability, Section 5 coverage is not a strong predictor of liability in many Section 2 cases. This does not mean, of course, that jurisdictions subject to Section 5 are not unique in ways that justify additional federal oversight. It does mean, however, that liability rates in Section 2 cases do not themselves appear to provide evidence of that uniqueness.

Still, we can confirm one standard claim about Section 2. Commentators have suggested that the success rate of Section 2 cases has been falling over time. Our data verify this fact: in cases that resulted in published opinions, civil rights plaintiffs’ rates of success have fallen from 40 percent in the years immediately after the 1982 Amendments to 22 percent in the most recent five years. It is unclear what to make of this change. It could reflect the success of Voting Rights Act over the past several decades in eradicating the most discriminatory voting practices. It could also reflect changing judicial attitudes. We might speculate, for example, that attitudes have changed about the relative importance of descriptive and substantive minority representation or about the effectiveness of Section 2 litigation at advancing these different representational goals. Or perhaps judicial attitudes towards civil rights plaintiffs more generally have changed. Our data cannot distinguish among these or other possibilities. Still, the decline in success rates highlights the importance of investigating these possibilities in order to better understand the functioning of the Voting Rights Act as it enters its fifth decade of operation.

The Article proceeds in three Parts. Part I provides a snapshot of Section 2 cases over the past two decades. This Part introduces several prominent features of the cases that fit into a conventional account about what might influence liability under the Section 2. Part II turns to a different set of potential influences – to the role that judicial race and partisanship might play in liability determinations under the Act. The data provide substantial support for our hypotheses, but call into question some of the conventional wisdom about Section 2 litigation that we introduced in Part I. Part III discusses some of the potential implications of our findings.

⁹ See sources cited *infra* note 23.

I. THE CONVENTIONAL ACCOUNT

In this Article, we examine the role that a judge's race and partisanship play in the adjudication of claims brought under Section 2 of the Voting Rights Act. To do so, however, it is helpful first to understand the structure of the statute and the basic patterns of Section 2 litigation. Accordingly, this Part provides a bit of background about Section 2 and explains the universe of cases that we analyze. It then introduces three features of Section 2 cases that are often prominent in accounts about what influences the success or failure of those cases.

A. *Statutory History and the Universe of Section 2 Cases*

Section 2 is the central private enforcement provision of the Voting Rights Act of 1965. As initially enacted, the language of the section tracked fairly closely that of the Fifteenth Amendment: it prohibited states and political subdivisions from applying a voting rule “to deny or abridge the right of any citizen of the United States to vote on account of race or color.”¹⁰ Perhaps because it copied so closely the Fifteenth Amendment, the provision was little used in the years immediately following its enactment. The Fifteenth Amendment itself (as well as the Fourteenth Amendment) was more often the source of legal claims brought by minority voters.¹¹ Nonetheless, the two provisions' textual similarity became extremely important in 1980, when the Supreme Court decided *Mobile v. Bolden*.¹² The Court held in that case that the Fifteenth Amendment proscribed only *intentional* racial discrimination in voting.¹³ This holding, combined with the Court's affirmation that Section 2 was indeed only a restatement of the Fifteenth Amendment's protections,¹⁴ meant that plaintiffs would have to prove that a voting practice was enacted or maintained for an invidious purpose in order to obtain relief under Section 2.¹⁵ *Bolden's* effect was said to be devastating: “existing

¹⁰ The Voting Rights Act of 1965, Pub. L. No. 89-110, title I, sec. 2, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971); *see also* U.S. Const. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

¹¹ *See, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 422 U.S. 935 (1975); *cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (relying, prior to the passage of the Voting Rights Act, on the Fifteenth Amendment to strike down statute redrawing the boundaries of the city of Tuskegee).

¹² 446 U.S. 55 (1980).

¹³ *See id.* at 61-63.

¹⁴ *Id.* at 61 (“[I]n view of [Section 2's] language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim.”).

¹⁵ *See id.*

cases were overturned and dismissed,” and a good deal of voting rights litigation ground to a halt.¹⁶

In response, Congress in 1982 amended Section 2 to eliminate the requirement that plaintiffs show purposeful discrimination.¹⁷ Amended Section 2 now requires plaintiffs to show that, “based on the totality of circumstances, . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” by minority voters – a condition satisfied when those voters “have less opportunity than other [voters] to participate in the political process and to elect representatives of their choice.”¹⁸ While there has been considerable disagreement about the precise

¹⁶ See Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 161 (Chandler Davidson ed. 1989); see also SAMUEL ISSACHAROFF, PAMELA KARLAN, & RICHARD PILDES, *THE LAW OF DEMOCRACY* 710-711, 746 (2d ed. rev. 2002).

¹⁷ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. Section 5 of the Voting Rights Act, which we discuss below, was a temporary provision of the Act set to expire in 1982. See Derfner, *supra* note 16, at 150-51; see also *infra* notes 34-37. The Section 5 reauthorization process, coming closely on the heels of the Court’s decision in *Mobile v. Bolden*, provided Congress an opportunity to respond to – and in large part overturn – the Court’s decision in *Bolden*. See *id.* For a discussion of the history surrounding the reauthorization debate and the amendment of Section 2, see, for example, ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

¹⁸ Section 2 states in full that:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.

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

meaning of this standard,¹⁹ the amendment paved the way for Section 2 to become the principal litigation tool in modern vote dilution litigation.²⁰

Because Section 2 became crucial to voting rights litigation only after its amendment in 1982, we focus on Section 2 claims adjudicated after this time. Between 1982 and 2004, federal courts issued more than 750 opinions in cases raising Section 2 claims.²¹ Information on these opinions was initially collected by the Voting Rights Initiative at the University of Michigan Law School, under the direction of Ellen Katz.²² Katz and her co-authors assembled a rich set of doctrinal data about these Voting Rights Act decisions; using this data, they documented and analyzed the findings concerning discrimination that courts have made in Section 2 cases over the last two decades.²³

To assemble the dataset, we began with Katz's impressive database of voting rights cases. Because we are interested in a different set of questions than Katz and her co-authors, however, we analyze a subset of cases within that database different from the subset examined by Katz.²⁴ Our focus is on the relationship between judicial characteristics and findings of liability under the Act. For that reason, we examined only those opinions in the Voting Rights Initiative database in which a court decided a question of Section 2 liability.²⁵ Moreover, because

¹⁹ See, e.g. *League of United Latin American Voters v. Perry*, 126 S. Ct. 2594 (2006); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986); cf. *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

²⁰ See, e.g. ISSACHAROFF, KARLAN, & PILDES, *supra* note 16, at 747 ("The 1982 amendments marked a significant shift in the nature of litigation under the Voting Rights Act. . . . Between 1965 and 1982 . . . Section 2 was virtually never used Since 1982, the bulk of racial vote dilution litigation has taken place under section 2, rather than under either Section 5 or the Constitution.").

²¹ The Voting Rights Initiative at the University of Michigan Law school collected federal court decisions that came down on or after June 29, 1982 – the date on which the amendments to Section 2 were signed into law – and before October 2004.

²² See The Voting Rights Initiative, Documenting Discrimination: Judicial Findings Under Section 2 of the Voting Rights Act since 1982, <http://sitemaker.umich.edu/votingrights/home>.

²³ See Ellen Katz et al, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act since 1982 (2005) (Final Report of the Voting Rights Initiative, University of Michigan Law School)*, 39 MICH. J. L. REFORM 643-772 (2006), also available at www.sitemaker.umich.edu/votingrights/final_report; Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT (forthcoming) [hereinafter Katz, *Not Like the South*].

²⁴ Because of her research objectives, Katz focused on opinions that represented the final disposition of a particular Section 2 lawsuit. Out of the 763 opinions in the Voting Rights Initiative's dataset, Katz identified 331 unique lawsuits. For the purposes of her analysis, she used the final judicial decision issued in each of these lawsuits. See Katz, *Not Like the South*, *supra* note 23 (manuscript p. 3). These decisions were coded in the Voting Rights Initiative dataset as "Final Word" cases.

²⁵ To determine whether an opinion concerned liability, we utilized Katz's coding of "case type." Katz coded the cases as being of type "preliminary," "settlement," "liability," "remedy," "fees,"

we are interested in how trial courts and appellate panels decide these cases, we excluded en banc circuit court and Supreme Court opinions. The resulting sample contained 342 dispositions – 135 issued by federal circuit courts and 207 issued by trial judges or trial panels. Trial panels are part of the Section 2 landscape because the federal jurisdictional statute requires that a special three-judge district court be convened whenever a plaintiff challenges the constitutionality of a state legislative or congressional redistricting plan.²⁶ Because plaintiffs sometimes combine constitutional claims against such redistricting plans with Voting Rights Act claims, some of the cases in our data were heard by three-judge district courts. Decisions by district court judges sitting alone comprise most of the trial court opinions. But 10% of the data – 36 decisions – represents rulings made by the three-judge trial panels. For all of the decisions in the data, we utilized Katz’s coding of whether the court found Section 2 liability.

For these dispositions, we analyze every vote cast for or against liability. To analyze judge-votes rather than opinions, we supplemented the dataset with information on the names of the judges who participated in each disposition and, for panel decisions, information on whether each judge had joined the majority, concurred, or dissented.²⁷ There were a total of 659 judge-votes cast in the 342 decisions. These votes were cast by 359 different judges, for whom the median number of decisions was 1.0 and the mean 1.9. We collected demographic and biographical information about each judge in the dataset from the Federal Judicial Center.²⁸ These data permit us to examine judicial decisionmaking at the level of judge-votes.

and “other.” We used all cases of type “liability.” Accordingly, the data we use in our analysis are both more and less inclusive than the data analyzed by Professor Katz. They are more inclusive in that the data we analyze encompass decisions on Section 2 liability that are not the final judicial decision rendered in the litigation. In lawsuits in which a district court decision was appealed, our data include both district court and appellate court decisions. In contrast, Professor Katz’s data in such instances included only the appellate court decision. The data are also less inclusive than Professor Katz’s in that they exclude decisions on issues other than Section 2 liability. Professor Katz’s data included decisions on issues such as attorneys’ fees that are ancillary to our primary question of how judges resolve questions of Section 2 liability.

²⁶ See 28 U.S.C. § 2284 (“A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”).

²⁷ Because Katz’s dataset did not include complete information on judge-votes, we re-collected information on the names and votes of judges participating in each disposition. Judges who dissented were recorded as voting in the opposite direction from the court’s conclusion with respect to Section 2 liability, and the court’s conclusion itself was drawn from the coding in the Voting Rights Initiative dataset.

²⁸ <http://www.fjc.gov>.

B. Prominent Features of Section 2 Cases

Many aspects of Section 2 cases – aspects having nothing to do with the judges’ identities or biographies – might influence the likelihood of liability. While we focus centrally on the judges’ identities, it is important to understand other potential correlates of liability. In Appendix I we provide summary statistics about a variety of aspects of Section 2 litigation. These statistics are themselves very interesting, as they provide perhaps the most complete portrait currently available of Section 2 litigation patterns. For example, they show that, on average, plaintiffs had about a 30% change of establishing liability in the cases in our data. This average, however, masks considerable variation. In this section we focus on three potential causes of variation that are prominent in accounts about how Section 2 has operated in practice: (1) the types of practices challenged in Section 2 litigation; (2) the location of Section 2 litigation; and (3) the timing of Section 2 litigation.

1. Types and Origins of Voting Practices

Section 2 proscribes any voting practice “that results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”²⁹ Courts have interpreted this language to cover a variety of voting practices. Most obviously, Section 2 covers classic vote denial claims – that is, a claim that a practice unlawfully prevents a voter from casting a ballot. Examples of such practices could include poll taxes, literacy requirements, and so forth. Over time, however, courts also interpreted Section 2 to apply to claims of vote dilution – that is, a claim that a practice unlawfully dilutes the political opportunities of a protected class of voters, despite the fact that those voters are able to cast ballots.³⁰ A variety of election practices might be subject to a claim of vote dilution: at-large electoral structures, single-member districts, etc. Moreover, these practices might be produced at either the local or state level.

It is commonly thought that suits against some of these types of election practices are more likely to successful than suits against other types. The summary

²⁹ 42 U.S.C. § 1971(a). As noted above, this is the current text of Section 2. Prior to 1982, the provision prohibited states from using any voting practice “to deny or abridge” minority voting rights, rather than prohibited states from using any voting practice “in a manner which results in a denial or abridgement of” minority voting rights. Compare The Voting Rights Act of 1965, Pub. L. No. 89-110, title I, sec. 2, 79 Stat. 437, with 42 U.S.C. § 1971 (2004). Congress made this change from active to passive voice to emphasize that it was rejecting the requirement that plaintiffs show intentional discrimination to make out a Section 2 claim.

³⁰ One standard claim about Section 2 vote dilution litigation is that its early focus was on at-large (and similar) electoral structures passed principally by local governments. These were the types of practices that Congress may have been most interested in when it amended the Voting Rights Act in 1982 to rehabilitate vote dilution litigation. Over time, this story of Section 2 goes, the focus turned to the structure of individual districts within single-member-district arrangements, such as state legislative or congressional districting arrangements adopted by state legislatures.

statistics shown in Appendix I suggest some such variation. The data is dominated by decisions involving challenges to at-large elections (which comprise over half of the decisions), and challenges to reapportionment plans (which represent just over a third of the decisions in the data). These decisions resulted in liability about one third of the time – 33% of the time for at-large challenges, and 30% of the time for reapportionment challenges. In contrast, the remaining catch-all category of challenges, which includes policies ranging from majority vote requirements to felon disenfranchisement laws, resulted in an appreciably lower success rate of 21%.

