JUDICIAL DECISIONMAKING AND THE TRANSFORMATION OF VOTING RIGHTS DOCTRINE

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For two decades, the Supreme Court's decision in *Thornburg v. Gingles* has been the centerpiece of vote dilution litigation in the United States. *Gingles* cut from whole cloth a new doctrinal framework for evaluating claims brought under Section 2 of the Voting Rights Act. The sequential, two-part framework combines a set of rule-like preconditions to liability with a more-standard like totality-of-the-circumstances inquiry. What can we learn from courts' treatment of this doctrinal structure about voting rights litigation in particular and judicial decisionmaking more generally? First, the unique doctrinal structure of *Gingles* provides a preliminary means of testing the relationship between rules, standards, and ideological disagreement. One might predict that ideological differences between judges would be more likely to be expressed in the application of a standard-like doctrine rather than a rule-like one. Using a data set of every Section 2 decision issued since *Gingles* was handed down by the Supreme Court, we find support for this hypothesis. Second, the changes over time in voting rights litigation suggest additional hypotheses about how courts use doctrine to respond to changes in case characteristics. Changes over time in the nature of Section 2 litigation have altered the significance of treating the *Gingles* preconditions as central proof of unlawful vote dilution. These changes suggest that, over time, judges should move away from their near-exclusive reliance on the *Gingles* factors as a measure of liability; moreover, the nature of the changes in vote dilution litigation suggest that this movement should be more pronounced for Democratic appointees than Republican appointees. We find strong evidence for both of these predictions. In fact, courts' sharp movement away from the centrality of the *Gingles* factors amounts to a largely unrecognized second transformation of voting rights litigation.

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INTRODUCTION

The history of Voting Rights Act litigation is usually told as a tale of transformation. The transformation divides voting rights litigation into two periods separated by a sharp break in 1982, the year in which Congress amended the statute. In amending it, Congress recast Section 2 of the Act as the central judicial tool for enforcing minority voting rights. The Supreme Court responded to this revision a few years later by forging a new doctrinal framework in the seminal case of *Thornburg v. Gingles*. This transformation by Congress and the Court ushered in the modern era of vote dilution litigation. Lawsuits brought under Section 2 became a centrally important mechanism for the enforcement of minority voting rights. And the framework laid down in *Gingles* became the linchpin in this litigation.

This Article argues that this standard history is incomplete. Voting rights jurisprudence actually underwent a second transformation less than a decade after the first. This second change, which took place in the early 1990s, was unlike the first because it was not embodied in any amendments to the statute or changes to the formal doctrinal structure of voting rights litigation. But it was a serious change nonetheless. During the second transformation, courts altered the way in which they evaluated claims brought under Section 2. Moreover, the *Gingles* framework that played the key role in the first transformation was significantly undermined by the second.

This second transformation has been overlooked in part because the history of voting rights litigation has often been framed around a few formal aspects of jurisprudential change: change to either the text of the Act itself or the Supreme Court's doctrinal framework for litigation. We uncover the second transformation by shifting our focus away from these formal features and toward an empirical investigation of the practices of the lower courts that decided voting rights cases. Using a data set of every decision issued in a Section 2 case since *Gingles*, we examine the doctrinal route judges choose to follow when either finding or rejecting liability under the Act. While most empirical work on adjudication attends only to case outcomes, our focus on doctrine allows us to understand more fully both judicial decisionmaking in general and voting rights litigation in particular.

Our inquiry centers around the new doctrinal framework that the *Gingles* Court created for evaluating claims brought under Section 2 of the Voting Rights Act. The sequential, two-part framework combines a set of rule-like preconditions to liability with a more standard-like totality-of-the-circumstances inquiry. This unique doctrinal structure permits us to undertake two sorts of inquiries. The first is static: the two-part structure of *Gingles* provides a preliminary means of testing the relationship among rules,

standards, and ideological disagreement. One might predict that ideological differences between judges would be more often observed in the application of a standard-like doctrine rather than a rule-like one. We find support for this hypothesis. Ideological divisions in judicial voting patterns are more pronounced in the standard-like second step of *Gingles* than in the evaluation of the more rule-like factors – precisely the opposite of what is suggested by the broad swath of scholarship concerning the *Gingles* test.

The second inquiry focuses on the doctrinal dynamics of vote dilution litigation over time. In the two decades since *Gingles* was decided, vote dilution litigation has undergone a remarkable transformation. Changes over time in the nature of Section 2 litigation have altered the significance of treating the *Gingles* preconditions as central proof of unlawful vote dilution. These movements have both undermined the close connection between the preconditions and minority representation and complicated the question of whether Democrats or Republicans are likely to benefit from the rigid application of the preconditions. These changes allow us to investigate the way in which changes in the characteristics of litigated cases influence the way in which judges apply judicial doctrines. One might predict that judges will respond to the shifting characteristics by moving away from their near-exclusive reliance on the *Gingles* factors as a determinant of liability; moreover, the nature of the changes in vote dilution litigation suggest that this movement should be more pronounced for Democratic appointees than Republican appointees. We find strong evidence for both these predictions. Over time, the *Gingles* factors that both judges and scholars claim are central to the liability inquiry become far less important. Judges – particularly Democratic appointees – have concluded less frequently that liability should follow immediately from satisfaction of the *Gingles* preconditions. Courts' sharp movement away from the centrality of the *Gingles* factors amounts to a largely unrecognized second transformation of voting rights litigation.

Uncovering this oft-overlooked transformation enriches our understanding of how the Voting Rights Act has functioned over its near half-century life span. Among other things, it provides important evidence about how federal courts respond to the changes in the political and social circumstances that give rise to voting rights voting litigation, as well as an additional way to evaluate the doctrinal tools that structure that litigation. In this vein, one might take our findings as an endorsement of federal judges' capacities for change but a critique of the Supreme Court's *Gingles* framework itself. The changes in adjudication might reflect judicial responsiveness to changes in the racial and partisan consequences of voting rights claims during this period – changes that the doctrinal framework itself did not keep pace with. And beyond the domain of voting rights litigation, the Article's findings

help further our understanding of judicial decisionmaking. They shed important light, for example, on the hierarchical relationship between a Supreme Court responsible for creating doctrine and the inferior courts responsible for implementing that doctrine.

I. CONGRESS, THE COURT, AND *THORNBURG V. GINGLES*

The Voting Rights Act was enacted in 1965 to combat America's long history of excluding African Americans from the political process. Minority voters had been constitutionally entitled to the franchise since the adoption of the Fourteenth and Fifteenth Amendments in the wake of the Civil War.[1] But these formal legal protections had been mostly dead letter since shortly after the end of Reconstruction. Throughout the South, states used a variety of legal mechanisms, often backed by intimidation and violence, to prevent African Americans from registering to vote and casting ballots.[2] Although courts (and eventually Congress) occasionally intervened, as of 1965 African Americans were still registered to vote in only trivial numbers in many Southern states.

The Voting Rights Act attacked discrimination in three ways. First, the Act specifically prohibited (in certain parts of the country) the use of some legal restrictions on the franchise -- such as literacy requirements -- that were often applied in a discriminatory fashion to prevent potential minority voters from registering. Second, Section 5 of the Act subjected the election practices of some states and local governments to ongoing federal oversight: these jurisdictions were prohibited from changing their electoral rules without first pre-clearing those changes through the Justice Department. While the formula that determined which jurisdictions were covered was facially neutral, it was carefully crafted to pick out nearly all of the deep South states for oversight.[3] Third, Section 2 of the Act created a private right of action authorizing minority voters to sue in federal court to secure their voting rights. That provision closely tracked the language of the Fifteenth Amendment, prohibiting 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."[4]

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[1] See U.S. Const. Amend. 14 (""); U.S. Const. Amend. 15 ("").

