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THE SOUTH AFTER SHELBY COUNTY

Nicholas Stephanopoulos

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THE SOUTH AFTER *SHELBY COUNTY*

Nicholas O. Stephanopoulos*

In Shelby County v. Holder, the Supreme Court dismantled one of the two pillars of the Voting Rights Act: Section 5, which had barred southern jurisdictions from changing their election laws without receiving prior federal approval. But the Court left standing the VRA's other pillar: Section 2, which prohibits racial discrimination in voting throughout the country. The burning question in the wake of Shelby County is what will happen to minority representation in the South now that Section 5 has been struck down but Section 2 lives on. This Article is the first to address this vital issue.

The Article explores the Section 2 – Section 5 gap with respect to both the procedure and the substance of voting rights litigation. Procedurally, the provisions differ in their allocation of the burden of proof, their default before a decision on the merits is reached, and their proceedings' cost. These differences mean that numerous policies that previously would have been blocked now will go into effect. In the first substantive area to which the VRA applies, vote dilution, the provisions diverge as well. Section 2 does not extend to bizarrely shaped districts or districts whose minority populations are overly heterogeneous or below 50% in size. In contrast, Section 5 applies to all of these district types. According to my empirical analysis, more than one-third of all formerly protected districts in the South now may be eliminated with legal impunity. In the other substantive area covered by the VRA, vote denial, the provisions again vary in their scope. A mere statistical disparity between minorities and whites does not violate Section 2, but it typically does suffice for preclearance to be denied. The rash of franchise restrictions enacted by southern states in the months since Shelby County shows how much this distinction matters.

The Article also considers some of the ways in which the Section 2 – Section 5 gap could be closed. A new coverage formula could be adopted, thus restoring the prior regime. The VRA's "bail in" provision could be amended to make it easier to subject jurisdictions to preclearance through litigation. Or Section 2 could be revised so that it resembles the stricken Section 5 more closely. Unfortunately, all of these steps face serious legal and political obstacles. A divided Congress is unlikely to pass legislation touching on sensitive issues of race and political power. Likewise, the Court may be reluctant to allow Shelby County to be circumvented. The Section 2 – Section 5 gap thus will probably persist for the foreseeable future.

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TABLE OF CONTENTS

INTRODUCTION	1
I. PROCEDURE	6
A. Conceptual Differences	6
B. Empirical Gap	9
II. VOTE DILUTION	14
A. Conceptual Differences	15
B. Empirical Gap	23
C. Odds of Exploitation	36
III. VOTE DENIAL	40
A. Conceptual Differences	41
B. Empirical Gap	43
C. Odds of Exploitation	47
IV. CLOSING THE GAP	48
A. Section 4	49
B. Section 3	50
C. Section 2	51
CONCLUSION	54
APPENDIX	56

INTRODUCTION

For almost half a century, minority representation in America rested on two legal pillars. The first, Section 2 of the Voting Rights Act (VRA), applies nationwide and prohibits practices that “result[] in a denial or abridgement of the right . . . to vote on account of race or color.”¹ It is a relatively conventional provision that creates a cause of action for plaintiffs who have been subjected to racial vote dilution or denial. The second, Section 5 of the VRA, applies only to the (mostly southern) jurisdictions specified in Section 4, and bans practices that have the purpose or effect of “denying or abridging the right to vote on account of race or color.”² Despite its almost identical language, Section 5 is a highly unusual provision that prevents covered jurisdictions from implementing *any* changes to their voting laws unless they first have convinced the Department of Justice (DOJ) or a federal court that the changes will not worsen the electoral position of minority voters.³

On the penultimate day of the 2012-2013 term, the Supreme Court dismantled the second of these two pillars. In *Shelby County v Holder*, the Court held that Section 4 of the VRA, which contains the formula identifying the jurisdictions that are subject to Section 5’s preclearance requirement, is unconstitutional.⁴ According to the Court, the Section 4 formula is both obsolete—“based on decades-old data and eradicated practices”⁵—and irrational because covered areas no longer perform worse than their non-covered peers along the formula’s metrics

¹ 42 USC § 1973(a).

² Id § 1973c(a); see also id § 1973b(b) (specifying coverage formula of Section 4).

³ See id § 1973c(a).

⁴ *Shelby Cty v Holder*, 133 S Ct 2612 (2013).

⁵ Id at 2627.

of voter registration and turnout.⁶ Congress therefore exceeded its enforcement powers under the Fourteenth and Fifteenth Amendments when it reenacted Section 4 in 2006. Section 5 continues to be good law, but it has been rendered a zombie provision, no longer applicable to any jurisdiction, by the demise of Section 4.

An urgent question in the wake of *Shelby County* (and the subject of this Article) is what will happen now to minority representation in the areas that formerly were covered by Section 5. The question, in other words, is how large the gap is between Section 2, which continues to apply nationwide, and Section 5. Is the gap quite small, in which case minority representation in the South will be largely unaffected? Or is the gap more like a chasm, in which case the political influence of minority groups will be sharply curtailed? The answer is crucial to determining the electoral implications of *Shelby County* for the minorities who are the VRA's intended beneficiaries. The answer also is highly relevant to whether and how Congress should respond to the Court's neutering of Section 5.

Surprisingly, the existing literature has not explored in detail how Section 2 and Section 5 interrelate. Indeed, some scholars have elided the distinctions between the provisions and argued that they both can be “understood to require the creation of majority-minority districts whenever possible.”⁷ When academics have explicitly addressed the space between Section 2 and Section 5, they have tended to conclude (without much elaboration) that it is not very large. For instance, Samuel Issacharoff has written that, in the absence of Section 5, his “suspicion is that the combination of [S]ection 2, . . . the protections of the Fourteenth Amendment, and the fact of being in the process and at the table would afford much protection” to minority groups.⁸ Justice Kennedy expressed a similar sentiment at the *Shelby County* oral argument, declaring that “it’s not clear to me that there’s that much difference [between] a Section 2 suit now and preclearance.”⁹

In this Article, then, I carry out a conceptual, empirical, and political investigation of the gap between Section 2 and Section 5. I analyze, that is, how the provisions differ in their formal operation, what kinds (and quantities) of practices are permitted by Section 2 but barred by Section 5, and which of these practices are likely to be enacted by the jurisdictions that now are free from Section 5's constraints. My analysis covers both the procedural aspects of voting rights litigation and the substance of minority representation. On the substantive side, I discuss both vote dilution (redistricting in particular) and the recent wave of franchise restrictions that

⁶ See *id.* at 2627-29.

