# A Strategic Dominance Argument for Retaining Section 5 of the VRA[*]

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## 1  Introduction

The arguments against renewing Section 5 of the Voting Rights Act fall
generally into three categories. First is the claim that Section 5 is no longer
necessary. Over the past four decades, the argument goes, the Voting Rights
Act has wrought dramatic changes in the South, empowering minorities to
the point where normal politics has taken over. These groups can now "pull,
haul, and trade to find common political ground"[1] just like other groups, and
no longer need government protection to do so. In one form of this argument,
Section 5 has "served its purposes" and is now a "victim of its own success."[2]
In another, conditions on the ground have changed so profoundly that the
courts will no longer find Section 5 constitutional in any case.[3]

The second type of claim concedes that we may not yet have achieved a

[1]Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994).
[2]Issacharoff (2004, 1731).
[3]Hasen (2005).

"unitary" political system "in which racial discrimination [has been] eliminated root and branch."[4] Nonetheless, the Voting Rights Act may now be "at war with itself"[5] because Section 5 preclearance procedures are being interpreted too narrowly, focusing on issues of descriptive representation to the exclusion of substantive representation. This produces a ratchet effect: the number of minority-controlled legislative seats can increase but never decrease, locking in a racially separated political system and impeding a "transition to a society where race no longer matters: a society where integration is a simple fact of life."[6] Better perhaps to do away with Section 5 altogether than have it pose a roadblock to further progress.

Third, observers worry about the "mischief"[7] that might result from having the powerful Section 5 machinery enforced by actors who are either indifferent to minority concerns, or willing to subvert these concerns to partisan political gain. The fact that grants of preclearance are not reviewable makes it possible for such administrators to collude with like-minded states in passing legislation harmful to minorities, and to block proposals that would advance minority interests. A world with no Section 5, this argument asserts, would be preferable to a world with Section 5 enforced by those with purely partisan motives, or worse.

The present paper does not address the first two of these concerns.[8] Rather, we address the third point, that Section 5 should perhaps not be

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[4]Green v. County School Bd., 391 U.S. 430, 437 (1968).

[5]Pildes (2002).

[6]Georgia v. Ashcroft, 539 U.S. 461 (2003).

[7]Issacharoff (2004).

[8]Indeed, we have argued previously (Cameron, Epstein and O'Halloran, 1994) that Section 5 enforcement has focused too narrowly on questions of electability up until now, to the possible detriment of gains in substantive representation.

renewed so as to avoid the "mischief" that might be done should it fall into the wrong hands. Using a formal model of the Section 2/Section 5 policy making process, we come to the rather surprising conclusion that, a few minor caveats aside, Section 5 can only help protect minority voting rights, no matter who enforces it: the worst possible outcomes with Section 5 are just as good as the best outcomes without it. Assuming that it is still proper for the federal government to keep its thumb on the scale in covered jurisdictions' relations with their minority communities, our analysis provides a strong rationale for retaining Section 5 rather than relying on Section 2 alone.

This does not necessarily imply, though, that the present set of institutional arrangements cannot be improved on. In a world where the preferences of the various political actors are uncertain, our analysis shows that there may be gains to moving to a system of "expedited injunctions," rather than the current regime of required preclearance. Reducing the discretion given to the Justice Department when interpreting the Act's provisions, our model indicates, would increase the utility of minority voters; Congress might consider amending the Act so as to allow judicial review of positive preclearance determinations as well.

The following section reviews some recent evidence of increased partisanship with regard to racial policy issues, arguing that the neat division of preferences between the federal government and the states no longer holds. We then present a formal model of the policy making process under current institutional arrangements and evaluate its effectiveness in a world where policy makers have partisan as well as policy motivations. The fourth section analyzes the effect of alternative institutions, ranging from the status quo, to

eliminating section 5 completely, to various intermediary options. The last section concludes.

# 2   Increasing Partisanship

As a result of the VRA's passage, Southern politics reentered the world of bipartisan electoral competition after nearly a century's hiatus. This development has had two, rather contradictory, effects. On the one hand, as noted by Pildes (2002), the conversion of many conservative Southern Democrats to the Republican party has actually enhanced minorities' electoral prospects. In the old Solid South, a black candidate would have to win a Democratic primary loaded with conservatives to gain office, meaning that the district usually had to effectively comprise at least 50% black voters. Now blacks need far fewer voters to control the democratic primary, after which a sufficient number of white democrats can ensure them of winning the general election as well. Assume for instance that a district has 35% black democrats, 30% white democrats and 35% republicans. Then blacks comprise over half the democratic electorate, and as long as half the white democrats vote for a black candidate over a republican, the black democrat can win the general election as well. [9] So the two-step primary-general structure of elections means that the more Republicans there are, the easier it is for black candidates to win office.

On the other hand, as Issacharoff (2004) argues, administrative decisions which previously had little if any partisan repercussions are now fraught

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[9]See Epstein and O'Halloran (2005) for a formalization of this logic.

with consequences for party control of state government and/or Congress, and such considerations may in turn influence policy outcomes. Many observers have concluded, for instance, that the DOJ's insistence on the creation of large numbers of majority-minority districts in the early 1990's under a Republican administration was due in part to the electoral advantages that would accrue to Republican candidates in surrounding districts.

The institutions, or procedural provisions, that comprise the VRA—most importantly, Sections 2 and 5—were established four decades ago based on a particular set of assumptions regarding the preferences of various actors. Following the long history of southern resistance, it was natural to assume in the mid-1960s that the federal government would play a watchdog role, supporting black voters' rights over the states' objections. There was, in essence, only one relevant policy dimension: the degree to which minority voters would be permitted to participate in the electoral process, from registering, to voting, to running for office, to winning office, to governing. And relative to this dimension, it was assumed that the federal government had pro-minority preferences, while the states would try to hinder minorities' advancement.

The rise of the Republican party in the South has irrevocably changed this equation: the relevant space is now two-dimensional, as policy decisions regarding minority voting rights will also carry partisan implications. The most often-cited example is the fact that the creation of majority-minority voting districts helps Republican candidates by concentrating loyal democratic voters. But such considerations are not limited to redistricting: the expansion of city limits to include suburbs may dilute minority voters in the

city but help Republicans; felon disenfranchisement laws may be politically attractive to the lawmakers who enact them, even though their impact falls disproportionately on minority citizens; more stringent ballot access requirements may favor those groups with the strongest grass-roots organizations, including both the conservative right and religious organizations in the minority community. And so on.

