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To Participate and Elect: Section 2 of the Voting Rights Act at 40

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To Participate and Elect:

Section 2 of the Voting Rights Act at 40

Ellen D. Katz, Brian Remlinger, Andrew Dziedzic, Brooke Simone & Jordan Schuler*

This document summarizes our analysis of cases decided under Section 2 of the Voting Rights Act between September 1, 1982 and December 31, 2021. It updates our 2006 study documenting Section 2 litigation through 2005. While the legal landscape has changed considerably since the original report, this project, like the original, rests on the idea that Section 2 decisions offer a lens through which variations in political participation over time and region may be viewed and evaluated. We hope to help inform how Section 2 claims and remedies have changed over the past four decades. For more information, or to view the dataset, please visit our website at voting.law.umich.edu.

The Evolution of Section 2: Numbers and Trends

For four decades, Section 2 of the Voting Rights Act has barred electoral practices that result in a “denial or abridgment” of the right to vote based on race or membership in protected language minority groups. Since 1982, 439 Section 2 cases have resulted in published decisions or opinions available on the major legal databases. Notable findings from our study of these decisions include:

- More cases addressed vote dilution (e.g., challenges to at-large elections, districting plans, and similar practices) than non-dilution (e.g., challenges to election procedures like voter ID and early voting).
- The proportion of non-dilution cases to dilution cases increased over time.
- Plaintiffs were much more likely to succeed in Section 2’s first decade than in more recent decades.
- Dilution cases succeeded more often than non-dilution cases.
- More cases addressed local electoral practices than state practices.
- The proportion of cases challenging state practices has increased over time, while plaintiff success in these types of cases has declined.
- Since *Shelby County v. Holder*, more Section 2 cases have been decided in jurisdictions previously subject to Section 5 of the Voting Rights Act than in places never subject to it. Plaintiffs bringing these cases succeeded less often than they did previously.

* **Preferred Citation:** Ellen D. Katz, Brian Remlinger, Andrew Dziedzic, Brooke Simone & Jordan Schuler, *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, **Univ. Mich. L. Sch. Voting Rights Initiative** (2022), <https://voting.law.umich.edu>.

These trends are discussed in more detail below. For details on how the dataset was compiled, please see the Appendix at the end of this document.

Vote Dilution and Beyond

Seventy-two percent of Section 2 cases—316 out of the 439 coded cases—addressed some form of vote dilution, most of which involved a challenge to an at-large electoral structure or a redistricting plan. The remaining 123 Section 2 cases involved non-dilution claims, often described as “vote denial” or “time, place, and manner” disputes. Non-dilution claims addressed election procedures (e.g., early voting rules, voter registration requirements, election scheduling), appointment/state control (e.g., challenges to decisions replacing or shifting power from elected positions with appointed ones) or ballot design, felon disenfranchisement statutes, and related measures. Though they are a minority of Section 2 cases overall, non-dilution cases represent a growing proportion of Section 2 cases in more recent years.