⁷ Adam B. Cox and Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U Chi L Rev 553, 577 (2011); see also, for example, David Epstein and Sharyn O'Halloran, *A Strategic Dominance Argument for Retaining Section 5 of the VRA*, 5 Election L J 283, 285 (2006) (assuming that situations in which Section 2 and Section 5 diverge substantively are “relatively rare”).

⁸ Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum L Rev 1710, 1731 (2004); see also, for example, Bernard Grofman and Thomas Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics*, in David L. Epstein et al, eds, *The Future of the Voting Rights Act* 311, 321 (Russell 2006); Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 Neb L Rev 605, 627 (2005) (“[T]he gap has been significantly narrowed between what amounts to a section 2 violation and what amounts to a section 5 violation.”).

⁹ Transcript of Oral Argument, *Shelby Cty v Holder*, 133 S Ct 2612 (No 12-96), *37.

scholars have dubbed the “new vote denial.”¹⁰ Throughout my examination, I consider the statutory text, the case law, and the empirical evidence as they stood at the time of this Article’s writing. Section 2 and Section 5 operated quite differently in earlier periods, and how they will evolve in the future is, of course, unknowable.

With respect to procedure, there are three key differences between litigation under Section 2 and preclearance under Section 5. The burden of proof is on the plaintiff under Section 2 but on the jurisdiction under Section 5. The default is that a challenged policy goes into effect under Section 2 but that it does not under Section 5. And the party that typically invokes the VRA’s protections is a private plaintiff under Section 2 but the DOJ under Section 5. These differences mean that certain policies that formerly would have been blocked by Section 5 now will be implemented. Sometimes a plaintiff will be unable to satisfy its burden under Section 2 even though, on the same facts, a jurisdiction would have been unable to meet *its* burden under Section 5. Sometimes a plaintiff *will* be able to satisfy its Section 2 burden, but only after a contested policy has come into force for some time. And sometimes private parties will want to challenge particular electoral practices, but will be unable to do so because of limited resources.

How many policies will take effect as a consequence of these procedural distinctions? It is impossible to know for certain, but the available empirical evidence suggests that the number will be substantial. First, the success rate of Section 2 litigation in areas formerly covered by Section 5 has hovered around 40 percent over the last generation.¹¹ Plaintiffs therefore are likely to lose many of their lawsuits against practices that previously would have been denied preclearance. Second, the proportion of Section 2 suits in which preliminary injunctions are granted is quite small, certainly no higher than 25 percent and probably lower than 5 percent.¹² Many policies thus are likely to go into effect temporarily even if they ultimately are invalidated in Section 2 litigation. And third, the volume of Section 5 preclearance denials has been about the same, over the past few decades, as the volume of Section 2 suits in covered areas.¹³ Accordingly, private parties would need a significant infusion of resources in order to dispute all of the policies that formerly would have been blocked.

Turning next to vote dilution, there also are three major differences between the electoral districts to which Section 2 applies and those protected by Section 5. Section 2 does not extend to bizarrely shaped districts while Section 5 does. Section 2 does not encompass districts that merge highly dissimilar minority communities while Section 5 again does. And Section 2 does not cover districts whose minority voters comprise less than 50 percent of their total population while Section 5 does once more. These differences stem from a series of Supreme Court decisions narrowing the scope of Section 2, and they mean that certain districts that previously were shielded by Section 5 now no longer will enjoy legal protection. Jurisdictions now will

¹⁰ See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 SC L Rev 689 (2006) (coining the phrase).

¹¹ See Ellen Katz et al, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U Mich J L Reform 643, 656 (2006).

¹² See J. Gerald Hebert and Armand Defner, *More Observations on Shelby County, Alabama and the Supreme Court*, Campaign Legal Center Blog (Mar 1, 2013), online at http://www.clcblog.org/index.php?option=com_content&view=article&id=506:more-observations-on-shelby-county-alabama-and-the-supreme-court-.

¹³ See *Shelby Cty v Holder*, 679 F3d 848, 872 (DC Cir 2012), revd, 133 S Ct 2612 (2013).

have the ability to eliminate districts that are shaped too strangely, that have overly heterogeneous minority populations, or that have minority populations that are too small, to qualify for Section 2 coverage.

How many districts fall into these categories? To answer this question, I first identified all of the districts that used to be protected by Section 5 in the nine southern and southwestern states to which the provision formerly applied in large part or in full.¹⁴ There are 404 congressional and state legislative districts that meet these criteria. Of these, twenty-two are so non-compact that they likely can be dismantled without violating Section 2. This number is small because jurisdictions seem to have learned from the redistricting battles of the 1990s, when the Court struck down several strangely shaped districts. But a much larger number of districts, 146 in total, contain minority populations that are so heterogeneous that Section 2 may not extend to them. The role of such heterogeneity in Section 2 doctrine is not yet settled, but if it is a binding requirement then minority representation in the South could be slashed in the wake of *Shelby County*. Lastly, only 17 previously covered districts have minority voter proportions below 50 percent. Here too jurisdictions appear to have taken to heart the lessons of earlier Court decisions—and also to have mastered the art of crafting majority-minority districts while simultaneously advancing partisan interests.

Of course, not all of the districts that populate the Section 2 – Section 5 gap will be disbanded. When Republicans are responsible for redistricting (as they now are in almost every formerly covered state), they often will find it politically beneficial to preserve majority-minority districts. Such districts enable them to pack Democrats into a small number of overwhelmingly safe constituencies, thus enhancing Republican electoral prospects. Likewise, when Democrats are in charge, they often will face intense pressure from minority groups not to eliminate minority-controlled districts, even if doing so would help the Democratic cause. But this is not to say that the Section 2 – Section 5 gap will not be exploited at all. Republican line-drawers sometimes will be able to reap greater political benefits by concentrating minority voters into a smaller number of super-packed districts. Analogously, Democratic line-drawers sometimes will decide to craft more districts in which minority voters are sufficiently numerous to ensure the victory of a Democrat—but not to elect their own preferred candidate.