[2] See, e.g., Alexander Keyssar, The Right to Vote (2001);

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[4] *Compare* 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) *with* U.S. Const. Amend. XV ("The right of citizens

Section 2 was little used by litigants during the first decade and a half following the passage of the Voting Rights Act. This is not to say that there was no voting rights litigation during this period; quite the contrary. But perhaps because of Section 2's similarity to the language of the 15th Amendment,[5] nearly all voting rights litigation was brought directly under the Reconstruction Amendments.[6] Still, this litigation would eventually prompt the revision of Section 2 and the first transformation in voting rights litigation. Initially, the litigation concerned first-generation claims of "vote denial" – claims that particular legal rules and practices unlawfully denied minority voters access to the ballot. Plaintiffs brought such claims against poll taxes, grandfather clauses, and so forth. But plaintiffs quickly realized that bare access to the ballot was insufficient to guarantee electoral equality. Litigation turned to second-generation claims of "vote dilution" – claims that particular electoral rules or practices unlawfully diluted the votes of minority voters. Plaintiffs first brought vote dilution claims against at-large (and multimember district) voting arrangements.[7] Soon, single-member districting schemes and many other practices were also challenged as vote dilutive.[8]

Courts were initially somewhat receptive to vote dilution claims. But in *Mobile v. Bolden*,[9] which concerned the at-large system used to elect Mobile's County commission, the Supreme Court issued two holdings that brought vote dilution litigation to a near standstill. First, the Supreme Court held that the 15th Amendment prohibited only *intentional* racial discrimination in voting. Second, the Court confirmed that it considered Section 2 to be only a

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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.").

[5] See *also*

[6] *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).

[7] See Whitcomb v. Chavis; White v. Regester; [cite secondary source on dilution claims, perhaps Karlan Tex L Rev] Plaintiffs argued that such systems diluted the votes of minority voters in part by submerging their votes within a larger white majority. To remedy the dilution, plaintiffs often asked courts to break up an at-large system into several single member districts so that minority voters would have a greater chance of electing a candidate of their choice in a least one of these districts

[8] See, e.g., [single member district]; [felon disenfranchisement law]

[9] 446 U.S. 55 (1980).

restatement of the Fifteenth Amendment's protections.[10] These twin holdings meant that the plaintiffs in every voting rights case would have to prove that a voting practice was enacted or maintained for an invidious purpose in order to obtain relief under Section 2. *Bolden*'s effect was said to be devastating: "existing cases were overturned and dismissed," and a good deal of voting rights litigation ground to a halt.[11]

The Court's holding in *Bolden* sparked the first transformation of voting rights litigation. In response to widespread criticism of the case, Congress in 1982 amended Section 2 of the Voting Rights Act. The amendment, designed to overturn *Bolden*'s statutory holding, reworded Section 2 to make clear that proof of discriminatory intent is not required to make out a claim of vote dilution.[12] Moreover, the amendment was accompanied by a Senate report suggesting that courts evaluate vote dilution claims using a multifactor totality-of-the-circumstances test that had been developed by lower courts in pre-*Bolden* cases.[13]

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[10] *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.").

[11] *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).

[12] 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." 42 U.S.C. § 1971.

[13] *See* Sen. Rep. No. 97-417 (1982):

> To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question. Typical factors include: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the

The Supreme Court interpreted the amended Section 2 for the first time in 1986, in the now-seminal case of *Thornburg v. Gingles*.[14] But rather than focusing on the multi-factor test suggested in the Senate Report and embodied in earlier lower-court case law, the Court fashioned a new doctrinal framework for evaluating Section 2 claims. The *Gingles* framework focused the inquiry on the actual behavior of voters: it moved the existence of racially polarized voting and its effect on the electoral success of minority-preferred candidates to the center of the judicial inquiry.[15] Specifically, the first stage of the new doctrinal structure included three preconditions for liability: it required plaintiffs to prove (1) that the minority group is sufficiently large and geographically compact, (2) that the minority group is politically cohesive, and (3) that white voters vote as a bloc and thereby typically defeat minority-preferred candidates. By focusing the inquiry on these three factors rather than the nine Senate factors, courts and commentators commonly believe that the first stage of the *Gingles* framework is more rule-like and works to constrain judicial discretion.[16]

The Supreme Court eventually clarified that the three *Gingles* factors are necessary but not sufficient conditions for liability under Section 2.[17] Once the preconditions are satisfied, a court is still required to engage in a multi-factor

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> extent to which members of the minority group have been elected to public office in the jurisdiction.
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> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: [w]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group . . . [and] [w]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution. The cases demonstrate, and the committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

[14] 478 U.S. 30 (1986).

[15] *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

[16] *See, e.g.*, McNeil v. Springfield Park District, 851 F.2d 937 (7th Cir. 1988) ("It reins in the almost unbridled discretion that section 2 gives the courts, focusing the inquiry so plaintiffs with promising claims can develop a full record"); SAMUEL ISSACHAROFF, PAMELA KARLAN, & RICHARD PILDES, THE LAW OF DEMOCRACY 618-19 (2d ed. rev. 2002) ("Are the three *Gingles* factors more 'objective' in some sense than the Senate Report factors? If they are, is *Gingles* yet another manifestation of the [Supreme] Court's preference for bright-line tests?").

[17] *See* Johnson v. De Grandy, 512 U.S. 997 (1994).

balancing inquiry (focusing on the factors identified in the 1982 Senate report) before determining whether vote dilution exists.[18] In other words, Section 2 doctrine is formally structured as a two-stage inquiry – with the first stage more rigidly rule-like, and the second involving a softer totality of the circumstances test. In practice, however, prominent opinions by lower courts have continued to downplay the significance of the second stage.[19] The idea of the dominance of the first stage *Gingles*' factors has continued unabated.

These changes – to the statute and the doctrinal structure – had two transformative consequences. First, they made Section 2 the central tool of modern vote dilution litigation. After 1982, nearly every vote dilution challenge to an electoral practice included a claim that the practice violated Section 2 – whether the lawsuit concerned an at-large electoral arrangement, a statewide redistricting scheme, a felon disenfranchisement statute, or some other type of voting practice.

Second, these changes led both courts and commentators to forge an account of voting rights litigation in which the first stage of the *Gingles* framework had central, nearly exclusive importance. In other words, this transformation led the three doctrinal preconditions in the first step of *Gingles* to be seen as the linchpin of the liability inquiry in modern voting rights litigation. Liability was thought almost always to rise or fall with the presence or absence of the three requirements laid out by Justice Brennan in that case.

Within the judiciary, this view was articulated as early as *Gingles* itself. Writing separately in that case, Justice O'Connor argued that Brennan's three-pronged test made electoral success the touchstone of vote dilution claims while rendering all other factors nearly irrelevant.[20] Over time, this view came to be commonplace among lower courts as well. Time and time again, lower courts have reiterated that "it will be only the very unusual case in which the

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[18] *See id.*

[19] *See, e.g.*, Thompson v. Glades County Bd. of County Comm'rs, 2007 U.S. App. LEXIS 17532 (11th Cir. 2007) ("Although . . . satisfying the three *Gingles* requirements is not, by itself, sufficient to establish vote dilution . . . it would be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances."); United States v. Charleston County, 316 F. Supp. 2d 268, 277 (D. S.C. 2003) ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances.").