Fig. 1: Dilution vs Non-Dilution Cases

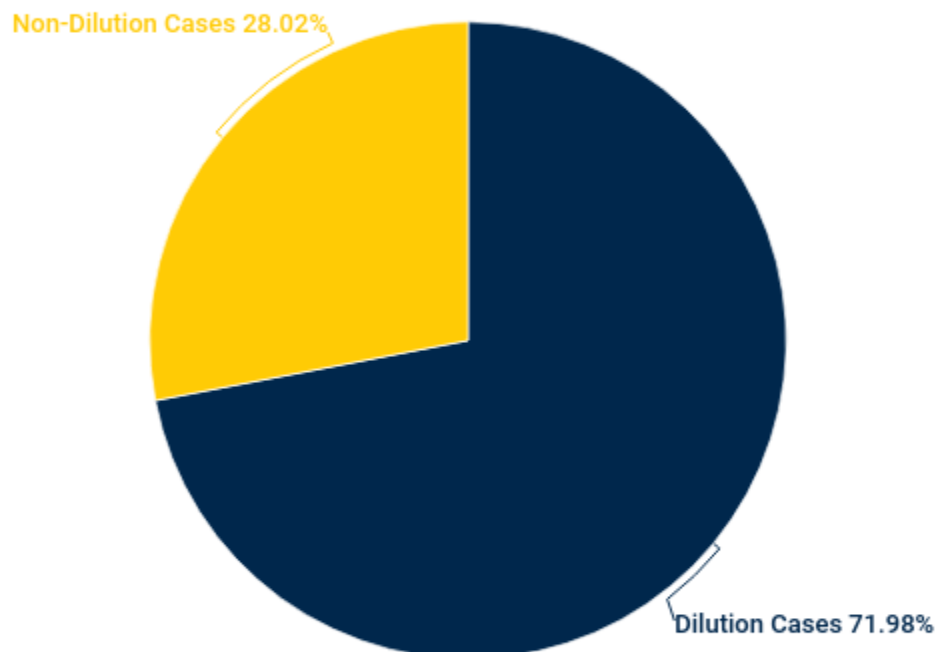


Fig. 2: Dilution Cases vs Non-Dilution Cases By Year

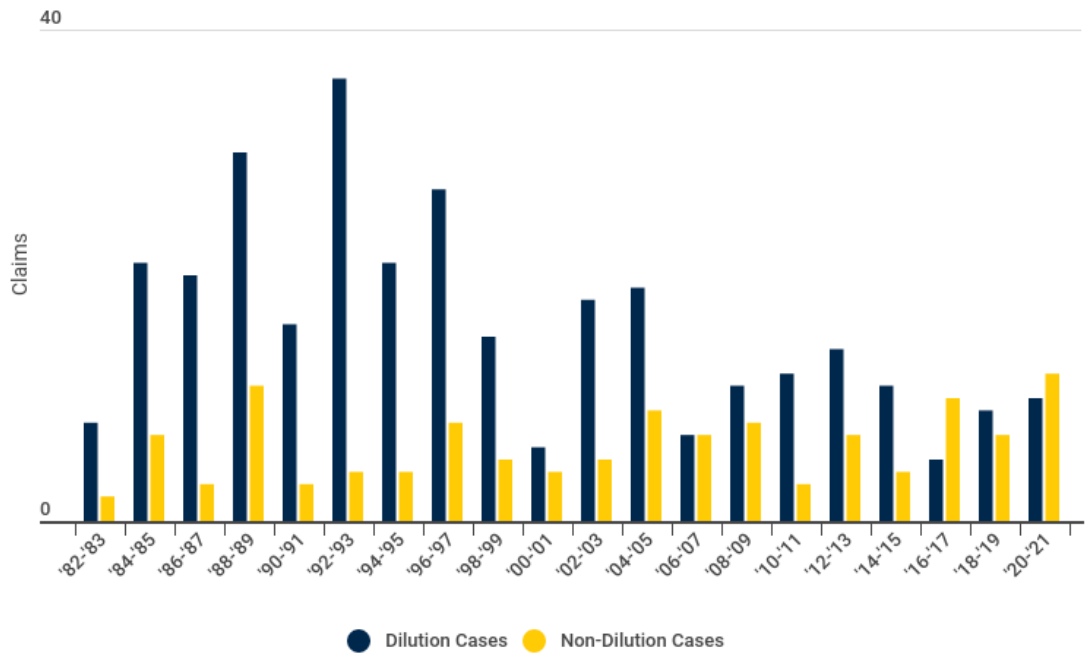


Fig. 3: Dilution Cases by Type

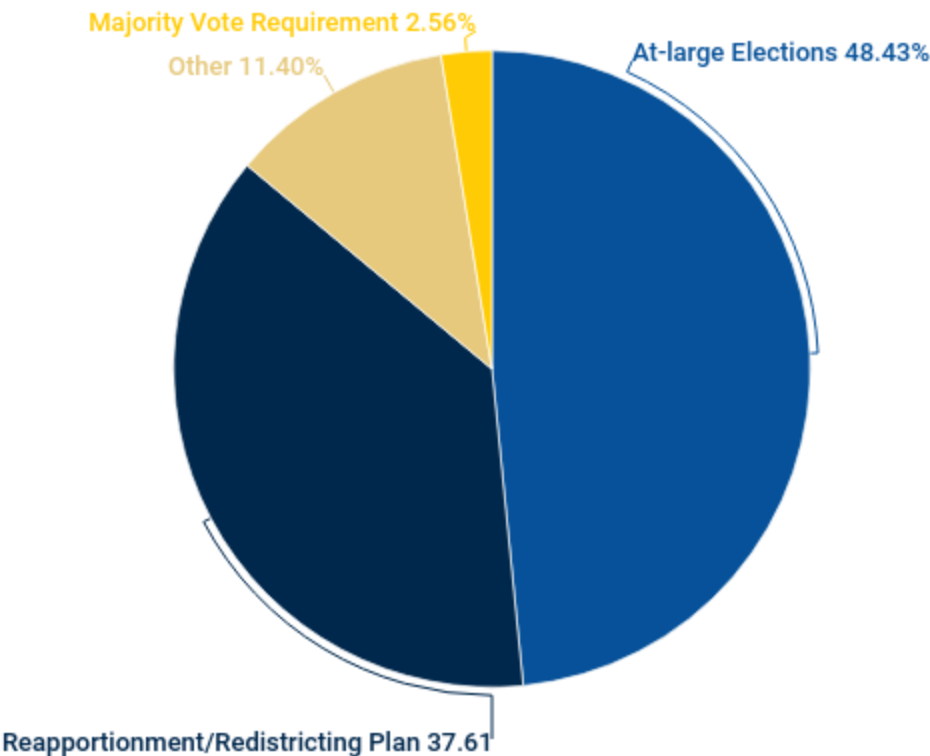
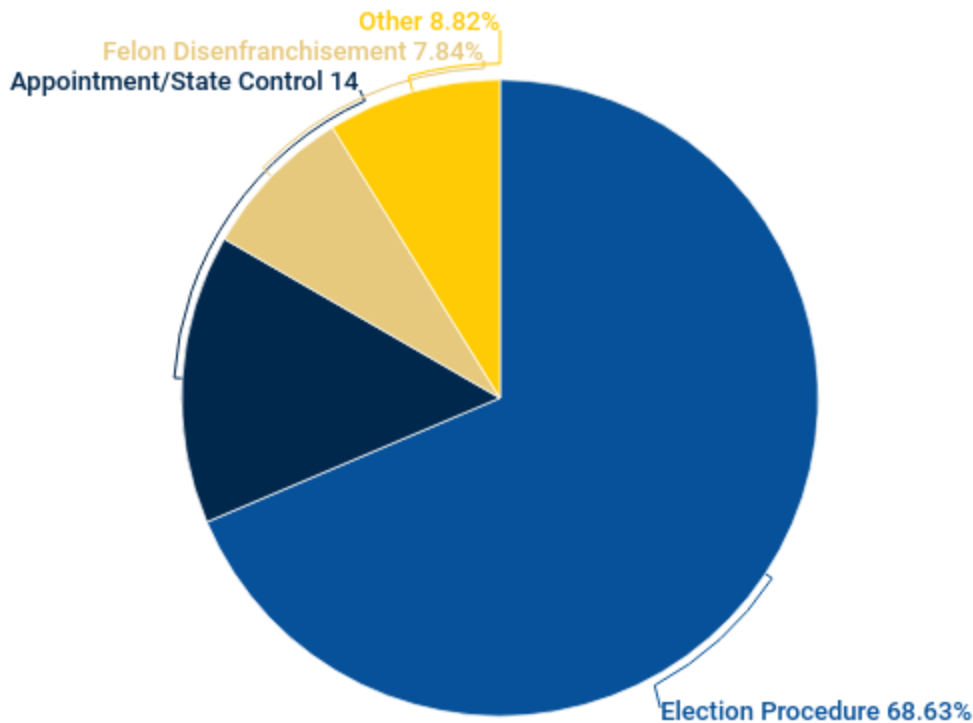


Fig. 4: Non-Dilution Cases by Type



Congress anticipated that most Section 2 cases would involve dilution claims when it amended the Voting Rights Act in 1982. Congress crafted the amended statute to restart challenges to dilutive electoral structures of the sort that had been halted by the Supreme Court’s 1980 decision in *City of Mobile v. Bolden*. There, the Court held that a finding of liability under Section 2, as enacted in 1965, required a showing that discriminatory intent had motivated the challenged practice. The 1982 amendments eliminated this intent requirement, advancing Congress’s belief that electoral practices may cause cognizable injuries regardless of the intent underlying their enactment.

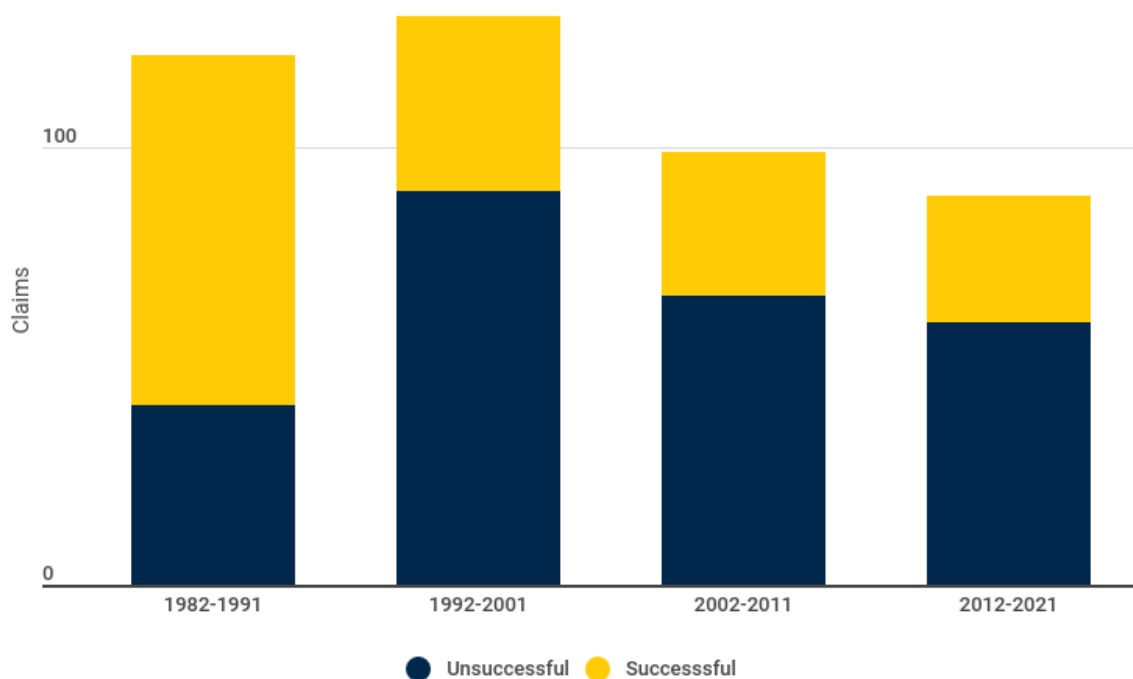
The amendments targeted at-large structures, like the one in *City of Mobile*, that predictably and reliably ensured that Black voters could not elect representatives of choice. Congress’s focus on dilution, moreover, is evident in the text of the amendments—which was taken, in part, from language used by the Supreme Court to define constitutional racial vote dilution in cases predating *City of Mobile*—as well as in much of the legislative history of the 1982 amendments. Indeed, the Senate Judiciary Committee Report accompanying the 1982 amendments listed

factors to guide the Section 2 inquiry that were themselves derived from earlier constitutional vote dilution cases.