Finally, the differences between Section 2 and Section 5 are more uncertain in the vote denial context. The franchise restrictions recently enacted by many states are a relatively new development, and neither the courts nor the DOJ yet have had time to develop concrete standards. Still, it again appears that there is substantive space between the two provisions. Under Section 2, plaintiffs typically need to demonstrate not only that a statistical disparity exists between minorities and whites, but also that a franchise restriction interacts with social and historical conditions to cause the disparity. Under Section 5, on the other hand, a disparate impact alone usually suffices to prevent a restriction from going into effect, as long as the burden imposed by the restriction on voting is material.

Because of the small number of cases to which these standards have been applied, the magnitude of the relevant Section 2 – Section 5 gap is unclear. But it is revealing that plaintiffs

¹⁴ These states are Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.

have yet to prevail in a Section 2 challenge to a photo identification law, while three such laws were blocked, at least temporarily, under Section 5.¹⁵ Similarly, a recent Florida law that reduced the number of hours for early voting was denied preclearance with respect to the state's five formerly covered counties, but sustained under Section 2 with respect to the rest of the state.¹⁶ If there indeed is space between Section 2 and Section 5 in the vote denial context, there is little doubt that it quickly will be seized. Unlike in the redistricting context, Republicans' political incentives point unambiguously toward the enactment of additional franchise restrictions. Not surprisingly, in the brief period that has elapsed since *Shelby County* was decided, officials in Alabama, Florida, Mississippi, North Carolina, Texas, and Virginia already have announced their intention to pass or implement photo ID laws and other similar measures.¹⁷

Assume, then, that there is both a procedural and a substantive gap between Section 2 and Section 5. Assume, that is, that minority representation in the South in fact will be adversely affected by the nullification of Section 5. What are the implications for Congress and for the Court? If these institutions are unconcerned about minority political influence, of course, the only upshot is that the new status quo should be maintained. If the institutions *are* concerned, however, there exist several options for narrowing the Section 2 – Section 5 gap. First, as the Court observed in *Shelby County*, “Congress may draft another formula based on current conditions.”¹⁸ Metrics such as the success rate of Section 2 litigation, the prevalence of racially polarized voting, and the persistence of racially discriminatory attitudes all would result in most of the formerly covered areas once again becoming subject to preclearance. Second, Congress could amend Section 3 of the VRA¹⁹ to make it easier to “bail in” jurisdictions that have committed voting rights violations. Section 3 applies at present only if a *constitutional* transgression has occurred; it could be revised to extend to findings of Section 2 liability as well.

Last, and most relevant to this Article, Congress could amend Section 2 to make it more closely resemble the stricken Section 5. On the procedural side, Congress could increase the availability of preliminary injunctions and institute a burden-shifting framework under which the onus would switch to the jurisdiction once a plaintiff makes a preliminary showing of harm. With respect to vote dilution, Congress could expand the scope of Section 2's coverage so that it too applies to districts that are strangely shaped or whose minority populations are heterogeneous or below 50 percent in size. And with respect to vote denial, Congress could make disparate impact alone the standard for Section 2 liability. Moreover, at least on the substantive side, these changes also could be made by the Court. It is the Court that has exercised its interpretive discretion to limit Section 2 in the past. This same discretion could be used to broaden it in the future.

The Article proceeds as follows. The first three Parts explore the contours of the Section 2 – Section 5 gap in the contexts of procedure, vote dilution, and vote denial. All three include conceptual and empirical assessments of the gap, while the latter two also evaluate the extent to

¹⁵ These were a Louisiana law in 1994, a South Carolina law in 2012, and a Texas law in 2012.

¹⁶ Compare *Florida v. United States*, 885 F Supp 2d 299 (DDC 2012) (denying preclearance in five covered counties) with *Brown v. Detzner*, 895 F Supp 2d 1236 (MD Fla 2012) (upholding law statewide under Section 2).

¹⁷ See Lizette Alvarez, *Ruling Revives Florida Efforts to Police Voters*, NY Times A1 (Aug 7, 2013); Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, NY Times A9 (July 6, 2013).

¹⁸ *Shelby Cty. v. Holder*, 133 S Ct 2612, 2631 (2013).

¹⁹ 42 USC § 1973a(c).

which the gap is likely to be exploited by political actors. The final Part shifts from analysis to prescription. It presents a range of actions that Congress and the Court could take to undo the effects of *Shelby County*—to make Section Two minus Section Five once again equal to zero.

I. PROCEDURE

Beginning with procedure, then, the crucial difference between Section 2 and Section 5 is that the former authorizes a conventional cause of action while the latter establishes the extraordinary institution of preclearance. In this Part I probe the implications of this distinction, focusing on the kind and quantity of policies that formerly would have been blocked but that now will go into effect. I first explain, as a conceptual matter, why there are likely to be policies that fall into the procedural gap between the provisions. Some previously blocked policies now will not be challenged; some will be challenged but will be upheld; and some will be struck down but only after they temporarily have come into force. I then survey the available empirical evidence about the magnitude of the procedural gap. Some rough estimates are that private parties would require at least twice their current resources to challenge all of the previously blocked policies; that 60 percent of policies that are challenged will be upheld; and that 95 percent of policies that eventually are stricken still will go into effect temporarily. These figures must be taken with a grain of salt, but they suggest that the impact of switching from Section 5 preclearance to Section 2 litigation will be substantial.

A. Conceptual Differences

In its current form, Section 2 creates a cause of action for parties who believe that an electoral practice “results in a denial or abridgement of the right . . . to vote on account of race or color.”²⁰ The provision is violated “if, based on the totality of circumstances, it is shown that” members of a protected racial or ethnic group “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”²¹ In contrast, Section 5 bars covered jurisdictions from implementing any changes to their voting laws until the changes have been approved by either the DOJ or the U.S. District Court for the District of Columbia.²² The DOJ has sixty days to object to a submission, while a three-judge panel of the federal court is convened if a jurisdiction chooses the judicial route for preclearance.²³ Under both the administrative and judicial routes, a jurisdiction must establish that its amendment “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”²⁴ “Any discriminatory purpose” is prohibited by this language,²⁵ as is “diminishing the ability” of members of protected groups “to elect their preferred candidates of choice.”²⁶

²⁰ Id § 1973(a).

