

Adding Substance to Section 5: Incorporating *Georgia v. Ashcroft* into the Voting Rights Act

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1 Introduction

A central debate surrounding the 1965 Voting Rights Act¹ over the past decade and a half has centered on the tension between descriptive representation — the degree to which a minority group can elect its candidates of choice to office — and substantive representation — the degree to which policies favored by the minority community are passed into law. In particular, is there a tradeoff between these two goals? And if so, which should states be required or allowed to pursue, for instance, when redistricting?

These issues are becoming even more acute now, in light of the most important Supreme Court decision on the VRA in recent years, *Georgia v. Ashcroft*.² When redrawing its State Senate districts following the 2000 census, Georgia devised a plan that reallocated black voters away from districts with either especially high or low levels of black voting age population (BVAP) in order to create more districts in the

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¹42 U.S.C. §1973 (2000). The Voting Rights Act (hereafter VRA) is codified in whole in sections 1973 to 1973aa-6.

²539 U.S. 461 (2003).

25-40% BVAP range, so-called “influence districts.”

As required by Section 5 of the VRA, Georgia submitted its plan to the DC District Court for preclearance. The Justice Department indicated its intention to interpose objections to Senate districts 2, 12, and 26, whose BVAPs were slated to fall from 60.6% to 50.3%, 55.4% to 50.7%, and 62.5% to 50.8%, respectively. The DOJ contended that the lower levels of BVAP in the redrawn districts would result in minority-supported candidates’ having a more difficult time winning election, and so the state had not met its burden of proving that the proposed plan would not harm black voters.

The district court agreed with the DOJ and refused to preclear the plan. Georgia appealed, and the Supreme Court overruled, declaring that states could legitimately pursue substantive representation, even at a possible small cost to descriptive representation. The *Georgia v. Ashcroft* decision marked the first time that the Court mentioned substantive representation as a legitimate goal of redistricting, thus opening the door to more of this type of tradeoff in the future.

The reaction to *Georgia v. Ashcroft* was swift and heated. Karlan (2004) denounced the decision as a first step towards “gutting” Section 5 preclearance.³ Others claimed that it “greatly weakened the enforcement provisions of Section 5.”⁴ An ACLU official’s reaction was that “The danger . . . is that it may allow states to turn black and other minority voters into second-class voters, who can influence the election of white candidates but cannot elect candidates of their own race.”⁵ Others viewed the decision more favorably: Henry Louis Gates wrote that “[Descriptive

³Pamela Karlan, “*Georgia v. Ashcroft* and the Retrogression of Retrogression,” 3 Election Law Journal, 21-36 (2004).

⁴Jocelyn Benson, “Turning Lemons into Lemonade: Making *Georgia v. Ashcroft* the *Mobile v. Bolden* of 2007,” 39 Harvard Civil Rights–Civil Liberties Law Review, 485-512 (2004) at 488-89.

⁵Rhonda Cook, “Redistricting Rules Ease,” *The Atlanta Journal-Constitution*, June 27, 2003, quoting Laughlin McDonald.

representation] came at the cost of substantive representation—the likelihood that lawmakers, taken as a whole, would represent the group’s substantive interests. Blacks were winning battles but losing the war as conservative Republicans beat white moderate Democrats.”⁶

Despite these deep conflicts, a conventional wisdom is forming on some key points of interpretation:

1. In *Georgia v. Ashcroft*, the Court abandoned a previous, “relatively mechanical” test for Section 5 compliance based on the election of minority legislators alone;⁷
2. It did so in favor of an amorphous concept of “substantive representation” that will be difficult to administer; and therefore
3. Under this new standard states will essentially be free to enact any redistricting plan that they choose.

The focal point of the controversy, then, is the indeterminate nature of the substantive-descriptive representation tradeoff: absent clear standards for implementation, *Georgia v. Ashcroft* could open the door to political manipulation and fatally weaken Section 5 preclearance requirements.

In this essay we present a solution to the indeterminacy problem. We demonstrate simple and straightforward methods to calculate the levels of both descriptive and

⁶Henry Louis Gates, “When Candidates Pick Voters,” *New York Times*, September 23, 2004: Section A, p. 27.

⁷Samuel Issacharoff, “Is Section 5 of the Voting Rights Act a Victim of Its Own Success?” 104 *Columbia Law Review* (2004), for example, claims that previous Supreme Court decisions had “narrowed section 5 to questions that could be addressed through relatively mechanical assessments of voting practices. For example, the *Beer* retrogression test made it easy to decide that a districting arrangement in a town with a twenty-percent black population that yielded one forty-five-percent black district (out of five) should not be precleared if the prior arrangement had afforded one district that was sixty-five-percent black.”

substantive representation associated with a given districting plan. These measures can then be used to compare a proposed plan with the status quo baseline plan in order to assess retrogression. Furthermore, apart from these technical calculations, the views of the minority community towards the particular tradeoff embodied in a given plan should be taken heavily into account, as expressed directly, through community organizations, and most importantly, through elected representatives.

This conflict over redistricting and preclearance could not have come at a more pivotal moment, since Section 5 of the Voting Rights Act is up for renewal in 2007; if Congress does not act to extend it, the preclearance provision will simply expire. And *Georgia v. Ashcroft*, with all its implications for the impact of the VRA on race and partisan control of Congress, is at the center of the debate: civil rights and civil liberties groups are insisting that Section 5 be renewed in such a way that overturns *Georgia v. Ashcroft*, while others believe that the decision is crucial to maintaining the effectiveness of the VRA as a whole, and the constitutionality of Section 5 in particular.⁸

The issues raised by our analysis, however, are important not just with respect to the VRA and its renewal; they go to the core of many of our democratic processes. How do we think about the goals and purposes of political representation in democracies? How should legal systems address competing objectives when protecting disadvantages segments of the population? And how can institutions best afford minorities influence over policy in a majoritarian system?

As expert witnesses for Georgia during the redistricting process, and authors of an article cited in the Court's opinion as an example of the importance of substantive representation, we are uniquely positioned to fill this gap. This essay thus has as its

⁸See Rick Hasen, "Congressional Power to Renew Section 5 of the Voting Rights Act After *Tennessee v. Lane*," 66 *Ohio State Law Journal* 177 (2005).

primary purpose the detailing of a procedure to calculate the extent of descriptive and substantive representation offered by a given districting plan, and to compare proposed plans with a baseline in order to assess retrogression. We also apply our procedure to the Georgia Senate redistricting plan at issue in *Georgia v. Ashcroft* and show that it would have, in fact, increased the substantive representation of minority interests. We conclude with some thoughts about the current state of race and representation in the United States, and the implications of our findings for Section 5 renewal.

2 *Georgia v. Ashcroft* and Retrogression

The Voting Rights Act has two major provisions: Sections 2 and 5. The former outlaws any voting arrangements that dilute the votes of minorities, giving them “less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.”⁹ The classic example of a dilutive practice is at-large elections for a city council, in which all voters can cast a ballot for each council position. By this method a white majority of, say, 60% can capture 100% of the council seats, thus locking minority voters out of power altogether. Section 2 is permanent, nation-wide, and relatively uncontroversial; under its aegis, for instance, many at-large voting systems have been changed to geographically-defined districts.¹⁰

Section 5, on the other hand, addresses the prospective, rather than retrospective, impact of voting practices. As of the 1960’s, the history of pursuing equal voting rights in the South offered nothing but frustration: as soon as one method of disenfranchisement—such as the grandfather clause or the white primary—was ruled

⁹42 U.S.C. §1973a (2000).

¹⁰See Davidson and Grofman, ed., *Quiet Revolution in the South*, Princeton University Press (1994) for detailed descriptions of how changes fostered by the aggressive application of Section 2 greatly increased black office-holding in the South.

unconstitutional after arduous decades of litigation, Southern states would simply switch to a different method, such as poll taxes or literacy tests.¹¹ The VRA combatted this history of discrimination in a two-step process: Section 4 swept away all “tests and devices” that could limit minorities’ ability to vote, and Section 5 required “covered” jurisdictions, which included most Southern states and their sub-jurisdictions,¹² to submit any proposed changes in voting practices to the Justice Department for preclearance, without which the changes could not legally go into effect.

By changing the burden of proof away from those challenging discriminatory state actions and onto the states themselves, Section 5 was a crucial element in the fight to provide minority voters with real access to the ballot box in the South for the first time since Reconstruction. Such prior restraint on state actions, though, is unique in U.S. law, and so Section 5 has always been limited in its geographic scope and temporary, not permanent. After relatively short renewal periods of five years in 1965 and 1970, and seven years in 1975, Section 5 was extended for a full twenty-five years in 1982. It is thus scheduled to expire in 2007 unless Congress acts otherwise.