Challenges to local government practices were also more prevalent and more likely to succeed. Over 70% of the decisions involved challenges to local government practices; almost all of the remaining decisions challenged state practices.³¹ The focus on local governments should be unsurprising, as the most common type of practice challenged – at large elections – was most often produced by local governments.³² As with the type of election practice, the rate at which courts assigned liability varied modestly according to which level of government was challenged. Courts were about 10% more likely to hold local practices than state practices in violation of Section 2.³³

2. Geography and Preclearance

Conventional accounts of the Voting Rights Act have long emphasized the way in which the Act has applied with different force to different parts of the nation. As enacted in 1965, the VRA included two principal enforcement mechanisms. The first was Section 2. The second, considered far more important at the time, was Section 5 of the Act, which prohibited all “covered” jurisdictions from making *any* changes to their voting practices or requirements without first seeking preclearance from the federal government.³⁴ The formula for determining which jurisdictions were covered was facially neutral, but it was carefully crafted to encompass the deep South states with a long history of disenfranchising black voters.³⁵ Because the preclearance provisions singled out

³¹ Only four cases – less than 2% – involved challenges to federal election practices.

³² This correlation is unsurprising given the structure of elections at different levels of government. At-large elections are a more common election structure for local offices, and reapportionment is typically a statewide process. In our data, for example, about 64% of decisions involving at-large elections challenged local governmental bodies, while 57% of the reapportionment decisions involved challenges to state governmental bodies.

³³ Challenges to local government practices resulted in liability about 32% of the time, while challenges to state practices resulted in liability about 22% of the time. *See* Appendix I.

³⁴ *See* 42 U.S.C. § 1973c (2004).

³⁵ *See* 42 U.S.C. § 1972b(b). As initially enacted, Section 5’s coverage formula extended coverage over some states in their entirety, as well as over a number of local governments that were not within covered states. During the 1975 and 1982 reauthorizations of Section 5, the coverage formula was amended and expanded a bit. Today, “Section 5 applies to eight states in their

some jurisdictions for more intrusive federal oversight of election practices, these provisions were enacted as temporary measures.³⁶ But they have been reauthorized (with minor amendments) four times since 1965 – most recently in August of 2006, when they were extended for another 25 years.³⁷

In light of the role that Southern exceptionalism has played in the history of minority disenfranchisement and in the structure of the Voting Rights Act, one might expect different patterns of Section 2 litigation in Southern and non-Southern states or in covered and uncovered jurisdictions. The raw data appear to support this hypothesis. The summary statistics in Appendix I show that almost two thirds of the cases occur in Southern states. In addition, courts were ten percentage points more likely to conclude that election practices inside rather than outside the South violated Section 2.³⁸ The pattern is similar for election practices in jurisdictions covered by the preclearance procedures of Section 5.³⁹ Courts were more likely to conclude that election practices covered by Section 5 were discriminatory. They held these election practices to violate Section 2 about 40% of the time, while finding liability only 26% of the time for practices not subject to preclearance.⁴⁰

3. *Liability Trends*

The timing of Section 2 litigation might also be closely related to the success of those suits. As we noted above, decisions in our dataset assigned Section 2 liability about 30% of the time. But the pattern of litigation changed over time. The number of cases decided in each year has fluctuated fairly widely, with large spikes in the number of Section 2 lawsuits occurring after each decennial census. Still, over time a clear trend emerges. In the first ten years following the 1982 Amendments to the VRA, the number of judicial decisions issued annually on Section 2 liability trended upward. It reached a peak in 1992, a year that featured 31 decisions. But since 1992, the trend has been downward. In 2004, courts

entirety (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas), to substantial portions of three states (New York, North Carolina, and Virginia), and to small portions of five other states.” Posner, *supra* note 5, at 3.

³⁶ See 42 U.S.C. § 1972b(b).

³⁷ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246.

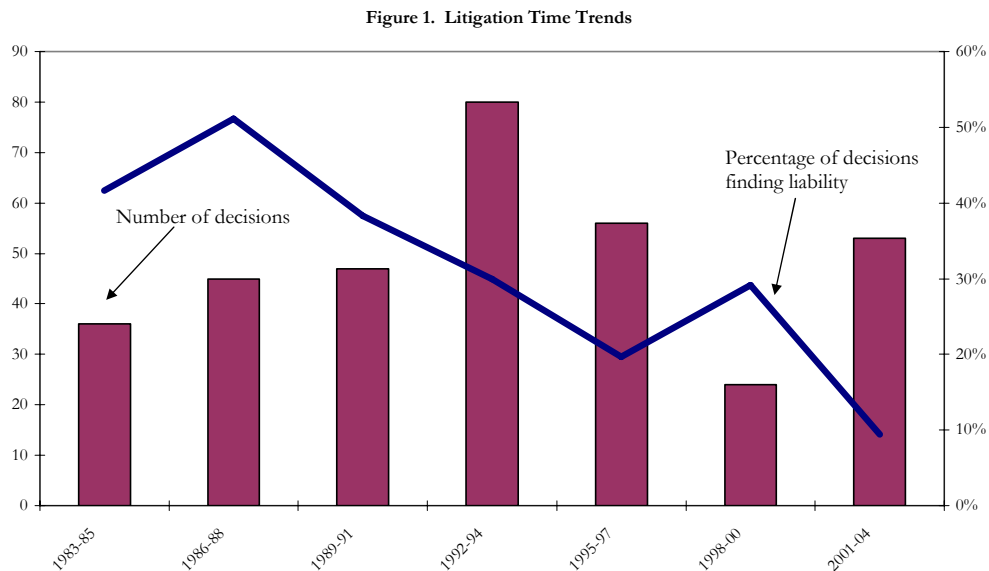
³⁸ Cases occurring in the South resulted in liability 33.5% of the time, while those occurring outside the South resulted in liability 23.4% of the time.

³⁹ Despite the overlap in Section 5 coverage and the former Confederate states, Katz’s coding of the cases indicates that decisions arising from covered jurisdictions are far less frequent than decisions on Southern election practices. About 28% of the decisions in the data involve practices governed by Section 5, while nearly two-thirds occur in the South.

⁴⁰ These figures are consistent with Ellen Katz’s finding that the final court to rule in a Section 2 challenge was more likely to assign liability when the challenge contested an election practice in a preclearance jurisdiction. See Katz, *supra* note 23.

issued only 18 decisions in Section 2 liability cases, a figure nearly half of the peak. Moreover, in 1999 and 2001, courts handed down a mere seven and four decisions, respectively, below even the level of the years 1982 and 1983.

As the number of Section 2 liability cases has fallen over time, the rate of plaintiff success has also declined. The rate at which courts found Section 2 liability also fluctuated widely on a year-to-year basis, but trends are easy to see when one examines the data over intervals of several years. For example, the rate at which courts found Section 2 liability exceeded 40% during 1982-89, the first seven years after the amendments to the VRA, but it fell to 25% during the 1990's. In the last five years of the data, it slipped to 22%. (Figure 1 highlights this declining liability rate, as well as the changes in the number of decisions over time.)



C. *The Status of the Conventional Account*

The brief snapshot of the data that we provide above might suggest that the history of litigation under Section 2 tracks something like the following account: discrimination at the local level is a bigger problem than at the state level; at-large schemes are more prone to produce vote dilution than other schemes; problems are worse in the South and in areas covered by Section 5 than they are in other areas; and the presence of obviously discriminatory practices has declined over time. In fact, this is a relatively conventional account in the literature.

Unfortunately, these data cannot alone support this conventional wisdom. Consider the decline over time in the rate at which courts find Section 2 liability. The conventional explanation for this decline is that the nature of the claims brought under Section 2 changed over time. Early lawsuits under Section 2 challenged the most blatant discriminatory practices, and courts were more ready

to conclude that these electoral practices violated Section 2. Over time, election officials removed the most egregious discriminatory election practices, either in direct response to Section 2 litigation or in the shadow of emerging precedents. The remaining election practices were either less discriminatory or presented more subtle forms of discrimination that courts were less willing to hold in violation of Section 2.

If the decline in liability over time tracked changes in the nature of the election practices being challenged in Section 2 litigation, we might expect these declines to line up with some of the observed characteristics of Section 2 cases. But movements over time in these observed characteristics do not correlate strongly with the decline in liability findings. In general, the decline in the liability rate occurred well before the greatest changes in the observable characteristics of the lawsuits that resulted in liability decisions. For example, the fraction of decisions involving challenges to at-large election districts remained in excess of 50% until 2000, after which it fell below 20%. Similarly, changes in the type of governing body challenged occurred well after the downward movement in liability rates. Challenges to local government bodies, such as city or county governments, represented well over 70% of the decisions from 1982 to 1999. Only in the last five years of the data did the frequency of local government challenges drop to 43%. Thus, the fall in the frequency of at-large challenges and challenges to local governmental bodies occurred nearly a full decade after the drop in liability rates.⁴¹

The absence of a strong correspondence in the movements of liability rates and case characteristics over time does not exclude the possibility that a change in some unmeasured aspect of these cases is responsible for the decline in liability. Indeed, the particular characteristics recorded in the data – such as whether the challenge is to an at-large election, whether the challenge is to a local governmental body, and whether the jurisdiction is covered by Section 5 – are relatively crude. Other important aspects of the cases, such as the strength of the evidence and the talent of the attorneys, are unobserved. Still, these data represent the most comprehensive to date on Section 2 litigation, and they make clear that changes in the measured characteristics of the cases do not explain the decline in liability rates.

The data also cannot support the conventional account for a more foundational reason. When plaintiffs have a higher success rate in particular jurisdictions, or during specific years, or against certain types of practices, there

⁴¹ Other lawsuit characteristics featured movements over time that differed from those of at-large challenges but that still did not closely track those of the liability rates. The fraction of decisions that challenged election practices in jurisdictions covered by Section 5 of the VRA declined steadily for the first ten years following the 1982 Amendments and stabilized in the mid-1990s. Between 1982 and 1986, roughly 40% of the decisions arose from election practices in jurisdictions covered by the preclearance procedures of Section 5. By the early 1990s, this fraction dropped to 18%, but in the late 1990s and the early 2000s, election practices in these jurisdictions accounted for 27% of the Section 2 liability decisions.

are two possible explanations for the difference. First, the difference may reflect actual changes in the discriminatory nature of election practices across time, place, and type of practice. Blatant discrimination may have waned over time, and there may be more discriminatory practices in covered than uncovered jurisdictions. But there is a second possibility: the different rates of success may also reflect plaintiffs' and courts' more vigorous policing of discriminatory practices in those times and places. That is, election practices may have remained constant, while enforcement and judicial attitudes toward particular election practices may have changed. Raw plaintiff success rates cannot distinguish these possibilities.

To see this more clearly, consider the possibility of strategic behavior by plaintiffs and defendants. Parties often settle disputes rather than litigating them to conclusion. The fact that only a certain selection of disputes are actually litigated to conclusion may affect the success rate of litigation. In fact, the famed Priest-Klein hypothesis predicts that, under certain conditions, plaintiffs' success in litigation should approach 50%.⁴² A large literature has challenged the Priest-Klein hypothesis on both theoretical and empirical grounds.⁴³ Whatever the status of this debate, litigation under Section 2 is unlikely to satisfy the preconditions of the Priest-Klein hypothesis. The remedy in these cases is typically injunctive relief rather than damages, which can make settlement more difficult. Moreover, the litigants are not typically private individuals or entities. Rather, a Section 2 defendant is a government entity, and the plaintiffs are often funded by civil rights organizations. These groups may bring cases in which they realize they are unlikely to prevail because the litigation process itself may provide benefits. For example, litigation can provide publicity, promote public education, and force governments to disclose information they would not otherwise release, all of which may serve the organizations' larger goals. Against this institutional background, it is not surprising that the plaintiff win-rate in Section 2 cases is well below fifty percent.

Nonetheless, the reality of strategic behavior by parties makes clear that raw plaintiff success rates alone cannot be used to assess the egregiousness of

⁴² See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Priest and Klein hypothesize that trials occur only when litigants are so optimistic about their chances for success that the difference between their estimates of the plaintiff's expected judgment exceeds the difference between trial costs and settlement costs. Their model predicts that when the stakes of trial are symmetric, the fraction of cases proceeding to trial approaches zero and the plaintiff win-rate approaches fifty percent.

⁴³ The literature is vast. An under-inclusive list of leading papers includes: Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145 (1990); Joel Waldfogel, *The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493 (1996) (presenting a model in which any fraction of cases may proceed to trial and any plaintiff win-rate may result); Daniel Kessler, et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996).

discriminatory practices. For example, while it might be tempting to conclude from the higher liability rate in Southern jurisdictions that discrimination is worse in these areas,⁴⁴ the greater liability could be the product of either more discriminatory practices or different behavior in Southern jurisdictions by civil rights plaintiffs, defendants, or judges. Perhaps discriminatory election practices are concentrated in the South because of the region's history of slavery and institutionalized racism. Or perhaps this history has led civil rights activists to focus their efforts in the South and prompted judges to look sympathetically at challenges originating in that region. The data do not permit us to distinguish these hypotheses. Accordingly, it would be premature to conclude from the data that discriminatory practices are waxing or waning – or that the need for Section 2 litigation or Section 5 preclearance has become more or less urgent.

We note these difficulties, which economists call an “identification problem,” but we offer no solution to them, and the absence of a solution is not a shortcoming of this research. Our primary interest is not in measuring the efficacy of Section 5 preclearance or Section 2 liability. Rather, the question we examine is whether judicial race and ideology influence judges' votes on Section 2 liability. There remains, of course, a possibility that our estimate of the impact of judicial ideology is biased by the omission of other relevant variables that correlate with partisan affiliation. But that possibility is less likely with these data. Within judicial districts, trial judges are randomly assigned to cases, and within circuits, appellate judges are randomly assigned to panels. Judicial characteristics are therefore less likely to correlate with any unobserved determinants of liability within judicial districts and circuits. We can also use circuit and year fixed effects to control for time-invariant differences in the average voting rates across districts. And we can further reduce the risk of omitted variable bias by including controls for the various characteristics of the cases that are coded in the data.

