

Do We Still Need §5 Preclearance? Theory and Evidence*

David Epstein and Sharyn O'Halloran
Department of Political Science, Columbia University

September 18, 2003

Abstract

1 Introduction

This conference arrives at critical juncture in voting rights law. With the coming expiration of Section 5 of the Voting Rights Act in 2007, we have a number of important questions to answer. Most directly, what should be the standards for Section 5 renewal? How can we tell when Section 5 has outlived its usefulness? Or should it become a permanent feature of the political landscape? And if it is retained, should it be kept intact or modified?

This essay attempts to make some headway on these questions by clarifying the issues at stake and then analyzing some current data relevant to the debate. A few key points inform our analysis. First, the choice before us is not just between a world with and without Section 5, but between Sections 2 and 5 or Section 2 alone. The decision over renewing Section 5 hinges on the marginal benefits (and costs) that it affords over and above Section 2. And the major difference between Sections 2 and 5 resides with the burden of proof: Section 5 requires demonstration that a proposed law will not harm minority interests, while Section 2 requires demonstrating that an existing law does harm minorities.

*Paper prepared for presentation at the Conference on the Future of the Voting Rights Act, Columbia University, September 20, 2003. Preliminary Draft: Comments welcome, but please do not cite or quote without permission. Thanks go to the Russell Sage Foundation and the NSF for financial support.

Second, that there are good reasons to not want the federal government to ride herd on states. States know best what laws will promote their interests, and giving the federal government veto power over issues that concern only the states themselves is to invite disaster. Thus, it should not be forgotten that Section 5, while undoubtedly a key element in promoting minority rights since the passage of the VRA, is a unique, unusual, and suspect arrangement that should be renewed only with great caution.

Third, Section 5 is enforced directly by the Department of Justice (DOJ), which is a federal bureaucracy like any other: it has expertise in its field; it is sometimes swayed by partisan or other political concerns; and that the degree of discretion afforded it in decision making can be tightened or loosened. In the early days of the VRA, it was common—and probably not too far off the truth—to think of the DOJ as a benevolent defender of minority rights against rapacious Southern states. Most likely, though, this good/evil caricature should be shelved in favor of a more realistic view of the DOJ as a strategic political actor amongst other such actors.

To help sort through these issues, we present a simple formal model of policy making with and without Section 5. The model implies that Section 5 should be eliminated if minorities are in the position to fend for themselves without the Federal government’s intervention. Failing this, Section 5 should be retained, but modified to reduce Justice Department discretion in preclearance cases.

Following the model, we present some preliminary but suggestive data on minorities’ position electorally, in Congress, and at the state level, indicating that much of the disparities in the past have now been eliminated. We also look at the history of DOJ Section 5 enforcement. We conclude with a summary of our findings and a research program looking ahead to events in 2007.

2 Model

To analyze the impact of Section 5 on voting rights litigation we present a simple spatial model of policy making under Sections 2 and 5, and under Section 2 alone. The model captures the key points of decision making mentioned above: 1) different burdens of proof in Section 2 and 5 procedures; 2) different levels of expertise between the relevant actors; and 3) DOJ discretion in determining Section 5 outcomes.

2.1 Setup

In this game, illustrated in Figure 1, a state covered under Section 5 of the Voting Rights Act makes a proposal which alters the existing status

quo (SQ).¹ The plan is then submitted to the Department of Justice (DOJ) for preclearance. The DOJ can decide to preclear or not and this decision, whichever way it turns, 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. Similarly, if preclearance is given, but challenged and overturned, then again the status quo is the final outcome.

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 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 make sense to speak of a Section 5 game independent of Section 2, which reinforces the substantive point that Section 5 deliberation does not take place in a vacuum, and that were Section 5 to be eliminated, minorities would still retain the Section 2 backstop.²

To motivate actors' behavior in this model, refer to Figure 2. Take the line indicated as a one dimensional policy space with the status quo marked near the center. Assume that movements to the right are favorable to minorities, while movements to the left harm minorities. Actors have ideal points along this line, so a state with ideal point X_1 prefers to move the status quo to the left, while a state at X_2 wants to move to the right. Just because the latter would favor policies endorsed by minorities and the former would not does not necessarily indicate pro- or anti-minority motivations. For instance, a city might favor annexing surrounding suburbs in order to increase economic activity, even though this might dilute minority voting strength overall.

States may also be able to offer a range of policies with different levels of minority benefits. For instance, a state with ideal point at X_2 might be able to devise a policy that gives minorities even greater utility, but at some inefficiency to the state as a whole. For instance, a city might be considering a change to its school board that would make members more responsive to the community's concerns, and this change might help minorities in general. The state could also alter the policy to reserve certain board seats for minority appointees, which would make the policy even more favorable for the minority

¹We use state here as a general term. This could just as well be a county, city, or another political subdivision in an area covered by Section 5. We return to this point below when evaluating the potential elimination of Section 5 as it relates to all levels of political actors.

