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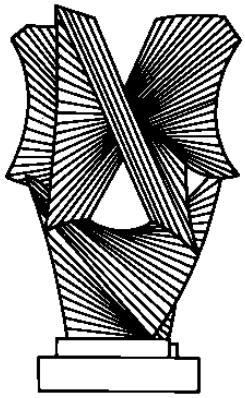

JUDICIAL IDEOLOGY AND THE TRANSFORMATION OF VOTING RIGHTS JURISPRUDENCE

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For two decades, the doctrinal test laid out in *Thornburg v Gingles* has been the centerpiece of vote dilution litigation in the United States. *Gingles* defined a sequential, two-part framework combining a set of rule-like preconditions to liability with a standard-like inquiry into the totality of the circumstances. Despite this elaborate framework, emerging empirical work shows that political ideology connects closely with how judges have decided vote dilution cases; Democratic appointees have proven much more likely than Republican appointees to favor liability under Section 2 of the Voting Rights Act. This work raises the question of what role the *Gingles* framework really plays in voting rights litigation. More basically, it raises the fundamental question of whether legal doctrine actually constrains judicial decisionmaking. Using a dataset of every Section 2 decision issued since *Gingles*, this Article explores these twin puzzles. It finds substantial evidence that legal rules are indeed more ideologically constraining than standards. Ideological divisions are much more pronounced in the standard-like second step of *Gingles* than under the more rule-like preconditions. Moreover, the Article shows that the doctrinal dynamics of vote dilution litigation have changed dramatically over the past two decades. As the representational and political implications of vote dilution claims have shifted, the *Gingles* factors that both judges and scholars claim are central to the liability inquiry have become far less important. Courts' sharp movement away from the centrality of the *Gingles* factors amounts to a largely unrecognized second transformation of voting rights litigation.

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INTRODUCTION

The history of Voting Rights Act litigation is usually told as a tale of formal jurisprudential change. The history divides voting rights litigation into two periods separated by a sharp break—a break marked by an amendment to the text of the statute and by the introduction of a new doctrinal framework. The amendment occurred in 1982, when Congress recast Section 2 of the Act as the central judicial tool for enforcing minority voting rights.[1] The Supreme Court responded to this revision a few years later by forging a new doctrinal framework in the seminal case of *Thornburg v Gingles*.[2] This transformation by Congress and the Court ushered in the modern era of vote dilution litigation. Lawsuits brought under Section 2 became a centrally important mechanism for the enforcement of minority voting rights. And the framework laid down in *Gingles* became the linchpin in this litigation.[3]

This Article argues that the standard history is incomplete. The focus on the formal features of voting rights doctrine, while important, leaves out the actual practices of lower courts that decide voting rights cases. Recently, evidence on how judges decide these cases has begun to emerge. It shows that Democratic appointees were more likely than Republican appointees to vote for liability under Section 2 of the Voting Rights Act, the primary private enforcement mechanism of the Act. Moreover, a judge's race had an even greater effect than partisanship on the likelihood of favoring liability: minority judges voted more than twice as often as white judges in favor of liability. For both partisanship and race, "panel" or "peer effects" were strong. The average Democratic appointee voted in favor of liability under Section 2 more often when she sat with other Democratic, rather than Republican, appointees. Similarly, the average white judge became substantially more likely to vote in favor of liability when she sat with at least one minority judge.[4]

These findings, while important, do not account for the role of *law* in voting rights cases. In this way, the emerging evidence is typical of most modern empirical work on judicial politics. Studies of judicial decisionmaking typically link judicial ideology to ultimate case outcomes without tracing the impact of ideology through the analytical framework of the applicable legal doctrine. For political scientists who adhere to the more extreme versions of the attitudinal model, inattention

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1 The Voting Rights Act Amendments of 1982, Pub L No 97-205 § 3, 96 Stat 131, 134, codified as amended at 42 USC § 1973 (2000).

2 478 US 30 (1986).

3 See text accompanying notes 31–36.

4 Adam B. Cox and Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum L Rev 1, 18–49 (2008).

to law is unsurprising. They believe that the pursuit of judicial policy preferences fully explains judicial behavior; legal variables are irrelevant. But for legal academics, empirical evidence on the relationship between doctrinal structure and ideology should have paramount importance because it informs one of the central controversies (perhaps *the* central controversy) of law: the age-old debate over the choice between rules and standards.

Debates about rules and standards almost inevitably begin with the presumption that rules constrain judges more so than standards. Judicial decisions seemingly provide a wealth of potential empirical data about the strength of this presumption. But by sidestepping legal doctrine almost entirely, studies of judicial behavior fail to capitalize on this resource. Studies that consider whether rule-like doctrines actually exert a more constraining effect than standard-like ones are remarkably rare. In view of the resurgent interest in empirical legal studies,[5] the omission of legal doctrine from statistical studies of judicial decisionmaking is particularly surprising.

This Article begins to remedy that omission by examining the doctrinal framework that the Supreme Court created in *Gingles* for evaluating claims brought under Section 2 of the Voting Rights Act. *Gingles* laid out a sequential, two-part doctrinal framework that combines a set of rule-like preconditions to liability with a more standard-like totality of the circumstances inquiry. This unique doctrinal structure permits us to undertake two sorts of inquiries.

The first inquiry is static: the two-part structure of *Gingles* provides a preliminary means of testing the relationship among rules, standards, and ideological disagreement. The greater indeterminacy and flexibility of standards implies that ideological differences between judges would be more often observed in the application of a standard-like doctrine rather than of a rule-like one.

The second inquiry focuses on the doctrinal dynamics of vote dilution litigation over time. In the two decades since *Gingles* was decided, vote dilution litigation has undergone a remarkable transformation. Changes over time in the types of suits brought and the political realities on the ground have altered the significance of treating the *Gingles* preconditions as central proof of unlawful vote dilution. These movements have both undermined the close connection between the preconditions and minority representation and complicated the question of whether Democrats or Republicans are likely to benefit from rigid

[5] See generally Thomas J. Miles and Cass R. Sunstein, *The New Legal Realism*, 75 U Chi L Rev 831 (2008) (discussing the emergence of the New Legal Realism). **[AP]**

application of the preconditions.[6] These changes allow us to investigate the way in which changes in the characteristics of litigated cases influence the way in which judges apply judicial doctrines. They suggest, for example, that both Democratic and Republican appointees may over time rely less on the *Gingles* preconditions, but that reliance will drop more sharply for Democratic appointees.

Using a data set of every decision issued in a Section 2 case since *Gingles*, we examine the doctrinal route judges choose to follow when either finding or rejecting liability under the Act. We find strong evidence for both sets of predictions. Ideological divisions in judicial voting patterns are more pronounced in the standard-like second step of *Gingles* than in the evaluation of the more rule-like factors—precisely the opposite of what one might suspect given the existing literature's preoccupation with ideological disagreements over the rule-like factors. Moreover, over time the *Gingles* factors that both judges and scholars claim are central to the liability inquiry have become far less important. Judges—particularly Democratic appointees—have concluded less frequently that liability should follow immediately from satisfaction of the *Gingles* preconditions. Courts' sharp movement away from the centrality of the *Gingles* factors amounts to a largely unrecognized second transformation of voting rights litigation.

Uncovering this overlooked transformation enriches our understanding of how the Voting Rights Act has functioned over its near half-century life span. Among other things, it provides important evidence about how federal courts respond to the changes in the political and social circumstances that give rise to voting rights litigation, as well as an additional way to evaluate the doctrinal tools that structure that litigation. In this vein, one might see the transformation in the actual practices of lower courts as something of an endorsement of federal judges' capacities for change. It may reflect judicial responsiveness to the changing racial and partisan consequences of voting rights claims during this period. But the transformation also suggests that these were changes with which the doctrinal framework itself could not keep pace. The growing irrelevance of the *Gingles* framework itself might thus be seen as a critique of the Supreme Court's efforts to create an objective framework for mediating judicial involvement in the political thicket of minority vote dilution claims.

6 See text accompanying notes 39–47.

I. DOCTRINE AND SOCIAL CHANGE

This Part sets the stage by sketching two central aspects of litigation under the Voting Rights Act. Part I.A describes the formal transformation of Section 2 litigation in *Thornburg v Gingles*. This transformation gave rise to the rules-plus-standard doctrinal framework that provides a unique opportunity for analysis. Part I.B lays out the changes in the nature of voting rights litigation that took place in the two decades following *Gingles*—changes with profound implications for the doctrinal framework.

A. Congress, the Court, and *Thornburg v Gingles*

The Voting Rights Act[7] was enacted in 1965 to combat America's long history of excluding African-Americans from politics.[8] Minority voters had been constitutionally entitled to the franchise since the adoption of the Fourteenth and Fifteenth Amendments in the wake of the Civil War.[9] But these formal legal protections had been mostly dead letter since shortly after the end of Reconstruction. Throughout the South, states used a variety of legal mechanisms, often backed by intimidation and violence, to prevent African-Americans from registering to vote and casting ballots.[10] Although courts (and eventually Congress) occasionally intervened,[11] as of 1965 African-Americans in many Southern states were still registered to vote in only trivial numbers.[12]

The Voting Rights Act attacked this discrimination in three ways. First, the Act specifically prohibited (in certain parts of the country) the use of some legal restrictions on the franchise—such as literacy requirements—that were often applied in a discriminatory fashion to prevent potential minority voters from registering.[13] Second, Section 5 of the Act subjected the election practices of some states and local gov-

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7 Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1971 et seq (2006).

8 See Richard M. Valelly, *The Voting Rights Act: Securing the Ballot* ix, 258 (CQ 2006).

9 See US Const Amend XIV, § 1; US 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.").

10 See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 258–59 (Basic 2000); Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1877* 550–63 (Harper Perennial 1989).

11 See, for example, *Nixon v Herndon*, 273 US 536, 540–41 (1927) (striking down a white-only primary in Texas).

12 See J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 55, 145, 201 (North Carolina 1999).

13 See Voting Rights Act of 1965 § 4, 79 Stat at 438–39, codified as amended at 42 USC §§ 1973b–73c (proscribing unlawful use of certain tests or devices as a prerequisite for voting or registration to vote). **[FC at n 7]**

ernments to ongoing federal oversight: these jurisdictions were prohibited from changing their electoral rules without first preclearing those changes through the Justice Department.[14] While the formula that determined which jurisdictions were covered was facially neutral, it was carefully crafted to pick out nearly all of the Deep South states for oversight.[15] Third, Section 2 of the Act created a private right of action authorizing minority voters to sue in federal court to secure their voting rights. That provision closely tracked the language of the Fifteenth Amendment, prohibiting states and political subdivisions from applying a voting rule "to deny or abridge the right of any citizen of the United States to vote on account of race or color."[16]

Section 2 was little used by litigants during the first decade and a half following the passage of the Voting Rights Act. This is not to say that there was no voting rights litigation during this period. Quite the contrary. But perhaps because of Section 2's similarity to the language of the 15th Amendment, nearly all voting rights litigation was brought directly under the Reconstruction Amendments.[17] Nonetheless, this constitutional litigation would eventually prompt the revision of Section 2's statutory language and lead to the first transformation in voting rights litigation. It is therefore helpful to understand how that litigation developed.

The first generation of constitutional litigation concerned claims of "vote denial"—claims that particular legal rules and practices unlawfully denied minority voters access to the ballot. Plaintiffs brought such claims against poll taxes, grandfather clauses, and so forth.[18] But they

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14 See 42 USCA § 1973c (1965) (setting up judicial and administrative procedures that covered jurisdictions were required to follow to ensure that new voting qualifications "will not have the effect of denying or abridging the right to vote on account of race or color").

15 See 42 USC § 1973b(b) (1965) (establishing that the proscriptions on use of certain voting tests will apply to states that have had less than 50 percent of residents of voting age registered as of specified dates).

16 Voting Rights Act of 1965 § 2, 79 Stat at 437, codified as amended at 42 USC § 1973(a) **[FC at n 7.]**. Compare US 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.").