Plaintiff Success

Since 1982, plaintiffs achieved successful outcomes in 41% of the cases identified. Successful outcomes include the issuance of a preliminary injunction, a finding for a plaintiff on the merits, a decision issuing attorneys' fees in a manner that indicated a plaintiff had been successful on the merits or through settlement, or if the plaintiff achieved some other positive outcome. (More details on how the study defined success may be found in the Appendix at the end of this document.) Plaintiff success has diminished over time: plaintiffs were most successful during Section 2's first decade, with plaintiffs succeeding in 66% of the cases. Success rates were 31% in the second decade and 33% in both the third and fourth decades.

Fig. 5: Plaintiff Success



Plaintiffs achieved successful outcomes in 49% of the dilution cases overall. Much of this success was frontloaded, with plaintiffs succeeding in 74% of the dilution cases brought during the first decade following the 1982 amendments; plaintiffs, by contrast, succeeded at a reduced but fairly steady rate in dilution cases brought in subsequent decades: 35% in 1992-2001, 39% in 2002-2011, and 43% from 2012-2021.

Plaintiffs achieved successful outcomes in 23% of the non-dilution cases overall. Plaintiff success in non-dilution cases has decreased over time, with plaintiffs succeeding in 38% of the non-dilution cases brought during the first decade following the 1982 amendments and then 12%, 22%, and 20% in each decade thereafter.

Fig. 6: Plaintiff Success for Dilution and Non-Dilution Cases

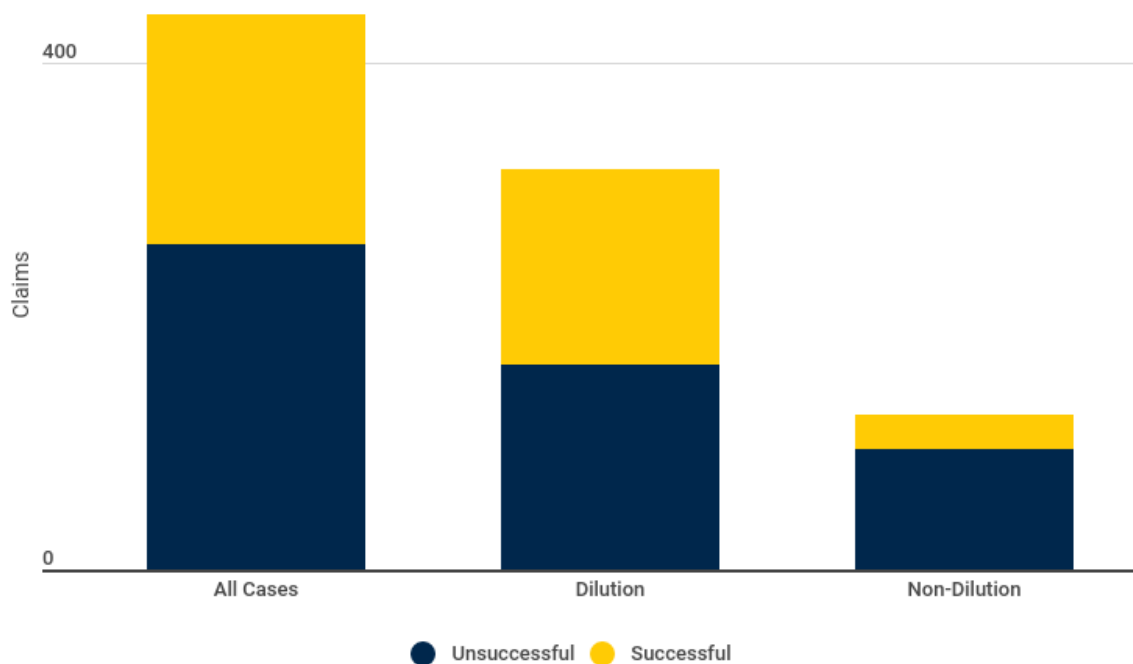


Fig. 7: Plaintiff Success in Dilution Cases by Era

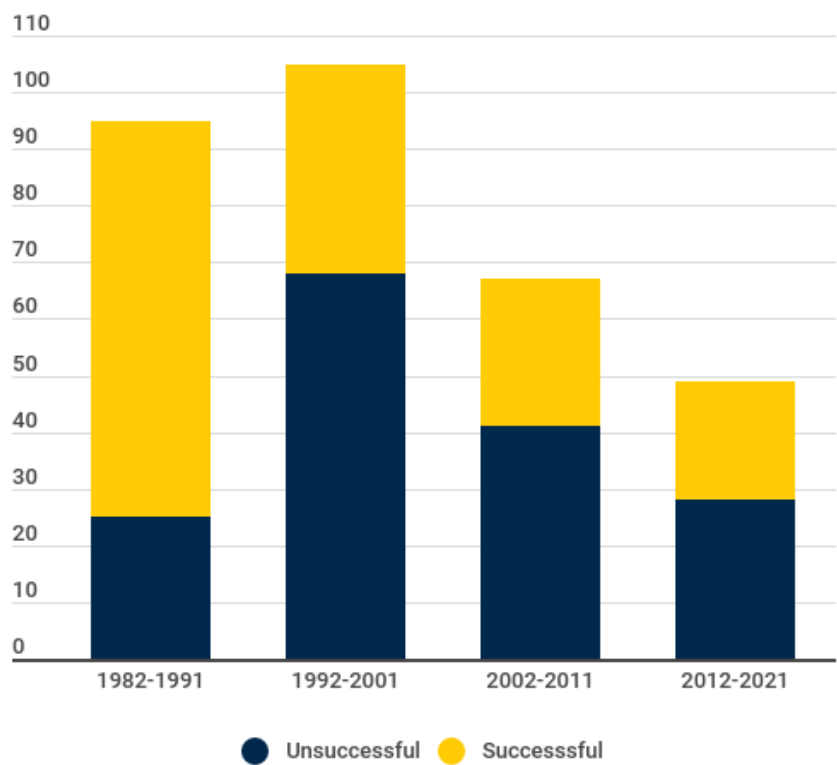
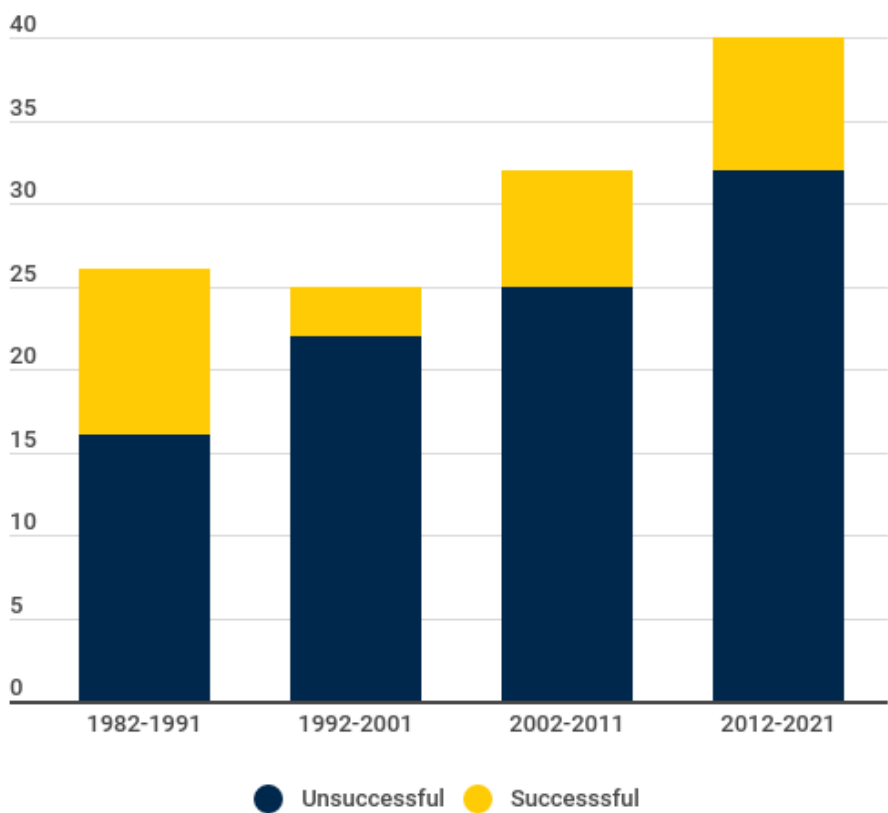


