

The Future of the Voting Rights Act

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Introduction

The Voting Rights Act (VRA) is a sacred symbol of American democracy. The act, the most effective civil rights statute ever enacted in the United States, was the last significant stage in the nearly universal formal inclusion of all adult citizens in American democracy. Yet when laws in a democracy take on the status of sacred icons, the risk arises that they will be viewed as appropriate only for reverence, rather than for the public discussion, analysis, and debate that characterize sound and legitimate policy making. That risk is particularly great with the VRA, because that phrase represents and means dramatically different things to different audiences; when discussion of the act takes place, different minds conjure up distinct features of the act. Yet, like many major laws, the act is comprised of varied provisions, some enacted at different times than others, some justified by distinct policy aims than others.

Although the VRA is among the most important and effective enacted statutes, discussion of it over the last twenty-five years has been confined largely to academic specialists and those who must work with the act, such as judges, lawyers, state and federal officials, as well as politically engaged citizens' groups. But broader public discussion of the act can no longer be avoided. Portions of the act were due to expire in 2007, which has recently forced Congress and the rest of us to consider how to adjust the legislation to the massive demographic, political, and cultural changes of the forty-one years since it was first passed (or the nearly twenty-five years since Congress last revisited it). With a changing Supreme Court, as well as long experience now with implementing the act, this national debate has required, and will continue to require, coming to terms with the experience of various institutional actors, such as the courts and the Department of Justice, in enforcing the act.

This book is titled *The Future of the Voting Rights Act*. To set the stage for considering that future, it is necessary to start with a brief history of the act and its evolution. This history is an important starting point. Consideration of the future of the VRA requires assimilating both the problems to which the act initially responded and the changing context of these issues in the ensuing forty years.

It is startling, in some respects shocking, to recall the nature of American democracy on the eve of the initial Voting Rights Act in 1965. In Mississippi, state laws and manipulative election administration practices had strangled black voter registration to a mere 6.4 percent of eligible voters as late as 1964. In the Alabama county whose county seat is Selma, which became ground zero in the social movement and violent confrontations that helped motivate passage of the act, black residents made up half the voting age population, yet Alabama officials had invented ways to permit only 156 of 15,000 eligible black voters—1 percent—to register to vote. Formal barriers to participation required that those seeking to register pass tests of "good character" or those that required them properly to "understand" and "interpret" various constitutional provisions—tests that election officials could easily manipulate in prac-

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tice to exclude particular voters. Poll taxes had to be paid up in full before one could vote in some states. Felon-disfranchisement laws were jury-rigged to include crimes for which blacks were more likely to be prosecuted and convicted than whites, such as wife beating. Literacy tests for voting were required in much of the United States, North as well as South, including states such as New York. These various barriers excluded many poor white and Latino voters as well as African Americans. In some southern states, blacks who tried to register or vote were subject to economic reprisals and intimidation; white employers would fire them or, for those who did not directly depend on white employers, such as black dentists and barbers who serviced only black customers, white employers would seek to destroy these businesses by firing their employees who went to politically active black dentists, barbers, and the like.

In the states of the old Confederacy, these legal barriers had been created in the late nineteenth and early twentieth centuries and remained in place ever since. They had been enacted and enforced despite the Fifteenth Amendment, the constitutional culmination of the Civil War, an amendment designed for the express purpose of barring racially discriminating voting rules and practices. But from 1890 until mid-century, the Fifteenth Amendment was de facto repealed, for all practical purposes, in the South. As Reconstruction faded in the late nineteenth century, white elites successfully “redeemed” their control over southern politics from blacks and poor whites through enactment of massive disfranchisement schemes throughout the region. The Supreme Court, Congress, and various presidents ignored the amendment or lacked the nerve to enforce it; the Amendment became the most willfully ignored one in constitutional history. National legislative efforts to address these issues began to stir only in 1957, when Congress enacted the Civil Rights Act of 1957, the first civil rights statute of the twentieth century, in a process orchestrated by Senate Majority Leader Lyndon Johnson and magisterially described in Robert Caro’s book, *Master of the Senate*. But this 1957 law had had only minimal effect in opening up American democracy by 1965, on the eve of the Voting Rights Act.

The original VRA was the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction. It permitted the federal government to send federal officials into the South to take over the voter-registration process in recalcitrant areas. For states and local governments that had a history of racially discriminatory voting practices, the act also directly suspended the use of various “tests and devices” as prerequisites to registration and voting. And in its central provision—one that looked to the future and is the focus of much of this book—the act directly put, and continues to put, the election systems in certain parts of the country under what is, essentially, a form of federal receivership. The part of the act that does so is known as section 5.

Section 5 was designed to be limited in time and geographic scope. These limitations reflected the law’s extraordinary structure and justification, a structure unique in the arsenal of federal civil rights policy. For areas of the country that

Congress concluded had used racially discriminatory voting practices, Congress suspended key existing barriers, such as literacy tests, and banned those areas from putting into effect any new provision or change that affects voting, no matter how large (redesigning election districts) or small (keeping polls open 1 hour later), until the jurisdiction seeking to make the change gets permission from the federal government. In what is known as the preclearance review process, that permission must be provided by either the United States Department of Justice (DOJ) or a specially designated three-judge federal court in Washington, D.C. Preclearance is denied unless the federal government or federal court concludes that the change is consistent with the VRA. The structure of section 5 thus expresses an exceptionally proactive regulatory philosophy: it puts the burden on the local jurisdiction to submit its proposed change to the federal government and to demonstrate to federal officials or judges that the change will not violate the VRA. Until precleared, no change in voting practices can be made. Section 5 embodies strong skepticism about the parts of the country it singles out. Although government is normally presumed to act lawfully, section 5 turns the tables; in the covered parts of the country, any change in voting is, in essence, suspect until the jurisdiction convinces the federal government the change will not impair minority voting rights.

Section 5 and its “preclearance review” process was designed to apply, and continues to apply today, only to selected areas of the country. From its inception, the act also included another central provision that, unlike section 5, applies uniformly nationwide. This provision, known as section 2, consists of a permanent, nationwide ban on voting practices that deny or abridge minority voting rights. In the early years of the act, this provision was not particularly important. When Congress previously revisited and amended the act in 1982, however, Congress substantially strengthened section 2. Since then, section 2 has been a major vehicle for attacking at-large election structures, redistrictings that dilute minority voting power, voting fees that operate much like poll taxes, and many other practices.

The current act is therefore divided into two distinct structures for protecting minority voting rights. Congress concluded that there were two distinct problems that required distinct solutions: proactive federal oversight for certain regions, based on their history, and a more general nationwide set of rules. The difference between these two features of the act is that the nationwide rule of section 2 operates through the ordinary legal system, rather than the unusual preclearance review process; a voter must bring a lawsuit to challenge a voting practice, the practice can go into effect immediately unless a court enjoins it, and the voter bears the burden of proving that a law violates the act. (Outside the areas reached by section 5, there is no general presumption that state officials are acting illegally in regulating voting.) Section 2 is therefore more costly, more time consuming, and substantively more difficult for those challenging a voting practice than is section 5.

Since originally enacted in 1965, the VRA has been amended several times. Among the most important amendments are those that extend similar as well

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as novel protections against discriminatory voting practices affecting Asian Americans, American Indians, and members of language minorities. These amendments extend the nationwide ban of section 2 to forbid discrimination on the basis of membership in specified language minority groups; require the provision of non-English-language ballot materials (section 203) in certain circumstances; and extend the preclearance regime of section 5 to additional jurisdictions based on the presence or effective exclusion of language minorities (which the act did by redefining test or device to include English-only ballot materials, which brought Texas, Arizona, and parts of California within the coverage of section 5). Over time, the VRA has evolved into one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions.

Yet partly because of the scale of this ambition, the Congress that enacted the VRA, as well as the Congresses that have amended it over the subsequent forty years, also recognized that the act had to remain responsive to ever-changing circumstances. That is why, in part, the act was divided into two distinct structures, one designed to be permanent, the other designed to apply to selected regions for a certain period of time. When section 5 was first enacted in 1965, it was designed to be a temporary measure to last five years; in 1970, it was extended for another five years; in 1975, it was extended again until 1982; and in 1982, it was extended for twenty-five years.

That brings us to the present moment. Section 5, due to expire in 2007, was recently reenacted for another twenty-five years. Congress essentially kept much of the same form of section 5 intact while also making a few significant modifications. As we passed the fortieth anniversary of the original VRA, policy makers had to confront the question of how the philosophy and purposes of section 5 should be understood and applied in today's context, as well as in the coming years. Now that Congress has acted, the courts will have to address whether the renewed section 5 is constitutional, given the current context of minorities and voting rights in today's America.

Precisely because the VRA is a sacred symbol of American democracy, that will not be an easy or unfreighted discussion. Given the status and practical effects of the act, any discussion of constitutional challenges to section 5 will create understandable anxieties that hard-fought rights will be whittled away. At the same time, the political, legal, and social changes since section 5 was originally enacted in 1965 have been monumental; even in the twenty-five years since Congress previously revisited the VRA and section 5 in 1982, these changes have been substantial. Over just the last generation, these include the dramatic rise of the Hispanic population, which increases the complexity and polycentric nature of minority voting-rights issues today; the emergence of a substantial cohort of minority legislators who now wield political power in local, state, and national offices throughout the country; the fact that the South, which for nearly a century was the home of a one-party political monopoly of the Democratic Party in state and local elections, is now the site of the traditional two-party competition that has long characterized much of the rest of the country, with substantial but uncer-

tain effects of that competition on minority voters; and the kinds of nuts and bolts problems in running elections and counting votes exposed in the 2000 election cycle and, to a lesser extent, in the 2004 elections.

In the face of these changes, or the even more dramatic changes since the original enactment in 1965, Congress recently confronted the urgent question of whether section 5 should be continued. But the national debate thrust upon the country by the recent reauthorization of section 5 also inevitably triggers more general questions about the nature of voting rights, democracy, and minority participation and representation at the start of the twenty-first century. The questions remain pressing. How are the voting rights of all Americans best protected? What is the relationship between that question and the protection of minority voting rights? How should democratic institutions be designed today to strike the appropriate balance between majorities and minorities in the extraordinary heterogeneity of the modern United States?

This book is designed to address these and related issues. The contributors include the country's leading historians, political scientists, and law professors who work on voting rights and the Voting Rights Act (through both academic scholarship and in practical roles as expert witnesses or lawyers), as well as some of the most experienced practitioners in this field. The approach of this book reflects the much greater complexity surrounding these issues today than in earlier generations. The views of our contributors range from those who believe section 5 should have been substantially strengthened, to those who believe it should have been extended in largely its current form, to others who argue that it should have been extended but limited and contracted in specific ways, to those who believe that it has outlived its usefulness and should have been allowed to expire. Many contributors suggest, for example, that issues previously treated the same under the act should have now been separated out. A prime example is redistricting, which is more visible and more politically charged than more routine issues affecting voting. Our contributors differ, however, over exactly how redistricting should be treated under the VRA. Some believe that a renewed section 5 should have been limited to issues of major consequence, such as redistricting. Others argue that the very fact that redistricting is so highly visible and contentious means that there are adequate political checks on it (as compared to the relocation of polling places) and that therefore section 5 is no longer needed to constrain practices like redistricting. These differences of view emerging today are particularly revealing because many of our contributors have been influential figures in the evolution of the VRA, either through their scholarship or their direct involvement in prior congressional debates over the act; and at these earlier moments, there was much greater consensus among our contributors about the proper direction the VRA should take. We have not tried to impose any artificial unity on these chapters. The result is a book that accurately captures the range of views among experts today about the future of the VRA.

The Future of the Voting Rights Act is immediately relevant to the renewal debates over the VRA just completed in Congress, but its importance also transcends those issues. The book contains some of the most detailed and comprehensive empirical

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material ever published on the administration of the VRA. The analyses presented here will be of enduring value in understanding the VRA's ambitious effort to regulate the relationship between majorities and minorities in American democracy. As the renewed section 5 goes into effect, its operation will have to be tested against the considerations and concerns described in this volume. More broadly, the insight, information, and analyses in these chapters inevitably flow beyond the particulars of section 5 to voting rights and the VRA as a whole. It is impossible to separate the questions section 5 itself forcefully raises—how have conditions concerning politics, demographics, and voting rights changed in the United States in the last generation—from questions about the future of the VRA itself. The renewal debates are, inevitably, a catalyst for assessment of the state of voting rights today and for charting the direction the VRA ought to take in coming years.

The opening chapter of this book, by Richard Pildes, frames those that follow by suggesting that all democracies face the general problem of how to build flexibility into the design of their democratic institutions that enables those institutions to adapt original goals of fair representation to changing configurations of political power over time. Presenting the VRA as America's effort to manage this tension, Pildes then applies this insight to the balance between political equality and credible commitments to minorities against majoritarian domination reflected in the VRA. He suggests that the political dynamics in Congress are unlikely to lead it to engage these issues deeply and concludes by speculating whether courts, paradoxically, are the only institutions (in the United States and elsewhere) capable of adapting existing political institutions to changing circumstances.

For historical perspective, the chapter by Peyton McCrary, Christopher Seaman, and Richard Valelly then provides the most comprehensive analysis to date of the way the DOJ has administered section 5 from 1965 to the present. This chapter reflects analysis of all the objections the DOJ has lodged over the years under section 5 to proposed voting changes, and what the overall pattern of these objections tells us about the decade-by-decade evolution of the VRA.

The chapter by Guy Charles and Luis Fuentes-Rohwer applies a similar approach to the state of South Carolina, which was the first state to challenge the constitutionality of the original section 5, in 1965, and which remains a focal point of continuing voting-rights issues.

David Epstein and Sharyn O'Halloran explore the changing political context in which the VRA has operated. This chapter provides data, from 1974 to 2004, on the extent to which white voters have been prepared to vote for African American candidates, in different regions of the country, and whether white-black coalitions can be put together that successfully elect African American candidates. The critical finding of this work—that white voters are now more willing to vote for black candidates, with implications for how election districts can be designed that will elect such candidates—has been the focus of much scholarly debate and judicial decisionmaking.

Richard Hasen's chapter focuses on the constitutional hurdles that the recently renewed section 5 will have to surmount, given the Supreme Court's more aggressive scrutiny that emerged in the 1990s of Congress's powers to legislate.

Samuel Issacharoff, who raises the strongest doubts in this book about whether section 5 should have been renewed at all, focuses on two elements of change over the last generation. First, in his view, the DOJ now acts in more partisan ways than in the past, which calls into question the earlier legal strategy of placing primary enforcement responsibility with DOJ. Second, the VRA itself has succeeded in ensuring that black legislators have substantial presence in many legislative bodies and greater ability to protect their interests and those of their constituents than in prior decades of virtually all-white legislative bodies. As a result of these two developments, Issacharoff questions whether section 5 might not only have outlived its usefulness, but become counterproductive.

Bruce Cain and Karin MacDonald examine the mechanism by which the VRA to date has been as effective as it has. They conclude that legislators are extremely risk averse when it comes to losing their control over voting regulations and election-district design to the courts; as a result, legislators strongly internalize the commands of the VRA (indeed, perhaps over-internalize them beyond what the act actually commands) to avoid the risk of litigation and judicial invalidation. Going forward, the fact of legislative risk aversion suggests, in their view, that Congress should have been more accepting of recent Court decisions that incorporate more flexibility for legislative choice into the way the VRA is implemented.

Rodolfo de la Garza and Louis DeSipio explore the limited focus the VRA has given to date to the situation of Hispanic residents and citizens, whose interests with respect to voting rights differ in insufficiently appreciated ways from those of African Americans. They argue, for example, that to maximize Latino voting rights, naturalization procedures should be examined to determine the extent to which they slow naturalization rates, which diminishes Latino voting rights, and that the voting rights of Puerto Ricans who reside on the island should be extended to presidential elections.

Laughlin McDonald, who has litigated voting rights cases for many years, addresses the largely unexplored but disturbing issues facing American Indian voters in areas, such as South Dakota, where those voters are present in significant numbers.

Steve Ansolabehere illuminates the problems with the nuts and bolts of election administration that reached widespread public attention only with the disputed 2000 presidential election—problems with voting technology and election oversight. He collects and analyzes data on whether these problems differentially affect minority voting rights and suggests ways reforms might best address these problems.

Nathaniel Persily suggests approaches that both would have changed section 5 from within, by keeping its essential structure but reshaping it to fit current circumstances, and approaches that would have abandoned section 5's regionally targeted philosophy for more aggressive, nationwide protections of voting rights. Congress's failure to incorporate such changes raises questions about how effective the future of voting rights law will be.

Spencer Overton argues that the factors used in previous decades to identify the parts of the country to which the special, federal oversight of voting should apply

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are now obsolete. Both to enhance the likelihood that section 5 will be upheld as constitutional, and to craft a coverage formula that identifies those areas that still remain exceptionally suspect with respect to their treatment of minority voters, Overton constructs new criteria that, in his analysis, will appropriately do so today. Overton then applies these criteria and shows which states they would, in practice, cover. Again, the failure of Congress in the recent renewal process to attend to the considerations Overton raises will generate issues about how effective voting rights enforcement will be going forward.

Michael McDonald pursues a similar problem: how should policy identify today the jurisdictions that warrant the exceptional regulatory oversight that section 5 entails? McDonald demonstrates just how difficult that task is.

Heather Gerken proposes an entirely different, “third way,” for implementing the VRA in the future. She seeks to deal with the uncertainty about how the VRA should develop in coming years by enlisting greater citizen participation on that very question. Her aim is to deemphasize the role of the DOJ, and perhaps the courts, by creating a new structure for the VRA that gives community groups representing voters a more central role in determining how the VRA is implemented in different jurisdictions.

Bernard Grofman and Thomas Brunell argue that the congressional process took place in the shadow of the constitutional issues about the act that Richard Hasen’s chapter identifies; as a result, Congress was required not just to settle on what the majority considers ideal policy, but on which policies will also survive inevitable Supreme Court constitutional review. They then suggest a restructured VRA that would have come closest, in their analysis, to meeting both of these constraints.

The future of voting rights and the VRA have just come to the fore as Congress and the country have recently had the first policy discussion in twenty-five years of how the VRA ought to be designed. Even with that initial policy issue resolved, the relationship between majorities and minorities in American democracy will remain an ongoing, essential issue. So too will questions about how the law, through statutes like the VRA and others, can best protect the right to vote. No more distinguished group of scholars and practitioners has been assembled to address these questions concerning the future of American democracy. The diverse perspectives represented here offer no solace of consensus thinking. But by reflecting the genuine complexity of these issues in the twenty-first century, this book should foster discussion and policy debate about these most vital of issues.

Richard H. Pildes, for the editors

Political Competition and the Modern VRA

Richard H. Pildes

Political equality is often viewed as one of the central political and constitutional values, or even the central value itself, that explains and justifies democratic self-government. Theorists seek to deduce, from the value of political equality, numerous and varied implications for the way democratic processes should be structured. Much of the constitutional law concerning democratic institutions, such as the malapportionment decisions, are justified in the name of judicially enforcing constitutional commitments to political equality. Some of the most important statutes Congress has enacted, such as the Voting Rights Act (VRA), aim to secure values of political equality in the electoral process and in the design of representative institutions. Yet at the same time, application of overly abstract moral or legal ideals of equality to political processes, or the institutional entrenchment of specific and static understandings of political equality at particular moments in time, can interfere with the complex, dynamic processes through which material power is organized effectively in democratic politics. Constitutional, legislative, and moral understandings of political equality must be understood—as they often are not—in light of the way power is organized and exercised in the actual processes of democratic political competition.

POLITICAL EQUALITY, DEMOCRATIC INSTITUTIONAL DESIGN, AND COMPETITIVE POLITICS

A central problem at the moment that new democratic institutions or states are being formed, particularly in societies deeply fragmented by cleavages of religion, race, ethnicity, or culture, is to provide credible commitments that political majorities will not exploit vulnerable minorities. These commitments can take the form of independent courts empowered to enforce Bill of Rights guarantees of equality and liberty. But courts are primarily reactive, *ex post* institutions better at vetoing exercises of governmental power than at mobilizing power affirmatively. Institutional design mechanisms that build guarantees for minority representation directly into the structure of political institutions are stronger credible-commitment devices than

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judicial review. Particularly for groups long excluded from political power, guaranteed representation is an expressively important sign of equal political standing and citizenship, as well as a functional means of securing participation in power. At the moment of institutional formation, concerns for stability and legitimacy, along with risk aversion, often dominate and ensure that representative structures with guaranteed minority representation will be forged. The U.S. Senate is one example.