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

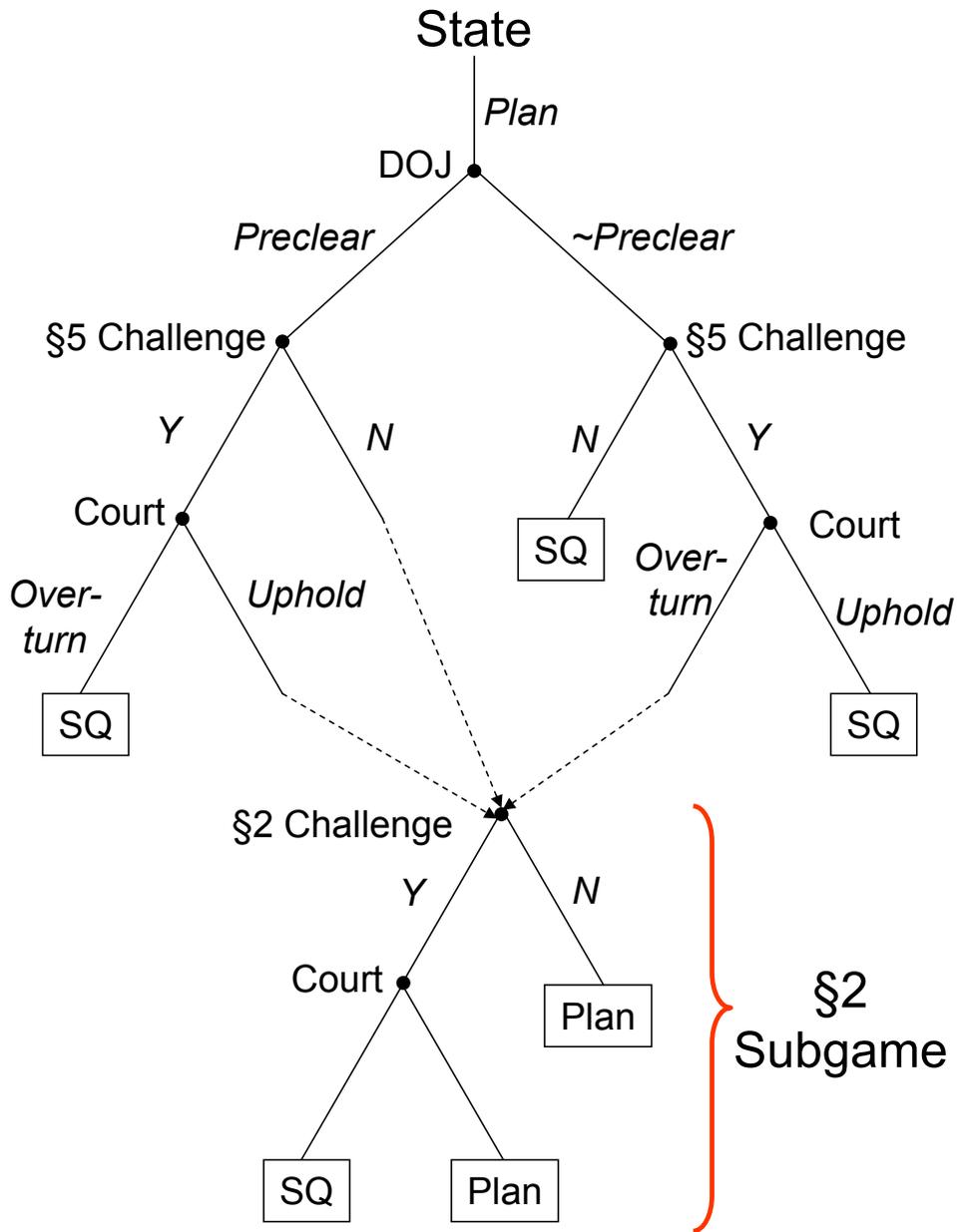


Figure 1: Game tree for §5 and §2 policy making

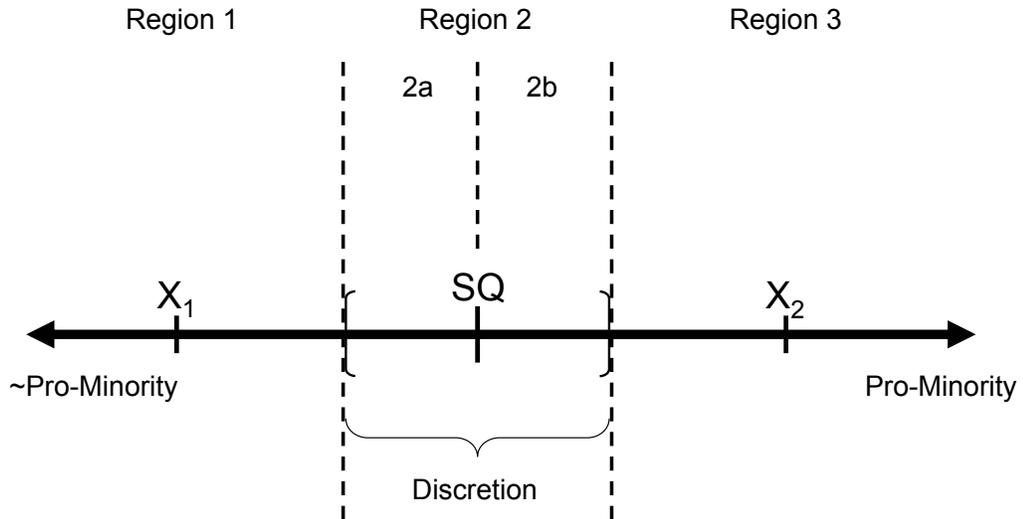


Figure 2: Policy space with regions in which court can overturn DOJ decisions.

community, but less effective overall. It is assumed that the status quo can always be chosen, at no cost to the state.

Actors are assumed to differ in their levels of expertise. States know both the impact of the proposed policy on their own welfare and on the welfare of their minority population. Since states would not take action that could only harm their own welfare, we assume that all proposals increase their utility. The Justice Department can observe perfectly the impact of the proposed policy on minorities, but the courts have only imperfect information. To be precise, courts can observe if a policy is in Region 1, 2 or 3 in the figure. Region 1 policies are unambiguously detrimental to minorities; 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 are those that do harm minorities, and 2b policies help.

A few notes about the informational structure of the game. First, the assumptions of perfect information on the part of the DOJ is for analytical convenience only. All that matters qualitatively for the results below is that the DOJ have better information than the courts. Second, the court cannot know the state's ideal point either; if it did, then it could infer the direction in which policy is moved even though it could not observe this movement directly.

As for the motivations of the actors, we assume states want to move policies as close to their ideal point as possible, given the institutional structure with 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 than ask for their ideal and end up with the status quo.

Courts are assumed to enforce the mandates of the VRA, given the amount of information they possess and the inferences they draw from previous actions. Thus under Section 2, were the burden of proof is on those who would strike down a law, the courts will allow policies in Region 2 and 3 to stand, since it cannot be proved definitively that the law will harm minorities. On the other hand, were the courts to enforce Section 5 alone, they would allow only policies in Region 3 since those are the policies that definitely do not harm minorities.