Fig. 8: Plaintiff Success in Non-Dilution Cases by Era

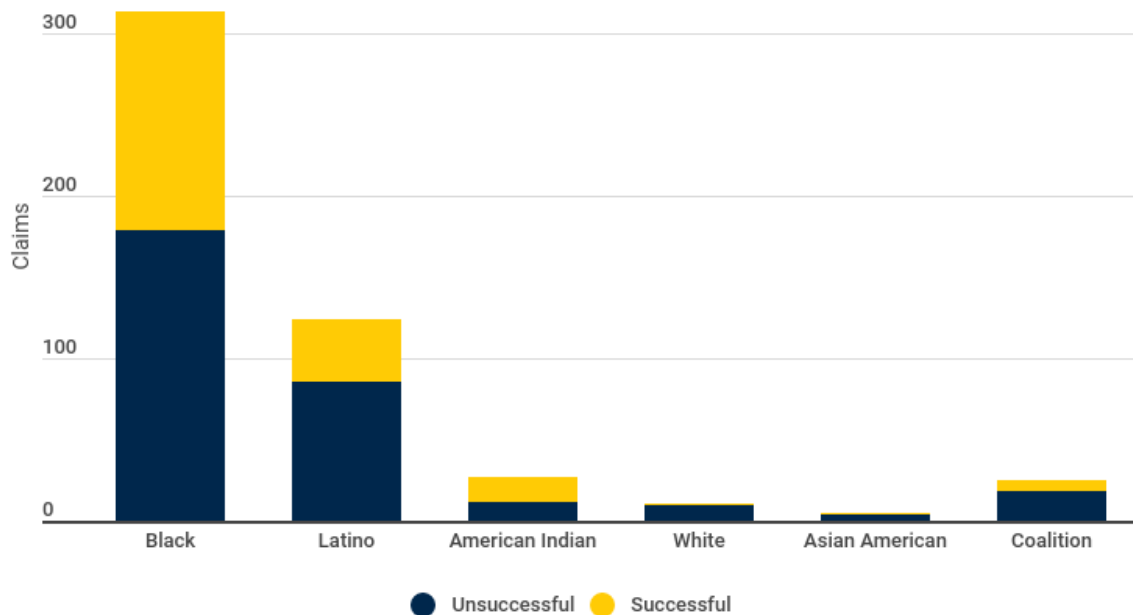


Plaintiff and Defendant Identity

Black plaintiffs participated in 71% of Section 2 cases—the most of any plaintiff group. Latino plaintiffs participated in 28% of cases, American Indian plaintiffs in 6% of cases, white plaintiffs in 3% of cases, and Asian American plaintiffs in 1% cases. (These percentages exceed 100% because multiple plaintiff groups brought separate claims in some cases). Six percent of cases were brought by coalitions of racial groups alleging they jointly constituted a single cohesive voting bloc.

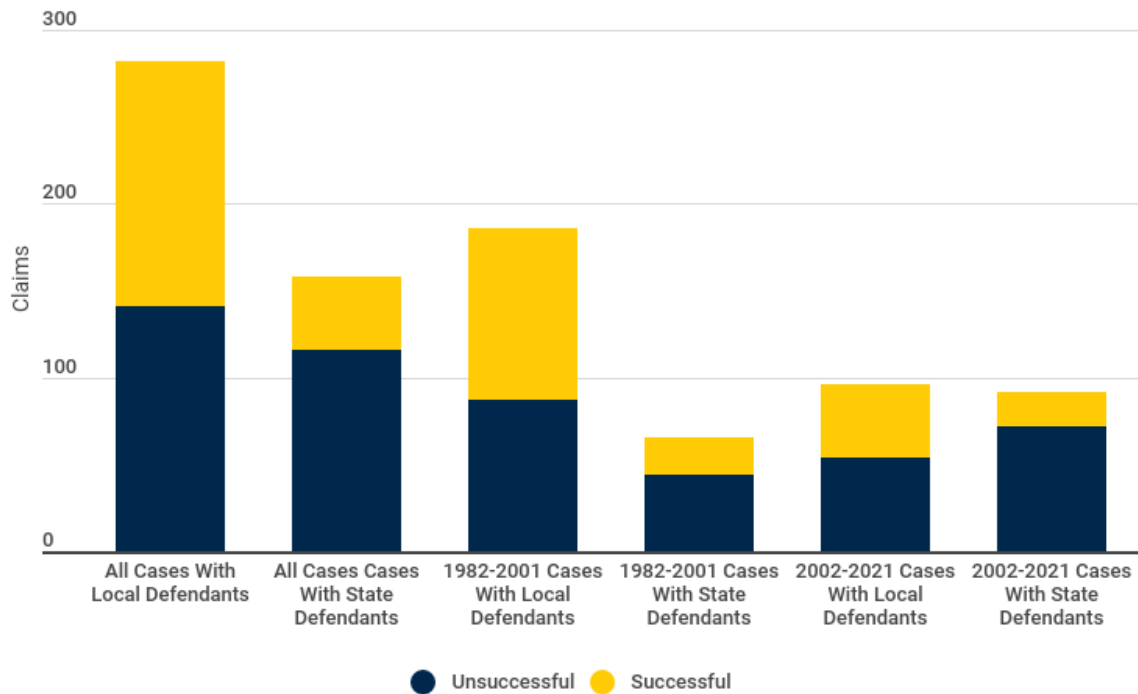
Success varied by plaintiff group. Black plaintiffs succeeded in 43% of the cases in which they participated, American Indian plaintiffs succeeded in 56%, Latino plaintiffs succeeded in 31%, coalition claims were successful in 28%, Asian American plaintiffs succeeded in 20%, and white plaintiffs succeeded in 9%.

Fig. 9: Plaintiff Cases and Plaintiff Success By Plaintiff Group



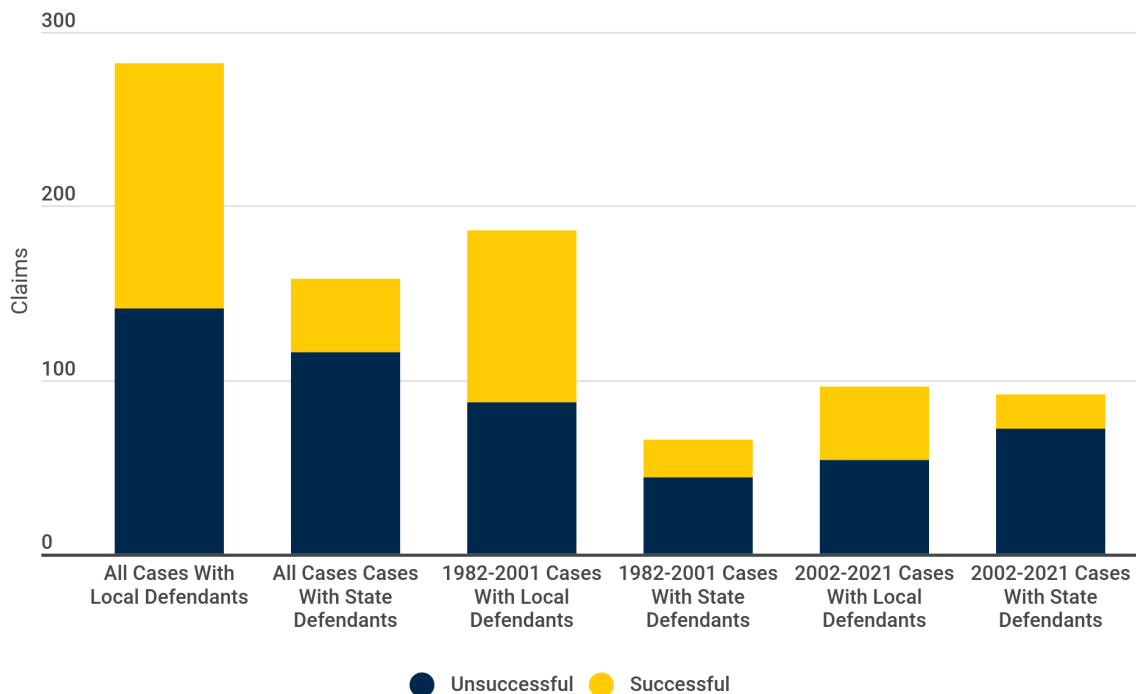
Section 2 defendants are more often local governments or officials (e.g., counties, cities, and school districts) than state governments or officials. Sixty-four percent of cases involved local defendants, while the remaining 36% were brought against state defendants. In recent decades, the number of cases brought against state governments increased, while the number of cases brought against local governments decreased.

