

## ARTICLES

### JUDGING THE VOTING RIGHTS ACT

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*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.<sup>1</sup> Of course, the Voting Rights Act’s power to transform politics raises questions about its partisan implications. Some critics complain that it systematically benefits Republicans; others call the Act’s prohibition of minority vote dilution a Democratic Party protection provision.<sup>2</sup> 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.<sup>3</sup> These concerns have been heightened by the

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1. See generally, e.g., David Lublin, *The Republican South* (2004); *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965–1990* (Chandler Davidson & Bernard Grofman eds., 1994).

2. See, e.g., *infra* notes 75–76 and accompanying text.

3. See *infra* notes 134–135 and accompanying text.

Justice Department's recent approval under the Act of several controversial redistricting plans, including the Texas mid-decade redistricting plan orchestrated by Tom DeLay.<sup>4</sup>

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. 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.<sup>5</sup> 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 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 the plaintiff under section 2 of the Voting Rights Act. Moreover, these party effects become even more pronounced when judges appointed by a President of the same party 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 for understanding 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, and 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 the Voting Rights Act. Section 5 of the Act—which singles out some

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4. 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) [hereinafter Cox, *Partisan Fairness*].

5. 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 66, 69–70.

jurisdictions and requires that they pre-clear any changes to their voting rules with the federal government—was reauthorized recently after being set to expire in 2007.<sup>6</sup> 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.<sup>7</sup> Some prominent scholars even suggested that the scope of section 5 should be scaled back to limit this threat.<sup>8</sup> An implicit assumption of this argument is that there is less risk that partisanship will influence the application of other Voting Rights Act tools (like section 2 litigation) that protect minority voting rights. Our findings show, however, 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. We do not mean to suggest that this means 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 different way than does the centralized bureaucratic structure of the Justice Department.<sup>9</sup> Our analysis 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 her 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 dataset 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 African-American judge, she becomes roughly 20 percentage points more likely to find a section 2 violation.

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6. See 42 U.S.C. § 1973c (2000); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

7. See, e.g., Dan Eggen, Staff Opinions Banned in Voting Rights Cases: Criticism of Justice Dept.'s Rights Division Grows, *Wash. Post*, Dec. 10, 2005, at A3; 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? (Jan. 30, 2006) (unpublished white paper, on file with the *Columbia Law Review*), at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>.

8. See, e.g., An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing on S. 2703 Before the S. Comm. on the Judiciary, 109th Cong. 220-25 (2006) (statement of Professor Samuel Issacharoff, NYU School of Law); Samuel Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success?, 104 *Colum. L. Rev.* 1710, 1730-31 (2004) [hereinafter Issacharoff, *Victim of Its Own Success*].

9. See *infra* text accompanying note 135.

These findings are perhaps the first to document a strong connection between a judge's race and her judicial decisions—and certainly are 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 criminal and civil rights litigation.<sup>10</sup> 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.<sup>11</sup> 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 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.”<sup>12</sup> The possibility that section 5 coverage relates closely to section 2 liability is thought by some to be important for current debates over section 5's constitutionality.<sup>13</sup> 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.<sup>14</sup> But our analysis finds that, once one controls for other influences on liability, section 5 coverage is not a strong predictor of liability in most 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, voting rights plaintiffs' rates of success have fallen from

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10. See sources cited *infra* notes 99–102.

11. See *infra* note 100 and accompanying text. In Hanna Pitkin's classic formulation, descriptive representation is concerned with reflecting particular *identities*, while substantive representation is concerned with acting on behalf of particular *interests*. See Hanna Fenichel Pitkin, *The Concept of Representation* (1967).

12. See *infra* note 28 and accompanying text.

13. See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *Yale L. J.* 174 (2007).

14. See *id.* at 207 (“[T]he data concerning section 2 violations . . . provides the best systematic evidence to distinguish covered from uncovered jurisdictions.”).

40% in the years immediately after 1982 to 18% in the most recent five years. It is unclear what to make of this change. It could reflect the success of the Voting Rights Act over the past several decades in eradicating the most discriminatory voting practices. It could also reflect changing judicial attitudes. One 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 toward 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 how the Voting Rights Act functions 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 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.

## 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 (VRA). 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 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.”<sup>15</sup> Perhaps because it mirrored so closely the language of the Fifteenth Amendment, the provision was little used in the years im-

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15. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437; see also U.S. Const. amend. XV, § 1 (“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.”).

mediately 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.<sup>16</sup> Nonetheless, the two provisions' textual similarity became extremely important in 1980, when the Supreme Court decided *Mobile v. Bolden*.<sup>17</sup> The Court held in that case that the Fifteenth Amendment proscribed only *intentional* racial discrimination in voting.<sup>18</sup> This holding, combined with the Court's affirmation that section 2 only restated the Fifteenth Amendment's protections,<sup>19</sup> 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.<sup>20</sup> *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.<sup>21</sup>

In response to mounting criticism of *Bolden*, Congress in 1982 amended section 2 to eliminate the requirement that plaintiffs show purposeful discrimination.<sup>22</sup> 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."<sup>23</sup> While there has been considerable disagreement about

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16. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 344–45 (1960) (relying, prior to passage of Voting Rights Act, on Fifteenth Amendment to strike down statute redrawing boundaries of Tuskegee, Alabama).

17. 446 U.S. 55 (1980).

18. See *id.* at 61–63.

19. *Id.* at 61 ("In 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.")

20. See *id.*

21. Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in *Minority Vote Dilution* 149 (Chandler Davidson ed., 1989); see also Samuel Issacharoff, Pamela Karlan & Richard Pildes, *The Law of Democracy* 710–11, 746 (2d rev. ed. 2002) (discussing outcry following *Bolden* and "substantial obstacle [it threw] in the path of minority plaintiffs").

22. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2000)). 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 21, at 150–51; *infra* notes 46–50. 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 Derfner, *supra* note 21, at 151–52. 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).

23. Section 2 states in full that:

the precise meaning of this standard,<sup>24</sup> the amendments paved the way for section 2 to become the principal litigation tool in modern vote dilution litigation.<sup>25</sup>

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 decisions in cases raising section 2 claims.<sup>26</sup> Information on these decisions was initially collected by the Voting Rights Initiative at the University of Michigan Law School, under the direction of Ellen Katz.<sup>27</sup> Katz and her coauthors assembled a rich set of data about these Voting Rights Act decisions; using these data, they documented and analyzed the findings concerning race discrimination in voting that courts have made in section 2 cases over the last two decades.<sup>28</sup>

(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.

42 U.S.C. § 1973.

24. The deep disagreements are illustrated by the Court's fractured dispositions of both *Gingles* itself and more recent section 2 cases. See *Thornburg v. Gingles*, 478 U.S. 30 (1986); see also *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, (2006); cf. *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (reflecting deep disagreement over the proper interpretation of section 5's nonretrogression requirement, and tying this disagreement in part to divide over the proper meaning of section 2).

25. See, e.g., Issacharoff, Karlan & Pildes, *supra* note 21, at 747 ("The 1982 amendments marked a significant shift in the nature of litigation under the Voting Rights Act. [Before] 1982 . . . [s]ection 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.").

26. 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. See generally *The Voting Rights Initiative, Documenting Discrimination: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, at <http://sitemaker.umich.edu/votingrights/home> (last visited Nov. 10, 2007) (on file with the *Columbia Law Review*).

27. *Id.*

28. See generally Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (Final Report of the Voting

To assemble the dataset, we began with Katz's impressive database of voting rights cases.<sup>29</sup> Because we are interested in a different set of questions than Katz and her coauthors, we analyzed a subset of decisions within that database.<sup>30</sup> Our focus is on the relationship between the judges' characteristics and findings of liability under the Act. For that reason, we examined only those dispositions in the Voting Rights Initiative database in which a court decided a question of section 2 liability.<sup>31</sup> Moreover, because 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 341 dispositions—133 that were issued by federal circuit courts and 208 that were issued by trial judges or three-judge 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.<sup>32</sup> Because plaintiffs sometimes combine constitutional claims against such redistricting plans with Voting Rights Act claims, some of the dispositions in our data were issued by three-judge district courts. Decisions by district court judges sitting alone comprise most of

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Rights Initiative, University of Michigan Law School), 39 U. Mich. J.L. Reform 643, 643–772 (2006), available at <http://sitemaker.umich.edu/votingrights/files/finalreport.pdf> (on file with the *Columbia Law Review*) [hereinafter Katz et al., Documenting Discrimination]; Ellen D. Katz, Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2, in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power* 183, 183–221 (A. Henderson ed., 2007) [hereinafter Katz, Not Like the South].