²¹ Id § 1973(b). According to the statute, minority groups’ diminished opportunity to participate in the political process and to elect the representatives of their choice is evidence that “the political processes leading to nomination or election . . . are not equally open to participation” by the groups’ members. Id.

²² See id § 1973c(a).

²³ See id.

²⁴ Id.

²⁵ Id § 1973c(c).

²⁶ Id § 1973c(b); see also id § 1973c(d) (“The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.”).

The first important difference between Section 2 litigation and Section 5 preclearance is the allocation of the burden of proof. Under Section 2—as under most causes of action—“the initial burden of proving [a policy’s] invalidity [is] squarely on the plaintiff’s shoulders.”²⁷ If the plaintiff cannot satisfy its burden, with respect to each statutory element, then the challenged policy comes into (or remains in) force. Under Section 5, on the other hand, “a jurisdiction seeking . . . preclearance must prove that the change is nondiscriminatory in purpose and effect.”²⁸ If the jurisdiction cannot meet its burden, as to both purpose and effect, then its proposed policy cannot be implemented.

Sometimes the allocation of the burden is immaterial. When the illegality of a policy is sufficiently clear, a plaintiff can satisfy its burden under Section 2 and a jurisdiction cannot meet its burden under Section 5. Likewise, when the lawfulness of a policy is evident enough, a plaintiff cannot satisfy its burden under Section 2 and a jurisdiction can meet its burden under Section 5. But sometimes the allocation of the burden is dispositive. There necessarily exist circumstances in which a plaintiff is unable to satisfy its burden under Section 2 and, on the same facts, a jurisdiction is unable to meet *its* burden under Section 5. In these close cases, a policy takes effect if it is the subject of Section 2 litigation, but is blocked if it is the subject of Section 5 preclearance.²⁹

A second procedural difference between Section 2 and Section 5 is that, under the former, a policy typically remains in force while it is being challenged, while under the latter, a policy never goes into effect until it has been precleared.³⁰ The provisions have opposite defaults, in other words, during the period *before* a decision on the merits has been reached. This distinction means that, under Section 2, a policy that eventually is declared unlawful still may be implemented for one or more election cycles, causing harm to minorities in the meantime.³¹ Under Section 5, in contrast, a policy that is denied preclearance never may be put into operation, not even for a single election.

However, this difference between the provisions dissolves whenever a Section 2 plaintiff manages to secure a preliminary injunction. In this case, as in a preclearance proceeding, a policy does not go into effect until it explicitly has been deemed lawful. Of course, preliminary injunctive relief is not easy to obtain, requiring, at an early stage of the litigation, a judicial

²⁷ *Voinovich v Quilter*, 507 US 146, 155 (1993); see also 42 USC § 1973(b) (provision violated only “if . . . it is shown” that substantive standards have been satisfied (emphasis added)); S Rep No 97-417, at 27 (1982).

²⁸ *Branch v Smith*, 538 US 254, 263 (2003); see also *Georgia v United States*, 411 US 526, 538 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended [hereinafter DOJ Procedures], 28 CFR § 51.52(a) (“The burden of proof is on a submitting authority . . .”).

²⁹ See Epstein and O’Halloran, 5 Election L J at 284-85 (cited in note 7) (observing that there exist “proposals whose effects are unclear, so that they would be struck down under Section 5, but survive under Section 2”).

³⁰ See 42 USC § 1973c(a) (“[U]nless and until [preclearance is granted] no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure.”).

³¹ See *Shelby Cty v Holder*, 679 F3d 848, 872 (DC Cir 2012), revd, 133 S Ct 2612 (2013) (“[D]uring the time it takes to litigate a section 2 action . . . proponents of a discriminatory law may enjoy its benefits, potentially winning elections and gaining the advantage of incumbency before the law is overturned.”).

finding that a plaintiff's claim is likely to succeed.³² But it *is* an available remedy, and when it is granted, Section 2 and Section 5 partially converge.

The final procedural differences between the provisions relate to the magnitude and allocation of the proceedings' costs.³³ Litigation under Section 2 is more expensive than administrative preclearance under Section 5. Section 2 plaintiffs must go through some or all of a lawsuit's familiar phases—discovery, summary judgment, trial, appeal, etc.—while jurisdictions covered by Section 5 need only submit a standardized set of forms to the DOJ.³⁴ Moreover, private parties are the usual plaintiffs in Section 2 litigation, while the DOJ is the key institution involved in Section 5 preclearance.³⁵ Private parties thus incur much of the cost of litigation under Section 2, while the DOJ shoulders much of the expense of preclearance under Section 5.

The upshot of these differences is that a proceeding's cost rises when it takes place under Section 2 rather than Section 5, and a larger proportion of this higher cost is borne by private parties. Now that preclearance is unavailable, then, private parties would require additional resources in order to challenge under Section 2 all of the policies that formerly would have been blocked under Section 5. If these resources are not forthcoming, then private parties will not be able to contest the full set of policies that previously would have been denied approval. They will need to pick and choose their battles, letting slide some number of policies that they believe (and the DOJ would have agreed) are discriminatory.

But some caveats must be appended to this analysis. First, *administrative* preclearance may be inexpensive, but *judicial* preclearance, which a covered jurisdiction always has the option to request,³⁶ is not. Full-dress litigation under Section 5 is similar in scope and complexity to a lawsuit under Section 2. Second, while private parties are the most common plaintiffs in Section 2 actions, the DOJ also has the authority to bring suit (and to intervene in existing suits) under the provision.³⁷ Now that the DOJ no longer can block policies using Section 5, it can be expected to shift some of its resources to litigating Section 2 claims. Third, while the DOJ always was the indispensable institution under Section 5, private parties played an important role in preclearance proceedings as well. They commonly advised the DOJ in the administrative context and intervened in suits in the judicial context—both costs that no longer will be incurred after *Shelby County*. Lastly, private parties are entitled to the reimbursement of attorney and expert fees when they prevail in Section 2 suits.³⁸ Thus, in successful cases, the ultimate cost of such suits is not necessarily exorbitant (at least not to the plaintiffs).