This section briefly reviews evidence on the increased correlation between party and race in southern politics.[10] Regarding descriptive representation, the story revolves around the increased electoral fortunes of both republicans and black democrats, at the expense of white democrats. For substantive representation, we highlight the gulf that now separates the parties, as the ranks of the liberal republicans and conservative democrats have dwindled over time.

## 2.1 Elections

The changing nature of elections in the South is now well known in the voting rights literature. Throughout the region, blacks register and turnout in number roughly equal to those of whites. About one third of white voters cross over to cast their ballots for black candidates, while only about 2% of black voters cross over the other way.[11]

The result of these factors is illustrated in Figure 1, showing the electoral probabilities of Republicans, White Democrats, and Black Democrats in the

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[10]The literature on the rise of a two-party system in the South is now voluminous. See Lublin (2004) for details, and Pildes (2002) for an excellent overview.

[11]See for instance Bullock and Dunn (1999) and Grofman, Handley and Lublin (2001). The research in this area is well summarized in Pildes (2002), and updated in our contribution elsewhere in this volume.

94th, 98th, 102nd and 106th Congresses, for all Southern states.[12] Also shown in each figure is the point of equal opportunity, the percent of black voting age population at which a black democrat has a 50% chance of getting elected.

In the 94th Congress (elections of 1974), equal opportunity was at about 80% black, and a district with no black voters had a slightly better than even chance of electing a white democrat to office (this is the graph at BVAP=0). In the 98th Congress, (elections of 1982; i.e., the time at which the last VRA reauthorization took place) the situation is little changed; in fact, the point of equal opportunity is estimated at over 100%, since a number of southern districts with majority black populations still elected white democrats (such as Hale and then Lindy Boggs from Louisiana).

From here on, though, through the elections of 1990 and 1998, the picture changes dramatically. The point of equal opportunity falls steadily, to about 45% BVAP in 2000, and white democrats' chances of winning an election in a district with no blacks crashes to about the 10% range. The rise of Republican and black electoral prospects, that is, necessarily comes at the expense of white democrats. In the first two pictures white democrats have a greater than 50-50 chance of winning elections for almost *all* levels of BVAP. By the 106th Congress, they only have a slightly greater than 50% chance of winning in the 20-40% BVAP range.

The implication is clear: concentrating black voters in relatively few dis-

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[12]These are the graphical results from an ordered probit analysis, in which the type of representative elected was regressed on the black voting age population in the district. See Epstein and O'Halloran (1999) for further details on the technique. Similar trends hold for the election of Latino representatives; see our companion essay elsewhere in this volume.
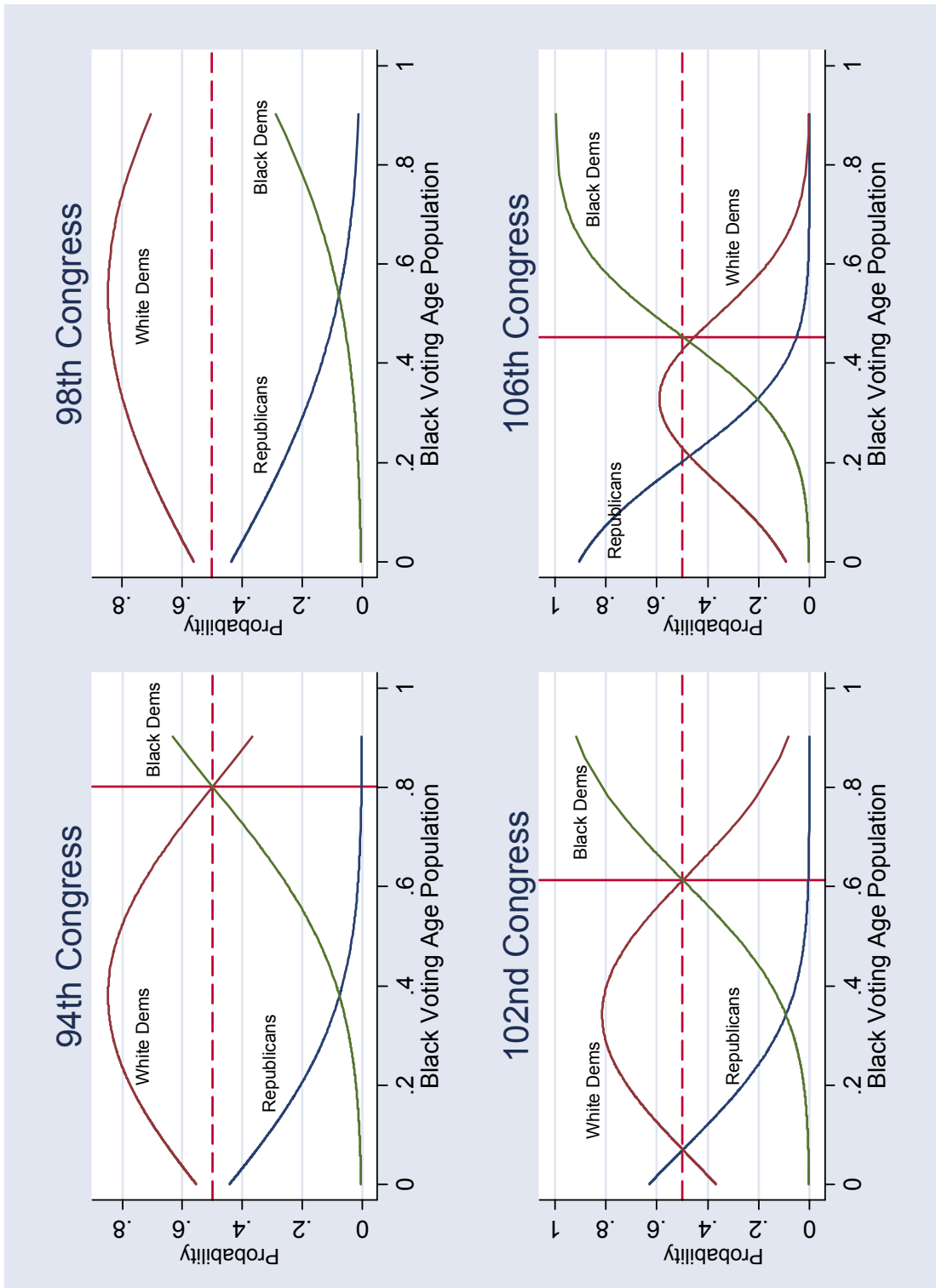
Figure 1: Equal Opportunity in Congressional Elections, 94th, 98th, 102nd and 106th Congresses

tricts works to the electoral advantage of both black and Republican candidates, and disadvantages white democrats. Polarization has decreased over time, so that black candidates can now gain office in districts that are below majority-minority, but maximizing the number of blacks elected to office will also result in the election of Republicans in surrounding districts.