29. See Katz et al., Documenting Discrimination, *supra* note 28.

30. 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 last judicial decision issued in each of these lawsuits. See Katz, Not Like the South, *supra* note 28, at 186–87 nn. 3–4. These decisions were coded in the Voting Rights Initiative dataset as “Final Word.” Katz et al., Documenting Discrimination, *supra* note 28. Given our different focus, we did not limit our dataset to “Final Word” dispositions. Thus, in some instances, our dataset contains multiple decisions from the same lawsuit.

31. 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,” 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.

32. See 28 U.S.C. § 2284 (2000) (“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.”).

the trial court opinions. But 11% of the data—36 decisions—represent 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 dispositions, 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.<sup>33</sup> There were a total of 679 judge-votes cast in the 341 decisions. These votes were cast by 349 different judges, for whom the median number of decisions was 1.0 and the mean 2.1. We collected demographic and biographical information about each judge in the dataset from the Federal Judicial Center.<sup>34</sup> These data permit us to examine judicial decisionmaking at the level of judge-votes.

### 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 this section we focus on three potential sources 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.<sup>35</sup>

1. *Types and Origins of Voting Practices.* — Section 2 proscribes any voting practice “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.”<sup>36</sup>

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33. 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.

34. The Federal Judicial Center (FJC) compiles biographical information about all federal judges from publicly available sources. The FJC notes that its information about the race or ethnicity of each judge is “determined, whenever possible, by [a] judge’s [own] self-definition.” Federal Judicial Center, History of the Federal Judiciary, About the Biographical Directory of Federal Judges: Description, at <http://www.fjc.gov/history/home.nsf> (last visited Nov. 11, 2007) (on file with the *Columbia Law Review*).

35. 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.

36. 42 U.S.C. § 1973(a) (2000). 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 prohibiting states from using any voting practice “in a manner which results in a denial or abridgement of” minority voting rights. Compare Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, with 42 U.S.C. § 1973(a) (emphasis added). Congress made this change from the active to the passive

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 minority voters from casting ballots. Examples of such practices could include literacy requirements,<sup>37</sup> felon disenfranchisement rules,<sup>38</sup> voter identification requirements,<sup>39</sup> 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.<sup>40</sup> A variety of election practices can be subject to a claim of vote dilution: at-large electoral structures,<sup>41</sup> single-member districting schemes,<sup>42</sup> etc. Moreover, these practices can be produced at either the local or state level.

It is commonly thought that suits challenging certain types of election practices are more likely to be successful than suits challenging other types of practices. The summary statistics shown in Appendix I suggest some such patterns. The data are 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). These decisions resulted in liability about one-

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voice to emphasize that it was rejecting the requirement that plaintiffs show intentional discrimination to make out a section 2 claim.

37. In fact, Congress when it enacted the Voting Rights Act was so concerned about the discriminatory consequences of literacy requirements that it banned their use in six southern states. See section 4 of the Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (current version at 42 U.S.C. §§ 1973b–1973c). Later amendments extended this ban to the rest of the nation and made it permanent. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 201, 84 Stat. 314, 315 (current version at 42 U.S.C. § 1973aa) (extending temporary ban to entire nation); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400, 400–01 (current version at 42 U.S.C. §§ 1973b–1973c) (making the temporary nationwide ban permanent).

38. See, e.g., *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

39. See, e.g., Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 712–13 (2006) (discussing case law applying section 2 to voter identification requirements).

40. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 46–48 (1986) (discussing cases). One standard claim about section 2 vote dilution litigation is that its early focus was on at-large (and similar) electoral structures that were implemented 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. See *id.* at 35 (explaining that the 1982 amendments were largely a response to the Court's opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), a case concerning a vote dilution challenge to an at-large election structure); see also *supra* note 21. 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. See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1674–76 (2001).

41. See, e.g., *Gingles*, 478 U.S. at 46.

42. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997, 1001–02 (1994).

third of the time—34% of the time for challenges to at-large districts, and 30% of the time for reapportionment challenges. In contrast, the remaining catch-all category of challenges, which includes challenges to policies ranging from majority vote requirements to felon disenfranchisement laws, resulted in an appreciably lower success rate of 22%.

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.<sup>43</sup> 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.<sup>44</sup> 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, rather than state practices, in violation of section 2.<sup>45</sup>

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.<sup>46</sup> The formula for determining which jurisdictions were covered was facially neutral, but it was carefully crafted to encompass the deep southern states with a long history of disenfranchising African-American voters.<sup>47</sup> Because the preclearance provisions singled out some jurisdictions for more

43. Only four cases—less than 2%—involved challenges to federal election practices but not to either state or local practices. (A few cases involved challenges to multiple types of practices.)

44. In our data, 86% of decisions involving at-large elections challenged local governmental bodies. Even among reapportionment decisions, challenges to local practices constituted 59% of the dispositions.

45. Challenges to local government practices resulted in liability about 32% of the time, while challenges to state practices resulted in liability about 23% of the time. Cf. Appendix I (presenting a slightly different comparison—between challenges to local practices and challenges to non-local practices).

46. See 42 U.S.C. § 1973c (2000). For a discussion of the perceived importance of section 5’s enforcement structure, see *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding constitutionality of section 5); *The Future of the Voting Rights Act*, at xi–xiii (David L. Epstein et al. eds., 2006).

47. See § 1973b(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 reauthorization of section 5, the coverage formula was amended and expanded a bit. Today, “[s]ection 5 applies to eight states in their 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 7, at 3.

intrusive federal oversight of election practices,<sup>48</sup> these provisions were enacted as temporary measures.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> In addition, courts were ten percentage points more likely to conclude that election practices inside rather than outside the South violated section 2.<sup>52</sup> The pattern is similar for election practices in jurisdictions covered by the preclearance procedures of section 5.<sup>53</sup> Courts were more likely to conclude that election practices covered by section 5 were discriminatory. These election practices were found to violate section 2 about 40% of the time, while liability was found only 27% of the time for practices not subject to preclearance.<sup>54</sup>

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 round of redistricting.<sup>55</sup> 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

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48. See § 1973b(b).

49. See Issacharoff, Karlan & Pildes, *supra* note 21, at 714 (noting that section 5 was initially scheduled to expire in 1970).

50. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81.

51. The Voting Rights Initiative coded the following states as “Southern”: Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

52. Cases occurring in the South resulted in liability 34.1% of the time; those occurring outside the South resulted in liability 23.4% of the time.

53. 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.

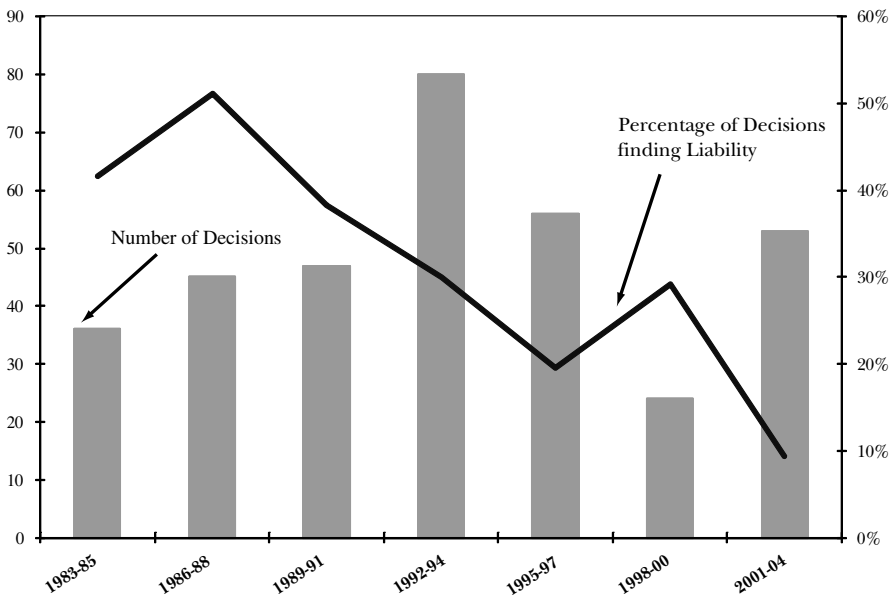
54. These figures are consistent with Ellen Katz’s finding that the final court to rule in a section 2 challenge was more likely to assign liability when the challenge contested an election practice in a preclearance jurisdiction. See Katz et al., *Documenting Discrimination*, *supra* note 28, at 655.

55. In accordance with *Reynolds v. Sims* and its progeny, states and local governments are required to redraw their district lines following the release of each census. See *Reynolds v. Sims*, 377 U.S. 533, 583 (1964); Cox, *Partisan Fairness*, *supra* note 4, at 757–58 (discussing development of decennial redistricting requirement).

annually on section 2 liability trended upward. It peaked in 1992, a year that featured 30 decisions. But since 1992, the trend reversed. In 2004, courts issued only 18 decisions in section 2 liability cases, a figure nearly half of the peak. Moreover, from 1999 to 2001, courts handed down between four and seven decisions each year, 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. While the rate at which courts found section 2 liability fluctuated widely on a year-to-year basis, 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 1982–1989, the first seven years after the amendments to the VRA, but it fell to 26% during the 1990s. In the last five years of the data, it slipped to 18%. Figure 2 highlights this declining liability rate, as well as the changes in the number of decisions over time.