II. PARTISANSHIP, RACE AND VOTING RIGHTS ACT LITIGATION

This Part tests our core hypotheses: that a judge's political affiliation and race influence her votes in Section 2 cases, as well as the votes of her colleagues. Sections II.A and II.B provide summary statistics that strongly support these hypotheses. Sections II.C. and II.D then test the robustness of these results, using multivariate regression analysis to control for other aspects of the cases, including the three features emphasized in Part I. This analysis generates two sets of conclusions. First, it confirms that the powerful effects of race and partisanship remain even after controlling for numerous features of the cases. Second, the regression results prompt us to re-visit Part I's conventional account of Section 2 liability. Specifically, the results cast doubt on the conventional claim that the location of the challenge and the type of practice challenged are important determinants of liability. Section II.E provides a nontechnical

⁴⁴ See *supra* note 38 and accompanying text; *infra* Appendix I.

summary of our findings for readers who would prefer to skip the more technical analysis in Sections II.C. and II.D.

A. *The Role of Judicial Partisanship*

Surprisingly, the influence of judicial ideology in cases litigated under Section 2 of the Voting Rights Act has not previously been examined. This is not for lack of work investigating judicial ideology more generally. In myriad other doctrinal areas, scholars in recent years have investigated the influence of judicial ideology. These studies have generally found that judicial ideology correlates strongly with judicial voting patterns in a wide range of policy areas.⁴⁵ But VRA cases have gone unstudied.

The paucity of research on the judicial politics of Voting Rights Act cases is surprising. After all, for several reasons, these cases are highly politically salient. First, VRA cases necessarily concern the legality of *election* practices, which means that a court's decision to uphold or invalidate a challenged practice can directly affect the outcome of an election. Second, partisan consequences of a court's finding liability may often be obvious on the face of a lawsuit. VRA plaintiffs are overwhelmingly racial minorities, and historically these minority groups have voted disproportionately for Democratic party candidates. In many VRA cases, therefore, it may be clear that success for minority plaintiffs will translate into success for the Democratic party.⁴⁶ Such clear partisan stakes may tempt judges to favor their own political party. Third, the outcomes of VRA cases can affect the balance of power in government and thus influence an entire set of public policies. In contrast, cases that have been the subject of prior studies of judicial ideology have generally pertained to a single issue, such as gender discrimination in employment or the actions of an administrative agency.⁴⁷

In fact, the reasons that make voting rights cases so politically salient have often led scholars to assume that Article III judges deciding such cases are influenced by their political ideology.⁴⁸ But these hunches have not been tested.

⁴⁵ See *infra* notes 47-51.

⁴⁶ Of course, we do not mean to suggest that the partisan cast of VRA claims is always clear. During the early years of VRA enforcement, it was generally assumed that victories for minority plaintiffs benefited the Democratic party. In more recent Section 2 litigation concerning majority-minority single-member districts, however, the partisan consequences were deeply contested. We discuss this point more fully below. See *infra* text accompanying notes 55-56.

⁴⁷ See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Miles & Sunstein, *supra* note 3.

⁴⁸ See, e.g., Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993). We note that a few scholars have studied the role of judicial ideology in different set of voting rights cases – the one person, one vote reapportionment cases decided in the 1960s. See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER, THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002); Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995).

We explore two ways in which a judge's ideology might matter: for himself, and for other judges with whom he sits.

1. *Individual Effects*

To test the role of judicial politics, we must first pick a measure of judicial partisanship or ideology. Two large literatures studying judicial politics – one by political scientists⁴⁹ and one by legal academics⁵⁰ – have long debated the appropriate measure. Legal scholars typically code judicial ideology as a binary variable: the political party of the appointing president.⁵¹ In contrast, political scientists favor continuous measures that rely on media perceptions of the judge at the time of appointment, or on linear combinations of the ideological proxies of the appointing president and particular Senators.⁵² The appropriate measure of

⁴⁹ In the political science literature, the seminal work is by Jeffrey A. Segal and Harold J. Spaeth. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). They posited two competing conceptions of judicial decisionmaking: the legal model and the attitudinal model. In the legal model, judges make decisions based on the facts of the case and consistent with the directions of precedent, statutes, and other sources of law. In contrast, the attitudinal model perceives the commands of law as frequently indeterminate and legal questions as often requiring judges to render policy judgments. The attitudinal model predicts that judges decide cases according to their ideological preferences. Following Segal and Spaeth, an explosion of political science research has examined judicial decisionmaking using increasingly sophisticated statistical methods and richer datasets. A recent movement in political science known as the “new institutionalism” attempts to integrate legal doctrines and institutions into the political science analyses of judicial decisionmaking. A sampling of authors involved in this movement includes Lee Epstein, Thomas G. Walker, & William J. Dixon, *The Supreme Court and Criminal Justice Disputes: A Neo-Institutionalist Perspective*, 33 AM. J. POL. SCI. 825 (1989); Mark J. Richards & Herbert M. Krizter, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

⁵⁰ The literature by legal scholars, while older than the literature in political science, has only recently turned to frequent use of statistical analysis. Legal realists of the 1930's, such as Karl Llewellyn and Jerome Frank, argued that statutory law did not determine the outcome of legal disputes and called for interdisciplinary investigations of legal decisionmaking. Karl Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1237 (1931); JEROME FRANK, *LAW AND THE MODERN MIND* (1949). In the past two decades, legal scholars have produced a body of statistical work that examines the determinants of legal decisionmaking. Much of this work gives particular attention to the influence of judicial ideology and thus dovetails with the political science literature on judicial behavior. See, e.g., sources cited *infra* note 51.

⁵¹ Using this metric, legal scholars have documented the influence of ideology in myriad legal fields. For example, Cass Sunstein and his co-authors have shown that across a range of controversial issues, there are systematic differences in voting patterns between federal appeals judges appointed by Democratic presidents and those appointed by Republican presidents. See CASS R. SUNSTEIN, ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) [hereinafter SUNSTEIN ET AL., *ARE JUDGES POLITICAL?*]; Cass R. Sunstein, et al., *Ideological Voting in Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) [hereinafter Sunstein et al., *Ideological Voting in Federal Courts of Appeal*].

⁵² Jeffrey A. Segal & Albert D. Cover, *Ideological Values and Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (using newspaper editorial content as a proxy for the ideology of

judicial ideology is the subject of a lively debate that we make no attempt to resolve here.⁵³ For our purposes, however, party of the appointing president appears to be a particularly appropriate measure. This is because we are not interested only in judicial ideology. In light of the high degree of *partisan* salience of Section 2 litigation, we are also interested in the possibility that a judge's affiliation with a particular party itself, rather than just ideology, might influence her actions. This partisan salience makes our use of this measure at least as appropriate here as in the other doctrinal areas in which it has been used.

To test the judicial ideology hypothesis we shift our level of analysis from *decisions*, which were the focus in Part I, to the votes of *individual judges*. By analyzing individual judge-votes, we can examine the influence of a judge's political affiliation on her votes in Section 2 liability cases. Table 1 presents the basic finding on partisanship. It compares the rates at which judges appointed by Democratic and Republican presidents voted to assign Section 2 liability.

Table 1. Rates of Voting to Find Section 2 Liability,
by Party of Appointing President

Party of Judge		Difference of
Democrat	Republican	(1) – (2):
(1)	(2)	(3)
.354	.222	.132**
(.028)	(.021)	(.034)
[297]	[388]	

Notes: Table provides means, standard errors in parentheses, and number of observations in brackets. * means significant at 10% level. ** means significant at 5% level.

The data suggest that a judge's political affiliation correlated strongly with her votes in Section 2 cases. Democratic appointees voted to impose liability 35.4% of the time, while Republican appointees did so 22.2% of the time. In other words, a Democratic appointee was 13 percentage points more likely to vote in

Supreme Court nominees); Jeffrey A. Segal, et al., *Ideological Values and the Votes of Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) (same). For nominees to the federal appeals and district courts, political scientists typically use common-space scores. For common-space measures based on both the appointing president and Senator in the judge's home state, see Michael Giles, Virginia A. Hettinger, & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001); Susan W. Johnson & Donald R. Songer, *The Influence of Presidential versus Home State Senatorial Preference on the Policy Output of Judges on United States District Courts*, 36 L. & SOC'Y REV. 657 (2002).

⁵³ See, e.g., Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 743 (2005); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYSTEM J. 219 (1999). See also Joshua Fischman, *Collegiality in the Courts of Appeals: An Empirical Analysis* (Tufts Univ. working paper, 2006) (estimating judge-level ideology measures in sex discrimination cases).

favor of liability that a Republican appointee – an increase of more than 50%. Moreover, the difference is statistically significant. The size of the gap between Republican and Democratic appointees is comparable to what other researchers have found in federal appellate panels. Sunstein and his co-authors, for example, code judicial votes as liberal and conservative across a range of legal policy issues, and they compare liberal voting rates for Democratic and Republican appointees. While their manner of coding prevents a precise comparison of our estimates to theirs, their figures are remarkably close to the raw averages in Table 1. They found that the average rate at which Democratic appointees cast liberal votes was higher than that of Republican appointees by 12 percentage points.⁵⁴

While these data support our central hypothesis that a judge's political affiliation plays a significant role in Voting Rights Act litigation, it does not explain why Democratic appointees are substantially friendlier to Section 2 plaintiffs than are Republican appointees. There are at least two possibilities here. First is the conventional perception that Democratic appointees are more favorable than Republican appointees to civil rights litigation. Second, and perhaps more interestingly, Democratic and Republican appointees may be inclined to cast votes that favor the electoral prospects of their own political party. In Section 2 litigation, this might make Republicans less likely than Democrats to vote in favor of liability. As we noted above, it is commonly thought that granting relief to minority voters in many types of Section 2 claims – most notably challenges to at-large election schemes that dominated Section 2 litigation in the 1980s and constituted a majority of claims in the 1990s – benefits the Democratic party as well as minority voters. Accordingly, judges might believe that imposing Section 2 liability generally favors the Democratic party.

There is, however, an important caveat to this second possibility. While granting relief in many types of Section 2 cases is thought to benefit the Democratic party, there is at least one significant exception to that conventional wisdom. Voting rights scholars are deeply divided over the partisan consequences of Section 2 claims that concern the creation of majority-minority districts within existing single-member district schemes. Some commentators have argued that the creation of majority-minority districts in such situations has harmed Democrats by packing Democratic voters into fewer districts, wasting an excessive number of votes.⁵⁵ Other researchers disagree.⁵⁶ Judges aware of this

⁵⁴ See SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 51 at 20-21.

⁵⁵ See, e.g., DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1998); David Lublin & Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 AM. J. POL. SCI. 792 (2000); cf. Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996). To be clear, this debate is not limited to the partisan consequences of minority-majority districts. Scholars are also intensely interested in the consequences of drawing such districts for different conceptions of minority representation. See, e.g., DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS (1999); CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (2006).

debate or attuned to this complication might be less inclined to think that Section 2 claims involving majority-minority districts benefit the Democratic party. But such claims appear to make up a relatively small fraction of the cases in our dataset,⁵⁷ and thus do not undermine the possibility that judges believe that Section 2 liability favors Democrats as a general matter.

Moreover, the variation in potential political consequences across case types provides a potential way in which to test the possibility that judges are influenced in part by expected electoral consequences of their decisions in Section 2 cases. If judges are carefully attuned to the partisan consequences of Section 2 litigation and believe that some types of challenges are more likely than others to favor Democrats, then we might expect certain types of Section 2 cases to be more polarizing than others. In the raw data, two aspects of the cases are correlated with a heightened degree of polarization. The first is time. The voting gap between Democratic and Republican appointees has shrunk in recent years. In cases decided during and before 1994, Democratic appointees voted for liability at a rate more than fifteen percentage points higher than the rate for Republican appointees.⁵⁸ But in cases decided after 1994, the difference between Democratic and Republican appointees was only about seven percentage points, less than half the earlier difference.⁵⁹ To illustrate this, Figure 2 shows the way in which the partisan gap between Democratic and Republican appointees has decreased over time.

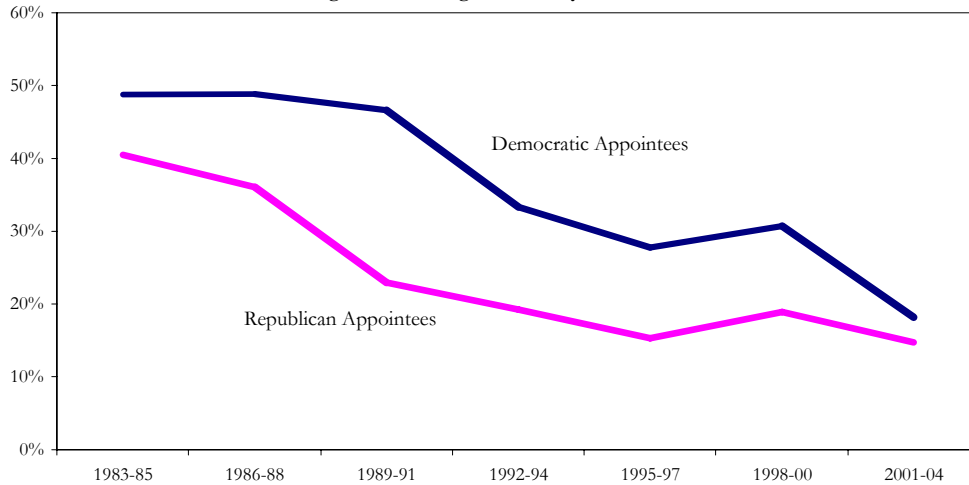
⁵⁶ See, e.g., Kenneth W. Shotts, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, 45 AM J. POL. SCI. 120 (2001) (arguing that, under certain conditions, majority-minority mandates do not hurt Democrats, and could advantage them); Lani Guinier, *Don't Scapegoat the Gerrymander*, N.Y. TIMES MAGAZINE, Jan. 8, at 36-37.