Section 5 states that a change in voting practices submitted for preclearance should be allowed to take effect if it “does not have the purpose and will not have

¹¹See *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating an Oklahoma statute denying registration to anyone who could not vote as of January 1, 1866, or anyone lineally descended from such a person) and *Nixon v. Herndon*, 273 U.S. 536 (1927), *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953) (outlawing the restriction of participation in primaries, or their functional equivalents, to white voters only). See also Morgan Kousser, “The Strange Career of Section 5 of the Voting Rights Act,” forthcoming in *The Future of the Voting Rights Act*, ed. David Epstein, Rodolfo de la Garza, Sharyn O’Halloran and Richard Pildes, Russell Sage (2006).

¹²Section 5 coverage was defined to include any state or political jurisdiction that had a test or device in operation as of November 1, 1964 and in which less than half the voting age population voted in the 1964 presidential election. This definition included the entire states of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, and parts of North Carolina. The current list of covered states and subdivisions is available at <http://www.usdoj.gov/crt/voting/sec.5/covered.htm>.

the effect of denying or abridging the right to vote on account of race or color.”¹³

Thus states had to prove that their proposed changes were neither based on a discriminatory purpose, nor would they have a discriminatory effect.

The standard for judging discriminatory effect was defined early on to be “retrogression;” a new law, that is, could not make minorities worse off than they had been before.¹⁴ Thus the effects test became an “anti-backsliding” provision; it would be violated, for instance, by a municipality’s attempting to change from a district-based system back to at-large elections.

The requirements for determining discriminatory purpose, on the other hand, had received less judicial scrutiny, and a number of submissions were denied preclearance during the 1980’s on the basis of the intent standard, even when no retrogression was apparent. In *Busbee v. Smith*,¹⁵ for example, a Georgia congressional redistricting plan was denied preclearance even though it was actually ameliorative, rather than retrogressive. The plan increased the black voting age population in the 5th district—located in Atlanta, and which had previously elected Andrew Young to Congress—from 39% to 57%, yet there was evidence that the district was designed specifically to avoid giving black voters effective control over election outcomes.¹⁶ In *City of Pleasant Grove v. United States*,¹⁷ the Alabama city of Pleasant Grove was enjoined from annexing surrounding white suburbs but not black suburbs, even though Pleasant Grove had no black residents at all at the time. And the well-

¹³42 U.S.C. §1973c (2000).

¹⁴The term “retrogression” was introduced in *Beer v. United States*, 425 U.S. 130 141 (1976). Cf. *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) (permitting a change that simply perpetuated the existing situation because “[a]lthough there may have been no improvement in their voting strength, there has been no retrogression either.”).

¹⁵549 F. Supp. 494 (D.D.C. 1982), aff’d mem., 459 U.S. 1166 (1983).

¹⁶The DOJ judged that even a BVAP of 57% would result in black voters’ comprising less than half of the total turnout.

¹⁷479 U.S. 462 (1987).

known *Shaw v. Reno* case¹⁸ was launched when the DOJ objected to North Carolina's original redistricting plan on the basis of discriminatory intent, even though the plan maintained the previous number of majority-minority districts.¹⁹

But the courts began narrowing the scope of the intent standard during the 1990's. In *Reno v. Bossier Parish School Board*,²⁰ the Court ruled that a Section 2 violation was not sufficient to establish discriminatory intent under Section 5. And then, in a later iteration of the same case,²¹ the Court ruled that the two standards were in fact one and the same; the only relevant discriminatory intent for Section 5 preclearance, the Court ruled, was retrogressive intent.

Section 5 preclearance has thus come to mean retrogression and nothing else, under both the intent and effect standards. This rule may be easily implementable in many policy areas—the change of a voting system or the annexation of surrounding suburbs, for instance—but the exact meaning of “retrogression” in the context of redistricting has always been a bit unclear. After all, voters excluded from one district do not simply disappear; they are reallocated to surrounding districts, where they have the potential to influence the selection of a different representative. What, then, does it mean for one districting plan to retrogress in comparison with the pre-existing baseline plan?

Leaving aside for the moment the complicating issue of substantive representation, we focus first on the steps for determining whether a districting plan is retrogressive on grounds of descriptive representation alone. Three steps are required: 1) specifying a standard by which to measure the electability of minority-preferred

¹⁸509 U.S. 630 (1993).

¹⁹See the objection letter sent from John Dunne, Assistant Attorney General for the Civil Rights Division of the DOJ, to the North Carolina Secretary of State, dated Dec. 18, 1991.

²⁰520 U.S. 471 (1997) (*Bossier Parish I*).

²¹*Reno v. Bossier Parish School Board*, 528 U.S. 320 (1999) (*Bossier Parish II*).

candidates; 2) applying this standard to both the baseline and proposed districting plans; and 3) translating this determination of electability into a conclusion about retrogression. We term these calculations a Retrogression Assessment Procedure.

This section first outlines the Justice Department’s pre-*Georgia v. Ashcroft* procedure for assessing retrogression, which, we argue, is implementable in a straightforward manner only when voting is highly polarized along racial lines. We then show that, absent such polarization, these standards become less coherent, and that their implementation requires difficult tradeoffs among different types of districts. Finally, we review evidence that voting is, in fact, currently much less polarized than before, implying the need for a revised measure of descriptive representation.

2.1 Pre-*Georgia v. Ashcroft* Preclearance

Let us begin by dissecting the body of argumentation surrounding the Justice Department’s pre-*Georgia v. Ashcroft* criteria for approving a redistricting plan. Up until now, the DOJ has measured retrogressive effect with respect to issues of descriptive representation alone:

A proposed plan is retrogressive under the Section 5 “effect prong” if its net effect would be to reduce minority voters’ “effective exercise of the electoral franchise” when compared to the benchmark plan. The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice.²²

²²*Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act*, Federal Register, January 18, 2001, at 5411-5414 (hereafter referenced as “*Guidance Concerning Redistricting*”). This is consistent with the Court’s declaration in *Bush v. Vera* that non-retrogression “mandates that the minority’s opportunity to elect representatives of its choice not

To implement this electability-based standard for determining retrogression, with reference to the three steps in the Retrogression Assessment Procedure outlined above, the DOJ's approach was to: 1) Use historic patterns of voting rates and electoral outcomes to determine a crucial threshold necessary for minority voters to have effective control over elections.²³ Call this level of BVAP P^* .²⁴ 2) Calculate the number of districts with BVAP's at or above P^* in the baseline and proposed plans; call these N_b and N_p , respectively. 3) The proposed plan is retrogressive if $N_p < N_b$, and non-retrogressive otherwise.²⁵

This algorithm is indeed simple, even mechanical, once P^* is determined, but it clearly rests on the assumption that P^* does in fact exist; that is, that there is some BVAP threshold below which minority-supported candidates have very little chance of gaining office, and above which they are practically certain to win. This would be diminished, directly or indirectly, by the State's actions." (517 U.S. 952, 983 (1996)).

²³These thresholds are often summarized as a single percentage of minority residents. At first, the rule of thumb was 65% total black population. More recently, the informal standard has been 50% BVAP, termed "majority-minority." The DOJ has consistently maintained, though, that its criteria for assessing electability are much more nuanced than any single-number approach. See for instance *Guidance Concerning Redistricting*: "Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission."

²⁴For ease of discussion, we will refer mainly to BVAPs and black voters in the following sections. It should be understood that these arguments apply equally to Hispanic voters (HVAP) or any other community of interest protected by the VRA. We will make special note of provisions that depend on there being a single, rather than multiple, community of interest.

²⁵It has been claimed that, in the 1990's, the DOJ followed a "max-min" policy; that is, maximizing the number of minority-controlled districts in each state. Call this number P_{max} ; then under this standard a plan should be denied preclearance unless $P_p = P_{max}$. This was, in fact, the opinion of the Court in *Shaw v. Reno, Id.* at 924-25 ("Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts."). The Court noted that the Justice Department "disavows having had that policy," and that it "seems to concede its impropriety," but the majority opinion nevertheless relied on "the District Court's well-documented factual finding." *Id.* at 924-25. The District Court opinion is found at 864 F. Supp. 1354 (S.D. Ga. 1994). Others have argued, though, that no such standard has ever been in effect. See Peyton McCrary, Christopher Seaman and Richard Vallely, "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," forthcoming in *The Future of the Voting Rights Act*, ed. David Epstein, Rodolfo de la Garza, Sharyn O'Halloran and Richard Pildes, Russell Sage (2006).