Fig. 11: Plaintiff Success By Defendant Type Over Time



Plaintiffs have achieved successful outcomes in 50% of the Section 2 cases brought against local defendants, and in 27% of the cases against state defendants. Plaintiff success in both types of cases has declined over time. Plaintiffs succeeded against local defendants in 53% of the cases during Section 2's first decades, and 44% in the latter two. They succeeded against state defendants in 33% of the cases in the first period, and 22% in the latter.

Fig. 11: Plaintiff Success By Defendant Type Over Time



The *Gingles* Preconditions and the Senate Factors

The Senate Judiciary Committee report accompanying the VRA’s 1982 reauthorization identified several factors to guide the assessment of whether a challenged practice or procedure violates Section 2 as amended. The Senate Report stated the Committee’s expectation that the listed factors “will often be the most relevant ones,” but that “in some cases other factors will be indicative of the alleged dilution.” Federal courts construing Section 2 claims have repeatedly, albeit not universally, invoked the Senate factors.

Plaintiff success was considerably higher in cases in which courts found one or more of the Senate factors. Notably, plaintiffs found success in 100% of decisions in which a court expressly found Senate factor 9 (tenuousness). Plaintiffs lost every case in which a court determined that Senate factor 2 (racially polarized voting) was absent.

Fig. 12: Findings of Senate Factors

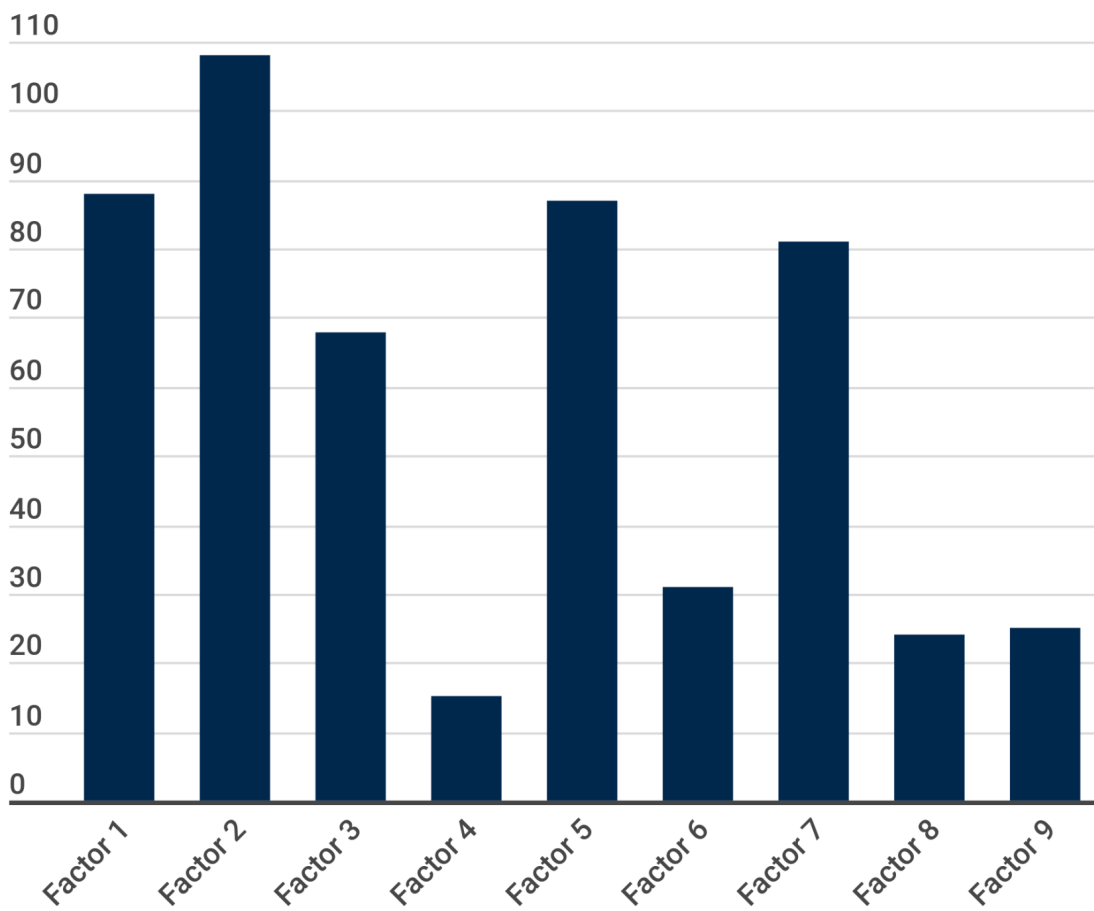


Fig. 13: Plaintiff Success by Finding of Senate Factor

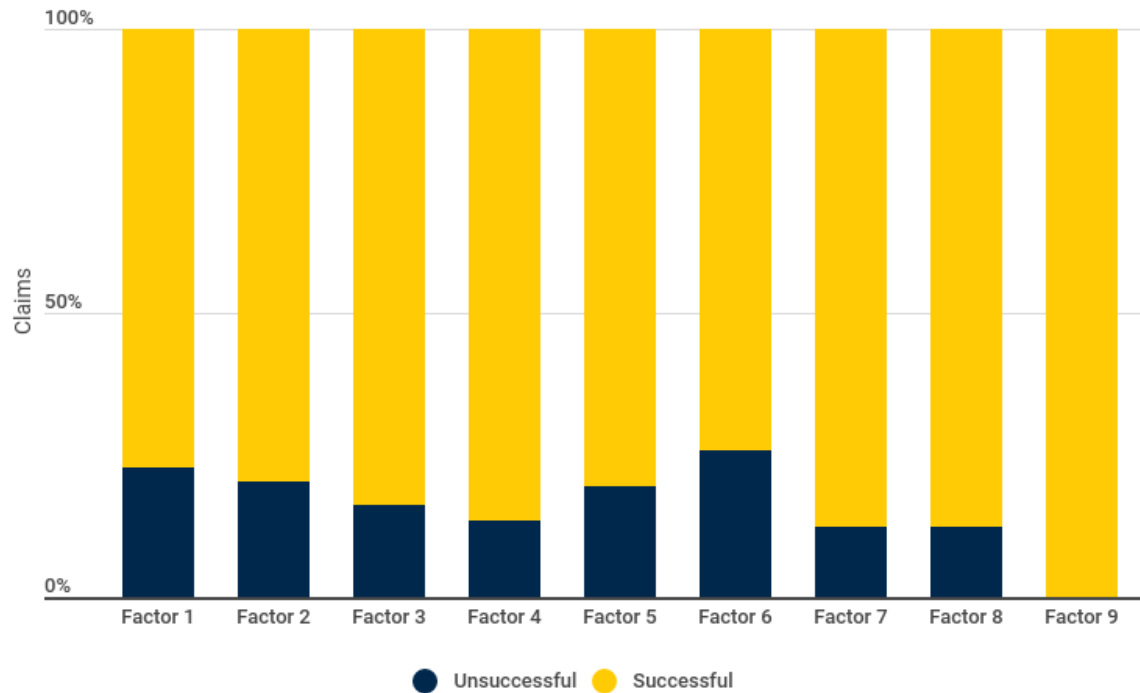
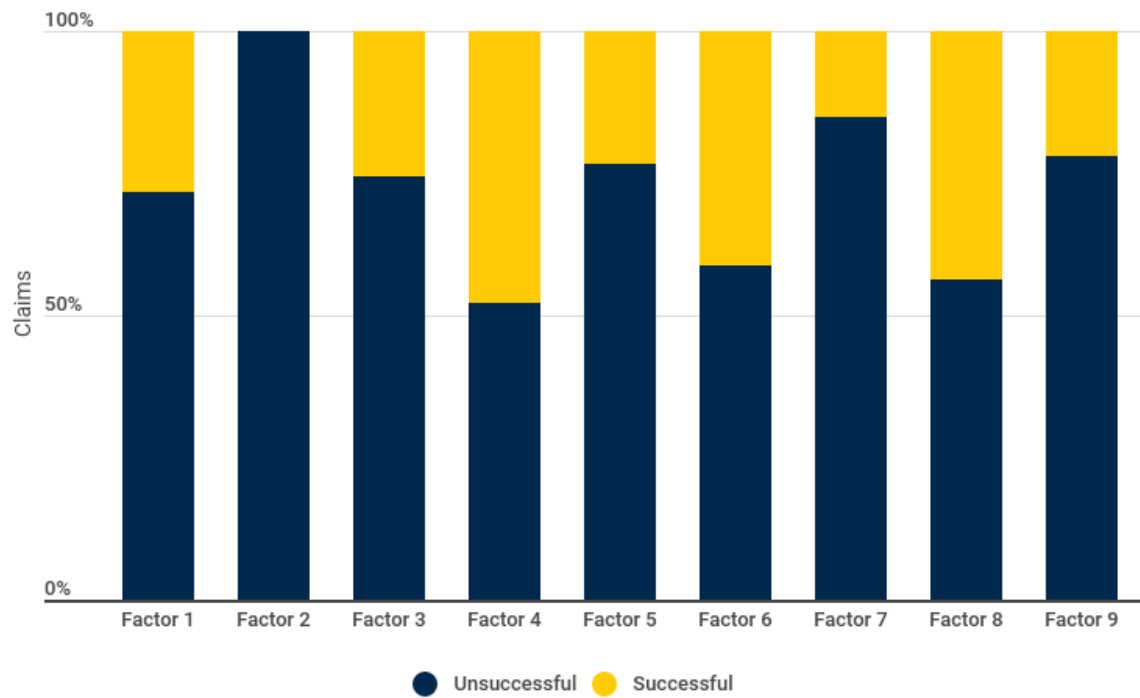