⁵⁷ Judge-votes in reapportionment cases that do not concern at-large electoral structures constitute only 34% of the data. Moreover, it is unlikely that all of these cases involve the creation of majority-minority districts under circumstances that threaten to excessively pack Democrats.

⁵⁸ In the period before 1994, Democratic appointees voted in favor of liability 42% of the time (s.e. = .036, observations = 193), while Republican appointees voted in favor of liability 27% of the time (s.e. = .030, observations = 219).

⁵⁹ In the period since 1994, Democratic appointees voted in favor of liability 23% of the time (s.e. = .042, observations = 104), while Republican appointees voted in favor of liability 16% of the time (s.e. = .028, observations = 169). These declines are consistent with the pattern previously seen in the case-level analysis of Table 1, which showed that the rate at which courts imposed Section 2 liability was substantially lower after 1994. The raw data reveal that the rate at which judges voted to impose liability fell for judges of both political parties – but that the steepest declines were among Democratic appointees.

Figure 2. Findings of Liability Over Time



The second characteristic of the cases that suggests a greater degree of polarization between Democrats and Republicans is the type of practice challenged. The largest gap in the raw average voting rates of Democratic and Republican appointees occurs in cases involving at-large elections. In these cases, Democratic appointees voted to impose liability nearly 43% of the time, while their Republican appointed colleagues did so only 24% of the time. The resulting nineteen-percentage-point gap is more than double the corresponding gap in cases not involving at-large elections. The gap in at-large cases is also nearly a mirror image of the gap in reapportionment cases: the partisan gap between Democratic and Republican appointees is considerably smaller in reapportionment cases than other case types.⁶⁰

These summary statistics suggest that the ideological divisiveness of Section 2 challenges may have waned over time, and that challenges to at-large practices may be the most ideologically divisive type of Section 2 challenge. These indications are tantalizing, because they could be construed as support for the argument that partisan electoral consequences at least partly motivate judges' decisions in Section 2 cases. They are consistent with a common story about Voting Rights Act enforcement, according to which enforcement in the 1980s

⁶⁰ It is not surprising that the patterns for reapportionment cases closely mirror those of the at-large cases, because only about 16% of the decisions did not fall into either the reapportionment or at-large categories. For completeness, we should note that, putting to one side practice types and the year of the decision, the other characteristics of Section 2 cases that are included in Appendix I appear to correspond only modestly, if at all, to the size of the partisan gap between Democratic and Republican appointees. The magnitude of the partisan gap varies only modestly by the geographic region, Section 5 pre-clearance coverage, the level of the government entity challenged, the race of the plaintiff, and whether the proceeding was at the trial or appellate stage. For the most part, therefore, these data simply correspond to the patterns seen in Table 1. The likelihood of liability varies across these case characteristics, but the characteristics have only a modest differential affect on the voting patterns of Democratic and Republican appointees.

centered on the dismantling of at-large arrangements, benefiting both minority voters and the Democratic party, while the focus of enforcement in the 1990s shifted to the creation of majority-minority districts within larger single-member districting schemes, a strategy whose partisan consequences are more deeply contested.⁶¹ If that story were correct, one might expect Democratic and Republican appointees to be more polarized in at-large cases, because those would be the cases that most clearly favored Democrats; and one might expect Democratic and Republican appointees to become less polarized over time, as the enforcement strategy under the VRA became less clearly beneficial for Democrats.⁶²

Despite the attractiveness of this account, however, caution is warranted in interpreting these raw averages because they do not control for other influences. What appears to be convergence between Republican and Democratic appointees might actually be the product of other changes, such as changes over time in the mix of cases heard by each group of judges. Moreover, this is a potential problem even for our basic finding about the powerful effect of judicial partisanship, because summary statistics do not permit us to control for other influences on judicial decisionmaking. For that reason, we revisit these findings below, after conducting regression analysis, to evaluate their robustness.⁶³

2. Panel Effects

A judge's partisan affiliation might matter for more than the judge herself. It might also matter for other judges with whom she sits. Judges often sit in panels, and we might suspect that their votes are influenced in various ways by their colleagues. Over the last decade, several researchers have documented these "indirect effects" or "panel effects" of partisanship.⁶⁴ This research shows that Republican or conservative judges are more likely to cast liberal votes when they sit on appellate panels with Democratic or liberal judges, and conversely, it

⁶¹ It is important to note that this common story of VRA enforcement is in at least some tension with the snapshot of Section 2 litigation that we presented in Part I (and Appendix I). The common account suggests that challenges to at-large election practices dominated the early years of Section 2 enforcement, while challenges to the structure of single-member-district schemes became the focus of litigation in the 1990s. As the discussion in Part I shows, however, challenges to at-large election practices continued to account for the majority of decisions issued in Section 2 litigation throughout most of the 1990s.

⁶² Alternative explanations are also possible. Perhaps Republican and Democratic appointees simply agree more today than they did twenty years ago. We do not pursue these alternatives here, however, because our regression analysis calls into question the factual premise of convergence over time. See *infra* text accompanying note 91.

⁶³ See *infra* Part II.C.

⁶⁴ See, e.g., sources cited *supra* note 51.

indicates that Democratic or liberal judges are more likely to vote cast conservative votes when they sit with Republican or conservative judges.⁶⁵

To test for partisan panel effects, Table 2 reports the average rates at which judges voted to impose Section 2 liability, as a function of the partisan composition of the court on which they sat. The first and last rows of the table display the voting rates of trial judges sitting alone, and the middle rows report the results for judges sitting in panels. The estimates for panels include the votes of judges sitting in both trial panels and appellate panels.

Table 2. Likelihood of Individual Judges Voting in Favor of Section 2 Liability, by Party of Appointing President and Panel Partisan Composition

Party of Judge	Panel Composition	Fraction finding § 2 liability
(A) Democratic	Single Trial Judge	.448 (.066) [58]
(B) Democratic	DDD	.400 (.074) [45]
(C) Democratic	DDR	.341 (.040) [138]
(D) Democratic	DRR	.250 (.058) [56]

(E) Republican	DDR	.246 (.053) [69]
(F) Republican	RRD	.196 (.038) [112]
(G) Republican	RRR	.140 (.036) [93]
(H) Republican	Single Trial Judge	.298 (.043) [114]

Notes: Table provides means, standard errors in parentheses, and number of observations in brackets. * means significant at 10% level. ** means significant at 5% level.

⁶⁵ See, e.g., Revesz, *supra* note 47; Sunstein et al., *Ideological Voting in Federal Courts of Appeal*, *supra* note 51; SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 51; Sean Farhang & Gregory Waro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. L. ECON. & ORG. 299 (2004).

The data provide some evidence of panel effects. Table 2 shows clearly that as more Democratic appointees were added to a panel, the rate at which the judge voted to impose liability rose. Conversely, as more Republican appointees were added to a panel, the rate at which the judge voted to impose liability fell. With one exception, the incremental difference from adding one more Republican (or one more Democrat) is relatively modest, on the order of 5 to 6 percentage points. The one exception is the voting pattern of Democratic appointees who fall out of the majority of a panel. When a Democratic appointee goes from sitting on a panel with another Democratic to one with two Republicans, he becomes a full 9 percentage points less likely to impose liability. The voting rates of Republican appointees do not show this marked change when they transition from a majority to a minority of a panel: their likelihood of voting to impose liability rises only half as much – about 5 percentage points – when they go from sitting on a panel with one other Republican to one with two Democrats. Thus, the larger drop for Democrats when they lose majority control of a panel appears idiosyncratic.⁶⁶

Perhaps the most striking pattern is the large gap that emerges between panels of all Democratic appointees and all Republican appointees. The difference in rates of voting to assign liability between these panels is 26 percentage points (= .400-.140). This gap swamps any of the differences in liability rates associated with case characteristics that we discussed in Part I. Moreover, this gap is considerably larger than the 15-percentage-point difference between Democratic and Republican appointees sitting alone in trials on Section 2 liability.⁶⁷ This suggests the importance of panel effects in Section 2 litigation.⁶⁸

⁶⁶ We might expect that judge would vote significantly differently when her party commands a majority of a panel rather than a minority. One reason might be that it is more costly for a judge to vote her ideological preferences when she is in the minority, as she would have to draft a dissent rather than just join a colleague's majority opinion. But this possibility cannot explain why the effect of majority status on a panel seems to be much more significant for Democratic appointees than Republican appointees.

⁶⁷ We note that care should be taken when comparing the overall voting rates of single judges to panel judges in Table 2 (as opposed to the way in which those rates change as panel composition or single judge identity changes). One difficulty is that Table 3 does not control for the possible differences between appellate and trial judging – differences in judicial task, in the composition of cases, etc. A second difficulty is that the comparison of single-trial-judge cases with panel cases in Table 2 *does not* isolate the difference between trial and appellate cases. The votes of judges sitting alone encompass only decisions made in trials. But the votes of judges serving on panels include decisions from both appeals and from the special three-judge trial panels required in certain Section 2 cases. Table 2 does not separately report the votes of judges on trial panels, because the number of such decisions is too small to permit strong conclusions. Moreover, no strong pattern emerges from the small number of trial panels – all of which, it should be remembered, are deciding state or federal reapportionment challenges. When the trial panel was composed entirely of Democratic appointees, the rate at which the judges voted to find liability was 33% (s.e.=.114) [n=18], which is the same as the rate 33% for Democratic appointees sitting alone on Section 2 cases involving reapportionment. When the trial panel was composed entirely of Republican appointees, the rate at which the judges voted to find liability was 25% (s.e.=.131) [n=12], which is

There are several possible explanations for the panel effects we observe in Section 2 cases. We can herd these explanations into two groups: sincere voting effects and strategic voting effects.⁶⁹ First, a judge's sincere view about the merits of a case may be affected when she interacts with her colleagues on a judicial panel. There are a number of ways in which the interaction might change her views. The presence of another judge with different views may provide new information or insights that prompt a judge to re-evaluate her position or alter her ideological preferences.⁷⁰ (Some authors refer to this possibility as "deliberation,"⁷¹ though that concept covers a number of different possible mechanisms.) Moreover, this possibility is not limited to situations in which other panel members have different views. A judge's view about a case may also change when she interacts with panel members who share her views. Sunstein has suggested, for example, that when persons with similar views deliberate their views tend to grow more extreme.⁷²

The second possibility is that, while a judge's sincere view remains unchanged by her panel colleagues, she alters her vote for strategic purposes. She might engage in so-called logrolling – the trading of a disfavored vote in one case in exchange for a favorable vote in another. Accounts of judicial logrolling are commonplace, but testing for this effect would require data on judge-votes in a potentially large number of cases because, were vote-trading to occur, it would not necessarily be limited to Section 2 cases. Other forms of bargaining among

a bit lower than the rate of 33% (s.e.=.092) [n=27] for Republican appointees sitting alone on Section 2 cases involving reapportionment.

⁶⁸ This result is consistent with recent research Sunstein, Miles, and others, who have documented the existence of panel effects in other doctrinal areas. See, e.g., SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 51, at 23; Miles & Sunstein, *supra* note 3. Again our estimates are not precisely comparable because Sunstein and his co-authors code the judicial votes as liberal or conservative. But, they report that a Democratic appointee sitting with two other Democrats casts liberal votes 64% of the time, and a Republican appointee sitting with two other Republicans casts Republican votes 31% of the time.

⁶⁹ For a general discussion of sincere and strategic voting, see Evan H. Caminker, *Sincere and Strategic Voting on Multi-member Courts*, 97 MICH. L. REV. 2297 (1999).

⁷⁰ This effect might differ depending on whether a judge is initially in the majority or minority of the panel. This difference would be difficult to untangle, however, because switching a judge from the majority to the minority likely changes his strategic calculus significantly. This highlights one difficulty with the effort by Sunstein and his co-authors to distinguish "amplification" from "moderation" by defining the baseline as the voting rate of a judge sitting with one Democrat and one Republican: this definition conflates the impact of amplification-dampening distinction with the impact of switching the political party in the majority on the panel. See SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 51, at 9.

⁷¹ Farhang & Wawro, *supra* note 65 at 325-26; Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759, 1781-82 (2005); cf. SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 51, at 8-9 (using the term "ideological dampening").

⁷² See SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 51, at 71-78.

judges may also be difficult to distinguish from the persuasive effect of deliberation. Judges may bargain over the breadth and content of a decision in order to secure the vote of a would-be dissenter. Of course, this form of moderation -- in the content of an opinion -- would not be detectable in an analysis of judge-votes. When a judge is in the minority, drafting a dissent is time-consuming, and it may sacrifice good-will among colleagues. If a dissent irks a judge's colleagues, it also may ultimately be counterproductive in effecting future logrolling trades.

Unfortunately, our data do not allow us to isolate the cause of the panel effects we observe. But whatever the cause, the result appears to be dramatic: a judge's vote in a Section 2 case is strongly affected by changes in the political identities of her colleagues.

B. *The Role of Race*

While partisanship is frequently front and center in Voting Rights Act litigation, it is obviously not the only important feature of these cases. Race is similarly salient -- perhaps even more pervasively so. The Act, passed in the wake of the Selma marches, was enacted principally in response to Southern black disenfranchisement.⁷³ Moreover, claims raised under Section 2 of the Act are brought on behalf of racially-defined groups of voters. Given the salience of race, we explore the question whether a judge's race or ethnicity correlates with his votes in Section 2 cases.

Consistent with the history of the Act, more than 80% of the dispositions in our data included at least one African-American plaintiff.⁷⁴ In part for this reason, we focus on the potential differences in the ways that African-American and non-African-American judges decide Section 2 cases. An additional reason for our focus is that there are almost no judges in our data set who are not either black or white.