17 See, for example, *White v Regester*, 422 US 935, 935–36 (1975) (per curiam) (holding that parts of Texas's redistricting plan violated the Equal Protection Clause by diluting the votes of minorities); *Whitcomb v Chavis*, 403 US 124, 127 (1971) ("We have before us in this case the validity under the Equal Protection Clause of the statutes districting and apportioning the State of Indiana for its general assembly elections."). Consider also *Gomillion v Lightfoot*, 364 US 339, 340, 345–46 (1960) (relying, prior to the passage of the Voting Rights Act, on the Fifteenth Amendment to evaluate a statute that allegedly redrew the boundaries of the city of Tuskegee in order to segregate voters by race). **[AP]**

18 See, for example, *Harper v Virginia State Board Of Elections*, 383 US 663, 666, 670 (1966) (invalidating a Virginia poll tax of $1.50 because it denied "the opportunity for equal participation by all voters" as required by the Equal Protection Clause of the Fourteenth Amendment).

quickly realized that bare access to the ballot was insufficient to guarantee electoral equality. Litigation turned to second-generation claims of "vote dilution"—claims that particular electoral rules or practices unlawfully diluted the votes of minority voters. Plaintiffs first brought vote dilution claims against at-large (and multimember district) voting arrangements.[19] Over time, single-member districting schemes and other practices were also challenged as vote dilutive.

Courts were initially somewhat receptive to vote dilution claims. But in *Mobile v Bolden*,[20] which concerned the at-large system used to elect Mobile's County Commission, the Supreme Court issued two holdings that brought vote dilution litigation to a near standstill. First, the Supreme Court held that the 15th Amendment prohibited only *intentional* racial discrimination in voting.[21] Second, the Court confirmed that it considered Section 2 to be only a restatement of the Fifteenth Amendment's protections.[22] These twin holdings meant that the plaintiffs in every voting rights case would have to prove that a voting practice was enacted or maintained for an invidious purpose in order to obtain relief under either the constitution or Section 2. *Bolden*'s effect was said to be devastating: "Existing cases were overturned and dismissed," and a good deal of voting rights litigation ground to a halt.[23]

The Court's holding in *Bolden* sparked the first transformation of voting rights litigation. In response to widespread criticism of the case, Congress in 1982 amended Section 2 of the Voting Rights Act.[24] The amendment, designed to overturn *Bolden*'s statutory holding, reworded Section 2 to make clear that proof of discriminatory intent is

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19 See *White v Regester*, 412 US 755, 765–66 (1973); *Whitcomb*, 403 US at 142, 142–44**[FC at n 17]**; Pamela S. Karlan, *The Rights* **[CQ "Rights"]** *To Vote: Some Pessimism About Formalism*, 71 Tex L Rev 1705, 1705–06 (1993) (discussing the Supreme Court's development of vote dilution doctrine). Plaintiffs argued that such systems diluted the votes of minority voters in part by submerging their votes within a larger white majority. To remedy the dilution, plaintiffs often asked courts to break up an at-large system into several single member districts so that minority voters would have a greater chance of electing a candidate of their choice in a least one of these districts.

20 446 US 55 (1980).

21 See id at 62 (plurality) (affirming the principle that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation").

22 Id at 61 (plurality) ("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.").

23 Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in Chandler Davidson, ed, *Minority Vote Dilution* 145, 149 (Howard 1989). See also Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 563, 595 (Foundation 3d ed 2007) (explaining that the case "threw a substantial obstacle in the path of minority plaintiffs" and "virtually shut down" vote dilution suits). **[AR]**

24 See Voting Rights Act Amendments of 1982 § 3, 96 Stat at 134, codified at 42 USC §1973.**[FC at n 1.]**

not required to make out a claim of vote dilution.[25] Moreover, the amendment was accompanied by a Senate report suggesting that courts evaluate vote dilution claims using a multifactor totality of the circumstances test that had been developed by lower courts in pre-*Bolden* cases.[26]

The Supreme Court interpreted the amended Section 2 for the first time in 1986, in the now-seminal case of *Thornburg v Gingles*. But rather than focusing on the multifactor test suggested in the Senate Report and embodied in earlier lower court case law, the Court fash-

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[25] Prior to 1982, the provision prohibited states from using any voting practice "to deny or abridge" minority voting rights. The 1982 Amendment changed the Section 2's language from active to passive voice, so that it prohibited states from using any voting practice "in a manner which results in a denial or abridgement of" minority voting rights. Compare The Voting Rights Act of 1965, Pub. L. No. 89-110, title I, sec. 2, 79 Stat. 437, with 42 U.S.C. § 1971 (2004). To further emphasize that this grammatical change was meant to eliminate the requirement that plaintiffs show intentional discrimination, Congress also elaborated on what was required for liability. As amended, Section 2 now requires plaintiffs to show that, "based on the totality of circumstances **[CQ]** . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by minority voters—a condition satisfied when those voters "have less opportunity than other [voters] . . . to participate in the political process and to elect representatives of their choice." 42 USC § 1973(b)**[FC at n .1]**.

[26] See Voting Rights Act, S Rep No 97-417, 97th Cong, 2d Sess 28–29 (1982), reprinted in 1982 USCCAN 177, 204–07: **[CQ]**

> **[Block]**To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.
>
> Typical factors include: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.
>
> While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.
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> The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other. **[End block, no indent]**

ioned a new doctrinal framework for evaluating Section 2 claims. The *Gingles* framework focused the inquiry on the actual behavior of voters: it moved the existence of racially polarized voting and its effect on the electoral success of minority-preferred candidates to the center of the judicial inquiry.[27] Specifically, the new doctrinal structure included three rule-like preconditions for liability: it required plaintiffs to prove (1) that the minority group is sufficiently large and geographically compact; (2) that the minority group is politically cohesive; and (3) that white voters vote as a bloc and thereby typically defeat minority-preferred candidates.[28]

The Supreme Court eventually clarified that the three *Gingles* factors are necessary but not sufficient conditions for liability under Section 2.[29] Once the preconditions are satisfied, a court is still required to engage in a multifactor balancing inquiry (focusing on the factors identified in the 1982 Senate report) before determining whether vote dilution exists.[30] In other words, Section 2 doctrine is formally structured as a two-stage inquiry—the first stage more rigidly rule-like, the second involving a softer totality of the circumstances test. In practice, however, prominent opinions by lower courts have continued to downplay the significance of the second stage.[31] The idea of the primacy of the first stage *Gingles* factors remains pervasive.

These changes—to the statute and the doctrinal structure—had two transformative consequences. First, Section 2 became the central

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27 **[CQ no signal]**Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich L Rev 1833, 1851–52 (1992).

28 *Gingles*, 478 US at 48–51**[FC at n 2.]**. Both courts and commentators concur that the doctrinal inquiry became more rule-like by focusing initially on these three factors rather than the nine Senate factors. See *McNeil v Springfield Park District*, 851 F2d 937, 942 (7th Cir 1988) ("It reins in the almost unbridled discretion that section 2 gives the courts, focusing the inquiry so plaintiffs with promising claims can develop a full record."); Issacharoff, Karlan and Pildes, *The Law of Democracy* at 618–19 (cited in note 23) ("Are the three *Gingles* factors more 'objective' in some sense than the Senate Report factors? If they are, is *Gingles* yet another manifestation of the [Supreme] Court's preference for bright-line tests?").

29 See *Johnson v De Grandy*, 512 US 997, 1011 (1994) ("[*Gingles*] clearly declined to hold [the three factors] sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution.").

30 See id at 1011–12.

31 See, for example, *Thompson v Glades County Board of County Commissioners*, 493 F3d 1253, 1260–61 (11th Cir 2007):

> **[block]**Although [ ] satisfying the three *Gingles* requirements is not, by itself, sufficient to establish vote dilution[,] . . . it would be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances. **[end block, no indent]**

United States v Charleston County, 316 F Supp 2d 268, 277 (D SC 2003) ("[I]t will be only the *very* unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances."). **[EIO]**

tool of modern vote dilution litigation. After 1982, nearly every vote dilution challenge to an electoral practice included a claim that the practice violated Section 2, whether the lawsuit concerned an at-large electoral arrangement, a statewide redistricting scheme, a felon disenfranchisement statute, or some other type of voting practice.[32]

Second, these changes created a two-stage, rule-plus-standard doctrinal structure for Section 2 litigation. Within this framework, the first stage quickly assumed central importance: the three doctrinal preconditions in the first step of *Gingles* came to be seen as the linchpin of the liability inquiry in modern voting rights litigation. Liability was thought overwhelmingly to rise or fall with the presence or absence of the three requirements laid out by Justice Brennan in that case.

Within the judiciary, this view was articulated as early as *Gingles* itself. Writing separately in that case, Justice O'Connor argued that Brennan's three-pronged test made electoral success the touchstone of vote dilution claims while rendering all other factors nearly irrelevant.[33] Over time, this view came to be commonplace among lower courts as well. Lower courts have repeatedly reiterated that "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances."[34]

Among scholars, the central importance of *Gingles*' doctrinal framework has come to frame many debates in the field of election law.[35] Perhaps the quickest way to get a sense of *Gingles*' dominance is

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32 See Issacharoff, Karlan and Pildes, *The Law of Democracy* at 596 (cited in note 23) ("[Since 1982], the bulk of racial vote dilution litigation [has taken] place under section 2, rather than under either section 5 or the Constitution.").

33 *Gingles*, 478 US at 90–93**[FC at n 2.]** (O'Connor concurring in the judgment) (stating that the Justice Brennan's doctrinal framework in *Gingles* amounts to a dramatic transformation that makes electoral success "the true test of vote dilution," while rendering the other factors of the totality of the circumstances approach nearly irrelevant).

34 *Jenkins v Red Clay Consolidated School District Board of Education*, 4 F3d 1103, 1135 (3d Cir 1993). See *Nipper v Smith*, 39 F3d 1494, 1525 (11th Cir 1994) ("[R]ather, proof of the second and third *Gingles* factors will ordinarily create a sufficient inference that racial bias is at work."); *Uno v City of Holyoke*, 72 F3d 973, 983 (1st Cir 1995) ("We predict that cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a section 2 claim because other facts undermine the original inference."); *NAACP v City of Niagara Falls*, 65 F3d 1002, 1019–20 n 21 (2d Cir 1995) (quoting *Jenkins*); *Clark v Calhoun County*, 88 F3d 1393, 1396 (5th Cir 1996) (quoting *Jenkins* and noting that "unlawful vote dilution 'may be readily imagined and unsurprising' where the three *Gingles* preconditions exist"); *NAACP v Fordice*, 252 F3d 361, 374 (5th Cir 2001) (quoting *Clark* for the proposition that liability will usually follow in cases where the *Gingles* factors obtain, and noting that, as a result, any district court holding against liability after finding those preconditions satisfied is required to explain its conclusion with great particularity); *Black Political Task Force v Galvin*, 300 F Supp 2d 291, 310–11 (D Mass 2004) (citing *Jenkins*).

35 See, for example, Richard H. Pildes, *The Politics of Race*, 108 Harv L Rev 1359, 1364–89 (1995) (discussing the role of "safe" minority-dominated districting in increasing black representation and in the redistribution of partisan power in the South in the aftermath of *Gingles*); J.

to flip through two leading election law case books. These casebooks devote the vast majority of their coverage of Section 2 litigation to *Gingles* and the elaboration of its three-pronged test.[36] Moreover, debates about the three preconditions have garnered by far the bulk of commentary and intellectual interest in Section 2 litigation. A vast literature considers myriad questions about what exactly each of the three *Gingles* prongs requires. Can minority voters satisfy the first prong even if they are insufficiently numerous to constitute a majority of a single-member district? Can a multiracial coalition of voters constitute a single cohesive minority group for purposes of the second prong? Can the third prong be satisfied even when a nontrivial fraction of white voters are willing to vote for a minority-preferred candidate? These technical questions dominate the scholarship concerning modern vote dilution litigation.

B. The Changing Nature of Vote Dilution Litigation

The development of the modern doctrinal framework in *Gingles* is only half of the story. Since that framework was laid down there have been substantial changes in the nature of vote dilution litigation. In the years immediately following Section 2's amendment, vote dilution litigation most often targeted at-large and multimember voting arrangements in areas where voting was extremely racially polarized and where minority voters had almost no success electing their preferred candidates. *Thornburg v Gingles* itself involved just such a voting system. In a multimember and at-large district, several officials are elected from a single geographic district. Voters are permitted to cast one ballot for each official to be selected. As O'Connor concluded in her concurrence in *Gingles*, this electoral arrangement can submerge the voting power of the minority electorate, as compared to the alternative of using several single-member districts to elect the officials.[37] The *Gingles* preconditions are designed to capture the possibility of such submer-

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Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 USF L Rev 551, 561–69 (1993) (arguing that there is no bright line between the three *Gingles* prongs and that they should be read together in recognition of the fact that there is no meaningful distinction between minority control districts and minority influence districts); Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich L Rev 483, 486–592 (1993); Katharine I. Butler and Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac L J 619, 641–74 (1990).