³² See *Winter v NRDC, Inc.*, 555 US 7, 20 (2008). To issue a preliminary injunction, a court also must find that the plaintiff is likely to suffer irreparable harm in the absence of relief, that the balance of equities is in the plaintiff's favor, and that an injunction is in the public interest. See *id.*

³³ One additional procedural difference is that Section 5 requires jurisdictions to notify the DOJ of each electoral change that they wish to make. Section 2 has no comparable disclosure requirement, meaning that sometimes private parties will not *know* about a policy that they would have challenged had they learned about it.

³⁴ See DOJ Procedures, 28 CFR §§ 5120-28 (detailing procedures for preclearance submission as well as requisite content).

³⁵ Of course, the jurisdictions whose policies are at issue are the same in either proceeding.

³⁶ See 42 USC § 1973c(a).

³⁷ See, for example, *United States v Blaine Cty.*, 363 F3d 897 (9th Cir 2004) (Section 2 action brought by DOJ); *Brown v Bd of School Comm'rs*, 706 F2d 1103 (11th Cir 1983) (Section 2 action in which DOJ intervened).

³⁸ See 42 USC § 1973l(e).

One more caveat should be mentioned with respect to this entire Part. In discussing the procedural differences between Section 2 and Section 5, I implicitly am controlling for their differences in *substance*. Their substantive distinctions are addressed at length in the following two Parts, but here I am interested in investigating whether (and how large) a space exists between the provisions even if Section 2 vote dilution or denial is identical to Section 5 retrogression. Having identified the conceptual contrasts between the two kinds of proceedings, then, I turn next to the empirical evidence about the magnitude of the Section 2 – Section 5 gap.

B. Empirical Gap

The empirical evidence, it must be conceded at the outset, is quite limited. Section 5 was in force alongside Section 2 until *Shelby County* was decided, so it is difficult to determine from historical data how many policies that were blocked by Section 5 would have gone into effect had only Section 2 been available to challenge them. The deterrent effect of Section 5—how many policies never were proposed at all because of the provision’s existence—is even harder to quantify. Still, a wealth of information exists about the operation of Section 2 and Section 5 over the years, and it is possible to draw several inferences from this material about the size of the gap between the provisions. It also is possible to reach some tentative conclusions from the experiences of jurisdictions that were bailed in under Section 3 but that later were released from their preclearance obligations.

To begin with, a study by Ellen Katz found (and other studies later confirmed) that the success rate of Section 2 lawsuits in formerly covered jurisdictions was approximately 40 percent between 1982 and 2005.³⁹ This figure suggests that when private parties challenge policies that in the past would have been blocked by Section 5, they will lose a good deal of the time. The figure suggests, in other words, that Section 2’s allocation of the burden to the plaintiff rather than the jurisdiction will be dispositive in a substantial number of cases. Of course, the policies that in the past would have been blocked by Section 5 may differ in important respects from the policies that were analyzed in the retrospective Section 2 studies. In particular, the former policies may be more clearly discriminatory than the latter, in which case the success rate for plaintiffs challenging the former may be higher than 40 percent. Still, it seems unlikely that this figure will approach 100 percent, meaning that Section 2’s burden allocation will be decisive with some frequency.⁴⁰

³⁹ See *Shelby Cty v Holder*, 679 F3d 848, 875 (DC Cir 2012), revd, 133 S Ct 2612 (2013) (citing 40.5 percent figure); Adam B. Cox and Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum L Rev 1, 54 appendix 1 (2008) (citing 39.4 percent figure); Katz et al, 39 U Mich J L Reform at 656 (cited in note 11) (citing 42.5 percent figure). The success rate was slightly higher, 45.9 percent, for challenges to *changes* in electoral practices—which are, of course, the only policies that can be blocked by Section 5. See Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in Asa Henderson, ed, *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power* 183, 221 table 8.6 (Berkeley 2007) [hereinafter *VRA Reauthorization*]. The success rate also has been declining over time. See Cox and Miles, 108 Colum L Rev at 5, 14 (cited in note 39); Katz et al, 39 U Mich J L Reform at 656 (cited in note 11). And the success rate in *non-covered* jurisdictions, 32.2 percent, was lower than in covered jurisdictions despite the unavailability of Section 5 in the former areas. See Katz et al, 39 U Mich J L Reform at 656 (cited in note 11).

⁴⁰ An additional caveat is that the 40 percent figure stems from Section 2 suits that gave rise to *published* decisions. See Katz et al, 39 U Mich J L Reform at 652 (cited in note 11). I am not aware of any data on the success rate of Section 2 suits that did *not* generate published decisions. However, former DOJ voting rights attorney (and

Next, estimates vary as to how often preliminary injunctions are granted in Section 2 cases, but consistently are quite low. At the *Shelby County* oral argument, Solicitor General Donald Verrilli stated that such relief is obtained in “fewer than one-quarter of ultimately successful Section 2 suits.”⁴¹ Veteran Section 2 litigators Armand Defner and Gerry Hebert put the proportion at “less than 5%, and possibly quite lower.”⁴² And former DOJ official Robert Kengle recently testified that “the total *number* of such cases since 1982 is in the range of 10 to 15.”⁴³ Whatever the exact figure may be, the implication is that preliminary injunctions rarely alter the Section 2 default during the period before a decision on the merits is reached. Most of the time, policies that never previously would have gone into effect due to Section 5 now will come into force upon enactment—even if they ultimately are struck down. The nominal availability of preliminary relief does not appreciably shrink the Section 2 – Section 5 gap.⁴⁴

Nor is the gap mitigated by the pace of Section 2 litigation. According to testimony by longtime civil rights attorney Anita Earls, it takes “at least two years” to advance a Section 2 action from filing to trial, and “[t]wo to five years is a rough average” of a suit’s duration.⁴⁵ This period typically is long enough to encompass at least one and possibly multiple election cycles. It indicates that the absence of preliminary relief in most Section 2 cases will have real bite. Litigation will not move quickly enough to produce a decision on the merits before a policy that eventually is invalidated has harmed minorities for an election or two (and allowed incumbents to entrench themselves in office).⁴⁶

Of course, the burden of proof and the availability of preliminary relief matter only if Section 2 litigation actually has commenced. But such litigation may *not* commence if private parties lack the resources to challenge policies that formerly would have been denied preclearance. Defner and Hebert have estimated that a Section 2 districting case “requires a

current law professor) Michael Pitts informs me that the latter rate almost certainly is higher because it would include the many consent decrees approved as a result of Section 2 litigation.