1. *Individual Effects*

Table 3 reports the rates at which judges vote to impose liability in Section 2 cases, according to the race of the judge. The data include twenty judges whom we identify as African-American, and forty-four votes by these judges in Section 2

⁷³ See, e.g., DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING JR. AND THE VOTING RIGHTS ACT OF 1965* (2001).

⁷⁴ This figure makes black plaintiffs far and away the most common in Section 2 litigation. After African Americans, Latino plaintiffs were the most common; at least 30% of the decisions had a Latino plaintiff. In some cases, of course, there were both Latino and African-American plaintiffs. Decisions involved plaintiffs of multiple racial groups about 25% of the time. But even among opinions involving plaintiffs of only one race, African Americans were the plaintiffs 60% of the time.

liability decisions. The data report an average of two votes per African-American judge.

Table 3. Rates of Voting to Find Section 2 Liability,
by Race of Judge

Race of Judge		Difference of (1) – (2): (3)
African American (1)	Other (2)	
.545 (.080) [44]	.261 (.017) [641]	.285** (.069)

Notes: Table provides means, standard errors in parentheses, and number of observations in brackets. * means significant at 10% level. ** means significant at 5% level.

Although the number of African-American judges is relatively small in the sample, Table 3 shows that these judges are substantially more likely to vote in favor of Section 2 liability. The African-American judges in the data voted 55% of the time to impose liability, while the remaining judges voted to impose liability only 26% of the time. The nearly twenty-nine percentage-point difference between African-American and other judges is more than double the size of the gap seen in Table 1 between Democratic and Republican appointees.⁷⁵ This suggests that a judge's race has a marked effect on his voting behavior in Section 2 cases.

Caution is warranted in interpreting this finding because the number of votes by black judges is relatively small. Nonetheless, the difference in the voting rates of the black and non-black judges is remarkable for its magnitude.

Moreover, the strong pattern we see is important because it contrasts starkly with previous work on the role of race in judicial decisionmaking. Over the past several decades, a number of studies have attempted to identify a relationship between a judge's race and her voting patterns.⁷⁶ This earlier research focused on criminal and employment discrimination cases, presumably because these types of cases were likely to present racially salient issues.⁷⁷ But the research has not

⁷⁵ The small number of African-American judges appointed by Republican presidents prevents us from disaggregating these results by race and party of appointing president.

⁷⁶ This research is part of a larger body of research documenting the ways in which a judge's demographic characteristics and prior experience correlate with her decisions. *See infra* notes 77-81.

⁷⁷ Because our analysis focuses on VRA cases, it does not speak to the question of whether ideological or demographic judicial characteristics influence decisionmaking in cases not presenting salient issues. *See, e.g.,* Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEG. STUD. 257 (1995) (reporting that the race, gender, and partisan affiliation of judges does not affect outcomes in a randomly-selected set of decisions in federal district courts).

unearthed any meaningful differences in the voting patterns of judges of different races. A series of studies on sentencing in state and municipal courts found that white and black judges impose roughly similar sentences.⁷⁸ Although sentence length clearly correlates with the race of the defendant in those studies, it does not appear to correlate with the race of the judge.⁷⁹ A study of sentencing in federal district courts similarly found no relationship between sentencing patterns and the race of the judge.⁸⁰

Interestingly, researchers have found disparities in voting patterns that correlate with sex. Two recent studies of federal appellate employment discrimination decisions detected relatively strong effects of a judge's sex on the likelihood that a judge voted in favor of the plaintiff. These studies too, however, identified no such impact of a judge's race.⁸¹

Our results are, we believe, the first to find a strong relationship between the race of a judge and her voting behavior. This raises the question why the racial differences we document in Section 2 cases do not seem to be present in other jurisprudential areas – like employment discrimination – where we might suspect that issues of race are similarly salient. Because our data are limited to Section 2 cases, it is difficult to assess this question. But a possibility is that voting rights, as a central focus of the civil rights movement and as a fundamental right long

⁷⁸ Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884 (1978) (finding that black and white trial judges convict criminal defendants at roughly the same rate and impose sentences of approximately the same length); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749 (2001) (reporting weak correlations suggesting that black judges were more likely to impose a sentence of incarceration and gave slightly shorter average sentences).

⁷⁹ Susan Welch, et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126 (1988) (reporting that black and white judges exhibited modest differences by the race of the defendant in the likelihood of sentencing defendants to incarceration and the length of incarceration); Cassia Spohn, *The Sentencing Disparities of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197 (1990) (finding that black and white judges impose longer sentences on black defendants).

⁸⁰ Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Demographic Characteristics*, 34 J. LEG. STUD. 57 (2005).

⁸¹ See, e.g., Peresie, *supra* note 71; Farhang & Waro, *supra* note 65. Other studies that examined the decisions of federal district court judges across a range of legal issues reported no effect of a judge's race and conflicting results as to the impact of a judge's gender. Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137 (2000) (concluding that the voting patterns of female and minority judges were similar to those of male and white judges in every policy area examined); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985) (finding that female and male judges voted similarly except that females were more likely to support federal economic regulation, and reporting no significant differences by the race of the judge).

thought “preservative of all rights,”⁸² may possess a distinctive valence that the criminal and employment cases do not.

Putting aside the comparison to other jurisprudential areas, there is a more foundational question: what might explain the fact that African-American judges vote very differently than non-African-American judges in Section 2 cases? This question is a large one, and adequate treatment of it is beyond the scope of this paper because our data do not permit us to offer more than speculation. But we note a few possible explanations.

Nearly all the non-African-American judges in our data are white, so the question essentially reduces to the question why white judges are less likely than black judges to vote in favor of Section 2 liability. One possibility is that judges are influenced by their personal experiences, and that white and black judges tend to have different life experiences. For example, black judges are more likely to have suffered from racial discrimination themselves (perhaps even discrimination in voting), and this might affect the way they view Voting Rights Act litigation. A closely related possibility is that judges are influenced by the information they have acquired through life. Given the history in the United States of residential, social, and occupation segregation, it would not be surprising if black and white judges had quite different information about the prevalence and persistence of discrimination generally or of discrimination in voting in particular.

In addition, there is the possibility that the black judges in our dataset may simply be more liberal than the white judges in our data.⁸³ As we will explain below, controlling for the fact that nearly all the black judges in our data are Democrats does not undermine our finding regarding race. But this control cannot eliminate the possibility that black Democratic appointees are more liberal than white Democratic appointees. As we explained in Part II, we used the party of the appointing president as a rough proxy for the political ideology of each judge. But this binary variable might mask ideological variation among judges who were all appointed by presidents of the same party. If the ideological variation among Democratic appointees were correlated with race, that could explain our result above. That said, it is not clear why we would suspect that the black Democratic appointees in our dataset are systematically more liberal than white Democratic appointees. And even if they are, it is not clear that this undermines our result. Rather, it would simply raise the question of why white and black Democratic appointees have systematically different ideological views.

⁸² *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886).

⁸³ Other biographical characteristics of the judges provide reasons to be skeptical of this possibility. For example, judges who previously served as prosecutors are often thought to be more conservative. Yet, in our data, 29% of the white judges previously served as prosecutors, and 55% of the black judges also did so. Thus, their prior professional experience does not obviously suggest liberal views.

2. Panel Effects

Like political affiliation, it is possible that race exerts a panel effect, as well as an individual effect. For this reason, we examine the possibility that the presence of an African American judge on a panel affects the votes of his colleagues. Again, the small number of African-American judges in our data counsels us to take care interpreting this data. Still, the data contain twenty-seven panel decisions in which an African-American judge participated.⁸⁴ These panels include 53 observations of a non-African American-judge sitting on a panel with a judge who is African American.⁸⁵ Table 4 compares the votes of these non-African-American judges with the votes of judges on panels that did not include an African-American judge.

Table 4. Rates of Voting to Find Section 2 Liability,
by Panel Racial Composition

Votes by Judges who are Not African American Serving on Panels	Did the Panel Include an African-American Judge?		Difference of (1) – (2): (3)
	Yes (1)	No (2)	
(A) Votes by All Such Judges	.434 (.069) [53]	.226 (.021) [411]	.208** (.063)
(B) Votes by Such Judges who are Democratic Appointees	.550 (.114) [20]	.306 (.034) [183]	.244** (.110)
(C) Votes by Such Judges who are Republican Appointees	.364 (.085) [33]	.162 (.024) [228]	.201** (.072)
(D) Difference of (B) – (C)	.186 (.141)	.144** (.041)	--

Notes: Table provides means, standard errors in parentheses, and number of observations in brackets. * means significant at 10% level. ** means significant at 5% level.

The first row of the table shows that the judges were more likely to cast a vote for Section 2 liability when they served on a panel with an African-American judge. The impact is quite large; the probability that a judge voted to impose liability was twenty percentage points higher when an African-American judge was a member of the panel. The effect is larger than that of changing the political

⁸⁴ Nineteen of these panels were appellate panels. The remaining eight were trial panels.

⁸⁵ Because the panels all have three members, each panel with a single African-American judge provides two observations of a non-African-American judge sitting with an African-American judge. If all 27 panels in this subset of the data had a single African-American judge, this would provide 54 observations. Our data include one panel on which there were two African-American judges, however, which accounts for the fact that there are only such 53 observations in Table 4.

party of two judges on the panel. As shown in Table 2, the difference in the likelihood of a Democratic appointee voting in favor of liability changes by fifteen percentage points when she goes from sitting with two Democrats to sitting with two Republicans. Similarly, the difference in the probability of a Republican appointee voting in favor of liability changes by eleven percentage points when she goes from sitting with two Republicans to sitting with two Democrats. Thus, the panel effects of race in Section 2 cases appear greater than these panel effects from partisan affiliation.

The next two rows demonstrate that the panel effect of race bears on judges of both political parties. Although the number of observations is quite small when the data are decomposed by political party, the pattern is striking. When an African-American judge was a member of the panel, the likelihood that a judge voted in favor of liability rises by twenty percentage points for both Democratic and Republican appointees. Relative to the size of the panel effects from political affiliation, the magnitude of this effect is especially dramatic. In Table 2, the panel effects of political affiliation were cumulative, meaning that the addition of a second member of a particular political party to the panel appeared exerted just as much influence on a judge's vote just as the addition of the first member of that political party did. Whether the effect of race similarly increases with the number of African-American judges on the panel is uncertain. Only one case in the data involved a panel with two African-American judges, and no case involves a panel with three African-American judges. However, the evidence in Table 4 indicates that the presence of any African-American judge on the panel has a strong influence on the votes of the other panel members.

These results reflect perhaps the first non-experimental evidence that the presence of a minority judge on a judicial panel influences the decisions of other members of that panel. Previous scholarship has tested for but not found evidence of panel effects by race.⁸⁶ This is particularly interesting in light of the fact that other sorts of panel effects related to identity have been uncovered. For example, Peresie and others have found that a federal appellate judge's sex can produce a panel effect in employment discrimination cases: a male judge becomes more likely to vote in favor of a plaintiff in such cases when he sits with a female judge.⁸⁷ Until now, however, no research had brought to light panel effects related to race.

The question why a judge's race would affect the voting behavior of his colleagues on a panel is extremely interesting – and almost entirely undiscussed in the existing empirical literature of judicial behavior. Given the fact that this literature has struggled to identify any effect of race on judicial behavior, it is not surprising that the potential peer effects of race have been overlooked. But this effect in Section 2 cases appears to be quite powerful. Why does the race of

⁸⁶ See Peresie, *supra*, note 71; Farhang & Wawro, *supra*, note 65.

⁸⁷ See Peresie, *supra*, note 71; Farhang & Wawro, *supra*, note 65.

colleagues on a panel matter so much? And why does it appear matter even more than the colleague's politics?

Again, it is beyond the scope of this paper to provide anything like a full answer to this question. Still, the potential causes of panel effects that we discussed earlier provide a few possibilities. The vast majority of Section 2 litigation is brought by African-American plaintiffs, and nearly all the non-black judges in our dataset are white. In light of this, why might a white judge vote differently when he sits with a black judge in a Section 2 case? One possibility is the white judge's sincere view of the merits of the case may change when he deliberates with a black judge. The black judge may have different experiences or information relating to discriminatory practices, and this might lead the white judge to re-evaluate her view. In addition, there are a number of other ways in which the presence of a black judge during deliberations might change the conversation and, as a consequence, the sincere views of other panel members.

Strategic behavior is a possibility here as well. For example, on panels where a black judge votes in favor of liability, a white judge might worry that the social sanction for voting against liability could be greater than in cases with no black panel members. Logrolling also might be present, though it is difficult to determine how prevalent we should expect logrolling to be. If black judges have particularly intense preferences with respect to Section 2 cases, then logrolling might be quite frequent when they sit on panels. This is because their intense preferences would motivate them to trade more votes on other cases in order to obtain the votes of fellow panel members in Section 2 cases. On the other hand, if vote trading is often limited to similar types of cases or if black judges have different preferences than other judges across a whole host of cases, then black judges will have difficulty engaging in logrolling. After all, if they are consigned to a near-permanent voting minority on panels, other panel members may have no need to bargain with them.

C. The Robustness of Partisanship and Race

Our summary statistics suggest that a judge's votes are affected by both her own partisanship and race, as well as the partisanship and race of other judges with whom she sits. But as we discussed in Part I, there are many features of Section 2 cases that might affect the likelihood of a judge voting in favor of liability. To confirm the influence of partisanship and race in Voting Rights Act litigation, it is important to be sure that the patterns observed in the raw data regarding the role of these features are robust – that is, that they are not actually the product of some other characteristics of Section 2 litigation that happen to be correlated with the partisanship or race of the judges.