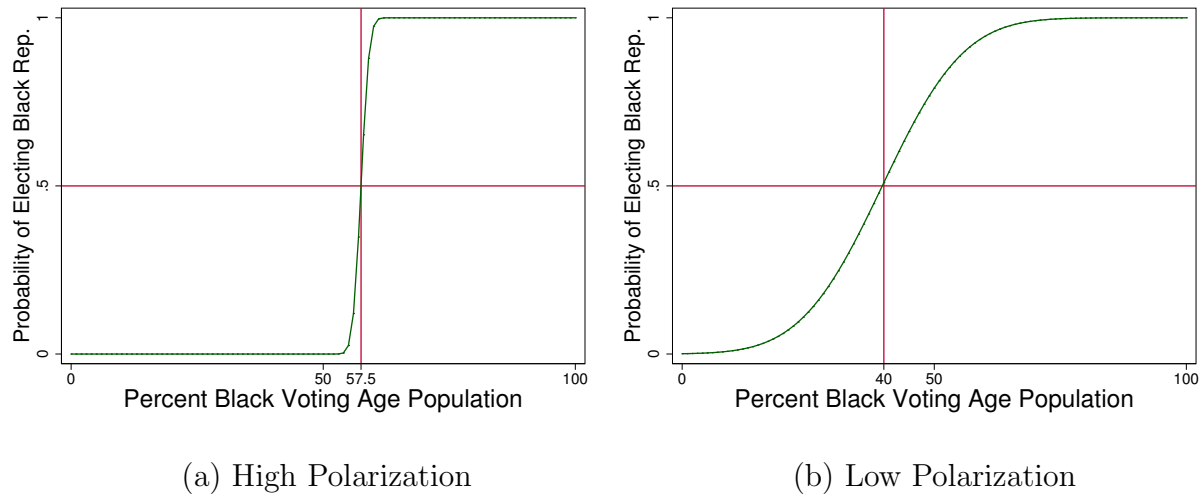


Figure 1: Probability of Electing Candidate of Choice vs. Percent BVAP

be the case for instance if voting is highly polarized, with few ballots cast by white voters for minority candidates and vice-versa.

Figure 1a illustrates this polarized scenario with sample data, graphing the probability of electing a minority-supported representative as a function of percent black voting age population. The key threshold P^* as drawn in the figure is 57.5% BVAP: below this point minorities have almost no chance of controlling an election, while above it they are nearly assured of such control.²⁶ Note that 57.5% BVAP also serves as the “point of equal opportunity,” the point at which minority-supported candidates have a 50-50 chance of winning. Thus minority control, electability, and equal opportunity coincide perfectly.

Note that this world view admits of no gray areas or tradeoffs across districts: it would not be possible, for instance, to shift minority voters in such a way as to decrease the probability of electing a minority candidate from 85% to 75% in district x, but raising the probability from 35% to 50% in district y. The distinction between

²⁶This number will be above 50% to the degree that black levels of registration, turnout and/or crossover are lower than the corresponding levels for white voters.

districts with and without minority electoral control is, so to speak, black and white, and there is no question but that a representative elected from such a district is in fact a candidate of choice of the minority community.

2.2 A Menagerie of Districts

But when polarization in the electorate is reduced, this neat binary division of districts begins to break down, and the single-threshold approach to retrogression becomes more arbitrary. Consider, for instance, the situation depicted in Figure 1a. Here the probability of electing minority-preferred candidates rises continuously with changes in district BVAP, rather than abruptly. The figure also illustrates the possibility that, when white crossover voting reaches a significant level, the point of equal opportunity could fall below 50% BVAP: in this illustration, it occurs at 40%.

This scenario complicates the electability calculus enormously. The top and bottom halves of Figure 2 illustrate the key cut points in worlds with high and low polarization, respectively. In the high polarization example, the point of equal opportunity, labeled P^* , divides districts with and without minority control. As long as P^* —which was 57.5% in Figure 1a—remains above 50%, there is no conflict between electability and control.

The lower half of the figure, though, illustrates a situation when P^* slips below 50%. For districts with BVAPs under P^* , minority control is less likely, although if the situation illustrated in Figure 1b holds, electability will not suddenly plunge to 0. This creates a range of districts between P^* and 50% which Pildes terms “coalitional districts.”²⁷ Here, it is relatively likely that minority-supported candidates will be

²⁷Richard Pildes, “Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s” 66 North Carolina Law Review 1517 (2002).

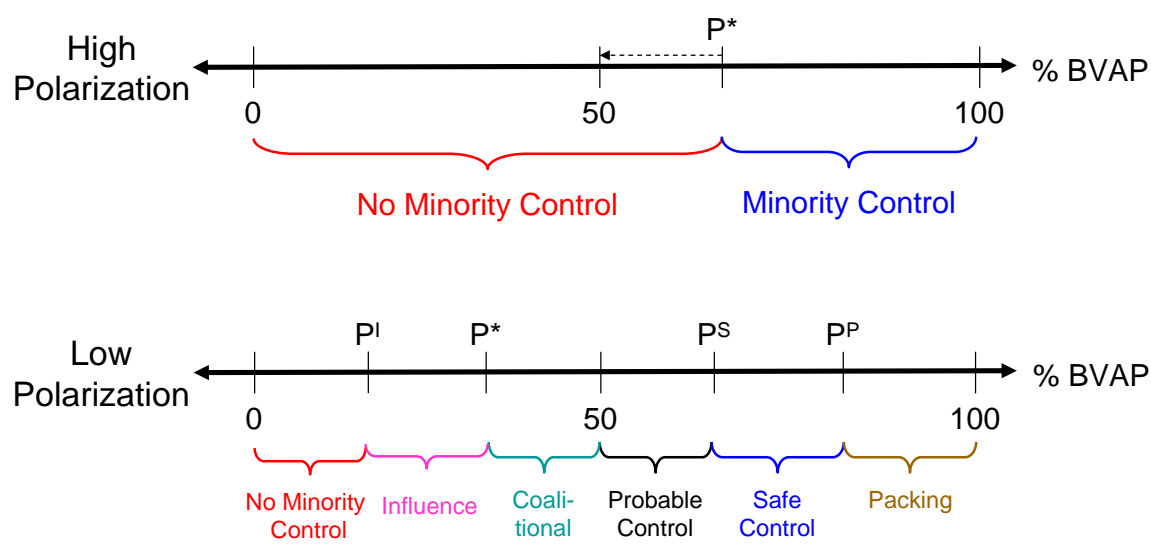


Figure 2: Key Points and District Types

elected, but they must rely on white crossover voting to do so. In this case, it might be argued, minority voters lack the degree of control they had with majority-minority districts, since their preferred candidate may have to accommodate the preferences of non-minority voters to some extent in order to gain office.

The situation becomes even more complicated by the Justice Department’s introduction of the category “safe minority districts” in *Georgia v. Ashcroft*. Although they never define this term precisely, it would seem to indicate a point at which the probability of minority candidate’s attaining office is considerably greater than 50%. In particular, they argue that the redistricting plan for the Georgia State Senate at issue in *Georgia v. Ashcroft* was retrogressive because it reduced the number of these safe districts. And since the three districts that they objected to all had BVAPs just above 50%, we can assume that the “safety point”, labeled P^S in the figure, is considerably above the 50% mark.²⁸ Note that this introduces two

²⁸Pildes (2002), written prior to the DOJ’s objections to Georgia’s proposed plan, conflates the categories of majority-minority and safe districts. The DOJ clearly considers them to be distinct.

more district categories: those between 50% and the safety point, and those above the safety point. In the figure we term the former the region of “probable minority control” and the latter the region of “safe control.”

We also include the point P^I to indicate the boundary of influence districts, those districts in which “a minority group has enough political heft to exert influence on the choice of candidate though not enough to determine that choice.”²⁹ For concreteness, we propose to define this boundary as the point of “partisan equal opportunity:” the level of BVAP at which a candidate of the party supported by minority voters has an equal chance of winning the election.³⁰ A final division is suggested by the DOJ’s statement in *Guidance Concerning Redistricting* that they will reject plans in which “minorities are over-concentrated in one or more jurisdictions;” that is, packing. The point over which districts are packed is labeled P^P in the figure, bringing the total number of possible district types up to six.

Such a menagerie of choices immediately raises difficult questions about tradeoffs. How many coalitional districts does one need to outweigh one safely controlled district? Perhaps some combination of coalitional and probable-control districts may outweigh one safe district? Or perhaps, as the DOJ argued, there is no combination of other district types that could possibly offset the loss of even one safe district. The latter position implies a “ratchet effect” in safe districts: their number can be increased from one decade to the next, but never decreased.

Overall, then, the low-polarization state of the world plays havoc with the DOJ’s current Retrogression Assessment Procedure. It is hard to specify a consistent, non-

²⁹*Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998) (opinion by Posner, J.), cert. denied (1998).

³⁰This is consistent with Karlan’s (2004) definition of influence districts as those in which “white candidates defeat black preferred candidates in the democratic primary but in which the democratic candidate wins the general election.” See the analysis in Section 3.2 below.

arbitrary standard by which to measure electability; it is therefore difficult if not impossible to apply any such standard to the baseline and proposed plans; and it follows that retrogression will be similarly difficult to assess.

2.3 The Need For New Standards

We have argued that the DOJ's current method of assessing retrogression in electability—counting the number of districts above a key minority-control threshold—works well when voting is polarized and poorly otherwise. Which of these two possibilities is most descriptive of current conditions? The answer is that the assumption of polarized voting both in the public and in Congress accurately described the reality of southern politics up until sometime in the 1980s.