At the same time, the institutions that result can become problematic for at least three reasons. The first is the paradox of success: if these institutional strategies succeed in creating stable democratic institutions accepted among majorities and minorities, these institutional configurations become less necessary over time. The success of democracy may temper previously deep cleavages and transform them into routine interest group struggles. A pluralist regime of “normal politics” may thus become possible. But democratic institutional designers rarely consider or build in the capacity for representative institutions to be readily redesigned as circumstances change. The static considerations of power and vulnerability at the moment of formation overwhelm any capacity to create ready mechanisms for later institutional self-revision. To make matters worse, one of the iron laws of democratic institutions is that institutional structures, once created, become refractory to change. Identities and interests coalesce around existing institutional arrangements. That the U.S. Senate, in which 500,000 Wyomingites have equal political power with 34 million Californians (Barone and Cohen 2003), or the Electoral College would be structured along precisely the same representational basis today is questionable, even if some form of regional or state-based representation would still be used. (The disparity today between the most and least populous states is 68:1 compared with a ratio of 13:1 in 1790.)¹ Yet though cleavages based on state identities have diminished since the framing, the Senate and Electoral College seem securely entrenched.²

Second, and related, by building these cleavages into the structure of political institutions, those differences risk becoming more deeply entrenched. Studies across many countries show that when political power is allocated based on group identities, political entrepreneurs have incentives to mobilize these identities and harden them in the pursuit of political power (see, for example, Horowitz 2000, 151–96; Laitin 1998; Fearon and Laitin 1996; Laitin 1995, 38–42).³ The identities are often fluid and contingent, rather than primordial and fixed. Embedding group differences in the structure of democratic institutions might be necessary at the moment of institutional creation, but absent institutional permeability to changed identities over time, institutional entrenchment will more firmly lock these identities into place. Though minority representation can be achieved through an array of devices and institutional-design options, some more responsive than others to the possibility of changed group identities over time,⁴ the framers of democratic institutions (constituent assemblies, ordinary legislators, or referendum voters) rarely recognize this range of options or choose among them with these dynamic considerations in mind.

Finally, at this initial moment of formation, representation often serves a protective and expressive role for vulnerable groups. But politics also involves the

mobilization of group coalitions to exercise effective affirmative power. Initial institutional-design strategies focusing on representation can undermine the capacity of the groups thereby protected to forge the coalitions necessary and possible to exercise effective political power later.

POLITICAL EQUALITY

These considerations form a backdrop to America's experience with the Voting Rights Act (VRA or the act). The VRA can be viewed as America's institutional design mechanism for building in commitments to fair representation and political equality with respect to the cleavage of race. In 2003, a sharply divided 5–4 Supreme Court, in *Georgia v. Ashcroft* (123 S.Ct. 2498), had its most important confrontation in a generation with the act and its animating concerns of race, representation, and political equality. That decision exposed the difficulties of transporting models of equality from other domains into the unique structural context of democratic politics.

The VRA was first enacted in 1965 and last significantly amended a generation ago in 1982 (Issacharoff, Karlan, and Pildes 2002). Key portions of the act sunset in 2007 (42 U.S.C. sec. 1973b(a)(8)). As is well known, in 1965, when blacks were massively disenfranchised throughout the South, the act initiated the full democratization of American politics.⁵ Less appreciated is that, though most formal barriers to the franchise had been removed by 1982, two structural features of southern politics remained in place. Congressional and judicial understandings of political equality and fair political representation necessarily took shape within these structural conditions (for further elaboration of these points, see Pildes 2002; for data, see Davidson and Grofman 1994; see also Pildes 1995, reviewing *Quiet Revolution in the South*). First, even as of 1982, few black officials held elected office throughout the South (see Pildes 1995, 1367–69).⁶ Though black voters had access to the ballot box, levels of white polarized voting were so high that few blacks were able to get elected. Overwhelmingly, whites would not vote for black candidates and black majorities were too rare to ensure election of black candidates. Blacks were no longer formally excluded from political participation but were virtually excluded from officeholding. Second, in 1982 the South remained the one-party political monopoly it had been throughout the era of Jim Crow.⁷ Although passage of the VRA in 1965 began the process of normalizing the region's politics, that process remained in its first generation. Because the Democratic Party at that time faced no external competition from a strong alternative party, it had little incentive to respond to claims pressed by recently enfranchised black voters. The Democratic Party remained free to use its monopoly power over state legislatures to retain office while indulging, at no competitive cost, any preferences its leaders might have had to minimize the influence of black voters.

In 1982 the VRA served as a rough but effective tool to destabilize this system of polarization and political monopoly. To similar effect as consociational structures of democracy that directly compel assigned levels of representation for specific

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groups (see Issacharoff, Karlan, and Pildes 2002, 1168–72), the VRA indirectly compelled state institutions to incorporate representation of black officials (see *Thornburg v. Gingles*, 478 U.S. 30, 46–51). An exceptional provision of the act, section 5 (42 U.S.C. sec. 1973c), applies only to selected jurisdictions, many of them in the South (see Issacharoff, Karlan, and Pildes 2002, 556–57).⁸ In the 1970s, the Court had construed this provision to preclude any diminishment or “retrogression” in minority voting power (see *Beer v. United States*, 425 U.S. 130, 140–41). Entering the 2000s, the question was whether this understanding of the act precluded new institutional arrangements that reflected changes in the background circumstances of race and political representation.

Several changes in the larger structural context of democratic politics test whether principles of political equality and fair representation should be understood as general ideals or contingent functions of certain background structural conditions. First, due in part to the VRA itself, a substantial contingent of black elected officials, particularly in the South, now have a seat at the legislative table (see Lublin 1997, 21–28; see also Pildes 2002, 1523–39 on rise of safe minority districts in the 1990s). These black elected officials participate directly in legislative bargaining, including bargaining over issues concerning the design of representative institutions themselves. In the South, black Democrats are a key component of the Democratic Party. Black state legislators range from 31 percent to 45 percent of all Democratic state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina.⁹ The southern state political process now cannot avoid engaging black political aspirations and claims; the Democratic Party cannot act without black Democrats playing a central role. Second, white voters are more willing to vote for black candidates than a generation ago; though this change should not be exaggerated and voting is still racially polarized, the level of polarization has diminished (see, for example, Bullock and Dunn 1999, 1237–253; Grofman, Handley, and Lublin 2001, 1407–409; Pildes 2002, summarizing studies). Third, the last generation has finally witnessed the full emergence of a genuine two-party political system in the South as the effects of the VRA and other changes have worked their way through two generations of elected officials. The South now has a robust Republican Party, not strong enough to constitute the inverse of the old, solid Democratic South, but vital enough that a nationalized, competitive two-party system exists for the first time since the Democrats and Whigs battled before the Civil War (see generally Black and Black 2002, 2; Lublin 2004). In contrast to its days as a lazy monopolist, the Democratic Party is now engaged in an intensely competitive partisan struggle for every inch of political terrain.

These circumstances came together to create a perfect storm in Georgia in 2001 and then to test the meaning of political equality two years later in *Georgia v. Ashcroft*. The contrast with redistricting a generation ago, in 1980, marks the difference. In the 1980s, both the Department of Justice and the federal courts had found Georgia’s redistricting to violate the VRA (*Busbee v. Smith*, 549 F.Supp. 494, 517).¹⁰ In invalidating that attempt, a federal district court had made the following extraordinary finding of fact regarding the chairman of the Georgia house reapportionment committee:

Representative Joe Mack Wilson is a racist. Wilson uses the term “nigger” to refer to black persons. He stated to one Republican member of the Reapportionment Committee that “there are some things worse than niggers and that’s Republicans.” Wilson opposes legislation of benefit to blacks, which he refers to as “nigger legislation.” His views on blacks are well known to members of the General Assembly. From the House Reapportionment Committee to the Conference Committee, Wilson played the instrumental role in 1981 congressional reapportionment and he was guided by the same racial attitudes throughout the reapportionment process that guided his other legislative work. (*Busbee v. Smith*, 549 F.Supp. 494)

By 2001, Georgia typified the structure of southern politics, even in the Deep South. The first element in the perfect storm there was the now sizable contingent of black elected officials: about 20 percent of Georgia’s state legislators were black, including about one-third of Democratic legislators (see *Georgia v. Ashcroft*, 123 S.Ct. 2498, 2506). The majority leader of the senate was black, as was the chair of the senate subcommittee that created the redistricting plan at issue (2506). The second element was that, as in other southern states, Georgia’s Democratic party now faced intense and burgeoning Republican pressure. Democrats were still in control of the state’s political institutions (house, senate, governorship) as redistricting began, but the state was now precariously balanced between the two parties. The state senate teetered on the verge of shifting to Republican control. Because districting is generally still in the hands of existing officeholders largely free to pursue their own partisan ends, the Democrats sought to design districts that increased the likelihood of retaining their majority in the senate. Their aim was to preserve the number of minority legislators, while increasing the number of Democratic senate seats (2505).¹¹ Not a single Republican legislator voted for the districting plan adopted (2506). The third element, then, was that critical leverage in passing the plan was held by Georgia’s black legislators, who almost unanimously joined white Democrats to support the plan.¹²

The key strategic move involved reducing the black populations of some districts, including some represented by black legislators. That might put the seats of one or two black Democrats slightly more at risk, but would increase the prospects that critical surrounding districts, now bolstered with additional black voters, would elect Democrats. Nearly all of Georgia’s black legislators agreed that the risk was worth running, for the trade-off involved maintaining partisan control of one institution of government. Moreover, the reductions involved were small: both before and after the new plan, thirteen districts had majority-black populations, though three fewer districts had a black majority of registered voters.¹³ Diminished polarized voting by whites was thought to make this strategy even less risky.¹⁴ This approach reflected judgments about the trade-offs between descriptive and substantive representation.¹⁵ The question was whether the VRA precluded black and white legislators from agreeing to slightly increase the risk to descriptive representation for the prize of the substantive representation that follows from being part of a winning coalition that controls one of the state’s two representative institutions.

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The political judgment in Georgia to accept this trade-off, one made in other states as well,¹⁶ was driven by the experience of the 1990s. During that decade, there had been fractious debates about whether safe minority districts, compelled by the Court's 1986 interpretation of the VRA (*Thornburg v. Gingles*, 478 U.S. 30), also had caused a net increase in Republican seats. Although the suggestion of such a trade-off between black and Democratic representation had been met with hostility early in the decade (see, for example, Pildes 1995, 1379), many social scientists soon agreed that such tension existed.¹⁷ Political actors involved in local politics also often agreed. Thus, black-white Democratic coalitions formed in a number of places to make the safe minority districts of the 1990s somewhat less safe.¹⁸ In northern states, the VRA did not preclude white-black coalitions of Democratic officeholders from somewhat reducing black populations in the safe districts that had been created in the 1990s.¹⁹ The question that Georgia tested was whether the South would be permitted to do the same. The "no retrogression" regime, still applicable almost everywhere initially covered in 1965, appeared to stand in the way.²⁰ Reducing black populations, even marginally in a few districts, and even as part of an effort to maintain partisan control of the senate, constituted impermissible "backsliding" under existing Court decisions (*Reno v. Bossier Parish School Board*, 528 U.S. 320, 335). That black legislators almost universally supported the plan, and that the justification for the tradeoff was to maintain partisan control of the senate in a southern state, were factors neither within the contemplation of Congress in 1982 nor the Court when its critical interpretations of the VRA had been developed. Treating these considerations as legally irrelevant, the Department of Justice and the lower three-judge federal court had concluded that Georgia's efforts violated the VRA (*Georgia v. Ashcroft*, 123 S.Ct., 2515).

What a perversion of the VRA that would have been in Georgia. Here were black and white legislators, willing to make their seats more dependent upon interracial voting coalitions, and yet the act would have imposed on them more racially homogenous constituencies. Here was a large contingent of black legislators who, now that they had entered the halls of legislative power, determined that they and their constituents would have more effective power as part of a Democratic senate; yet the act would have required them to become the minority in the senate for the sake of a marginal potential gain in formal black representation. Here was Congressman John Lewis, his life risked in the Selma march to help get the VRA enacted, his seat not at stake, testifying after nearly twenty years in Congress that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made" (*Georgia v. Ashcroft*, 123 S.Ct., 2516) and that the South has "come a great distance" since a generation ago (Pildes 2002, 1563). And here were black legislators, not demanding safer sinecures for themselves, as officeholders typically do, but taking risks to forge a winning coalition and exercising political agency; yet the act would have denied these politicians the autonomy to make the hard choices at issue, even with partisan control of government at stake.

In a 5-4 decision, the Court permitted the concepts of political equality and fair representation in the VRA to reflect these changed circumstances. Reversing the lower court, the Court concluded that Georgia had latitude to make at least marginal tradeoffs between the safety of black seats and the aim

of marshaling political power effectively to control state political institutions (see *Georgia v. Ashcroft*, 123 S.Ct., 2512). The act, in the changed context of today, did not require institutional designers to blind themselves to the coalitional mobilization of political power in order to meet the single goal of maximizing electoral prospects of black legislators. Southern states, at least where black legislators play a decisive role, have some of the flexibility other states have to modify, at the margins, the safe-districting regime of the 1990s.²¹ Although some might question how much discretion the Court ought to have to take such considerations into account when interpreting a statute, the reality is that, given the relatively open-textured terms of the VRA and the generality of Congress's original purposes, much of the content of the VRA has always emerged through judicial implementation.

The divided Court did unanimously agree on one new principle that reflected modestly revised understandings of political equality. Academics had argued that the act should recognize a new form of election district, a "coalitional district," in which black voters might not form a numerical majority, but in which black and white coalitional voting would nonetheless give black candidates a realistic opportunity to be elected (Pildes 2002, 1551–63). As some commentators have put it, this principle is "emerging as the new 'third way' in racial redistricting" (Gerken 2004, 2 n.5). The entire Court agreed that coalitional districts are now plausible substitutes for the safe districts of the 1990s when coalitional districts offer the same likelihood of black electoral success (*Georgia v. Ashcroft*, 123 S.Ct., 2511–12).²²

But the Court's 5–4 divide on whether Georgia's objectives were consistent with the VRA—a familiar, recurring 5–4 divide in VRA and racial redistricting cases—was disappointing. In the perfect storm of Georgia, control of a political body was at stake, a virtually unified black-white Democratic legislative coalition was in charge, and marginal reductions in safe black districts were at issue. If that did not present a context justifying more widely shared support for greater flexibility in prior understandings of the VRA, few contexts would.²³

At the start of a new decade, it was particularly important that the Court signal that structural changes in partisan competition, black officeholding success, and white crossover voting justified flexibility in legal principles developed in an earlier environment of black exclusion from officeholding within a one-party system.²⁴ Perhaps this Court, which has been together longer than any other nine-justice Court, has itself become so polarized on issues of race and voting that it could not find unanimity even on the striking facts of Georgia. But the majority went further and embraced a more expansive, still ill-defined conception of other modes of "political influence" that might be attributed to minority voters. These more nebulous modes of influence might also substitute, the Court held, for safe minority-controlled election districts (see *Georgia v. Ashcroft*, 123 S.Ct., 2511–14). The dissent was right to raise questions, both in principle and in practice, about whether this further flexibility in the VRA is appropriate (2518–20).

The VRA is a form of national, command-and-control regulation for the design of democratic institutions. In the last generation, the act mandated an appropriate, uniform, remedial approach nationwide: safe minority districts for all elections (local, state, and federal) in which voting was racially polarized. That approach

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made sense when safe districts were essential to the election of black candidates, when the one-party South had no incentive to respond to black voters, and when there were virtually no black elected officials to participate in negotiation over the appropriate structures of democracy itself.²⁵ Like all command-and-control legislation, the act did not allow regulated actors latitude to make decisions about how most effectively, in their own diverse contexts, to realize the aims of the act; those actors were the object of the act's distrust. And like all regulatory statutes, the VRA must contend with the difficulty of statutory updating as political dynamics change. As in many other regulatory arenas, Congress is unlikely to provide a consistent mechanism for responsive updating, for Congress is likely to revisit the statute only episodically.²⁶ Each new decade does require a new census and new redistricting, and because the courts have given contemporary social-scientific analysis of voting patterns a central role in the act's implementation, the act's interpretation has been more responsive to changing circumstances than many statutes (for the role of social science in the act's application, see Pildes 2002; Issacharoff 1992). Nevertheless, facts must still be interpreted and normative judgments must still be made about the purposes of democratic representation in constantly changing contexts.

Georgia v. Ashcroft, the most important decision in a generation on race and political equality, can be seen as a form of "democratic experimentalism" in the design of democratic institutions themselves (see Dorf and Sabel 1998). The decision replaced a single, mandatory remedial regime with one that defines general objectives but leaves representative bodies, with black participation, more flexibility in choosing the means to realize those aims in varied contexts.²⁷ How much flexibility state and local political bodies should have, and in what circumstances, will be difficult future questions. In *Georgia*, the Court could rely on essentially a process-based approach to resolve these substantive uncertainties: given the nearly unanimous support of a large black political delegation and the objective plausibility that black Georgians—who overwhelmingly are Democratic²⁸—would be better served by a Democratically controlled senate, *Georgia* presented a relatively easy case. It is true that the interests of black voters cannot necessarily be assumed to be reflected in the positions that black elected officials take, but the usual concern is that incumbents want to make their own districts overwhelmingly safe regardless of any other consequence. In *Georgia*, by contrast, black legislators were willing to make their districts less safe if it meant being part of a willing coalition that would control the state senate. But if there is no substantial black participation in the process, or if a black legislative delegation is deeply divided, or if black legislators are at odds with organizations that genuinely represent large numbers of black voters, courts will face more ambiguous process-based signals that provide less clear proxies for substantive judgments. Congress, after a twenty-five year absence, will have to confront these issues when it is forced to decide whether to reauthorize and modify section 5 in 2007 (42 U.S.C. sec. 1973b(a)(8)).

Georgia shows the dangers, in the domain of politics, of borrowing understandings of equality from other constitutional spheres, of regulating politics through deductive analyses of logical concepts of equality, and of viewing equality issues

in the ideological terms they might be thought to present in other arenas. But legal academics and many judges—especially in an era when fewer federal judges have political experience—are better trained to think in terms of rights, participation, representation, and equality than of material issues of political power. In politics, though, equality of groups cannot be effectively realized without recognizing the interdependence of multiple groups in the collective mobilization of material political power. Pragmatic, productive analyses of equality must recognize the distinct role that power plays in this arena. Issues of race-conscious policies in academic admissions, or in government contracting, pose different questions. For that reason, analyses of general principles that transcend these differences, such as “equal concern and respect,” can be misguided or even self-defeating.

Georgia also raises broader questions about the relationship between political competition and the legal understanding of equality. The VRA was a commitment to imposing first-order legal principles of equality on a political order that lacked meaningful partisan competition. With the emergence of such competition in the South, hard questions have arisen, not just about whether that first-order imposition remains necessary, but about whether that imposition will become dysfunctional by frustrating formation of the coalitions and agreements that make success in a competitive two-party regime possible. As the biracial world of the original VRA fully gives way to a multiethnic political landscape, these issues will only become more difficult to manage through a national, command-and-control regime. In a mature political order that involves regular, two-party competition, the principle of representational equality—to be effective—might be largely derivative of whatever is necessary to mobilize winning coalitions. Because groups cannot realize their legislative objectives outside the context of affiliation with a winning political party (absent coalitions forged across party lines), the fates of groups and parties are unavoidably linked. Put in other terms, competition itself creates the incentives and provides the checks that most effectively realize representational equality. When the Democratic Party was a monopolist, it suffered no penalty from ignoring constituent groups. But in a competitive environment, both parties are disciplined to maximize partisan advantage through accommodations and trade-offs among claims of constituent groups. Perhaps that competitive process ensures the regime of normal, pluralist interest group politics to which the VRA aspired.

All this might suggest that the judicial role, in a mature regime of intense partisan competition, should shift from the first-order imposition of representational equality to the second-order task of securing the conditions of effective partisan competition itself. If that competition is an effective means of realizing representational equality, and if first-order mandates of equality can undermine competition and hence effective equality itself,²⁹ courts would best ensure equality by policing the background conditions of competition. Courts would have a justified role in limiting the inevitable tendencies toward self-entrenchment and partisan manipulation of the institutional framework of competitive democracy. But if courts (and other institutions) minimize partisan gerrymandering and other anticompetitive practices, judicial deference to the outcomes of that competition, as in Georgia, might not only be justified, but might also be more effective at ensuring

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equality itself. Just as courts and legislatures no longer protect rights in the economic sphere through first-order imposition of “just price” principles, but instead through second-order securing of the competitive structure of the market, a functional analysis of democratic politics must consider the extent to which courts can best oversee political processes in similar ways. Democratic representation, of course, serves multiple aims, and effective competition might be better at realizing certain aims than others. But mobilizing effective legislative power to make law (or to resist law) surely must be a central aim of well-designed representative institutions, particularly for vulnerable minorities. This perspective is not meant to endorse specific solutions for future applications of the VRA.³⁰ Instead, it is meant to offer a general framework for organizing analysis of the way legal ideas of rights and equality must be modified to account for the larger structural environment within which politics takes place.

INSTITUTIONAL MECHANISMS

What institutional mechanisms exist for enabling democracies to address the need to revisit structural issues concerning political representation in the face of continually shifting contexts? This is a profound but not fully appreciated problem not only regarding America’s VRA, but also in the design of democratic institutions throughout the world. In the last generation, in this new age of democracy in which we live, more new democracies, all constitutional ones, have been forged than in any comparable period. In regions ranging from South Africa, to the former Soviet Union, to Latin America, to Afghanistan and parts of the Middle East (see Saikal and Schnabel 2003), the renewed rise of democratic institutions has been a defining political development of the era. Since 1985, this wave has doubled the number of recognized democracies (see Marshall and Gurr 2003, 17).³¹ These new democracies are being formed in the midst of considerable heterogeneity, whether of religion, culture, ethnicity, linguistic differences, or other powerful cleavages. Democratization in the world today often involves institutional design in the midst of group conflicts and differences even more explosive than the American experience with race. Democratic bodies must be designed at moments of extreme fragmentation and distrust, yet the original representational structures do not contemplate, and may actually impede, mechanisms of transition beyond that moment. Are there means that enable both recognition of the need to address group differences through specific institutional structures at the moment of state formation, but also enable those structures to be revisited as a democratic state matures and group differences take on different meanings and consequences over time?