## 2.2   Representation of Minority Interests

Turning to legislative decision making, we examine the correlation between party and roll-call voting behavior, using data drawn from both the U.S. House of Representatives and the South Carolina state legislature. The congressional data covers the period between the 94th and 106th Congresses, while the South Carolina data comes from 2001.

For the congressional analysis, we started with all *Congressional Quarterly* key votes and took the direction that the majority of the black legislators voted to be a pro-minority vote. We then took the votes of all legislators and used a Bayesian ideal point estimation routine to place all legislators on a single scale; we term this estimated ideal point the legislator's "Vote Score."[13] The results are displayed in Figure 2, with Republicans as red crosses, White Democrats as blue squares, and Black Democrats as green stars.

The estimation technique produces a smooth, S-shaped curve of ideal points, so the absolute differences between legislators' positions are not necessarily meaningful. But the clear pattern that emerges is that, early on, a considerable amount of overlap existed among Republicans and White Democrats; the crosses and squares mix to a significant extent. But more re-

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[13]For details on the estimation procedures, see Treier and Jackman, 2002.
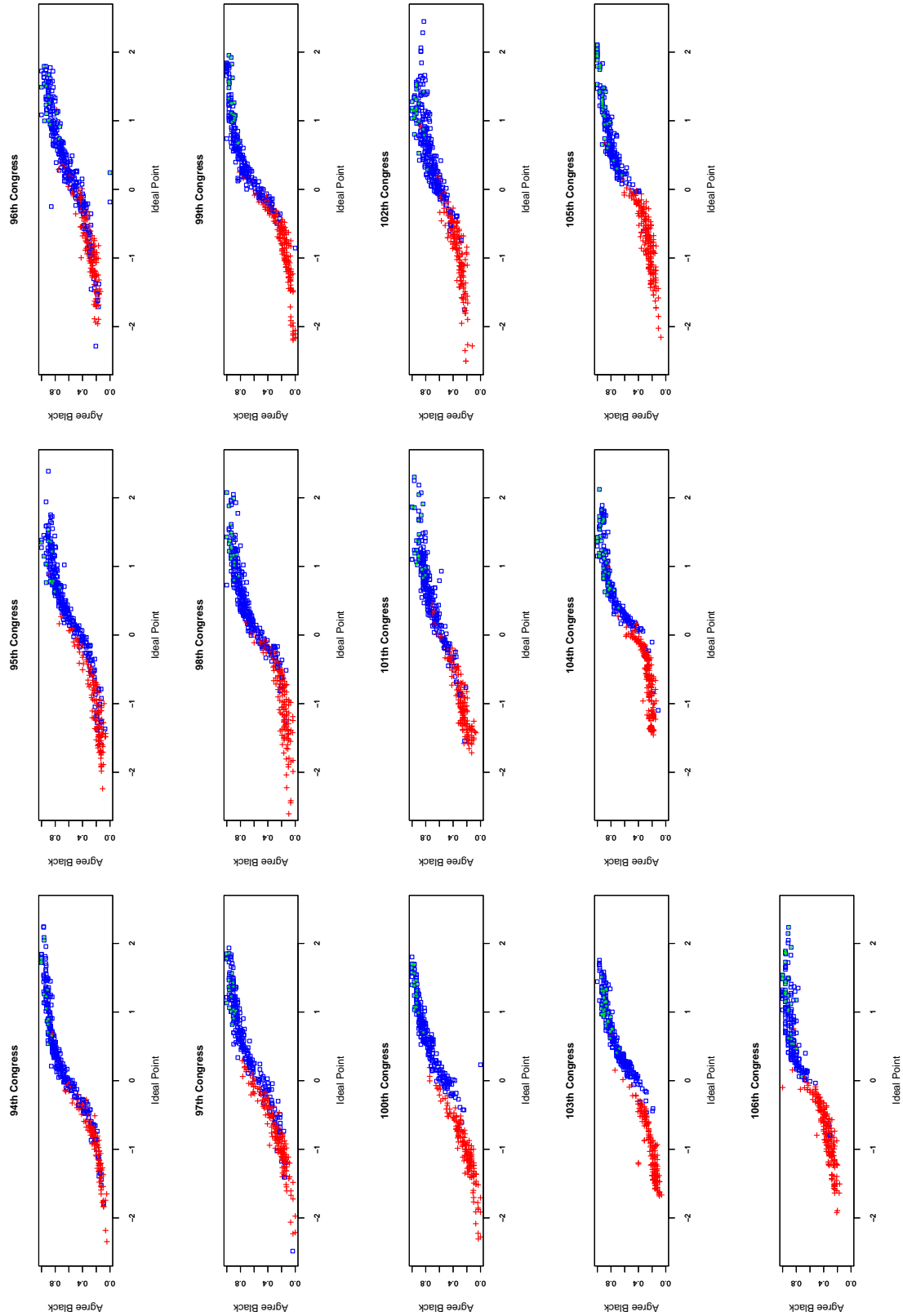
Figure 2: Bayesian Estimation of Pro-Minority Voting Score, 94th-106th Congresses