Since then, though, a large body of social science research points to the conclusion that voting in the South is much less polarized than it has been at any time since Reconstruction. The evidence for decreased polarization is admirably adduced in Pildes (2002). To wit:

1. Blacks now register and vote at similar levels as do white voters.
2. Roughly one-third of all white voters will cross over to vote for black candidates in general elections, while almost all black voters vote for black candidates.
3. These trends have caused the BVAP necessary to elect a black candidate to fall from about 65% in the 1980's to around 40% now.

Thus polarized voting, while not completely eliminated, has been reduced considerably, at the same time that black participation has increased. We add to this two more facts: the resurgence of the Republican party in the South³¹

³¹See David Lublin, *The Republican South: Democratization and Partisan Change*, Princeton University Press (2004).

and the subsequent emergence of a tradeoff between descriptive and substantive representation.³² Put together, these trends imply that there are now good reasons why the minority community might want to reduce the concentration of black voters in districts with the highest levels of BVAP: these concentrated-minority districts are, on the whole, no longer needed to elect minority-preferred candidates to office, and the consequences of fewer minority voters in surrounding districts—the election of Republicans, who in general do not support the same policy goals as minority voters—have become more serious. Hence Georgia’s strategy following the 2000 census made sense politically in this changed electoral environment.

Those who express the view that the *Beer* retrogression test would have been easy to implement in this new environment of decreased electoral polarization and increased crossover voting are, we argue, looking for the on-off switch in a room where all the lights are on dimmers. The DOJ’s district-by-district test for retrogression is now obsolete and, even absent concerns about substantive representation, would have to be replaced. And given the concomitant rise in Republicanism, the question is no longer how to force states to create more majority-minority districts, but how to regulate the reduction of minority voters in formerly concentrated districts in the name of increasing substantive representation.

3 Implementing *Georgia v. Ashcroft*

Enter *Georgia v. Ashcroft*, the Court’s initial foray into the realm of districting and substantive representation. The first issue to tackle was the Court’s previous emphasis on descriptive representation as both an indicator of Section 2 dilution and

³²See Charles Cameron, David Epstein and Sharyn O’Halloran, “Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?” 90 *American Political Science Review* 794–812 (1996).

a measure of Section 5 retrogression under the theory that an “effective” vote is one that aids in the election of a minority-preferred representative.³³

But, despite its importance in determining the extent of minority voting strength, descriptive representation has never been the sole metric by which to judge retrogression. The 1982 amendments to Section 2 stated that “The extent to which members of a protected class have been elected to office... is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”³⁴ The Court had stated that “No single statistic provides courts with a shortcut to determine whether” a voting change retrogresses from the benchmark.³⁵ Justice O’Connor’s concurrence in *Gingles* also leaves open the possibility that an effective vote might accomplish other goals than the election of minority representatives: “Is the ‘voting strength’ of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group?”³⁶

On this groundwork, the *Georgia v. Ashcroft* court made explicit the notion that legislatures may legitimately pursue substantive representation as their goal in redistricting: “In order to maximize the electoral success of a minority group, a State may choose to create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively,

³³In practice, this has been implemented by “creating racially ‘safe boroughs.’” *United States v. Dallas County Comm’n*, 850 F.2d 1433, 1444 (CA11 1988) (Hill, J., concurring specially), cert. denied, 490 U.S. 1030 (1989). See also *Holder v. Hall*, 512 U.S. 874, 895-903 (Thomas, J., concurring) (stating that the Court has tacitly selected the number of elected officials as its indicator of electoral strength).

³⁴42 U.S.C. Sec. 1973a. This disclaimer was essential to the compromise that resulted in passage of the amendment. See S. Rep. No. 97-417 at 193-194 (1982) (additional views of Sen. Dole).

³⁵*Johnson v. De Grandy*, *supra*, at 1020-1021.

³⁶478 U.S. 30, 88-89.

a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.”³⁷

Justice’s Souter’s dissent in *Georgia v. Ashcroft* sharply questions the administrability of the majority decision, declaring it “simply not functional in the political and judicial worlds.”³⁸ He asserts that “It is very hard to see anything left of the standard of nonretrogression,” and wonders what an effective test would look like:

Is the test purely ad hominem, looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four?³⁹

We agree that *Georgia v. Ashcroft* would be meaningless, or worse, without consistent, administrable measures of substantive representation. But we have also emphasized in the previous section that those who claim *Georgia v. Ashcroft* abandoned a previous set of clear, electability-based standards for preclearance do not understand the full force of Pildes (2002). Even had the court kept preclearance within the ambit of descriptive representation alone, it would nonetheless have had to create new standards.

³⁷Id. at 468. Internal citations omitted.

³⁸Id. at 474.

³⁹Id. at 489.

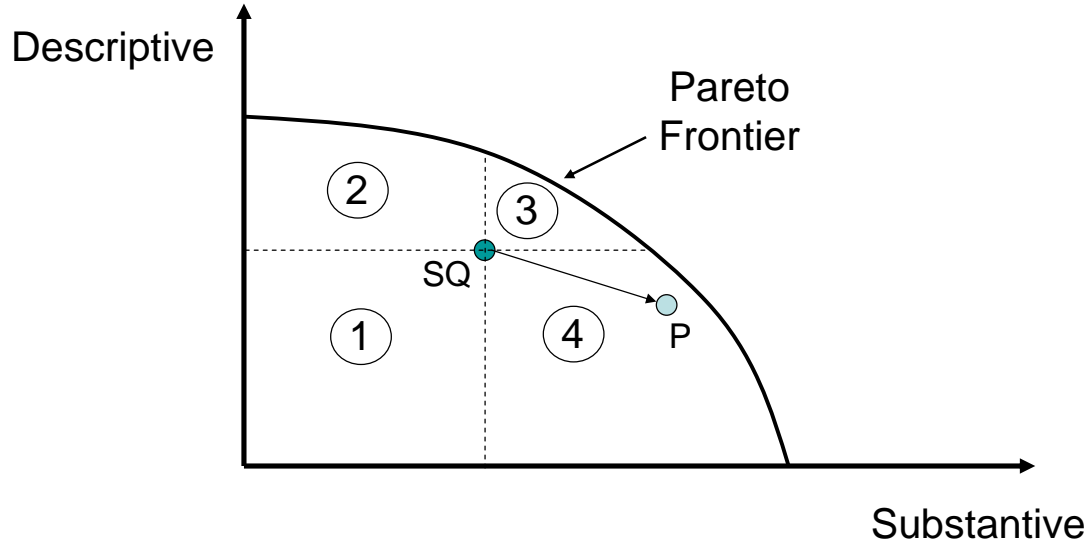
This section begins with a schematic overview of *Georgia v. Ashcroft*, deriving its requirements for a new retrogression test based on both substantive and descriptive representation. We then provide new measures of both types of representation that are consistent with these constraints. Not only are these standards administrable and neutral with respect to political parties, they have the added advantage of working well together; to be precise, our measure of descriptive representation is one component of our substantive representation standard.

3.1 Life on the (Pareto) Frontier

To understand the relation between descriptive and substantive representation and the *Georgia v. Ashcroft* decision, Figure 3 shows a two-dimensional graph, with substantive representation on the horizontal axis and descriptive representation on the vertical axis. The degree of substantive and descriptive representation associated with a particular districting plan, then, corresponds to a point on the graph.

Assuming, as argued above, that a tradeoff between these two objectives exists, there will be a “Pareto frontier,” a term borrowed from economics to describe the maximum possible combination of each type of representation. Starting from any point on the frontier, that is, there is no other achievable point that is better in both dimensions. Conversely, any increase in one quantity necessarily requires a decrease in the other.

There are, of course, points inside the frontier, one of which is labeled “SQ” in the figure, indicating that it is the status quo state of affairs. The lines drawn through SQ, parallel to the horizontal and vertical axes, divide the Pareto region into four quadrants. Moves from SQ to region 3 improve both substantive and descriptive representation and are termed Pareto improving. Conversely, movements



Pre-Ashcroft: Areas 2 and 3 were permissible → proposal P is retrogressive
Post-Ashcroft: Areas 2, 3, and 4 are permissible → P is non-retrogressive

Figure 3: Pareto Frontier of Descriptive and Substantive Representation

into quadrant 1 are worse in each dimension. And regions 2 and 4 represent improvements in one dimension at the cost of decreases in the other. For example, the point labeled P in the figure, representing a proposed change from the status quo to region 4, would increase substantive representation at the cost of descriptive representation.

It is tempting to conclude that jurisdictions should be required to move to the Pareto frontier whenever possible, but we reject such a strong interpretation of the diagram. First of all, the exact districting schemes needed to move to the frontier could be very difficult to devise, and they may well violate other traditional redistricting criteria such as compactness and regard for preexisting political subdivisions. Second, while theoretically attractive, there may be some points on the Pareto frontier that may be regarded as normatively suspect. The point

that maximizes descriptive representation, for example, might give minority voters a share of legislative seats greater than their population proportion.⁴⁰ Similarly, the point that maximizes substantive representation might well result in electing no minorities at all to office; this outcome would undoubtedly represent a major step backwards in minority voting rights, whatever positive policy implications it might have.