The original VRA of 1965 was enacted at what can be understood as a moment of state formation in the United States. After slavery and decades of exclusion from political participation, African Americans in the South at last began the process of becoming fully effective citizens and full participants in democratic life. In the early stages of that process, the need to express commitment to that transformation, and to signal security to previously excluded groups, required a commitment, not just

to formal access to the right to vote, but to direct, visible representation in the halls of democratic bodies. Four decades later, with robust partisan competition between the two parties throughout the country, including the South; with African American constituents constituting one of the largest constituency groups within one of the parties; and with significant African American participation, of both elected officials and citizens, in the partisan contest for effective electoral power, the question is whether modifications in the earlier institutional approaches to addressing group conflicts in the United States ought to be revisited in some way.

In theory, the VRA itself, through section 5, provides an ideal institutional mechanism for updating and reassessing whether such modifications are now appropriate. In theory, Congress is the appropriate body to confront these difficult questions, and the sunset provisions of Section 5 require Congress to focus on these questions. But I think it unlikely that Congress will actually engage these serious questions, except in the most formal way, despite its need to consider whether to reauthorize section 5 and in what form. The Court's recent, momentous decision in *Georgia v. Ashcroft* might be thought exactly the catalyst that would require Congress to decide whether to endorse, reject, or modify the Court's approach. But for two reasons, even this is not likely to be sufficient. First, *Georgia v. Ashcroft* will still be too new, its meaning still too uncertain, when Congress confronts the renewal process for section 5. Some members of Congress will no doubt think that any modification at all to the previously prevailing approach—the “no retrogression” standard of *Beer v. United States*, established in the 1970s—is a mistake. Overturning *Georgia v. Ashcroft* will thus be an objective for those members. But for those in Congress who believe that some modification to the approach of the 1970s might be warranted in light of changes in the context of race and politics today, the perfect storm of *Georgia v. Ashcroft*—on the specific facts presented there—is likely to suggest at least one precise context in which such modifications might be justified. But how narrowly or broadly *Georgia* will be applied, in what contexts, will remain unknown. Given this uncertainty, and given how unlikely it will be that a majority will emerge that would consider the principle of *Georgia* wrong in all contexts, *Georgia* will present too elusive a target for Congress to engage in any precise way.

Second, it is now widely accepted that, in the redistricting context, Republicans benefit politically from the VRA's mandate to create safe minority election districts (when certain factors are present). Whether or not updating the VRA in the context of redistricting might be desirable as a matter of policy, Republicans have no political incentive to change the status quo. And though at least some Democrats do have that incentive, there is simply too great a risk that raising questions about whether the VRA should continue in the form it has had since 1982, about such core issues as political representation, will be seen as an attack on a statute that is viewed as sacred by important constituencies in the Democratic Party. Unless voting-rights activists, community leaders, and others pave the way by going first in making the case that minority voters and the Democratic Party would be better off with some modifications in the redistricting context to section 5, Democratic members of Congress are not likely to take the lead in raising these questions.

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Serious changes to the status quo regarding the way section 5 currently distributes political power among groups during redistricting are therefore not likely to emerge in Congress. Most likely, Congress will either simply reaffirm the status quo on this critical issue or adopt a vague, “totality of the circumstances,” multi-factor formula to address it that leaves enormous discretion with the courts. Either way, the institutional mechanism American politics has generated for managing the transition from the early moments of state formation to a more mature stage of political development will, most likely, fail effectively to play this role. For better or worse, that task will therefore inevitably fall back on the courts. With the experience of forty years of the VRA in the United States and the democratic histories of other countries, it is now easier to recognize that managing the transition from the group conflicts at critical moments of state formation to later stages of political development is a critical, though until now largely neglected, task in democratic institutional design and theory. Perhaps it will fall to courts in many systems to become the central agents in managing this transition. Unless other institutions can be designed to address these issues, that might be the reality we face. But surely it is a sobering and discomfoting one.

APPENDIX: STATUTES AND REGULATIONS LIST

42 U.S.C. sec. 1973b(a)(8) (2000)

42 U.S.C. sec. 1973c (2000)

NOTES

1. According to the first official census, in 1790, the largest state was Virginia, with 747,610 people. The smallest was Delaware, with 59,094 (U.S. Census 1793, 3).
2. The design defect in the Constitution is not necessarily the Electoral College itself, but the document’s failure to build in any ready capacity to modify that structure over time through national political processes, particularly in light of the material disincentives that individual states have to change their own allocation rules for electors.
3. In Iraq today, for example, observers report that Shi’ite and Sunni identities became more firmly entrenched in response to material incentives created by the immediate postwar instability and the need for organizational forms of self-protection in the absence of a centralized authority with a monopoly on violence. “The Coalition, specifically the United States, played a major role in the rapid emergence of denominational identities in the immediate postwar period. The United States did not invent those identities, nor did it intentionally reify them; but it produced an environment in which it was necessary for Iraqis to invent them” (Feldman 2004, 79).
4. For analysis of different institutional structures and instruments for taking group differences into account in design of democratic institutions, see Pildes (2004). As one example, constitutions can directly allocate executive or legislative power along identified group bases, as in consociational structures. This approach allows little change,

other than through constitutional amendment itself, if identities shift over time. Another approach is districted-election systems, where election districts can be assigned once a decade on the basis of empirical facts regarding whether voting behavior in recent periods reveals strong group-based identities. Yet another approach is voting systems, like cumulative voting, in which voters choose election by election with which group identities they prefer to affiliate. Federalism has one underappreciated advantage as a tool for institutionalizing group differences that might be powerful at the moment of state formation; if mobility is free, federalism need not as strongly embed group identities, which can be eroded from within over time if mobility is exercised.

5. These facts are described in Court decisions upholding extraordinary remedial provisions of the VRA: as the Court concluded, “the constitutional propriety of the Voting Rights act of 1965 must be judged with reference to the historical experience which it reflects” (*South Carolina v. Katzenbach*, 383 U.S., 308; see also *Oregon v. Mitchell*, 400 U.S. 112, 131–34, upholding the VRA’s nationwide ban on literacy tests).
6. As leading researchers put it in 1992:
Unpalatable as it may be, the simple truth is that at the congressional and state legislative level, at least in the South, blacks are very unlikely to be elected from any districts that are not majority minority, and most majority-black legislative districts and all majority-black congressional districts now elect black officeholders (Grofman, Handley, and Niemi 1992, 134; citing Grofman and Handley 1991, 111, 112–18, showing no decline in racially polarized voting in the South between 1965 and 1985).
7. On the partisan structure of southern politics in the early 1980s, see Earl Black and Merle Black (2002) and David Lublin (2004).
8. The seven states originally covered by the 1965 act’s triggering formula for special-coverage provisions were Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia; twenty-six counties in North Carolina were also covered originally, as well as three in Arizona, one in Hawaii, and one in Idaho.
9. These data are based on composition of state legislatures in 2000 and are taken from Morgan Kousser (2003, 30).
10. For a general discussion of the history of Georgia’s redistricting, see Laughlin McDonald (2003, 167–73); and Pamela Karlan (2004, 22–24). Some of this history is also described in *Georgia v. Ashcroft*, 123 S.Ct., 2506.
11. Indeed, the plan was such an aggressive partisan gerrymander that the federal courts later held it unconstitutional in a decision the Supreme Court summarily affirmed. (See *Cox v. Larios*, 124 S. Ct. 2806 [mem.]).
12. More specifically, “ten of the eleven black Senators voted for the plan” and “thirty-three of the thirty-four black Representatives voted for the plan” (*Georgia v. Ashcroft*, 123 S.Ct., 2505).
13. In the three districts at issue, the black voting age population dropped from 60.58 percent to 50.31 percent, from 55.43 percent to 50.66 percent, and from 62.45 percent to 50.80 percent. In all three, “the percentage of black registered voters dropped to just under 50%” (*Georgia v. Ashcroft*, 123 S.Ct., 2507–08). Testimony indicated that these decreases were likely to affect the candidates elected only marginally (2515).
14. See *Georgia v. Ashcroft*, 195 F.Supp.2d 25, in which the three-judge court recognized that “African American candidates may garner sufficient white crossover votes in some

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contexts to win elections” (94), which decision was *vacated and remanded*, 123 S. Ct. 2498. See also Karlan explaining that “in communities where white voters were willing to support the black community’s candidates of choice, it might be possible for black voters to elect more representatives” under a plan similar to that proposed in Georgia (2004, 27). In addition, the plan reduced large black voting-age populations of over 60 percent in four districts while maintaining them as majority-minority districts (Georgia v. Ashcroft, 123 S.Ct., 2506). Compared to the earlier 1997 plan that formed the actual benchmark for retrogression analysis, the new plan *increased* the number of districts with a majority black voting-age population by three and increased by five the number of districts with a black voting-age population of between 30 percent and 50 percent (2506).

15. The terms trace to Hanna Pitkin (1967, 60–91, 112–43). Descriptive representation is that in which the representative personally mirrors the relevant characteristics of those represented; substantive representation refers to whether the substantive political and policy preferences of those represented are effectively realized.
16. See, for example, *Page v. Bartels* (144 F.Supp.2d 346, 353–54), describing New Jersey state legislators’ attempt to reduce “wasted” excess minority populations in majority-minority districts in order to bolster party support in other districts.
17. “The concentration of minority Democrats, especially African Americans, in majority-minority districts undercut the Democratic base in adjoining districts and aided the Republicans. Moreover, it provided an incentive for whites to run as Republicans as the number of districts favorable to white Democrats declined” (Lublin 2004, 23, see also 104–06, providing detailed case study of redistricting in Georgia).
18. See, for example, *Page v. Bartels* (144 F.Supp.2d, 353, 369), upholding a New Jersey redistricting plan that reduced black voting age populations in certain districts from 53 percent to 28 percent; 57 percent to 48 percent; and 48 percent to 39 percent. For a comparison of the New Jersey and Georgia redistrictings, see Samuel Issacharoff (2004). Ironically, as more large states with sizable minority populations came under Republican control in the 2000s, *Shaw v. Reno* might have benefited the partisan interests of the Democratic Party; *Shaw* constrains the extent to which the redistricters can concentrate minority voters into election districts regardless of the design of those districts. See, for example, Lublin, noting that “over the long term, this shift [caused by *Shaw*] will probably aid Democrats [in the South]” (2004, 23) and that “the Supreme Court has aided the Democrats, though not necessarily black and Latino Democrats, by striking down many majority-minority districts as racial gerrymanders” (109).
19. See, for example, *Page v. Bartels* (144 F.Supp.2d, 362–66) holding that the VRA allowed New Jersey to reduce black populations in safe districts.
20. The VRA creates a mechanism for jurisdictions to bail out from inclusion as a covered jurisdiction, but the criteria that had to be met, particularly as interpreted by Court decisions, were originally so stringent that few jurisdictions bailed out. On the criteria, see *City of Rome v. United States* (446 U.S. 156, 162–69) and *Gaston County v. United States* (395 U.S. 285, 293–96). In 1982, Congress amended the law to make bailout easier, but even so, only eleven counties bailed out between 1982 and 2006.

21. The Court, accepting these principles, remanded for a determination whether a full record permitted Georgia to act on this legal understanding of “retrogression” (*Georgia v. Ashcroft*, 123 S.Ct., 2517).
22. The court concluded that “the prudential objective of § 5 is hardly betrayed” by allowing coalition districts (*Georgia v. Ashcroft*, 123 S.Ct., 2518).
23. What was the net result of this saga when actual elections took place? First, Georgia Democrats were right to think that they were captaining a sinking ship. In 2002, a Republican was elected governor for the first time since 1868. After the 2004 elections, the state also had two Republican U.S. senators. Second, the plan the Supreme Court upheld was never used in an actual election, though a similar plan was. That similar plan worked largely as Democratic legislators, black and white, had intended. Despite the new statewide Republican majority in the governor’s race, the Democrats retained the senate on general election day in 2002, winning a 30–26 majority. See Georgia General Assembly at <http://www.legis.state.ga.us>, listing current officeholders. None of the black incumbents whose seats the plan put marginally more at risk lost. But then, in a state that now had a Republican governor and that was trending Republican, four Democratic senators shifted parties after the election. The senate thus ended up with a 30–26 Republican majority.
24. In commenting on *Georgia v. Ashcroft*, Lani Guinier rightly notes that leaving districting in the hands of state legislatures “creates the dangerous moral hazard that those already privileged may seek only to reproduce themselves” (“Saving Affirmative Action: And a Process for Elites to Choose Elites,” *Village Voice*, July 2–8, 2003, p. 46). That argument, to which I am sympathetic, is an indictment of all districting done by self-interested elected officials, though not an indictment of the Court’s decision in *Georgia*. Although Professor Guinier would prefer to make elections a product of “the voters’ freely given choice,” that change would not resolve the issue in *Georgia* either way, nor does Professor Guinier suggest it would. The choice in *Georgia* was whether the Georgia legislature, with decisive black participation, would draw the districts or whether the courts would do so through application of the centralized commands of the VRA. Neither option directly reflected the “freely given choice” of Georgia residents in 2001. Even were *Georgia* to adopt an independent districting commission, such a commission would still involve mediated citizen participation. Professor Guinier might have cumulative voting systems in mind. I am supportive of cumulative voting systems for local elections, but more skeptical about whether they make sense for state or congressional elections (see generally Pildes and Donoghue 1995). But even cumulative voting systems, which give voters a greater range of choice, must still be structured; they require prior decisions about how many votes and seats will be used in jurisdictions that must still somehow be defined. In general, a collective will must be organized before it can be expressed.
25. See Pildes (2002, 1569–71) defending the safe-minority-districting interpretation of the VRA based on empirical facts.
26. On the increasingly recognized problem of statutory obsolescence in the regulatory state, see Guido Calabresi (1982) and Donald Langevoort (1987).
27. The covered jurisdictions at issue must still comply with the act’s general, nationwide requirements. By its own terms, *Georgia* addresses section 5 of the VRA and does not

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- directly extend to the interpretation of the nationwide provisions of section 2 (42 U.S.C. sec. 1973). The Court has repeatedly made clear, including in Georgia itself, that sections 2 and 5 have different purposes and impose different duties (see *Georgia v. Ashcroft*, 123 S.Ct., 2510–11). Functionally, reading more flexibility into section 5 than into section 2 could be justified, given that section 5 is designed to be an extraordinary, temporary remedy (see *Reno v. Bossier Parish School Board*, 520 U.S. 471, 477–79, describing the “limited purpose” of section 5). But the central decisions on which the Court relied in Georgia involved separate concurring opinions in earlier section 2 cases, which suggests the possibility that the Court will extend Georgia to section 2 cases should that question arise. See *Georgia v. Ashcroft* (123 S.Ct., 2511–16), citing thirteen times Justice O’Connor’s opinion concurring in the judgment in *Thornburg v. Gingles* (478 U.S. 30).
28. The state’s expert testified that approximately 90 percent of black voters in Georgia voted for Democratic candidates (see Karlan 2004, 25 n.38).
 29. There might be some means of imposing norms of representational equality that affect different political parties the same way and thus impose no competitive disadvantage on any one party. Laws in some countries that impose obligations of gender equality on the parties, such as the French *parite* laws or Scandinavian requirements that party lists contain fixed percentages of women candidates, might be examples. Mala Htun (2004) catalogues ethnic and gender quota and reservation provisions across the world and discusses different remedies appropriate for the representation of different identity groups. These mandates are legislatively imposed. Any such mandates must be attentive to whether they disadvantage particular parties. Legislatures are more likely to make these calculations accurately than are judges, who are trained to think in terms of more abstract concepts of rights and equality.
 30. One of the questions a full analysis would have to consider is the extent to which the competitive context of politics today is a product of the VRA itself. The VRA has helped establish the large contingent of black legislators in Georgia. If section 5 were not reauthorized, it is unclear how levels of black political representation or influence would be affected. Changes of this sort can certainly not be assumed to be likely to return southern politics to the status quo that existed in 1982, when the current version of section 2 was adopted and the act was last amended. Today, two-party competition exists and black citizens are a critical component of the Democratic Party. Those factors would continue to be true, even without section 5. But precisely how repeal of section 5 would affect political dynamics in the South remains uncertain.
 31. For an attempt to periodize the formation of democracies into three distinct eras, see Samuel Huntington (1991, 13–26). Huntington’s first wave of democratization began in the year 1828 with the extension of the franchise in the United States and continued until around 1926 (26). During this period, some twenty-nine democracies came into being (17). The reversal of the first wave began in 1922 with the accession of Mussolini to power in Italy and lasted until about 1942, when the number of democracies in the world had been reduced to twelve (16–18, 26). Huntington’s second wave began during World War II and reached its peak in the early 1960s, when the number of democracies had risen to thirty-six (18–19, 36). The reversal of the second wave between approximately 1958 and 1975 brought the number back down to thirty (16, 19–21, 26). In Huntington’s analysis, a third wave of democratization began in 1974 in

Portugal and spread through southern Europe during the 1970s, Latin America and Asia during the late 1970s and early 1980s, and eastern Europe beginning in 1988 (21–24). As of *The Third Wave's* publication, more than thirty new democracies had been added in this most recent period (26). Some scholars have taken issue with Huntington's periodization, arguing that it rests on a poorly specified definition of democracy and fails adequately to take into account changes in the number of independent countries (see Doorenspleet 2000). After refinements in the data analysis to take these considerations into account, Renske Doorenspleet concludes that only Huntington's "third wave" is accurately supported by the data (398–99).

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The Law of Preclearance: Enforcing Section 5

Peyton McCrary, Christopher Seaman, and Richard Valelly

In August 2007, several special provisions of the Voting Rights Act (VRA) of 1965—the “preclearance” requirement set forth in section 5 of the act, the authority of the Department of Justice to use federal examiners and observers, and protections for the voting rights of language minorities—will expire, unless extended by congressional action. Of the provisions due to expire, the most important for the protection of minority voting rights over the years has been the preclearance requirement. Jurisdictions covered by section 5, for the most part states of the former Confederacy, must obtain federal approval of voting changes, either through a declaratory judgment action before a three-judge panel in the District of Columbia or from the Department of Justice, before these changes become legally enforceable. To secure preclearance of desired changes, covered jurisdictions have over the years removed barriers to registration and voting, as well as eliminated election structures that dilute minority voting strength. Preclearance requires proof by the jurisdiction that the submitted change, in the language of the statute, “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” (42 U.S.C. sec. 1973c; Days 1992, 52–53).

Before January 2000, the definition of discriminatory “purpose” under section 5 was understood as synonymous with the term’s meaning in constitutional cases: a practice designed by a covered jurisdiction to restrict access to registration or voting, or to dilute minority voting strength, in violation of the Fourteenth or Fifteenth Amendments, was thought to be prohibited by the purpose requirement of section 5 (Blumstein 1983, 685; Posner 1998, 80, 100; McCrary 2003, 693). For a decade after the Voting Rights Act was adopted, federal courts assessed discriminatory effect under section 5 by the same standard used in a constitutional challenge.¹ However, in a key 1976 decision, *Beer v. United States* (425 U.S. 130, 141 [1976]), the Supreme Court bifurcated the statutory and constitutional effect standard by announcing that in the section 5 context a voting change likely to produce a racially discriminatory effect prohibited by either the Fourteenth or Fifteenth Amendments was entitled to preclearance unless it *would make matters worse* for minority voters than the existing plan, an effect the Court referred to as “retrogression” (141).²

Retrogression remains the standard for assessing the effect of a voting change, but on January 24, 2000, the Court fundamentally redefined—and weakened—the purpose requirement under section 5 in *Reno v. Bossier Parish School Board* (*Bossier II*) (528 U.S. 320).³ Under the new standard announced in *Bossier II*, a voting change with an unconstitutional racial purpose, no matter how strong the evidence of discriminatory intent, would have to be precleared unless the evidence demonstrated that the change was also intended to make matters worse for minority voters than under the status quo—thus limiting the prohibition on purposeful discrimination to what the Court termed “retrogressive intent” (326).⁴ As subsequent events made clear, *Bossier II* effectively minimized use of the purpose prong as a weapon for protecting minority voters from discrimination.⁵

Determining the impact of this doctrinal change on section 5 enforcement by the Department of Justice (DOJ) is the central focus of this essay. The key evidence on which we rely is found in the 996 letters from 1968 through 1999—and the forty-one after the *Bossier II* decision—in which the assistant attorney general for civil rights explained the basis for objections to voting changes.⁶ These objection letters, unlike court opinions regarding preclearance, do not set forth the full body of evidence on which the department relies in making each decision, and thus do not provide a basis for evaluating the accuracy of the department’s fact finding.⁷ The letters are, however, the official record of the legal bases asserted for each objection and thus constitute the essential starting point for an analysis of the department’s preclearance policy.