In the following discussion, we use multivariate regression analysis to control simultaneously for multiple features that might influence Section 2 liability. While the details of the analysis that follows are somewhat technical, our basic conclusion is straightforward: the econometric approach confirms our central

findings about the importance of both judicial race and judicial partisanship. For that reason, readers who are uninterested in the technical details can proceed to the next section.

1. Partisanship

To test the robustness of our hypothesis about partisanship, we use regression analysis to estimate the probability that a judge votes in favor of a Section 2 plaintiff as a function of the judge's partisan affiliation, the judge's race, and a variety of other characteristics of the judge and the case. We employ several different specifications of the regression model to evaluate the robustness of the estimates for partisanship and race.⁸⁸ Table 5 presents the first set of regression results.⁸⁹

⁸⁸ We estimated the probability that judge j in case i in circuit c and year t votes in favor of liability with probit regressions in the form $\Pr(\text{Vote}_{ijct}) = \text{Dem}_i + Z_{jt} + X_{ijct} + \alpha_c + \alpha_t + \varepsilon_{ijct}$. The dependent variable $\Pr(\text{Vote}_{ijct})$ represents the probability that judge i in case j in year t and circuit c votes for the plaintiff. In this equation, Dem_i is a binary variable taking the value one when a Democratic president appointed judge i and zero otherwise. The term X_{ijct} reflects a matrix of variables that are specific to case j , and Z_{jt} contains variables reflecting characteristics of judge j , some of which may vary over time. The binary variables α_c and α_t are fixed effects for circuit c and year t . The term ε_{ijct} is an error term.

⁸⁹ To make it easier to interpret our results, the regression results in Table 4 show the marginal effects for each explanatory variable rather than the regression coefficients. This simply means that the numbers listed in Table 4 reflect percentage changes in the likelihood of a judge finding liability. To see this, consider for example the first row of Table 4. This row shows how much more likely a judge was to vote in favor of liability if the "Judge Was Democratic Appointee." Under our first regression (in Column (1)), the marginal effect is .139, which means that a judge was 13.9% more likely to vote in favor of liability if she is a Democrat rather than a Republican.

Table 5. Likelihood of Individual Judges Voting for Section 2 Liability:
 Probit Regression Analysis Focusing on Political Affiliation

Variable	(1)	(2)	(3)	(4)	(5)	(6)
Judge Was Democratic Appointee	.139** (.037)	.132** (.037)	.133** (.046)	.111** (.033)	.088** (.035)	.130** (.037)
Judge Was Democratic Appointee * Year Was After 1994	--	--	-.004 (.077)	--	--	--
One Democratic Appointee on Panel	--	--	--	-.013 (.078)	--	--
Two Democratic Appointees on Panel	--	--	--	.050 (.082)	--	--
Three Democratic Appointees on Panel	--	--	--	.129 (.159)	--	--
One Dem. Appointee on Appellate Panel	--	--	--	--	.087 (.120)	--
Two Dem. Appointees on Appellate Panel	--	--	--	--	.178 (.122)	--
Three Dem. Appointees on Appellate Panel	--	--	--	--	.402** (.202)	--
Case Occurred in Jurisdiction Covered by § 5 * Appellate Case	--	--	--	--	--	-.236** (.074)
Year Was After 1994	-.102** (.052)	--	--	--	--	--
Case Occurred in South	.020 (.057)	--	--	--	--	--
Appellate Case	-.100* (.052)	-.108** (.053)	-.108** (.053)	-.124** (.072)	-.229** (.097)	-.027 (.062)
Challenge to At Large Election	.111* (.067)	.073 (.066)	.073 (.066)	.070 (.066)	.075 (.066)	.076 (.066)
Challenge to Reapportionment Plan	.069 (.073)	.030 (.071)	.030 (.071)	.027 (.070)	.050 (.072)	.031 (.071)
Challenge to Local Election Practice	-.001 (.061)	-.015 (.062)	-.015 (.062)	.006 (.067)	-.001 (.060)	-.007 (.061)
Plaintiffs Were African-American	.044 (.066)	.114* (.063)	.114* (.063)	.119* (.062)	.121* (.061)	.111 (.066)
Case Occurred in Jurisdiction Covered by § 5	.046 (.064)	.042 (.066)	.042 (.066)	.043 (.066)	.049 (.068)	.246** (.097)
Log-likelihood	-374.613	-347.436	-347.435	-346.258	-342.957	-346.562
Pseudo- R ²	.0557	.1242	.1242	.1272	.1355	.1375

Notes: * means significant at 10% level. ** means significant at 5% level. N=659. With the exception of the equation in Column (1), all regressions also include fixed-effect controls for judicial circuits and years.

Judge Partisanship. The regressions confirm that a judge's political affiliation influences her votes in Section 2 cases. Models (1) and (2) of Table 5 display estimates from an equation that includes the variables examined in Part I, as well

as a number of other variables.⁹⁰ Those models indicate that appointment by a Democratic president rather than a Republican one implies an almost 14 percentage point increase in the chance that the judge votes to impose Section 2 liability. This estimate is statistically significant at the 5% level. It shows that the partisan gap between Republican and Democratic appointees is unaffected by the presence of controls for the additional characteristics of the cases, courts, and judges. Moreover, the size of this estimate is almost identical to the difference observed in the simple averages of Table 1, where Democratic appointees voted on average 35% of the time to impose liability and Republican appointees did so 22% of the time.

In addition to confirming our central hypothesis about the importance of partisanship, the regression framework permits us to test our earlier speculation that some cases were more ideologically polarized than others. The summary statistics suggested that cases decided before 1995, as well as cases challenging at-large electoral structures, were more polarized than cases decided later and cases challenging reapportionment schemes. Model (3) tests for changes in the level of polarization over time. This model includes a control variable that interacts the variable for a Democratic appointment with the indicator variable for a decision occurring after the year 1994. If the partisan gap in voting rates has grown over time, the estimated effect for this interaction term should be positive. But, if the partisan gap in voting has shrunk over time, the estimated effect on the interaction term should be negative.

Model (3) shows that the estimate for this term, -.004, is less than one percentage point, far from conventional levels of statistical significance. The nearly zero value of this estimate implies that the magnitude of the partisan gap in the likelihood of voting for liability is essentially the same before 1994 as it is after 1994. Although not reported here, when other years were chosen for the interaction term, the estimates were similarly close to zero. Thus, the partisan gap does not trend significantly over time. Moreover, the inclusion of the interaction term has virtually no effect on the magnitude of the estimate for a Democratic appointment itself. The estimate of .133 is essentially identical to the estimate of .132 in Model (2), and it remains statistically significant.

Similar results obtain when we test for the possibility that the level of ideological divisiveness differs across case type. When we interact the variable for

⁹⁰ The only difference between Model (1) and Model (2) is that Model (2) (as well the remainder of the models in Table 5 and Table 6) includes so-called fixed effects for years and judicial circuits. See *supra* note 88. The fixed effects control for systematic variation across circuits and years in the probability a judge votes for a Section 2 plaintiff. These systematic differences might arise from variations in legal doctrine or judicial attitudes across circuits and time. Model (1) does not include controls for these effects. Instead, it includes an indicator variable for the South and an indicator variable for all years following 1994. (This is why only Model (1) includes values for the variables for whether the case occurred after 1994 or in the South.) We include the simpler specification in Model (1) because it facilitates our discussion in Part II.D about variation across region and period in the likelihood a judge favors a Section 2 plaintiff.

a Democratic appointment with the indicator variable for whether a case involved a challenge to an at-large election, the estimate for the interaction term is very close to zero and far from statistical significance.⁹¹ This implies that the type of election practice challenged does not intensify or diminish the influence of a judge's partisan affiliation.

Contrary to the summary statistics, therefore, the regressions do not suggest that challenges to at-large election practices are particularly divisive, or that judges deciding Section 2 cases have become less ideologically divided over time. This finding undercuts the theory that challenges to at-large practices may be more polarizing because the partisan consequences of dismantling an at-large election system are often so clear. Similarly, it undermines the theory that Section 2 cases may have become less polarizing in recent years as more debate has arisen over the partisan consequences of Section 2 liability. Instead, after conditioning on other factors, the effect of a judge's partisanship appears relatively consistent across time and across case types.

Panel Effects. As we explained above in Table 3, the raw data revealed a pattern of partisan panel effects in Section 2 cases. The next regressions in Table 5 test for the presence of partisan panel effects after conditioning on other factors. Model (4) includes three binary variables for whether the decision was rendered by a panel with one, two, or three Democratic appointees. The estimated coefficients for these variables ascend in magnitude. The estimated impact of one Democrat is nearly zero. The point estimate for two Democrats on a panel is a five percentage-point increase in the likelihood that the judge votes in favor of liability, and for three Democrats on a panel, it is an increase of thirteen percentage points. The pattern of the estimates is thus roughly consistent with the summary statistics reported in Table 3; a greater number of Democrats on the panel raises a judge's likelihood of voting in favor of liability. But none of these estimates are statistically different from zero.

It is important to note, however, that the specification of Model (4) captures panel effects in both trial and appellate panels. The existing literature on panel effects studies only appellate panels, because the standard structure in federal court is that three-judge panels preside only at the appellate stage. Section 2 provides for special three-judge trial panels in some cases, and this feature of Section 2 provides a potentially interesting way to test whether the partisan composition of trial panels exerts an influence similar to that of appellate panels. The panel effect of partisan composition may be less pronounced at the trial stage than the appellate stage for several reasons. Panel trials are so rare that judges may have no expectation of repeated play, which may be important facilitator of cooperation or bargaining. The process of fact-finding at the trial stage may allow fewer opportunities for the assertion of judicial policy preferences, and thus trials may be less susceptible to panel influences than the review of these decisions and related questions of law.

⁹¹ To conserve space, this result is not reported in Table 5.

Unfortunately, the small number of Section 2 trial panels – again, only 36 decisions – precludes a direct test of whether panel effects are greater in appellate rather than trial courts. Still, we can attempt to isolate better panel effects in appellate courts by examining only appellate panels. Model (5) does this, replacing the variables for the partisan composition of both trial and appellate panels with variables for the partisan composition of only appellate panels. Focusing on appellate panels produces strikingly different results. At 8.7%, 17.8%, and 40.2% respectively, the estimated effects for partisan composition on appellate panels are more than three times the magnitude of the estimates for all panels in Model (4). Moreover, the estimate for the presence of three Democrats on the appellate panel is statistically significant. If we take these estimates at face value, they imply that a Republican appointee serving on an appellate panel with two Democratic appointees is about five percentage points less likely to vote in favor of Section 2 liability than a Republican-appointed trial judge (e.g., $-.051 = .178 - .229$).

The presence of the variables for panel composition has some effect on the estimated impact of appointment by a Democratic president. In Model (4), the estimated effect for a Democratic appointment remains statistically significant and its magnitude changes little. In Model (5), it retains statistical significance, but its value slips slightly to .088. This implies that a trial judge who was appointed by a Democratic president is more likely than a Republican trial judge to vote in favor of liability by about nine percentage points. However, when evaluated together, the estimated impact of partisan appointment and panel composition are sizable for appellate judges. The probability that a Democratic appointee serving on an appellate panel with two fellow Democrats votes in favor of liability is about 32 percentage points higher than that of a Democrat serving on an appellate panel with two Republicans (e.g., $.315 = .402 - .087$).⁹² In sum, after controlling for other factors, the precision of the estimates of partisan panel effects is weaker, but the magnitude of the estimates remains quite large.⁹³

⁹² The other implied magnitudes are also large. For example, the probability that a Democratic appointee serving on an appellate panel with two fellow Democrats votes in favor of liability is about seventeen percentage points higher than that of a fellow Democrat presiding alone at trial (e.g., $.173 = .402 - .229$). Incredibly, the probability that a Democrat serving on an appellate panel with two other Democrats votes in favor of liability is 49 percentage points higher than that of a Republican judge presiding alone at trial (e.g., $.490 = .402 + .088$).

⁹³ In addition to testing for partisan panel effects, we also tested for whether the partisan composition of the circuit court influences the decisions of judges both on three-member appellate panels and at the trial stage. Judges may cast their votes in the shadow of en banc review, and thus the partisan composition of the circuit may influence their decisionmaking. A judge may be less likely to vote according to her ideological preferences when the partisan composition of the circuit makes it likely that her decision would be undone by a rehearing en banc. Model (6) of Table 5 tests for this simple account of strategic ideological voting by including a term for the difference between the number of active Democratic appointees in the circuit and the number of active Republican appointees. These counts exclude judges who are senior status because senior judges do not cast votes in determining whether a case is reheard en banc, and once it has been reheard en banc, they generally do not participate in the decision on

2. *Race*

The summary statistics in Tables 3 and 4 suggested that a judge's race, and the race of other panel members, correlate strongly with the judge's vote on Section 2 liability. While those tables focused on race because of its particular salience in Voting Rights Act litigation, we collected considerably more detailed information about the judges. Table 6 presents the results of regressions that consider the effect of a variety of demographic characteristics and prior experience of the judges. These regressions allow us to confirm the robustness of our findings about the explanatory power of race, as well as test for the influence of other biographical characteristics on judicial behavior.

Another reason why it is important to control for a judge's race is that the close correlation of judicial race and partisanship suggests that the failure to control for a judge's race may bias upward the estimated influence of partisanship. The African-American judges in the data are disproportionately Democratic appointees (which mirrors the partisan affiliation of African Americans generally), and the averages in Table 3 indicate that they are more likely to vote in favor of liability than white judges. These two features of the data -- the strong correlation between race and partisanship, and the higher rates at which African Americans vote in favor of liability -- raise the possibility that the estimated effect of Democratic appointment may be an artifact of the voting behavior of African-American Democratic judges rather than the general tendency of Democratic judges to vote in favor of liability.

the case.⁹³ When the number of Democrats exceeds the number of Republicans, this figure is positive; when they are equally matched, it is zero; and when Republicans exceed Democrats, it is negative. If a more Democratic circuit raises the likelihood that a judge will vote in favor of Section 2 liability, the estimated effect of this variable should be positive.