⁴¹ Transcript of Oral Argument, *Shelby Cty v Holder*, 133 S Ct 2612 (No 12-96), *38.

⁴² Hebert and Defner, *More Observations on Shelby County, Alabama and the Supreme Court* (cited in note 12).

⁴³ Testimony of Robert A. Kengle Before the House Judiciary Committee 11 (July 18, 2013) (emphasis added). The reasons why preliminary relief rarely is granted in Section 2 cases include the difficulty of amassing sufficient evidence at an early stage in the litigation, see Testimony of Prof Justin Levitt Before the US Senate Committee on the Judiciary 8 (July 17, 2013) [hereinafter Levitt Testimony], and the aversion of many courts to enjoining elections if alternate remedies can be imposed in the future, see, for example, *Williams v Dallas*, 734 F Supp 1317, 1367 (ND Tex 1990).

⁴⁴ Though it should be noted again that the policies that formerly would have been blocked by Section 5 may differ materially from the policies that until now have given rise to Section 2 litigation. It is possible that preliminary injunctions will be granted with greater frequency when the former policies are challenged under Section 2.

⁴⁵ Testimony of Anita Earls Before the House Judiciary Committee 63-64 (Oct 25, 2005); see also Brief of Joaquin Avila et al as Amici Curiae in Support of Respondents 22, *Shelby Cty v Holder*, 133 S Ct 2612 (No 12-96) [hereinafter Avila Brief].

⁴⁶ It may be the case, as Michael Carvin has testified, that Section 2 and Section 5 give rise to equally lengthy litigation in complicated redistricting cases. See Testimony of Michael A. Carvin Before the US Senate Committee on the Judiciary 7 (July 17, 2013). But during the pendency of the litigation, the district plan typically goes into effect under Section 2 but does not under Section 5.

minimum of hundreds of thousands of dollars,”⁴⁷ while Hebert separately has testified that “the cost . . . to bring a vote dilution case through trial and appeal[] runs close to a half a million dollars.”⁴⁸ Similarly, in a 2005 study, the Federal Judicial Center found that voting rights suits entail 3.86 times more work than the median federal action, and rank sixth in intensity out of sixty-three case categories.⁴⁹ The unusual cost and complexity of Section 2 suits mean that private parties will not be able to bring them against all of the policies that previously were blocked by Section 5. As a group of Section 2 litigators has written, “The voting rights bar lacks the numbers and resources . . . to prosecute the . . . Section 2 lawsuits that would be necessary to block all the discriminatory changes that would be implemented without Section 5.”⁵⁰

What resources would the voting rights bar need to pursue all of these cases? One way to answer this question (albeit imprecisely) is to compare the volume of Section 2 and Section 5 activity in recent years. Under Section 2, then, there were 653 successful suits⁵¹ in formerly covered jurisdictions between 1982 and 2005, resulting in 160 published decisions.⁵² The *total* number of such suits is unknown, but has been estimated conservatively to be at least 800.⁵³ Under Section 5, over the same period, there were 626 preclearance denials by the DOJ and 25 preclearance denials by the courts.⁵⁴ Another 800 proposed policies were withdrawn or modified after the DOJ requested additional information about them.⁵⁵ Accordingly, the ratio of Section 2 to Section 5 activity in the South was between 1:1 and 1:2 over the last generation. Private parties would have had to have launched double to triple their actual number of Section 2 suits in order to have challenged all of the policies that were blocked by Section 5. This larger volume of

⁴⁷ J. Gerald Hebert and Armand Defner, *Shelby County, Alabama and the Supreme Court*, Campaign Legal Center Blog (Feb 28, 2013), online at http://www.clcblog.org/index.php?option=com_content&view=article&id=505:shelby-county-alabama-and-the-supreme-court.

⁴⁸ Avila Brief at 25 (cited in note 45); see also Levitt Testimony at 9 (cited in note 43) (reporting plaintiffs’ fees and costs of \$712,027.71 in a representative Section 2 case). In contrast, administrative preclearance usually costs between \$1,000 and \$5,000 for a major change, and between \$500 and \$1,000 for a minor one. See Avila Brief at 26 (cited in note 45); see also National Committee on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 55-56 (2006) [hereinafter *Protecting Minority Voters*] (noting much greater cost of Section 2 suit challenging at-large voting scheme for Charleston county council than Section 5 preclearance denial of identical policy proposal by Charleston county school board).

⁴⁹ Fed Judicial Ctr, 2003-2004 District Court Case-Weighting Study 5-6 table 1 (2005); see also *Shelby Cty v Holder*, 679 F3d 848, 872 (DC Cir 2012), revd, 133 S Ct 2612 (2013) (citing this study); *United States v Blaine Cty*, 363 F3d 897, 906 (9th Cir 2004) (“[S]ection 2 cases are some of the most difficult to litigate . . .”).

⁵⁰ Avila Brief at 3 (cited in note 45); see also *id.* at 29 (noting that major civil rights groups such as the NAACP and the Lawyers’ Committee for Civil Rights have only a handful of attorneys dedicated to voting rights).

⁵¹ See *Shelby Cty*, 679 F3d at 868, 872; *Protecting Minority Voters* at 88 (cited in note 48).

⁵² See Katz et al, 39 U Mich J L Reform at 656 (cited in note 11).

⁵³ See *id.* at 655. A single group, the ACLU Voting Rights Project, brought several hundred of these actions. See ACLU, *The Case for Extending and Amending the Voting Rights Act* 4 (2006).