FIGURE 1. LITIGATION TIME TRENDS



### 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; discrimination is worse in the South and in areas covered by section 5 than it is 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.<sup>56</sup>

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.<sup>57</sup> Over time, however, 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.<sup>58</sup>

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 changes in the characteristics of section 2 cases discussed above. 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.<sup>59</sup>

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

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56. See, e.g., Issacharoff, Karlan & Pildes, *supra* note 21, at 657–58.

57. See *id.* at 813 (noting that “[m]uch of the ‘easy’ litigation” had occurred by 1990 census).

58. See *id.*

59. 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 45% 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 19%, but in the late 1990s and the early 2000s, election practices in these jurisdictions accounted for 27% of the section 2 liability decisions.

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 in our data. Still, these data are 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 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. But there is a second possibility: the different rates of success may also reflect changes across times and places in the behavior of plaintiffs, defendants, and courts. That is, election practices may have remained constant, while enforcement activity, settlement decisions, and judicial attitudes toward particular election practices may have changed. Raw plaintiff success rates cannot distinguish between these possibilities.

To see this point 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 is 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%.<sup>60</sup> A large literature has challenged the Priest-Klein hypothesis on both theoretical and empirical grounds.<sup>61</sup> Whatever the status of this debate, litigation under section 2 is unlikely to satisfy the preconditions of the

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60. See generally 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. See *id.* at 15. 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 50%. See *id.* at 17.

61. The literature is vast. For an underinclusive list of leading papers, see generally Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 *J. Legal Stud.* 337 (1990) (testing and rejecting 50% prediction in sample of tort and general civil litigation); 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) (showing that empirical rejection of 50% prediction may be due to failure of cases to conform to assumptions of prediction); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 *J. Legal Stud.* 493, 499–501 (1996) (presenting model in which any fraction of cases may proceed to trial and any plaintiff win-rate may result); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 *J. Pol. Econ.* 229 (1995) (testing

Priest-Klein hypothesis. The remedy in these cases is typically injunctive relief rather than damages, which can make settlement more difficult.<sup>62</sup> 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 50%.

Nonetheless, the reality of strategic behavior by parties makes clear that raw plaintiff success rates alone cannot be used to assess the egregiousness of 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,<sup>63</sup> the greater liability rate could also be the product of 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 institutionalized racism, both in and out of the political arena. 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 between 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 our 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 estimates of the impact of judicial ideology or race are biased by the omission of other relevant variables that correlate with the race or ideology of judges hearing particular cases. But that possibility is less likely with these data. The random assignment of judges to cases helps overcome many of the selection problems identified above. Within judicial districts, trial judges are randomly assigned to cases, and within circuits, appellate judges are randomly assigned to panels. Judicial charac-

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structural model of litigation and showing that plaintiff win rates vary by area of law and do not converge on 50%).

62. It can be more difficult for parties to settle a case involving injunctive relief because there are frequently fewer possible outcomes over which the parties can bargain.

63. See *supra* note 52 and accompanying text; *infra* Appendix I.

teristics are therefore less likely to correlate with any unobserved determinants of liability within judicial districts and circuits. The assignment of judges is, of course, not random across circuits or districts. And the assignment is not random across time, because the composition of the federal judiciary changes as new judges are confirmed and sitting judges resign. But we can use regression analysis to control for average differences in judges' voting rates across time and across districts. (These controls are conventionally referred to as "fixed effects.") Moreover, we can use this regression analysis to reduce further the risk of omitted variable bias by including in the regressions controls for the various characteristics of the cases that are coded in the data. For these reasons, our approach is not subject to many of the standard selection bias criticisms that are often leveled at empirical studies of litigated cases.

## 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. Parts II.A and II.B provide summary statistics that strongly support these hypotheses. Parts 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 features emphasized in Part I—the timing, location, and type of each challenge. 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 revisit Part I's conventional account of section 2 liability. Specifically, the results cast doubt on the conventional claim that the location of the challenged practice and the type of practice challenged are important determinants of liability. Part II.E provides a nontechnical summary of our findings for readers who would prefer to skip the more detailed analysis in Parts II.C. and II.D.

### A. *The Role of Political Affiliation*

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 a variety of 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, including criminal law, administrative law, and so on.<sup>64</sup> 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 *elec-*

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64. See *infra* notes 66–70.

tion practices, which means that a court's decision to uphold or invalidate a challenged practice can directly affect the outcome of subsequent elections. Second, the partisan consequences of a court 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 candidates. In many VRA cases, therefore, it may be clear that success for minority plaintiffs will translate into success for the Democratic Party.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> But these hunches have not been tested empirically. We explore two ways in which a judge's ideology might influence the decisionmaking process in section 2 litigation: by influencing the judge himself and by influencing the other panel members with whom the judge 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 scientists<sup>68</sup> and one by

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65. 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 75–76.

66. See, e.g., Miles & Sunstein, *supra* note 5; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997); sources cited *infra* notes 86, 92 (studying employment discrimination cases).

67. See, e.g., Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1737 (1993). We note that a few scholars have studied the role of judicial ideology in a 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).

68. 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

legal academics<sup>69</sup>—have long debated the appropriate measure. Legal scholars typically code judicial ideology as a binary variable: using the political party of the appointing President, they categorize each judge as either a Democratic or Republican appointee.<sup>70</sup> In contrast, political scientists favor continuous measures of ideology; to array judges along an ideological spectrum, these scholars often rely on media perceptions of the judge at the time of appointment, or on linear combinations of various ideological proxies of the appointing President and particular Senators.<sup>71</sup> The appropriate measure of judicial ideology is the subject of a lively debate that we make no attempt to resolve here.<sup>72</sup> For our pur-

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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-Institutional 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).

69. 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 1930s, 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. See Jerome Frank, *Law and the Modern Mind* (1949); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222 (1931). 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 70.

70. Using this metric, legal scholars have documented the influence of ideology in myriad legal fields. For example, Cass Sunstein and his coauthors 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 on Federal Courts of Appeals: A Preliminary Investigation*, 90 *Va. L. Rev.* 301 (2004) [hereinafter Sunstein et al., *Ideological Voting on Federal Courts of Appeals*].

71. For nominees to the Supreme Court, political scientists sometimes use newspaper editorial content as a proxy for ideology. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 *Am. Pol. Sci. Rev.* 557 (1989); Jeffrey A. Segal & Lee Epstein, *Ideological Values and the Votes of Supreme Court Justices Revisited*, 57 *J. Pol.* 812 (1995). For nominees to the federal appeals and district courts, political scientists often use “common-space scores,” which model ideology as a combination of both the appointing President and the Senators in the judge’s home state. See, e.g., Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 *Pol. Res. Q.* 623, 633, 636 (2001); Susan W. Johnson & Donald R. Songer, *The Influence of Presidential Versus Home State Senatorial Preferences on the Policy Output of Judges on United States District Courts*, 36 *Law & Soc’y Rev.* 657, 665–73 (2002).

72. For a sampling of that debate, see, for example, Lee Epstein & Gary King, *The Rules of Inference*, 69 *U. Chi. L. Rev.* 1 (2002); Daniel R. Pinello, *Linking Party to Judicial*

poses, however, the 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 her 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.<sup>73</sup>

TABLE 1. RATES OF VOTING TO FIND SECTION 2 LIABILITY,  
BY PARTY OF APPOINTING PRESIDENT

Party of Judge		Difference of (1)-(2): (3)
Democratic (1)	Republican (2)	
.362 (.027) [307]	.212 (.021) [372]	<b>.149**</b> <b>(.034)</b>

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 correlates strongly with her votes in section 2 cases. Democratic appointees voted to impose liability 36.2% of the time, while Republican appointees did so only 21.2% of the time. In other words, a Democratic appointee was more than 50% more likely to vote in favor of liability than a Republican appointee. 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 coauthors, for example, code judicial votes as liberal and conservative across a range of legal policy issues, and they compare liberal

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Ideology in American Courts: A Meta-Analysis, 20 Just. Sys. J. 219 (1999); Gregory C. Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates About Statistical Measures, 99 Nw. U. L. Rev. 743 (2005); see also Joshua B. Fischman, Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels 16 (July 3, 2007) (unpublished manuscript, on file with the *Columbia Law Review*), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=912299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912299).

73. Where a judge served on both the federal district court and the federal appellate court, we assigned the judge's party affiliation on the basis of the judge's initial appointment.