[36] See Daniel Hays Lowenstein and Richard L. Hasen, *Election Law: Cases and Materials* 187–244 (Carolina Academic**[CQ]** 3d ed 2004); Issacharoff, Karlan and Pildes, *The Law of Democracy* at 595–711 (cited in note 23).

[37] *Gingles*, 478 US at 87**[FC at n 2.]** (O'Connor concurring in the judgment) ("[T]he at-large or multimember district has an inherent tendency to submerge the votes of the minority.").

gence. Oversimplifying a bit, the test identifies the circumstances under which minority voters *could* control the outcome of an election in a single-member district, but where, in the presence of racially polarized voting, they will be unable to elect a candidate of their choice in an at-large arrangement.[38] In these situations, judicial intervention seemed relatively uncontroversial: intervening meant substituting *some* minority success for *none*, and the difficult questions concerning how to draw the single-member districts could be left largely to the remedial stages of the litigation.

Over time, however, two features of Section 2 lawsuits changed. First, plaintiffs began to challenge more single-member redistricting practices in areas where minority voters had already achieved some level of electoral success. These challenges focused on the question of how many majority-minority districts to draw, and on where to draw them, rather than on whether to disaggregate a multimember district within which minority voters had never succeeded in electing a minority-preferred candidate.[39] Second, the political demographics underlying Section 2 lawsuits began to change. Throughout the 1990s, levels of racially polarized voting declined in some parts of the South. This meant that growing numbers of white voters became willing, in some places, to vote for minority-preferred candidates.[40]

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

First, treating the *Gingles* preconditions as strong indicators of liability created the possibility in these later cases that Section 2 would require the creation of majority-minority districts in excess of what would be required even by a system of proportional representation.

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

[39] See notes 17–20 and accompanying text (discussing the changes over time in case composition) **[AR]**; Issacharoff, Karlan and Pildes, *The Law of Democracy* at 673–700 (cited in note 23) (same). **[AR]**

[40] See Richard H. Pildes, *Is Voting Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 NC L Rev 1517, 1522 (2002).

The preconditions suggest that a minority-controlled district may be required wherever a sufficiently large and compact group of minority voters exists—implicitly incorporating an idea of representational maximization into the doctrinal test.[41]

Second, it became less clear in these later cases that the representational interests of minority voters would be advanced by treating the *Gingles* preconditions as nearly synonymous with vote dilution. The *Gingles* framework is geared towards increasing the descriptive representation of minority voters: as we explained above, the test generally specifies the conditions under which it will be possible to draw an electoral district in which minority voters can elect a candidate of their choice, which in practice typically has meant a minority legislator.[42] When the *Gingles* test was introduced, it was generally assumed that using Section 2 to increase the descriptive representation of minority voters would also increase their substantive representation—that is, that electing more minority legislators would increase the likelihood that the *interests* of minority voters would be reflected in the legislative process.[43] Over time, however, this assumption became more contested. As litigation shifted toward single-member districting plans, and as voting patterns became less racially polarized, some scholars began to conclude that using Section 2 to increase minority descriptive representation might in certain cases—particularly in cases where Section 2 was used to force the drawing of majority-minority districts—impair minority substantive representation by packing excessive numbers of minority voters into a few districts.[44]

Third, the partisan valence of the *Gingles* preconditions changed over time. In the multimember context of *Thornburg v Gingles*, it was generally thought that increasing the descriptive representation of minority voters would, if anything, benefit the Democratic Party. African-American voters identified overwhelmingly with the Democratic

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41 For evidence of the Court's concern about this possibility, see *De Grandy*, 512 US at 1016–17 **[FC at n 29.]**(cautioning that "reading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting . . . causes its own danger" and that "[f]ailure to maximize cannot be the measure of § 2").

42 See note 38 and accompanying text.

43 In Hannah Pitkin's classic formulation, "descriptive" representation is concerned with representing the *identity* of a voter while "substantive" representation is concerned with representing the *interests* of a voter. See Hannah F. Pitkin, *The Concept of Representation* 60–61, 209 (California 1972).

44 See, for example, David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* 74 (Chicago 1999); Carol M. Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* 229 (Harvard 1995).

Party,[45] and the combination of multimember districting with high levels of racial polarization left them with little influence over elections. But the turn toward single-member district litigation and declines in racially polarized voting changed this calculus. Once minority voters could control or influence elections with the crossover support of some white Democrats, the *Gingles* preconditions' pressure to create majority-minority districts threatened to pack minority voters into excessively safe Democratic districts. Such packing could waste Democratic votes and ultimately benefit the Republican Party.[46] Some commentators began to argue in the late 1990s that safe districting practices were doing just this.[47]

II. JUDICIAL RESPONSES TO DOCTRINE AND SOCIAL CHANGE

Congress's amendment of Section 2 was tremendously important to modern voting rights litigation. And *Thornburg v Gingles* was an important acknowledgment by the Court that the actual behavior of groups of voters was critical to any understanding of the concept of vote dilution. But this formal story of jurisprudential change leaves out how judges actually applied the *Gingles* test in specific cases. This leads the doctrinal story to miss important features of Voting Rights Act litigation by overlooking the significance for judicial decisionmaking of *Gingles*'s two-stage, rule-plus-standard doctrinal structure. The way courts apply *Gingles* in practice can give us new insights into how judges respond to rules and standards. Moreover, comprehensive data about the application of *Gingles* can help us understand how judges reacted to recent changes in the consequences of vote dilution litigation for both minority voters and the major political parties.

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45 See Michael S. Kang, *Race and Democratic Contestation*, 117 Yale L J 734, 743–44 (2008) (noting the rise in the South of a Democratic Party "newly remade with African American voters as one of its core constituencies" after enactment of the Voting Rights Act of 1965).

46 The potential tradeoff between descriptive and substantive representation, as well as the potential political consequences, were made particularly salient by a few events in the early 1990s. Perhaps the most prominent was the 1994 landslide national election victory for the Republican Party. Before the 1994 election, discussions of the representational tradeoffs and partisan consequences of drawing majority-minority districts were mostly theoretical. But after that election there was considerable coverage in the popular press of the potential connections between Voting Rights Act enforcement and the Republican victory. And within a few years, a large political science literature emerged that was dedicated to measuring these representational and partisan effects. See note 47.

47 See, for example, David Lublin and D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 Am J Polit Sci 792, 793 (2000); David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 36–37, 99 (Princeton 1997); compare Charles Cameron, David Epstein, and Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 Am Polit Sci Rev 794, 794 (1996).

A. Hypotheses: Rules, Standards, and Ideological Disagreement

In our earlier work, we found persistent ideological differences in the rates at which judges assigned liability under Section 2 of the Voting Rights Act.[48] How are these ideological disagreements channeled by (or reflected in) the doctrinal structure of vote dilution litigation? As described above, *Gingles* framed the judicial inquiry as a two-part sequential test with a more rule-like inquiry preceding a more standard-like one. Legal scholars have long discussed the advantages and disadvantages of rules relative to standards.[49] Two aspects of this literature are particularly relevant here: discretion and flexibility.

1. Discretion.

Rules deprive a decisionmaker of discretion.[50] Rules announce ex ante the criteria according to which legal entitlements will be allocated. In a fully specified rule, the criteria are an exhaustive list of the considerations relevant to allocating the legal entitlement as well as a description of the relative importance and sequencing of each consideration. A decisionmaker applying a fully specified rule cannot deviate from the rule's weighting or consider excluded factors. By restricting a decisionmaker's actions, rules may guard against improper and arbitrary uses of authority.[51]

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48 See Cox and Miles, 108 Colum L Rev at 18–49 (cited in note 4).

49 See, for example, Eric A. Posner, *Standards, Rules, and Social Norms*, 21 Harv J L & Pub Policy 101, 101–07 (1997); Cass R. Sunstein, *Problems with Rules*, 83 Cal L Rev 953, 953 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L J 557, 621–23 (1992); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 172 (Clarendon 1991) **[CQ "Decision-Making"];** Richard A. Posner, *The Problems of Jurisprudence* 42 (Harvard 1990); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L J 65, 65 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685, 1687–88 (1976); Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J Leg Stud 257, 257 (1974); Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* 216 (Louisiana State 1969).

50 See Sunstein, 83 Cal L Rev at 961 (cited in note 49) (describing a "continuum" of possible systems "from rules to untrammeled discretion, with factors, guidelines, and standards falling in between"); Schauer, *Playing by the Rules* at 150–51, 158–62 (cited in note 49) (arguing that a preference for rules may be justified as a power allocation device and by a desire to reduce the risk of bias by particular decisionmakers); Posner, *Problems of Jurisprudence* at 44 (cited in note 49) ("A rule suppresses potentially relevant circumstances of the dispute . . . while a standard gives the trier of fact . . . more discretion because there are more facts to find, weigh and compare."); Davis, *Discretionary Justice* at 4 (cited in note 49) ("A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.")**[CQ. Order of authorities]**.

51 See Sunstein, 83 Cal L Rev at 976 (cited in note 49) ("[R]ules reduce the risk that illegitimate or irrelevant factors will enter into the decision, at least compared with standards or factors."); Kaplow, 42 Duke L J at 609 (cited in note 49) ("Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.").

Less dramatically, rules may prevent a decisionmaker's own policy preferences from influencing her decision. A decisionmaker may consciously attempt to advance her own idiosyncratic objectives through a decision. Or preferences may operate at an unconscious level, such as in the implicit weighting of particular factors. By limiting the criteria for decisions and governing the conversion of those criteria into outcomes, rules permit less opportunity for a decisionmaker's identity, preferences, or value judgments to influence the decision.

In voting rights cases, the first step of the *Gingles* framework is more rule-like in that it specifies three conditions that must be present in order for liability to be assigned. The test is structured as a checklist in which the court merely assesses the presence or absence of each of the three conditions: the size and geographic compactness of the minority group, the political cohesion of the minority group, and the presence of white bloc–voting.[52] To be sure, there has always been some ambiguity about what each factor requires—as is the case for nearly all legal tests, given that rules and standards exist on a spectrum rather than as purely dichotomous categories.[53] But the *Gingles* preconditions do not call upon the court to assign relative weights to or balance the importance of these conditions. Each factor is a necessary precondition. Moreover, the first step in the *Gingles* framework does not allow the court to consider factors other than the three already specified. A judge may not, for example, discuss in the first step the presence or absence of a history of discrimination in the jurisdiction.

In contrast, the second step of the *Gingles* framework is much more standard-like. It requires the court to assess whether, "in the totality of the circumstances," a finding of vote dilution is appropriate.[54] This second step does provide some guidance to courts: it incorporates the nine factors that the 1982 Senate Report suggested are relevant to the inquiry.[55] But that report did not explain how courts should balance the importance of each factor, and it expressly declined to treat the enumerated factors as an exhaustive list.[56]

In light of this doctrinal structure, our first hypothesis is that the rule-like first step of *Gingles* will better cabin the influence of judicial ideology than the standard-like second step. This leads to the simple prediction that there will be greater disagreement between Democratic and Republican appointees at the second step than the first.

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52 See *Gingles*, 478 US at 50–51**[FC at n 2.]**.

53 See note 50.

54 See 478 US at 79**[FC at n 2.]**.

55 See S Rep No 97-417 at 28–29 (cited in note 26).

56 See id at 29 ("[T]he Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.").

To see this more clearly, consider a judge who for ideological reasons prefers a particular outcome in a Section 2 case. The judges faces a choice: she may distort the rule-like preconditions to reach her preferred outcome, or she may massage the totality-of-the-circumstances test to do so. The constraining power of rules makes the first option more costly than the second. This cost may take several forms. It may be that higher courts will be more likely to reverse decisions that conflict with the rule because the legal error is more obvious.[57] But even without reference to the hierarchical structure of courts, a rule may make it costly for a judge to impose her policy preferences. When a rule and a judge's preferred policy outcome conflict, the task of writing an opinion that reconciles the rule and the outcome is more difficult. There is no guarantee this effort will be successful. It may fail to persuade co-panelists who have different policy preferences or who value fidelity to the rule above their preferred policy outcomes. It may even provoke a colleague into dissenting in order to expose the rule-disregarding judge's reasoning as a fig leaf. Whether in dissent or majority, the judge who necessitates the drafting of a separate opinion taxes the collegiality of the bench.[58] The weakness of the rule-disregarding judge's reasoning or the reprimand of her colleague may prompt colleagues to view her future work with circumspection.