Fig. 14: Plaintiff Success Despite Finding Senate Factor Not Present



In *Thornburg v. Gingles*, the Supreme Court identified three additional “preconditions” relevant to Section 2 claims: namely, that the racial or language minority group is “sufficiently large and geographically compact to constitute a majority in a single member district;” that the minority group is “politically cohesive;” and that the “majority votes sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate.” While *Gingles* itself stated the preconditions were relevant to Section 2 claims addressing “dilution through submergence” in at-large electoral schemes, federal courts have invoked the factors in a variety of Section 2 cases. Since *Gingles* was decided, 126 cases found the first precondition to be satisfied, 127 cases found the second precondition to be satisfied, and 96 cases found the third precondition to be satisfied.

Before and After *Shelby County v. Holder*

From 1982 through 2013, Section 2 operated in tandem with Section 5 of the Voting Rights Act. First enacted in 1965, this regime required jurisdictions with notably low levels of voter registration and turnout to seek federal approval, known as “preclearance,” before implementing any changes to their electoral procedures. The Supreme Court’s 2013 decision in *Shelby County v. Holder* rendered Section 5 inoperative by scrapping the criteria Congress used to designate “covered” jurisdictions subject to the preclearance requirement.

Since *Shelby County* was decided in 2013, Section 2 cases decided in once-covered jurisdictions represent a greater proportion of the total Section 2 cases than they did previously. Prior to 2013, 51% (185/365) of Section Two cases came from covered jurisdictions. After 2013, 63% (43/68) of the cases originate in these regions. This increase in Section 2 cases was to be expected, given that a portion of the electoral changes once blocked by Section 5 appeared vulnerable to Section 2 challenges as well. This rise was also fueled by the fact that a number of once-covered jurisdictions responded to *Shelby County* by adopting electoral changes that the preclearance regime either had previously blocked or would have blocked had it remained in place.

Fig. 15: Cases by Section 5 Coverage Before 2013

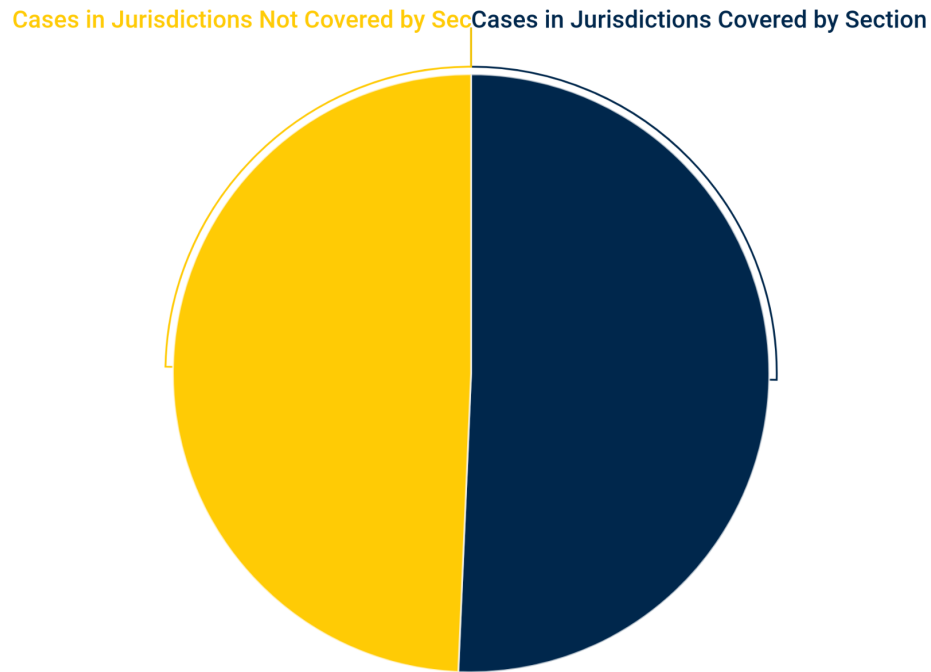
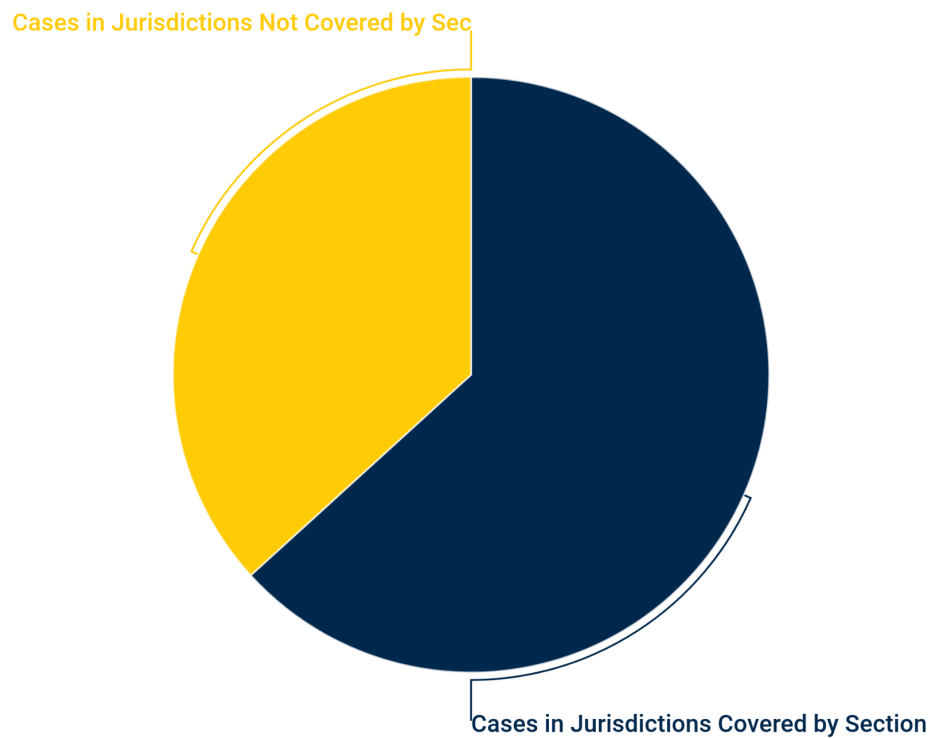