Note that when voting in both the electorate and legislature is polarized, increases (and decreases) in substantive and descriptive representation go hand-in-hand. When only candidates elected in minority-controlled elections, that is, will represent minority policy interests, only districting plans that increase descriptive representation can increase substantive representation, and conversely. With reference to the figure, this scenario would translate into the statement that regions 2 and 4 do not exist, so the only possible moves are into regions 1 and 3. But, as explained above, current research shows that these tradeoffs do now exist; in fact, the redistricting plan passed by the Georgia state legislature was, arguably, a move into region 4.⁴¹

How do these regions translate into decision rules regarding retrogression and preclearance? In a regime where retrogression is measured by changes in descriptive representation alone, the only question is whether the proposed plan lies above or below the status quo on the vertical axis. Moves from SQ to regions 2 or 3, that is, would be permissible, while moves to regions 1 and 4 would be retrogressive.

Georgia v. Ashcroft, however, declared that legislatures can enact plans which they expect to increase substantive representation, even at a possible small cost to

⁴⁰In first-past-the-post elections, a minority group which constitutes x percent of the population could theoretically control up to $2x$ percent of the legislature.

⁴¹See the analysis in Section 4 below.

descriptive representation. In our framework, the *Georgia v. Ashcroft* decision can be simply summarized as allowing moves to region 4 as well as regions 2 and 3, leaving only the Pareto inferior moves to region 1 as retrogressive.

It is important to immediately circumscribe this interpretation of *Georgia v. Ashcroft*. First, the plan enacted by the Georgia state legislature received strong support from the minority representatives, and, as noted above, the Court gave significant weight to this fact in its decision. A similar plan passed, for instance, by a Republican majority over the objections of black legislators would probably not receive such a favorable evaluation. We therefore propose that in order to obtain preclearance states must present evidence that the tradeoffs embodied in their redistricting plans have significant support within the minority community.

Second, the Court did not attempt to set limits on the scope of such moves, and it would probably not look favorably on changes like those noted above which would significantly increase substantive representation but deny any minority legislators a reasonable chance to win office. *Georgia v. Ashcroft* should simply be read as announcing that region 4 is not *ex ante* out of consideration when mapping out a redistricting plan.

In taking this view of the *Georgia v. Ashcroft* decision we therefore part ways with Issacharoff (2004), who claims that the Court “substituted a highly nuanced totality-of-the-circumstances approach for the relatively rigid *Beer* retrogression test.” To the contrary, we view *Georgia v. Ashcroft* as simply extending the set of criteria that can be applied to determine retrogression. This assumes that descriptive and substantive representation can be measured in an objective fashion, the topic to which we now turn.

3.2 Measuring Descriptive Representation

One aspect of the *Georgia v. Ashcroft* decision that has so far received less attention is that it abandoned the previous district-by-district method of comparing two districting plans described in Section 2.1 above in favor of a method that explicitly allows for tradeoffs across districts:

[W]hile the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-minority districts to elect a candidate of their choice.⁴²

Notice that the opinion chides the district court for failing to take tradeoffs into account *before* it adds that they should consider issues of substantive representation as well. The implication is that a determination of retrogression should allow for increases in electability in one district to be able to offset losses in another. This is a task for which the previous different-types-of-districts methodology described above is inherently unsuited, for it involves potential tradeoffs among district categories that will be hard to define. Further, it lumps together into a single category districts that may have very different characteristics: in the example of Figure 1b, for instance, a district with a BVAP of 40.1% would be treated the same as a district with 49.9% BVAP.

The cleanest way to escape the menagerie of district types, and to allow for the inter-district tradeoffs that the Supreme Court now mandates, is simply to

⁴²Id. at 465.

estimate the probability that each district in a given redistricting plan will elect a minority-supported candidate to office. For each district in each plan, that is, one can assign a probability between 0 and 1 that a candidate of choice (CoC) of the minority community will be elected to office, and then use this information to assess retrogression.

To provide a more detailed description, recall that a Retrogression Assessment Procedure comprises three steps: 1) specifying a standard by which to measure the electability of minority-preferred candidates; 2) applying this standard to both the baseline and proposed districting plans; and 3) translating this determination of electability into a conclusion about retrogression. We tackle each step in turn.

The process starts by selecting the set of elections to be analyzed. One strategy is to use elections only to the institution being challenged; in assessing electability to a state senate, for instance, one could use all senate elections for the previous ten years. This method has the advantage of being limited to the body being studied, but for statistical reliability it may require using elections that are rather distant in time from the current period. The second alternative is to analyze a number of related elections—for instance, elections to the state house, the state senate, and possibly Congress as well. This approach can shorten the time period studied but departs from the ideal of using only elections to the challenged body.

Next, for each election in the data set, one determines whether or not a candidate of choice was elected. Defining the term “candidate of choice” may in fact not be straightforward. We know one definition that we *cannot* use, which is simply the race of the winning candidate. Judicial interpretations of the VRA have been scrupulous to avoid equating a minority community’s “candidate of choice” with a candidate from that particular minority community or racial background. In

theory, the Supreme Court has said, minority voters may well prefer non-minority representatives, and to assume otherwise is to do an injustice to their freedom to choose their preferred candidate. Justice Brennan argued this point emphatically in *Thornburg v. Gingles*, stating that “It is the status of the candidate as the chosen representative of a particular group, not the race of the candidate that is important.”⁴³

In previous work, we have suggested that a minority candidate be deemed a candidate of choice absent evidence of strong opposition from within the minority community. Further, a non-minority candidate can be a CoC if 1) they are elected from a majority-minority district, and 2) they received support from minority voters in obtaining office.⁴⁴ This definition includes all minority officeholders, as long as minority voters supported that candidate in each election. It would therefore exclude candidates such as U.S. Representatives Gary Franks (R-Conn.) and J.C. Watts (R-Okla.), since these minority office-holders won office without the support of minority voters.

Our approach also excludes non-minority candidates who win election with minority support from non-majority-minority districts—for instance, a white Democrat winning with minority support in a 10% black district—on the grounds that the minority community may jointly prefer to elect a minority candidate, but such a candidate may have been deterred from running by the scant chance of success. It does allow for a non-minority candidate to be classified as a candidate of choice, but only if the candidate won office from a majority-minority district *and* had minority support at every stage. Thus our definition above may constitute a somewhat

⁴³478 U.S. 30, 37 (1986).

⁴⁴For a fuller explanation, see David Epstein and Sharyn O’Halloran, “Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts,” 43 *American Journal of Political Science* 367–95 (1996).

conservative measure, so as to remain consistent with the Courts' rulings regarding candidate characteristics and their classification as a candidates of choice.

Once the candidates of choice have been determined, each election is said to have an outcome of 1 if a CoC was elected, and 0 otherwise. We can then use standard statistical techniques, called probit analysis, to produce curves like those drawn in Figure 1, which show the probability that a candidate of choice will be elected, as the black voting age population changes from 0 to 100%.⁴⁵ For each district in each plan—the pre-existing baseline plan, the state's proposed plan, and any alternative plans—we can then associate a number representing the probability of electing a CoC. The sum of these probabilities gives the expected number of CoC's elected for each plan.⁴⁶ Then a drop in this score from the baseline to the proposed plan would indicate retrogression in descriptive representation. This is the most direct method of assessing whether decreased minority control in one district is offset by gains elsewhere.

Note that plans which increase expected descriptive representation may be riskier as well. For concreteness, imagine that in the baseline plan District 1 has an 80% probability of electing a CoC and District 2 has a 30% probability, while in the proposed plan these change to 60% and 51%, respectively. Then the 20% drop in minority control of District 1 is more than offset by the 21% gain in District 2, even though the proposed plan would increase from 21% to 25% the chances that *no* minority-supported candidates would be elected to office. On the other hand, the

⁴⁵The logit and probit models are the two most commonly used estimators for qualitative dependent variables. Probit analysis, for instance, was used to estimate the 44.3% point of equal opportunity in *Georgia v. Ashcroft*. The details of this procedure, as well as analysis of the statistical advantages of probit estimation over ecological regression, are given in Epstein and O'Halloran (1999).

⁴⁶If the probability of electing a CoC in district d of plan p is π_d^p , then the overall score for plan p is $\Pi^p = \sum_d \pi_d^p$. Thus, as Karlan (2004) notes, a 50-50 chance of winning 20 districts is just as good as a certainty of winning 10.

probability of electing two CoC's rises from 24% to 30%.⁴⁷

As an example of the calculations outlined in this section, consider a city with 30% minority population and five city council districts. Further assume that the probability of electing a CoC is given by the probit graph in Figure 1b. The city is drawing up a redistricting plan in which the current set of districts, whose BVAP's are given in the second column of Table 1, would be changed to a new set of districts, given in the fourth column. The idea is to take 10% of the black voters out of both Districts 4 and 5 and reallocate them to District 3, thus bringing its BVAP up from 20% to 40%. Assume also that Districts 4 and 5 elect a candidates of choice to office in the baseline plan.