[20] Thornburg v. *Gingles*, cite (O'Connor, J., dissenting) (stating that the *Gingles* inquiry is a dramatic transformation that makes electoral success the lynchpin of vote dilution claims while rendering the other factors of the totality-of-the-circumstances approach nearly irrelevant).

plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances."[21]

Among scholars, the central importance of *Gingles*' doctrinal framework has come to frame many debates in the field of election law. Perhaps the quickest way to get a sense of *Gingles*' dominance is to flip through the two leading election law case books. These casebooks devote the vast majority of their coverage of Section 2 litigation to *Gingles* and the elaboration of its three-pronged test.[22] Moreover, debates about the three preconditions have garnered by far the bulk of commentary and intellectual interest in Section 2 litigation. A vast literature debates myriad questions about what exactly each of the three *Gingles* prongs requires. Can minority voters satisfy the first prong even if they are insufficiently numerous to constitute a majority of a single-member district? Can a multi-racial coalition of voters constitute a single cohesive minority group for purposes of the second prong? Can the third prong be satisfied even when a nontrivial fraction of white voters are willing to vote for a minority-preferred candidate? These technical theoretical questions dominate the scholarship concerning modern vote dilution litigation.[23]

On these accounts, modern voting rights location is defined by a dramatic transformation in the early 1980s. That sharp change in the jurisprudence turned the focus toward actual voting behavior and made the *Gingles* test the most important (and most analyzed) feature of modern litigation in the field. As we will show below, this view was not entirely correct.

II. DOCTRINE, SOCIAL CHANGE, AND JUDICIAL BEHAVIOR

The historical account laid out in Part I is important but incomplete. Congress's amendment of Section 2 was tremendously important to modern voting rights litigation. And *Thornburg v. Gingles* was an important acknowledgment by the Court that the actual behavior of groups of voters was

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[21] Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (3d Cir. 1993); accord Nipper v. Smith, 39 F.3d 1494, 1514 (11th Cir. 1994); Uno v. City of Holyoke, 72 F.3d 973, 983 (1st Cir. 1995); NAACP v. City of Niagara Falls, 65 F.3d 1002, 1020 n.21 (2d Cir. 1995); Clark v. Calhoun County, 88 F.3d 1393, 1396 (5th Cir. 1996); NAACP v. Fordice, 252 F.3d 361, 373 (5th Cir. 2001); Black Political Task Force v. Galvin, 300 F. Supp. 2d 291 (D. Mass. 2004).

[22] See SAMUEL ISSACHAROFF, PAMELA KARLAN, & RICHARD PILDES, THE LAW OF DEMOCRACY (2d ed. rev. 2002); RICHARD HASEN & DANIEL LOWENSTEIN, ELECTION LAW (3d ed. 2006).

[23] *See*, e.g., [cites].

critical to any understanding of the concept of vote dilution. But this common story misses two important features of Voting Rights Act litigation. First, it underplays the significance of the role of the totality of the circumstances test – both as an important aspect of the liability determination and the central source of partisan disagreement among judges. Second, this account overlooks a second transformation in voting rights jurisprudence – a transformation occurred in the early 1990s rather than the early 1980s, and a transformation that gives us new insights into the way in which judges have responded to changes over time in the consequences of vote dilution litigation for both minority voters and the major political parties in America.

This Part uncovers these poorly understood features of voting rights litigation by using a dataset that includes a rich set of information about every Section 2 case decided since the Supreme Court handed down its decision in *Thornburg v. Gingles*. To track the evolution of voting rights jurisprudence, we focus only on decisions in which courts addressed the issue of Section 2 liability, rather than some preliminary or ancillary issue (such as whether attorneys fees should be awarded or a settlement approved). During the period covered by our dataset, courts issued 296 opinions concerning Section 2 liability. For each decision, our data set includes three broad categories of information:[24]

1. *Case characteristics*: this includes information about what type of voting practice the plaintiffs challenged,[25] about where the challenged practice was located,[26] and about when the challenge was litigated.

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[24] Detailed information on all of these opinions was collected by Ellen Katz and the staff of the Voting Rights Initiative at the University of Michigan Law school. We supplemented that data with information about every judge who adjudicated a Section 2 case – information about both the judge's treatment of the case and about the judge's demographic characteristics.

[25] The dataset groups the practices challenged into the following categories: at-large electoral systems, redistricting plans, election administration, and other practices. A single decision can encompass challenges to multiple types of practices. Challenges to at-large systems and redistricting plans make up the overwhelming majority of the cases.

[26] The dataset includes two geographic variables. The first indicates whether the challenged practice was located in the south. The second indicates whether the challenged practice was located in a jurisdiction subject to special oversight under Section 5 of the Voting Rights Act. (These jurisdictions are typically called "covered" jurisdictions.) The data include these variables because, as we have discussed elsewhere, it is commonly thought that voting rights litigation is systematically different in the south and in covered jurisdictions. See Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act.

2. *Judicial demographics*: this includes detailed information about the judges deciding the case – their political affiliation (as measured by the party of the appointing president), their race, their age, and so forth.

3. *Doctrinal data*: this includes information about whether each judge voted for or against Section 2 liability, as well as information about whether and how the judge applied the *Gingles* framework.

This dataset for the first time makes it possible to evaluate the way in which lower federal courts have evaluated liability under Section 2, as well as permitting us to trace changes in the courts' doctrinal treatment of Section 2 cases over time. Moreover, this assessment is made much richer by the fact that we have judge-level, rather than just case-level, information about the treatment of Section 2 claims. Thus, when a claim is resolved by an appellate court or trial panel of three judges, we have three data points rather than just one. This expands our dataset from 296 judicial decisions to 588 judge votes.

A. *The Static Account: Rules, Standards, and Ideological Disagreement*

In our earlier work, we found persistent ideological differences in the rates at which judges assigned liability under Section 2.[27] How are these ideological disagreements channeled by (or reflected in) the doctrinal structure of vote dilution litigation? *Gingles* framed judicial inquiry around a two-part sequential test. Do the partisan differences we identified in liability determinations replicate themselves in the doctrinal approach taken by judges? To begin investigating this question, Table 1 reports the average rates at which Democratic and Republican appointees vote to find either liability or particular steps of the *Gingles* framework met.

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[27] Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008).

TABLE 1. RATES OF VOTING IN SECTION 2 DECISIONS, BY PARTY OF APPOINTING PRESIDENT

	Party of Judge		Difference of
	Democrat	Republican	(1) – (2):
	(1)	(2)	(3)
(A) Votes for Section 2 Liability	.333 (.030) [240]	.213 (.022) [348]	**.121**** **(.037)**
(B) Votes to Apply *Gingles* Factors	.754 (.028) [240]	.767 (.023) [348]	**-.013** **(.036)**
(C) Votes to Find *Gingles* Factors Satisfied, Conditional on Discussing Them	.442 (.037) [181]	.345 (.029) [267]	**.097**** **(.047)**
(D) Votes for Section 2 Liability, Conditional on Finding *Gingles* Factors Satisfied	.775 (.047) [80]	.598 (.051) [92]	**.177**** **(.070)**

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

Row (A) of the table displays the rates at which judges of each party voted to find liability under Section 2, and it confirms that the partisan differences we observed previously are also evident in the shorter, 1986-2004 period following the *Gingles* decision. The row shows that Democratic appointees voted to assign liability about 12 percentage points more often than Republican appointees. This difference is almost identical to the 13 percentage point difference we observed in the longer time period of our earlier study.

The remaining rows examine to the judicial treatment of the *Gingles* test. Row (B) shows the rates at which these judges voted to apply the *Gingles* framework. They did so at high rates – about 75%. This pattern is consistent with the conventional wisdom that the *Gingles* test is the centerpiece of litigation under Section 2. In addition, these aggregate figures reveal no sharp ideological differences in the rate at which the judges voted to apply the *Gingles* test. Fewer than two percentage points separate the rates at which Democratic and Republican appointees voted to apply the test, and this difference is not statistically significant.

In contrast, some ideological divisions are evident in the summary statistics for the judges' decisions whether the *Gingles* preconditions are satisfied. Row (C) reports the rates at which judges voted to conclude that the plaintiff's challenge satisfied the *Gingles* factors in cases whey they agreed to

apply the framework. It shows that in cases in which they voted to apply the *Gingles* factors, Democratic appointees were more likely to conclude that the factors were met. The difference, slightly less than ten percentage points, is just above standard significance levels. This difference provides some support for the characterization of Section 2 litigation in the academic commentary: that conclusions on the satisfaction of the *Gingles* factors track conclusions about liability.