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.<sup>74</sup>

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 favorably disposed than Republican appointees to civil rights litigation in general or minority voting rights claims in particular. 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 in addition to 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.<sup>75</sup> Other

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74. See Sunstein et al., *Are Judges Political?*, *supra* note 70, at 20–21.

75. See, e.g., David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress 119* (1997) (“Republicans usually benefit from racial redistricting, since creating new majority black districts inevitably concentrates Democrats in a few districts.”); David Lublin & Stephen D. Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 *Am. J. Pol. Sci.* 792, 805 (2000) (finding that “packing loyal Democrats into majority-minority enclaves hurts their party, sometimes minimally, sometimes enough to cost control of a legislative chamber”); cf. Charles Cameron, David Epstein & Sharyn O’Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 *Am. Pol. Sci. Rev.* 794, 809 (1996). To be clear, this debate is not limited to the partisan consequences of majority-minority districts. Scholars are also intensely interested in the consequences of drawing such districts for different dimensions of minority representation. See, e.g., David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* (1999); Carol

researchers disagree.<sup>76</sup> Judges aware of this 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,<sup>77</sup> 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 way to test the possibility that judges are influenced in part by the 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 (such as challenges to at-large districts) are more likely than others to favor Democrats, then we might expect those 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,<sup>78</sup> Democratic appointees voted for liability at a rate more than 17 percentage points higher than the rate for Republican appointees.<sup>79</sup> But in cases decided after 1994, the difference between Democratic and Republican appointees was only about nine percentage points, about half of the earlier difference.<sup>80</sup> To illustrate this shift, Figure 2 shows the way in which

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M. Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* (1993).

76. See, e.g., Kenneth W. Shotts, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, 45 *Am. J. Pol. Sci.* 120, 128 (2001) (arguing that, under certain conditions, majority-minority mandates do not hurt Democrats, and could help them); Lani Guinier, *Don't Scapegoat the Gerrymander*, *N.Y. Times*, Jan. 8, 1995 (Magazine), at 36–37.

77. Judge-votes in reapportionment cases that do not concern at-large electoral structures constitute only 35% of the data. Moreover, it is unlikely that all of these cases involve the creation of majority-minority districts that pack Democrats in ways that threaten to undermine their partisan electoral interests.

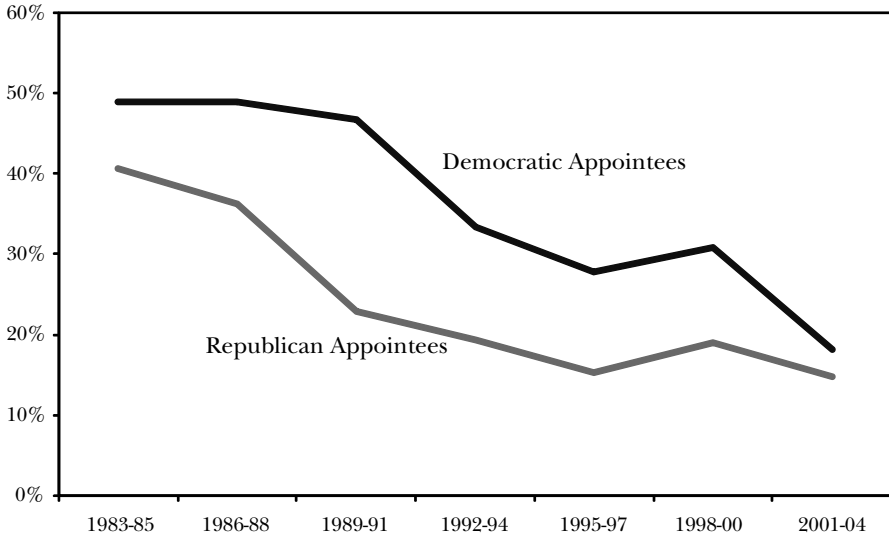
78. We use 1994 as the dividing point for all two-period tests in the Article because it represents the chronological mid-point of the dataset. We attach no additional significance to the year 1994; as the midpoint, it is merely a convenient way to measure trends in the data.

79. In the period before 1994, Democratic appointees voted in favor of liability 43% of the time (standard error = .036, observations = 194), while Republican appointees voted in favor of liability 26% of the time (standard error = .030, observations = 212).

80. In the period since 1994, Democratic appointees voted in favor of liability 24% of the time (standard error = .040, observations = 113), while Republican appointees voted in favor of liability 15% of the time (standard error = .028, observations = 160). 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.

the partisan gap between Democratic and Republican appointees has decreased over time.

FIGURE 2. FINDINGS OF LIABILITY OVER TIME



The second characteristic of the cases that is connected with 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 44% of the time, while their Republican appointed colleagues did so only 22% of the time. The resulting 21 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.<sup>81</sup>

81. 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 effect on the voting patterns of Democratic and Republican appointees.

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 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.<sup>82</sup> If that story were in fact 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.<sup>83</sup>

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.<sup>84</sup>

2. *Panel Effects.* — A judge's partisan affiliation might have an impact beyond the judge herself. It might also affect other judges with whom

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82. See, e.g., Issacharoff, Karlan & Pildes, *supra* note 21, at 657–58, 665–66; Gerken, *supra* note 40, at 1672–76 (discussing progression of vote dilution cases during 1980s and 1990s); Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 487–89 (1993) (describing shift in section 2 challenges from at-large districts to single-member districts). 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.

83. Alternative explanations are also possible. Perhaps Republican and Democratic appointees simply agree more today than they did 20 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 118.

84. See *infra* Part II.C.

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.<sup>85</sup> 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 indicates that Democratic or liberal judges are more likely to cast conservative votes when they sit with Republican or conservative judges.<sup>86</sup>

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.

The data provide evidence of panel effects. Table 2 shows clearly that as more Democratic appointees were added to a panel, the rate at which a judge voted to impose liability rose. Conversely, as more Republican appointees were added to a panel, the rate at which a judge voted to impose liability fell. The incremental difference from adding one more Republican (or one more Democrat) is relatively modest, on the order of eight or fewer percentage points.<sup>87</sup> But a striking pattern emerges when one compares panels of all Democratic appointees with panels of all Republican appointees. The difference in rates of voting to assign liability between these panels is 30 percentage points ( $=.407 - .111$ ). 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 18 percentage point difference that exists between Democratic and Republican appointees sitting alone in trials on

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85. See, e.g., sources cited *supra* note 70.

86. See, e.g., Sunstein et al., *Are Judges Political?*, *supra* note 70; Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 *J.L. Econ. & Org.* 299 (2004); Revesz, *supra* note 66; Sunstein et al., *Ideological Voting on Federal Courts of Appeals*, *supra* note 70.

87. We might expect that a judge’s vote would differ greatly 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. Interestingly, however, the voting patterns do not suggest a sharp difference when a judge’s party falls out of the majority on a panel.

section 2 liability.<sup>88</sup> This suggests the importance of panel effects in section 2 litigation.<sup>89</sup>

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.<sup>90</sup> 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 reevaluate her position or alter her ideological preferences.<sup>91</sup> (Some authors refer to this possibility as "deliberation,"<sup>92</sup> though that

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88. 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 2 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 43% (standard error = .111, observations = 21), which is nearly the same as the rate for Democratic appointees sitting alone on section 2 cases involving reapportionment. In only two cases were the trial panels composed entirely of Republican appointees, and every Republican appointee voted against liability in those decisions. When Republican appointees sat on politically mixed trial panels, they voted in favor of liability 24.3% of the time (standard error = .072, observations = 37), which is a bit lower than the rate of 28% for Republican appointees sitting alone on section 2 cases involving reapportionment.

89. This result is consistent with the recent research of 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 70; Miles & Sunstein, supra note 5. Again our estimates are not precisely comparable because Sunstein and his coauthors 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.

90. For a general discussion of sincere and strategic voting, see Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297 (1999).

91. 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 coauthors to distinguish "amplification" from "dampening" by defining the baseline as the voting rate of a judge sitting with one Democrat and one Republican. This definition implies that "dampening" might instead reflect a judge's response to her political party constituting a majority of a panel. See Sunstein et al., *Are Judges Political?*, supra note 70, at 9.

92. Farhang & Wawro, supra note 86, at 325–26; Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114

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	.462 (.062) [65]
(B) Democratic	DDD	.407 (.067) [54]
(C) Democratic	DDR	.328 (.041) [134]
(D) Democratic	DRR	.278 (.062) [54]
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(E) Republican	DDR	.239 (.052) [67]
(F) Republican	RRD	.213 (.040) [108]
(G) Republican	RRR	.111 (.033) [90]
(H) Republican	Single Trial Judge	.280 (.044) [107]

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

concept covers a number of different possible mechanisms through which a judge's sincere views might be affected.) 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.<sup>93</sup>

The second possibility is that, while a judge's sincere view is unaffected 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

Yale L.J. 1759, 1781–82 (2005); cf. Sunstein et al., *Are Judges Political?*, supra note 70, at 8–9 (using term “ideological dampening”).