| *Congress* | 94th | | | 99th | | | 104th | | |
|---|---|---|---|---|---|---|---|---|---|
| **Group** | **Mean Vote Score** | **Average BVAP** | **Number** | **Mean Vote Score** | **Average BVAP** | **Number** | **Mean Vote Score** | **Average BVAP** | **Number** |
| (1) Non-eastern Republicans | 20.93% | 6.15% | 106 | 15.55% | 6.09% | 139 | 24.17% | 5.29% | 185 |
| (2) Eastern Republicans | 40.97% | 3.6% | 38 | 36.00% | 4.16% | 43 | 34.98% | 5.01% | 45 |
| (3) Non-black Democrats from covered Southern districts | 42.76% | 18.02% | 62 | 52.33% | 20.55% | 47 | 53.78% | 13.55% | 36 |
| (4) Non-black Democrats from non-covered Southern districts | 56.78% | 11.81% | 27 | 60.06% | 13.94% | 33 | 61.09% | 11.18% | 11 |
| (5) Non-southern Non-black Democrats | 81.30% | 5.52% | 186 | 84.21% | 6.71% | 154 | 77.57% | 6.41% | 122 |
| (6) Black Democrats | 93.69% | 46.86% | 16 | 91.58% | 52.42% | 19 | 90.06% | 54.72% | 36 |
| Overall Mean | 56.53% | 9.20% | 435 | 52.55% | 10.30% | 435 | 49.10% | 10.50% | 435 |
| Overall Median | 64.00% | 4.0% | | 53.50% | 5.0% | | 37.00% | 4.0% | |

Figure 3: Substantive Representation, 94th 99th and 104th Congresses

cently, they are almost completely separate, meaning that Republicans tend to vote against positions supported by minorities, and Democrats in favor.

The same results are presented for the 94th, 99th and 104th Congresses in Figure 3. Here we divided House members into six subgroups: Non-eastern Republicans; Eastern Republicans; Non-black Democrats from covered Southern districts; Non-black Democrats from non-covered Southern districts; Non-southern Non-black Democrats; and Black Democrats.[14] For each group and congress, we tabulated the mean Vote Score, the average BVAP per district, and the number of representatives.

The table clearly shows that the gap between Republicans and Democrats, represented by the difference between groups 2 and 3, has increased over time. In the 94th Congress the voting patterns of eastern Republicans and southern Democrats were nearly identical, but these patterns diverge in subsequent Congresses. Thus the party of the representative elected, always an impor-

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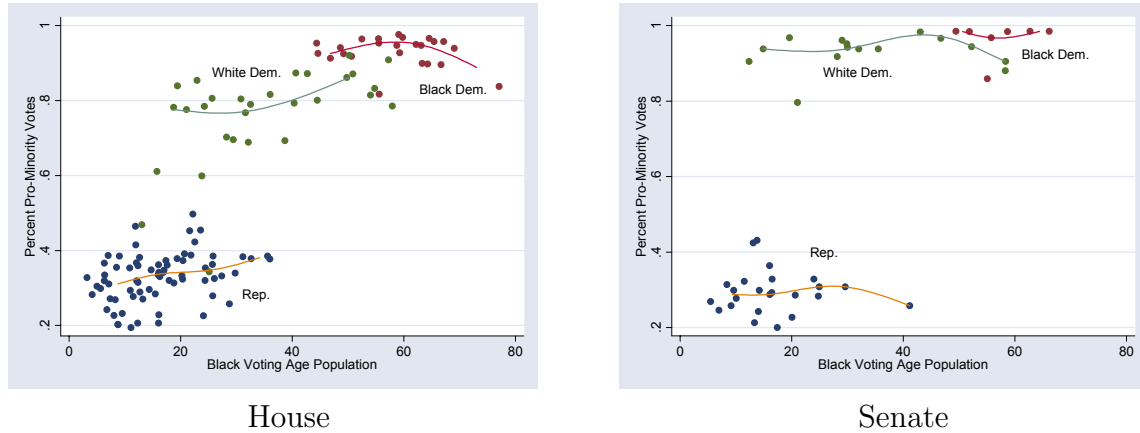[14]These are the same divisions employed in Cameron, Epstein and O'Halloran, 1994.

Figure 4: Support for Minority Positions in South Carolina State Legislature, 2001

tant factor in minority representation, has become even more important in the last two decades.

Note too that the gaps among Democrats in groups 3, 4, and 5 have narrowed over time. The total gap between the average Vote Score for groups 3 and 5 has gone from roughly 40 points in the 1970s, to 30 points in the 1980s, to 20 points today. We have thus moved from a preference distribution displaying a diversity of interests within each party, to a situation where distinct, homogeneous parties have little overlap in their attitudes towards minorities.

We see similar patterns in South Carolina, where Figure 4 plots the percent of times that members of the State House and Senate voted with the majority of minority representatives. Again, the notable difference is between the different parties; all Democrats tend to vote together, as do all Republicans. Within each group, adding more minority constituents to a district does little to alter their representative's voting behavior.

## 2.3   Mixing Preferences

It is important to understand the story being told here. Start with the situation as it was in the mid-1960's, with the federal government trying to protect minority voting rights, Southern states resisting, and little in the way of partisan gain one way or the other. In such a world one could give extraordinary power to the federal government to oversee state actions and be fairly certain that it would be used to protect minority interests.

The injection of a partisan dimension to this scenario, coupled with decreasing racism, means that this neat division of preferences can no longer be assumed to hold. Federal officials might now support a policy that harms minority voters to some degree, not necessarily because they have acquired anti-minority preferences, but because there are partisan gains to the policy that outweigh its other components. Southern states may take steps that increase minority representation, not necessarily because racism has disappeared, but because of the political advantage to be gained by doing so.

In short, the presence of partisan concerns does not necessarily make any one actor more or less pro-minority; rather, the new partisan environment means that the preferences of the different actors are *mixed*. One cannot understand the workings of the present policy making institutions simply by assuming that the old, mid-1960's preferences hold; one must examine all possibilities. That is the challenge to which we now turn.

# 3   The §2–§5 Game

We now capture some key elements relevant to the Section 5 renewal debate through a formal model of VRA enforcement. Whatever the fate of Section 5, Section 2 will remain in effect, so the choice is between a combination of a (possibly modified) Section 5 action prior to Section 2, versus Section 2 alone. That is, in deciding whether or not to renew Section 5, we must evaluate its marginal impact, positive or negative, over and above that of Section 2.