Fig. 16: Cases by Section 5 Coverage After 2013



But while Section 2 cases have increased in once-covered jurisdictions since Shelby County, plaintiffs have succeeded in such cases less often than they did previously. From 1982-2013, plaintiffs in both regions succeeded at roughly comparable rates. Plaintiffs found success in 44% (81/185) of the cases decided in covered jurisdictions, and 41% (74/180) of cases decided in non-covered jurisdictions. Since Shelby County, plaintiff success rates have decreased for all jurisdictions, with a somewhat larger decrease in once-covered jurisdictions. After 2013, plaintiffs achieved successful outcomes in 37% (16/43) of cases decided in once-covered jurisdictions, and 36% (9/25) in cases decided in jurisdictions that were not subject to Section 5 when Shelby County was decided.

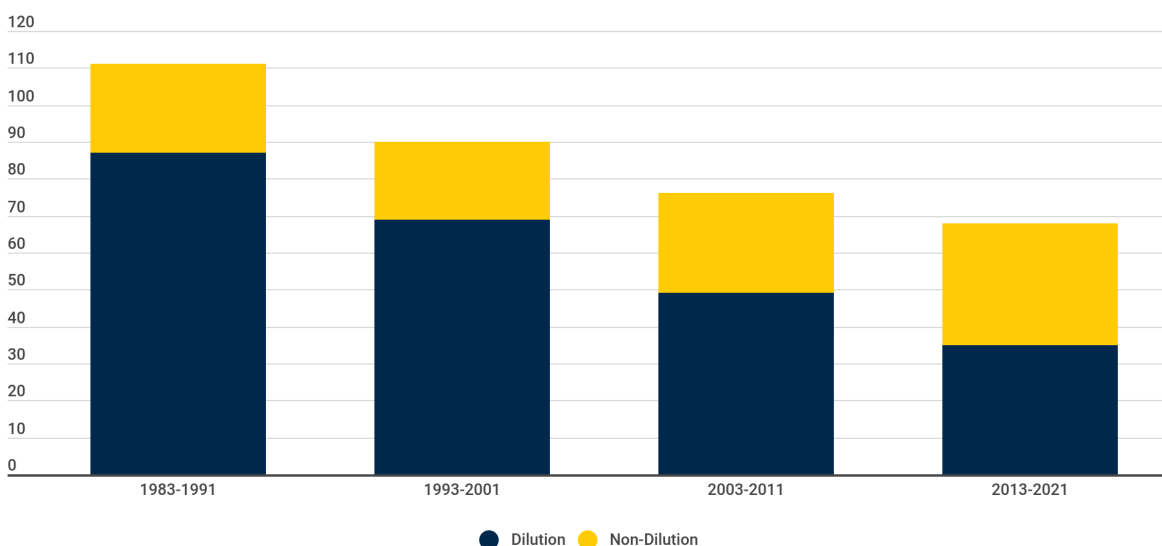
This decline in plaintiff success is susceptible to competing interpretations. Some may view it as confirming the contention, voiced by opponents of Section 5 as well as the Shelby County majority, that diminished racial discrimination in voting rendered the Section 5 preclearance regime obsolete. On this view, Section 5 was no longer blocking meaningful discrimination at the time it was reauthorized in 2006, and thus the suspension of the Section 5 regime should have had no discernible impact on actionable discrimination under Section 2. Simply put, no increase in successful Section 2 cases should have been expected, regardless of whether or not plaintiffs attempted to bring them.

A competing view, however, sees the lack of success among post-Shelby County Section 2 claims as confirming what supporters of Section 5 long claimed: Section 2 is not an adequate substitute for the protection afforded by Section 5. Both the complexity of the Section 2 inquiry and the heavy evidentiary burden it employs keep the statute from providing the quick and calibrated relief Section 5 offered for nearly a half-century. Moreover, by the time Shelby County was decided, Section 2 itself had already been pared back in a series of decisions that limited the reach of the statute and the remedies it could offer. On this view, diminished plaintiff success in the aftermath of Shelby County is best understood as evidence of a regulatory failure to address ongoing racial discrimination in voting. Support for this argument is found, most notably, in the deluge of restrictive voting practices enacted in the years since Shelby County. Section 5's broad reach suggests that statute would have blocked implementation of many of the practices enacted after Shelby County. By contrast, Section 2 challenges to these practices have been largely unsuccessful.

Dilution cases represent a smaller proportion of Section 2 cases in the years since Shelby County than they did during the years preceding the decision. More specifically, dilution cases comprise 76% of Section 2 cases prior to 2013 and 51% of the cases decided after 2013. Part of the reason for the diminished proportion of dilution cases is that Section 2 cases challenging redistricting plans adopted after the 2020 Census have yet to produce final word decisions. (For more information about how the absence of final word opinions affects the dataset, see the About page.)

The absence of those cases alone, however, does not explain the observed decline in dilution cases. Neither, for that matter, does Shelby County. Section 2 dilution cases have been steadily declining over time such that a diminished proportion of such cases in the post-Shelby County era was likely even absent that decision. Figure 18 suggests as much. It shows the relationship of dilution to non-dilution cases in date ranges corresponding to the period of time that has elapsed since Shelby County. More specifically, it shows that dilution cases steadily decrease in each corresponding period, from 87 between 1983-1991 to 35 in the post-Shelby County era. At the same time, non-dilution cases rose modestly, from 24 in the first period to 33 in the most recent period. These numbers suggest the rise in non-dilution cases in the post-Shelby County era is less attributable to the timing of that decision than to the steady decline in dilution cases over time.

Fig. 17: Dilution vs. Non-Dilution Cases Over Time



The Future of Section 2

We expect that both the number of Section 2 cases decided and the fraction of those in which plaintiffs succeed will continue to decline in coming years.

Dilution cases have been in steady decline for decades and plaintiffs have seen diminished success over time. We do not yet know what the Section 2 dilution cases presently making their way through the courts will show. None yielded a final word decision in time for inclusion in this report. Still, the Supreme Court's recent stay and note of probable jurisdiction in *Merrill v. Milligan* suggests that Section 2 dilution cases are likely to be reduced yet further, and perhaps drastically so.

Plaintiff success in non-dilution cases is also likely to decline. Plaintiffs have long had difficulty achieving successful outcomes in these cases. Overall, 28 of the 123 such cases, or 23%, counted as plaintiff successes. The Supreme Court’s 2021 decision in *Brnovich v. DNC* promises to further diminish plaintiff success. *Brnovich* “identif[ied] certain guideposts” to direct Section 2 analysis in non-dilution cases that call into question roughly half of the 28 successful non-dilution cases to date. Among them are cases that involved challenges to electoral practices that were in widespread use in 1982, a factor *Brnovich* suggested weighed against finding a Section 2 violation. Similarly vulnerable are cases that confined their inquiry to the burdens the challenged practice imposed rather than, as *Brnovich* suggested, assessing those burdens in conjunction with other ways to participate in the electoral process.