The courts might also incorporate this information from previous action in their decision. If the DOJ preclears a Region 2 proposal and the courts believe that the DOJ has pro-minority preferences, for instance, then they could defer to the DOJ's expertise in this matter, assuming that the DOJ would only preclear policies in Region 2b. If the courts defer to the DOJ in Region 2 cases, then the DOJ will have discretion over the outcome of these cases, as indicated in the diagram.

Finally, we must address the question of strategic challenges to Section 2 or Section 5 determinations. In general, losers at one stage will appeal to the courts if their probability of winning times the expected benefit of winning exceeds the cost of appeal. To simplify the analysis, we assume that any appeal with a non-zero chance of success will happen.

2.2 Analysis

To begin the analysis of outcomes under this model, let us define the efficient benchmark. The optimal system would allow proposed changes in Regions 2b and 3, and disallow all others. Thus, changes in law that helps states and do not harm minorities would be permitted. The question is, how close do different institutional arrangements come to this benchmark?

First, let us consider 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 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 begin with the Justice Department that is known to be pro-minority, say with an ideal point of X_2 in Figure 2, then the DOJ will deny preclearance to proposals in Regions 1 and 2a, and permit all others. The courts will defer to their judgement, making any subsequent Section 2 actions superfluous. Under this configuration, the first best outcome is achieved. Moreover, proposals in Region 1 would be disallowed from the very beginning, rather than having them enacted into law and forcing minorities to pay the time and expense necessary to strike them down (not to mention the harm these laws could do in the interval between their passage and the courts striking them down). As noted above, this is no doubt the scenario originally envisioned when the VRA was passed.

Now let us consider a DOJ with preferences to the left, say at X_1 in Figure 2, which nonetheless enjoys the deference of the courts.³ In this case, the DOJ will preclear actions in Region 2a and Region 3, the former because it suits their preferences and the latter because the courts would overturn a denial of preclearance in any case. Both of these types of policies will survive a Section 2 challenge and so will be allowed to enter into law. States with preferences to the left of the status quo will propose the policy in Region 2a closest to their ideal point, and states with preference to the right of the status quo will propose policies in Region 3 closest to their ideal point.

Interestingly, this means that states with ideal points in Region 2b must make a choice. They can either stay with the status quo at no cost, or switch to a policy on the Region 2/Region3 border, “upping the ante” for the minority community. Some may give up and just accept SQ as the outcome, in which case they would probably not go through the trouble of proposing a new plan in the first place. Or, they could move their proposal to the right, in a manner inefficient for their polity as a whole, but good for minorities.

Relative to the efficient benchmark, this scenario allows for outcomes in 2a and disallows those in 2b. As noted, it may have the side-effect of convincing slightly pro-minority states in Region 2b to make their proposals more dramatically pro-minority—up to the dividing line between Regions 2 and 3—so that their proposal will definitely pass court review, suggesting some possible positive benefits could offset some of the negative.

What if the courts decide not to defer to the DOJ in Region 2 cases, because they suspect the DOJ to have anti-minority preferences? Then the

³The courts might misapprehend the true preference of the DOJ, or they might value a norm of deference so highly that they refuse to overrule unless they have clear evidence to the contrary.

court will take the DOJ’s preclearance determination to be “cheap talk,” completely uninformative about the true nature of the proposal. In this case, the situation is as it would be if the court alone determined preclearance outcomes absent a DOJ.⁴ Then only proposals in Region 3 will be precleared, and all of these will pass Section 2 muster. States with ideal points in Regions 1 and 2a will be content with the status quo. Those in Region 2b will also stay with the status quo, or they will move to the boundary between Regions 2 and 3, whichever they prefer most. Compared with the efficient benchmark, this configuration eliminates proposals in 2b, meaning that some proposals that would make both states and minorities better off will never see the light of day.

2.3 Implications

Let us review the analysis thus far. Table 1 summarizes the results under various scenarios. A scenario is defined by the whether Section 5 exists or has been repealed, the preferences of the DOJ (Pro-minority or not), and whether or not the Supreme Court defers to DOJ judgement. The last four columns indicate which ranges of proposals will pass in each scenario.

The efficient benchmark would allow only outcomes in Regions 2b and 3, with no distortions to obtain the federal government’s approval. These outcomes are matched by a pro-minority DOJ with Section 5 preclearance powers, deferred to by the courts. Skipping down to the bottom, the worse outcome is a DOJ with anti-minority preferences that nonetheless receives court deference.

The difficult rankings are scenarios 2 and 3. The former disallows any policies in Region 2, even slight improvements, while the latter allows all Region 2 policies. The ranking given represents a risk averse approach to the problem: it favors a regime that eliminates negative movements and discounts incremental positive ones.

What does this imply for Section 5 renewal? If a pro-minority DOJ could be assured then clearly Section 5 should stay. But politics is never certain, and a DOJ that does not share minorities’ preferences must be considered. If the courts counted on to disregard DOJ decisions, then again Section 5 should remain, but this could put an enormous administration burden on the court system, as a large number of Section 5 claims are filed every year.

What other alternatives exist? If anti-minority proposals could be prevented, then Section 5 could be safely dropped. Thus if minorities are themselves powerful enough in the political process to prevent anti-minority poli-

⁴In fact, of course, states can choose to go to the courts rather than the DOJ for preclearance. They rarely choose to do so—although they did in *Georgia v. Ashcroft*—but this possibility is identical to the one where the court disbelieves the DOJ.

| Scenario | §5 | DOJ | Defer | 1 | 2a | 2b | 3 |
|-----------|----|------|-------|---|----|----|---|
| Benchmark | | | | | | ✓ | ✓ |
| 1 | Y | Pro | Y | | | ✓ | ✓ |
| 2 | Y | Any | N | | | | ✓ |
| 3 | N | — | — | ✓ | ✓ | ✓ | ✓ |
| 4 | Y | ~Pro | Y | ✓ | | | ✓ |

Table 1: Comparison of Various Scenarios

cies from passing, or if they can logroll so that these policies are bundled with others that favor minorities, then Section 5 would again be superfluous. That is, if minorities can do enough of the “pulling and hauling” that is normal politics, with Section 2 still in place to prevent any major backsliding from occurring, then Section 5 should be dropped.