93. See Sunstein et al., *Are Judges Political?*, supra note 70, at 71–78.

judicial logrolling are commonplace,<sup>94</sup> but testing for this effect would require data on judge-votes in a large number of cases, because any vote-trading would not necessarily be limited to section 2 cases. Other forms of bargaining among 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.<sup>95</sup> Of course, this form of moderation—in the content of an opinion—is not detectable in an analysis of judge-votes. Relatedly, when a judge is in the minority, drafting a dissent is time-consuming, and it may sacrifice goodwill among colleagues. If a dissent irks a judge's colleagues, it also may ultimately be counterproductive in effecting future logrolling.

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 influenced by the political orientations 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 the disenfranchisement of African-Americans in the South.<sup>96</sup> Moreover, claims raised under section 2 of the Act are brought on behalf of racially-defined groups of voters. Given the central role of race in this type of litigation, 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.<sup>97</sup> In

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94. Burton M. Atkins & Justin J. Green, Consensus on the United States Courts of Appeals: Illusion or Reality?, 20 Am. J. Pol. Sci. 735, 739–40 (1976) (describing suspicions of judicial logrolling in federal circuit courts); Caminker, *supra* note 90, at 2300 (noting that “stark vote trading across unrelated cases [is] roundly condemned”); see also Bob Woodward & Scott Armstrong, *The Brethren* 225 (1979) (suggesting Justice Brennan voted contrary to his legal opinion to curry favor with Justice Blackmun); Farhang & Wawro, *supra* note 86, at 308–09, 325 (considering but rejecting possibility that logrolling explains voting patterns in employment discrimination cases).

95. See Caminker, *supra* note 90, at 2317–20; Stephen J. Choi & G. Mitu Gulati, Trading Votes for Reasoning: Covering in Judicial Opinions 4–7 (Duke Univ. Law Sch. Legal Studies Research Paper Series, Paper No. 166, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1010311](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010311) (on file with the *Columbia Law Review*).

96. See, e.g., David J. Garrow, *Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965*, at 31–133 (1978) (discussing history of passage of Voting Rights Act in 1965).

97. This figure makes African-American 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

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 dataset who are not either African-American or white.

1. *Individual Effects.* — Table 3 reports the rates at which judges vote to impose liability in section 2 cases, grouped by the race of the judge. The data include 22 judges whom we identify as African-American, and 43 votes by these judges in section 2 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)	
(A) All Judges	.558 (.077) [43]	.261 (.017) [636]	<b>.297**</b> <b>(.070)</b>
(B) Democratic	.559 (.086) [34]	.337 (.029) [273]	<b>.222**</b> <b>(.087)</b>
(C) Republican	.556 (.176) [9]	.204 (.021) [363]	<b>.352**</b> <b>(.137)</b>
(D) Difference of (B)–(C)	<b>.003</b> <b>(.191)</b>	<b>.133**</b> <b>(.035)</b>	—

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 category of “Other” covers all racial and ethnic categories other than African-American, including Caucasian, Asian American, Native American, and Hispanic.

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 56% of the time to impose liability, while the remaining judges voted to impose liability only 26% of the time. The nearly 30 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. 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 African-American judges is relatively small. Nonetheless,

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groups about 23% of the time. But even in cases involving plaintiffs of only one race, African Americans were the plaintiffs 60% of the time.

the difference in the voting rates of the African-American and non-African-American 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.<sup>98</sup> This earlier research focused on criminal and employment discrimination cases, presumably because these types of cases were likely to present racially salient issues. But the research has not unearthed any meaningful differences in the decisionmaking patterns of judges of different races.<sup>99</sup> A series of studies on sentencing in state and municipal courts found that white and African-American judges impose roughly similar sentence lengths.<sup>100</sup> 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*.<sup>101</sup> A study of sentencing in federal district courts similarly found no relationship between sentencing patterns and the race of the judge.<sup>102</sup>

Interestingly, researchers have identified disparities in voting patterns that correlate with the sex of a judge. Two recent studies of federal appellate employment discrimination decisions have found that female judges were more likely than male judges to vote in favor of a plaintiff's

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98. 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 99–103 and accompanying text.

99. Because our analysis focuses on VRA cases, it does not speak to the question whether ideological or demographic judicial characteristics influence decisionmaking in cases not presenting racially 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. Legal Stud.* 257, 277–81 (1995) (reporting that race, gender, and partisan affiliation of judges does not affect outcomes in set of decisions representing the day-to-day docket of federal trial courts).

100. Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 *Am. J. Pol. Sci.* 884 (1978) (finding that African-American and white trial judges convict criminal defendants at roughly same rate and impose sentences of approximately same length); cf. Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 *Soc. Sci. Q.* 749, 757–61 (2001) (reporting weak correlations suggesting that African-American judges were more likely to impose sentence of incarceration and gave slightly shorter average sentences).

101. Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 *Law & Soc'y Rev.* 1197, 1207, 1209 (1990) (finding that African-American and white judges impose longer sentences on African-American defendants); Susan Welch et al., *Do Black Judges Make a Difference?*, 32 *Am. J. Pol. Sci.* 126, 131–34 (1988) (reporting that African-American and white judges exhibited modest differences by race of defendant in likelihood of sentencing defendants to incarceration and length of incarceration).

102. Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Demographic Characteristics*, 34 *J. Legal Stud.* 57, 85 (2005).

discrimination claim. These studies too, however, identified no meaningful impact with respect to a judge's race.<sup>103</sup>

Our results are, we believe, the first to find a strong relationship between the race of a judge and the judge's voting behavior. This raises the question why the racial differences we document in section 2 cases do not seem to be present in other areas of the law—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 thought “preservative of all rights,”<sup>104</sup> may possess a distinctive valence that the criminal sentencing and employment discrimination 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 in section 2 cases than judges who are not African-American? This question is a large one, and adequate treatment of it is beyond the scope of this Article, 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 why white judges are less likely than African-American judges to vote in favor of section 2 liability. One possibility is that judges in these cases are influenced by their personal experiences, and that white and African-American judges tend to have different life experiences. For example, African-American 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 occupational segregation, it would not be surprising if African-American and white judges

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103. Farhang & Wawro, *supra* note 86, at 319; Peresie, *supra* note 92, at 1774. 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, 144–48 (2000) (concluding that voting patterns of female and minority judges were largely similar to those of male and white judges); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 *J. Pol.* 596, 604–11 (1985) (finding that female and male judges voted similarly except that females were more likely to support federal economic regulation, and male judges were more likely to support personal rights claims and nonfemale minority issues, and reporting no significant differences by race of judge).

104. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“[T]he right of suffrage is . . . fundamental . . . in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right . . . to vote must be carefully and meticulously scrutinized.”).

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 African-American judges in our dataset may simply be more liberal than the white judges in our data. To be sure, our findings regarding race do not appear to be driven by the fact that most of the African-American judges in our data are Democrats. Table 3 shows that even within each party the effect of race is strong. African-American Democratic appointees are more than 20 percentage points more likely to vote in favor of liability than other Democratic appointees. A similar pattern obtains for Republican appointees (though the number of observations is too small for the pattern to be meaningful). And as we will explain below, controlling simultaneously for race and party in our regressions does not undermine the significance of either.<sup>105</sup>

Still, the party of the appointing President is obviously a crude proxy for the political ideology of each judge. This binary variable might mask ideological variation among judges who were all appointed by Presidents of the same party. If the ideological variation among appointees of the same party were strongly correlated with race, that could explain our result above. (In other words, using party as a proxy cannot eliminate the possibility that African-American Democratic appointees are more liberal than white Democratic appointees.) But even if we use other, more fine-grained measures of political ideology—measures that account for both the ideological differences among Presidents of the same party and for the role that senatorial courtesy plays in the judicial appointments process—we still uncover no evidence that African-American appointees of either party are more liberal than other appointees of that party.<sup>106</sup> Accordingly, one should be at least somewhat skeptical of the intuition that the African-American Democratic appointees in our dataset are systematically more liberal than other Democratic appointees.<sup>107</sup>

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105. See *infra* Part II.C.

106. For a more fine-grained measure, we use the Rosenthal-Poole scores discussed below. See *infra* note 117. According to our calculations, when senatorial courtesy is not considered, the average common space score for the African-American Democratic appointees in these data is  $-.45$  while the average for other Democratic appointees is  $-.43$ . Adjusting for senatorial courtesy on district court appointments, these figures are  $-.38$  and  $-.37$ , respectively. Although the number of African-American Republican appointees in our data is small, their common space scores are also very close to those of the other Republicans in the data. When senatorial courtesy is not considered, the average common space score for the African-American Republican appointees in these data is  $.49$ , and the average for other Republican appointees is  $.47$ . When senatorial courtesy is considered for district court judges, these figures are both  $.41$ . Using this measure of political ideology, African-American judges appear essentially identical to their white co-partisans.