One major difference between Sections 2 and 5 concerns the burden of proof: in Section 2, the plaintiff must prove that the proposed plan injures minorities, while under Section 5, the state must show that its proposed plan will *not* injure minorities. We capture this distinction by assuming that three types of proposals exist, from the courts' point of view: 1) proposals that clearly violate the VRA, 2) proposals that clearly do not violate the VRA, and 3) proposals whose effects are unclear, so that they would be struck down under Section 5, but survive under Section 2.

The other major difference between the Sections, of course, is that Section 5 is concerned with non-retrogression, while Section 2 addresses non-dilution. The former standard refers to *changes* in policy (they cannot make minority voters worse off), while the latter refers to *levels* of policy (they cannot fall below some dilutive threshold). A proposed change will then be one of four types: it will be both dilutive and retrogressive, neither dilutive nor retrogressive, dilutive but not retrogressive, or retrogressive but not dilutive.

The first three possibilities can be handled correctly in a regime with

Section 2 alone; either dilution and retrogression go in the same direction, or the proposal violates Section 2 but not Section 5. The only instance in which Section 5 would be needed on evidentiary grounds, rather than for its burden of proof, would be for retrogressive but non-dilutive policy changes. This might occur, for instance, if a change in districting patterns would reduce the expected number of minority office-holders, but still keep this number above the group's population proportion. Assuming such situations are relatively rare, we abstract from these considerations here and focus instead on Section 5's higher burden of proof relative to Section 2.

## 3.1 Model Setup

In the game, illustrated in Figure 5, a jurisdiction covered under Section 5 makes a proposal ($P$) which alters the existing status quo ($SQ$). The plan is then submitted to the Department of Justice for preclearance. The DOJ can decide to preclear or not, and if the DOJ denies preclearance its decision can be appealed to the courts. If preclearance is denied and not challenged, or if it is denied, challenged and upheld, then the status quo prevails. If the plan clears the Justice Department, either through direct preclearance or the courts' overturning a denial, then it is subject to a Section 2 challenge. If no Section 2 challenge is offered, then the plan goes into effect; otherwise, the court can choose between the status quo and the plan.

The tree represents policy making with both Sections 2 and 5 in effect. Also indicated is the Section 2 subgame; if Section 5 were eliminated altogether, then state plans would go directly to a possible Section 2 challenge and skip the upper part of the tree entirely. Notice, though, that it does not
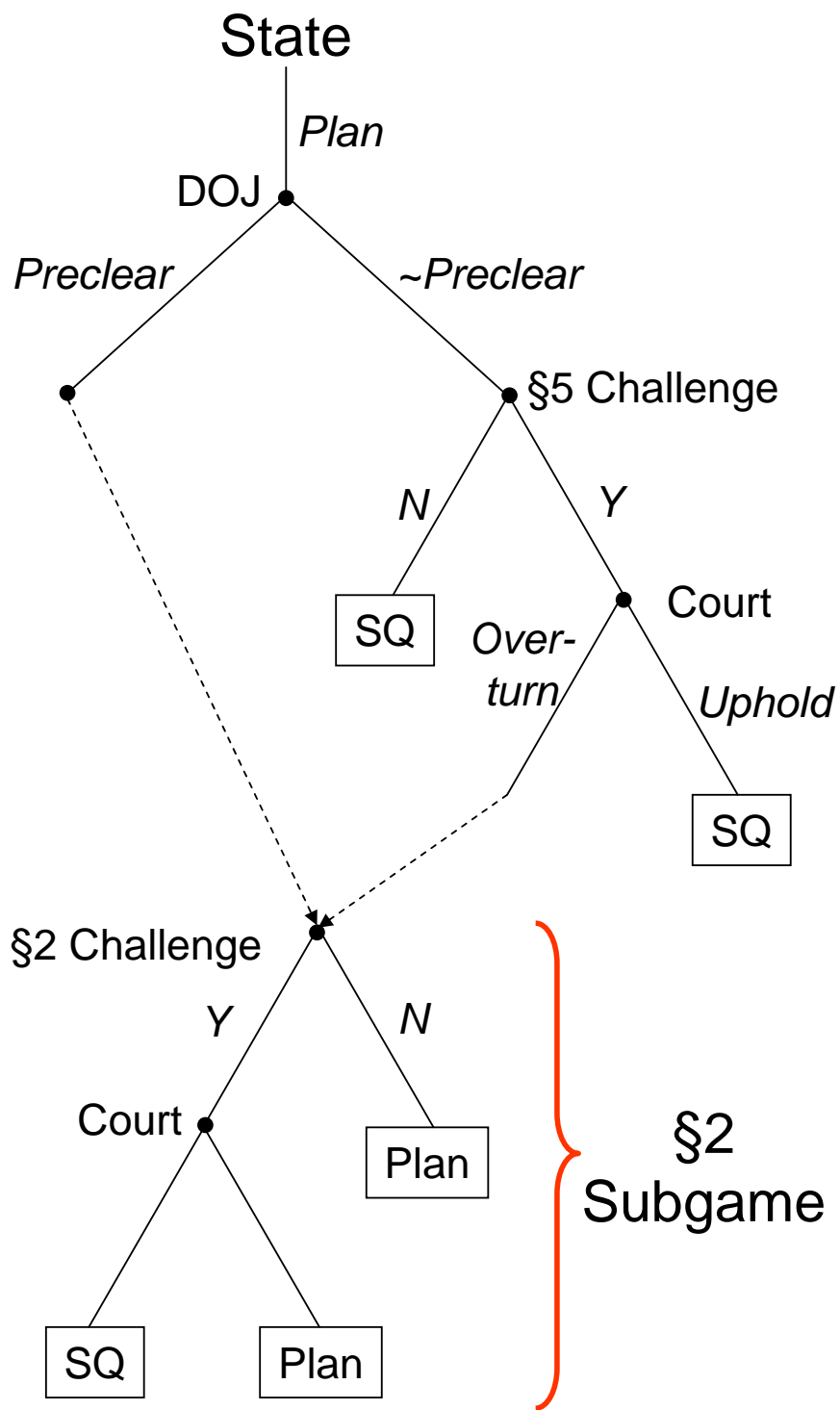
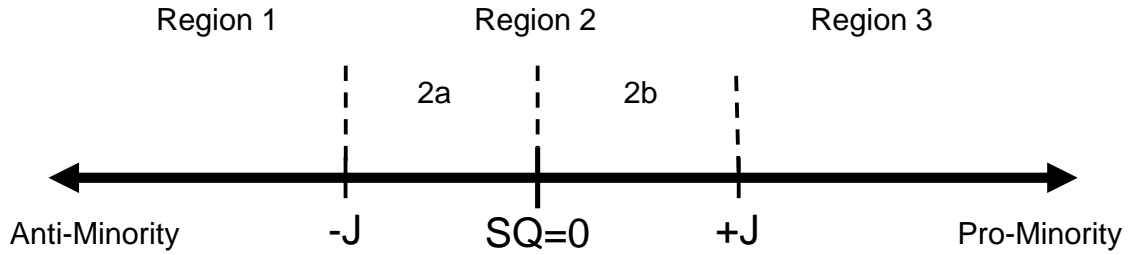Figure 5: Game tree for §5 and §2 policy making