Alternatively, Section 5 could be retained and the focus could shift to the DOJ’s discretion in providing Section 5 preclearance. If rules of procedure could be devised that would force even an anti-minority DOJ to preclear 2b proposals and not 2a, then Section 5 could again be retained.

The next two sections consider these possibilities in turn. First, we investigate the political position of minorities in the South to see if they have reached significant political parity with non-minority voters to ensure that their interests will be protected. We then examine DOJ preclearance history to search for potential partisan bias and investigate proposals for reducing DOJ discretion.

3 Minority Power in the South

Section 5 should be dropped, then, only if minorities are now in a position to guarantee their own interests in the political process. The best way to define this condition is through its negative: minorities cannot defend themselves if a combination of polarized voting in electorate and the legislature would lead to their losing power.

Consider a polity, for instance, in which blacks hold two seats out of nine in a city council. If the whites on the council vote as a bloc against the blacks, and if polarized voting in the public makes it impossible for blacks to be elected outside of safe majority-minority districts, then blacks’ position in

local politics is not assured. Whites can redistrict blacks out of their seats, and blacks will have no countervailing influence in the legislature to fight off such attacks.

Contrast this with the scenario in which blacks are frequently members of the winning legislative coalition, sometimes decisive members of that coalition, and where there is significant cross-over vote in the public. Under these terms, it will not be hard to draw districts that elect black candidates to office, and black legislators will have sufficient pull in the redistricting process to protect their interests. This is normal politics: blacks will not necessarily be on the winning side in every legislative fight, but they will be able to wield power, using existing electoral institutions to assure themselves of exercising power in the future. In such a world, then, Section 5 would be unnecessary.

What we are describing is termed a “self-reinforcing equilibrium” by game theorists. That is, minorities have enough power to draw districts that further their own success, then the legislators drawn from these districts represent minority view points to give blacks sufficient power to draw the next set of districts, and so on. In such a system, black political power may wax and wane overtime, but it can never be totally eliminated.

How do current conditions measure up to this standard? This requires us to examine current levels of minority registration and turnout, polarized voting in the public, and patterns of coalition formation in legislatures. We will do so here specifically with reference to blacks in the South at the state and congressional levels. We will return to the issues of other minority groups and other levels of government in the conclusion.

3.1 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.⁵

The result of these factors is illustrated in Figure 3, showing the electoral probabilities of Republicans, White Democrats, and Black Democrats in the 94th, 98th, 102nd and 106th Congresses, for all Southern states.⁶ 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

⁵See for instance Bullock and Dunn (1999) and Grofman, Handley and Lublin (2001).

⁶These 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.

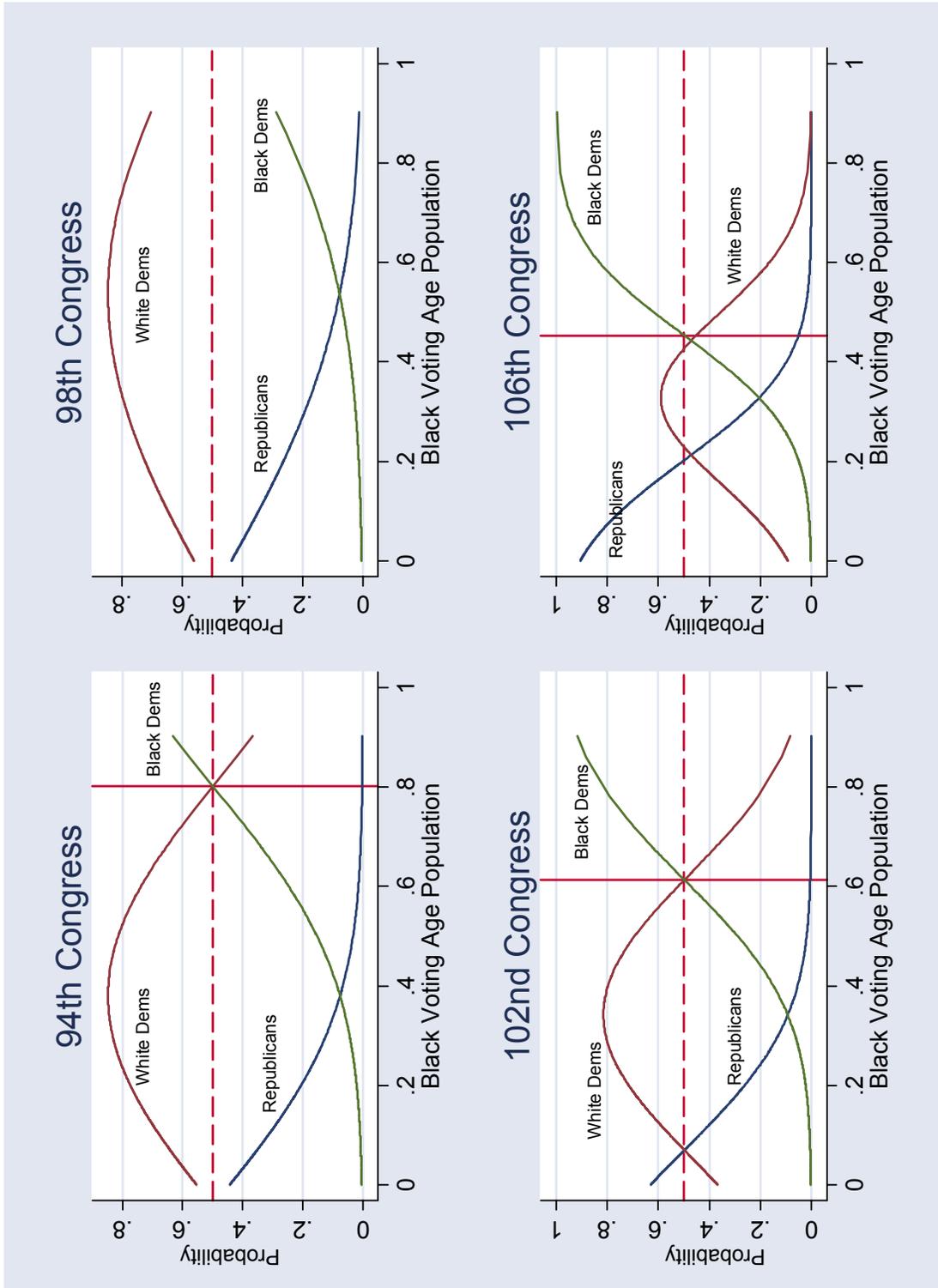


Figure 3: Equal Opportunity in Congressional Elections, 94th, 98th, 102nd and 106th Congresses