Together, *Brnovich* and *Merrill* suggest that Section 2 is likely to occupy a declining role in future disputes involving racial and language-based discrimination in the electoral process. It seems worth remembering, however, that Congress crafted Section 2 to be a decidedly open-ended statute. In 1982, Congress amended the statute with the clear intent to restart the dilution claims halted by *City of Mobile v. Bolden*. Congress expected that Section 2 would operate concurrently with the Section 5 regime, which means Section 5’s effective demise had made Section 2 more important today than ever. In amending Section 2, Congress used broad language to target “any standard, practice or procedure” that denies or abridges the right to vote based on race or language minority status. By its terms, then, Section 2 should be a powerful tool to reach new circumstances and developing problems as well as resurgent practices. While Section 2 can and, in our view, should be used in just that way, it looks like the courts are taking the statute in the opposite direction.

About the Project

The Voting Rights Initiative (VRI) at the University of Michigan Law School (UMLS) explores how Section 2 of the Voting Rights Act operates over time. VRI's 2006 report documented Section 2 claims brought between June 29, 1982, and December 31, 2005 that resulted in one or more decisions published or available on Westlaw or Lexis. A draft of the 2006 report and accompanying database were included in the evidentiary record assembled by Congress when it reauthorized the Voting Rights Act in 2006. Subsequent judicial rulings addressing the constitutionality of the 2006 reauthorization relied on the report.

In early 2022, we published this summary as well as a database documenting Section 2 litigation from June 29, 1982 through December 31, 2021. The database includes judicial decisions that addressed a substantive Section 2 claim during this period and were published or made available on Westlaw or Lexis. The dataset does not include cases that cited or discussed Section 2 independent of a substantive claim. It also omits cases in which the Section 2 claim appeared frivolous and cases in which the merits decision was vacated on appeal.

In contrast to our 2006 report, which examined every opinion issued in a given case, the 2022 database includes only what we have labeled the “final word” ruling. In most lawsuits, the final word decision is the merits decision that determined whether Section 2 was violated. Absent a direct decision on the merits, the final word case is the last published case in the lawsuit that made a substantive determination for or against the plaintiff. Final word opinions can include rulings on a preliminary injunction, evidentiary disputes, judicial approval of a settlement, a remedial order, and attorneys' fees. In instances where the final word opinion focused on a secondary issue, the contours of the underlying Section 2 claim and the court's Section 2 analysis were not always clear. Still, these cases, particularly preliminary injunction cases, often included some substantive assessment of Section 2 criteria that researchers documented. Cases in which nothing more than the fact of decision was evident from the opinions were included so long as the opinion appeared to rest at least in part on a substantive Section 2 claim.

The 2022 dataset includes a coded final word opinion for every case appearing in the 2006 report. Because the 2022 dataset focuses on the final word case, while the 2006 report included all substantive rulings in a litigation string, some differences between the two datasets arise. The two approaches yielded few aggregate differences, but in a handful of cases the 2022 dataset reports findings for specific cases that differ from the findings reported in the 2006 report.

Finally, note that because our dataset only examines published opinions or opinions that are available through Westlaw or Lexis, any Section 2 case that did not result in such an opinion is not represented here. Additionally, we have not included cases that are still being litigated. This necessarily means that our dataset undercounts all Section 2 cases, and also undercounts cases brought in the last several years that remain active.

The dataset is current as of December 31, 2021.

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Appendix: Definitions and Coding Practices

The Section 2 cases in our dataset were coded along 50 criteria. Terms and categories that may not be not self-evident are defined here.

- Appointment/State Control: These are Section 2 challenges to a state's authority to change elected positions to appointed positions, to shrink or enlarge the duties of an elected position, or to allow one set of positions to be elected while a similar set of positions were appointed.
- Dilution: The effect of an electoral practice that minimizes the influence of a particular group of voters. Practices found to be dilutive within the meaning of Section 2 include at-large elections, redistricting plans, and majority vote requirements.
- Considered and Unconsidered Factors: Whether a reviewing court considered and/or found any of the three *Gingles* preconditions or any of the nine Senate Factors. Occasionally, the court discussed a factor but did not make a determination as to whether the factor had been satisfied; in those instances, the factor was left blank.
- Election Procedures: Electoral rules addressing early voting, voter registration, voter identification, election scheduling, and related measures. These cases are categorized as a subset of non-dilution.
- Fees: A final word decision that addressed a post-liability issue such as attorneys' fees.
- Final Word: Our term for the final decision in a Section 2 litigation string. In most lawsuits, the final word decision is the most thorough merits decision that both determined whether Section 2 was violated and which was not reversed on appeal. Absent such a final word decision, the database includes the last published decision in the lawsuit that made a substantive ruling on any topic. When an appellate opinion specifically stated that it was agreeing with, concurring with, or otherwise incorporating analysis from a lower court opinion on *Gingles* preconditions or Senate factors without reciting that analysis, the researchers included the analysis found in the district court's opinion. Researchers similarly incorporated the lower court's findings if the appellate court stated that no party challenged a particular finding.
- Intent: A case was coded as finding discriminatory intent if the court explicitly ruled that the defendants engaged in intentional voting discrimination, either under Section 2 or under the Fourteenth Amendment. If the court did not make an explicit determination regarding intentional discrimination, this field was left blank.
- Jurisdiction Covered/Not Covered By Section 5: Researchers determined if a claim arose in a jurisdiction that had been subject to the Section 5 preclearance regime because either the case arose in a jurisdiction that fell within the Section 4(b) coverage formula prior to the Supreme Court's decision in *Shelby County*, or because the case arose in a jurisdiction within a larger jurisdiction that fell under the coverage formula. If a jurisdiction was itself not covered but contained covered jurisdictions, researchers attempted to discern if the

challenged practice would affect voters in the covered jurisdictions. If so, the case was coded as occurring in a jurisdiction that was covered by Section 4(b). If not, the case was coded as not covered.

- **Liability:** A final word decision that addressed the merits of a Section 2 claim. Liability decisions typically resolved a motion to dismiss, a motion for summary judgment, announced a verdict after trial, or resolved an appeal of such decisions.
- **Non-dilution:** Also known as “vote denial” or “time, place, and manner” claims, non-dilution claims are Section 2 claims that address election procedures, ballot design, felon disenfranchisement statutes, and related measures.
- **Plaintiff Group:** Cases were categorized by the ethnicity of the plaintiff group or groups bringing the Section 2 challenge, and, specifically, whether the plaintiffs were Black, Latino, American Indian, Asian American, or white. Many cases included plaintiffs of more than one ethnicity. Some dilution cases, coded as “coalition” claims, are brought by two or more plaintiff groups alleging that, together, they were injured by the challenged electoral practice. Finally, the few cases coded as having no plaintiff ethnicity involved a challenge to a racial classification or another practice on behalf of all voters, or did not specify the plaintiff’s ethnicity.
- **Plaintiff Success:** A case was coded as successful if it resulted in a change to a challenged practice. Successes include:
 - Issuance of a preliminary injunction, a finding for a plaintiff on the merits, a decision issuing attorneys’ fees in a manner that indicated a plaintiff had been successful on the merits or through settlement, or if the plaintiff achieved some other positive outcome.
 - Cases involving multiple Section 2 claims in which plaintiffs were successful on at least one.
 - Fees or remedy cases in which defendants stipulated that the challenged practice had violated Section 2, even if plaintiffs were unable to obtain attorneys’ fees or the post-settlement relief sought.
- **Preliminary:** A final word decision on the issuance of a preliminary injunction, evidentiary issue, or other ruling prior to a merits Section 2 claim.
- **Violation:** A case was coded as a violation if the court found, or the parties stipulated, that the challenged practice was a violation of Section 2.

A note on cases, claims, and successful Section 2 challenges: Cases that involved multiple Section 2 claims were coded as a single case. The number of cases containing multiple distinguishable claims was small, and dividing the cases into individual claims threatened to confuse, rather than clarify, the results of the study. In a small number of cases, case-dependent coding leads to odd results: for instance, both *LULAC v. Perry* and *Abbott v. Perez* are coded as plaintiff successes even though, in each case, only one of several challenged districts was struck down under Section 2.

Finally, while the VRI team made every effort to code cases consistently and accurately, judicial reasoning, legal opinions, and the underlying fact patterns often defy easy categorization. Please report any errors, or direct any questions, to law-votingrightsinitiative@umich.edu.