But even when judges agree that the *Gingles* factors are met, a court must assess the totality of the circumstances to determine whether an ultimate determination of liability is warranted. Row (D) reports the average rates at which judges concluded that liability was warranted after finding the factors satisfied. An important caveat in considering these figures is that the number of observations is modest because these are cases are the subset in which judges have determined both that the *Gingles* factors apply and its factors are met. Despite this, two strong patterns emerge. First, Democratic and Republican appointees differed widely in the rate at which they concluded (after deciding that the *Gingles* factors were met) that the totality of the circumstances warranted liability. Democratic appointees favored liability in this setting 78% of the time, while Republican appointees favored it only 60%. The 18 percentage point difference in these conditional probabilities is somewhat larger in magnitude than the 12 percentage point difference in overall liability rates seen in Row (A), and it is nearly double the 10 percentage point difference in conditional probability that the factors were met shown in Row (C). If taken at face value, these comparisons suggest that question whether the totality of the circumstances warrant liability is perhaps even more polarizing than the question whether the *Gingles* preconditions are satisfied.

The second pattern evident in Row (D) is that, aside from the ideological difference, the conditional probability that the judges concluded that liability is warranted is high. The likelihood of assigning liability conditional on the factors being met is over 50%. For each set of appointees, it is more than 25 percentage points higher than the corresponding (conditional) probability that they concluded the factors are met. In other words, conditional on having satisfied the first step of the *Gingles* framework, judges were more likely to render a pro-plaintiff decision at the second step of the analysis than they are at the first stage. These findings are consistent with the conventional wisdom that satisfaction of the *Gingles* factors correlates strongly with liability. But they show that the inquiry totality of the circumstances is an area of equally, if not more, intense ideological division.

These findings are consistent with the idea that the relatively rule-like *Gingles* preconditions constrain judges' decisions more than the looser totality-of-the-circumstances test. If the three preconditions were more constraining,

one would expect to see greater ideological disagreement in the application of the totality-of-the-circumstances test than in the application of the *Gingles* preconditions. The summary statistics suggest just such a result, and the regression analysis below suggests that the effect is fairly pronounced. To be sure, we must be somewhat cautious about this interpretation. Because the doctrinal test is sequential, the selection of cases to which judges apply the three preconditions is somewhat different than the selection of cases to which the judges apply the totality of the circumstances test. Still, this concern is mitigated somewhat by the fact that many lower courts issue alternative holdings: in other words, they address the totality of the circumstances test even if they find that the plaintiffs have not satisfied the *Gingles* preconditions.

B. *Safe Minority Districts and Section 2's Second Transformation*

The static account of the role of the *Gingles* preconditions is only half of the story. The data also shed new light on the changing dynamics of Voting Rights Act litigation over the past two decades. Our earlier work demonstrated that the liability rate in Section 2 cases has declined dramatically over the last two decades. The question of what accounts for that decline is important for both voting rights scholars and students of judicial behavior. Looking only at litigation outcomes, we were previously unable to explain this pattern. But capitalizing on the richer doctrinal data allows us to make more progress towards understanding these changes.

1. The Changing Composition of Vote Dilution Litigation

There is widespread agreement that there have been substantial changes in the nature of vote dilution litigation over the past two decades. In the years initially following Section 2's amendment, vote dilution litigation most often targeted at-large and multimember voting arrangements in areas where voting was extremely racially polarized and where minority voters had almost no success electing their preferred candidates. *Thornburg v. Gingles* itself, for example, involved just such a situation. In multi-member and so-called at-large district arrangements, several officials are elected from a single geographic district. Voters are permitted to cast one ballot for each official to be selected. As the Court concluded in *Gingles*, this electoral arrangement can submerge the voting power of the minority electorate, as compared to the alternative of using several single-member districts to elect the officials. The *Gingles* preconditions are designed to capture the possibility of such submergence. Oversimplifying a bit, the test identifies the circumstances under which minority voters *could* control the outcome of an election in a single-member district, but where, in the presence of racially polarized voting, they will be unable to elect a candidate of their choice and an at-large

arrangement.[28] In these situations, intervention seemed relatively uncontroversial: intervening meant substituting *some* minority success for *none*, and the difficult questions concerning how to draw the single-member districts could be left largely to the remedial stages of the litigation.

Over time, however, two features of Section 2 lawsuits changed. First, plaintiffs began to challenge more single-member redistricting practices in areas where minority voters had already achieved some level of success. These challenges focused on the question of how many majority-minority districts to draw, and on where to draw them, rather than on whether to disaggregate a multimember district within which minority voters had never succeeded in electing a minority-preferred candidate. Second, the political demographics underlying Section 2 lawsuits began to change. Throughout the 1990s, levels of racially polarized voting declined in some parts of the South. This meant that growing numbers of white voters became willing, in some places, to vote for minority-preferred candidates.

These twin changes altered the significance of the *Gingles* preconditions and the consequences of treating those preconditions as central proof of unlawful vote dilution. Rick Pildes, Sam Issacharoff, and others have discussed these changes in considerable detail, but for present purposes we note briefly three consequences of these changes in case composition.

First, treating the *Gingles* preconditions as strong indicators of liability created the possibility in these later cases that Section 2 would require the creation of majority-minority districts in excess of what would be required even by a system of proportional representation. The preconditions suggest that a minority-controlled district may be required where ever a sufficiently large and compact group of minority voters exists – implicitly incorporating an idea of representational maximization into the doctrinal test.[29]

Second, it became less clear in these later cases that the representational interests of minority voters would be advanced by treating the *Gingles*

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[28] To better see this possibility, imagine a stylized example in which three officials are elected from a multi-member district containing 700 white voters in 200 black voters. As noted above, each voter is permitted to vote for each official to be elected; in other words if all voters participate, there are 900 votes cast for each available seat – 700 by white voters and 200 by black voters. If voting is perfectly racially polarized, it is easy to see that white voters will control the election of all three officials. But this result could change were the multi-member district divided into three single-member districts containing 300 voters each. If all of the black voters were placed in one such district, they would constitute a majority of that district and could elect a candidate of their choice.

[29] For evidence of the Court's concern about this possibility, see, e.g., Johnson v. DeGrandy.

preconditions as nearly synonomous with vote dilution. The *Gingles* framework is geared towards increasing the descriptive representation of minority voters: as we explained above, the test generally specifies the conditions under which it will be possible to draw an electoral district in which minority voters can elect a candidate of their choice, which in practice typically has meant a minority legislator. When the *Gingles* test was introduced, it was generally assumed that using Section 2 to increase the descriptive representation of minority voters would also increase their substantive representation – that is, that electing more minority legislators would increase the likelihood that the *interests* of minority voters would be reflected in the legislative process.[30] Over time, however, this assumption became more contested. As litigation shifted toward single-member districting plans, and as voting patterns became less racially polarized, some scholars began to conclude that using Section 2 to increase minority descriptive representation might in certain cases – particularly in cases where Section 2 was used to force the drawing of majority-minority districts – impair minority substantive representation by packing excessive numbers of minority voters into a few districts.[31]

Third, the partisan valence of the *Gingles* preconditions changed over time. In the multimember context of *Thornburg v. Gingles*, it was generally thought that increasing the descriptive representation of minority voters would, if anything, benefit the Democratic party. African American voters identified overwhelmingly with the Democratic party, and the combination of multimember districting with high levels of racial polarization left them with little influence over elections. But the turn toward single-member district litigation and declines in racially polarized voting changed this calculus. Once minority voters could control or influence elections with the cross-over support of some white Democrats, the preconditions pressure to create majority-minority districts threatened to pack minority voters into excessively safe Democratic districts. Such packing could waste Democratic votes and ultimately benefit the Republican party.[32] Some commentators began to argue in the late 1990s that safe districting practices were doing just this.[33]

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[30] In Hannah Pitkin's classic formulation, descriptive representation is concerned with representing the *identity* of a voter while substantive representation is concerned with representing the *interests* of a voter. See Hannah Pitkin, The Concept of Representation (1967).