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) 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, so that it is now around 45% BVAP, and white democrats' chances of winning an election in a district with no blacks crashes to about the 10% range. This is the result of two well-known trends in southern politics, the flight of conservative white democrats to the republican party, and the increase in cross-over voting. The outcome is, as Rick Pildes (2002) has noted, that equal opportunity districts are now "coalitional" districts, bringing together black voters and reliably democratic whites.

What does this mean for black voting strength? On the one hand, voting is still polarized, in the sense that it is still more likely that a white voter will cast her ballot for a white candidate than a black candidate, given a choice. On the other hand, net cross-over is significant and growing, so one cannot say that voting decisions are based solely on race. This means that states when designing districting plans now have expanded opportunities to draw districts that will elect blacks to office.

Beyond this, one can ask whether at the present time, with no extra aid from Section 5, blacks can elect a reasonable number of candidates to office, and this of course hinges on one's definition of "reasonable." The obvious answer is that they should elect a proportionate number of representatives—30% of the legislature if they are 30% of the population, for instance—but this approach has been consistently rejected by the courts and, given dispersed population housing patterns, can be difficult to arrange in practice.

Besides, the norm of proportionality is high relative to the normal course of events under plurality winner elections. That is, first-past-the-post electoral systems usually display what is known as the "cube rule:" the relative share of two groups' seats in the legislature is the cube of their population shares. So a 2 to 1 population majority should translate into an 8 to 1 ratio of seats in the legislature. Relative to this standard, blacks have always done well, going from about twice their expected cube rule seat share in the 94th Congress to five times their expected seat share today.⁷

In any case, a single objective standard for the proper number of minority representatives will not be found; it is and should be the subject of public debate. The pertinent question for our analysis here is whether, combined

⁷These are estimated from the probit graphs in Figure 3, taking the expected number of black representatives elected at the national average for BVAP.

with representation and voting patterns in legislatures, blacks have reached a self-sustaining level of influence.

3.2 Representation of Minority Interests

Turning to legislative decision making, we examine two kinds of evidence. First, are non-minority representatives casting votes in support of the same policies that minority legislators support, or in opposition? In a polarized world, black legislators will be opposed by a white majority and hence unable to affect policy. But if voting is more along partisan lines, then minorities will have success to the degree that the party with which they ally themselves succeeds.

We examine this question with data drawn from the U.S. Congress 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.⁸ The results are displayed in Figure 4, 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 red and blue areas mix to a significant extent. But more recently, they are almost completely separate, meaning that Republicans tend to vote against positions supported by minorities, and Democrats in favor.

We see similar patterns in South Carolina, where Figure 5 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.

Similar patterns can be observed in other state legislatures: partisan divisions dominate racial ones. One could argue that these voting patterns do not reflect true minority sentiment, since the legislative agenda is often set by white party leaders. Thus, on a case-by-case basis, even if minority

⁸For details on the estimation procedures, see Treier and Jackman, 2002.