The fact that it is more costly to express ideological disagreement through the application of a rule leads to the prediction that ideological disagreements should be less pronounced in the application of *Gingles*'s rule-like preconditions. Those disagreements will be channeled more frequently into the standard-like second step.

We should note that our examination of judicial ideology and the *Gingles* doctrine has much in common with the literature on the strategic use of legal instruments developed by Emerson Tiller.[59] In the stra-

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57 Relatedly, the fact that federal appellate courts must give greater deference to lower court fact-findings may also raise the cost of relying on *Gingles*'s rule-like preconditions, as their application is somewhat less fact-intensive than the totality test.

58 Richard A. Posner, *How Judges Think* 32-34 (2008) (describing "dissent aversion")..

59 See Max M. Schanzenbach and Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U Chi L Rev 715, 722–24 (2008) (predicting and presenting evidence that a trial judge makes sentencing "departures," a predominantly legal determination, more often when the reviewing appellate court is politically aligned, and makes sentencing "adjustments," a more fact-based determination, when the reviewing court is not aligned)**[AR]**; Max M. Schanzenbach and Emerson H. Tiller, *Strategic Judging under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J L, Econ, & Org 24 (2007) (same)**[AR]**; Joseph L. Smith and Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J Leg Stud 61, 70–81 (2002) (finding empirically that as the "strategic instrument" perspective suggests, lower court judges behave strategically in using different agency reversal instruments depending on their policy preferences); Emerson H. Tiller, and Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J L, Econ, & Org 349 (1999) (arguing that agencies and courts insulate their policy choices from

tegic instruments model, judges seeking to advance their ideological preferences choose the legal materials on which to base their decisions according to whether appellate reviewers are likely to share their ideological preferences. Decisions based on facts or procedure rather than interpretations of substantive law have less precedential effect but are harder for appellate reviewers to reverse. Judges face a tradeoff between precedential effect and risk of reversal, and the alignment of the judge's and the appellate court's ideological preferences influences this tradeoff. When a high fraction of the appellate court shares a judge's ideological preferences, she is more likely to render a decision on the basis of a legal interpretation. But when only a small fraction of the appellate court shares a judge's preferences, she is more likely to base her decision on facts or procedure. Strategic instrument models thus offer predictions about how judicial hierarchy influences a judge's choice between legal materials.

While our approach shares much of the spirit of the strategic instrument models, the question we ask is fundamentally different. We ask whether judges are more consistently ideological when applying rule-like tests than standard-like tests. Moreover, our account is in some ways a simpler one. Our inquiry does not turn on the impact of court hierarchy or the risk of appellate review. Nor does it flow from any difference between law and fact, or substance and procedure.[60] Our approach depends solely on whether a judge may reach an ideologically preferred outcome more readily when applying a standard rather than a rule.

2. Flexibility.

Rules are relatively inflexible. Because they fix the decisionmaking calculus ex ante, they conform poorly to new circumstances. As a result, change in society may render rules "anachronistic" and "hopelessly outmoded."[63] Standards, in contrast, are more readily adapted to new and unanticipated situations. They are unlikely to provide an exclusive enumeration of relevant considerations or to specify the ordering or

higher-level **[CQ hyphen.]**review by choosing high-decision-cost instruments that discourage further review).

60 A further difference is that, unlike the strategic instrument models in which judges may choose their legal materials, the two steps of the *Gingles* test are joined by an "and." Rather than picking between the rule-like portion and the standard-like portion, judges can only pick where to express their ideological preferences.

63 Sunstein, 83 Cal L Rev at 993–94 (cited in note 49) (explaining how rules can be outrun by changing circumstances).

weighting of those considerations. Thus, more of the decisionmaking structure is fleshed out ex post.[64]

This second insight of the literature on rules and standards has important implications for our analysis of Section 2 litigation. The *Gingles* framework does make it possible for courts to respond to changing social conditions—but only in one direction. The first-rules, then-standards sequence of the test implies that the framework can be used to reduce the scope of liability but not to expand it. The totality of the circumstances test may be used to defeat liability even when a claim satisfies the rule-like preconditions.[65] But if a judge feels that the totality of the circumstances warrants liability, she cannot impose it in the absence of satisfaction of the rule-like first stage because the three first-stage factors are *necessary* conditions for liability.[66] Accordingly, the *Gingles* structure is not symmetric.

Gingles's asymmetric doctrinal structure prompts several speculations about how its application will evolve over time. The first is that, as more decisions under the framework emerge, the circumstances in which liability is not warranted even though the rule-like preconditions are met will become clearer. As these precedents accumulate, the boundaries of liability may become clearer or may shrink. These changes may lead to a series of familiar Priest-Klein-like predictions: plaintiffs may be deterred from bringing marginal claims, and defendants may be persuaded to settle strong claims.[69] The standard selection-of-disputes-for-litigation analysis would predict

64 Kaplow, 42 Duke L J at 616–17 (cited in note 49) (explaining how "a standard promulgated decades ago can be applied to conduct in the recent past using present understandings" while "rules must be changed, which may require more effort"); Schauer, *Playing by the Rules* at 140–42 (cited in note 49) (noting that rules offer predictability at the cost of "diminishing [ ] capacity to adapt to a changing future").

65 In this sense, the totality of the circumstances in this test acts as a "trump" on the rule-like portion. See Kaplow, 42 Duke L J at 560–61 n 5 (cited in note 49) (describing the concern about "whether rules can be binding" as centering on "whether there is any content to a rule as long as a standard can trump the rule").

66 We do not address in this Article the question why the Supreme Court chose a framework for analyzing claims under Section 2 that effectively set an upper boundary on the scope of liability. The reasons are likely many. They may include Justice Brennan's need to cobble together a sufficient number of votes to announce the judgment of the Court; Brennan's hope that the *Gingles* prongs would become seen as nearly sufficient (rather than just necessary) conditions for liability; or the Court's desire to control the discretion of lower court judges. Consider Tonja Jacobi and Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J L, Econ, & Org 326 (2007) (presenting evidence of the use of legal doctrines as instruments of political control by higher courts); Linda R. Cohen and Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L & Contemp Probs 65, 68–86 (1994) (suggesting that the Supreme Court adopted different doctrines as signals to lower courts in order to exert policy preferences); Linda R. Cohen and Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and Empirical Test*, 69 S Cal L Rev 431, 441–56 (1996) (offering the same conclusions from a game theoretic perspective).

69 See George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Leg Stud 1, 6–30 (1984) (presenting a selection theory of litigation in which trials result from litigants'

selection-of-disputes-for-litigation analysis would predict that the number of litigated cases would decline over time, as precedents became clearer, but that the rate of plaintiff victory would remain perhaps unchanged. But in the context of Section 2 litigation there are reasons to suspect that these standard predictions about the pattern of litigation may not obtain. The *Gingles* framework was initially designed to deal with challenges to at-large districting arrangements, and these were the paradigmatic early claims.[70] By the mid-1990s, however, the types of cases brought began to change significantly. These new cases were less likely to satisfy the *Gingles* preconditions. Therefore, it is possible that in Section 2 litigation, the rate of plaintiff success may fall over time along with the number of litigated cases.

Our primary interest, however, lies in the way that judges of different ideological stripes may use *Gingles*'s asymmetric structure to respond to changes over time in the nature of Section 2 litigation. In Part I we described the ways in which the character of voting rights litigation changed in the two decades since *Gingles*: challenges to single-member districts became more prevalent; racially polarized voting waned in some jurisdictions. These trends altered the consequences of treating the *Gingles* preconditions as strong indicators of liability. First, they created the possibility that following the *Gingles* preconditions would require the creation of even more majority-minority districts than would be required by a system of proportional representation. Second, they raised the possibility that the application of preconditions would actually impair the substantive representation of minority voters. Third, they led to a situation in which the partisan consequences of following *Gingles* might shift by making liability under the Act less beneficial for the Democratic Party.[71]

These changes in Section 2 litigation suggest two ways in which we might expect the doctrinal patterns of vote dilution litigation to change over time. One hypothesis flows from the first and second consequences described above. If the *Gingles* preconditions proved over time to be excessively aggressive in some cases, and representationally counterproductive in others,[72] judges of all political stripes would likely

comparisons of the costs of settlement and trial and, importantly, the estimated probability of success at trial).**[AR]**

70 See text accompanying notes 38–40.

71 See notes 38–47 and accompanying text.

72 This does assume that judges are interested, at least in part, in substantive representation. See Pitkin, *The Concept of Representation* at 60–61, 209 (cited in note 43) (elaborating on the difference between substantive and descriptive representation). To the extent that a judge believes that Section 2's vote dilution inquiry should concern *only* descriptive representation, she will obviously be unconcerned if the doctrine threatens to undermine the substantive representa-

rely less on the *Gingles* preconditions as a measure of liability.[73] Were this true, judges who found the *Gingles* factors satisfied would become more likely to vote against liability.[74]

A second hypothesis flows from the third consequence. If the *Gingles* preconditions became more likely to favor the Republican Party over time (or at least came to have more contested partisan consequences), we would predict that Democratic appointees would become less enthusiastic about treating the preconditions as strong evidence of liability.[75] Were this true, Democratic appointees would abandon the preconditions at a higher rate than Republican appointees—that is, the likelihood of voting for liability when the *Gingles* factors were satisfied would decline for Democratic appointees relative to Republican appointees.

Before proceeding, we should note one minor complication. Both hypotheses implicitly assume that the more rule-like preconditions remain relatively unchanged throughout the post-*Gingles* period. In reality, of course, this is an oversimplification. The legal requirements of the three prongs have been clarified and tweaked by a large body of case law over the last two decades.[76] But these minor changes likely sharpen our hypotheses. On balance, the changes to the preconditions

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tion of minority voters. There is little evidence, however, that federal judges are focused solely on descriptive representation in these cases, and considerable evidence to the contrary.

73 Judges of both political parties might also more frequently decline to find the preconditions satisfied. But the constraints imposed by the rule-like structures of *Gingles*'s first stage would limit judges' ability to do so. Thus, not only would the rate at which judges conclude that the second stage of *Gingles* warrants liability decline over time, it would decline more sharply than the rate at which judges found the preconditions not satisfied.

74 We should note that this hypothesis implicitly assumes that judges with different ideological dispositions share similar views about the appropriate theory of minority representation. If Democratic and Republican appointees operate with divergent theories of minority representation they may respond differently to changing representational consequences. As we explained in Part I, the "representationally counterproductive" changes were ones that threatened to undermine substantive representation relative to descriptive representation. These changes would be more troubling to a judge who cared about the extent to which Section 2 promoted the substantive interests of minority voters. A judge who cared only about securing the election of minority officials would be much less concerned about the changes. Thus, were it the case that Democratic appointees cared mostly about substantive representation while Republican appointees cared mostly about descriptive representation, then Democratic appointees would be more likely that Republican appointees to reduce their reliance on the *Gingles* preconditions in response to the changes in Section 2 litigation. Differences in judges' theories of representation would in that case provide an additional reason why Democratic appointees in particular might lose enthusiasm for treating the *Gingles* preconditions as nearly sole determinants of liability.

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

76 See Issacharoff, Karlan and Pildes, *The Law of Democracy* at 596–672, 764–807 (cited in note 23) (surveying some of these changes); supra text accompanying notes 35–36 (discussing the centrality over the past two decades of debates about the elaboration of and changes to the preconditions' precise contours).

have arguably made them a harder hurdle to clear. Some lower courts have imposed a causation requirement on prong 2 of the test;[77] others have interpreted prong 1 to disallow coalition- and influence-district claims that Justice Brennan refused to rule out in *Gingles* itself;[78] and so on.[79] To the extent the preconditions have become more difficult to satisfy, we would predict that judges would become *more* likely to find liability once the preconditions were satisfied. Our hypotheses above, however, predict that (either all or at least Democratic) judges will become *less* likely to do so. Thus, our assumption that the legal content of the preconditions remained fixed, should, if anything, stack the deck against us.

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To summarize our hypotheses, a comparison of the rule- and standard-like features of the *Gingles* framework generates three main predictions. First, the discretion afforded by standards predicts that the rate of disagreement between Democratic and Republican appointees should be greater under standard-like portions of the *Gingles* test than it is under rule-like portions. Second, the greater flexibility afforded by standards predicts that, as the changing nature of vote dilution litigation undermined the relevance of the *Gingles* preconditions, judges of both political parties would move away from their reliance on the preconditions as a nearly exclusive determinant of liability—leading to a decline in the rate at which judges find liability warranted in the totality of the circumstances. Third, that rate should decline more sharply over time for Democratic appointees than Republican appointees because of the changing partisan significance of the *Gingles* preconditions—leading to less ideological disagreement in later years.