⁵⁴ See *Shelby Cty*, 679 F3d at 866, 870-72; see also Luis Ricardo Fraga and Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in Henderson, ed, *VRA Reauthorization* 47, 49 (cited in note 39) (finding that DOJ preclearance denials prevented 2,282 individual changes from taking effect).

⁵⁵ See *Shelby Cty*, 679 F3d at 866, 872; Fraga and Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act* at 58 table 3.1 (cited in note 54) (identifying 854 such policies).

litigation would have required double to triple the resources as well (assuming that the hypothetical suits would have been similar in cost to the actual suits).⁵⁶

But recall from the above discussion that the DOJ also will be able to shoulder some of the heavier Section 2 burden in the wake of *Shelby County*.⁵⁷ Unfortunately, the DOJ's capacity to bring Section 2 suits is relatively limited. Its Voting Rights Section includes a range of demographers, historians, and other analysts who formerly worked on Section 5 matters—but “comparatively few attorneys” who now could turn their attention to Section 2.⁵⁸ Notably, the Section filed only eighteen Section 2 cases during the eight years of the Bush administration, and has initiated just four cases under the Obama administration (through 2012).⁵⁹ These numbers undoubtedly will rise as the Section shifts its focus from Section 5 to Section 2, but, as Justin Levitt has observed, “‘The Nation’s Litigator’ should not be expected to meet all of the new need . . . at least given staffing at the current order of magnitude.”⁶⁰

Since the DOJ will be unable to play the role of *deus ex machina*, private parties will need to make difficult choices as to which policies they will challenge (barring a large infusion of resources). The policies they seem least apt to contest are ones promulgated by local governments. In recent years, local practices accounted for more than 90 percent of preclearance denials under Section 5,⁶¹ but only about 70 percent of Section 2 litigation.⁶² Suits against local governments also are especially vulnerable to “[t]he unavailability of experienced voting rights attorneys and of sufficient financial resources,” according to longtime Section 2 litigators.⁶³ High-profile statewide laws, such as district plans and franchise restrictions, thus are likely to be the target of future Section 2 litigation. The Section 2 – Section 5 gap probably will be largest with respect to less salient local election law changes.

The final evidence about the size of the gap stems from the experiences of the two states, Arkansas and New Mexico, that have been bailed in under Section 3 of the VRA. Section 3 authorizes courts to impose a preclearance requirement almost identical to Section 5’s on

⁵⁶ If Section 5 had a significant deterrent effect in the past, then jurisdictions now may be expected to enact more policies that formerly would have been denied preclearance. In this case, private parties would need even more resources to challenge under Section 2 all of the policies that previously would have been blocked. In terms of actual dollar figures, there were approximately sixty policies per year that were blocked by Section 5 over the 1982-2005 period. If each of these policies would have cost about \$500,000 to litigate under Section 2, then the total price tag for challenging the policies under Section 2 rather than under Section 5 would have been roughly \$30 million per year.

⁵⁷ See note 37 and accompanying text.

⁵⁸ Levitt Testimony at 11 (cited in note 43); see also Office of the Inspector General, *A Review of the Operations of the Voting Section of the Civil Rights Division* 9 (2013) [hereinafter *Inspector General Report*] (noting that number of attorneys in Voting Section has varied between thirty-one and forty-five in recent years).

⁵⁹ See *Inspector General Report* at 24 (cited in note 58). Former DOJ voting rights attorney John Tanner also informs me that since 1976 the DOJ has launched only 112 Section 2 cases, or approximately three per year.

⁶⁰ Levitt Testimony at 11.

⁶¹ See *Shelby Cty v Holder*, 679 F3d 848, 872 (DC Cir 2012), revd, 133 S Ct 2612 (2013); Pitts, 84 Neb L Rev at 612-13 (cited in note 8).

⁶² See Cox and Miles, 108 Colum L Rev at 54 appendix 1 (cited in note 39); Pitts, 84 Neb L Rev at 616 (cited in note 8) (“[S]ection 2 cases are much less likely to be filed when it comes to redistricting in smaller jurisdictions . . .”).

⁶³ Avila Brief at 28 (cited in note 45); see also *Shelby Cty*, 679 F3d at 872 (noting that difficulty of bringing Section 2 claim is greatest “at the local level and in rural communities”).

jurisdictions that are found to have violated the Fourteenth or Fifteenth Amendments.⁶⁴ The provision has been used only twice to bail in states, both times for the 1990 redistricting cycle.⁶⁵ In both Arkansas and New Mexico, then, the Section 2 litigation in the 1980s that led to the imposition of preclearance was much costlier and lengthier than the proceedings in the following decade. In Arkansas, the *Jeffers* suit in the 1980s necessitated a trial⁶⁶ and resulted in the creation of eight new majority-minority districts,⁶⁷ while the state's district plans in the 1990s were precleared by the court with relatively little fuss.⁶⁸ Analogously, in New Mexico, the *Sanchez* suit in the 1980s led to sixteen districts being invalidated, primary elections being nullified, and federal examiners being deployed,⁶⁹ while the state's plans in the 1990s were precleared by the DOJ within four months.⁷⁰ This history confirms the much greater expense and complexity of Section 2 litigation relative to preclearance.⁷¹

Arkansas's experiences *since* the 1990 redistricting cycle—i.e., after it was released from its preclearance obligations—also are illuminating. None of the state's district plans in the 2000s was challenged under Section 2, suggesting either that private parties lacked the resources to dispute them or that they were compliant with the VRA.⁷² In the 2010s, private parties did bring a Section 2 action against Arkansas's state senate plan, alleging that one of its districts was “not an effective majority-minority district.”⁷³ The court rejected this claim even though it seemed to concede that the district did not “provide minority voters . . . with the ability to elect candidates of their choice.”⁷⁴ The court rejected the claim, that is, while apparently admitting that the state senate plan was retrogressive and thus would have violated Section 5. Also of note, private parties did not challenge Arkansas's 2010s state house plan even though it reduced by one the number of majority-minority districts.⁷⁵ This plan likely would have been denied preclearance too, but it escaped judicial review altogether thanks to the expiration of the state's Section 3 coverage.

⁶⁴ See 42 USC § 1973a(c).