[31] *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).

[32] The potential trade-off between descriptive and substantive representation, as well as the potential political consequences, were made particularly salient by a few events in the early

2. A Judicial Response to the Changed Conditions?

These changes in Section 2 litigation suggest two ways in which we might expect the doctrinal patterns of vote dilution litigation to change over time. One hypothesis flows from the first and second effects described above. If the *Gingles* preconditions proved over time to be excessively aggressive in some cases, and representationally counterproductive in others,[34] judges would likely rely less on the *Gingles* preconditions as a measure of liability. Were this true, judges who found the *Gingles* factors satisfied would become more likely to vote against liability.

A second hypothesis flows from the third consequence. If the *Gingles* preconditions became more likely to favor the Republican party over time (or at least came to have more contested partisan consequences), we might expect Democratic appointees to become less enthusiastic about treating the preconditions as strong evidence of liability.[35] Were this true, Democratic appointees would abandon the preconditions at a higher rate than Republican appointees – that is, the likelihood of voting for liability when the *Gingles* factors were satisfied would decline for Democratic appointees relative to Republican appointees.

1990s. Perhaps the most prominent was the 1994 landslide national election victories for the Republican party. Before the 1994 election, discussions of the representational trade-offs and partisan consequences of drawing majority-minority districts were mostly theoretical. But after that election there was considerable coverage in the popular press of the potential connections between Voting Rights Act enforcement and the Republican victory. And within a few years, a large political science literature emerged that was dedicated to measuring these representational and partisan effects.

[33] *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).

[34] This does assume that judges are interested, at least in part, in substantive representation. To the extent that a judge believes that Section 2's vote dilution inquiry should concern *only* descriptive representation, she will obviously be unconcerned if the doctrine threatens to undermine the substantive representation of minority voters. There is little evidence, however, that federal judges are focused solely on descriptive representation in these cases, and considerable evidence to the contrary.

[35] We might also expect Democratic and Republican appointees to respond differently if Democratic appointees were more concerned than Republican appointees about promoting substantive (rather than descriptive) minority representation.

Overall Trends. — For an initial assessment of these predictions, we first examine raw time trends in the liability rates and the rates of *Gingles* application. Figure 1 shows the volume of Section 2 decisions in the two decades following the Court's decision in *Gingles* on the left scale, as well the success rate of that litigation over time on the right scale. (Unlike the tables which examine the data at the level of judge-votes, Figure 1 analyzes the data at the level of case outcomes.) The number of Section 2 decisions rises in the early part of each decade, which is consistent with a flurry of redistricting litigation following the decennial censuses. As we have previously reported, the rate of plaintiff success is marked by a sharp downward trend during the late 1980's and early 1990's.[36] In the decade between 1986 and 1995, the rate of plaintiff success declines by more than 20 percentage points. Since the mid-1990's, the liability rate has exhibited more stable, but it remained at level far below its previous highs. Except for a brief uptick during 1998-2000, the rate of plaintiff success is flat or slightly declining since 1997.

Have liability rates declined while the doctrinal approach by courts has remained constant? The remaining trend lines in Figure 1 provide partial answers to the first of these questions. The rate at which courts have applied the *Gingles* framework has remained high and relatively stable. The figure shows that federal courts immediately accepted the framework the Supreme Court articulated in *Gingles* and have readily applied it in the vast majority of cases brought under Section 2. Except for a slight decline after 2000, the rate at which courts applied the framework hovered between 70% and 80%.

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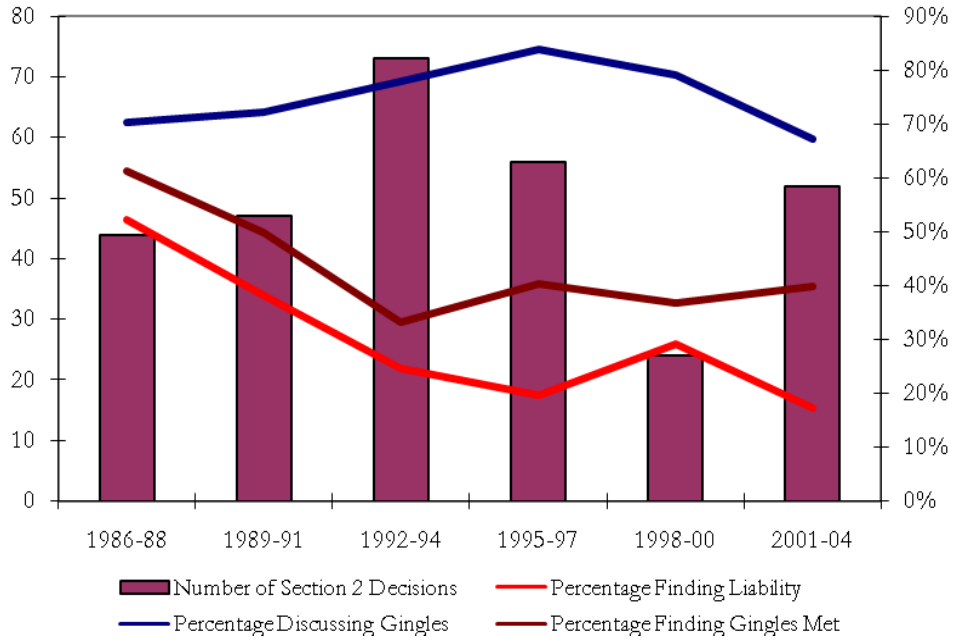
[36] Cox and Miles.

Figure 1. Litigation Time Trends



In contrast, the rate at which courts found the *Gingles* factors satisfied fluctuated widely during the observation period. The movements can be separated in two periods: first, a period of sharp decline, and then, a period of stability. The steady decline in the late 1980's and early 1990's resulted in a roughly 25 percentage point reduction in the likelihood that the average court found the factors satisfied. But these declines mirrored the fall in liability with the result that when judges found the *Gingles* conditions met, they voted in favor of liability at least two-thirds of the time. Thus, the factors were central to courts' assessments of Section 2 challenges in the first years after the decision.

Since the mid-1990's, the rate at which courts have found the factors satisfied has remained relatively steady but low. In addition, even when courts have found that a challenge satisfied the factors, they less often reached a conclusion that the election practice violated Section 2. In effect, the *Gingles* factors become somewhat unmoored from liability determinations during this period. Unlike the earlier years, during which liability almost always followed from satisfaction of the factors, the later period witnessed a greater frequency of courts concluding that the factors were met but that the election practices did not violate Section 2.

To put it differently, the gap between the lines for liability and for satisfaction of the *Gingles* factors reflects the rate at which courts determined that the totality of the circumstances did not warrant liability. The gap between these two lines was virtually constant in the first half of the observation period, and after 1994, it widened. Although there is some narrowing between 1998 and 2000, these years had the fewest number of decisions. Generally, the likelihood that a court concluded that liability was warranted after it held that the factors were met was lower in the years after 1994.

These patterns are consistent with the first prediction of the impact of the changing nature of Section 2 litigation. Early on, the decline in the liability rate under Section 2 resulted primarily from a decline in the rate at which courts found the *Gingles* preconditions met. More recent Section 2 challenges were unlike earlier cases involving multimember districts because they emphasized changing the number of majority-minority districts and often involved areas of the South where racial polarization had declined. These changes in the nature of Section 2 claims made liability less likely for two reasons. First, the more recent challenges were less likely to satisfy the *Gingles* preconditions, and without satisfaction of the first stage of the doctrinal framework, these claims could not advance to liability. Second, even when court concluded that the *Gingles* factors were met, the different context of these cases, including their changing partisan valence, made it less likely that court would conclude that the totality of the circumstances warranted liability. The widening gap between the rates at which the factors were met and liability suggest a greater hesitancy to let liability follow immediately from the meeting of the factors. The raw overall trends therefore provide some support for the first prediction about the effect of evolving nature of Section 2 challenges.