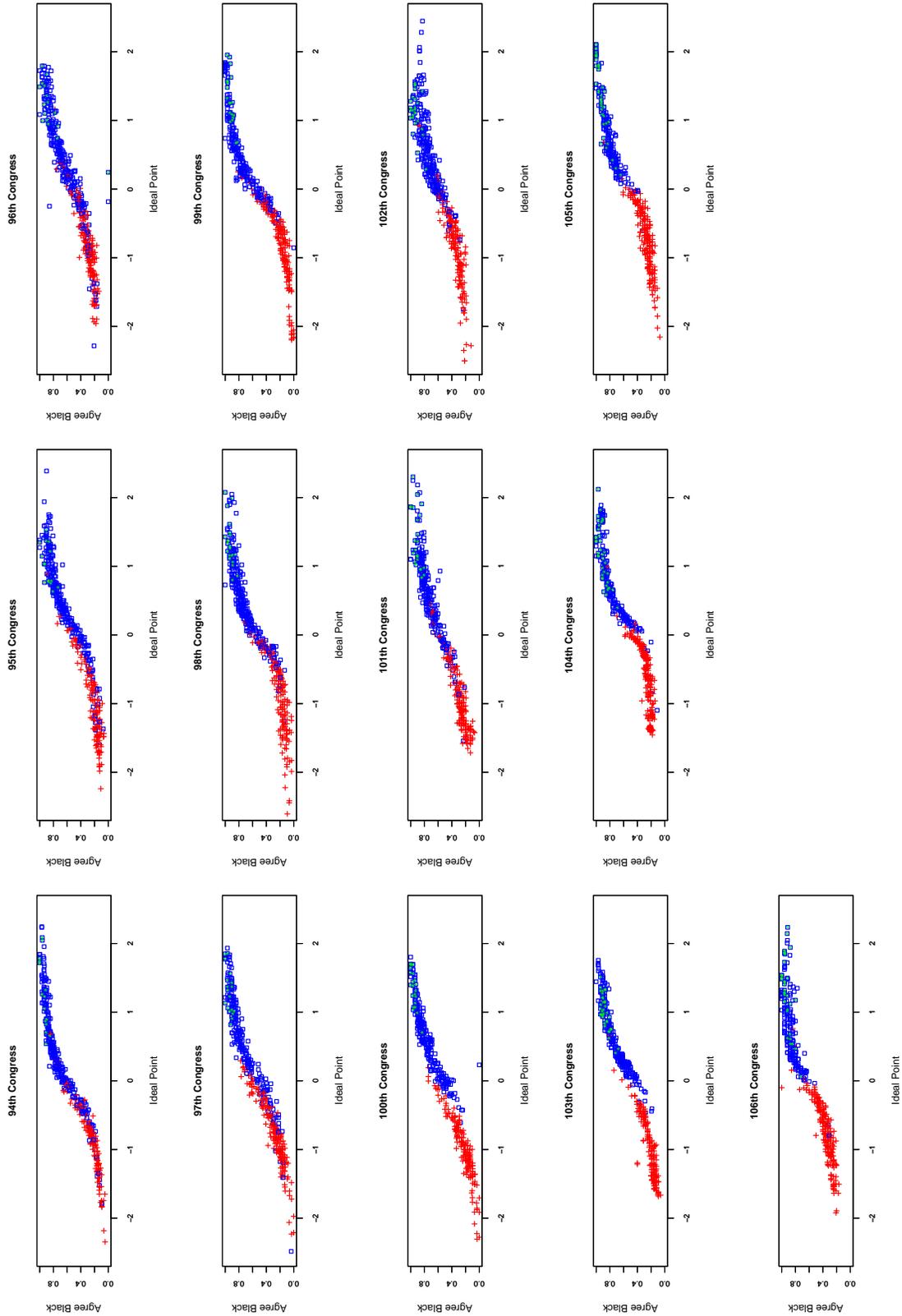


Figure 4: Bayesian Estimation of Pro-Minority Voting Score, 94th-106th Congresses

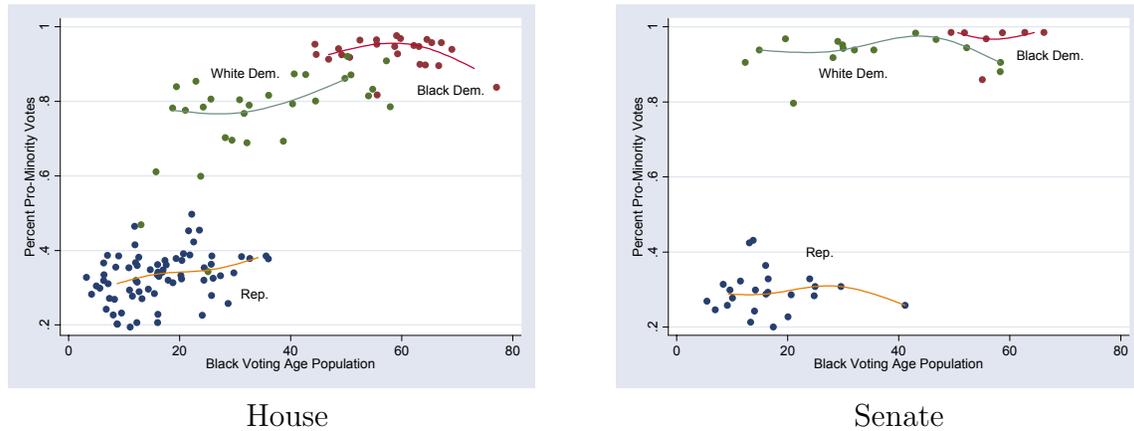


Figure 5: Support for Minority Positions in South Carolina State Legislature, 2001

legislators vote for a proposition, the policy enacted is not the one most preferred by minority voters, but rather a compromise position.

This is undoubtedly true, but the correct test of a set of institutional arrangements is not whether minority groups receive their ideal point on a consistent basis—that would be unrealistic as well as undemocratic—but whether the compromises that they strike over time trade off their interests with those of their majority partners to make both groups better off.

3.3 Voting Patterns

It is difficult to measure policy outcomes on a consistent basis, but one measure of minority power in legislative bargaining is their position vis-a-vis the winning coalition on a given set of votes. If a group is consistently under-represented among the winning coalition, then it would be expected to wield less influence than its raw numbers in the legislature are due.

To investigate this aspect, we looked again at the CQ key vote data, charting for each vote the makeup of the winning coalition. We represent the data first with the “triangle plots” of Figure 6. Each triangle represents the possible proportions of Republicans (bottom left corner), White Democrats (bottom right) and Black Democrats (top). The red star indicates the overall proportions of each type of representative in the House as a whole, and the gray squares give the composition of the winning coalition on the key votes.

The important part of the picture to note, then, is whether the gray dots generally lie above or below the red star. If they do, then Black Democrats are a larger proportion of the winning coalition than they are of the House in general; if they lie below the star, then blacks are relatively under-represented.