107. Other biographical characteristics of the judges provide additional 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, compared to 55% of the African-American judges. Thus, their prior professional experience does not obviously suggest liberal views.

Even if further research uncovered evidence that African-American judges were systematically more liberal than other judges appointed by Presidents of the same political party, that would not undermine our results. We are interested in the question whether African-American federal judges exhibit significantly different voting behavior in voting rights cases than their (mostly white) counterparts. Our results uncover just such a difference. If it turns out that that difference is the product of more liberal views among African-American judges, that simply raises new questions—about why white and African-American appointees of the same party have systematically different ideological views, and about why those different views do not produce different voting patterns in other doctrinal arenas.

2. *Panel Effects.* — Like political affiliation, it is possible that the race of a judge exerts a panel 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 these data. Still, the data contain 28 panel decisions in which an African-American judge participated.<sup>108</sup> These panels include 54 observations of a non-African-American judge sitting on a panel with a judge who is African-American.<sup>109</sup> 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.

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 19 percentage points higher when an African-American judge was a member of the panel. The effect is larger than that of changing the political 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 13 percentage points when she goes from sitting with two Democrats to sitting with two Republicans.<sup>110</sup> Similarly, the difference in the probability of a Republican appointee voting in favor of liability changes by 13 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 partisan panel effects.

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108. Twenty of these were appellate panels. The remaining eight were trial panels.

109. 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 28 panels in this subset of the data had a single African-American judge, this would provide 56 observations. Our data include two panels on which there were two African-American judges, however, which accounts for the fact that there are only 54 observations in Table 4.

110. See *supra* Part II.A.2.

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	.407 (.067) [54]	.220 (.021) [423]	<b>.188**</b> <b>(.061)</b>
(B) Votes by Such Judges who are Democratic Appointees	.550 (.114) [20]	.289 (.032) [197]	<b>.261**</b> <b>(.108)</b>
(C) Votes by Such Judges who are Republican Appointees	.324 (.081) [34]	.159 (.024) [226]	<b>.164**</b> <b>(.070)</b>
(D) Difference of (B)-(C)	<b>.226*</b> <b>(.138)</b>	<b>.130**</b> <b>(.040)</b>	—

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 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 rose by 26 percentage points for Democratic appointees and by 16 percentage points for 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 to exert just as much influence on a judge's vote as did the addition of the first member of that political party. 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 involved 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 evidence that the presence of a minority judge on a judicial panel influences the votes of other members of that panel. Previous scholarship has tested for, but not found, evidence of panel effects by race.<sup>111</sup> This is particularly interesting in light

111. See Farhang & Wawro, *supra* note 86, at 326 (finding racial composition of panels in federal court of appeals does not significantly affect outcome); Peresie, *supra*

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.<sup>112</sup> 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 is almost entirely ignored by the existing empirical literature of judicial behavior. Because 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 colleagues on a panel matter so much? And why does it appear to 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.<sup>113</sup> The vast majority of section 2 litigation is brought by African-American plaintiffs, and nearly all the judges in our dataset who are not African American are white. In light of this, why might a white judge vote differently when he sits with an African-American judge in a section 2 case? One possibility is that the white judge's sincere view of the merits of the case changes when he deliberates with an African-American judge. The African-American judge may have different experiences or information relating to discriminatory practices, and this might lead the white judge to reevaluate his view. Moreover, beyond experience or information, there are a number of other ways in which the presence of an African-American 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 an African-American 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 African-American panel members. Logrolling also might be present, though it is difficult to determine how prevalent logrolling would be. If African-American 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

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note 92, at 1774 (noting "past research has not generally borne out [the] expectation" that "minority judges are more likely to make liberal decisions than white judges").

112. See Farhang & Wawro, *supra* note 86, at 324 (finding "male judges vote more liberally when one woman serves on a panel with them"); Peresie, *supra* note 92, at 1778 (concluding that presence of female judge on panel "more than doubled the probability that a male judge ruled for the plaintiff").

113. See *supra* Part II.A.2 (discussing effects of judge's colleagues on both her sincere and strategic voting preferences).

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 African-American judges have different preferences than other judges across a whole host of cases, then African-American 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 or desire to bargain with them.

### C. *The Robustness of Partisanship and Race*

Our summary statistics suggest that a judge's votes are affected by 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 that a judge votes 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.

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.<sup>114</sup> Table 5 presents the first set of regression results.<sup>115</sup>

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

115. To make it easier to interpret our results, the regression results in Table 5 show the marginal effects for each explanatory variable instead of the regression coefficients. This simply means that the numbers listed in Table 5 reflect percentage changes in the likelihood of a judge finding liability. To see this, consider for example the first row of Table 5. 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

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	.145** (.035)	.151** (.037)	.158** (.044)	.163** (.042)	.164** (.041)	.150** (.037)
Judge Was Democratic Appointee * Year Was After 1994	—	—	-.021 (.072)	—	—	—
One Additional Dem. Appointee on Panel	—	—	—	.044 (.050)	—	—
Two Additional Dem. Appointees on Panel	—	—	—	.121 (.088)	—	—
One Additional Dem. Appointee on Appellate Panel	—	—	—	—	.114* (.063)	—
Two Additional Dem. Appointees on Appellate Panel	—	—	—	—	.226** (.110)	—
Case Occurred in Jurisdiction Covered by § 5 * Appellate Case	—	—	—	—	—	-.242** (.075)
Year Was After 1994	-.123** (.050)	—	—	—	—	—
Case Occurred in South	.016 (.057)	—	—	—	—	—
Appellate Case	-.084 (.051)	-.102* (.053)	-.103* (.053)	-.138** (.062)	-.203** (.069)	-.019 (.062)
Challenge to At-large Election	.104 (.070)	.078 (.069)	.077 (.070)	.078 (.070)	.086 (.069)	.079 (.069)
Challenge to Reapportionment Plan	.054 (.073)	.034 (.073)	.034 (.073)	.027 (.073)	.049 (.074)	.034 (.073)
Challenge to Local Election Practice	.005 (.059)	-.018 (.062)	-.018 (.062)	.014 (.066)	.001 (.061)	-.008 (.062)
Plaintiffs Were African-American	.027 (.068)	.114* (.064)	.114* (.064)	.116* (.064)	.120* (.062)	.109 (.067)
Case Occurred in Jurisdiction Covered by § 5	.046 (.063)	.045 (.069)	.045 (.068)	.045 (.068)	.047 (.069)	.253** (.098)
Log-likelihood	-378.540	-343.654	-343.618	-342.084	-339.965	-338.245
Pseudo-R2	.0595	.1273	.1274	.1313	.1366	.1410

Notes: \* means significant at 10% level. \*\* means significant at 5% level. With the exception of Model (1), all regressions also include fixed-effects controls for judicial circuits and years. For Model (1), the number of observations is 679; for subsequent models, the number of observations is 653. The subsequent models exclude 26 observations because fixed-effects estimates cannot be obtained for one circuit (the D.C. Circuit) and certain years due to the lack of variation in judge votes within that circuit and those years.

a. *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

marginal effect is .145, which means that a judge was 14.5 percentage points more likely to vote in favor of liability if she is a Democrat rather than a Republican.

examined in Part I, as well as a number of other variables.<sup>116</sup> Those models indicate that appointment by a Democratic President rather than a Republican one implies an almost 15 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 36% of the time to impose liability and Republican appointees did so 21% of the time.<sup>117</sup>

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

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116. The only difference between Model (1) and Model (2) is that Model (2) (as well as the remainder of the models in Table 5 and Table 6) includes so-called fixed effects for years and judicial circuits. See *supra* note 114 (explaining formula for Model (2)). 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.

117. Moreover, these results are robust to other measures of political ideology. Although we report estimates using the party of the appointing President, we noted above that other ideological proxies are available. One of the most common, developed by political scientists Howard Rosenthal and Keith Poole, assigns judges the common space scores of their appointing Presidents. Keith T. Poole & Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (1997); Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 *Am. J. Pol. Sci.* 954 (1998). This measure of judicial ideology is sometimes adjusted to reflect the practice of "senatorial courtesy," which provides a role for home-state senators in the selection of judicial appointees. See Giles et al., *supra* note 71, at 623 (finding that when "senatorial courtesy" is relevant in the judicial selection process any link between presidential preferences and judicial outcomes disappears). We reestimated the regressions using these common space measures rather than the party of the appointing President. Both measures showed a substantial and statistically significant impact for judicial ideology. The basic Rosenthal-Poole measure produced a coefficient of  $-.166$  (standard error =  $.040$ ). When we adjusted this measure for the practice of senatorial courtesy in the appointment of district court judges (for whom the practice is most robust), the estimate was  $-.193$  (standard error =  $.043$ ). These estimates imply that a judge who is most conservative favors the voting rights plaintiff less often than a politically neutral judge by about 16 to 19 percentage points. The insensitivity of our conclusions about the influence of judicial ideology to the particular measure used is consistent with other research on judicial decisionmaking. See, e.g., Sisk & Heise, *supra* note 72, at 794 (showing that party of appointing President and common space scores lead to similar inferences about effect of judicial ideology in religious freedom cases).