Figure 6: Policy space and regions of observability

make sense to speak of a Section 5 game independent of Section 2, which reinforces the substantive point that Section 5 actions take place in relation to a Section 2 backstop.[15]

All actors have ideal points $x_i$ in a one-dimensional policy space $X = \Re$ with utility functions $U(x) = -|x - x_i|$ for all $x \in X$. Without loss of generality, the status quo is set to $SQ = 0$, and policies $x > 0$ are taken to be pro-minority. The state's ideal point is denoted $S$, while the Justice Department's ideal point is $D$. Both states and the DOJ have perfect information about the position of the state's policy proposal $P$ relative to the status quo.

Courts, however, have only imperfect information about the proposal. As shown in Figure 6, courts can observe if a policy is below $-J$, between $-J$ and $+J$, or greater than $+J$, denoted Regions 1, 2 and 3 in the figure. Region 1 policies are unambiguously detrimental to minorities, while Region 3 policies are unambiguously beneficial. But policies in Region 2 are too close to the status quo for the courts to determine whether they in fact help or harm minorities. For convenience, Region 2a contains those policies that do harm minorities, and 2b policies help minorities.

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[15]Technically, the point is that the game tree without the Section 2 subgame is not a proper subtree of the entire game tree.

We assume that states want to move policy as close to their ideal points as possible, given the institutional structure within which they operate. Similarly, the DOJ wants to move policy outcomes close to its preferences. These actors, then, are purely policy motivated, although they might strategically ask for intermediate outcomes that they know they can attain, rather then ask for their ideal and end up with the status quo.

Courts are assumed to enforce the VRA as a set of evidentiary requirements. Thus under Section 2, where the burden of proof is on those who would strike down a law, the courts will allow policies in Regions 2 and 3 to stand, since it cannot be proved definitively that the law will harm minorities. On the other hand, in Section 5 actions the courts uphold only policies in Region 3, since those are the policies that definitely do not harm minorities.

## 3.2   Equilibrium

To begin the analysis of outcomes under this model, let us define the full-information benchmark, which would allow proposed changes in Regions 2b and 3 and disallow all others. Thus, changes in law would be permitted if and only if they do not harm minorities. The question is, how close do different institutional arrangements come to this benchmark?

Consider first the Section 2 game without Section 5. The courts must determine whether a proposed change clearly harms minorities. As indicated above, this means they will strike down anything in Region 1 and allow laws in Regions 2 and 3. States with ideal points in Regions 2 and 3 will propose policies that give them their ideal outcomes. States in Region 1 will tactically

propose a policy $P = -J$, just on the border of Regions 1 and 2, so as to survive a possible Section 2 appeal. Relative to the benchmark, policies in Region 2a do get enacted, and all states, regardless of their possible anti-minority bias, can find some law to their liking that will pass, flying in under the radar if necessary.

Now let us add Section 5 review and establish a few basic elements of the analysis. It is clear that Section 2 review will strike down all proposals in Region 1 and uphold proposals in Region 3. States with ideal points in Region 1 can therefore never attain their ideal outcomes, and those in Region 3 can always get their ideal points; it is only Region 2 states that are in question. Further, given the equilibrium to the Section 2 game, any policy precleared by the DOJ in Region 2 will be implemented, since the decision to preclear is not reviewable and the court will not have sufficient information to rule it dilutive. Conversely, a DOJ objection to a Region 2 proposal will kill it, since the court will not have sufficient evidence to rule it non-retrogressive.

Assume first that the Justice Department is pro-minority, with an ideal point $D > J/2$. The DOJ will prefer all proposals in the range $[0, J]$ to the status quo, so it will preclear all proposals in Region 2b. Furthermore, even though it prefers the status quo to proposals $P > 2D > J$, any denial of preclearance to such proposals can be challenged and overturned, since they are clearly pro-minority. So when $D > J/2$, all states with ideal points $S \geq 0$ enact $S$. All states with ideal points $S < 0$ are content with the status quo.