District	Baseline Plan		Proposed Plan	
	BVAP	P(CoC Elected)	BVAP	P(CoC Elected)
1	0	0.00	0	0.00
2	10	0.01	10	0.01
3	20	0.06	40	0.50
4	60	0.94	50	0.79
5	60	0.94	50	0.79
Expected CoC's		1.96	2.10	
P(Less Than 2 CoC's)		11%	20%	

Table 1: Expected number of candidates of choice (CoC's) elected and probability that less than two are elected. Sample Data for a city with five council seats and 30% BVAP. (Probabilities are derived from probit graph in Figure 1b.)

The table indicates the probability of electing a CoC from each district in each plan. As shown, the increased probability of electing a CoC in district 3 more than makes up for the losses in Districts 4 and 5, so from the viewpoint of expected

⁴⁷There may be valid reasons for favoring continued success of a limited number of candidates, such as the accrual of seniority, experience and name recognition. Minority voters may, of course, be willing to take this risk; see our discussion above of the minority support for proposed plans.

CoC's elected, the proposed plan is non-retrogressive. It is, however, riskier, as the probability of elected fewer than the current two CoC's in office rises from 11% to 20%.⁴⁸

3.3 Measuring Substantive Representation

Which brings us to the question of how to define substantive representation. We propose here to use the same measure developed in our previous essays,⁴⁹ namely, the percent of times that a given legislator votes in concert with the majority of the minority representatives, which we term a member's Minority Support Score.

Social scientists have developed sophisticated methodologies in the past decade for inferring legislative preferences from their roll call voting patterns,⁵⁰ and these measures have subsequently been used in dozens of essays in leading journals. These measures are used not because they are assumed to capture the totality of legislators' actions; after all, constituency service, committee work and behind-the-scenes maneuvering are at least as important as final roll call votes. Rather, roll call voting behavior has been shown to be highly correlated with these others measures of representation in various contexts, making it an appropriate summary measure of substantive representation.

The object of this analysis, then, is to estimate the relation between a district's composition and its representative's roll call voting behavior. Notice that this is consistent with the view of representation implicit in previous discussions of the Voting Rights Act and Section 5 preclearance: candidates of choice are important not for their race or ethnicity, but because they will represent the minority group's

⁴⁸This risk has its upside, too: the probability of electing three or more candidates of choice rises from 6% to 32%.

⁴⁹Cameron, Epstein and O'Halloran (1996); Epstein and O'Halloran (1999).

⁵⁰See Keith Poole, *Spatial Models of Parliamentary Voting*, Cambridge University Press (2005).

concerns in the legislature.⁵¹

The idea behind our measure of substantive representation is to use the votes of minority legislators themselves to measure how well other representatives take minority views into account, rather than rely on measures such as a “Democratic Performance Index” or interest-group generated support scores. It is also important to use a measure directly related to policy outcomes, as opposed to, for instance, bill sponsorship and co-sponsorship, which may be regarded as “signals” to other legislators, but do not have direct policy impact.

To determine the extent of substantive representation in the baseline plan, one proceeds as follows. 1) Begin with all non-unanimous recorded roll call votes cast in the relevant body for a “reasonable” time period; one that provides sufficient data for valid statistical inference, yet reflects current voting patterns as closely as possible.⁵² 2) For each roll call, calculate whether the majority of black representatives voted Aye or Nay. 3) Use this information to score each legislator for each roll call, assigning

⁵¹This relationship also lies at the heart of discussions of coalitional and influence districts, although not always in a consistent manner. Worries about coalitional districts, for instance, can be based on a median voter theory of representation. If the voter at the 50th percentile of the distribution is non-minority, that is, then the representative will be forced by electoral concerns to move her policies in a more conservative direction, thus reducing minority influence. Once understood in this light, concerns about coalition districts become understandable on substantive rather than descriptive representation grounds. (For these concerns to be valid, one must assume that minority voters are homogeneous and uniformly more liberal than any of the non-minority voters in the district. To the degree that there is some mixing of preferences at the liberal end of the scale, such concerns become less pressing.) Influence districts, on the other hand, are based on the somewhat contradictory notion that representatives who rely on a large block of voters for reelection must take their concerns into consideration once in the legislature. Under an median voter argument, of course, this is not the case: black voters are unlikely to cast their ballots for republican candidates anyway, and so representatives will aim their policy positions at the center of the preference distribution. Small groups in a district may have significant influence, though, if politics consists of more than a single left-right continuum. There may be particular issues that a small group cares deeply about but are less important to the majority. If minority voters can organize themselves and lobby their representatives on this discrete set of issues, they may wield considerable influence in these issue domains.

⁵²In practice, a period of two to five years is usually sufficient. This stage of the analysis has been made much more convenient by the practice of many states to post roll call votes on the internet in machine-readable form.

them a score of 1 if they voted with the black majority, 0 if they voted in opposition, and a missing value otherwise. 4) Average these scores by district and year to obtain that legislator's Black Support Score.⁵³ 5) Calculate the median of all support scores as a summary measure of substantive representation.⁵⁴

To translate these findings into predictions about the extent of substantive representation in proposed districting plans, divide legislators into a small number of groups with similar scores in each group and distinct behavior across groups. This will usually involve dividing legislators by race and party: republicans, white democrats and black democrats.⁵⁵ For each group, calculate the relation between the district BVAP and the legislator's support score through regression analysis. Often a simple linear regression will suffice, but each group should be checked for important non-linearities and, if they exist, these patterns should be captured in a parametric form.⁵⁶ This yields the expected substantive representation as a function of BVAP for each group.

It is now straightforward to combine these measures of descriptive and substantive representation to produce the expected overall level of substantive representation. For any given level of BVAP, we can estimate the probability that a republican, white democrat or black democrat will be elected and, for each of these types, we can estimate the rate at which they will vote for minority-supported issues. The overall expected level of substantive representation is then the product of these two

⁵³One could use a weighted average here, with the weights equal to the degree of unanimity among black representatives on a given roll call. This variation usually has only marginal impact on the substantive results.

⁵⁴When evaluating an entire legislative body, the median is the appropriate statistic. When evaluating a congressional delegation, though, the mean support score may be used as well, since the median of one state's delegation will in general not be the same as the overall median.

⁵⁵Black republicans usually do not form a distinctive group in these calculations, as their voting patterns closely mirror those of their republican colleagues. Where significant, regional variations can be added to the analysis as well.

⁵⁶See Cameron, Epstein and O'Halloran (1996).

quantities.

Assume for example that a 40% BVAP district has a 10% chance of electing a republican, a 50% chance of electing a white democrat, and a 40% chance of electing a black democrat. Further assume that a republican elected from a 40% black district is expected to have a black support score of 40, a white democrat from such a district is expected to have a support score of 90, and a black democrat has an expected support score of 100. Then the overall expected support from such a district is $(0.1 * 40) + (0.5 * 90) + (0.4 * 100) = 89$. For a districting plan, one averages up these numbers district-by-district to obtain total substantive representation, and these summary statistics can be compared across plans.⁵⁷

One might wish to add other considerations to this calculus, including, for instance, the probability that one party or another controls a majority of the legislature. Such considerations, though, would violate our reading of the “black box” approach to Section 5 preclearance implied by *Presley v. Etowah County*.⁵⁸ Under *Presley*, actions taken inside the legislature do not fall under Section 5 preclearance, and the organizing role played by majority parties would fall into this category.⁵⁹

It is our contention that this measure of expected substantive representation is in fact identical to the mental model being used by advocates of safe minority districts. They, too, imagine a world where each legislator is assigned a number between 0 and 100, indicating the degree to which they will work to pursue minority policy goals.

⁵⁷As with descriptive representation, one is free to include the uncertainty in these outcomes as part of the decision process. A plan with a guaranteed average score of 80 might well be preferred to a plan with a 50% chance of 60 and a 50% chance of 100. The point is not to argue that states must choose the plan with the higher average support score even if it comes at the cost of higher variance; covered jurisdictions may exhibit risk aversion just as readily as do consumers and investors.

⁵⁸502 U.S. 491 (1992).

⁵⁹As noted by Karlan (2004), the Court’s reference in *Georgia v. Ashcroft* to the value of maintaining committee chairmanships comes dangerously close to transgressing into the legislative sphere and away from a minority groups’ right to cast an effective vote.

It is just, we contend, that these advocates believe that the only numbers which will appear in practice are either 0 or 100 (or there about), and that the only way to assure oneself of a high-type representative is to ensure that minorities control the electoral process.