Our analysis reveals that by the 1990s the intent, or purpose, prong of section 5 had become the dominant basis for objections to discriminatory voting changes. During that decade an astonishing 43 percent of all objections were in our view, based on discriminatory purpose alone (see table 2.2). Thus a key issue for Congress in determining how to deal with the preclearance requirement of the act due to expire in 2007—assuming it seeks to restore the protection of minority voting rights that existed before January 2000—is whether to revise the language of section 5 so as to restore the long-accepted definition of purpose thrown out by *Bossier II*. We believe that the analysis in the following pages provides critical evidence for the debate over reauthorization and revision of section 5.⁸

JUDICIAL AND ADMINISTRATIVE REVIEW UNDER SECTION 5

During the first three years after adoption of the act in 1965, the preclearance requirement set forth in section 5 was rarely invoked (Derfner 1973, 578, n. 244). During that time, however, southern legislatures, faced with the prospect that black voters might cast a majority of the ballots in some single-member districts, often shifted to at-large election systems, numbered place or runoff requirements, or gerrymandered district lines to minimize the number of black-majority districts (Derfner 1973, 553–55, 572–74; Lawson 1976, 329–52; McDonald 2003, 130–36; Parker 1990, 34–77). Active enforcement of section 5 to deal with such changes

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awaited the 1969 ruling in *Allen v. State Board of Elections* (393 U.S. 544).⁹ In that decision, the Supreme Court determined that all changes affecting voting, including measures with the potential to dilute minority voting strength as well as procedures for registering or casting votes, required preclearance under section 5 (569).¹⁰

In this preclearance review the department provides a quicker and less expensive alternative to litigation and is to function as a “surrogate” for the District of Columbia trial courts.¹¹ The attorney general has from the start delegated responsibility for preclearance decisions to the assistant attorney general (AAG) who heads the Civil Rights Division. Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights. The new Voting Section then provided the factual investigation for preclearance reviews and made detailed recommendations to the AAG for Civil Rights. Prodded by liberal critics in Congress, the department developed detailed guidelines for enforcing section 5 that were, in turn, endorsed by the Supreme Court.¹² Other Supreme Court decisions over the next decade interpreted the scope of section 5 expansively and strengthened the department’s enforcement powers (Days and Guinier 1984, 164, 167–80; MacCoon 1979).

The Supreme Court, however, agreed to hear arguments and issue opinions in only a few cases. As a result, the District of Columbia trial courts who hear preclearance lawsuits by the jurisdictions played a major role in shaping section 5 case law. Often the Supreme Court declined to hear oral argument and summarily affirmed the trial court’s decision. Although summary affirmances simply endorse the lower court’s decision and not necessarily its reasoning, they are binding precedents for the lower courts and the Department of Justice until contradicted by a future Supreme Court decision.¹³

PURPOSE AND EFFECT UNDER SECTION 5

Section 5, like the Fourteenth and Fifteenth Amendments, has both a purpose and effect prong.¹⁴ The Supreme Court made it clear as early as 1975 in *City of Richmond v. United States* (422 U.S. 358) that assessment of purpose under section 5 was to follow the constitutional standard. “An official action, whether annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute” (*City of Richmond v. U.S.*, 422 U.S. 358, 378 [1975]).¹⁵ Even justices who opposed a strong Voting Rights Act seemed to agree: “it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation” (*City of Rome v. United States*, 446 U.S. 156, 210). That was the approach consistently followed by section 5 courts in the District of Columbia—until the Bossier Parish litigation in the 1990s.¹⁶

When the Beer majority redefined the section 5 effect standard in 1976 it coined a term—retrogression—that does not appear in the text of the statute at all and seems contrary to congressional intent (Katz 2001, 1179). The Court relied for its view of legislative history on a passage from the 1975 House report on extension

of the Voting Rights Act, which in turn simply reprinted a characterization of section 5 from a little-known 1972 oversight committee report.¹⁷ The oversight report was based on detailed consideration of the administration and enforcement of the VRA in Mississippi during 1971, when twenty-six counties in Mississippi undertook to reregister voters, and the subcommittee cautioned that “the observations and conclusions contained within this report are based upon *and limited to that study*” (U.S. Congress 1972, iii, emphasis added). To us, this appears a slim basis for an assessment of legislative intent in 1965, or later. Neither this 1972 subcommittee nor any congressional committee in 1975 ever made a systematic investigation of the legislative history of section 5.¹⁸ Nevertheless, problematic voting changes often could not satisfy the retrogression standard, especially in the early years.

THE RESEARCH DESIGN

To assess the legal basis asserted for objections by the Department of Justice, we examined the 996 letters interposing objections to voting changes before Bossier II and the forty-one objection letters since that critical decision.¹⁹ Where a single letter included objections to changes affecting more than one governing body (both school board and county commission in the same jurisdiction, for example, or both state house and state senate redistricting plans), we have treated this as two objections. On the other hand, if a letter itemized objections to several different features of a proposed change (such as objections to at-large elections, a numbered post requirement, staggered terms, and a majority vote requirement), we treated this as a single objection where only a single governing body was involved. To simplify the analysis we divided voting changes into five groups: ballot access; at-large elections and multimember districts; enhancing devices; redistrictings; annexations and consolidations (see table 2.1 below).²⁰

We did not code an objection as one based on purpose unless the letter cited at least some specific evidence of the sort set forth by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corporation* (429 U.S. 252), such as the historical background, the sequence of events leading to the decision, the views of decision-makers on related issues, whether the procedures followed were consistent with usual practice, and the likely impact of the decision. (*Arlington Heights*, 265–66). Where the letter referred to the exclusion of minority group members from the decision-making process, the refusal to accommodate requests from the minority community, the awareness by decision makers that the adopted change would have a racially discriminatory effect, the departure from standard decision-making procedures or criteria, or the use of pretextual arguments to justify the change, we took that as evidence that the objection was based on purpose (Posner 1998, 100–01).²¹ This was especially clear where the letter indicated reliance on court decisions based in part on intent.²²

In order to have a consistent standard for the entire period, we coded objections as based on retrogression when the Beer definition was satisfied, both before and after the Supreme Court decision in that case.²³ Where the letter made clear that

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the objection was based on the change's discriminatory effect—before Beer—but the effect did not appear retrogressive, we coded it as simply an effect objection. In either case, assessing changes with the potential for diluting minority voting strength required the Voting section to determine whether the jurisdiction's elections revealed a pattern of racially polarized voting. Where the attorney general interposed objections, we assume the decision was based on a finding of racial bloc voting (recall that we are not assessing the accuracy of the department's fact finding but rather the legal basis for the objection). For example, all changes from single member districts to at-large elections, from straight at-large elections to a numbered place or residency district requirement, from a plurality rule to a majority vote requirement, and from concurrent to staggered terms would necessarily be retrogressive in effect, if objectionable. Where the department objected to annexations, deannexations, or consolidations that reduced the city's minority population significantly, we classified the objections as retrogressive, recognizing however that such changes could subsequently be precleared where accompanied by a fairly drawn district election plan (28 C.F.R. sec. 51.61(c), following *City of Richmond v. United States*).

In the 1980s, after Congress revised section 2 of the act to create a statutory results test, the department revised its guidelines to require objections where the new practice would clearly violate the new results test.²⁴ Where objection letters specifically used language referring to a “clear violation of section 2,” we identified this as a third type of section 5 effects test.²⁵ The department's letter often provided evidence of racial purpose as well as retrogressive effect or a clear violation of section 2; where that was true, we coded the objection as having two legal bases (both purpose and effect).

On occasion, voting changes were found objectionable because they would violate the minority language protections of the act (28 C.F.R. sec. 51.55(a)). Finally, some objections were based on the failure of the submitting authority to provide the information necessary to determine whether the change was entitled to preclearance. These were considered technical objections, and the change was often precleared once the jurisdiction supplied the necessary evidence (28 C.F.R. secs. 51.40, and 51.52(c)).

THE CHANGING LEGAL BASIS OF OBJECTIONS

To grasp the larger patterns at work in the department's objection decisions, a few simple quantitative observations are necessary. Table 2.1 summarizes the types of voting changes to which objections have been interposed, by decade.²⁶ During the 1970s, at-large elections and enhancing devices together were denied preclearance 292 times, 59 percent of all objectionable changes, but only 86 redistricting plans (17 percent) were the subject of objections (see table 2.1). By the 1980s, the picture presented by table 2.1 is more mixed: the department interposed objections to 150 at-large election plans and enhancing devices (35 percent of objectionable changes) and denied preclearance to 165 redistricting plans (38 percent). In the 1990s, at-large elections and enhancing devices were the subject of objections only

TABLE 2.1 / Change Types to Which Objections Were Interposed

Change Type	1970s	Percentage	1980s	Percentage	1990s	Percentage	Totals
Annexations	34	7%	47	11%	24	6%	105
At-large	110	22	57	13	31	8	198
Enhancing devices	182	37	93	22	73	18	348
Districting	86	17	165	38	209	52	460
Ballot access	77	15	64	15	56	14	197
Other changes	9	2	5	1	9	2	23
Totals	498	100	431	100	402	100	1331

Source: McCrary, Seaman, and Valelly (2006). Reprinted with permission.

Note: In this and the following tables, the column headed "1970s" is actually the period 1968–1979, but few objections were interposed until 1970. The number of change types to which objections were interposed is greater than the total number of objections, because numerous objection decisions affected two or more change types.

104 times, 26 percent of objectionable changes, but the department denied preclearance to a striking 209 redistricting plans (52 percent)—over half of all changes to which objections were interposed (see table 2.1). The increasing proportion of redistricting objections was, to some extent, a direct consequence of the decline in the number of at-large systems resulting from earlier departmental objections.

The most striking characteristic of our findings regarding the legal basis of the department's decisions to object (see table 2.2) is the consistent increase over time of objections based on the purpose prong of section 5, and the consistent decline of objections based on retrogression. During the 1970s the department rarely cited intent in its objection letters. We identified only nine objections (just 2 percent) as based entirely on purpose, and only twenty-two more (6 percent) were based on a combination of intent and retrogressive effect. The vast majority of the objections (297, or 77 percent) were based on retrogression.²⁷

By the 1980s, eighty-three objections (25 percent) were based entirely on the intent requirement, and another seventy-three (22 percent) were seen as both retrogressive and purposefully discriminatory. Only 146 (44 percent) relied on the retrogression standard alone. A new basis for objecting was available in the 1980s, when it was possible to object because the proposed change presented a clear violation of the new section 2 results test. In our judgment, however, the department only interposed two objections (1 percent) on this basis alone in the 1980s, and only seventy-three letters (22 percent) cited both purpose and section 2.

In the 1990s, fully 151 objections (43 percent) were based on purpose alone. In contrast, retrogression alone was the basis for only seventy-three objections (21 percent), and only one relied entirely on section 2. Another sixty-seven objections (19 percent) relied on a combination of purpose and retrogression, and forty-one (12 percent) on both purpose and the need to comply with section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade. In contrast, a determination of retrogressive effect was involved in only 40 percent of objections in the 1990s and section 2 in only 14 percent.

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TABLE 2.2 / Legal Bases for Objection Decisions

Legal Bases	1970s	Percentage	1980s	Percentage	1990s	Percentage	Totals
<i>Exclusive categories</i>							
Intent	9	2%	83	25%	151	43%	243
Dilution	34	9	—	—	—	—	34
Retrogression	297	77	146	44	73	21	516
Technical	17	4	15	5	1	0	33
Section 2	—	—	2	1	6	2	8
Minority Languages	2	1	2	1	5	1	9
<i>Combined categories</i>							
Intent, retrogression	22	6	73	22	67	19	162
Intent, dilution	5	1	—	—	—	—	5
Intent, section 2	—	—	6	2	41	12	47
Other	—	—	3	1	5	1	8
<i>Totals</i>	386	100	330	100	349	100	1065

Source: McCrary, Seaman, and Valelly (2006). Reprinted with permission.

Looking just at objections to redistricting plans, we observe similar patterns (see table 2.3). Objections based on purpose alone increased from seven (11 percent) in the 1970s to seventy-five (44 percent) during the next decade and 112 (58 percent) in the 1990s. The intent prong, in combination with retrogression, was involved in only five redistricting objections in the 1970s, but increased to forty (24 percent) in the 1980s, sagging a bit to thirty-three redistricting objections (16 percent) in the 1990s. Although inconsequential in the 1980s, the combination of intent and section 2 concerns provided the basis for twenty-seven objections (14 percent of redistricting objections) in the 1990s.

The principal difference between redistricting objections and objections as a whole was that a substantially lower proportion of redistricting objections were based on retrogression than was case for objections as a whole. In the 1970s, only thirty-seven redistricting plans (40 percent) were retrogressive (see table 2.3), compared with 297 (77 percent) for all objections (see table 2.2). In the 1980s, thirty-five redistricting plans were rejected on retrogression grounds (23 percent), but retrogression was the basis for 146 objections (44 percent) for all change types (see tables 2.2 and 2.3). In the 1990s retrogression provided the sole basis for only twenty redistricting objections (only 10 percent), but 73 (21 percent) for all change types (see tables 2.2 and 2.3).

These results make clear that the likely effect of striking down the department's authority to object to voting changes when they present a clear violation of section 2 (see *Reno v. Bossier Parish School Board* 1997 [Bossier I]) was inconsequential. On the other hand, the effect of redefining purpose under section 5 as extending only so far as an "intent to retrogress" (see Bossier II) was to reduce the potential number of objections substantially from the level found in the 1990s.

TABLE 2.3 / Legal Bases for Objection Decisions, Redistrictings

Legal Bases	1970s	Percentage	1980s	Percentage	1990s	Percentage	Totals
<i>Exclusive categories</i>							
Intent	7	11%	75	46%	122	58%	204
Dilution	23	27	—	—	—	—	23
Retrogression	37	40	35	21	20	10	92
Technical	10	12	9	5	1	0	20
Section 2	—	—	1	1	1	0	2
<i>Combined categories</i>							
Intent, retrogression	5	7	40	24	34	16	79
Intent, dilution	2	2	—	—	—	—	2
Intent, section 2	—	—	4	2	30	14	34
Other	2	2	—	—	1	0	3
<i>Totals</i>	86	101	164	99	209	98	459

Source: McCrary, Seaman, and Valelly (2006). Reprinted with permission.

Note: Totals do not always equal 100 percent, due to rounding.

THE PATTERN OF OBJECTIONS AFTER BOSSIER II

The impact of the Supreme Court's decision in *Bossier II* was dramatic, as measured by the number of objections interposed by the department in its wake. Since the Court's decision of January 24, 2000, the department has interposed only forty-one objections, compared with 250 during a comparable period a decade earlier—between January 26, 1990, and June 25, 1994. This is not to say that there would have been approximately 250 objections after January 2000, had *Bossier II* not eliminated the long-standing section 5 purpose standard. Years before *Bossier II*, the number of objections dropped precipitately after the Supreme Court's criticisms of the department's section 5 policy beginning with *Shaw v. Reno* (509 U.S. 630) and continuing through *Miller v. Johnson* (515 U.S. 900).²⁸ Between 1995 and 1999, the department objected to a total of only forty-six changes, fewer than in 1994 alone (49), and substantially fewer than in each of the preceding three years (seventy-four in 1991, seventy-eight in 1992, and sixty-seven in 1993). It is plausible to view that drop in objections in part as the department's adjustment to changes—changes it had not anticipated—in section 5 case law. That said, the gap between forty and 250 is substantial, and likely cannot be explained by this factor alone.²⁹

Virtually all objections after *Bossier II* were based on a finding of retrogressive effect; at most two of the forty-one objections were based on the elusive concept of retrogressive intent. One of the two objections based on retrogressive intent involved a retrogressive policy of selective annexation in the town of North, South Carolina. Although the objectionable annexation would have added only two white people to the town's voting age population, there was evidence that

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TABLE 2.4 / Legal Bases for Objections since Bossier II

Change Type	Retrogressive Intent	Percentage	Retrogressive Effect	Percentage	Both	Percentage	Totals
Annexations	1	50%	1	4%	1	8%	3
At-large	0		2	7	1	8	3
Enhancing devices	0		6	21	0		6
Districting	1	50	15	54	10	77	26
Other	0		4	14	1	8	5
<i>Totals</i>	2	100	28	100	13	101	43

Source: McCrary, Seaman, and Valelly (2006). Reprinted with permission.

Note: Totals do not always equal 100 percent, due to rounding.

a large number of black persons living just outside the town's borders had unsuccessfully sought annexation. Granting the requested annexation would have swung the town from a white to a black population majority. Town officials had routinely assisted whites in complying with annexation requirements but made no effort to disseminate information about annexation procedures to nearby black applicants. "The test for determining whether or not a jurisdiction made racially selective annexations," wrote the department, "is whether the annexation policies and standards applied to white areas are different than those applied to minority areas," and the town failed that test (Objection Letter to City of North, September 16, 2003).

The other objection based only on retrogressive intent involved a redistricting plan for Cumberland County, Virginia. There was a small reduction in the black percentage of the voting age population in the county's one black-majority district—but the change was only from 55.7 to 55.2 percent—leaving the district still arguably viable for minority-preferred candidates. However, the county apparently went to great lengths to reduce the black proportion in the district because, as the department put it, "given the demographics in the area, it was virtually impossible to devise an illustrative plan which did not increase the district's black population percentage." The areas moved out of the old district were, moreover, those black neighborhoods "from which the black-preferred candidate in District 3 drew substantial support in the 1995 and 1999 elections," leading the department to conclude that the plan reflected a retrogressive intent, if not effect (Objection Letter to Cumberland County, Virginia, July 9, 2002).³⁰

Most objections involved straightforward cases of retrogression. In roughly a third of the forty-one objections in table 2.4 the department also concluded, following an Arlington Heights analysis, that the submitting jurisdiction intended to make matters worse for minority voters. Of course, in those instances the change would not have been legally enforceable even without the purpose finding.

CONCLUSION

Because *Bossier II* was the most transformative decision regarding section 5 of the Voting Rights Act since the 1976 opinion in *Beer v. United States*, the story we have told in the preceding pages focuses on its impact on enforcement of the preclearance requirement by the Department of Justice. We examined in some detail the legal basis on which the Department of Justice objected to voting changes of all types, and provided a systematic quantitative analysis of how the legal bases for objections evolved over time.

Our principal finding was that by the 1990s, the purpose prong of section 5 had become the dominant legal basis for objections.³¹ As a result, the jurisprudential change likely to have the greatest impact on the incidence of objections by the late 1990s was to eliminate the purpose prong of section 5. That is, in effect, what the majority opinion in *Bossier II* accomplished. By overturning the long-standing view that the purpose standard under section 5 was identical to the purpose test in a Fourteenth Amendment challenge, in favor of the view that under section 5 the purpose test was limited to whether the jurisdiction had a retrogressive intent—a view dismissed by the Supreme Court as recently as 1987—the majority in *Bossier II* guaranteed that the number of objections would be very substantially reduced.

When Congress turns its attention to deciding the future of section 5, which is set to expire in 2007 if not extended, there will doubtless be calls for amendments to narrow (or increase) its scope, to narrow (or increase) its geographical coverage, and the like. Whatever changes Congress makes should, of course, be designed in light of the evidence as to the current threats facing minority voters. We believe there can be no more important change for the cause of minority voting rights than to restore the traditional purpose requirement that guided enforcement of the preclearance requirement for the quarter century preceding *Bossier II*. The Court's decision in that case turned in many respects on what its author, Justice Antonin Scalia, saw as the garbled syntax of section 5—syntax that had left the Supreme Court untroubled for thirty-five years. It does not seem too much to ask Congress to revise the provision's language so as to make clear that the purpose standard under section 5 is identical to the way in which discriminatory purpose is assessed in Fourteenth Amendment cases.

APPENDIX: STATUTES AND REGULATIONS

28 C.F.R. sec. 51.19 (1971)

28 C.F.R., pt. 51 (2004)

42 U.S.C. sec. 1973c

52 Fed. Reg. 486 (Jan. 6, 1987)

Objection Letter to City of Charleston, Charleston County, South Carolina (Oct. 12, 2001)

Objection Letter to City of North, Orangeburg County, South Carolina (Sept. 16, 2003)

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Objection Letter to Cumberland County, Virginia (July 9, 2002)

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 Fed. Reg. 18,186 (Sept. 10, 1971).

Revision of Procedures for Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987).

We are grateful for the advice of friends who have read and commented on earlier drafts: Ted Arrington, Joaquin Avila, Bob Berman, Jim Blacksher, Chris Coates, Richard Dellheim, Anita Earls; Julie Fernandes, Heather Gerken, Jon Greenbaum, Gerry Hebert, Ellen Katz, Morgan Kousser, Laughlin McDonald, Steve Mulroy, Spencer Overton, Steve Pershing, Rick Pildes, Mike Pitts, Gaye Tenoso, and Brenda Wright. We are, however, responsible for any errors that remain.

NOTES

1. This is clear in the trial court decision in *Beer v. United States* (374 F.Supp. 363, 379), relying on *Allen v. State Board of Elections* (393 U.S. 544, 548, 556), and *South Carolina v. Katzenbach* (383 U.S. 301, 308–09). In an earlier section 5 decision, the Court had observed that “Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims* . . . [to] protect Negroes against a dilution of their voting power” (*Perkins v. Matthews*, 400 U.S. 379, 390). Note that we focus on the *definition* of the term *effect* in constitutional cases. We do not address here the question of whether courts were required prior to 1976 to make a finding of discriminatory intent in order to strike down an election practice as unconstitutional.
2. Even so, the Court in *Beer* recognized that the concept of purpose was to be defined the same way under both section 5 of the act and the Constitution. The purpose of the plan was not among the issues presented to the Supreme Court by the parties in *Beer*, but the Court observed that a change motivated by racially discriminatory purpose was not entitled to preclearance: “an ameliorative new legislative apportionment cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*” [emphasis added]. The analysis is developed at length in McCrary, Seaman, and Valelly (2006), from which this chapter is adapted.
3. The Court’s initial opinion, *Reno v. Bossier Parish School Board*, 520 U.S. 471—*Bossier I*—decided a related issue, but remanded to the lower court certain questions regarding the purpose prong of section 5, which were ultimately resolved in *Bossier II*.
4. The notion that purpose under section 5 was limited to retrogressive intent was first proposed in a Supreme Court opinion—in dissent—in *City of Pleasant Grove v. United States* (479 U.S. 462, 474). This view only received the support of three justices. In fact, the author of *Bossier II*, Justice Antonin Scalia, voted with the Pleasant Grove majority to reject this definition.