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,  $-.021$ , is only about two percentage points, and 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. 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  $.158$  is essentially identical to the estimate of  $.151$  in Model (2), and it remains statistically significant. Thus, it is tempting to conclude that the partisan gap does not trend significantly over time.

But it is worth noting that the standard errors on the interaction term are relatively large. Their size means that we cannot reject the possibility that the coefficient on the interaction term is equal to  $-.158$ —the value that would indicate that Democratic appointees voted identically to Republican appointees in the post-1994 period. In other words, the imprecision of the estimates prevent us from either rejecting or accepting the hypothesis that in more recent years the partisan gap vanished.

Somewhat 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 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  $.095$  (standard error =  $.077$ ).<sup>118</sup> The baseline estimate for a Democratic appointment falls to  $.101$  (standard error =  $.051$ ) but remains statistically significant at the 5% level. Although the coefficient on the interaction term is imprecisely estimated, its magnitude is consistent with the summary statistics and suggests that challenges to at-large election practices are particularly divisive. This finding provides potential support for the theory that challenges to at-large practices are more polarizing because the partisan consequences of dismantling an at-large election system are often so clear.

b. *Panel Effects.* — As we explained in Table 2 above, the raw data revealed a pattern of partisan panel effects in section 2 cases. The next regressions in Table 5 test for the continued presence of partisan panel effects after conditioning on other factors. Model (4) includes two binary

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

variables for whether a judge cast her vote while sitting with one or two Democratic appointees. The estimated coefficients for these variables ascend in magnitude. The estimated impact of one Democratic co-panelist is about four percentage points. The point estimate for sitting with two Democratic co-panelists is a 12 percentage point increase in the likelihood that the judge votes in favor of liability. 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 neither 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,<sup>119</sup> and this feature of section 2 provides an 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 at the appellate stage for several reasons. Panel trials are so rare that judges may have no expectation of repeat play, which may be an 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.

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 the 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. This focus produces strikingly different results. At 11.4%, and 22.6%, respectively, the estimated effects for partisan composition on appellate panels are more than double 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.

The presence of the variables for panel composition has some effect on the estimated impact of appointment by a Democratic President. In Models (4) and (5), the estimated effect for a Democratic appointment remains statistically significant and its magnitude changes little. These estimates imply 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 16 percentage points. When evaluated together, the es-

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119. See *supra* note 32 and accompanying text.

timated 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 23 percentage points higher than that of a Democrat serving on an appellate panel with two Republicans.<sup>120</sup> 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.<sup>121</sup>

2. *Race*. — The summary statistics in Tables 3 and 4 suggest that a judge's race and the race of other panel members correlate strongly with that 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 from the Federal Judicial Center. 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

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120. The other implied magnitudes are also large. For example, the probability that a Democrat serving on an appellate panel with two other Democrats votes in favor of liability is about 19 percentage points ( $.164 + .226 - .0203$ ) higher than that of a Republican judge presiding alone at trial.

121. 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. Although not reported in Table 5 to conserve space, we tested 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 have taken 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 the case. 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.

This model 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.

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-American judges 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.

a. *Individual Effects.* — Model (1) in Table 6 tests for the importance of a judge's demographic characteristics on his decisionmaking in section 2 cases 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 30 percentage points more likely than a judge who is not African-American 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 of gender provides a sharp contrast. Male and female judges appear to have virtually the same voting rates. 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. Moreover, the magnitude of the estimated partisan effect is only slightly smaller than in the model that lacked race and gender controls—about 12.5 percentage points rather than 15—and the two estimates are statistically indistinguishable.<sup>122</sup> The estimates support the conclusion that partisan affiliation exerts an influence on voting behavior independent from that of race.

The race finding is especially compelling because other demographic factors that we might think would be 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

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

TABLE 6. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING FOR SECTION 2  
LIABILITY: PROBIT REGRESSION ANALYSIS FOCUSING ON  
JUDICIAL CHARACTERISTICS

Variable	(1)	(2)	(3)	(4)	(5)	(6)
Judge Was Democratic Appointee	.125** (.037)	.128** (.038)	.130** (.038)	.140** (.037)	.166** (.039)	.155** (.038)
Judge Was African-American	.300** (.081)	.353** (.093)	.350** (.088)	—	—	—
Judge Was Female	-.020 (.056)	—	—	—	—	—
At Least One African-American Judge on Panel	—	.255** (.110)	—	—	—	—
At Least One African-American Judge on Appellate Panel	—	—	.398** (.118)	—	—	—
Judge's Age	—	—	—	.003 (.002)	—	—
Judge Attended Ivy League College	—	—	—	—	.018 (.051)	—
Judge Attended Elite Law School	—	—	—	—	-.078* (.041)	—
Judge Previously Served as Law Clerk	—	—	—	—	.016 (.044)	—
Judge Previously Served in State Legislative or Executive Branch	—	—	—	—	—	.021 (.039)
Judge Previously Served on State Court	—	—	—	—	—	-.056 (.040)
Judge Previously Served in Federal Legislative or Executive Branch	—	—	—	—	—	-.002 (.036)
Log-likelihood	-337.442	-332.257	-328.255	-342.188	-342.315	-342.718
Pseudo-R2	.1430	.1562	.1664	.1295	.1307	.1296

Notes: \* means significant at 10% level. \*\* means significant at 5% level. These regressions include the same controls as in Model (2) of Table 5: controls for whether the case occurred in a jurisdiction covered by section 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. As described in the note to Table 5, the number of observations for each of these models is 653.

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 eight percentage points for a judge having attended an elite law school.<sup>123</sup> But this estimate is half of the magnitude of that for partisan affiliation, and it is only marginally statistically significant. The estimates for attendance at an Ivy League college and clerkship experience are each two percentage

123. 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 underinclusive list and coded only Yale, Harvard, Stanford, Chicago, Columbia, and Michigan as elite.

points or less and are 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 measures service in the executive branch or legislature at the state level, and the other reflects 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, each of them implies an effect of less than six percentage points. The weakness of the estimates for these dimensions of a judge's experience indicates that, in contrast to race, these aspects of a judge's background have little connection to how judges decide section 2 claims.

b. *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 26 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 than on 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 13 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 the outcome of these cases: (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.

1. *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—that is, in the first half of the period that we studied. Thus, the volume of section 2 decisions concerning liability 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 16 percentage points lower after 1994 than before.<sup>124</sup> Model (1) of Table 5 provides additional support for this conclusion.<sup>125</sup> The coefficient on the variable for the post-1994 period implies (with statistical significance) that judges were 12 percentage points less likely to vote in favor of liability after 1994.<sup>126</sup> Thus, even after controlling for other characteristics, the rate at which the average judge favors section 2 plaintiffs has generally declined.<sup>127</sup>

2. *Location.* — Model (1) in Table 5 also allows us to reassess the importance of region in the likelihood that 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.<sup>128</sup> This result contrasts with the raw data, which showed somewhat higher rates of liability in southern cases.<sup>129</sup> 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 pro-

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124. See *infra* Appendix I, row (B).

125. 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 116.

126. The other models do not report the estimates for the circuit and year fixed effects in order to conserve space. But the coefficients on the year fixed effects in these models confirm the patterns already observed in the data. They indicate 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.

127. The estimate for the post-1994 period captures the decline in the average rate at which judges vote for section 2 plaintiffs. As previously discussed, Model (3) of Table 5 could neither confirm nor reject that the gap between Democrats and Republicans in the rates at which they favored section 2 plaintiffs was relatively constant over time.

128. 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 116.

129. The estimates for the circuit fixed effects in the other models are consistent with the finding in Model (1) that the South is not an important explanatory variable. With one small exception, 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. The only exception is the First Circuit: 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.

cedures 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 significantly more likely to impose liability under section 2 than decisions in other jurisdictions.<sup>130</sup> Our analysis reveals that the role of section 5 coverage is considerably more complex.

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 25 percentage points in covered jurisdictions compared to uncovered jurisdictions. In contrast, for appellate judges, this difference is only one percentage point ( $= .253 - .242$ ), 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 26 percentage points ( $= .242 + .019$ ) 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 two percentage points, a gap that was not statistically distinguishable from zero.

These results cast doubt on the conventional view that section 5 coverage increases the probability that a judge votes in favor of liability. The conventional view does not acknowledge 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.