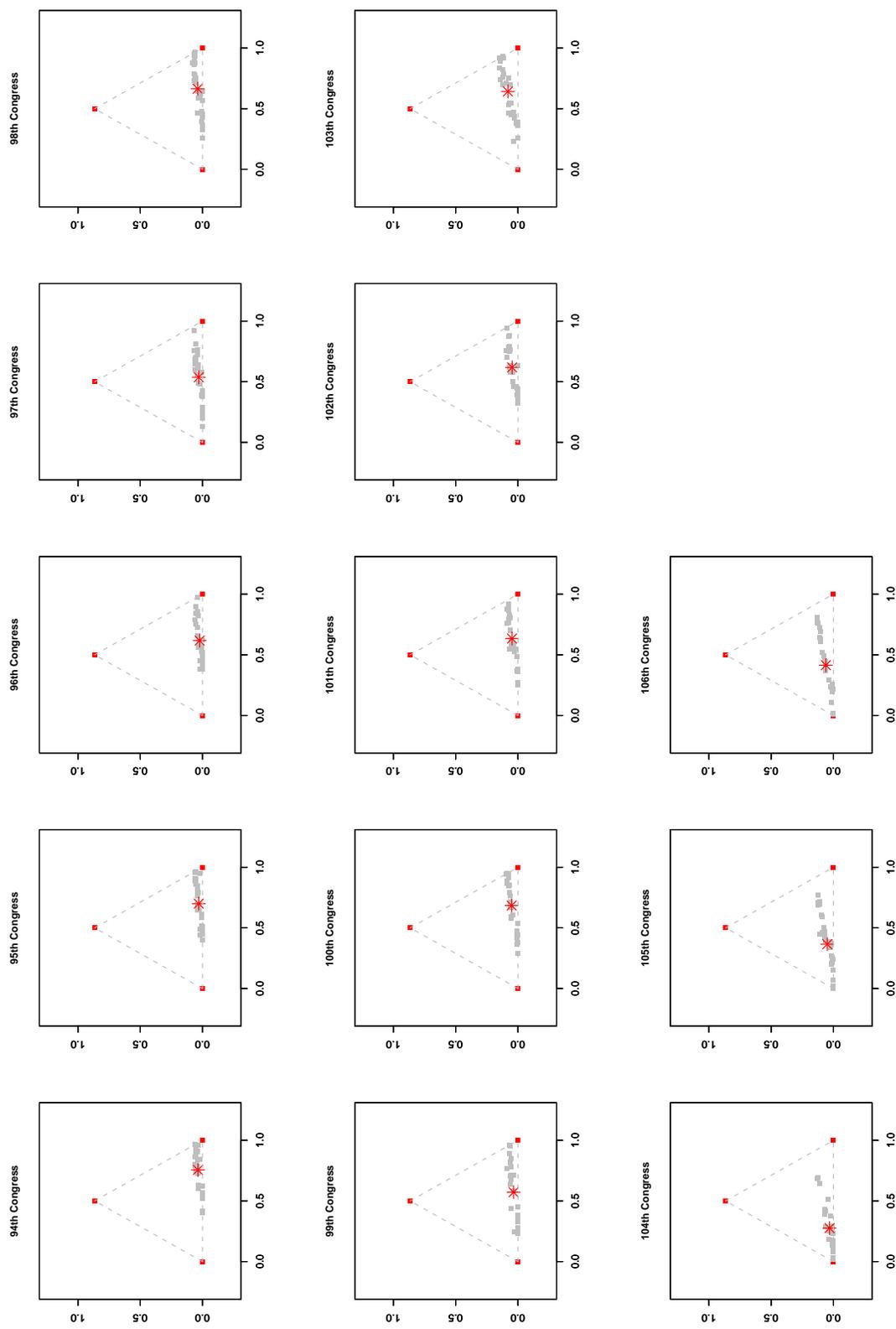


Figure 6: Triangle Plots of Voting Patterns, 94th-106th Congresses

As a first approximation, no pattern is apparent in the data, meaning that blacks are not systematically excluded from majority coalitions on key congressional issues. To get a finer-grained look at the figure, we examine the degree of over- and under-representation for each group, by Congress, in Figure 7.

Here, each diagram shows the proportion of each group in the winning coalition divided by their proportion in the House overall, with the Republicans on the left, White Democrats in the middle, and Black Democrats on the right. So a group that is 10% of the House, but represents 20% of the winning coalition, would have a score of 2.0 for that given vote. The red line shows the average for each group by Congress. Thus, for instance, in the 94th Congress, Republicans were slightly under-represented, while both White and Black Democrats were over-represented.

Again, the figure shows no outstanding trend over time. Blacks were generally a fair proportion of the winning coalition, with the sole significantly negative reading coming in the 104th Congress, the first one after the Republican takeover of the House in the 1994 midterm elections. But the Republican discipline soon broke down, and by the 106th the Black Democrats were almost at parity once again.

So far, then, every indication is that blacks are included in winning coalitions roughly to the same extent as other Democrats. As a final check, we looked at the number of key votes in which blacks were decisive; that is, the votes in which a unified vote of the black democrats could swing the final tally either way.

The results of these calculations are shown in Table 2. The first column gives the Congress number; the second, the number of key votes in that Congress; the third, the number of those votes in which Black Democrats were decisive; and the last the ratio of decisive votes to total votes. Surprisingly, blacks were decisive in almost one quarter of all key votes, even though they comprised between 3% and 8% of the House overall. And they were the most cohesive of all groups on these roll calls: 91% of Black Democrats voted together on the average key vote, as compared with 82% for Republicans and 75% for White Democrats. So blacks did tend to vote as a bloc on important, tight roll calls, giving them excellent bargaining leverage on other matters.

4 DOJ Discretion

Assuming that Section 5 is retained, one could focus more directly on the role that the Justice Department plays in §5 preclearance actions. For instance, it is possible if not probable that the DOJ's position on redistricting the past two decades has been largely driven by the desire of Republicans to