Partisan Trends. — For an initial assessment of the second prediction – that Democratic appointees may be less likely to conclude that liability should follow immediately from satisfaction of the *Gingles* factors – we turn from the case-level analysis in Figure 1 back to a judge-vote level analysis. Figure 2 displays the rates at which Democratic and Republican appointees voted for liability and voted to conclude that the factors were satisfied.

Looking first at the voting patterns for Republican appointees (which are shown in the green lines), both the rate at which they find the factors met and the rate at which they vote for liability decline modestly over time. In addition, the rates at which they vote for liability consistently lies 10 to 20 percentage points below the rate at which they find the factors met. This gap indicates that Republican appointees conclude that the totality of circumstances do not warrant liability in a significant fraction of cases, and that their willingness to deny liability in face of satisfaction of the *Gingles* factors persists throughout

the observation period. That is, Republican appointees consistently voted against liability in a fair fraction of cases in which they concluded that the factors were met. The fact that this relationship between the factors and liability remained fairly constant over time suggests that for Republican appointees, the significance of the *Gingles* preconditions did not change nearly as much. The likelihood that a Republican appointee voted in favor of liability after finding the preconditions met fell only by about 10 percentage points between the earlier and later period.

Figure 2. Findings of Liability and Gingles Factors Met Over Time

The rates for Democratic appointees (shown in the red lines) are nearly everywhere higher than those of Republicans. Except for a brief blip in the early 1990's, the liability rates for Democratic appointees lie everywhere above those of Republican appointees, and the rate at which Democratic appointees concluded the factors are met is always above that of Republican appointees. These patterns are consistent with the overall means shown in Table 1. Thus, Democratic appointees were more likely than their Republican counterparts to

find the *Gingles* factors met, and conditional on having found the factors met, they were much more likely to conclude that the challenged electoral practice violated Section 2.

Over time, both rates for Democratic appointees exhibit wider fluctuations than do those of Republican appointees. Particularly in the years prior to 1994, the rates for Democratic appointees slope downward more steeply. Despite these fluctuations, the rates at which Democratic appointees found the factors met and the rate at which they assigned liability were much closer to each other than they were for Republican appointees. In the 1989-94 period particularly, these lines indicate that when the average Democratic appointee determined the *Gingles* factors were met, she was almost certain to vote in favor of liability. For example, after concluding that a challenge satisfied the preconditions, Democratic judges favored liability about 92% of the time in the years prior to 1994. The corresponding rate for Republican appointees was also high at 67%, and the difference between them of early 25 percentage points is statistically significant.

Importantly, however, this basic partisan division in the evaluation of the totality of the circumstances in the years immediately following *Gingles* did not hold up over time. Although their rates show some fluctuations in the post-1994 period, Democratic appointees became less likely to find that liability followed from the factors. In fact, during the years after 1994, Democratic appointees look nearly like Republican appointees in their evaluation of whether the totality of the circumstances warrant liability. After 1994, the average Democratic appointee who found the preconditions met voted for liability 58% of the time, while Republican appointees did so 55% of the time – a nearly identical treatment that stands in sharp contrast to the gap of almost 25 percentage points separating these groups of judges prior to 1994. An implication of Figure 2 is therefore that the change in the relative importance of the *Gingles* factors appears to be partly the product of changes in the behavior of Democratic appointees.

Preliminary Conclusions. — In short, these data point to a second transformation of voting rights litigation. As the data show, the 1982 amendments and the Supreme Court's subsequent interpretation of them did initially make *Gingles*'s three-part test the central doctrinal tool around which Section 2 litigation was organized. But within a decade a second transformation dramatically undermined the significance of *Gingles*. Two doctrinal shifts propelled this transformation. First, judges moved dramatically away from their near-exclusive reliance on the *Gingles* preconditions as a measure of liability. In the early years following *Gingles*, courts that found the preconditions satisfied overwhelmingly concluded that liability existed. More recently, however, the connection between the preconditions and liability has

grown much more tenuous. While courts continued to insist that finding the *Gingles* preconditions satisfied would almost inevitably lead to liability,[37] the actual practice of courts belied this rhetoric. Second, the behavior of Democratic and Republican appointees has converged over time. In fact, the declining significance of the *Gingles* preconditions appears to be largely the product of changes in the voting patterns of Democratic appointees. These judges have come, over time, to look much more like Republican appointees in their skepticism of the significance of the *Gingles* preconditions.

This finding is quite significant for our understanding of the role that federal courts play in promoting minority voting rights. Other voting rights scholars, perhaps most notably Rick Pildes, have suggested that federal courts adapt quickly to changing social conditions in voting rights litigation.[38] Our findings provide some empirical support for his argument. But our data suggest a different sort of response than that predicted by most voting rights literature. The literature focuses principally on the implications of social change for the substantive content of the *Gingles* test itself.[39] This focus is understandable, particularly in light of the fact that courts continue to claim that the test itself is so centrally important. But stepping back from judicial rhetoric and focusing instead on judicial practice reveals a very different pattern. Courts have responded to changing litigation and political realities not just by tweaking the *Gingles* test, but by moving substantially away from that famous test as an important determinant of liability under the Voting Rights Act.

III. CONFIRMING THE HYPOTHESES

To be sure that the patterns we observe in the raw data are robust – that is, they are not actually the product of some other characteristics of Section 2 litigation – we turn in this section to regression analysis.[40] In so doing, we

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[37] See supra note __ and accompanying text.

[38] See Richard H. Pildes, Is Voting Rights Law At War With Itself (2002).

[39] See id. at __.

[40] We estimated the probability that judge j in case i in circuit c and year t votes in favor of a plaintiff with probit regressions in the form $Pr(Vote_{ijct}) = Dem_i + Z_{jt} + X_{ijct} + \alpha_c + \alpha_t + \varepsilon_{ijct}$. The dependent variable $Pr(Vote_{ijct})$ represents the probability that judge i in case j in year t and circuit c votes for the plaintiff. The dependent variable in some specifications is the likelihood of voting in favor of Section2 liability, and in others, it is the likelihood of voting in favor of satisfaction of the *Gingles* factors. In these equations, 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

acknowledge that untangling the precise causes of this transformation in voting rights litigation is no easy task. In part, this is because the jurisprudential features on which we have focused are not exogenous attributes of the cases. The doctrinal structure and analyses arises endogenously from each judge's resolution of a particular case. In other words, we have no objective measure of whether the *Gingles* preconditions were met in any particular case; we have only a judge's conclusion that they were or were not satisfied. We are also alert to the difficulty of distinguishing empirically two possible reasons for the declining significance of the *Gingles* framework and the convergence of Democratic and Republican appointees: first, that the composition of litigated cases changed in some important way over time; second, that litigated cases remained unchanged but that judge's views about minority vote dilution litigation changed nonetheless.[41] Still, the patterns in the data are consistent with an account about some substantial changes in the nature of vote dilution litigation that took place over the past two decades.

Table 2 presents the first set of regressions results.[42] The dependent variable in these equations is the probability that a judge votes in favor of assigning liability under Section 2. These equations confirm that the findings we previously obtained regarding the relationship between the liability and judicial characteristics in the entire period since the 1982 Amendments persist in the post-*Gingles* period.[43] The results in the subsequent tables present analyses of the doctrinal factors.

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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.

[41] The views of judges could have changed because of ideological drift or because of generational replacement on the courts. A third possibility is that judges views changed because they acquired new information over time about the consequences of vote dilution litigation. But we believe that it is more appropriate to characterize changes in information as changes in case composition. Analytically, this more cleanly separates "internal" accounts of the change in judicial behavior from "external" accounts.