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77 See, for example, League of United Latin American Citizens (LULAC) v Perry, 999 F2d 831 (5th Cir 1994) (en banc).

78 See, for example, Brief for the League of Women Voters of the United States as *Amicus Curiae* Supporting Petitioners (On Petition for a Writ of Certiorari), *Bartlett v Strickland*, No 07-689 (filed Dac 21, 2007) (laying out this disagreement among lower federal courts); see also Issacharoff, Karlan and Pildes, *The Law of Democracy* at 637–38 (cited in note 23) (stating that "[i]nitially, most courts . . . either assumed without deciding or . . . explicitly permitted coalition suits under section 2," but that "[i]n more recent decisions . . . several courts of appeals have rejected coalition claims").

79 Additional examples of the steady constriction include both the *Shaw* line of cases and *LULAC v. Perry*, the Court's most recent effort to elaborate on the meaning of Section 2. See Shaw v Reno, 509 US 620 (1992); League of United Latin American Citizens (LULAC) v Perry, 548 US 399 (5th Cir 1994). In this vein, Rick Pildes has recently argued that, "in every single districting case receiving plenary consideration [by the Supreme Court] since *Gingles* . . . the Court has continuously sought, without interruption, to cabin and confine safe minority districting to a narrower and narrower domain." Richard H. Pildes, The Decline of Legally Mandated Minority Representation, 68 Ohio St L J 1139, 1140–41 (2007).

3. A Caveat.

Gingles's sequentiality is part of what makes it possible for us to compare how judges evaluate rules and standards. The doctrinal framework requires judges to first analyze the rule-like preconditions before proceeding to the totality of the circumstances test. If *Gingles* did not specify the sequence of the analysis, a judge who opposed liability might immediately proceed to the standard-like step, conclude that the totality of the circumstances did not merit liability, and forgo analysis of the rule-like step. The application of the rule-like portion by judges opposed to liability would not be observed. The sequencing requirement of *Gingles* makes this possibility much less likely. While in practice some judges might assume the existence of the preconditions rather than addressing their merits, the doctrinal structure discourages this practice, and it does not appear to be prevalent in our data.

Gingles's doctrinal structure does have its own shortcomings, of course. The ideal comparison of rules and standards would result from randomizing the methods of legal judgment across judges with varying ideological preferences. An experimenter would ask some judges to apply a rule and others to apply a standard to identical disputes and then compare the outcomes reached by the judges of differing ideological predilections under each method of judgment. The *Gingles* test is not this ideal experiment, and there is some risk that our estimates overstate the constraining force of rules.

Overstatement might arise from the sequential nature of the *Gingles* framework that makes our analysis possible. Because the first step in the sequence is a necessary condition for liability, the full set of cases do not reach the second stage of the *Gingles* analysis. Nor are the cases reaching it a random selection of cases. The claims that fail to reach the second stage are those that cannot satisfy the first step of *Gingles*. Some of the cases that fail to satisfy the first step may be hard cases, but others will be easy cases—easy in the sense that that judges would agree that liability is inappropriate. It is possible that more easy than hard cases are screened out at the first step. If that is so, the second step of *Gingles* may be marked by sharper ideological disagreements simply because the pool of cases reaching that stage includes more difficult cases.

Another possible source of overstatement is that the higher cost of disfavoring liability at the first stage may encourage insincere voting in favor of liability at that stage. If the standard-like prong permits a judge more discretion in arguing against liability or allows a judge to disfavor liability at lower cost than does the rule-like prong, a judge opposing liability might insincerely agree that a plaintiff's claim satisfies the rule-like prong. She would do this because she would know that

the greater discretion of the totality of the circumstancestest is an easier route to defeating liability. Loosely speaking, the judge might save her ammunition for the second, standard-like prong.[83] In this account, the degree of observed ideological disagreement under the rule-like prong would understate the degree of actual disagreement. But to the extent such substitution by judges occurs, it supports our claim that the wider discretion involved in applying a standard affords greater room for ideological disagreement than applying a rule. Since our primary interest is in documenting the existence of such a difference rather than calibrating its exact magnitude, the possibility of insincere voting actually bolsters rather than undercuts our claims.

B. Data

We evaluate our central hypotheses using data that includes a rich set of information about every Section 2 case decided since the Supreme Court handed down its decision in *Thornburg v Gingles*.[84] The dataset includes all lower court dispositions, whether issued by a single district court judge, a special three-judge trial panel,[85] or a three-judge appellate panel.[86] To track the evolution of voting rights jurisprudence,

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[83] In this account, the totality of the circumstances prong in *Gingles* acts as a broad exception to the set of preconditions for liability specified in the first prong. See Kaplow, 42 Duke L J at 560–61 n 5 (cited in note 49) ("When standards can be employed *ex post* to trump rules, the value of rules might be significantly eroded to the extent their purpose was primarily to constrain adjudicators' discretion for fear of abuse."). **[EIO]** On exceptions generally, consider Frederick Schauer, *Exceptions*, 58 U Chi L Rev 871, 893–99 (1991) (characterizing legal exceptions as attributes of power to change rules or to avoid their constraints rather than as a distinct category).

[84] Detailed information on all of these opinions was initially collected by Ellen Katz and the staff of the Voting Rights Initiative at the University of Michigan Law School. See generally Ellen Katz, et al, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U Mich J L Ref 643, 643–772 (2006); Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation through the Lens of Section 2*, in Ana Henderson, ed, *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power* 183, 183–221 (Berkeley 2007) (analyzing the Voting Rights Initiative data to evaluate the statistically significant differences in findings of liability by courts in "covered," as opposed to "noncovered," jurisdictions). We supplemented the Voting Rights Initiative's initial data collection with detailed information about every judge who adjudicated a Section 2 case—information about both the judge's treatment of the case and about the judge's demographic characteristics. For a more detailed explanation of our data collection and the construction of the dataset, see Cox and Miles, 108 Colum L Rev at 18–49 (cited in note 4).

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

[86] Because we are interested in how trial courts and appellate panels behave within a legal framework established by the Supreme Court, we excluded en banc circuit court and Supreme Court opinions. For more explanation about the distribution of Section 2 litigation across trial

we focus only on decisions in which courts addressed the issue of Section 2 liability, rather than some preliminary or ancillary issue (such as whether attorneys fees should be awarded or a settlement approved). During the period covered by our dataset, courts issued 296 opinions concerning Section 2 liability. For each decision, our dataset includes three broad categories of information:

1. *Case characteristics*: this includes information about what type of voting practice the plaintiffs challenged,[87] about where the challenged practice was located,[88] and about when the challenge was litigated.

2. *Judicial demographics*: this includes detailed information about the judges deciding the case—their political affiliation (as measured by the party of the appointing president), their race, their age, and so forth.[89]

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judges, trial panels, and appellate panels, see Cox and Miles, 108 Colum L Rev at 9–10 (cited in note 4).

[87] The dataset groups the challenged practices into the following categories: at-large electoral systems, redistricting plans, election administration, and other practices. A single decision can encompass challenges to multiple types of practices. Challenges to at-large systems and redistricting plans make up the overwhelming majority of the cases. See Cox and Miles, 108 Colum L Rev at 10–12 (cited in note 4).

[88] The dataset includes two geographic variables. The first indicates whether the challenged practice was located in the South. The second indicates whether the challenged practice was located in a jurisdiction subject to special oversight under Section 5 of the Voting Rights Act. (These jurisdictions are typically called "covered" jurisdictions.) The dataset includes these variables because, as we have discussed elsewhere, it is commonly thought that voting rights litigation is systematically different in the South and in covered jurisdictions. See Cox and Miles, 108 Colum L Rev at 12–13 (cited in note 4).

[89] As the discussion thus far makes clear, we use party of the appointing president as a crude proxy for political ideology. Although not reported here in order to conserve space and to ease exposition, we have verified the robustness of our conclusions against other measures of judicial ideology, such as common space scores. For an explanation of common space scores, see Susan W. Johnson and Donald R. Songer, *The Influence of Presidential versus Home State Senatorial Preferences on the Policy Output of Judges on United States District Courts*, 36 L & Socy Rev 657, 663–65 (2002) (describing the common space score method as one that "tak[es] the data matrix of [congressional] roll call votes and estimate[es] legislator [and President] ideal points and roll call outcomes that maximize the joint probability of the observed votes" in order to then extrapolate them to a measure of ideology of judicial appointees) **[AR]**; Micheal **[CQ spelling]** W. Giles, Virginia A. Hettinger, and Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 Polit Rsrch Q 623, 631 (2001) (designating scores that account for both the ideology of the President and the practice of senatorial courtesy) **[AR]**. On the appropriate measures of ideology generally, see, for example, Gregory C. Sisk and Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 Nw U L Rev 743, 779–90 (2005) (demonstrating from a study of religious freedom cases that both the common space score and the party-of-the-nominating-president methods are largely legitimate and interchangeable proxies for measuring judicial ideology); Lee Epstein and Gary King, *The Rules of Inference*, 69 U Chi L Rev 1, 87–96 (2002) (criticizing the adoption of the party of the appointing president as a measure of a judge's policy preferences as invalid because "[p]residents of the same political party vary in their ideological preferences" and are not necessarily motivated to appoint judges with the same ideol-

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

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

C. Initial Evidence

The sections below provide summary statistics that strongly support our central hypotheses. Part II.C.1 shows that there is considerably more ideological disagreement over the application of *Gingles*'s standard-like second step than over the application of the more rule-like preconditions. Part II.C.2. shows that, over time, the behavior of Democratic and Republican appointees has converged, and their use of the *Gingles* framework has changed, in exactly the way we have predicted. Part III tests the robustness of these results using multivariate regression analysis to control for other aspects of the cases. The regression analysis confirms the relationships we uncover in the summary statistics.

1. Static Comparisons

Do rules constrain judges more than standards? To begin investigating this question, Table 1 reports the average rates at which Democratic and Republican appointees vote to find either liability or particular steps of the *Gingles* framework met.

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ogy as their own)**[AR]**; Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 Just Sys J 219, 221–43 (1999) (synthesizing numerous studies and concluding that party of the appointing president is a reasonable proxy of judicial ideology) **[AR]**. See also Joshua B. Fischman, *Decision-Making under a Norm of Consensus: A Structural Analysis of Three-Judge Panels* 1 (unpublished manuscript,**[Comma CQ]** 2008), online at http://ssrn.com/abstract=912299 (visited July 5, 2008) (estimating ideology parameters for judges using data from asylum and sex discrimination cases).

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

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

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

Row (A) of the table displays the rates at which judges of each party voted to find liability under Section 2, and it confirms that the partisan differences we identified in our earlier work are also evident in the shorter, 1986–2004, period following the *Gingles* decision.[90] The row shows that Democratic appointees voted to assign liability about 12 percentage points more often than Republican appointees. This difference is almost identical to the 13 percentage point difference we observed in the longer time period of our earlier study.

The remaining rows examine the judicial treatment of the *Gingles* test. Row (B) shows the rates at which these judges voted to apply the *Gingles* framework. They did so at high rates—about 75 percent. This pattern is consistent with the conventional wisdom that the *Gingles* test is the centerpiece of litigation under Section 2.[91] In addition, these aggregate figures reveal no sharp ideological differences in the rate at which the judges voted to apply the *Gingles* test. Fewer than two percentage points separate the rates at which Democratic and Republican appointees voted to apply the test, and this difference is not statistically significant.

In contrast, some ideological divisions are evident in the summary statistics for the judges' conclusions about whether the *Gingles* precon-

90 See Cox and Miles, 108 Colum L Rev 18–49 (cited in note 4) (identifying substantial differences in the rates at which Democratic and Republican appointees voted in favor of Section 2 liability). **[AR]**

91 See text accompanying notes 31–34.

ditions are satisfied. Row (C) reports the rates at which judges voted to conclude that the plaintiff's challenge satisfied the *Gingles* factors in cases where they agreed to apply the framework. It shows that in cases in which they voted to apply the *Gingles* factors, Democratic appointees were more likely to conclude that the factors were met. The difference, slightly less than ten percentage points, is just above the standard 5 percent significance level. This difference provides some support for the characterization of Section 2 litigation in the academic commentary—that conclusions about the satisfaction of the *Gingles* factors track conclusions about liability.