Model (6) shows that the political composition of the circuit has essentially no relationship to the probability that a judge votes to impose liability under Section 2. The estimate is statistically insignificant and small in magnitude. If taken at face value, the estimate implies that in a circuit in which there were ten more active Democratic appointees than Republicans, which would be an extraordinarily unbalanced circuit, the effect would still be less than the effect of the judge's own partisan pedigree. The estimate provides no support for the view that judges cast ideological votes strategically in Section 2 cases in response to the partisan composition of the circuit.

Table 6. Likelihood of Individual Judges Voting for Section 2 Liability:
 Probit Regression Analysis Focusing on Judicial Characteristic

Variable	(1)	(2)	(3)	(4)	(5)	(6)
Judge Was Democratic Appointee	.109** (.037)	.111** (.037)	.110** (.038)	.119** (.037)	.144** (.039)	.136** (.038)
Judge Was African-American	.297** (.079)	.176** (.076)	.154** (.079)	--	--	--
Judge Was Female	-.011 (.057)	--	--	--	--	--
At Least One African-American Judge on Panel	--	.190** (.076)	--	--	--	--
At Least One African-American Judge on Appellate Panel	--	--	.361** (.122)	--	--	--
Judge's Age	--	--	--	.003 (.002)	--	--
Judge Attended Ivy League College	--	--	--	--	.020 (.050)	--
Judge Attended Elite Law School	--	--	--	--	-.064 (.041)	--
Judge Previously Served as Law Clerk	--	--	--	--	.016 (.044)	--
Judge Previously Served in State Legislative or Executive Branch	--	--	--	--	--	.015 (.039)
Judge Previously Served on State Court	--	--	--	--	--	-.056 (.039)
Judge Previously Served in Federal Legislative or Executive Branch	--	--	--	--	--	.002 (.036)
Log-likelihood	-341.092	-333.294	-331.532	-345.911	-346.502	-346.479
Pseudo- R ²	.1402	.1523	.1643	.1266	.1266	.1266

Notes: * means significant at 10% level. ** means significant at 5% level; N=659. These regressions include the same controls as in the regression in Column (2) of Table 6: controls for whether the case occurred in a jurisdiction covered by § 5, whether the case was an appeal, whether the plaintiffs were African-American, whether the challenge was to an at-large election scheme or a reapportionment plan, whether the governing body challenged was local, and fixed-effect controls for judicial circuits and years.

Individual Effects. Model (1) in Table 6 tests for the importance of a judge's demographic characteristics by including explanatory variables for the race and gender of the judge. The estimate for race is astonishingly large; even after controlling for other factors, an African-American judge is nearly thirty percentage points more likely to vote in favor of Section 2 liability. Again, the

number of African-American judges in the data is relatively low, and a switch in just a few votes of these judges could affect the magnitude of the estimate substantially. But it is compelling that the additional explanatory variables do little to reduce the striking racial gap in voting rates seen in Table 3.

The estimated effect for gender provides a sharp contrast. The voting rates of male and female judges appear virtually the same. The estimate implies that a female judge is only one percentage point less likely to vote in favor of liability, and the estimate is far from statistical significance. The contrast between the strong effect of race and the absence of an effect for gender may reflect that race is highly salient under the Voting Rights Act while gender is not.

Importantly, the presence of controls for a judge's race and gender has little impact on our findings regarding partisanship. The estimated difference between Republican and Democratic appointees remains highly statistically significant. The magnitude of the estimated difference is only slightly smaller – about eleven percentage points rather than thirteen – and the two estimates are statistically indistinguishable.⁹⁴ The estimates support the conclusion that partisan affiliation exerts an influence on voting behavior separate from that of race.

Moreover, the race finding is especially important because other demographic factors that we might think important turn out to have no significant effect on the likelihood that a judge votes in favor of Section 2 liability. The last three models in Table 6 examine other characteristics of the judges, but none of them exert a large or statistically significant effect. Model (4) includes the judge's age in years as a control variable. The estimate is statistically insignificant and predicts a weak effect of age. An additional decade of age raises the probability of voting in favor of liability by only three percentage points. Model (5) examines the nature of the judge's education. The largest estimate is minus 6% for a judge having attended an elite law school.⁹⁵ But, this estimate is half of the magnitude of that for partisan affiliation, and it is not statistically different from zero. The estimates for attendance at an Ivy League college and clerkship experience are each two percentage points or less and not statistically significant. The final model includes explanatory variables reflecting the nature of a judge's prior experience in government, if any. One of these binary variables captures whether the judge previously served on a state court. Two more variables measure whether the judge had experience in the political branches: one measuring service in the executive or legislature at the state level, and the other reflecting analogous experience at the federal level. As with the education and training variables, none of the prior government service estimates are statistically significant. Even if taken at face value, all of them imply effects of less than six percentage points. The weakness of the estimates for these dimensions of a

⁹⁴ Compare Model (1) in Table 5 with Model (1) in Table 6.

⁹⁵ The classification of law schools as elite is a judgment that varies across time and surely involves some subjectivity. We erred on the side of an under-inclusive list and coded only Yale, Harvard, Stanford, Chicago, Columbia, and Michigan as elite.

judge's experience indicate that, in contrast to race, these aspects of a judge's background have little connection to how judges decide Section 2 claims.

Panel Effects. Models (2) and (3) in Table 6 explore whether race, like partisan affiliation, influences the votes of other judges on the panel. Model (2) suggests that race generates substantial panel effects. The estimate implies that a white judge is almost twenty percentage points more likely to vote in favor of liability when she sits on a panel with an African-American judge. The magnitude of this estimate is quite large. It is nearly double the magnitude of the estimated impact of a judge's own partisan affiliation. When the panel effect of race is restricted to appellate panels in Model (3), the estimated impact is even larger. While this estimate relies on the small number of observations in which an appellate panel included an African-American judge, it implies that the panel effect of race is greater on appellate panels rather than trial panels. This pattern is consistent with the partisan panel effects which the models in Table 5 revealed were more pronounced on appellate panels. Furthermore, the inclusion of a control variable for a racial panel effect leaves virtually undisturbed the estimate for partisan effect. The estimate for a Democratic appointment is eleven percentage points, which is nearly the same as the estimates that emerged from the other regression specifications.

D. The Conventional Account Redux

Our results show that partisanship and race play a significant role in the adjudication of Section 2 cases. In Part I, however, we began with a different set of factors that are conventionally thought to play a significant role in these cases' success: (1) the type of practice challenged (at-large or reapportionment? Local or state?); (2) the location of the challenged practice (in the South? In a covered jurisdiction?); and (3) the date of the lawsuit. What do our findings mean for the significance of these characteristics? The regression results call into question the claim that all these characteristics are important determinants of liability.

Time. One piece of conventional wisdom about Voting Rights Act litigation we can confirm: the number of cases and the plaintiff success rate have declined over time. The raw data in Appendix I and the discussion in Part I support the view about the declining number of cases. Almost two thirds of the liability determinations occurred before 1994, even though 1994 is the half-way point of the period since the 1982 Amendments to the Act. Thus, the volume of Section 2 litigation resulting in a liability determination has trended downward.

Both the raw data and the regression analysis support the second part of this conventional wisdom as well – that the plaintiff success rate has also fallen since 1982. The raw data show that the rate at which courts found violations of Section 2 was lower by fifteen percentage points in the years since 1994.⁹⁶ Model

⁹⁶ See *infra* Appendix I, row (B).

(1) of Table 5 provides additional support for this conclusion.⁹⁷ The coefficient on the variable for the post-1994 period implies (with marginal statistical significance) that judges were ten percentage points less likely to vote in favor of liability after 1994.⁹⁸ Thus, even after controlling for other characteristics, the rate at which the average judge favors Section 2 plaintiffs has generally declined.⁹⁹

Location. Model (1) in Table 5 also allows us to reassess the importance of region in the likelihood a judge votes in favor of Section 2 liability. In the model, the estimate for the Southern region implies that a judge's likelihood of voting in favor of liability was higher by only two percentage points when the case occurred inside rather than outside the South.¹⁰⁰ This result contrasts with the raw data, which showed somewhat higher rates of liability in Southern cases.¹⁰¹ Model (1) indicates that after controlling for the other explanatory variables in the regression, the probability that a judge votes for liability has only a weak relationship to whether the case occurred in the South.

Perhaps more importantly, the models in Table 5 call into question the conventional claim that judges are more likely to favor liability when the challenge originates in a jurisdiction covered by the preclearance procedures of Section 5. In the first five models of Table 5, the estimated impact of Section 5 coverage is small – fewer than five percentage points – and statistically insignificant. These estimates contrast with Ellen Katz's finding that court decisions in jurisdictions covered by Section 5 were more significantly more likely to impose liability under Section 2 than decisions in other jurisdictions.¹⁰² Our analysis reveals that the role of Section 5 coverage is considerably more complex.

⁹⁷ As we noted above, Model (1) includes a variable for whether the case was decided after 1994, rather than controls for year fixed effects. *See supra* note 90.

⁹⁸ The other models do not report the estimates for the circuit and year effects in order to conserve space. But the coefficients on the year effects in these models confirmed the patterns already observed in the data. They indicated that the likelihood that a judge voted in favor of a Section 2 plaintiff was lower in each subsequent year than it was in 1982.

⁹⁹ The estimate for the post-1994 period captures the decline in the average rate at which judges vote for Section 2 plaintiff. As previously discussed, Model (3) of Table 5 established that the gap between Democrats and Republicans in the rates at which they favored Section 2 plaintiffs was relatively constant over time. Together, these results imply that while the rates at which Democrats voted for liability declined over time, the rate for Republicans trended downward at roughly the same pace.

¹⁰⁰ As we noted above, Model (1) includes a variable for whether the case was decided in the South, rather than controls for circuit fixed effects. *See supra* note 90.

¹⁰¹ The estimates for the fixed effects in the other models indicated that relative to judges in the First Circuit, all other judges were more likely to vote in favor of the plaintiff. This result is primarily due to the relatively small number of Section 2 cases in the First Circuit. Other than that difference, the circuit fixed effects did not indicate that judges in any circuit were more likely to vote in favor of the plaintiff than judges sitting in any other circuit.

¹⁰² *See Katz, Not Like the South, supra* note 23. An important difference between our analysis here and Katz's is whether the unit of analysis is a case or a judge's vote. When cases are the unit of

Specifically, we find that only *trial* judges were more likely to vote in favor of Section 2 liability in covered jurisdictions. The rates at which *appellate* judges favored Section 2 liability were unrelated to the presence of preclearance coverage. Model (6) in Table 5 shows this by including a term that interacts the variables for Section 5 coverage and appellate review. The estimates of Model (6) imply that judges at the trial stage were more likely to favor liability by nearly twenty five percentage points ($=.246$) in covered jurisdictions compared to uncovered jurisdictions. In contrast, for appellate judges, this difference is only one percentage point ($=.246 - .236$), and it is not statistically significant. Section 5 coverage thus correlates with the probability a trial judge favors liability but not with whether an appellate judge does.

These estimates also imply that in covered jurisdictions, trial judges were about twenty percentage points ($=.236-.027$) more likely to favor liability than their circuit colleagues. Outside of covered jurisdictions, the rates at which trial and appellate judges voted for liability differed by fewer than three percentage points ($=.027$), a gap that was not statistically distinguishable from zero.

These results cast doubt on the conventional view that Section 5 increases the probability that a judge votes in favor of liability. The conventional view does not account for the fact that the positive correlation between preclearance coverage and the likelihood of Section 2 liability is limited to trial-stage determinations. Appellate judges treat challenges in covered jurisdictions no differently from challenges in other jurisdictions. This finding highlights the perils of interpreting the frequency of liability votes as evidence of the underlying rate of violations. It also indicates that the relationship between the preclearance coverage and the incidence of Section 2 violations is more nuanced than the conventional account envisions.

Practice Types. Last, the summary statistics in Part I suggested that liability rates were slightly higher in challenges to local practices than state or federal practices, and higher in challenges to at-large election structures than other practices. The regressions call into question these findings as well. After controlling for other factors, the estimated impact of a challenge to the practice of a local government, rather than that of a state or federal government body, is less than two percentage points.

The estimate for whether the challenge was to an at-large election practice is somewhat sensitive to the different specifications of the time and place variables. In the Model (1) regression, the estimate for at-large challenges is .111 and is statistically significant. When the simple time and place variables are replaced

analysis, the decisions of trial judges presiding alone comprise a larger proportion of the data set, and the patterns characterizing those cases are prominent in an analysis of judicial decisions. But, when the votes of judges are the unit of analysis, the votes of judges presiding alone constitute a smaller proportion of the data set, because each case heard by a panel contributes three observations to the data set while single-judge trials contribute one observation. For example, the estimates of Model (6) in Table 5 contrast with row (D) in Appendix I.

with the more detailed set, the estimate falls from .111 to .073 and is no longer statistically significant. This weakening is due the fact that the number of at-large challenges declines steadily over this period; the fraction of such challenges in the data falls an average of roughly two percentage points per year.¹⁰³

E. Summary of Findings

This section provides a nontechnical summary of the basic findings described above in Sections II.A through II.D:

—We find that a judge’s partisan affiliation relates closely to the likelihood that she will vote in favor of liability under Section 2 of the Voting Rights Act. Democratic appointees are, on average, about 12 percentage points more likely than Republican appointees to find a violation – which makes them nearly 50% more likely to rule for the minority plaintiffs in these cases. Moreover, a judge’s partisan affiliation affects the votes of her colleagues when they review Section 2 cases on appellate panels. The partisan composition of panels has the largest impact when a judge sits on a politically homogenous panel.