[42] To make it easier to interpret our results, the regression results in Table 2 show the marginal effects for each explanatory variable instead of the regression coefficients. This simply means that the numbers listed in Table 2 reflect percentage changes in the likelihood of a judge finding liability. To see this, consider for example the first row of Table 2. 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 .109, which means that a judge was more likely to vote in favor of liability by 10.9 percentage points on average if she is a Democrat rather than a Republican.

[43] *See* Cox and Miles. Briefly, the estimates in the shorter time period are quite similar to the earlier results, and our central conclusions are unchanged.

Table 3 reports equations in which the dependent variable is the probability a judge decides the *Gingles* factors are satisfied, and in these regressions the data are limited to those observations in which judges voted to apply the *Gingles* framework. These equations estimate the first step of the *Gingles* analysis: the probability a judge concludes the *Gingles* factors are met, conditional on the judge having favored applying the framework.

Table 4 presents similar equations for second stage of the *Gingles* framework, the totality of the circumstances. In these equations, the dependent variable is the probability a judge votes to assign liability under Section 2, and here, the data are limited to those observations in which judges decided that the case satisfied the *Gingles* factors. These equations estimate the probability a judge favors liability, conditional on the judge having concluded that the challenge met the *Gingles* factors.

To ease the exposition of the results, we organize the discussion around the parameters of interest rather than the equations.

TABLE 2. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING FOR SECTION 2 LIABILITY: PROBIT REGRESSION ANALYSIS

Variable	(1)	(2)	(3)	(4)
Judge Was Democratic Appointee	.109**	.105**	.114**	.129**
	(.036)	(.038)	(.047)	(.049)
Judge Was Democratic Appointee * Year Was After 1994	--	--	-.048	-.048
			(.055)	(.052)
One Additional Democratic Appointee on Panel	--	.057	--	.055
		(.041)		(.041)
Two Additional Democratic Appointees on Panel	--	.114	--	.113
		(.088)		(.088)
Judge was African-American	.269**	.335**	.269**	.333**
	(.084)	(.094)	(.085)	(.094)
Additional African-American on Panel	--	.282**	--	.284**
		(.105)		(.105)
Appellate Case	-.112**	-.177**	-.115**	-.179**
	(.045)	(.056)	(.046)	(.056)
Challenge to At Large Election	.062	.071	.061	.070
	(.055)	(.057)	(.055)	(.057)
Challenge to Reapportionment Plan	.033	.009	.033	.009
	(.061)	(.061)	(.062)	(.061)
Challenge to Local Election Practice	.006	.036	.008	.037
	(.051)	(.050)	(.051)	(.050)
Plaintiffs Were African-American	.051	.052	.052	.052
	(.056)	(.055)	(.056)	(.055)
Case Occurred in Jurisdiction Covered by § 5	.055	.036	.054	.035
	(.060)	(.061)	(.060)	(.061)
Log-likelihood	-285.840	-274.841	-285.548	-274.551
Pseudo- R^2	.1546	.1872	.1555	.1880

Notes: Estimated marginal effects and in parentheses standard errors. * means significant at 10% level. ** means significant at 5% level. N=588. All regressions also include fixed-effect controls for judicial circuits and years.

A. *Judicial Ideology*

The results of Table 2 show that consistent with our earlier analysis, judicial ideology exerts a sizable and robust effect on the likelihood a judge votes to assign liability in Section 2 challenges. The magnitude of the impact in columns (1) and (2), about 10 percentage points, is similar to our previous findings, and it is very close to the difference observed in summary statistics of Table 1.

Columns (3) and (4) include interactions of the ideology and time period in an effort to measure whether the differential trends in the liability rates of Democratic appointees are robust to controlling for other determinants of liability. The estimates in column (3), for example, imply that the average rate at which a Democratic appointee in the years prior to 1994 voted in favor of Section 2 liability was 11.4 percentage points higher than that of the average Republican appointee. In the years after 1994, this difference shrinks to 6.6 percentage points (= .114 - .048). Although the point estimates imply that even after 1994, Democratic appointees are more likely to vote in favor of liability, the imprecision of the estimates implies that this 6.6 percentage point difference is not distinguishable from zero at conventional significance levels (p-value = .1891).

The equations in columns (2) and (4) in Table 2 include control variables for the partisan composition of the panel, for those judges who sit in panels, an effort to control for "indirect effects" or "panel effects" of partisanship. Numerous researchers have found evidence that the ideology of other judges on a panel can influence a judge's decisionmaking. This research typically shows that Republican or conservative judges are more likely to cast liberal votes when they sit on panels with Democratic or liberal judges, and conversely, it indicates that Democratic or liberal judges are more likely to cast conservative votes when they sit with Republican or conservative judges.[44] The estimates columns (2) and (4) provide weak support for the presence of panel effects in liability determinations. The point estimates for the individual panel effects are not statistically significant, but they imply that as Democratic appointees comprise a greater share of the panel, the likelihood a judge votes in favor of the plaintiff rises. For example, the results in column (2) indicate that the probability that a Republican appointee votes in favor of liability rises by 4.8 percentage points when she sits with one Democratic appointee and by 11.4 percentage points when she sits with two.

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[44] *See, e.g.*, Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717 (1997);; 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].; 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); Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. ___ (forthcoming 20008); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, 73 U. Chi. L. Rev. 823 (2006).

TABLE 3. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING TO FIND *GINGLES* FACTORS MET, CONDITIONAL ON APPLYING THEM: PROBIT REGRESSION ANALYSIS

Variable	(1)	(2)	(3)	(4)
Judge Was Democratic Appointee	.076 (.054)	.079 (.061)	.093 (.078)	.103 (.082)
Judge Was Democratic Appointee * Year Was After 1994	--	--	-.033 (.101)	-.037 (.103)
One Additional Democratic Appointee on Panel	--	-.038 (.071)	--	-.031 (.074)
Two Additional Democratic Appointees on Panel	--	-.114 (.117)	--	-.100 (.123)
Judge was African-American	.214** (.090)	.259** (.108)	.213** (.090)	.329** (.110)
Additional African-American on Panel	--	.253** (.0128)	--	.312** (.128)
Appellate Case	-.023 (.076)	-.024 (.090)	-.024 (.076)	-.026 (.092)
Challenge to At Large Election	.112 (.126)	.112 (.127)	.111 (.126)	.127 (.126)
Challenge to Reapportionment Plan	.150 (.136)	.130 (.136)	.149 (.136)	.132 (.135)
Challenge to Local Election Practice	-.020 (.093)	-.025 (.103)	-.019 (.093)	-.019 (.104)
Plaintiffs Were African-American	.216** (.088)	.210** (.089)	.217** (.088)	.263** (.088)
Case Occurred in Jurisdiction Covered by § 5	.016 (.104)	-.005 (.103)	.013 (.104)	-.006 (.105)
Log-likelihood	-249.294	-245.529	-249.245	-240.582
Pseudo- R^2	.1644	.1770	.1242	.1883

Notes: Estimated marginal effects and in parentheses standard errors. * means significant at 10% level. ** means significant at 5% level. N=448. All regressions also include fixed-effect controls for judicial circuits and years.

The regressions in Table 3 show that judicial ideology has a weaker relationship to the likelihood that a judge finds the *Gingles* factors satisfied, in those cases in which the framework is applied. In the first two equations, a Democratic appointee is more likely to vote in favor of finding the *Gingles* factors met than a Republican appointee by about eight percentage points. In addition to their smaller implied magnitudes, these estimates are slightly less precisely estimated than those in Table 2. Consequently, these estimates are not statistically significant. The last two equations in Table 3 attempt to capture the trend in effect of judicial ideology, and they indicate an even

smaller difference existed between Democratic and Republican appointees after 1994. Equation (3), for example, implies a six percentage point (= .093 - .033) difference between Democratic and Republican appointees. An additional reason to doubt that ideology has a meaningful effect on a judge's decision regarding the satisfaction of the *Gingles* factors is that the estimated effects of panel composition are negative signed here and statistically indistinguishable from zero.