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

The second pattern evident in Row (D) is that, aside from the ideological difference, judges who reach step two's totality test are quite likely to find a violation of Section 2. The likelihood of assigning liability conditional on the three preconditions being met is well over 50 percent. For each set of appointees, it is more than 25 percentage points higher than the corresponding (conditional) probability that they found the preconditions satisfied. In other words, judges were much more likely to render a pro-plaintiff decision at the second stage of the *Gingles* analysis than they were at the first stage. These findings are consistent with the conventional wisdom that satisfaction of the

Gingles factors correlates strongly with liability.[92] But they also suggest that the inquiry into the totality of the circumstances is an area of more intense ideological division.

These findings are consistent with the idea that the relatively rule-like *Gingles* preconditions constrain judges' decisions more than the looser totality of the circumstances test. If the three preconditions were more constraining, one would expect to see greater ideological disagreement in the application of the totality of the circumstances test than in the application of the *Gingles* preconditions. The summary statistics suggest just such a result, and the regression analysis below suggests that the effect is fairly pronounced. To be sure, we must be somewhat cautious about this interpretation. Because the doctrinal test is sequential, the selection of cases to which judges apply the three preconditions is somewhat different than the selection of cases to which the judges apply the totality of the circumstances test. But for the reasons we explained above, we do not believe that these selection concerns undermine the central findings.

2. Comparisons over Time

Our earlier work demonstrates that the liability rate in Section 2 cases has declined dramatically over the last two decades.[93] The question of what accounts for that decline is important for both voting rights scholars and students of judicial behavior. Looking only at litigation outcomes, we were previously unable to explain this pattern. But capitalizing on the richer doctrinal data allows us to make more progress towards understanding these changes.

As we explained above, the character of voting rights litigation changed substantially in two the decades since *Gingles*. These changes in the potential representational and partisan consequences led to two hypotheses: that judges who found the *Gingles* preconditions satisfied would become more likely to vote against liability, and that Democratic appointees would abandon the preconditions at a higher rate than Republican appointees.

a) Overall trends. For an initial assessment of these predictions, we first examine raw time trends in the liability rates and the rates of *Gingles* application. Figure 1 shows the volume of Section 2 decisions in the two decades following the Court's decision in *Gingles* on the left scale, as well the success rate of that litigation over time on the right scale. (Unlike the tables that examine the data at the level of judge-

92 See note 35 and accompanying text.

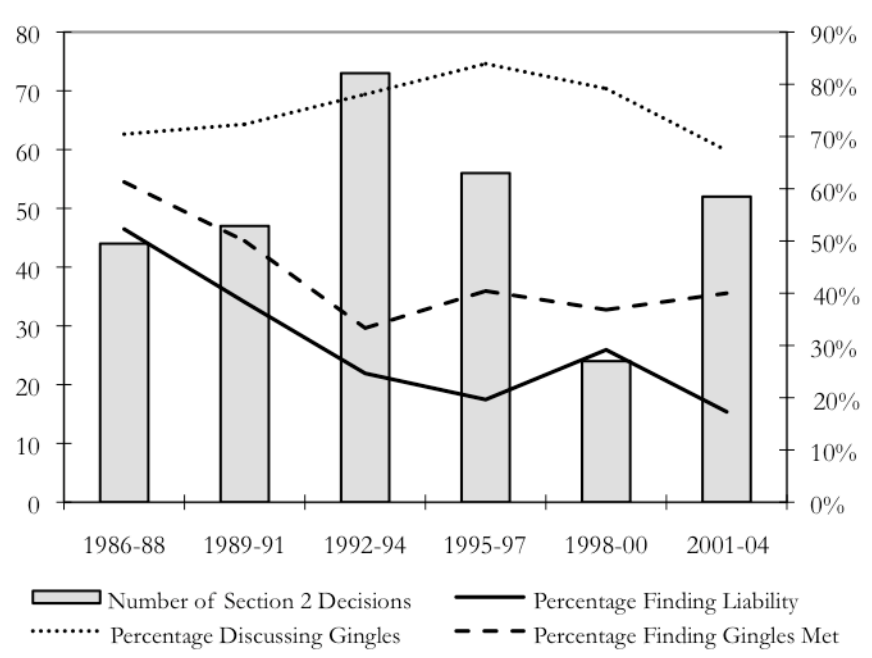
93 See Cox and Miles, 108 Colum L Rev at 13–14 (cited in note 4) (describing the declines in the rate of plaintiff success).

votes, Figure 1 analyzes the data at the level of case outcomes.) The number of Section 2 decisions rises in the early part of each decade, which is consistent with a flurry of redistricting litigation following the decennial censuses. As we have previously reported, the rate of plaintiff success is marked by a sharp downward trend during the late 1980s and early 1990s.[99] In the decade between 1986 and 1995, the rate of plaintiff success declined by more than 20 percentage points. Since the mid-1990s, the liability rate has exhibited more stability, but it has remained at levels far below its previous highs. Except for a brief uptick from 1998 to 2000, the rate of plaintiff success has been flat or slightly declining since 1997.

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

[99] Cox and Miles, 108 Colum L Rev at 13–14 (cited in note 4).

FIGURE 1. LITIGATION TIME TRENDS



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

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

These patterns are consistent with the first prediction about the impact of the changing nature of Section 2 litigation. Earlier cases typically involved multimember districts. In contrast, more recent Section 2 challenges emphasized changing the number of majority-minority districts and were more likely to involve areas of the South where racial polarization had declined. These changes in the nature of Section 2 claims made liability less likely for two reasons. First, the more recent challenges were less likely to satisfy the *Gingles* preconditions, and without satisfaction of the first stage of the doctrinal framework, these claims could not advance to liability. Second even when court concluded that the *Gingles* factors were met, the different representational consequences of these cases made it less likely that court would conclude that the totality of the circumstances warranted liability.[100] The widening gap between the rates at which the factors were met and liability suggests a greater hesitancy to let liability follow immediately from the meeting of the factors. The raw overall trends therefore are consistent with for the first prediction about the effect of the evolving nature of Section 2 challenges.

b) Partisan trends. For an initial assessment of the second prediction—that Democratic appointees became less likely over time to conclude that liability should follow immediately from satisfaction of the *Gingles* factors—we turn from the case-level analysis in Figure 1 back to a judge-vote level analysis. Table 2 displays the rates at which Democratic and Republican appointees favored voting rights plaintiffs at each step of the *Gingles* framework, and it breaks these comparisons into two periods, before and after 1994. The year 1994 was chosen because it was roughly the midpoint of the observation period, and thus, the comparisons give a sense of the time trends in judges' applications of *Gingles*.[101]

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[100] See notes 37–47 and accompanying text (explaining the changing representational and political consequences of vote dilution litigation over this period); notes 71–75 (setting out the hypotheses that flow from the changes in the nature of Section 2 litigation).

[101] We also chose this breakpoint **[CQ]** because it is the one we used for all two-period comparisons in our earlier work. See Cox and Miles, 108 Colum L Rev at 23 n 78 (cited in note 4).

TABLE 2. RATES OF VOTING IN THE *GINGLES* FRAMEWORK, BY PARTY OF APPOINTING PRESIDENT

		Gingles Factors Discussed	*Gingles* Factors Met, Conditional on Factors Discussed	Liability, Conditional on *Gingles* Factors Met
		(1)	(2)	(3)
Before 1994	Democrat	.768	.376	.915
		(.038)	(.486)	(.041)
		[125]	[125]	[47]
	Republican	.709	.258	.667
		(.037)	(.036)	(.076)
		[151]	[151]	[39]
	Democrat - Republican	**.059**	**.118****	**.248****
		(.053)	**(.156)**	**(.083)**
After 1994	Democrat	.739	.287	.576
		(.041)	(.042)	(.054)
		[115]	[115]	[33]
	Republican	.812	.269	.547
		(.028)	(.032)	(.069)
		[197]	[197]	[53]
	Democrat - Republican	**-.073**	**.018**	**.029**
		(.048)	**(.053)**	**(.111)**

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

Column (1) reports the rate at which judges concluded that the *Gingles* framework should be applied. As seen in Figure 1, both groups of judges applied the framework at high rates, between 70 percent and 80 percent of the time. In each time period, Democratic and Republican appointees generally agreed that the *Gingles* framework was appropriate. Before 1994, the Democratic appointees applied it at a rate only 6 percentage points higher than Republican appointees did, and after 1994, they applied it at a rate only 7 percentage points lower than Republicans did. Neither of these differences were statistically significant. The movement in these rates is due almost entirely to an increase in the willingness of Republican appointees to apply the doctrinal framework. The rate at which Republican appointees voted to apply it rose by 10 percentage points, from 71 percent to 82 percent, between the two time periods. These data cannot reveal whether this increase is due to a greater acceptance by Republican appointees of the appropriateness of the *Gingles* framework, to a conclusion by Republican appointees over time that application of *Gingles* might advance their own

party's interests, or some combination of the two.[102] But the primary conclusion from Column (1) is that judges widely accepted *Gingles* as the organizing framework for voting rights claims. Judges of both political affiliations voted at very high rates to apply *Gingles* throughout the observation period.

Columns (2) and (3) show the rates of ideological disagreement at each step in the *Gingles* analysis. In these columns, more pronounced differences between the two groups of judges are evident in the earlier time period, and these differences vanish in the later period. In the 1989–94 period, Democratic appointees were more likely than their Republican counterparts to find the *Gingles* factors met, and conditional on having found the factors met, they were much more likely to conclude that the challenged electoral practice violated Section 2. They concluded 38 percent of the time that the *Gingles* preconditions were met while Republican appointees did so only 26 percent of the time. The 12 percentage point difference between these figures is statistically significant.

The totality of the circumstances test featured an even larger degree of ideological disagreement in the earlier period. Column (3) reports the rate at which judges voted to assign liability conditional on those factors being met, and in the 1989–1994 period, the analysis of this prong featured the largest difference between Democratic and Republican appointees. When the average Democratic appointee determined the *Gingles* factors were met, she was almost certain to vote in favor of liability: after concluding that a challenge satisfied the preconditions, Democratic judges favored liability fully 92 percent of the time in the years prior to 1994. The corresponding rate for Republican appointees was also relatively high at 67 percent, and the difference between them of nearly 25 percentage points is statistically significant.

The results for the 1989–1994 period provide further support for the static hypothesis about the degree of discretion afforded judges under standards versus rules. The difference in the rates at which Democratic and Republican appointees favored voting rights plaintiffs under the second prong of the *Gingles* framework was more than dou-

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102 The opinions in *Thornburg v Gingles* make it somewhat unsurprising that Republican appointees were initially more reluctant to apply the *Gingles* framework to vote dilution challenges. The framework was crafted by Justice Brennan, one of the Court's most liberal members. See 478 US**[FC at n 2.]** at 34. In a separate opinion, the considerably more conservative Justice O'Connor rejected Justice Brennan's framework as misguided. See 478 US**[FC at n 2.]** at 90–93 (O'Connor concurring in the judgment) (complaining that under the Court's framework, "electoral success has [ ] emerged . . . as the linchpin of vote dilution claims, and that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.").**[37 wds.]**

ble the difference under the first prong. The larger gap in the second, standard-like prong of *Gingles* is consistent with the prediction that ideological disagreements will be more intense under standards than rules.

Importantly, however, this basic partisan division in the evaluation of the totality of the circumstances in the years immediately following *Gingles* did not hold up over time. During the years after 1994, Democratic appointees look nearly like Republican appointees at both steps of the framework. Column (2) shows that the rate at which Democratic appointees concluded that the rule-like preconditions were satisfied fell by nine percentage points, from 38 percent to 29 percent. In contrast, the corresponding rate for Republicans rose by a mere one percentage point, from 26 percent to 27 percent. The sizable ideological difference in how judges evaluated this prong during the earlier period all but disappeared in the later period. In the years after 1994, there was no meaningful difference in the rate at which Democratic and Republican appointees favored voting rights plaintiffs at the first stage of *Gingles*.

Column (3) shows that the evaluation of whether the totality of the circumstances warranted liability featured an even more substantial convergence. In both time periods, Republican appointees have always denied liability under the totality inquiry in a substantial fraction of cases. In cases where Republican appointees found the *Gingles* preconditions satisfied, they voted in favor of liability only about 67 percent of the time before 1994. This fraction fell somewhat over time, indicating that, for these judges, the significance of the *Gingles* preconditions waned. But the decline was modest: the likelihood that a Republican appointee voted in favor of liability after finding the preconditions met fell only by about 10 percentage points between the earlier and later period.