Policies here replicate the full-information outcomes, as envisioned upon the original passage of the VRA. Moreover, proposals in Region 1 would be disallowed from the very beginning, rather than having them enacted into
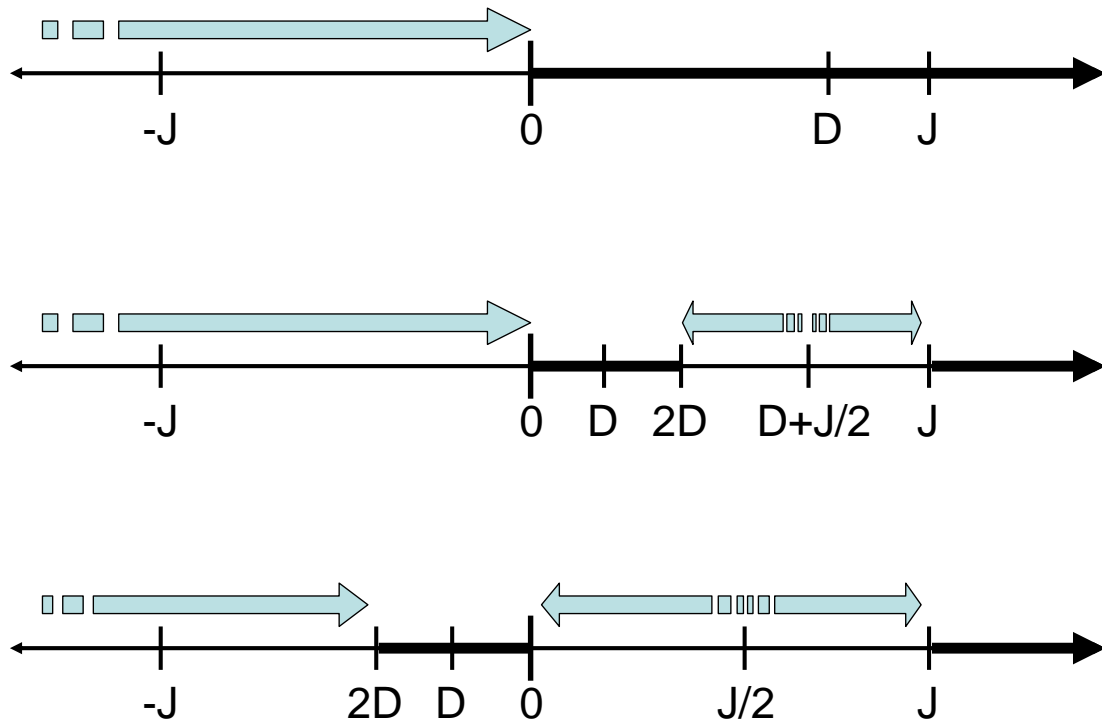
Figure 7: Equilibrium Analysis

law and forcing minorities to pay the time and expense necessary to challenge them (not to mention the harm these laws could do in the interval between their passage and the courts' striking them down).

This equilibrium is illustrated in the top portion of Figure 7. In the figure, the thick regions of the policy line indicate areas where states enact their preferred policies: this includes all states with $S \geq 0$ in the uppermost line, where the Justice Department's ideal point $D$ is close to $J$. The block arrows indicate ranges of states which enact a common policy; in the top figure, for instance, all states with ideal points $S < 0$ enact the status quo.

Next consider a DOJ with an ideal point between 0 and $J/2$, as illustrated in the middle portion of Figure 7. There are now states with ideal points between $2D$ and $J$, and if they tried to enact their preferred policy the

DOJ would deny preclearance, leaving the status quo as the result. Such states have two options: they can lower their ambitions and enact policy $2D$, or they can make policy even more pro-minority and move to $J$, so that their proposal falls within Region 3 and will be upheld by the courts despite any DOJ objections. States with $S > D + J/2$ will choose the latter option, "upping the ante" so as to ensure that the courts will preclear their proposal.[16] If there are more states with ideal points between $D + J/2$ and $J$ than there are with ideal points between $2D$ and $D + J/2$, minorities can actually do *better* than the full information outcome.

When the DOJ's preferences move to the left of the status quo, states with $S \in [0, J/2]$ enact the status quo, states with $S \in [J/2, J]$ enact $J$, and states with $S > J$ enact their ideal point. As long as $D > -J/2$, states in the $[2D, 0]$ range enact their (anti-minority) ideal points, and states further to the left enact $2D$, as illustrated in the bottommost portion of Figure 7. Finally, once D becomes less than $-J/2$, all states in Region 2a enact their ideal points and those in Region 3 enact a policy of $-J$. Such proposals would not survive Section 5 review, of course, but since grants of preclearance cannot be challenged they pass straight on to Section 2, where they cannot be struck down.

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[16]Arguably, this was the strategy that Georgia followed in their post-2000 redistricting. The state was initially considering creating a number of what Pildes (2002) terms "coalitional" districts, those with minority population below 50% but above the point of equal opportunity. Instead, they created a map with a number of districts whose black voting age population was just *above* 50%, in hopes of either obtaining preclearance or increasing the likelihood that the Supreme Court would accept their plan.

## 3.3  Analysis

We review the implications of our model for both the patterns of submission activity and for the utility of keeping Section 5. Regarding the former, notice that in equilibrium no submitted proposals are ever denied preclearance. This does not indicate, however, that the Act is ineffective, or that the states no longer have any desire to pass legislation harmful to minorities. Rather, it is a simple illustration of the law of anticipated reaction: states can think a few steps ahead, and they will only submit proposals that they know will eventually be upheld. Nor will the DOJ deny preclearance if it knows it will be overruled by the courts. No conclusions about Section 5's efficacy can thus be drawn from the lack of objections to state submissions; indeed, the idea of Section 5 was not to reject state actions, but rather to make state actions conform to the standards necessary for approval.

There are, however, some interesting implications of our model for the volume of submission activity. As long as $D > 0$, all states with ideal points in Regions 2b and 3 submit proposals, while those in Regions 1 and 2a do not. But as soon as $D$ passes below 0, the states in the latter two regions do submit proposals. So as the DOJ becomes less friendly to minority concerns, the submission rate should jump dramatically.

Turning to the implications of our model for retaining Section 5, we examine the pattern of policy outcomes for varying DOJ preferences. Starting with a distinctly pro-minority DOJ, outcomes remain optimal, or nearly so, as long as the DOJ will not preclear any proposal that harms minority interests. As the DOJ's ideal point moves past the status quo, though, the overall results become worse, and states with $S < 0$ can move policy closer to their

preferred outcomes. So, not surprisingly, minorities are better off when the DOJ's ideal point $D$ is greater than 0, although they might actually be best off with a moderately pro-minority DOJ ($D \in [0, J]$), rather than a strongly pro-minority DOJ ($D > J$).

On the other hand, notice that the worst outcomes with Section 5 (those that occur when $D \leq -J$) are no worse than the equilibrium outcomes with Section 2 alone.[17] In essence, the presence of a Section 2 backstop limits the mischief that the DOJ can do, even a DOJ with malign intentions. Hence keeping Section 5 is a dominant strategy: it can only make matters better, not worse.