5. Ellen Katz (2001) provides a careful analysis of the Court's Bossier II decision (see also Beverly 2000). Less illuminating are Charlotte Harper (2000), Lindsay Erickson (2001), and David Harvey (2001).
6. Two resourceful studies of section 5 objection policy, Hiroshi Motomura (1983) and Mark Posner (1998), have previously utilized these letters as a major resource. Neither, however, have undertaken a comprehensive quantitative analysis of the legal basis asserted by the Department for its decisions.
7. Memoranda that present the factual evidence and legal basis underlying each objection, the more appropriate analogue to formal court opinions, are restricted internal documents. In the course of his official responsibilities, the senior author has examined many memoranda recommending objections. Because it is important for any social science analysis to be replicable, and because these memoranda are internal documents of the Department of Justice, we have not relied on these memoranda in our analysis.
8. The Department of Justice has at the time of this writing taken no position regarding revision of the preclearance requirement.
9. Four cases, three from Mississippi and one from Virginia, were consolidated in *Allen*. The voting changes at issue included shifts from district to at-large elections, a switch from elected to appointed school superintendents, and restrictions on independent candidates. The Mississippi laws at issue in *Allen* were racially discriminatory in both intent and effect: "Clearly the Court could not stand by while southern whites in covered states—states with dirty hands on questions of race—altered electoral rules to buttress white hegemony" (Thernstrom 1987, 4).
10. The Court based its decision in *Allen* on its reasoning in the Alabama reapportionment case *Reynolds v. Sims* (377 U.S. 533, 555), for the proposition that was at the heart of the Court's expansive interpretation of the Voting Rights Act: "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" (*Allen v. State Board of Elections*, 566; McCrary 2003, 687–89).
11. The responsibility to act as a surrogate for the D.C. court, 28 C.F.R. sec. 51.52(a), was set forth in the department's original Section 5 guidelines, 28 C.F.R. sec. 51.19 (1971).
12. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 Fed. Reg. 18, 186. The guidelines, which have been revised several times over the years, are found at 28 C.F.R. pt. 51. The Supreme Court found the regulations "wholly reasonable and consistent with the Act" (*Georgia v. United States*, 411 U.S. 526, 541). On the development of the procedures for enforcing section 5, see Howard Ball (1982, 66–73, 91–93) and Steven Lawson (1985, 162–78).
13. "Lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not'" (*Hicks v. Miranda*, 422 U.S. 332, 344). "A summary affirmance by the Supreme Court has binding precedential effect" (*Picou v. Gillum*, 813 F.2d 1121). On the other hand, the precedential value of a summary affirmance has distinct limits: "We have often recognized that the precedential value of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions'" (*Anderson v. Celebrezze* 1983, 786, n. 5). Additionally, "because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below [but does] prevent

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- lower courts from coming to conclusions on the precise issues presented and necessarily decided by those actions” (Mandel v. Bradley, 432 U.S. 173, 176).
14. We use the terms *purpose* and *intent*—and the terms *result* and *effect*—interchangeably here.
 15. The Court took the same view in Johnson v. De Grandy(512 U.S. 997, 1019), City of Pleasant Grove v. United States (479 U.S. 462, 469, 471 n. 11, 472), and City of Port Arthur v. United States(459 U.S. 159, 168).
 16. “The prohibited ‘purpose’ of section 5 may be described as the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection” (Mississippi v. United States, 490 F.Supp. 569, 583). “Simply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of discriminatory purpose”(Busbee v. Smith, 549 F.Supp. 494, 516–17).
 17. Compare H. Rep. No. 94–106 (U.S. House of Representatives 1975, 60; U.S. Congress 1975) with U.S. Congress (1972, 14), hereafter 1972 Oversight Report.
 18. Bossier II compounds this inventive but problematic reading of congressional intent in Beer by reinterpreting the purpose prong of section 5 to mean no more than retrogressive intent. “Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine Beer, that policy does not demand that recognized error be compounded indefinitely, and the Court’s prior mistake about the meaning of the effects requirement of § 5 should not be expanded by an even more erroneous interpretation of the scope of the section’s purpose prong” (see 362–63). The idea that the 1965 Congress saw the preclearance requirement as limited to retrogression strikes critics as thoroughly counterintuitive. As Justice Breyer pointed out in a separate dissent, there were some jurisdictions in 1965 where “historical discrimination had left the number of black voters at close to zero,” and as a result “retrogression would have proved virtually impossible where § 5 was needed most.” As an example he pointed to Forrest County, Mississippi, where as of 1962 only one percent of the black voting-age population was registered to vote, due to the discriminatory application of the state’s registration requirements. When the Fifth Circuit Court of Appeals enjoined the registrar from discriminatory processing of registration applications, Justice Breyer observed, the state legislature enacted a “good moral character requirement,” which the Supreme Court characterized as “an open invitation to abuse at the hands of voting officials.” To Justice Breyer, “it seems obvious, then, that if Mississippi had enacted its ‘moral character’ requirement in 1966 (after enactment of the Voting Rights Act), a court applying § 5 would have found ‘the purpose . . . of denying or abridging the right to vote on account of race,’ even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the black voting age population of Forrest County to register.” As Justice Breyer wryly noted, this change “would result in *maintaining*—though *not*, in light of the absence of blacks from the Forrest County voting rolls, in *increasing*—white political supremacy,” and thus, under the majority’s reading of the section 5 purpose requirement, an intentionally discriminatory change would have been entitled to preclearance (Bossier II, 374–76).
 19. To identify letters we have relied on the “Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965,” now available on the Voting section

website. The observations in this document are objection letters, which sometimes affect two or even three governing bodies. Our count is 1,074 objections to specific governing bodies from 1965 through 1999. For the period since January 1, 1980, these objections and all other submitted changes are identified in the department's Submission Tracking and Processing System (STAPS). STAPS is a database used to track the thousands of submissions (containing tens of thousands of changes) that the department receives annually, and provides data on each voting change submitted and the type of determination made. For the discussion of legal standards in the current guidelines, see 28 C.F.R. pt. 51, especially 28 C.F.R. secs. 51.52, 51.54–61. These legal standards were first set forth in the Revision of Procedures for Administration of section 5 of the Voting Rights Act of 1965 (52 Fed. Reg. 486). In addition to the department's guidelines, our analysis is guided by the briefs filed by the parties in section 5 declaratory judgment actions, and by section 5 case law.

20. We began with a larger number of initial categories: for example, requirements for numbered places, runoffs, and staggered terms, as well as changes in the size of the governing body and changes from appointive to elective procedures (or vice versa) were all tallied separately, but were eventually collapsed into the category *enhancing devices*. The category *annexations* includes deannexations and consolidations between local jurisdictions. We put into the *ballot access* category all changes related to registration or voting, candidate qualification requirements, or the timing of referenda, primaries, or other elections. The *at-large election* category includes multimember districts, as well as the use of at-large seats, in mixed plans.
21. This is consistent with the department's approach (see 28 C.F.R. sec. 51.57). A special problem arises where there is no clear benchmark for comparing the new plan: "Where at the time of submission . . . there exists no other lawful practice or procedure for use as a benchmark (for example, where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups" (28 C.F.R. sec. 51.54(b)(4)). There is in most objection letters boilerplate language setting forth the legal burden of the jurisdiction to show that a change has neither the purpose nor the effect of discriminating on the basis of race. Because such language was included in the vast majority of letters, regardless of the actual basis for the objection, we do not view such language as substantively significant.
22. Among the most frequently cited were section 5 decisions *Wilkes County v. United States* (450 F. Supp. 1171) and *Busbee v. Smith* (549 F. Supp. 494); a Fourteenth Amendment decision, *Rybicki v. State Board of Elections* (574 F. Supp. 1082); and a section 2 decision, *Garza v. County of Los Angeles* (756 F. Supp. 1298).
23. This approach is in a sense ahistorical, because the department could not have based its decision on retrogression because the retrogression standard did not yet exist. Based on our reading of the letters, we think that before Beer the department understood the effect prong of section 5 to be identical to the constitutional effect standard.

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24. Revision of Procedures for Administration of section 5 of the Voting Rights Act of 1965, 52 Fed.Reg. 486, codified at 28 C.F.R. sec. 51.55(b)(2), barring implementation of any voting change that would constitute “a clear violation of amended section 2.”
25. In some cases, language in the objection letters referencing section 2 appeared to be no more than boilerplate, restating the requirements of 28 C.F.R. sec. 51.55(b)(2). Initially we were inclined to view this language as substantively insignificant, as we did with similar boilerplate references to the section 5 purpose requirement. Discussions with present and former Voting Section attorneys persuaded us, however, that this boilerplate language was used only when the fact that the proposed plan would clearly violate section 2 played at least some role in the decision to object. Consequently, we coded all letters that referred to section 2 of the Act as falling under this category. This approach introduces a bias in favor of finding numerous section 2 objections, but even so we found only a small number (see table 2.2). In *Reno v. Bossier Parish School Board* (520 U.S. 471), the Supreme Court ruled that this was an improper basis for objections.
26. Note that the data presented in table 2.1 are the number of change types to which objections were interposed, and are somewhat more numerous than objection decisions (the data presented in table 2.2).
27. A small number were technical objections, where the jurisdiction failed to supply the information required by the department’s guidelines, making a proper assessment of the change impossible. Although always small in number, technical objections were more common in the 1970s (5 percent) than in the 1980s (4 percent), and disappeared altogether by the 1990s.
28. The Supreme Court invalidated majority-black or majority-Hispanic congressional districts in several Southern states under a new constitutional standard thus far applied only to the creation of majority-minority districts: *Miller v. Johnson* (515 U.S. 900) in Georgia; *Vera v. Bush* (17 U.S. 952) in Texas; *Shaw v. Hunt* (517 U.S. 899) in North Carolina. The same conservative majority also upheld a court-drawn congressional plan in Georgia that decreased the number of black-majority districts from three to one: *Abrams v. Johnson*(521 U.S. 74).
29. Changed political circumstances may also have played a role. Where the Democratic Party controlled the legislature after the 2000 census, for example, the increased role of minority officeholders in the decision-making process in covered jurisdictions, due to earlier successes in enforcing the Voting Rights Act, may also have occasioned fewer objectionable changes. Even in *Georgia v. Ashcroft* (539 U.S. 461). two of the three plans at issue—the congressional and state house plans—were precleared without contest, and the facts in dispute in regard to the state senate plan at trial were quite limited (see Karlan 2004).
30. One objection was based on the concept of future retrogression. The city of Charleston, South Carolina, reduced the number of black-majority districts from six to five (out of twelve in the benchmark plan), but the department recognized that as a result of demographic changes in the city this was necessary to meet one-person, one-vote requirements, and was thus preclearable. One of the city’s black-majority districts, however, had been combined with a new, up-scale residential development on

Daniel Island, part of a neighboring county annexed to the city some years earlier. The city conceded that the development “will have mostly white residents in the future,” so that in a few years the district would no longer afford African-American voters an opportunity to elect candidates of their choice (Objection Letter to City of Charleston 2001).

31. Retrogressive effect was by far the most numerous basis for objections in the 1970s (72 percent) and still numerous in the 1980s (45 percent), but had shrunk to only 20 percent of all objections by the 1990s. Objections based only on the “clear violation of section 2” rule were trivial in number throughout.

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Rethinking Section 5

Guy-Uriel E. Charles and Luis Fuentes-Rohwer

It is hard to believe that section 5 of the Voting Rights Act (VRA) was once the crown jewel in one of the most successful regulatory schemes ever promulgated by Congress.¹ In the twenty or so years that have elapsed since Congress last extended section 5, the provision has lost some of its luster to the point that scholars, politicians, and activists are debating seriously whether it has outlived its usefulness. In this vein, some commentators have argued that Congress should not renew section 5 because voters of color in covered jurisdictions no longer need the assistance of the Department of Justice (DOJ), as they are capable of adequately defending themselves in the political process. Others have argued instead that the preclearance provision is still necessary to guard against the continued blight of racial discrimination.

Though the debate over the continued utility of section 5 is important, unfortunately, this debate is often conducted in an empirical vacuum. The debate over the continued relevance of section 5 is missing a systematic assessment of the actual preclearance practices of the DOJ. In order to understand whether section 5 has outlived its usefulness, we must first understand whether there is anything left for the DOJ to do under section 5.

This chapter undertakes that project. More specifically, we have examined objection letters from the DOJ to all covered jurisdictions. From those letters, we created a database in order to explain how the DOJ understands the provision's purpose; how it administers the provision; the types of changes it refuses to preclear; the number of objections it has interposed; and the factors it considers in rejecting preclearance submissions.

This chapter presents our findings for the state of South Carolina. Our findings are mixed. For the first three decades of the DOJ's administration of section 5 in South Carolina, 1970-1995, the DOJ interposed a fair and steady number of objections to proposed changes. But starting right after 1995, we found a sharp decrease in the number of objections. This decrease appears to support the contention of opponents of renewal that few objectionable matters exist and so section 5 is no longer necessary. However, as we discuss in this chapter, we are unable to conclude that the drop in objections to preclearance requests is due to the fact that there are significantly less objectionable such requests.

We also found that throughout the period covered by our study, the DOJ had a very broad conception of section 5's purpose and its own role in enforcing that purpose. Put simply, DOJ acted more as an agent on behalf of communities of color, viewing its task not always as ferreting out racial discrimination but as enforcing a broad norm of political participation.

OVERVIEW OF DOJ PRECLEARANCE PRACTICES IN SOUTH CAROLINA

Section 5 of the VRA requires those jurisdictions included within its coverage formula to preclear with the U.S. attorney general any change in a "standard, practice, or procedure with respect to voting" (42 U.S.C. sec. 1973(c)). The attorney general may not grant preclearance if the proposed change has the "purpose . . . [or] effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. sec. 1973(c)). A covered jurisdiction may additionally and alternatively file suit in the United States District Court for the District of Columbia seeking judicial preclearance.

Number of Objections by DOJ in South Carolina

The DOJ interposed its first objection to a preclearance request from South Carolina on March 6, 1972. This was to be the first of forty objection letters that the DOJ wrote to South Carolina officials in the 1970s. Table 3.1 contains the number of objections that the DOJ interposed in the four decades that it has administered section 5 of the VRA in South Carolina alone. The numbers in parentheses represent the total number of objection letters, including objection letters to resubmissions and requests for new information.²

As one might expect, the majority of objections occurred in the first two decades after the DOJ assumed the administration of section 5. The objections declined steadily between 1980 and 2000, but dropped sharply in the first decade of the

TABLE 3.1 / Objections, South Carolina

Decade	Number of Objection Letters	Number of Submissions
1970 to 1979	48 (52)	30
1980 to 1989	36 (46)	2,665
1990 to 1999	32 (34)	10,194
2000 to 2004	9 (9)	4,842
Total	125 (141)	22,543

Source: Authors' compilations.

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twenty-first century.³ In fact, as we will discuss, that decline started in the second half of the 1990s. From 1990 to 1995, the DOJ interposed twenty-nine total objections. From 1996 to 2000, the DOJ interposed only five. The question raised by these numbers is whether the decline in objections is a reflection of the submissions themselves and the changed behavior of the covered jurisdictions, or whether other plausible explanations exist.

Submissions to Which DOJ Objected

A review of the types of submissions that elicited objection letters from the DOJ presents a similarly stark picture. Table 3.2 provides a general summary of the types of submissions that the DOJ found objectionable. We classified the objectionable submissions into five major types: objections to voting systems or mechanisms—this includes objections to at-large election systems, numbered posts, staggered terms, and majority vote requirements; objections to proposed submissions that sought to change the form of government from elective office to appointive, partisan to non-partisan, decrease the number of elected officials, and the like; objections to elections procedures—which include, among other things, changes of polling places, residency requirements, registration changes; objections to redistricting submissions; and boundary changes—which includes primarily annexations and de-annexations.

As the table 3.2 reveals, the DOJ’s objections were mainly to the types of preclearance requests in South Carolina that sought changes in the electoral structures such as voting systems and redistricting. For example in the 1970s the DOJ objected seventeen times to submissions that proposed using at-large election systems. Similarly, the DOJ objected to eighteen submissions that proposed using majority vote requirements. Notice also the large percentage of the DOJ’s objections to preclearance requests in South Carolina involved changes in voting systems in the 1970s; about 60 percent of the objections in the 1970s involved voting systems. By contrast only about 25 percent of the objections in the 1980s involved objections to changes in voting systems.

TABLE 3.2 / Types of Objectionable Submissions, South Carolina

Type of Objectionable Submission	Decade				
	1970 to 1979	1980 to 1989	1990 to 1999	2000 to 2005	Total
Voting Systems	50	15	3	2	70
Form of Government	15	13	12	4	44
Procedures	13	22	7	0	42
Redistricting	4	7	17	4	32
Boundaries	2	5	4	2	13
Total	84	62	43	12	201

Source: Authors’ compilations.

Factors the DOJ Considered

To best understand the utility of preclearance, it is important to appreciate the specific factors the DOJ considered when it denied a request for preclearance. From our review of the data, we were immediately struck by the variety of factors that the DOJ took into account in deciding whether a standard or practice has the effect of or purpose of abridging the right to vote on the basis of race.⁴

Table 3.3 lists, in decreasing order of occurrence, the factors that the DOJ considered in its objection letters when it decided to deny requests for preclearance from South Carolina public officials from 1970 and 2005.⁵ The numbers in parentheses represent the number of times that objection letters noted the variable in question as the DOJ decided to deny the request for preclearance. As table 3.3 shows, over those thirty years, the DOJ considered a number of factors including the existence of racial bloc voting, the fact that the submitting authority did not sufficiently take into account the size of a minority population, the use of at-large districts for elections, the use of majority vote requirements, as well as other structural devices that may minimize the political power of minority voters.

For ease of analysis as well as for theoretical purposes, we have categorized the reasons suggested by the DOJ for acting negatively on a preclearance request into two categories. One category consists of objections interposed on the basis of structural features of a proposed change. This category includes eight such types of objections; in particular, these are objections interposed in part on the basis that the proposed change involves an at-large election system, numbered posts, majority vote requirements, staggered terms, single-member districts, multimember districts, residency requirements, and anti-single-shot provisions.

The second category consists of objections interposed on the basis of what we shall call process-based deficiencies with the proposed change. This includes objections based on a failure of the submitting entity to account for a significant minority population, the existence of racial bloc voting, the submitting authority rejected available alternatives, the fact that the submitting authority could not provide a nonracial reason for adopting the proposed change, the submitting

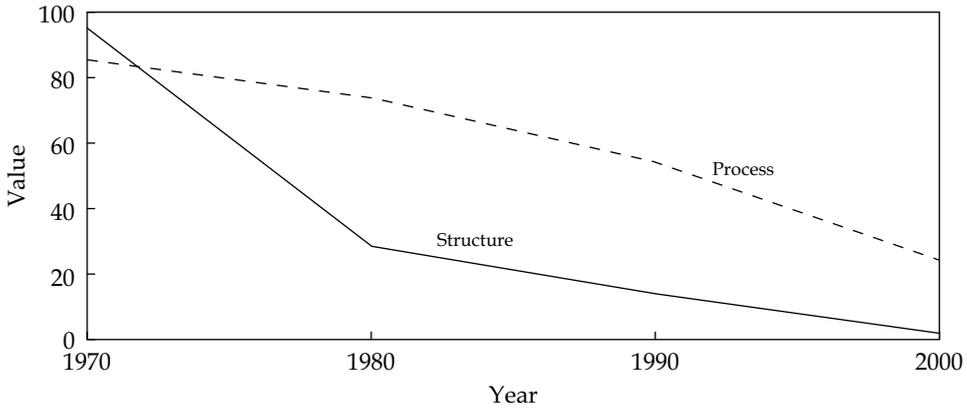
TABLE 3.3 / Top Ten DOJ Reasons for Denying Preclearance—1970 to 2005 South Carolina

Racial bloc voting (65)
Minority population (64)
At-large districts (41)
Majority vote requirement (36)
Limits opportunity to elect candidate of choice (34)
Rejected available alternatives (33)
Absence of nonracial explanations (29)
Opposition by minority communities (29)
Past failure to elect minority candidates (28)
Use of staggered terms (22)

Source: Authors' compilations.

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FIGURE 3.1 / Structural and Process-Based Preclearance Denials, South Carolina



Source: Authors' compilations.

authority was not responsive to minority input or did not seek it, opposition by minority communities, the jurisdiction has a history of not electing minority candidates, and the proposed change limits the opportunity of the relevant minority community to elect its preferred candidate.⁶

Figure 3.1 presents in graphic form the reasons noted by the DOJ for denying preclearance to submissions from South Carolina from 1970 to 2005 using the two categories explained. As the figure shows, there has been a marked decline in the number of times the DOJ has objected to proposed changes because, by the DOJ's own admittance, the proposed change is structural. Between 1970 and 1980, objection letters stating structural concerns for refusing to preclear declined precipitously. By the 1990s these types of objections were about 15 percent of what they were in 1970, likely because states stopped submitting changes that included these structural features. To the extent that the absence of objections or significant decrease in objections reflects success, one can say that the DOJ has been fairly successful in South Carolina in addressing the problems associated with structural changes. As figure 3.1 shows, the DOJ seemed to have paid particular attention to the potential impact of electoral structures on voters of color and it achieved relative success over a very short period.