The rate at which Democratic appointees concluded that the totality of the circumstances required liability after finding the preconditions met fell much more sharply. In the first half of the observation period, Democratic appointees favored liability 92 percent of the time after concluding the factors were met. In the second half of the time period, they favored it only 58 percent of the time. The rate at which they concluded the totality of the circumstances favored liability thus fell by 34 percentage points. Although the number of votes by Democratic appointees in this prong of the framework is small, the decline is quite large and statistically significant.

To put this differently, these figures imply that Democratic and Republican appointees favored voting rights plaintiffs under both the first and the second prongs at roughly the same rate in later years. After 1994, the average Democratic appointee who found the precondi-

tions met voted for liability 58 percent of the time, while Republican appointees did so 55 percent of the time—a nearly identical treatment that stands in sharp contrast to the gap of almost 25 percentage points separating these groups of judges prior to 1994. These raw changes are consistent with our second hypothesis regarding the inflexibility of rules to social change—that, as the partisan and representational consequences of vote dilution litigation changed, the rate at which judges found liability was warranted in the totality of the circumstances should decline more quickly for Democratic appointees than Republican appointees.

c) Preliminary Conclusions. In short, these data point to a second transformation of voting rights litigation. As the data show, the 1982 amendments and the Supreme Court's subsequent interpretation of them did initially make *Gingles*'s three preconditions test the central doctrinal tool around which Section 2 litigation was organized. But within a decade a second transformation dramatically undermined the significance of *Gingles*. Two doctrinal shifts propelled this transformation. First, judges moved sharply away from the view that satisfaction of the *Gingles* preconditions was essentially sufficient to establish liability. In the early years following *Gingles*, courts that found the preconditions satisfied overwhelmingly concluded that liability existed. More recently, however, the connection between the preconditions and liability has grown much more tenuous. While courts continued to insist that finding the *Gingles* preconditions satisfied would almost inevitably lead to liability,[103] the actual practice of courts belied this rhetoric. Second, the behavior of Democratic and Republican appointees has converged over time. In fact, the declining significance of the *Gingles* preconditions appears to be largely the product of changes in the voting patterns of Democratic appointees. These judges have come, over time, to look much more like Republican appointees in their skepticism of the significance of the *Gingles* preconditions.

This finding is quite significant for our understanding of the role that federal courts play in promoting minority voting rights. Other voting rights scholars, perhaps most notably Richard Pildes, have suggested that federal courts adapt quickly to changing social conditions in voting rights litigation.[104] Our findings provide some empirical support for his argument. But our data suggest a different sort of response than that predicted by most voting rights literature. The literature focuses principally on the implications of social change for the substantive con-

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103 See note 34 and accompanying text.

104 See Pildes, 80 NC L Rev at 1567–73 (cited in note 40). Compare Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 Ohio St L J 1139, 1141–42, 1158–60 (2007).

tent of the *Gingles* test itself.[105] This focus is understandable, particularly in light of the fact that courts continue to claim that the test itself is so centrally important. But stepping back from judicial rhetoric and focusing instead on judicial practice reveals a very different pattern. Courts have responded to changing litigation and political realities not just by tweaking the *Gingles* test, but by moving substantially away from that famous test as an important determinant of liability under the Voting Rights Act.

III. CONFIRMING THE HYPOTHESES

To be sure that the patterns we observe in the raw data are robust—that is, they are not actually the product of some other characteristics of Section 2 litigation—we turn in this section to regression analysis.[106] In so doing, we acknowledge that untangling the precise causes of the transformation in voting rights adjudication is no easy task. In part, this is because the jurisprudential features on which we have focused are not exogenous attributes of the cases. The doctrinal approach and analysis arise endogenously from each judge's resolution of a particular case. In other words, we have no objective measure of whether the *Gingles* preconditions were met in any particular case; we have only a judge's conclusion that they were or were not satisfied. We are also alert to the difficulty of distinguishing empirically between two possible reasons for the declining significance of the *Gingles* framework and the convergence of Democratic and Republican appointees: first, that the nature of litigated cases (which includes the underlying social conditions) changed in some important way over time; second, that litigated cases remained unchanged but that judge's views about minority vote dilution litigation changed nonetheless.[107] Still, the patterns

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105 See Pildes, 68 Ohio St L J at 1141–42, 1158–60 (cited in note 104); Pildes, 80 NC L Rev at 1567–73 (cited in note 40).

106 We estimated the probability that judge votes in favor of a plaintiff with probit regressions in the form $Pr(Vote_{ijct}) = Dem_j + Z_{jt} + X_{ijct} + \alpha_c + \alpha_t + \varepsilon_{ijct}$. The dependent variable $Pr(Vote_{ijct})$ represents the probability that judge j in case i in year t and circuit c votes for the plaintiff. The dependent variable in some specifications is the likelihood of voting in favor of Section 2 liability, and in others, it is the likelihood of voting in favor of satisfaction of the *Gingles* factors. In these equations, Dem_j is a binary variable taking the value one when a Democratic president appointed judge j and zero otherwise. The term X_{ijct} reflects variables that are specific to case i, and Z_{jt} contains variables reflecting characteristics of judge j, some of which may vary over time. The binary variables α_c and α_t are fixed effects for circuit c and year t. The term ε_{ijct} is an error term. Standard errors are clustered on cases because the votes of judges sitting on the same panel may not be independent.

107 The views of judges could have changed because of ideological drift or because of generational replacement on the courts. A third possibility is that judges' views changed because they acquired new information over time about the consequences of vote dilution litigation. But we believe that it is more appropriate to characterize changes in information as changes in case com-

in the data are consistent with a fairly conventional account about some substantial changes in the nature of vote dilution litigation that took place over the past two decades.[108]

Table 3 presents the first set of regression results.[109] The dependent variable in these equations is the probability that a judge votes in favor of assigning liability under Section 2. These equations confirm that the findings we previously obtained regarding the relationship between the liability and judicial characteristics in the entire period since the 1982 Amendments persist in the post-*Gingles* period.[110] The results in the subsequent tables present analyses of the doctrinal factors.

Table 4 reports equations in which the dependent variable is the probability a judge decides the *Gingles* factors are satisfied, and in these regressions the data are limited to those observations in which judges voted to apply the *Gingles* framework. These equations estimate the first step of the *Gingles* analysis: the probability a judge concludes the *Gingles* factors are met, conditional on the judge having favored applying the framework.

Table 5 presents similar equations for the second stage of the *Gingles* framework, the totality of the circumstances. In these equations, the dependent variable is the probability a judge votes to assign liability under Section 2, and here, the data are limited to those observations in which judges decided that the case satisfied the *Gingles* factors. These equations estimate the probability a judge favors liability, condi-

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position. Analytically, this more cleanly separates "internal" accounts of the change in judicial behavior from "external" accounts.

Also, as we noted above, we should emphasize that our results remain largely the same when we employ alternative measures of judicial ideology that are somewhat less crude than the party-of-the-appointing-President measure. See supra note __. The robustness of the results to alternative ideological proxies lessens the likelihood that the results are driven by generational replacement that changed the ideological composition of the judiciary. Thus, while it might be tempting to think that the post-1994 changes are driven by Clinton's judicial appointments being more conservative than earlier Democratic appointees, we find no significant evidence of this possibility.

108 See notes 39–47 and accompanying text (summarizing this conventional account).

109 To make it easier to interpret our results, the regression results in Tables 3 through 5 show the marginal effects for each explanatory variable instead of the regression coefficients. This simply means that the numbers listed in these tables reflect percentage changes in the likelihood of a judge finding liability. To see this, consider for example the first row of Table 3. This row shows how much more likely a judge was to vote in favor of liability if the "Judge Was Democratic Appointee." Under our first regression (in Column (1)), the marginal effect is .109, which means that a judge was more likely to vote in favor of liability by 10.9 percentage points on average if she is a Democrat rather than a Republican.

110 See Cox and Miles, 108 Colum L Rev at 18–49 (cited in note 4). Briefly, the estimates in the shorter time period are quite similar to the earlier results, and our central conclusions are unchanged.

tional on the judge having concluded that the challenge met the *Gingles* factors.

Each of these tables presents four regression specifications. Column (1) displays the baseline estimates in which judicial ideology and race are the parameters of primary interest. The regression in column (2) adds controls for the partisan and racial composition of the panel. Columns (3) and (4) present regression specifications that track Columns (1) and (2) respectively – except that this second pair includes a term interacting a judge's partisan affiliation with the time period.

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

TABLE 3. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING FOR SECTION 2 LIABILITY: PROBIT REGRESSION ANALYSIS

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

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

A. Judicial Ideology

The results of Table 3 show that, consistent with our earlier analysis, judicial ideology exerts a sizable and robust effect on the likelihood a judge votes to assign liability in Section 2 challenges. The magnitude of the impact in columns (1) and (2), about 10 percentage points, is similar to our previous findings, and it is very close to the difference observed in the summary statistics of Table 1.

Columns (3) and (4) include interactions of judicial ideology and time period. That interaction captures any change over time in the behavior of Democratic appointees relative to Republican appointees. It therefore allows us to test whether the ideological convergence that shows up in the summary statistics remains after we control for other determinants of liability. The estimates in column (3), for example, imply that the average rate at which a Democratic appointee in the years prior to 1994 voted in favor of Section 2 liability was 11.4 percentage points higher than that of the average Republican appointee. In the years after 1994, this difference shrinks to 6.6 percentage points (.066 = .114 – .048). Although the point estimates imply that, even after 1994, Democratic appointees are more likely to vote in favor of liability, the imprecision of the estimates implies that this 6.6 percentage point difference is not distinguishable from zero at conventional significance levels (p-value = .1891).

The equations in columns (2) and (4) in Table 3 include control variables for the partisan composition of the panel, for those judges who sit in panels. Because some of our observations come from Circuit panels and special trial panels, these variables are needed to control for the "indirect effects" or "panel effects" of partisanship. Numerous researchers have found evidence that the ideology of other judges on a panel can influence a judge's decisionmaking. This research typically shows that Republican or conservative judges are more likely to cast liberal votes when they sit on panels with Democratic or liberal judges. Conversely, it indicates that Democratic or liberal judges are more likely to cast conservative votes when they sit with Republican or conservative judges.[111] The estimates in columns (2) and (4) provide weak

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[111] See, for example, Thomas J. Miles and Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U Chi L Rev 761, 767–68 (2008) (finding ideological voting panel effects in cases of hard look review of EPA and NLRB decision in the Courts of Appeals); Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U Chi L Rev 823, 851–65 (2006) (same in *Chevron* review cases); Cass R. Sunstein, et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 17–45 (Brookings 2006) (demonstrating "substantial" panel effects in judicial voting as expressed through "ideological dampening and ideological amplification" across a wide variety of types of cases); Cass R. Sunstein, David Schkade, and Lisa M. Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va L Rev

support for the presence of panel effects in liability determinations. The point estimates for the individual panel effects are not statistically significant. But they imply that, as Democratic appointees comprise a greater share of the panel, the likelihood that a judge votes in favor of the plaintiff rises. For example, the results in column (2) indicate that the probability that a Republican appointee votes in favor of liability rises by 5.7 percentage points when she sits with one Democratic appointee and by 11.4 percentage points when she sits with two.[112]

301, 311–30 (2004) (same); Sean Farhang and Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J L, Econ, & Org 299, 312–21 (2004) (finding panel effects based on gender and ideology in employment discrimination suits); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va L Rev 1717, 1719 (1997) (finding that "a judge's vote . . . is greatly affected by the identity of the other judges sitting on the panel" and that "the party affiliation of the other judges on the panel has a greater bearing on a judge's vote than his or her own affiliation").

[112] For a more extensive discussion of the role that panel effects play in Section 2 cases, see Cox & Miles, 108 Colum L Rev at 25–29, 40–42.