# 4   Policy Options

Even though our analysis indicates that it is better to keep Section 5 than to drop it altogether, there may be intermediary options that do improve on the current set of institutional arrangements. This section considers three such options: adding the possibility of reviewing positive preclearance decisions; changing from mandatory preclearance to a system of "expedited injunctions;" and reducing the DOJ's discretion in preclearance proceedings.

## 4.1   Review of Positive Preclearance Determinations

Since the lack of reviewability of Section 5 determinations allows an anti-minority DOJ to collude with like-minded states, one natural idea is to make positive preclearance determinations reviewable as well. This does mean

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[17]Again, with the caveat that there are fewer states in the $[0, J/2]$ range than in the $[J/2, J]$ range.

that proposals in 2a can be successfully challenged, but it also means that 2b proposals can be challenged as well.[18] The upshot would be that no proposals in Regions 2a or 2b will be upheld, and in equilibrium states with ideal points less than $J/2$ will opt for the status quo, states between $J/2$ and $J$ will propose $J$, and states with ideal points greater than $J$ will get their preferred outcome.

Note that this is exactly the same result as the equilibrium in the original model with a DOJ ideal point of 0, so it is easy to see that adding challenges to grants of preclearance makes minorities worse off whenever $D > 0$ and better off when $D < 0$. The straightforward interpretation, then, is that this proposal should be adopted if and only if one expects the DOJ to be anti-minority. There is a complicating factor, however, as such a change could greatly increase the DOJ's workload if they are flooded by challenges to even the most mundane preclearance decisions, possibly by parties truly disagreeing with the determination, possibly by those wishing to use the challenge as a delaying tactic to wring concessions out of the jurisdiction submitting the proposal.

## 4.2 Expedited Injunctions

A second possibility is to switch from the current regime of mandatory preclearance to one of expedited injunctions. Rather than force states to submit all proposed policy changes to the federal government for review, this system would have the states publish their intent to make such a change, and then

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[18]As Pildes (2002) comments, "As long as the Republican Party can find willing plaintiffs who have standing, Section 5 can be deployed as a vehicle for partisan political interests ."

create a process by which any group could easily obtain an injunction against the proposed change. If the injunction were granted, the game would revert to its original form.

Assuming that injunctions are inexpensive but not costless, we incorporate them into the model by adding a small cost $c$ to be paid by those challenging a proposed change. How does this affect the equilibrium? It is clear that states could follow the strategy outlined above and get the same outcome, whether or not an opposing group pursues an injunction, so the question is whether there are cases in which they could modify their behavior to obtain outcomes closer to their ideal point.

The only states who would benefit from such a possibility are those who enact the status quo in equilibrium. In Figure 7, these are the states with $S < 0$ when $D \geq 0$ in the top two parts of the figure, and states with $S > 0$ when $D \leq 0$ in the bottom part. Each of these states could move policy to their ideal point if $|S| < c$, or to a distance $c$ from the status quo otherwise. Hence, just as with the challenges to grants of preclearance, this innovation is good if the DOJ is anti-minority, and vice-versa.

Whereas the challenges to grants of preclearance would increase the DOJ's workload, however, injunctions would decrease it; in fact, under full information, they would decrease the workload to zero! States would strategically enact the plan most to their liking that would not give any group an incentive to challenge, and so no case would ever actually go to the DOJ. On the other hand, the possible gains from this strategy are large only when the cost $c$ is sufficiently large as well, and it would increase the burden on civil rights groups to constantly monitor their local and state governments to

keep abreast of proposed changes. Even if the injunctions could be obtained at little monetary cost, the cost in terms of time and effort might still be substantial.

## 4.3   Limiting Discretion

Our approach to the Section 2/Section 5 distinction regarding the burden of proof is captured by Region 2 of the model—the range of proposals that fall between $-J$ and $J$. We regard the political outcomes that are the provenance of the VRA as inherently uncertain, so that it is entirely possible that a given districting scheme, for instance, cannot be decisively proved to either increase or decrease minority officeholding prospects.[19]

Another way of describing Region 2 is that it defines the DOJ's policy-making discretion: as shown above, a DOJ approval of a Region 2 proposal will shepherd it into law, while a denial of preclearance will kill it. Reductions in the width of this region will therefore reduce administrative discretion as well.

The impact of reducing the width of this middle region is to unambiguously improve minority voters' welfare. To convince oneself of this fact, one need only consider the limiting case where $J = 0$. Then courts can perfectly predict the outcomes of all policy proposals, the burden of proof becomes meaningless, and the game reverts to the full information outcome. From this logic, one can prove that minority voters' expected utility increases monotonically as $J$ decreases.

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[19]In this respect we differ from previous formal models of these issues, where one can meet an increasing burden of proof simply by expending more resources.

While the benefits of reducing DOJ discretion are clear, the levers available to do so are less clear. What is needed is a set of algorithms for courts to use to more clearly assess the impact of proposed changes in the law on minority voters' welfare. Part of the input to this process will come from the continuing stream of social science research into these questions. But another, important avenue could come from Congress's spelling out in greater detail the factors that must be taken into consideration in DOJ reviews of preclearance submissions.

# 5   Conclusion

This essay addressed the specific institutional mechanism by which the VRA's provisions are put into force. In particular, we analyzed a simple formal model of the "Section 2–Section 5" game to determine whether the possibility of partisan enforcement of preclearance provisions was sufficient reason to abandon Section 5 altogether.

Our conclusion was, surprisingly, that even if Section 5 is enforced by officials with preferences contrary to those of the minority community, Section 5 should still be retained, as it does no harm relative to a situation with Section 2 alone, and can sometimes do some good.

It must be emphasized, though, that our conclusions are specifically aimed at the question of institutional design, taking as given the underlying assumption that it is right and proper for the federal government to ride herd on covered jurisdictions. The objective of the VRA is, of course, to bring politics to a point where this is no longer necessary, where racial minorities have suf-

ficient power that they can never again be excluded from the policy process altogether. They may not win all the time, but they win their fair share of times. Policy reversals would not be a sign that minority voters are being submerged; rather (to extend the metaphor), they are like the bobbing of a cork on top of the water: sometimes up, sometimes down, but never out of the picture. In the meantime, while partisanship may taint the administration of Section 5, with Section 2 as a backstop, there is a limit to the mischief that can be done.