—We find that a judge’s race exerts even more influence than his partisan affiliation. Black judges are, on average, more than twice as likely than white judges to find that minority citizens’ voting rights were violated under Section 2. African-American judges vote in favor of liability more than half the time, while non-African-American judges do so in only about one quarter of the time. Moreover, a judge’s race substantially affects the votes of his colleagues on a panel. Both Republican and Democratic appointees are nearly twice as likely to vote in favor of liability when they sit with an African-American judge than when they do not.

—We find that the race and partisanship of judges correlates much more strongly with liability under the Act than many of the characteristics of the cases that the voting rights literature has suggested should be important determinants of liability. These two aspects of judicial identity – partisanship and race – appear

¹⁰³ Another variable that appears sensitive to the presence of year and circuit fixed effects is the indicator for the presence of an African-American plaintiff. In the regression in Column (1), which does not include year and circuit fixed effects, the presence of an African-American plaintiff implies only a four percentage-point increase in the likelihood of a vote for liability, and the difference is not statistically significant. That estimate was consistent with the summary statistics in Tables 1 and 2, where the presence of an African-American plaintiff correlated with a modest increase with liability rates. With the addition of year and circuit fixed effects in Column (2), the estimated impact jumps to eleven percentage points. This jump is due to the high rate at which Section 2 cases involved African-American plaintiffs and to the correlation of that involvement with certain circuits and years. In several circuits, nearly every case involved an African-American plaintiff, while in one circuit, the Tenth, no case had an African-American plaintiff. Similarly, in several early years of the data, every case involved an African-American plaintiff. These patterns make the estimated effect of an African-American plaintiff sensitive to conditioning on circuit and year. Caution is warranted in interpreting this estimate because the variable correlates so closely with circuits and years.

to be considerably more important than whether a case involves a jurisdiction subject to the Section 5 preclearance provisions of the Voting Rights Act, or occurs in the South, or challenges an at-large electoral system.

III. IMPLICATIONS

Our findings about race, partisanship, and the conventional account together provide a much more comprehensive view of Voting Rights Act litigation than has previously been available. Moreover, they have potentially important implications for a variety of debates relating to the protection of minority voting rights and the role of diversity on the federal judiciary. We briefly introduce three ongoing debates for which our findings are important.

A. *The Institutional Structure of Voting Rights Enforcement*

What institutional structures are best situated to protect minority voting rights? This question was central to the development of the Voting Rights Act and is key to many debates about the Act today. In 1965, Congress designed the Act to make use of two different institutions: federal courts for across-the-board enforcement, and the Justice Department for the particularly troublesome areas of the country subject to the preclearance requirements.¹⁰⁴ Just this past summer, Congress reauthorized those preclearance provisions.¹⁰⁵ But today there is considerably more ambivalence about the appropriateness of Department of Justice oversight – driven in part by the possibility that the Department will grant or deny preclearance on the basis of politics.¹⁰⁶

Our findings complicate this debate by demonstrating that partisanship is not only an issue within the Justice Department; it also appears to play a substantial role in the way that federal courts decide voting rights cases. As a matter of institutional design, therefore, it is important not to compare a realistic (or pessimistic) view of the Justice Department with an overly optimistic view of federal courts.

That said, of course, each institution channels partisanship in a different fashion. One important difference, for example, is that the Justice Department is centralized while the judiciary is disaggregated. The disaggregated nature of the judiciary will result in partisan variation across cases. But if the courts are roughly balanced, this variation might largely cancel out across a run of cases. (That said, of course, it is far from clear that it is appropriate make such trade-offs across cases, particularly given that the lawsuits in our data generally concern entirely unconnected governmental institutions.) The centralized Justice Department review embodied in Section 5 will not result in the same partisan variation across

¹⁰⁴ See *supra* text accompanying notes 34-37.

¹⁰⁵ See *supra* note 37.

¹⁰⁶ See, e.g., Issacharoff, *supra* note 6.

disputes that arise at the same time; but it will provide a different sort of variation – variation over time as presidential administrations change. Of course, this distinction between disaggregation and centralization captures just one way in which these different institutional structures shape the role that partisanship plays in voting rights enforcement. Our point here is just to emphasize the importance of our results for this ongoing debate about institutional design.

B. *Partisan Convergence and the Politics of Voting Rights Act Litigation*

As we noted above, voting rights scholars disagree strongly about the partisan consequences of some modern voting rights litigation.¹⁰⁷ This disagreement focuses primarily on the consequences of Voting Rights Act doctrine that pushes states to create majority-minority districts within their (largely single-member) redistricting schemes. Our data put this debate in perspective by highlighting the fact that those fights over the creation of majority-minority districts likely constitute a considerably smaller percentage of litigation under the Act than the prominence of the debate might suggest.¹⁰⁸

Moreover, the debate over the changing partisan consequences of such litigation might lead us to expect that, over time, Democratic and Republican appointees would become less polarized when they decide Section 2 cases. But our regression analysis strongly suggests that this has not occurred: the partisan gap between the rates at which Democratic and Republican appointees vote for liability has not changed over time.

This suggests a few different possibilities. On the one hand, our data might be taken as evidence against those who believe that the partisan valence of the Act has changed considerably. To the extent judges are carefully attuned to the partisan consequences of Section 2 litigation and have reasonably good information about those consequences in particular cases, our results undermine the possibility that the partisan consequences have changed substantially over time. Alternatively, the data might be taken as evidence that the judges are motivated by something other than just partisanship or party loyalty. If Section 2 litigation actually *has* become less beneficial for the Democratic party, then our data raise the question of why this change has not led to changes in the relative behavior of Democratic and Republican appointees. One possibility is that the judges are actually motivated by some other commitment.¹⁰⁹ Perhaps Democratic

¹⁰⁷ See *supra* notes 55-56 and accompanying text.

¹⁰⁸ See *infra* Appendix I (showing that challenges to at-large election practices dominate Section 2 litigation); *supra* text accompanying note 41 (noting that challenges to at-large election practices continued to constitute a majority of Section 2 litigation until just a few years ago). We should note that, because our data focus on Section 2 litigation, we cannot identify the patterns of Section 5 disputes. It is possible, though unlikely, that very different patterns are present in Section 5 preclearance disputes.

¹⁰⁹ Another possibility is that the judges are unaware in individual cases that the partisan consequences of their decisions may have changed.

appointees are simply more committed to the descriptive representation of minority voters than to their party. They might conclude that voting for liability still advances that goal even if it does not advance the interests of the Democratic party.¹¹⁰ Our data cannot distinguish between these two possible implications. But they raise additional questions about the debate over the Act's partisan consequences and provide a path for further research.

C. *Judicial Diversity*

Scholars have long debated the appropriate role of diversity – both racial and ideological – in the federal judiciary.¹¹¹ Our findings contribute to that debate by unearthing the effects of such diversity on the adjudication of Voting Rights Act cases. We present perhaps the first findings in which a judge's race is closely connected to her decisions and to the decisions of her colleagues.

Whether our findings support those who argue in favor of greater racial or ideological diversity on federal courts (particularly federal appellate courts) depends in part on how we conceptualize the process of judicial decisionmaking in Section 2 cases. Here there are at least two possibilities – which we might call the legal model and the policy model.

First, we might imagine that in many Section 2 cases the law actually provides a “right” answer to the question whether vote dilution exists. In such a case, the addition of diversity would be a good thing if it makes the panel deciding the case more likely to reach that right answer. The difficulty, of course, is that there is no way to measure directly what would be the “right” answer as a matter of law. Still, it might be possible to identify improvements if one could identify the *mechanisms* through which race and partisanship make a difference. Earlier, for example, we discussed the possibility that adding diversity brings additional information to the decisionmaking process.¹¹² Identifying the existence of an information advantage might be an indirect way of measuring whether the mixed panels get closer to the right answer than ideologically or racially pure panels. Other mechanisms are of course possible. Imagine that the mixed DDR and DRR panels produced roughly the same outcomes in our data, but that the pure

¹¹⁰ When voting in the electorate is extremely racially polarized and minority voters favor the Democratic Party, enhancing the ability of minority voters to elect a representative of their choice (which usually furthers descriptive representation) will generally also benefit the electoral prospects of Democrats. When voting is less racially polarized, however, augmenting the descriptive representation of minority voters is less likely to benefit the Democratic Party.

¹¹¹ In addition to the empirical social science literature concerning racial diversity that we discussed earlier, there is a substantial non-empirical literature by legal scholars. See, e.g., Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664, 669 (1985); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Bench*, 10 MICH. J. RACE & LAW 1 (2004) (symposium issue on diversity in the judiciary).

¹¹² See *supra* Section II.B.2.

DDD and RRR panels produced really divergent outcomes. We might take this as evidence that the minority member on a mixed panel is disciplining the majority to follow the law by threatening to be a whistleblower if the majority ignores the law.¹¹³ After all, if it were all about ideology and not at all about law, then we might think that the DDR panels would produce more liberal results than the DRR panels. In short, our findings raise the possibility that diversity improves the accuracy of decisionmaking, while highlighting the need for additional work to understand the mechanisms through which diversity makes a difference.

Second, we might conclude that Section 2 doctrine seldom provides a “right” answer to the question whether vote dilution exists. This possibility, quite real in many Section 2 cases, makes clear that judges in part are making policy when they decide these cases. For example, judges often must make tough choices about whether the Voting Rights Act should focus more on electing racial minorities (descriptive representation) or instead on promoting the interests of racial minorities (substantive representation).¹¹⁴ If Section 2 litigation is in part a policymaking process, then the desirability of diversity does not turn only on the question of accuracy; it turns also on the question of who we want involved in that policymaking process. Consider debates about racial diversity in legislative assemblies or on juries. Scholars often argue for such diversity despite the fact that they do not have any direct way of measuring whether a racially mixed legislature or jury produces more “optimal” decisions. Instead, they defend diversity on a variety of process-oriented grounds. One standard ground is that it is worse to have legislative decisions made by people who all share the same perspective, and that increasing racial diversity is likely to increase the diversity of perspectives present during deliberations. If we think that courts deciding Section 2 cases are in part policymaking institutions, then some of these same representation-based arguments might apply.

IV. CONCLUSION

Race and partisanship are important in litigation under Section 2 of the Voting Rights Act. This statement is so obvious as to be banal. After all, the very purpose of the provision is to ensure that racial minorities have an equal opportunity to participate in the election process and to elect representatives of their choice. Yet the possibility that a judge’s race or partisan affiliation might affect her voting patterns in Section 2 cases has gone unstudied. The absence of inquiry is especially curious because the period since the 1982 Amendments to the Act has been marked by parallel developments in academia: a burgeoning legal

¹¹³ See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L. J.* 2155 (1998).

¹¹⁴ For a good example of a case in which judges may disagree over which goal the Act should pursue, see *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

scholarship on voting rights, and increasingly sophisticated statistical analyses of judicial decisionmaking. This Article brings these developments together for the first time. It provides the first systematic evidence that a judge's race and partisan affiliation are important determinants of liability in Section 2 cases. Race and partisanship affect a judge's own voting behavior, as well as the voting behavior of fellow judges sitting on a panel. These findings raise important questions about the enforcement of Voting Rights Act and the role of diversity in the federal judiciary. Our hope is that this Article will help advance those conversations.

APPENDIX I

Characteristics of Cases and Rate of Finding Section 2 Liability

Characteristic	Fraction of Cases with this Characteristic (1)	Fraction Finding § 2 Liability among Cases . . .		Difference of (2) – (3) (4)
		. . . with this Characteristic (2)	. . . without this Characteristic (3)	
(A) All Cases	1.000 (.0000) [342]	.298 (.025) [342]	--	--
(B) Cases Decided After 1994	.386 (.026) [342]	.205 (.035) [132]	.357 (.033) [210]	-.153** (.050)
(C) Cases Occurring in the South	.637 (.026) [342]	.335 (.032) [218]	.234 (.038) [124]	.101** (.051)
(D) Cases Occurring in Jurisdictions Covered by § 5	.275 (.024) [342]	.394 (.051) [94]	.262 (.028) [248]	.132** (.055)
(E) <u>Practices Challenged</u>	.535 (.027) [342]	.333 (.035) [183]	.259 (.035) [159]	.075 (.050)
(E1) At-Large Elections	.345 (.026) [342]	.297 (.042) [118]	.299 (.031) [224]	.002 (.052)
(E2) Reapportionment	.164 (.020) [342]	.214 (.055) [56]	.315 (.028) [286]	.100 (.067)
(E2) Other Practices	.719 (.024) [342]	.317 (.030) [246]	.250 (.044) [96]	.067 (.055)
(F) Challenge to Local Election Practice	.830 (.020) [342]	.306 (.027) [284]	.259 (.058) [58]	.048 (.066)
(G1) African-American	.301 (.025) [342]	.223 (.041) [103]	.331 (.030) [239]	-.107** (.054)
(G2) Latino	.227 (.023) [342]	.253 (.051) [78]	.325 (.029) [264]	-.072 (.061)
(G3) More than One Racial Group				

Characteristic	Fraction of Cases with this Characteristic (1)	Fraction Finding § 2 Liability among Cases . . .		Difference of (2) – (3) (4)
		. . . with this Characteristic (2)	. . without this Characteristic (3)	
(H) <u>Type of Court Hearing the Case</u>	.500 (.027) [342]	.345 (.037) [171]	.251 (.033) [171]	.094* (.049)
(H1) Single Trial Judge	.105 (.017) [342]	.306 (.078) [36]	.297 (.026) [306]	.008 (.080)
(H2) Trial Panel	.395 (.026) [342]	.237 (.037) [135]	.338 (.033) [207]	-.101** (.050)

Notes: Table provides means, standard errors in parentheses, and number of observations in brackets. * means significant at 10% level. ** means significant at 5% level.

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