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130. See Katz, *Not Like the South*, *supra* note 28, at 29. 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 analysis, the decisions of trial judges presiding alone comprise a larger proportion of the dataset, 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 dataset, because each case heard by a panel contributes three observations to the dataset while single-judge trials contribute one observation. For example, the estimates of Model (6) in Table 5 contrast with row (D) in Appendix I.

3. *Practice Types.* — Last, the summary statistics in Part I suggested that liability rates were slightly higher in challenges to local practices than to 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 .104 and is statistically insignificant. When the simple time and place variables are replaced with the more detailed set, the estimate falls from .104 to .078. As described in Part I, this weakening is due to the fact that the number of at-large challenges declines substantially over this period.<sup>131</sup>

#### E. *Summary of Findings*

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

First, 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 15 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.

Second, we find that a judge's race exerts even more influence than his partisan affiliation. African-American judges are, on average, more than twice as likely as white judges to find that minority citizens' voting

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131. 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 three 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 Appendix I, 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 11 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.

rights were violated under section 2. African-American judges vote in favor of liability more than half the time, while judges who are not African-American do so 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 substantially more likely to vote in favor of liability when they sit with an African-American judge than when they do not.

Third, we find that the race and partisanship of judges correlate 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 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 combined findings concerning 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*

Which institutional structures are best situated to protect minority voting rights? This question was central to the development of the Voting Rights Act and is crucial to many debates about the Act today. In 1965, Congress designed the Act to make use of two different institutions: federal courts for nationwide enforcement, and the Justice Department for the particularly troublesome areas of the country subjected to the preclearance requirements.<sup>132</sup> In August 2006, Congress reauthorized those preclearance provisions.<sup>133</sup> 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.<sup>134</sup>

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

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132. See *supra* text accompanying notes 46–50.

133. See *supra* text accompanying note 50.

134. See, e.g., Issacharoff, *Victim of Its Own Success*, *supra* note 8, at 1730–31.

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.<sup>135</sup> The centralized Justice Department review embodied in section 5 will not result in the same partisan variation across 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 only one of many ways 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.<sup>136</sup> This disagreement focuses centrally on the consequences of case law 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.<sup>137</sup>

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.<sup>138</sup> Unfortunately, the regression analysis in this Article can neither confirm nor reject whether this has occurred. The partisan

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135. Still, it is far from clear that it is appropriate to make such tradeoffs across cases, particularly given that the lawsuits in our data generally concern entirely unconnected governmental institutions. For a general discussion of when such tradeoffs may be appropriate, see Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 *Sup. Ct. Rev.* 409.

136. See *supra* notes 75–76 and accompanying text.

137. See *supra* text accompanying note 59 (noting that challenges to at-large election practices continued to constitute a majority of section 2 litigation until just a few years ago); *infra* Appendix I (showing that challenges to at-large election practices dominate section 2 litigation). One important caveat is that our data focus only on section 2 litigation. Debates about the partisan consequences of the Voting Rights Act have also concerned the effects of section 5 enforcement, and we cannot identify the patterns of section 5 disputes. It is possible that very different patterns are present in section 5 preclearance disputes.

138. See *supra* notes 77–82 and accompanying text.

gap between the rates at which Democratic and Republican appointees vote for liability has declined over time, but our tests cannot confirm that this decline is statistically significant.

This suggests a few different possibilities. On the one hand, the lack of a statistically significant finding might be taken to be 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, we might expect stronger results if the partisan consequences actually have changed substantially over time. But even if section 2 litigation actually *has* become less beneficial for the Democratic Party, there are reasons why this change might not translate into statistically significant changes in the relative behavior of Democratic and Republican appointees. Perhaps federal judges are relatively unskilled at assessing the partisan consequences of section 2 liability in many cases. If so, they might not react strongly to changes in the actual partisan consequences. Or perhaps judges are motivated by something other than just partisanship or party loyalty. For example, Democratic appointees might simply be more committed to the descriptive representation of minority voters than to their party. If so, they might conclude that voting for liability still advances that goal even if it does not advance the interests of the Democratic Party.<sup>139</sup> Our data cannot distinguish between these 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.<sup>140</sup> Our findings contribute to that debate by unearthing the effects of such diversity on the adju-

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139. 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. See David Epstein & Sharyn O'Halloran, Trends in Substantive and Descriptive Minority Representation, 1974–2000, *in* *The Future of the Voting Rights Act* 61, 61 (David Epstein et al. eds., 2006); sources cited *supra* notes 75–76.

140. In addition to the empirical social science literature concerning racial diversity that we discussed earlier, there is a substantial nonempirical literature by legal scholars. See, e.g., Paul Brest, *Who Decides?*, 58 S. Cal. L. Rev. 661, 664 (1985) (discussing significance for legal interpretation of fact that “judges, especially federal judges . . . are overwhelmingly Anglo, male, well educated, and upper or upper middle class”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000) (arguing that racial diversity in judiciary improves judicial decisionmaking and promotes legitimacy); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Bench*, 10 Mich. J. Race & L. 5, 10, 24–33, 45–52 (2004) (arguing that increased racial diversity on the bench “would

dication 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.<sup>141</sup> 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 all potentially mixed panels produced roughly the same outcomes in our data—regardless of whether the panels contained one or two Democratic appointees—but that the pure Democratic and pure Republican panels produced highly 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.<sup>142</sup> After all, if outcomes were all about ideology and not at all about law, then we might think that the panels with two Democratic appointees would produce more liberal results than the panels with only one Democratic appointee. 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 are in part 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 representa-

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both benefit the decision-making process and improve public perception of the impartiality of judicial decision-making").

141. See *supra* Part II.B.2.

142. For an empirical study supporting this proposition, 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).

tion) or instead on promoting the interests of racial minorities (substantive representation).<sup>143</sup> 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.<sup>144</sup> 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 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 the Voting Rights Act and the role of diversity in the federal judiciary. Our hope is that this Article will help advance those conversations.

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143. For a good example of a case in which judges disagree over which goal the Act should pursue, compare *Georgia v. Ashcroft*, 539 U.S. 461, 482–85 (2003) (O’Connor, J.) (concluding that section 5 obligates courts to defer to states’ choices about how to make trade-offs between descriptive and substantive representation), with *id.* at 493–95 (Souter, J., dissenting) (arguing that section 5 focuses principally on promoting descriptive representation).

144. See, e.g., Harry T. Edwards, *Race and the Judiciary*, 20 *Yale L. & Pol’y Rev.* 325, 328 (2002); Ifill, *supra* note 140, at 409–11.

APPENDIX I. CHARACTERISTICS OF CASES AND RATE OF FINDING  
SECTION 2 LIABILITY

Characteristic	Fraction Finding § 2 Liability Among Cases . . .			Difference of (2)-(3): (4)
	Fraction of Cases with this Characteristic (1)	. . . with this Characteristic (2)	. . . without this Characteristic (3)	
(A) All Cases	1.000 (.0000) [341]	.302 (.025) [341]	—	—
(B) Cases Decided After 1994	.387 (.026) [341]	.205 (.035) [132]	.364 (.033) [209]	-.159** (.050)
(C) Cases Occurring in the South	.636 (.026) [341]	.341 (.032) [217]	.234 (.038) [124]	.107** (.052)
(D) Cases Occurring in Jurisdictions Covered by § 5	.276 (.024) [341]	.394 (.051) [94]	.267 (.028) [247]	.126** (.055)
(E) <i>Practices Challenged</i>	.540 (.027) [341]	.337 (.035) [184]	.261 (.035) [157]	.076 (.050)
(E1) At-Large Elections	.346 (.026) [341]	.297 (.042) [118]	.305 (.031) [223]	-.008 (.052)
(E2) Other Practices	.158 (.020) [341]	.222 (.057) [54]	.317 (.028) [287]	-.095 (.068)
(F) Challenge to Local Election Practice	.718 (.024) [341]	.322 (.030) [245]	.250 (.044) [96]	.072 (.055)
(G) <i>Plaintiff Race or Ethnicity</i>				
(G1) African-American	.830 (.020) [341]	.307 (.027) [283]	.276 (.059) [58]	.032 (.066)
(G2) Latino	.302 (.025) [341]	.223 (.041) [103]	.336 (.031) [238]	-.113** (.054)
(G3) More than One Racial Group	.232 (.025) [341]	.241 (.048) [79]	.321 (.029) [262]	-.080 (.059)
(H) <i>Type of Court Hearing the Case</i>				
(H1) Single Trial Judge	.504 (.027) [341]	.349 (.036) [172]	.254 (.034) [169]	.094* (.050)
(H2) Trial Panel	.106 (.017) [341]	.306 (.078) [36]	.302 (.026) [305]	.004 (.081)
(H3) Appellate Panel	.390 (.026) [341]	.241 (.037) [133]	.341 (.033) [208]	-.101** (.051)

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