This interpretation of the data is well supported by the letters themselves. Take for example an objection letter from Assistant Attorney General Drew Days III to a county attorney in South Carolina with respect to the county's proposal to change the system of electing its school board members from a districting system to an at-large system. The assistant attorney general noted:

With respect to the at-large feature of the electoral system we have carefully considered the information you provided as well as election returns for at-large elections in which black persons have competed. We are concerned under Section 5 with whether

this at-large feature dilutes the voting strength of any group of persons on the basis of race or color.

We note that the submitted plan calls for the election of seven School Board members, one from each of the seven councilmanic districts. Blacks comprise 42 percent of the registered voters, at least half of the voting age population, and have the potential to elect three candidates of their choice under the present councilmanic districting system. The injection of an at-large feature, against the background of racial bloc voting that appears to exist in the county, significantly reduces the opportunity of minority voters to select the candidates of their choice.⁷

The DOJ also seemed particularly concerned with the combined impact of structural electoral devices on the political rights of minority voters. Consider the DOJ's first letter objecting to a submission for preclearance from South Carolina, dated March 6, 1972. The letter from Assistant Attorney General David Norman referenced South Carolina's redistricting plans for its state senate districts:

We have given careful consideration to the submitted districting plans (Plan A and Plan B) and the supporting information, as well as to information received from other sources. Insofar as time limitations have allowed, we have studied both plans in detail. As a result, however, we are unable to conclude, as we must under the Voting Rights Act, that either proposed Plan A or Plan B will not have the effect of abridging the right of black citizens of South Carolina to vote on account of race or color.

A careful analysis and review of the demographic facts involved and recent court decisions identify several significant areas of concern. Twelve of the 23 proposed districts under Plan A and 14 of the 20 district in Plan B are multi-member. We note that in these districts candidates must run for numbered posts. It is our understanding also that South Carolina requires a majority of votes to win primary elections. A substantial number of multimember districts in each plan have significant concentrations of black population.

Our analysis of recent federal court decisions dealing with issues of this nature, and to which we feel obligated to give great weight, leaves us unable to conclude, with respect to these plans that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina.⁸

By contrast to the decline in objections based upon structural changes that the submitting authority sought to implement, objections based upon process continue to reflect a source of concern. Figure 3.1 also tracks the number of times that the DOJ expressed process-based concerns for interposing an objection to a proposed change. As the figure also demonstrates, though these types of objections have decreased steadily, they have not disappeared. One suspects that structural changes are easier for the DOJ to police. Conversely, process-based factors are more manipulable by the state and more difficult for the DOJ to determine their impact on the voting rights of minorities.

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These process-based factors are also more difficult for states to resolve satisfactorily. Covered jurisdictions can address the DOJ's concerns with the impact of electoral structures on the electoral prospects of minority voters by changing structures—for example, getting rid of at-large districts. But it is less easy for covered jurisdictions, for example, to respond to the objection that covered jurisdictions are not adequately responsive to the input of minority voters. Who among the community must be responded to?⁹ Assume that the relevant individuals are identified, should their views be outcome-determinative? Should their views be determinative all of the time or only some of the time? It is not surprising that these process-based factors are recurring concerns and difficult to resolve definitively.

Local Governments as Culprits

Last, the objection letters also identify which level of government was the primary violator of section 5. Commentators often focus on state legislatures as the primary violators of section 5. But our study of South Carolina indicated otherwise. Table 3.4 identifies the level of government responsible for implementing a proposed change and the number of objections against each level.

As table 3.4 shows, most of the objections were interposed against proposed changes submitted at the county and city level. The table underscores the importance of paying attention to how voters of color interact with local government officials (see also Pitts 2005, noting the need to pay attention to the behavior of local officials in the preclearance debate). It may not suffice to know how many elected officials of color there are in the legislature. One must also pay attention to the composition of school boards and city and county offices. These are the locus of significant political power, particularly in the South.

IS SECTION 5 STILL NECESSARY? TWO MODELS

In table 3.1, we chronicled the number of objections the DOJ interposed to preclearance submissions in South Carolina between 1972 and 2004. One of the remarkable observations from table 3.1 is the drop in objections interposed by the

Table 3.4 / Objections by Level of Government, South Carolina

	1970 to 1979	1980 to 1989	1990 to 1999	2000 to 2004	Total
State	19	15	7	4	45
County	13	11	8	1	33
City	19	18	17	4	58
School district	1	2	2	0	5
Total	52	46	34	9	141

Source: Authors' compilations.

DOJ, particularly from 2000 to 2004, the last decade of DOJ supervision. In view of the sharp decline in the number of objections interposed by the DOJ, one could tell a plausible story of section 5's obsolescence. But that story might be too facile. Whether one concludes that section 5 has outlived its purpose depends in great part on one's understanding of the purpose of section 5.

For analytical purposes, consider two models. One, perhaps the dominant one, understands section 5's purpose as eradicating, to the extent possible, racial discrimination from the political process. We call this the negative model of racial discrimination. Here section 5 provides a negative right—to borrow from Isaiah Berlin—to be free from racial discrimination in the political process.

A second and alternative model understands section 5's purpose as reflecting a normative commitment to political participation by voters of color notwithstanding the existence of racial discrimination in the political process, *vel non*. We call this the positive model of political participation. Here section 5 provides a positive right; a right to consequential autonomy by voters of color in the political process. This takes as its starting point the importance of political integration, equality, involvement by citizens of color in the political process. It is not motivated by racial discrimination, but the fact of inequality or lack of participation itself regardless of the cause.

Racial Discrimination Model

The renewal debate presupposes that the only purpose of section 5 is to protect against racial discrimination in the political process. Undoubtedly, when Congress first passed the act, Congress was concerned with combating pervasive instances of racial discrimination as commonly understood. This view is amply supported by the legislative history of the act. The record in 1965 was replete with evidence that jurisdictions were depriving blacks of the right to vote on account of race. These were "exceptional conditions," the Supreme Court explained in *South Carolina v. Katzenbach* (383 U.S. 301), which "can justify legislative measures not otherwise appropriate" (334).

Chairman Celler opened the House hearings on March 18, 1965, by noting that "the time is here for action. This committee will consider a strong bill that will guarantee to Negroes the inalienable right to vote, and to safeguard that vote as guaranteed by the Constitution" (U.S. House 1965, 1). Moments later, he remarked that "freedom to vote must be made meaningful. The legalisms, stratagems, trickery, and coercion that now stand in the path of the Southern Negro when he seeks to vote must be smashed and banished" (1). He soon repeated this point in connection to the Fifteenth Amendment, "namely, that no one shall be denied the right to vote because of race or color—in any election, be it Federal, State, or local" (2).

Congress examined the Act and its sunset provisions again four years later, in the summer of 1969. And the general story, while markedly improved, was all too familiar. Mrs. Frankie Freeman, a testifying member of the Civil Rights Commission, told the Senate on July 9 that "hostility and resistance to Negro voting have not ended

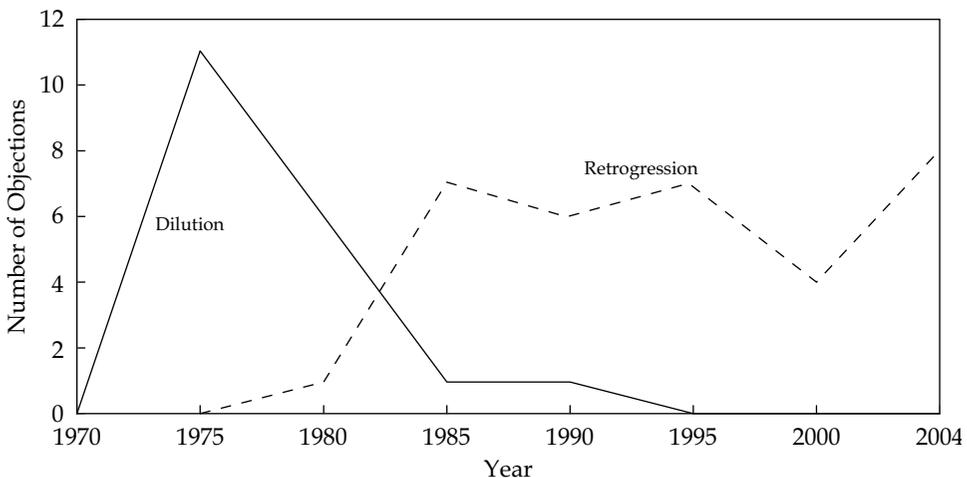
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in the South. Our political participation report documents many reports since the Voting Rights Act of physical and economic intimidation in connection with the voting activities. The incidents continue" (U.S. Senate 1969, 46). Chairman Celler similarly remarked on June 26, during the House hearings, that "the testimony recounts how various devices continue to be used in those States to dilute the newly gained voting strength of Negroes" (U.S. House 1969, 217). In this vein, he explained that "access to the ballot box, without discrimination on the basis of race or color, was the goal of the Voting Rights Act of 1965. It remains our national commitment" (218). On the strength of these further findings, Congress extended the life of the Act for another five years.

In recent months, commentators have mounted their attacks by returning to the original justifications for the Act as the "exceptional conditions" that sustained the enactment and extension of section 5. As these "exceptional conditions" have clearly waned, they argue that the special provisions of the Act must be allowed to expire on their own accord.¹⁰ This argument is supported in part by our analysis of the objection letters. As we discussed earlier, the DOJ interposed fewer objections to electoral structures in the last two decades of its administration of the Act than in the first two decades. If there is nothing for the DOJ to object to, there is no reason for Congress to force covered jurisdictions to bear what some perceive as the tremendous burdens that come with preclearance.

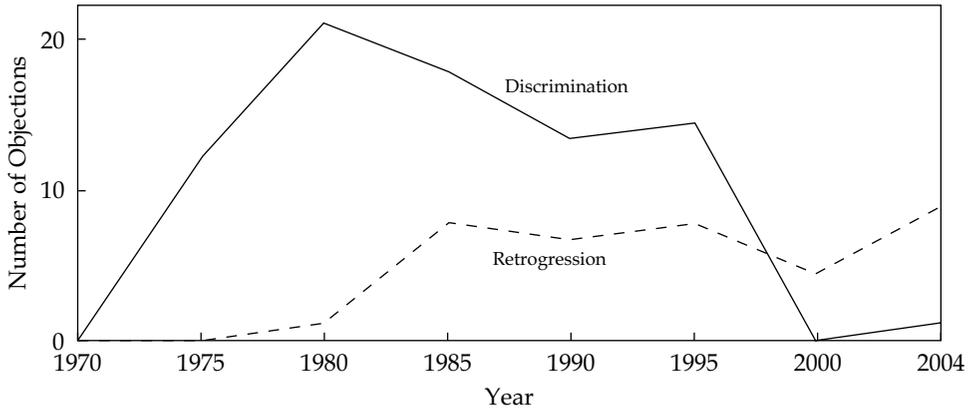
However, we are reluctant to reach the conclusion that the decline in objections is an indication that there is nothing left for the DOJ to vindicate. Two reasons are worth exploring here. First, though there has been a decline in the number of objections, the decline has not been uniform in all categories. From our examination of

FIGURE 3.2 / Objections South Carolina, Dilution and Retrogression



Source: Authors' compilations.

FIGURE 3.3 / Objections South Carolina, Discrimination and Retrogression



Source: Authors' compilations.

the objection letters that the DOJ interposed in South Carolina from 1970 to 2004, we determined that the DOJ used three legal standards to determine whether a proposed change should be precleared. It refused to preclear when the proposed change: diluted the votes of minority voters, was purposefully discriminatory, or was retrogressive. Figure 3.2 represents the number of objections the department interposed to preclearance requests from South Carolina on the grounds that the attorney general could not conclude that the proposed change was dilutive and that the proposed change was retrogressive.

Figure 3.2 shows a sharp decline in the number of DOJ objections from 1975 to 1985 based on the ground that the proposed change was dilutive. The figure also shows a sharp rise in the number of proposed changes objected to on the ground that the change was retrogressive, depicting the effect of the retrogression standard promulgated by the Supreme Court in the 1976 case of *Beer v. United States*. In *Beer*, the Supreme Court concluded that the DOJ can refuse to preclear a proposed change on the ground that the change would have a discriminatory effect only where the change “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise” (141). Figure 3.2 nicely demonstrates the impact of *Beer* and the standard that *Beer* sought to replace.

Figure 3.3 is instructive for two reasons. First, it displays the number of objections made on the grounds that the proposed change was discriminatory and retrogressive. As it also shows, the DOJ objected to a large amount of proposed changes on the ground that they were purposefully discriminatory. This point is remarkable because an important assumption of the regulatory structure of the VRA is that purposefully discriminatory changes would be difficult to detect. Thus, the expectation—not borne out by this data—was that the effects prong of section 5 would do most the work.

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This assumption served as a contextual background for the Court's decision in *Beer*. *Beer* was understood by almost all commentators as narrowing the reach of the DOJ under section 5 both because retrogression is a narrower standard than vote dilution and because the effects prong was expected to do the heavy lifting under section 5. Ironically, to the extent that the Supreme Court in *Beer* attempted to narrow the reach of section 5, the Court may have had the exact opposite effect; retrogression simply became an additional tool in the DOJ's arsenal.

Second, figure 3.3 clearly indicates an unmistakable decline in the number of objections that DOJ interposed. One way of reading figure 3.3 is to suggest that section 5 need not be renewed because there are few violations worth policing. However, the data do not permit us to arrive at that conclusion. Two reasons support our reluctance to do so.

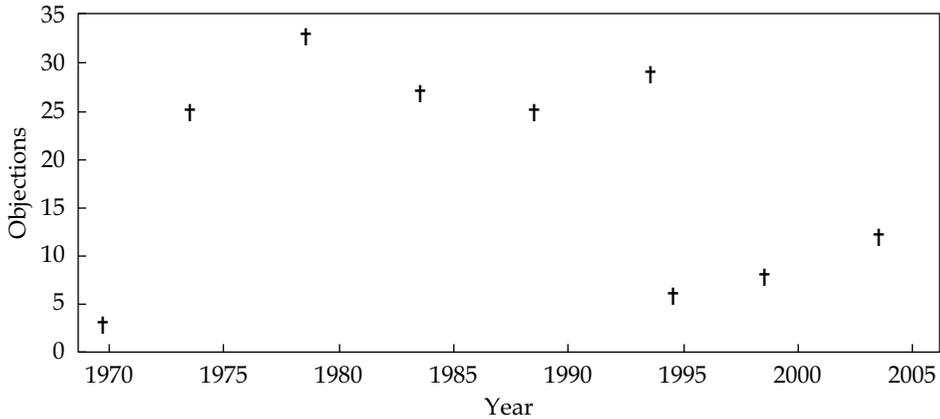
First, notice that notwithstanding the decline in total objections and to objections on the basis of discriminatory purpose in South Carolina, objections on the basis that the proposed change was retrogressive stayed steady and even demonstrated a slight uptick between 2000 and 2004, the time period during which the decline in objections has been greatest. Thus, though there were less objectionable submissions between 2000 and 2004, the DOJ concluded that nine proposed changes from South Carolina were retrogressive. To the extent that the DOJ continues to find some proposed changes retrogressive, the preclearance process continues to have some vitality. Consequently, proposals in favor of permitting section 5 to sunset might be premature.¹¹

Second, the decline in total objections by the DOJ may not be an indication that fewer reasons exist for objecting. Recall that earlier we noted that though the DOJ interposed thirty-four total objections in the 1990s, twenty-six of those were made between 1990 and 1994. Three were made in 1995. Between 1996 and 2000, the DOJ interposed only five objections.

Figure 3.4 demonstrates nicely the dramatic decline in objections after 1995, indicating the number of objections from 1970 to 2004. The x-axis represents the number in intervals from: 1970 to 1974, 1975 to 1979, 1980 to 1984, 1985 to 1989, 1990 to 1994, 1995, 1996 to 1999, and 2000 to 2004. The number of objections was fairly steady between 1970 and 1995.

The question then is what accounts for this precipitous drop. One possibility is that there were fewer objections to be made. This first possibility is supported by the data. As table 3.2 showed, from 1990 to 2004 the DOJ objected the most to submissions involving redistricting. As it turns out, submissions to preclear districting changes follow the same pattern for the 1990s that we observe for objections by the DOJ for the 1990s. If we look at total submissions involving request for redistricting preclearances—that is all covered jurisdictions, not simply South Carolina—the total submission for the 1990s is 3,456.¹² But when you compare the numbers for 1990 to 1994 against those for 1995 to 1999, you notice, not surprisingly, that the number of submissions for redistricting preclearance requests for the first part of the 1990s—2,890 between 1990 and 1994—dwarf the number of submissions of the same type for the second part of the 1990s—566 submissions.¹³

FIGURE 3.4 / Number of Objections, South Carolina



Source: Authors' compilations.

It is probable that a large part—though not all—of the drop can be accounted for by the decline in submissions for requests for redistricting preclearances.

Another possibility is the existence of an intervening variable. Commentators have pointed to the Supreme Court's decisions in the Bossier Parish cases as important explanatory variables for the decline in objections. In *Bossier Parish I* (520 U.S. 471), the Court held that the DOJ cannot refuse to preclear a proposed change under section 5 of the VRA on the ground that the change would violate section 2 of the VRA, which precludes vote dilution on the basis of race. To hold otherwise, the Court stated, would be "to shift the focus of § 5 from nonretrogression to vote dilution" (480). In *Bossier Parish II* (528 U.S. 320), the Court concluded that the DOJ cannot refuse to preclear a proposed change that does not have a retrogressive effect, though it may have a discriminatory (though nonretrogressive) purpose.

Both cases undoubtedly had some impact on the number of objections the DOJ interposed. As figure 3.3 depicts, a fair amount of objections interposed by the DOJ in South Carolina were interposed on the ground that the proposed change had a discriminatory purpose. Removing discriminatory purpose as a basis for objecting to preclearance submissions was certain to have an impact on the absolute number of objections.

However, one should not be so quick to attribute the decline in objections to the Bossier Parish cases. Two reasons are worth mentioning briefly. First, the Court decided *Bossier I* in 1997 and *Bossier II* in 2000. Neither case can account for the drop in objection letters from South Carolina that we see right around 1995.

Notably, figure 3.3 depicts the same pattern as figure 3.4. After 1995, objections on the ground that the proposed change is purposefully discriminatory drop dramatically. This drop occurs four years before the Court held in *Bossier II* that discriminatory purpose cannot be the basis for objecting under section 5.

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Second, as we intimated, though the singular fact of the Court's interpretation of the VRA is sure to have some impact on the DOJ's behavior, the impact may be less than one might suppose. Recall once again figure 3.3 and the Court's unsuccessful attempt in *Beer* to narrow the reach of section 5. This is because, as administrative law scholars remind us, an important determinant of an administrative agency's interpretation of a statute is more than simply a clarification of the underlying legal standard by a higher court: significant variables include the frequency of judicial review and the level of scrutiny of the administrative agency's decisions.

From this perspective, a better candidate is the Court's opinion in *Miller v. Johnson* (515 U.S. 900). In *Miller*, the Supreme Court chastised the DOJ for having a preclearance standard that was too demanding and for engaging in an "insupportable" "policy of maximizing majority-black districts" (924). *Miller* has been read by most observers as a stinging rebuke of the DOJ itself and its preclearance practices (see McDonald 1996, 158). *Miller* represented unprecedented searching scrutiny of the DOJ's preclearance practices and called into question the DOJ's good faith to faithfully interpret the VRA.

If this interpretation of *Miller* is correct, it is clearly possible that the DOJ's failure to object to preclearance requests after 1995 may reflect a skittishness on the part of a department thoroughly chastised by the Court. Again, the point here is not simply that the Court sought to clarify the legal standard, but that, in *Miller* in particular, it went after the DOJ itself.¹⁴

In sum, the dramatic decline in objections by the DOJ can be explained on at least two grounds. First, one could argue that the data clearly indicate that there is very little to object to. Under this view, section 5 clearly has outlived its purpose of making sure that voters of color in covered jurisdictions are free from discrimination.

Second, one could argue that the DOJ was much more restrained in its interpretation of section 5—perhaps, even more restrained than is warranted by the Court's understanding of what section 5 requires—simply to avert further scrutiny by the Court.

Thus, even though the drop in objections from submissions in South Carolina may indicate that there is very little discrimination to protect voters of color from, that conclusion is warranted only where the drop in objections reflects the actual level of objectionable practices and is not an artifact of a self-imposed interpretive constraint by the DOJ.

There is, however, a third option. It could also be that the DOJ was enforcing a different—participatory—model of section 5 that the Court obviously did not share (see Pildes 1996). Starting with *Beer* and followed by *Miller* a decade later, the Court issued a corrective to force the DOJ to enforce what the Court viewed as the correct—discrimination—model of section 5.¹⁵ Whether one believes that section 5 has outlived its usefulness depends in part on which model of section 5 one favors. Similarly, whether one approves of the DOJ's role or of the corrective the Court has applied, depends in great part on which model of section 5 one finds more persuasive. To fully assess the alternative, we now turn to the participatory model.