TABLE 4. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING TO FIND *GINGLES* FACTORS MET, CONDITIONAL ON APPLYING THEM: PROBIT REGRESSION ANALYSIS

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

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

The regressions in Table 4 shift focus to the role of ideology at first step of *Gingles*. They show that judicial ideology plays a weaker role at this first step than it does with respect to ultimate votes for or against liability. In those cases where the framework is applied, the first two Columns demonstrate that a Democratic appointee is about eight percentage points more likely than a Republican appointee to vote in favor of finding the *Gingles* factors met. In addition to their smaller implied magnitudes, these estimates are slightly less precisely estimated than the liability estimates in Table 3. Consequently, these estimates are not statistically significant. The last two equations in Table 4 attempt to capture changes over time in the role that judicial ideology plays in the

application of the *Gingles* preconditions. They indicate an even smaller difference existed between Democratic and Republican appointees after 1994. Column (3), for example, implies that the difference in the rates at which Democratic and Republican appointees find liability has decreased by six percentage points (.06 = .093 - .033). An additional reason to doubt that ideology has a meaningful effect on a judge's decision regarding the satisfaction of the *Gingles* factors is that the estimated effects of panel composition are negative here and statistically indistinguishable from zero.

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

The estimates in Table 4 contrast sharply with those in Table 5. Table 5 focuses on *Gingles*'s second step. This Table shows that judicial ideology correlates strongly and significantly with the probability a judge votes to assign liability after concluding that the *Gingles* factors are satisfied. Ideology's impact on this probability operates both directly, through a judge's own political affiliation, and indirectly, through the partisan composition of a judge's panel colleagues. For example, the estimates of column (1) of Table 5 show that the probability the average Democratic appointee concludes that liability should follow from satisfaction of the factors is 15.2 percentage points higher than that of the average Republican appointee. When controls for panel composition are included, as in the regression in column (2), this estimated difference is 20.5 percentage points. Moreover, the effects of panel composition are as large as the impact of a judge's own ideology. The equation in column (2) implies that the presence of any additional Democratic appointee on a panel raises by 22 percentage points the probability that the judge concludes liability should follow from satisfaction of the factors. All of these estimates are statistically significant. These regressions indicate that, after controlling for other characteristics of the cases, judicial ideology has a strong influence on the evaluation of whether, in the totality of the circumstances, liability should follow from the plaintiff's satisfying the *Gingles* factors.

TABLE 5. LIKELIHOOD OF INDIVIDUAL JUDGES VOTING FOR SECTION 2 LIABILITY, CONDITIONAL ON *GINGLES* FACTORS BEING MET: PROBIT REGRESSION ANALYSIS

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

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

Table 5 also shows that the role of judicial ideology at the totality – of-the-circumstances stage changed dramatically over time. The equations in columns (3) and (4) present tests for differential trends in the effect of judicial ideology. When the regression includes an interaction of a judge's partisan affiliation and time period, the baseline estimate of ideology remains substantial. For example, the results in column (3) imply that, prior to 1994, a Democratic appointee had a conditional probability of voting in favor of liability that was 38.6 percentage points higher on average than a Republican appointee. But after 1994,

the estimated effect of ideology swung back, even into negative territory (-.184 = .386 – .570).

Without attaching too much importance to the precise magnitudes of these estimates, the general patterns are clear. Before 1994, Democratic appointment correlated strongly with a higher conditional probability of favoring liability once a plaintiff satisfied the *Gingles* preconditions. After 1994, there was no statistically significant difference between Democratic and Republican appointees in this conditional probability (p-value = .4059). The regression analysis provides some confirmation of the patterns seen in Table 2. Democratic appointees were initially more likely to conclude that liability should follow from a plaintiff's satisfaction of the factors. But by the latter half of the 1990s, they were no more willing to assign liability in this circumstance than were Republican appointees.

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

Moreover, the models confirm that there were sharp changes over time in the role that judicial ideology played in the second stage of the *Gingles* inquiry. In the first half of the observation period, the probability that a Democratic appointee concluded that liability should follow from satisfaction of the *Gingles* preconditions is much higher on average than that of a Republican. But in the second half of the study period, this conditional probability for the average Democratic appointee was statistically indistinguishable from that of the average Republican appointee. This trend is consistent with the hypotheses we laid out in Part II about the possible changes over time in the representational and political consequences of voting rights litigation.

B. Other Characteristics

1. Judicial race.

In addition to its political salience, the Voting Rights Act—as a statute intended to protect minority voting rights—also has particular relevance to the dimension of race. For that reason, we previously investigated the role of a judge's race on the likelihood that the judge will impose liability under Section 2.[113] Although the number of African-

[113] See Cox and Miles, 108 Colum L Rev at 29–37, 42–45 (cited in note 4).

American judges in the data was small, the magnitude of the effects we detected was quite large. We observed that African-American judges were substantially more likely to vote in favor of a Section 2 plaintiff. In addition, race exerted a sizable panel effect. White judges who sat on panels with at least one African-American judge were considerably more likely to vote in favor of liability, and this effect was evident for both Democratic and Republican appointees. The results in Table 3 confirm these patterns persist in the shorter time period studied here.

Table 4 shows that similar patterns exist between race and the conditional probability a judge concludes the *Gingles* factors are met. The estimates for the direct and peer effect of race are large—over 20 percentage points. Again, the small number of African-American judges in the data may result in a few outliers driving the estimates. But the general pattern is remarkable in view of the muted effect of ideology in judicial assessments of whether the plaintiff has satisfied the *Gingles* factors.

In Table 5, the regressions indicate that a judge's race also influences the conditional probability that she determines that liability follows from the preconditions' satisfaction. Caution is warranted here because the number of observations of African-American judges in this subsample is quite small: there are only 19. Despite this limitation, it is remarkable that the race of the judge appears to correlate just as strongly with the likelihood that the judge determines the totality of the circumstances warrants liability as it does with the overall probability that the judge votes for liability.

2. Case characteristics.

The regressions control for a variety of case characteristics. Particular caution is warranted in interpreting these estimates because, unlike judicial characteristics, case characteristics are not the products of randomization. Rather, they are the result of litigant self-selection and are therefore likely correlated with the error term.[114] With this caveat in mind, the estimates for these features of the cases warrant brief discussion.

The type of court correlates with the probability of liability and in some specifications with the likelihood that liability follows from a plaintiff's satisfaction of the factors. The regressions in Table 3 show a pattern similar to our previous findings—that judges sitting on appel-

[114] See Cox and Miles, *Documenting Discrimination?*, 108 Colum L Rev Sidebar 23 (2008), available at http://www.clrsidebar.org/replies/Cox_Miles_Documenting (explaining the methodological problem with drawing strong inferences from the liability patterns associated with these case characteristics) .

late courts voted to assign liability at rates about 10 to 18 percentage points lower than their colleagues on trial courts. In Table 5, appellate courts appear correlated with lower rates of liability conditional on the factors having been met when the regression includes controls for panel compositions. In contrast, the type of court appears unrelated to the probability of a judge concluding that the factors are satisfied. The results in Table 4 show that the differences between court types are fewer than three percentage points and statistically insignificant.

CONCLUSION

Debates about the relationship between rules and standards are as old as law itself. While there is no shortage of theory about the advantages and disadvantages of each, empirical work on the relationship between the two has been lacking. Our findings provide support for two of the central theoretical intuitions about rules and standards. First, they indicate that rules indeed may, to a greater extent than standards, limit discretion and suppress ideological disagreements among judges. Second, they suggest that the flexibility preserved by standards may make it easier for adjudicators to respond to changing circumstances over time.

These findings have important implications for the long-standing debate about whether (and how) legal rules actually constrain judges. But our results also lead to a number of specific insights about the operation of the Voting Rights Act and the protection of minority voting rights. The doctrinal structure that Justice Brennan created in *Gingles* may well have been intended to encourage judicial intervention in the wake of Congress's amendments to Section 2. By establishing a set of relatively objective preconditions to liability, Brennan gave lower courts a steadier foothold for liability findings. Nonetheless, as these preconditions over time became a potential threat to substantive minority representation and the Democratic party, Brennan's two-stage analytic framework became more meaningful as a safety valve against liability than a spur to it. This safety valve may have allowed courts to respond more easily to changing social conditions and political consequences. But the cost has been the growing irrelevance of the *Gingles* preconditions themselves. Today the preconditions are surprisingly disconnected from the liability determination. Liability follows from a finding that the preconditions are satisfied only slightly more often than it would follow from a coin flip.

All this suggests that the Supreme Court's effort to provide an objective test for identifying minority vote dilution has been largely un-

successful.[115] The lack of success is important for ongoing debates about the structure of the Voting Rights Act. Recently, both Congress and the Supreme Court have confronted legal issues relating to how rule-like the Act should be. In 2006, Congress amended Section 5 of the Act to make more rigid the test for measuring minority political opportunity.[116] Similar changes may soon follow for Section 2. A case currently pending before the Supreme Court raises the question of whether prong 1 of the *Gingles* preconditions (which requires minority voters be "sufficiently numerous" in the area where they claim a violation) should be made even more rule-like—by requiring minority voters to constitute at least 50 percent of the voting age population of the district whose creation they seek under Section 2.[117] Our results show that these changes might help suppress ideological disagreements among judges, even if these disagreements continue to beset the public conversation about voting rights. But to the extent changes to Section 2 or Section 5 do cabin ideological disagreements, they may also make it more difficult for lower courts to adjust the Act to changing social conditions.[118]

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115 This transformation also suggests that the Supreme Court's decision in *Johnson v De Grandy* may be more consequential than is often recognized. See 512 US 997 (1994). Superficially, the case simply clarifies that the *Gingles* factors are necessary but not sufficient preconditions to liability. See id at 1011–12. In light of our evidence, however, one might read the Court's decision in *De Grandy* as an important indication of the Court's own understanding of the growing disconnect between the *Gingles* preconditions and minority vote dilution, or perhaps even as a signal to lower courts about the declining importance of the preconditions.

116 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, codified at 42 USCA § 1973(b) (2007). See also Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L J 174, 207–08 (2007) (noting that one of the two major changes instituted by the Act was to overturn *Georgia v Ashcroft* by requiring "denials of preclearance when voting laws 'diminish[] the ability' of minorities 'to elect their preferred candidate of choice'").

117 See *Pender County v Bartlett*, 649 SE2d 364 (NC 2007), cert granted sub nom Bartlett v. Strickland, 128 S Ct 1648 (2008) (calendared for October Term 2008). The question presented in the case is "Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act." See Petition for Writ of Certiorari, *Bartlett v Strickland*, No 07-689, *i (filed Nov 21, 2007), available on Westlaw at 2007 WL 4207130. There is currently some ambiguity about whether prong 1 creates such an obligation. See, for example, Pildes, 80 NC L Rev at 1556–63 (cited in note 40) (summarizing the disagreement).

118 This reification may be of considerable concern to the Court, as it has often emphasized that minority vote dilution jurisprudence was designed in part as a transitional regime rather than as a system that creates permanently safe sinecures for minority voters. See, for example, *De Grandy*, 512 US at 1020**[FC at n 115.]**:

> **[Block]**[F]or all the virtues of majority-minority districts as remedial devices, they rely on . . . the 'politics of second best' . . . . [S]ociety's racial and ethnic cleavages sometimes necessitate [such districts,] . . . but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.**[Block, no indent]**

More generally, our findings inform debates about judicial intervention in cases concerning political rights. Whenever federal courts intervene in the political process they inevitably face charges of improper entanglement in politics. (*Bush v Gore* is but one example of this fact.[119]) For that reason, many scholars have documented the strong pressure courts face in these cases to craft objective and relatively clear tests for liability. This pressure is in part what led the Supreme Court to adopt the bright-line test of one person, one vote in the 1960s—a legal test for which, as John Hart Ely once remarked, "administrability is its long suit, and the more troublesome question is what else it has to recommend it."[120] And it is in part what has led the Court to decline repeated invitations to police partisan gerrymandering. We show that the Court's efforts to provide such an objective test in *Gingles* has turned out to be somewhat self-defeating. What this means for the future of minority voting rights jurisprudence is not entirely clear. Courts may respond to the pressure by reshaping Section 2 doctrine to be more rule-like in practice. Or they may respond by scaling back their intervention in the field. Our findings cannot predict the future direction courts or Congress will take. But they do provide a rich account of the institutional constraints that will shape any effort to design a legal regime that protects minority political participation.

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119 531 US 98, 103–11 (2000) (per curiam). See also David Cole, *The Liberal Legacy of* Bush v. Gore, 94 Georgetown L J 1427, 1427–30 (2006) (summarizing the criticisms of the decision levied in law journals and the mass media).

120 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 121 (Harvard 1980). See also Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 NC L Rev 1411, 1441 (2002) ("[B]right-line rules may [ ] result in more *widespread* judicial interference in the political process than broad theories because only the latter offer grounds for discerning sensible limiting principles and making contextual judgments regarding application of the equality norm.").**[EIO]**

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