These estimates provide some support for the conclusion that judicial ideology exerts a more muted influence in the evaluation of the *Gingles* factors then it does on the overall liability determination. In that regard, the results are consistent with the view that the specific focus of the *Gingles* prongs and their more rule-like structure affords less opportunity for judicial ideology to assert itself.

The estimates in Table 3 contrast with those in Table 4. Judicial ideology correlates strongly and significantly with the probability a judge votes to assign liability after concluding that the *Gingles* factors are satisfied. Ideology's impact on this probability operates both directly – through a judge's own political affiliation – and indirectly – through the partisan composition of a judge's panel colleagues. For example, the estimates of column (1) show that the probability the average Democratic appointee concludes that liability should follow from satisfaction of the factors is 15.2 percentage points higher than that of the average Republican appointee. When controls for panel composition are included, as in the regression in column (2), this estimated difference is 20.5 percentage points. Moreover, the effects of panel composition are as large as the impact of a judge's own ideology. The equation implies that the presence of any additional Democratic appointee on a panel raises by 22 percentage points the probability that the judge concludes liability should follow from satisfaction of the factors. All of these estimates are statistically significant. These regressions indicate that after controlling for other characteristics of the cases, judicial ideology has a strong influence on the evaluation of whether in the totality of the circumstances, liability should follow from the plaintiff's satisfying the *Gingles* factors.

TABLE 4. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING FOR SECTION 2 LIABILITY, CONDITIONAL ON *GINGLES* FACTORS BEING MET: PROBIT REGRESSION ANALYSIS

Variable	(1)	(2)	(3)	(4)
Judge Was Democratic Appointee	.152*	.205**	.386**	.403**
	(.086)	(.096)	(.123)	(.102)
Judge Was Democratic Appointee * Year Was After 1994	--	--	-.570**	-.537**
			(.196)	(.180)
One Additional Democratic Appointee on Panel	--	.223**	--	.202**
		(.092)		(.090)
Two Additional Democratic Appointees on Panel	--	.222**	--	.199**
		(.065)		(.061)
Judge was African-American	.161	.204**	.131	.163*
	(.094)	(.065)	(.094)	(.063)
Additional African-American on Panel	--	.201*	--	.173
		(.066)		(.064)
Appellate Case	-.109	-.291**	-.086	-.256**
	(.106)	(.116)	(.103)	(.112)
Challenge to At Large Election	.326	.259	.288	.186
	(.227)	(.211)	(.249)	(.226)
Challenge to Reapportionment Plan	-.107	-.186	-.050	-.157
	(.185)	(.162)	(.197)	(.177)
Challenge to Local Election Practice	.160	.360**	.266**	.425**
	(.132)	(.168)	(.140)	(.166)
Plaintiffs Were African-American	.317	.281	.302	.270
	(.241)	(.250)	(.239)	(.242)
Case Occurred in Jurisdiction Covered by § 5	.220*	.215*	.249**	.236**
	(.090)	(.083)	(.078)	(.071)
Log-likelihood	-61.509	-54.730	-57.721	-51.656
Pseudo- R^2	.4294	.4923	.4645	.5208

Notes: Estimated marginal effects and in parentheses standard errors. * means significant at 10% level. ** means significant at 5% level. N=172. All regressions also include fixed-effect controls for judicial circuits and years.

The equations in columns (3) and (4) present tests for differential trends in the effect of judicial ideology. When the regression includes an interaction of a judge's partisan affiliation and time period, the baseline estimate of ideology is substantial. For example, the results in column (3) imply that prior to 1994, a Democratic appointee had a conditional probability of voting in favor of liability that was 38.6 percentage points higher on average than a Republican appointee. But after 1994, the estimated effect of ideology swung back, even into negative territory (-.184 = .386 - .570). The relatively small number of observations (N=172) and the inclusion of a full set of controls

may lead the estimates to be overstated. Without attaching too much importance to their precise magnitude, the general patterns are clear. Before 1994, Democratic appointment correlated strongly with a higher conditional probability of favoring liability after a plaintiff meets the *Gingles* factors. After 1994, there was no statistically significant difference between Democratic and Republican appointees in this conditional probability (p-value = .4059). The regression analysis provide some confirmation of the patterns seen the charts. Democratic appointees were initially more likely to conclude that liability should follow from a plaintiff's satisfaction of the factors. But by the latter half of the 1990's, they were no more willing to assign liability in this circumstance than were Republican appointees.

In short, these models confirm that ideology correlates with liability under Section 2; that there are only modest partisan differences in the likelihood that Democratic and Republican appointees will find the *Gingles* factors satisfied; and that ideology correlates strongly with the question whether liability should follow from satisfaction of the factors. Panel effects of ideology are most clearly apparent during the evaluation of the totality of the circumstances.

Moreover, the models confirm that there were sharp changes over time in the role that judicial ideology played in the second stage of the *Gingles* inquiry. In the first half of the observation period, the probability that a Democratic appointees concluded that liability should follow from satisfaction of the factors is higher on average than that of a Republican. But in the second half of the study period, this conditional probability for the average Democratic appointee was statistically indistinguishable from that of the average Republican appointee. This trend is consistent with the second transformation of voting rights jurisprudence that we predicted in Part I.

B. *Judicial Race*

In addition to its political salience, the VRA – as a statute intended to protect minority voting rights – also has particular relevance on the dimension of race. For that reason, we previously investigated the role of judicial race on the likelihood a judge imposes liability under Section 2.[45] Although the number of African-American judges in the data was small, the magnitude of the effects we detected were quite large. We observed that African-American judges were substantially more likely to vote in favor of a Section 2 plaintiff. In addition, race exerted a sizable panel effect. White judges who sat on panels with at least one African-American judge were considerably more likely to vote in favor of liability, and this effect was evident for both Democratic

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[45] Cox & Miles.

and Republican appointees. The results in Table 2 confirm these patterns persist in the shorter time period studied here.

Table 3 shows that similar patterns exist between race and the conditional probability a judge concludes the *Gingles* factors are met. The estimates for the direct and peer effect of race are large – over 20 percentage points. Again, the small number of African-American judges in the data may result in a few outliers driving the estimates. But the general pattern is remarkable in view of the muted effect of ideological in judicial assessments of whether the plaintiff has satisfied the *Gingles* factors.

In Table 4, the regressions indicate that a judge's race also influences the conditional probability that she determines that liability follows from the preconditions' satisfaction. Caution is warranted here because the number of observations of African-American judges in this sub-sample is quite small: thre are only 19. Despite this limitation, it is remarkable that the race of the judge appears to correlate just as strongly with the likelihood that the judge determines the totality of the circumstances warrants liability as it does with the overall probability that the judge votes for liability.

C. *Case Characteristics*

The regressions control for a variety of case characteristics. Particular caution is warranted in interpreting these estimates because, unlike judicial characteristics, case characteristics are not the products of randomization. Rather, they are the result of litigant self-selection and are therefore likely correlated with the error term. With this caveat in mind, the estimates for these features of the cases warrant brief discussion.

The type of court correlates with the probability of liability and in some specifications with the likelihood that liability follows from a plaintiff's satisfaction of the factors. The regressions in Table 2 show a pattern similar to our previous findings, that judges sitting on appellate courts voted to assign liability at rates about 10 to 18 percentage points lower than the their colleagues on trial courts. In Table 4, appellate courts appear correlated with lower rates of liability conditional on the factors having been met when the regression includes controls for panel compositions. In contrast, the type of court appears unrelated to the probability of a judge concluding that the factors are satisfied. The results in Table 3 show differences between court types are fewer than three percentage points and statistically insignificant.

IV. CONCLUSION

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