Participatory Model

In lieu of the discrimination model, one can approach the renewal debate from what we have called a participation model. This views section 5 as making a normative commitment to political participation by voters of color. It does not depend on the existence of discrimination but is concerned with ensuring consequential political involvement by voters of color. Under this model, it is not enough that covered jurisdictions refrain from erecting barriers to political participation by voters; the model also supposes that minority voters can make positive demands on the state. This includes, for example, a requirement that covered jurisdictions would remove barriers to political participation; would be responsive to the needs and concerns of voters, or would enact changes that will make it easier for voters of color to elect their preferred candidates.

There is some evidence in the legislative history, though not an overwhelming amount, in support of the participation model. Although the early legislative history of section 5 supports the discrimination model, Congress moved away in subsequent years, if only modestly so, from that and toward a model of voting rights grounded in a positive commitment to political representation and broad political participation. Congress, that is, worried less as time went on about racial discrimination and far more about “open[ing] the city of hope to all people of all races, because all Americans just must have the right to vote, and we are going to give them that right” (Johnson 1988, 641). We recognize that these views are not independent of one another; in attacking racial discrimination, Congress would concomitantly expand the political community. Racial discrimination mattered, to be sure, but expanding the political community and ensuring substantive political participation for people of color mattered even more.

The 1975 extension debates offer an unenviable window through which the Act and its accomplishments could be examined and ultimately measured. Ten years after passage of the Act, the gains were many and critics could confidently assert that the health of the republic had reached appropriate levels. And they argued exactly that. Senator James Allen complained, for example, that

somewhere along the line, if Congress does not recognize that it cannot continue to legislate based on a presumption on facts that existed in 1964, but which do not exist now, then we are going to reach a situation where even Congress will not feel that it has the power to act on a 1964 situation. (U.S. Senate 1975, 25)

A. F. Sumner, attorney general of Mississippi, similarly contended that “the act has accomplished its purpose” (U.S. Senate 1975, 187). For this reason, “certainly Congress should reexamine its own purpose in continuing to keep a State in harness for another 5 or 10 years or perhaps in perpetuity” (188).

Supporters of extension knew that these arguments must contend with the clear gains in registration and black office holding of the last ten years. Without question, the numbers were impressive, as documented by many witnesses.¹⁶ But they were hardly enough. Representative Edwards argued, for example, that “by any

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standard one wishes to use, the struggle to achieve equal political rights for all of our Nation's citizens is not over" (U.S. Senate 1975, 887). And early during the Senate hearings, Senator Bayh similarly remarked that "as a result of this legislation, much progress has been made towards including our black citizens in the political process, but much remains to be done" (3).

Although the heart of the debate in 1975 was about discrimination, in a very important sense it was also about achieving "full and fair participation in the political process" (U.S. Senate 1975, 8).¹⁷ Arthur Fleming put this point the following way: "The right to vote guaranteed by the 15th amendment is more than the right to be registered, it is also the right to cast an effective ballot, to have the ballot counted, and to have one's vote weighed equally with that of every other citizen of a particular jurisdiction" (74). He continued, in language worth quoting at length:

minority citizens are still vulnerable to overt and covert efforts on the part of whites to prevent them from fully exercising their constitutionally guaranteed right to vote. A key factor contributing to this persistent vulnerability is the continuing political dependence of minorities on whites. Whites retain control of the political process in almost every jurisdiction studied by the Commission, despite the presence of substantial minority populations.

Whites control decisions about who will work as election officials, what offices will be elective and when elections will be held; whether there will be districts for representative bodies and how district lines will be drawn. That is, whites continue to control the procedures that often determine the outcome of elections. (U.S. Senate 1975, 75)

From this perspective, the problem was not merely a problem of registering disenfranchised minority voters, but far more difficult than that: it was a structural problem, a problem of representation and accountability. How to ensure that access to the ballot would translate into real representation and meaningful political power?

There is much support from the objection letters that the DOJ understood its task not simply as protecting black voters from discrimination but also as facilitating their full participation into the political process. Put into strict doctrinal terms, the DOJ was not simply content with making sure that South Carolina did not enact procedures that were retrogressive; it was also concerned that minority voters in South Carolina were free to enjoy maximum political equality through the aegis of the VRA. We now examine two contexts that support the relevance of the participation model to the manner in which the DOJ has interpreted section 5.

THE DOJ'S BROAD CONCEPTION OF ITS ROLE

From our reading of the objection letters, it appeared that in dealing with these various government officials, the DOJ broadly conceived the purpose of section 5. The objection letters reflect a department concerned with protecting broad

political participation by minority citizens in South Carolina. The DOJ appeared to have focused more on removing any and all barriers to full political participation and access and less on overt discrimination.

We present two examples. The first is an objection letter from Assistant Attorney General William Bradford Reynolds to a county attorney with respect to a preclearance submission that would require county employees to resign before running for office:

With regard to the resignation requirement, we note from the 1980 Census data that blacks constitute approximately 39 percent of the population of Richland County. According to information provided by the personnel department of Richland County, blacks constitute approximately 31 percent of the employees of Richland County. In addition, the 1980 Census data and data from the county concerning salaries of county employees lend support to the concerns expressed by some that the resignation requirement will operate as an economic disincentive which will impact more heavily on black potential candidates than on the white potential candidates. This burden will in turn significantly affect black voters in Richland County because it limits the pool of potential candidates likely to be the choice of the black constituency.

An additional concern raised by information received from black and white county residents is that the 1986 change requiring resignation was designed to inhibit potential black candidates. A change cannot be precleared if it is tainted with an invidious racial purpose.

Under the circumstances involved here, I am unable to conclude, as I must under the Voting Rights Act, that these provisions are free of the proscribed purpose and effect.¹⁸

The second example is a 1990 objection letter from Assistant Attorney General John Dunne to South Carolina's assistant attorney general. The letter referenced a submission for a change in the qualifications for probate judges:

At the outset we note that currently the sole qualification for a person to be a candidate for the position of probate judge in South Carolina is that a person be a registered voter. Presently, 26 percent of the registered in the state are black, according to our information. The state now proposes to change those qualifications so that a person must be 21 years of age and either possess a degree from a four-year college or at least four years' experience working in a probate judge's office. According to the 1980 census, there are 232,629 persons who have completed four or more years of college, and of this number only 28,771 (12%) are black. Thus, the four-year college degree requirement would reduce the percentage of black citizens who meet the qualification to run for the office of probate judge by 14 percent. Requiring that persons who wish to run for the office of probate judge demonstrate that they have completed four years of college, therefore, would appear to have a disparate impact on black citizens of the state.

While we recognize the state's interest in establishing reasonable qualifications for those who are to hold office, especially those of the nature here, it cannot do so in a manner which weighs disparately upon its black constituents, absent a convincing

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reason. . . . We are not yet persuaded that the state's legitimate interest cannot be met through other means which do not produce the "undesirable racial effect . . ." of the qualifications proposed.¹⁹

These letters exemplify how broadly the DOJ conceived of its role of administering section 5 and the purpose of the preclearance requirement. A noticeable number of objections were not specifically based on any allegation that the proposed submission was racially discriminatory. The DOJ seemed instead to be concerned that the proposed changes were not enough to further significant political autonomy among black voters.

To be sure, one might argue that this concern is too vague, amorphous, and perhaps even outside of the concededly loose and flexible limits of the statute. But one must underscore here the importance of section 5's burden shifting device. Part of the reason that the DOJ was able to so broadly interpret section 5 is because the section places the burden of proving that a submitted change did not have a discriminatory purpose or effect on the submitting authority. The importance of this burden shifting is evident even in a cursory examination of the objection letters but is also reflected by the number of times the DOJ relied on *Georgia v. United States* (411 U.S. 526), which upheld DOJ regulations that placed the burden of proof on the submitting authority. If the DOJ did not think that the proposed change furthered the political interests of black voters, it simply stated that the submitting authority failed to meet its burden. Consequently, *Georgia v. United States* was the most cited case between 1970 and 1990.

ACTING ON BEHALF OF MINORITY CITIZENS

In examining the objection letters, we were also struck by the DOJ's conception of its role in administering section 5 and its understanding of the purpose of section 5. In many respects, the DOJ acted as advocates interceding on behalf of voters of color or as mediators between voters of color and government officials. The point is well illustrated in an objection letter from Assistant Attorney General Stanley Pottinger to an attorney for the town of McClellanville, South Carolina, in connection with the town's desire to annex two adjacent locales. The objection referenced the existence of "an area of concentrated black population immediately contiguous to the town" that was not included in the preclearance submission:

The information available to us . . . is conflicting with regard to the desire for annexation among the residents of the area of black population adjacent to McClellanville. Information which we have received from town officials would indicate that the majority of the adjacent black residents prefer to remain outside the town's boundaries. But our direct discussion with those residents, and with private citizens who claim familiarity with the desires of those residents, indicate a strong desire for annexation. Moreover, residents of this adjacent black area, who appear to be representative of the majority of the residents involved, have informed

us that town officials have made clear to them that any formal request for annexation of the area would be rejected, primarily because the addition of the residents of the area would serve to dramatically alter the racial composition of the town's present predominantly white population.²⁰

Mr. Pottinger noted that his office had been informed that the mayor of McClellanville would be meeting with black leaders "to more clearly determine the desire of the area's residents for annexation, and to inform them that the necessary steps under state law should be taken by those residents if a desire for annexation is evidenced." He further noted that the DOJ would be open to a request for reconsideration of the objection after the meeting, presumably should the town so desire, if the town provides the minutes of the meeting, "the actions of the residents taken in pursuit of annexation, and the actions and determination of the town officials in response to the efforts of the black residents."²¹

At the very least, the objection letters reveal that the DOJ clearly relied upon leaders and citizens of color for information and a sense of local political realities. Consider another objection letter from the DOJ to South Carolina's assistant attorney general, which referred to a preclearance submission that would abolish an elective county superintendent's office and remit the office's function to the county board of education, an appointive entity:

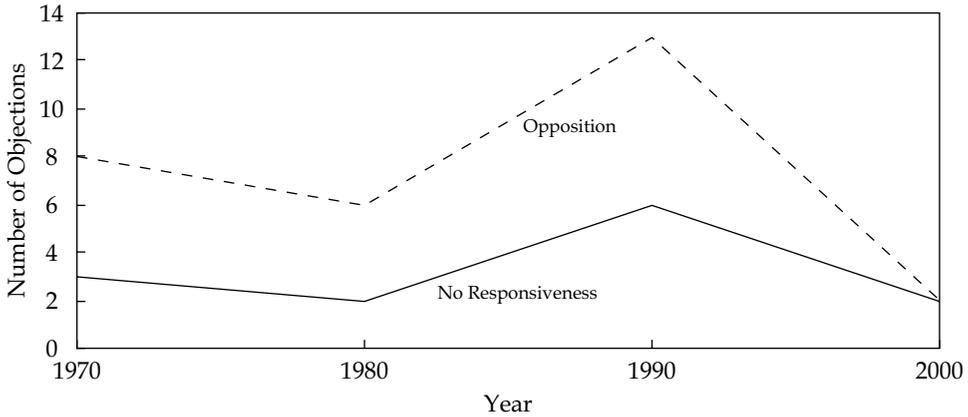
Comments received from black residents of Clarendon County indicate a perception that the abolition of the elective office in conjunction with a potential black majority electorate shows a discriminatory purpose or effect. Moreover, representations have been made to this office that some black citizens of Clarendon County do not agree that this elective office should be abolished and that black candidates would offer for this position had it not been abolished. We have carefully reviewed the justification submitted to satisfy the state's burden of proof that the submitted change does not have the purpose or effect of denying or abridging voting rights on the basis of race. Under all circumstances of this case we are not persuaded and must therefore interpose an objection.²²

The letters provide a strong impression that when black citizens objected to a proposed change, the DOJ appeared to listen. Consider in this vein another objection, from Assistant Attorney General J. Stanley Pottinger to his counterpart in South Carolina, referencing a previous objection in which the DOJ objected to a submission that included staggered terms, residency requirements, and an at-large electoral feature. The DOJ had objected to the staggered terms and residency requirement but not to the at-large feature. Following the previous objection—which failed to object to the at-large feature—Mr. Pottinger wrote the following objection letter:

On September 17, 1974, a delegation of black citizens of Bamberg County visited with representatives of this Division and presented petitions signed by more than 600 persons in opposition to the utilization of the at-large system of election in Bamberg County. Basically, the delegation raised issues as to the validity of our previous presumptions that the at-large voting system, in the context of plurality win

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FIGURE 3.5 / Letters Stating Opposition by and Lack of Responsiveness to Minority Communities, South Carolina



Source: Authors' compilations.

and the ability to single-shot vote, provides blacks a realistic opportunity to elect candidates of their choice in Bamberg County. In this connection, they cite the 1972 municipal elections in Denmark where it is claimed that in the face of such "single-shot" effort by blacks, white candidates withdrew to an extent that the field of candidates was reduced to a point which made any single-shot effort of blacks (a minority of registered voters) ineffective. In addition, we have been advised that voter registration efforts among blacks in the county have been frustrated and that those elected to office have not sought to protect black interest nor to satisfy black needs.

These claims raise serious questions as to which, I am sure you will understand, we are unable to resolve within 60 days allowed the Attorney General to render his final determination under Section 5 . . . Therefore, . . . I must interpose an objection to the at-large feature of the new system of government in addition to those objections previously registered in my letter of September 3, 1974.²³

Figure 3.5 reflects the number of objection letters that explicitly state opposition by black communities or the failure to be responsive to black communities as a consideration for denying preclearance.²⁴

As is clear in figure 3.5, the DOJ has relied on black communities throughout the four decades that it has administered the act in South Carolina. Out of forty-eight objections that the DOJ interposed in the 1970s in South Carolina, eight explicitly stated opposition by communities of color and three mentioned the covered jurisdiction's failure to be sufficiently responsive to African American communities as considerations for interposing an objection. Similarly, out of thirty-two submissions that were denied preclearance in the 1990s, thirteen explicitly noted opposition by

black communities and six remarked that the submitting authority failed to be responsive to the concerns of black communities as a consideration for refusing to preclear a proposed change.

The participation model tries to ensure that voters of color do not always depend on whites—as voters or elected officials—for their political power. To the extent that Congress is interested in pursuing the participation model, it ought to be concerned with the existence of structural features that would advance the political autonomy of voters of color. These structural features would include political structures that maximize the strength of voters of color, the presence of minority candidates at all levels of state government; and the existence of robust political competition in areas with a substantial population of minority voters. Such a framework might take Congress outside not only the jurisdictions currently covered by section 5 but also the issues that have occupied it, thrusting it toward issues of future significance such as ex-felon disenfranchisement, the relevance of voting identification, uniformity in federal ballots, guidelines for redistricting, and alternative voting structures.

CONCLUSION

We have showed that the renewal debate, when viewed from the actual preclearance practices of the DOJ, is slightly more complicated than it might first appear. The DOJ interposed significantly fewer objections than it did in first full decade of section 5 enforcement. Although this dramatic decline certainly indicates a reduced role for the DOJ, it does not permit a conclusion that there is nothing left for the DOJ to do. Moreover, to the extent that Congress is serious about promulgating a broader norm of political participation, Congress should not concentrate on the voting rights issues of the mid-twentieth century but on the voting rights issues of the twenty-first.

NOTES

1. See the testimony of Arthur Flemming, chairman of the U.S. Commission on Civil Rights, in the House hearings of 1975: “Section 5 of the Voting Rights Act . . . has become the centerpiece of the act” (587). See also *Beer v. United States* stating that section 5 is “the heart” of the VRA’s “enforcement mechanism” (425 U.S. 130, 147). See also *Drew Days* (1992).
2. The DOJ did not seem to write objection letters per submission. Submissions contained multiple proposed changes. Sometimes the objection letters responded to the whole submission and sometimes objection letters were written to address each objectionable proposed change.
3. One may be tempted to view the decline in objections as a sign that there were fewer objectionable submissions—and thus an indication of the fact that section 5 is much less necessary today. Although that may indeed be the case—certainly a great deal of progress has been made and that fact should not be downplayed—and, as we shall

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show later, we hesitate to reach that conclusion in light of the nature of the objections that DOJ officials interposed.

4. This is particularly true in the 1970s and 1980s.
5. The DOJ often provided multiple reasons for objection to a proposed change. As a methodological matter, we catalogued all the reasons stated by the DOJ in interposing an objection. We included as a reason any negative statements that the DOJ made or any negative inferences that it drew from the presence of what it viewed as an objectionable factor.
6. Admittedly, these categories are not mutually exclusive and ironclad. There is some relationship between the two categories but it is not anywhere near perfect co-variance. What matters are not fine differences but aggregate distinctions, particularly where the differences are dramatic.
7. Drew S. Days III, Assistant Attorney General, Civil Rights Division, letter to D. A. Early, August 31, 1977 (on file with authors as SC 47).
8. David L. Norman, Assistant Attorney General, Civil Rights Division, letter to Daniel E. McLeod, March 6, 1972 (on file with authors as SC 10).
9. Consider in this vein *Georgia v. Ashcroft* (539 U.S. 461) inferring that support of elected officials of color might be relevant to a regression analysis.
10. See Abigail Thernstrom and Edward Blum, "Do the Right Thing," *Wall Street Journal*, July 15, 2005, p. A10. Some in Congress made similar arguments during the 1975 debates. See Senator Hruska's remarks (U.S. Senate 1975) complaining that the act should not be extended "at a time when the need for such special circumstances and conditions as prevailed 10 years ago, are no longer existent" (123).
11. This does not mean that Congress should not adopt a less costly regulatory measure. The point is that section 5 is doing some work, even if one were to characterize that work as minimal. Moreover, that work has value even if the cost-benefit analysis might justify a less costly regulatory framework.
12. See http://www.usdoj.gov/crt/voting/sec_5/changes.htm.
13. See http://www.usdoj.gov/crt/voting/sec_5/changes_90s.htm.
14. To be clear, our argument is not that the Bossier Parish cases are insignificant. The point is to highlight why Miller might be of greater significance.
15. We do not mean to imply that the DOJ was incorrectly interpreting section 5. The point simply is that there are at least two ways of understanding the statute and the Court, particularly after *Beer*, understood the statute differently than the DOJ did.
16. See, for example, Senate hearings of 1975: the testimony of John Lewis, executive director of voter education project (109); the opening statement of Senator Bayh (3); and the testimony of Senator Scott: "First, the recent dramatic victories were made possible by the continued operation of the act. For example, it is doubtful whether the highly publicized increase in black members of the Alabama Legislature would have occurred if the multimember redistricting, initially attempted, had succeeded" (8). These impressive gains led some critics of the act to ask for its end. According to Mississippi's attorney general, for example:

So it is not a question of whether or not blacks are going to vote for blacks. It is a question, in my opinion, and if I am wrong you can correct me, of whether or not

we are trying to create the way for them to participate in the process. If that is the thing before us, then I say that has been accomplished in Mississippi. It is an accomplished fact. (681)

17. See also the testimony of Arthur Fleming, the chairman of the U.S. Commission on Civil Rights: "We feel that the Voting Rights Act is a symbol of national commitment to the full political participation of all citizens" (U.S. Senate 1975, 73).
18. William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, letter to C. Dennis Aughtry, September 23, 1988 (on file with authors as SC 95).
19. John R. Dunne, Assistant Attorney General, Civil Rights Division, letter to Harvard Jones, Jr., October 15, 1990 (on file with authors as SC 95).
20. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, letter to Philip A. Middleton, May 6, 1974 (on file with authors as SC 20).
21. J. Stanley Pottinger, letter to Philip A. Middleton.
22. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, letter to Mr. Hardwick Stuart, Jr., November 13, 1973 (on file with authors as SC 17).
23. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, letter to Daniel R. McLeod, September 20, 1974 (on file with authors as SC 26).
24. We also coded as failure to seek input from communities of color as a failure to be responsive to communities of color.

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Trends in Minority Representation, 1974 to 2000

David L. Epstein and Sharyn O'Halloran

Following the 2000 Census, Georgia redrew its fifty-six state senate districts to comply with the one-person-one-vote rule. At the time, the assembly and senate both had Democratic majorities. The governor, Roy Barnes, was a Democrat as well, and led the charge to construct a districting plan that could stem the expected Republican tide in the upcoming 2002 elections.

The key to this plan was to “unpack” many of the heavily Democratic districts and distribute loyal Democratic voters to surrounding districts. In particular, black voters were reallocated away from districts with either especially high or low levels of black voting age population (BVAP) to create more districts in the 25 to 40 percent BVAP range, so-called influence districts. This meant that some districts with black populations above 55 percent or 60 percent were brought down close to the 50 percent mark.