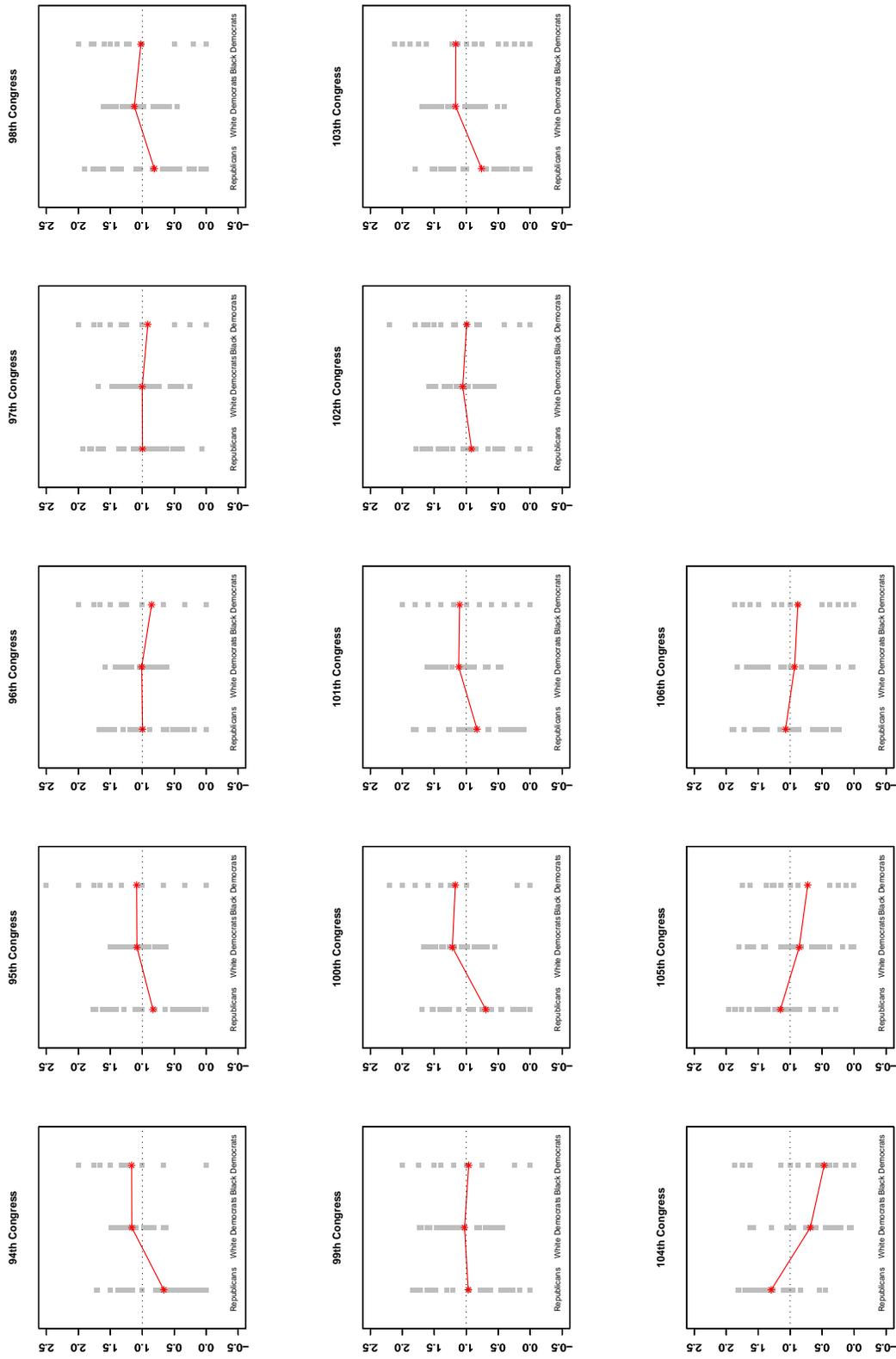


Figure 7: Over- and Under-Representation of Republicans, Democrats and Black Democrats in CQ Key Votes, 94th-106th Congresses

| Congress | # of Votes | BD Decisive | % Decisive |
|----------|------------|-------------|------------|
| 94 | 32 | 7 | 21.88% |
| 95 | 32 | 12 | 37.50% |
| 96 | 31 | 7 | 22.58% |
| 97 | 32 | 8 | 25.00% |
| 98 | 32 | 6 | 18.75% |
| 99 | 32 | 7 | 21.88% |
| 100 | 31 | 8 | 25.81% |
| 101 | 31 | 5 | 16.13% |
| 102 | 32 | 3 | 9.38% |
| 103 | 32 | 15 | 46.88% |
| 104 | 33 | 2 | 6.06% |
| 105 | 28 | 6 | 21.43% |
| 106 | 25 | 4 | 16.00% |
| Total | 403 | 90 | 22.33% |

Table 2: Percent of Congressional Quarterly Key Votes in which Black Democrats Were Decisive

concentrate minority voters in relatively few districts, hence gerrymandering the other districts in Republicans' favor.

Of course, politics can never be totally removed from agency decision making, but Congress does have the option of laying down more explicit guidelines for the DOJ's exercise of its discretionary authority. Enough preclearance cases have been brought before the DOJ over the years that a rather routinized set of rules for enforcing preclearance could be imagined. Yet the DOJ's only written set of general guidelines is, well, quite general.⁹

To further investigate patterns of DOJ preclearance rulings, all §5 submissions between April, 1998 and September, 2003, and all denials of preclearance, were obtained from the DOJ's website.¹⁰ [Given the unfortunate state of the data, further analysis will have to wait for the next version of this paper.]

⁹These guidelines are published in the Federal Register and are available on the internet at <http://www.usdoj.gov/crt/voting/28cfr/51/28cfr51.htm>. More explicit redistricting guidelines are available at http://www.usdoj.gov/crt/voting/sec_5/fedregvoting.pdf, though, as one might expect, they do not mesh perfectly with the Court's latest *Georgia v. Ashcroft* ruling.

¹⁰http://www.usdoj.gov/crt/voting/sec_5/notices.htm and http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, respectively.

5 Conclusion

This essay tried to get at the heart of some of the sticky issues that lie at the heart of Section 5 renewal. It presented a formal model of the policy making process, emphasizing both the costs and benefits of federal oversight of state-level policy making. The potential benefits are easy to see: the DOJ can afford minority voters extra protection by disallowing policies that would harm them, and saving them the time and expense of Section 2 litigation.

But there are also risks in continuing Section 5, most prominently the possibility that preclearance will be monitored by a political DOJ seeking to pursue its own partisan and/or political agenda. Many observers have argued, for instance, that this is exactly the explanation for the DOJ's insistence on a "max-min" redistricting strategy during the 1990's.

The model suggested that Section 5 can, and should, be dropped when minorities have sufficient power to protect themselves from their adversaries through the normal political channels of elections and legislative bargaining. It may not be possible to define how many minority legislators are sufficient, or how many votes should go minorities' way in the legislature, but it is possible to say that the electoral and legislative systems should reinforce each other to the point where even an unsympathetic majority cannot deny minorities their place in government.

We then presented some evidence regarding voting and legislative procedures suggesting that blacks in the South, at the congressional level and in some states, had met this test. If similar results hold elsewhere, for other minorities, and at all levels of government, then the federal government should get out of the business of micro-managing states' policy making processes.

However, we currently lack the data to make this statement for sure. More information is needed on the status of other minority groups in covered jurisdictions—most notably, of course, Latinos—and to investigate the situation at county, city and municipality levels. In other words, it seems that Section 5 has accomplished its original goals of providing blacks some breathing room while they gain political power in the South. It remains to be determined whether it should now step quietly out of the way, or be renewed one more time to finish the job for other minorities as well.