Even presented with evidence that non-minority representatives can have fairly high support scores, they might counter that a) such scores are not a true measure of their degree of support, since there are many other behind-the-scenes services performed by candidates of choice but not by these “impostors,” including constituency relations and working to put important minority issues on the legislative agenda; and/or b) that these intermediary-type representatives do not provide secure representation—as Karlan (2004) notes, they may switch parties or abandon the minority voters who helped them get elected in the first place—so it would be folly to let go of two or three birds in the hand for the prospect of six or even eight fly-by-night birds in the bush. They advise states to heed the first rule of wing-walking: Don’t let go of what you’ve got hold of, until you have hold of something else.

These are all valid concerns, but they do have their limits. If risk aversion is so high that no compromises of descriptive representation are ever allowed, then the system will literally never change to one based more on coalition building and fluid bargaining. We view possible tradeoffs between descriptive and substantive representation, and the risks inherent in moving from one to the other, as the epitome of political choices, rightfully made by voters through their elected representatives, and not to be imposed from above by a possibly over-weaning federal administration.

4 Application: Georgia State Senate

We apply these techniques to the analysis of the districting plan at issue in the *Georgia v. Ashcroft* case: Georgia’s original plan for its state senate. We evaluate the plan both with respect to descriptive and substantive representation, and then summarize its status with respect to the *Georgia v. Ashcroft* standard.

4.1 Descriptive Representation

A summary of Georgia’s proposed senate plan compared with the baseline 1997 plan is given in Figure 4. This shows the result of taking the BVAPs in each plan, ordering them from greatest to least, and taking the differences between corresponding entries. The graph clearly shows a reallocation of minority voters from the upper and lower ends of the spectrum towards the middle, influence district region.

To estimate the relation between percent Black voters and electoral outcomes, we analyze all 1,258 elections to the U.S. House and the Georgia state legislature between 1991 and 2001. Of these, 1,235 were regular elections to the 11 U.S. House, 180 Georgia House, and 56 Senate seats in years 1992, 1994, 1996, 1998, and 2000, while the other 23 were special elections to fill vacancies. We combined the results from all the races into a single analysis; all legislative elections occur every two years, and voting patterns on legislative races are generally similar from one body to another. For each election, we noted the race and party of the winner, and whether an incumbent participated in the election. In addition, the black voting age population (BVAP) of the district at the time of the election was recorded.

The results are illustrated in Figure 5, which gives the probability of electing different types of representatives—Republicans, white Democrats and black Democrats—as a function of district BVAP. As shown, the point of equal opportunity for

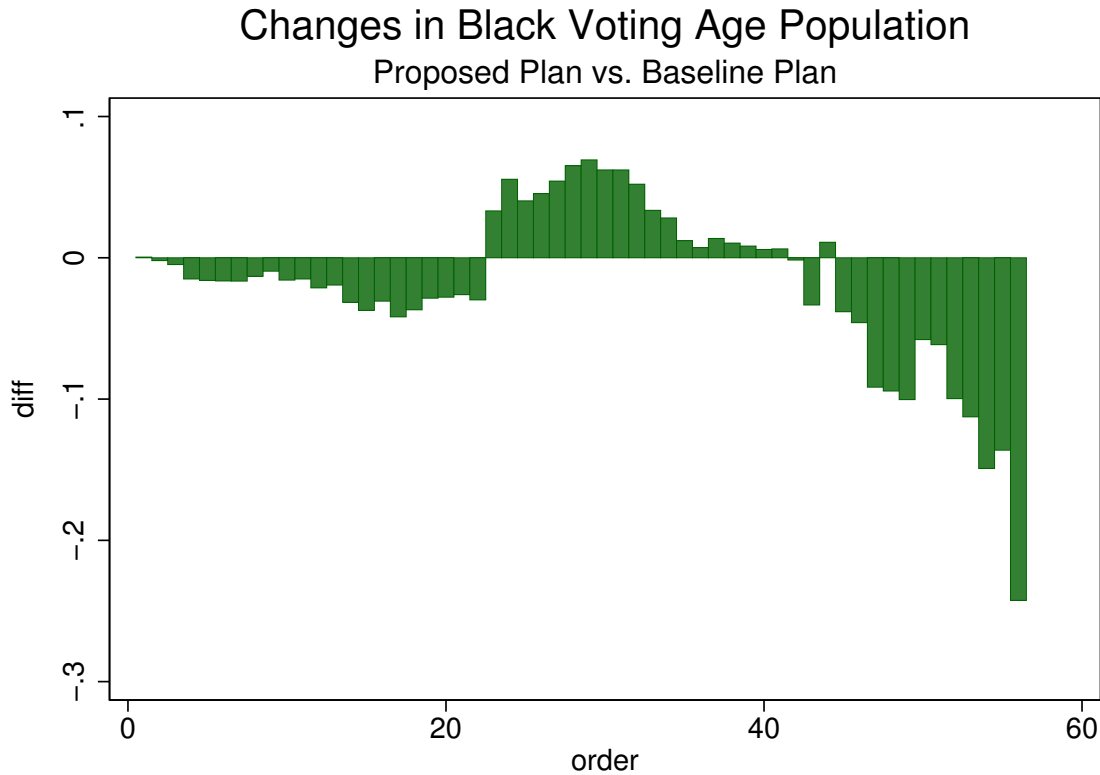


Figure 4: Differences Between Proposed and Baseline Plans

electing a black Democrat is under 50% BVAP, and the chances of electing a white Democrat peak at just over 25% BVAP.

4.2 Substantive Representation

We now compare expected overall minority policy influence in the 2001 plan to that in the baseline plan. Since the 2001 plan increased the number of influence districts, that is, we investigate the likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account, rather than simply assume that non-candidate of choice white Democrats will represent minority interests.

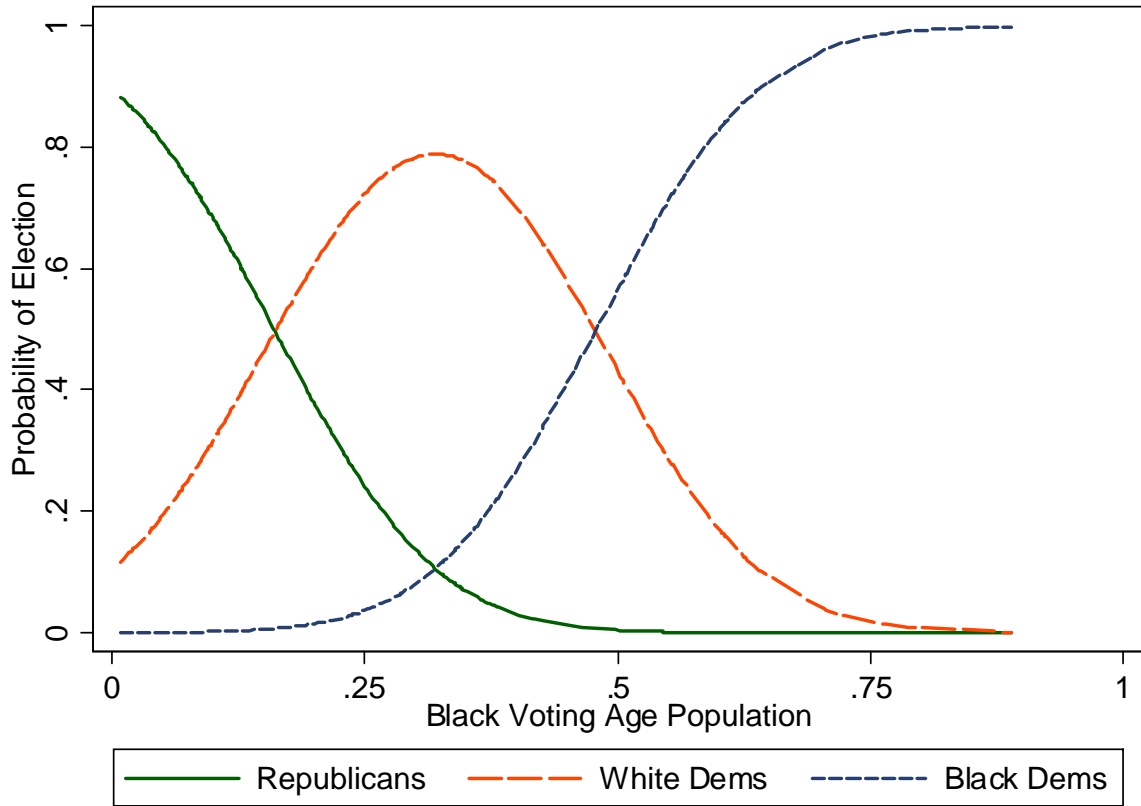


Figure 5: Probability of Electing a Republican, White Democrat and Black Democrat, Georgia Legislative Election, 1991-2002.