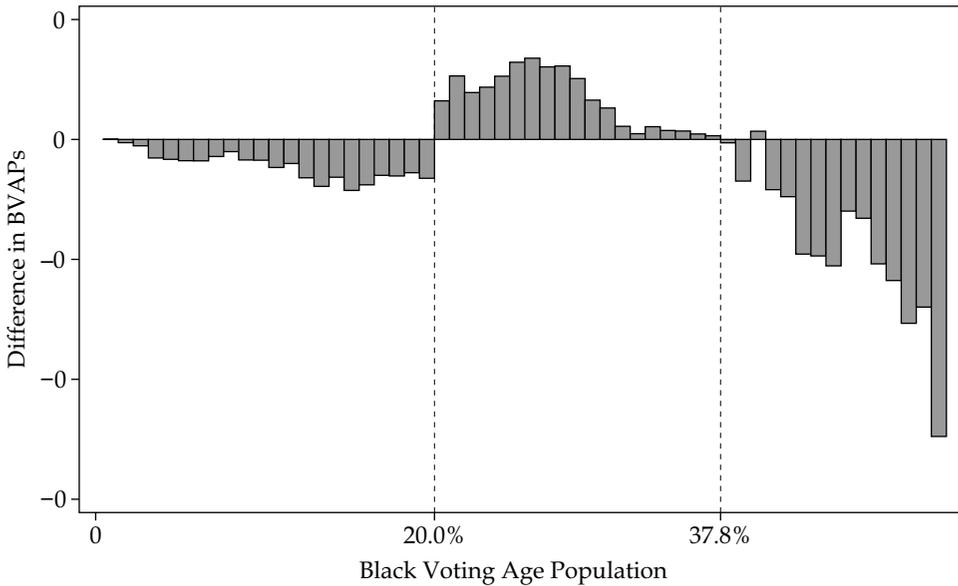
This strategy is illustrated graphically in figure 4.1. To construct this graph, the BVAPs in each district for both the existing baseline plan and the proposed plan were sorted from highest to lowest, and the difference between corresponding entries was calculated. The figure clearly shows the reallocation of black voters away from the extremes of the distribution and toward the center.

The state submitted its plan directly to the D.C. District Court for preclearance, and the Justice Department (DOJ) indicated its intention to interpose objections to Senate districts 2, 12, and 26, whose BVAPs were slated to fall from 60.6 percent, 55.4 percent, and 62.5 percent to 50.3 percent, 50.7 percent, and 50.8 percent, respectively. The state submitted evidence showing that the point of equal opportunity—the level of BVAP at which a minority-preferred candidate has a 50 percent probability of winning—was 44.3 percent, and argued that the redrawn districts should still offer black candidates a healthy chance of gaining office. The DOJ disagreed, arguing that the state had not met its burden of proving the proposed plan non-retrogressive.

The district court agreed with the DOJ and refused to preclear the plan. The Supreme Court eventually overruled in the case *Georgia v. Ashcroft* (539 U.S. 461), ruling that the district court had not taken sufficiently into account the state's avowed objective of increasing substantive representation, even at a possible cost

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FIGURE 4.1 / Changes in Black Voting Population, Proposed Versus Baseline Plan for Georgia Following 2000 Census



Source: Authors' compilations.

to descriptive representation. The Court relied heavily on the testimony of black state legislators, including civil rights leader and U.S. Representative John Lewis, who supported the plan as an attempt to expand Democratic control of state government.¹

The reaction to Ashcroft was swift and heated. Karlan (2004) denounced the decision as a first step towards “gutting” section 5 preclearance. Others claimed that it “greatly weakened the enforcement provisions of Section 5” (Benson 2004). 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” (House Committee on the Judiciary 2005, 6).

Others viewed the decision more favorably. Henry Louis Gates, for example, wrote in the *New York Times* that descriptive 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” (September 23, 2004, A23).

At the heart of the latter set of arguments lies the notion of a tradeoff between substantive and descriptive representation: getting more of one necessarily entails accepting less of the other. This topic has been the subject of previous research: Morgan Kousser (1993) discusses the possibility of such a tradeoff in the context

of influence districts, as does Richard Pildes (1995) in his review of social science research on the changing political landscape in the South. More quantitative studies of the tradeoff include Charles Cameron, David Epstein, and Sharyn O'Halloran (1996) and David Lublin (1997), both of which studies detected the possibility of an emerging tradeoff in their analyses of election and roll call data through the early 1990s.

One of our goals is to expand and update this work, studying patterns of minority electability and congressional voting on minority-supported legislation for the years 1974 to 2000, and the districting plans that maximize substantive and descriptive representation. We also, for the first time, include Hispanic as well as black voters in these calculations, both to see if the patterns emerging for Hispanic representation differ significantly from black representation and to examine the degree of cross-minority support between blacks and Hispanics in elections and in the legislature.

Our results show that up until roughly the mid-1980s few nonminority legislators in the South championed black causes in Congress. As a result, districting schemes that maximized black descriptive representation were identical to those that maximized substantive representation. Over the past two decades, though, these objectives diverged, so that recent increases in the number of blacks elected to Congress have come at the cost of substantive representation.

For Latinos, the story is rather different. It has always been relatively difficult to elect Hispanic representatives, quite possibly due to the gap between total voting age population and citizen voting age population in concentrated Latino districts. On the other hand, white Democratic representatives have been generally supportive of Latino positions on roll call votes, much more so than Republicans. Thus there has always been a tradeoff between Latino descriptive and substantive representation, with the dimensions of this tradeoff changing little over time. The situation is much the same for blacks outside the South: supportive votes from nonminority Democrats have led to tradeoffs between the two types of representation throughout the period.

Finally, we find interesting relationships between issues of black and Latino representation. There remains an almost perfect electoral separation: districts with more black than Hispanic voters rarely elect a Hispanic representative and vice-versa. Further, adding Hispanic voters to a heavily black district increases the probability that a black representative is elected, but adding blacks to a Hispanic district does little to help Hispanic candidates win office.

DESCRIPTIVE REPRESENTATION

We begin with analysis of black and Hispanic electoral opportunity. Our data set consists of all elections to the House of Representatives between 1974 and 2000. For each election held during that period, we recorded the party and race (white, black, Hispanic) of the winning candidate. We also calculated the black voting age population (BVAP) and Hispanic voting age population (HVAP) of the district,

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interpolating between census estimates to impute district demographics. In addition, we coded the region in which the election took place: east, south, or west.²

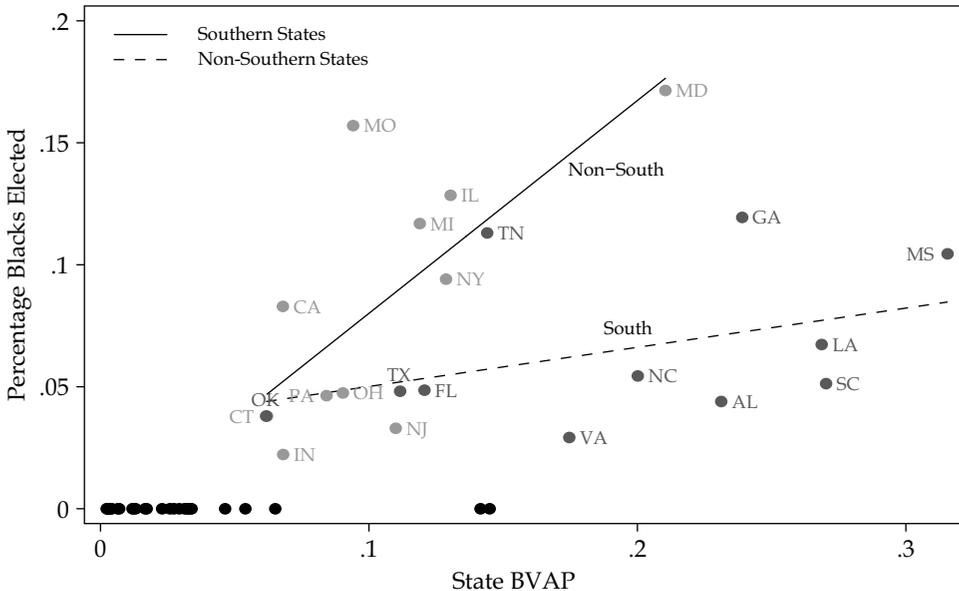
Blacks

Our first step is to review regional effects in the election of black representatives to Congress. Figure 4.2 displays the average percent of black voting age population for each of the fifty states on the horizontal axis and the percent of all elected representatives who are black during our time period on the vertical axis. Linear fit trend lines have been added to show the relationship between BVAP and the percentage of minorities elected for states with at least one black representative during the sample period.

The patterns shown clearly indicate that more blacks are elected to Congress in states with higher concentrations of black voters, but it is also clear that the southern states generally lie further to the right on the graph in comparison with other states. That is, it takes a higher percentage BVAP in southern states to elect the same proportion of black representatives as compared to all other states. We consequently separate these regions in our further analysis of black electoral opportunity.³

For the analysis of black electoral opportunity, we divided representatives into three types: Republicans, white Democrats, and black Democrats. We then per-

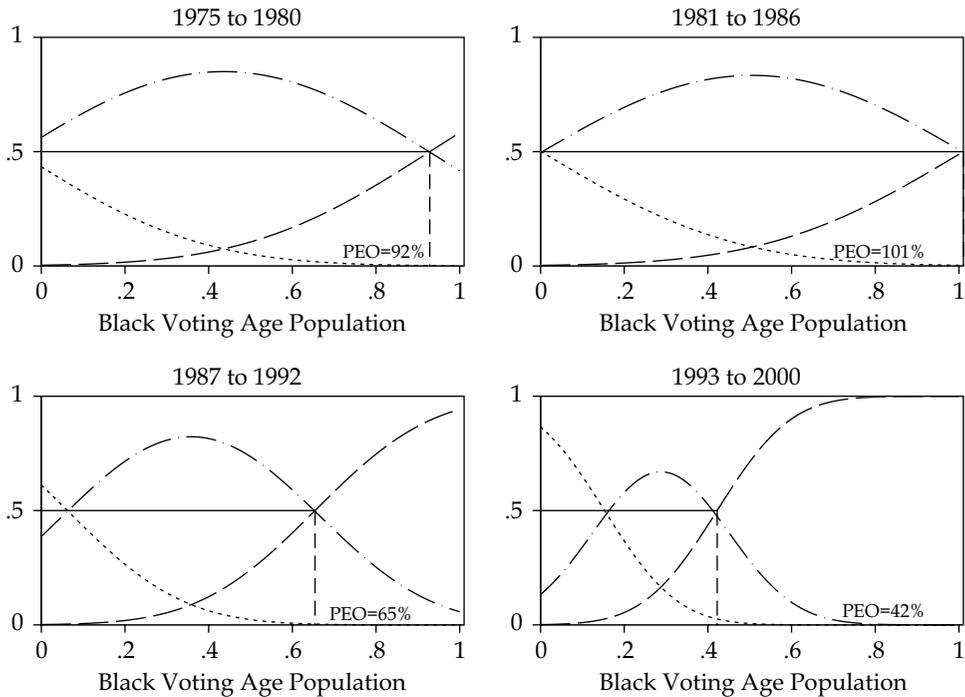
FIGURE 4.2 / Black Representatives Elected by State, 1974 to 2000



Source: Authors' compilations.

Note: Trendlines indicate relationships for Southern and Non-Southern states with at least one black representative.

FIGURE 4.3 / Probability of Electing Different Types of Representatives, Southern States



Source: Authors' compilations.

Note: — · — White Democrat, — — Black Democrat, - - - - - Republican.

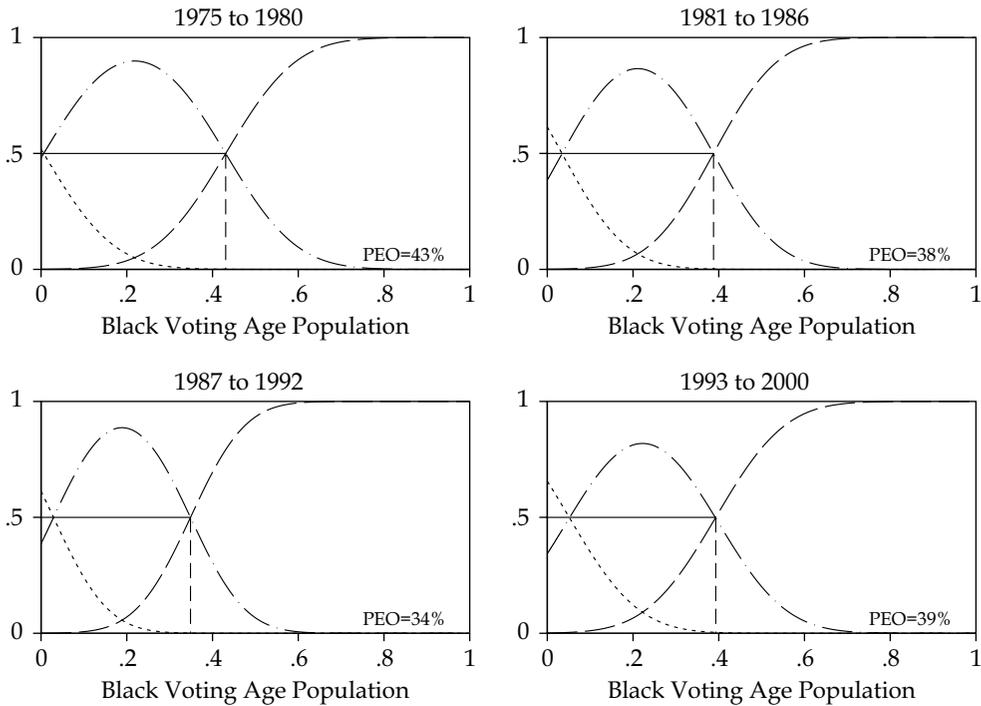
formed an ordered probit analysis on this representative type using BVAP as an independent variable, for each congress and region. The results of this analysis, grouped into four periods, are shown in graphical form for southern districts in figure 4.3 and for all other districts in figure 4.4.

In each graph, the central curve represents the probability of electing a white Democrat, the curve reaching its maximum at low levels of BVAP indicates the probability of electing a Republican, and the line reaching its maximum at high levels of BVAP is the probability of electing a black Democrat. These graphs also include a horizontal line at 0.5; the level of BVAP where this line intersects the black Democrat curve indicates the point of equal opportunity (PEO). This is the level of BVAP needed to give a black Democrat a 50-50 chance of winning election and serves as a convenient summary of black electoral opportunities.

As shown in the figure, from the mid-1970s to the mid-1980s, white Democrats were still the dominant group in southern politics. In fact, the point of equal opportunity is estimated at over 100 percent in the 1981 to 1986 period, given that a number of southern districts with majority black populations still elected white

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FIGURE 4.4 / Probability of Electing Different Types of Representatives, Nonsouthern States



Source: Authors' compilations.

Note: — · — White Democrat, — — Black Democrat, - - - - - Republican.

Democrats, such as Hale and then Lindy Boggs from Louisiana. Even in an all-white district (0 percent BVAP), Republicans had no better than an even chance of winning.

From here on, though, the picture changes dramatically. The point of equal opportunity falls steadily, to 65 percent in the third figure (1987 to 1992) and 42 percent in the fourth (1993 to 2000). At the same time, white Democrats' chances of winning an election in a district with no blacks crashes to about 20 percent. The rise of Republican and black electoral prospects, that is, necessarily came at the expense of white Democrats. In the first two scenarios, white Democrats have a greater than 50-50 chance of winning elections for almost all levels of BVAP. By 2000, they only have a slightly greater than 50 percent chance of winning in the 20-40 percent BVAP range.

This increase in black electoral opportunity in the South can be traced to the greater willingness of white voters to cast their ballots for black candidates. Whereas white cross-over was estimated at under 10 percent during the 1980s, it has risen since then to somewhere between 30 and 40 percent on average.⁴

For districts outside the South, not much change is apparent. Equal opportunity starts in the first period at a level (43 percent) nearly equal to where it ends up

in the South (42 percent), and then drifts down slightly from there. In terms of electing blacks to Congress, then, after lagging behind up through the early 1990s, the South has now caught up to the rest of the country.

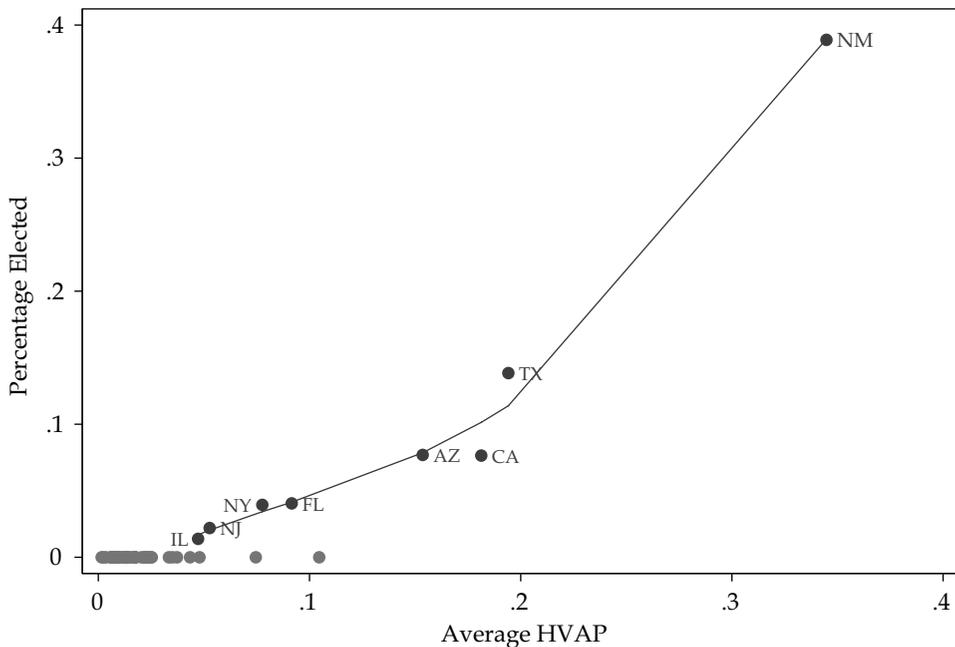
Latinos

In analyzing the electoral patterns for Latino representatives, we again start with an examination of regional effects. As we did with black representatives, figure 4.5 charts the percent of elected Hispanic representatives as a function of overall state Hispanic voting age population.

The first thing to note is that relatively few states have elected any Latino representatives over the period studied. In particular, only eight states have had at least one Latino representative over the past thirty years. Given this small number of states, and the fact that, as shown in figure 4.5, there is no obvious regional pattern to the electoral relationship, this portion of the analysis has no regional breakdown.

Turning to the electoral patterns themselves, figure 4.6 shows the electoral curves in the same four periods as in figures 4.3 and 4.4 above. As indicated, Hispanic electoral opportunity nationwide is similar to black electoral opportunity outside the South: the trend here is to have no trend. The point of equal opportunity for

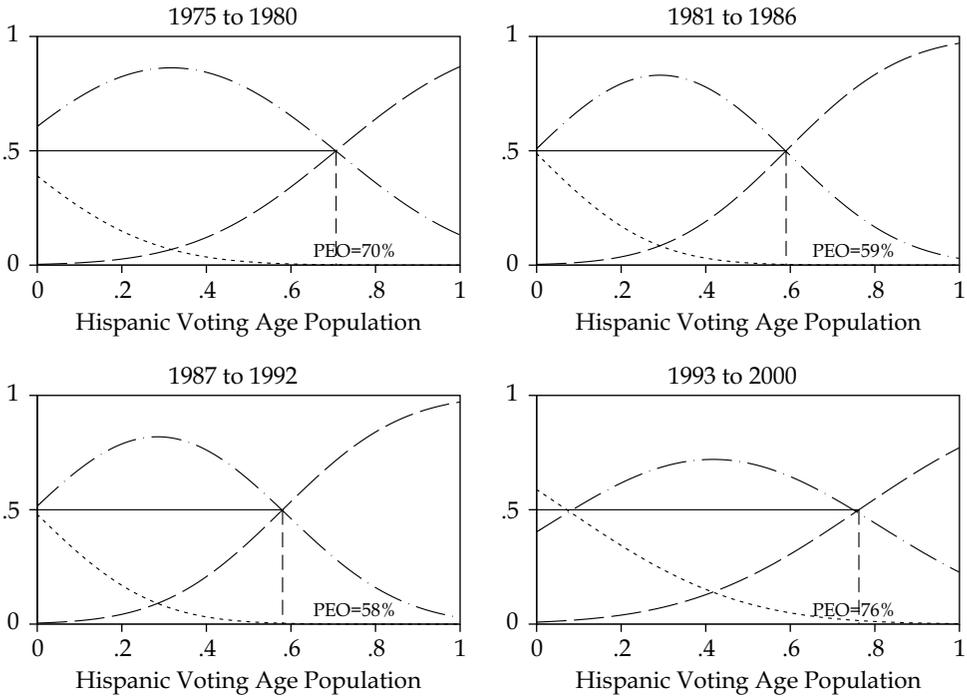
FIGURE 4.5 / Hispanic Representatives Elected by State, 1974 to 2000



Source: Authors' compilations.

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FIGURE 4.6 / Probability of Electing Different Types of Representatives



Source: Authors' compilations.

Note: — — White Democrat, — — Hispanic Democrat, - - - - - Republican.

Hispanics, however, ranges between 58 and 76 percent HVAP over the four time frame with an average of 66 percent. Electing Latinos was easier than electing blacks thirty years ago, but is more difficult today.

These patterns may reflect a number of underlying causes: greater white resistance to voting for Latino candidates, less cohesive voting among Latino voters, or greater disparities between voting age population and actual Latino voters, due perhaps to differences in citizenship rates. Whatever the cause, it is clear that at the moment more Hispanic voters are needed, as a percentage of total district population, to elect Hispanic representatives than black voters are needed to elect black representatives.

Intergroup Substitution

We next examine the relationship between combinations of black and Hispanic voters and the probability of electing a representative from one of these groups to office. As a first look at the data, figure 4.7 shows the BVAP and HVAP combina-