For the substantive representation calculations, we began with all 892 non-unanimous recorded roll call votes cast in the State Senate between 1999 and 2002 reported on the Senate’s web site. We then calculated for each roll call whether the majority of black representatives voted Aye or Nay and scored each senator for each roll call, assigning them a score of 1 if they voted with the black majority, 0 if they voted in opposition, and a missing value otherwise. Finally, we averaged these scores by district and year to get that legislator’s Black Support Score.

The results are illustrated in Figure 6, which provides the support scores for each of the three types of representatives and a summary linear regression line for each group. The average support score for Republicans was 50.2%, for white Democrats

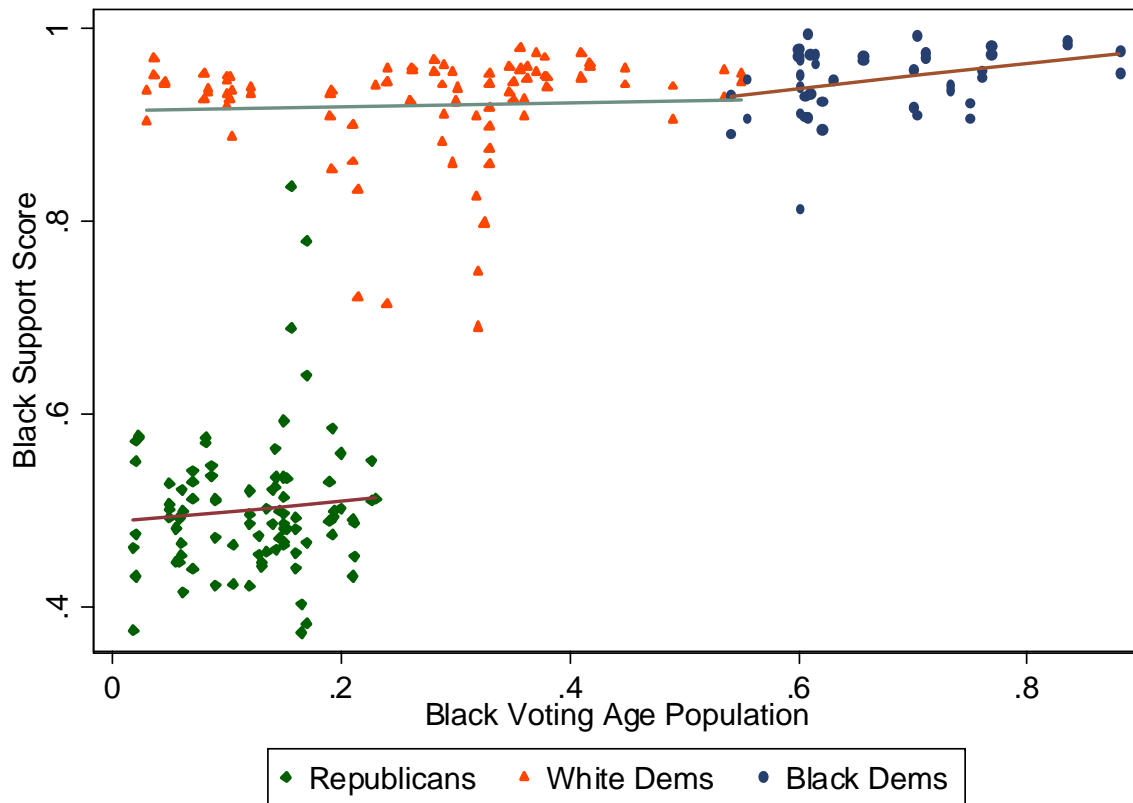


Figure 6: Black Support Scores for Republican, White Democrat and Black Democrat Legislators from Georgia

it was 92.0%, and for black Democrats it was 94.6%. Thus, while white Democrats do not always vote in favor of minority-supported positions on roll calls, they do so far more often than do Republicans.

Thus we can estimate the relation between district characteristics and support for minorities in roll call votes. In fact, these results allow us to calculate the implied tradeoff between majority-minority and influence districts. For instance, the expected Support Score for a 50% BVAP district is about 90%, while for a 25% district it is about 50%. By this measure, roughly two influence districts would, on average, compensate for the loss of one majority-minority district.

Furthermore, blacks form legislative coalitions with Republicans far less often

than they do with their white Democrat counterparts. There were a total of only 12 votes out of 892 in the sample where a majority of black representatives and Republicans voted in one direction against a majority of white Democrats, as opposed to 297 votes where a majority of white and black Democrats voted together against Republicans.

4.3 Comparison of Plans

We now compare the baseline, interim and proposed plans in terms of both descriptive and substantive representation.⁶⁰ First, one can count the number of majority-minority, coalitional, and influence districts in each plan. The results of this analysis are shown in Table 2: the proposed plan had 13 majority-minority districts as opposed to 12 in the baseline plan; no coalitional districts as opposed to 1 in the baseline plan; and 17 influence districts, as opposed to 12 in the baseline plan. If one takes the 1990 census data as the baseline, the results are even more pronounced: five more influence districts and three more majority-minority districts. Thus the proposed plan had both more majority-minority and more influence districts than did the baseline plan. The total number of expected candidates of choice elected did fall, though, from 13.6 to 12.5.⁶¹

We can now use the relation between black voting age population and support scores shown in Figure 6 to estimate which plan would yield the highest average and median support score. The method employed uses smoothing splines to approximate the nonlinear curve shown in the figure, and then uses the resulting parametric

⁶⁰The interim plan was passed by the state legislature after the original plan was denied preclearance and was in effect for the 2002 senate elections.

⁶¹Part of this drop was inevitable, given the fact that as of the 2000 census the existing senate districts were malapportioned in blacks' favor. The average BVAP in the baseline senate districts was, in fact, 29.7%, even though blacks comprised only 27.6% of the statewide population.

Plan	Influence	Coalition	Maj.-Min.	E(CoC)
Baseline (1990 Census)	12	1	10	11.2
Baseline (2000 Census)	12	1	12	13.6
Proposed	17	0	13	12.5
Interim (2002)	17	0	13	12.9

Table 2: Comparison of Alternative Plans by the Expected Number of Influence, Coalition, and Majority-Minority Districts Created, and Expected Candidates of Choice

function to score each district in the baseline and proposed plans.

The results in Table 3 show that the proposed plan has an average support score of 66.6%, as opposed to 62.3% in the baseline plan as of the 2000 census, 59.0% in the baseline plan as of the 1990 census, and 65.9% in the interim plan, for an increase of 6.3%. When looking at medians, the increase is even more dramatic: 75.9% in the proposed plan, as compared with 50.2% in the baseline, for an increase of 51.2%.

Plan	Mean	Median
Baseline (1990 Census)	59.0%	46.1%
Baseline (2000 Census)	62.3%	50.2%
Proposed	66.6%	75.9%
Interim (2002)	65.9%	69.2%

Table 3: Mean and Median Support Score, For Each Districting Plan

Taken as a whole, these results show that Georgia’s state senate redistricting plan did trade off a slight decrease in descriptive representation for an increase in substantive representation. In terms of Figure 3, they attempted to move into region 4. As the plan did have the overwhelming support of the minority representatives, it should have been able to obtain preclearance under the Court’s *Georgia v. Ashcroft* standard.

5 Conclusion

The renewal of Section 5 provides an opportune time to rethink the relation between race and redistricting. Changes in voting patterns—decreased polarization and the republican resurgence in the South—have made the current Retrogression Assessment Procedure all but obsolete. The inherent tensions created by the DOJ’s insistence on majority-minority districts at any expense were laid bare in the *Georgia v. Ashcroft* case: Why would the federal government know better than minority voters themselves how best to advance minority interests in the political sphere?

The question is how to implement the new *Georgia v. Ashcroft* standards. In this paper we have offered new measures of substantive and descriptive representation that do not rely on the classification of districts into separate and unequal types. Rather, they measure directly the number of candidates of choice that a given plan is expected to elect to office, and the subsequent degree of support for minority-favored policies in the legislature. Moreover, these measures are intertwined; the electoral outcomes of a districting plan are both the measure of descriptive representation and one component of calculating substantive representation.

What do our results imply for the current divisions within the voting rights community, between those who favor and those who oppose the *Georgia v. Ashcroft* ruling? Although these two sides are sometime characterized as those who are pro- and anti-substantive representation, we do not accept this neat division. Most advocates of restricting Section 5 review to electability issues alone — that is, the critics of *Georgia v. Ashcroft* — do so not just because they value descriptive representation *per se*, but because they believe that the election of minority representatives is the surest, least risky way to ensure minority voters of substantive representation. And those on the other side are not blind to the advantages of

descriptive representation; they just worry that other concerns should also be able to influence legislators' redistricting decisions.

If we are correct, then the points of disagreement between the two camps are more quantifiable than much of the previous debate would suggest. In order for a renewed Section 5 to pass strict scrutiny from the Supreme Court—and to ensure that it addresses the voting rights problems of today, rather than 40 years ago—a body of evidence needs to be built up in the next few years that examines these issues of representation in the depth that they deserve.