⁶⁵ See *Jeffers v Clinton*, 740 F Supp 585, 601-02 (ED Ark. 1990) (invoking Section 3 for preclearance of majority-vote provisions and court's own equitable power for preclearance of district plans); *Sanchez v Anaya*, No 82-0067M (DNM Dec 17, 1984) (consent decree).

⁶⁶ See *Jeffers v Clinton*, 730 F Supp 196 (ED Ark 1989).

⁶⁷ See *Jeffers v Tucker*, 847 F Supp 655, 657 (ED Ark 1994).

⁶⁸ See *id* (noting that certain plaintiffs settled with state and upholding state's plan).

⁶⁹ See New Mexico Legislative Council Service, *A Guide to State and Congressional Redistricting in New Mexico* 10-11 (2001).

⁷⁰ See *id* at 11-12. The DOJ objected to the original state senate plan, but within five weeks the legislature had passed, and the DOJ had approved, a new plan. See *id*.

⁷¹ Though the 1980 redistricting cycle also may have been especially laborious for Arkansas and New Mexico because the critical 1982 amendments to Section 2 were passed after the states' districts already had been drawn. Less costly and lengthy litigation might have ensued had the states known in advance about the legal standard with which they later were forced to comply.

⁷² See *2000s Redistricting Case Summaries*, Nat'l Conf of State Legislatures (last visited Oct. 1, 2013), online at <http://www.senate.mn/departments/scr/redist/redsum2000/redsum2000.htm> [hereinafter *2000s Case Summaries*]. The latter explanation is more likely since the numbers of majority-minority districts in Arkansas's state legislative plans did not decrease between the 1990s and the 2000s.

⁷³ *Jeffers v Beebe*, 895 F Supp 2d 920, 929 (ED Ark 2012). The district in question had a black voting-age population of 52.8 percent, which according to the plaintiffs' expert was insufficient to provide African Americans with an equal opportunity to elect their preferred candidate. See *id* at 932-33.

⁷⁴ *Id* at 933.

⁷⁵ The data on the composition of Arkansas's state legislative districts is on file with the author.

Unfortunately for present purposes, New Mexico’s elected branches deadlocked in both the 2000s and the 2010s, forcing courts to design all of the state’s districts.⁷⁶ While Section 2 supplied one of the principles on the basis of which the districts were shaped, it makes little sense to probe the Section 2 – Section 5 gap when courts, not political actors, are the line-drawers. Arkansas’s recent history also is suggestive but hardly conclusive; in particular, in the absence of an actual denial of preclearance, it is very difficult to determine whether a district plan in fact is retrogressive. Still, this Section 3 analysis is consistent with all of the other empirical evidence presented in this Section about the procedural space between Section 2 and Section 5. If anything, the Section 3 findings are especially compelling because they alone are based on the experiences of jurisdictions that were subjected to—but then released from—preclearance.

II. VOTE DILUTION

It is no surprise that the Arkansas and New Mexico cases both involved claims of vote dilution arising from redistricting. While the VRA prohibits both vote dilution and vote denial, the former has accounted for the vast majority of activity under both Section 2 and Section 5.⁷⁷ It therefore is the first substantive area to which I turn (and the area to which I devote more attention). I begin by describing the differences between the districts to which Section 2 applies and those protected by Section 5. Thanks to a series of narrowing interpretations by the Supreme Court, Section 2 does not extend to districts that are bizarrely shaped or whose minority populations are highly heterogeneous or below 50 percent in size. Section 5, in contrast, likely shields districts with all of these characteristics.

Next, I use a range of empirical techniques to estimate the *number* of existing districts that formerly were protected by Section 5 but now are beyond the scope of Section 2. No such analysis yet has been conducted even though it is vital to determining the practical impact of *Shelby County*. According to my calculations, only a handful of current districts are so non-compact, or have minority populations that are so small, that they are uncovered by Section 2. However, many more current districts contain sufficiently heterogeneous minority populations that they now may be dismantled without running afoul of the provision.

Lastly, I assess the likelihood, as a political matter, that the districts that populate the Section 2 – Section 5 gap will be eliminated. Both parties often will have strong incentives to preserve these districts, Republicans because of partisan advantage and Democrats due to pressure from minority groups. But both parties sometimes will find it beneficial to jettison previously insulated districts. Republicans may be able to win a larger proportion of seats by

⁷⁶ See *2000s Case Summaries* (cited in note 72); Justin Levitt, *Litigation in the 2010 Cycle – New Mexico*, All About Redistricting (last visited Oct 1, 2013), online at <http://redistricting.ils.edu/cases-NM.php#NM>.

⁷⁷ See Cox and Miles, 108 Colum L Rev at 11 (cited in note 39) (noting that Section 2 cases are “dominated by decisions involving challenges to at-large elections . . . and challenges to reapportionment plans”); Katz et al, 39 U Mich J L Reform at 656 (cited in note 11) (same); Peyton McCrary et al, *The Law of Preclearance: Enforcing Section 5*, in Epstein et al, eds, *The Future of the Voting Rights Act* 20, 25 (cited in note 8); Rick Pildes and Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, Election Law Blog (Aug 19, 2013), online at <http://electionlawblog.org/?p=54521> (“Redistricting changes generated vastly more objections [under Section 5] than any other category . . .”).

concentrating minorities into a smaller number of super-packed districts. And Democrats may be able to optimize their electoral position by spreading minorities more evenly across a district map.

A. Conceptual Differences

In its first decision interpreting the current text of Section 2, *Thornburg v Gingles*,⁷⁸ the Supreme Court set forth the doctrinal standard for claims of vote dilution arising from redistricting. Initially, a minority group must comply with three preconditions: (1) it must be “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) it must be “politically cohesive”; and (3) “the white majority [must] vote[] sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”⁷⁹ If these threshold criteria are satisfied, a court proceeds to an analysis of the totality of the circumstances. The most important elements of this analysis are the nine factors identified by the Senate report that accompanied Congress’s amendments to Section 2 in 1982,⁸⁰ as well as the proportionality of a minority group’s existing representation.⁸¹ In order to prevail, a group also must show that there exists a suitable benchmark with which the challenged policy may be compared.⁸² A group must show as well that at least one *additional* district could be created in which the group would be able to elect the candidate of its choice.⁸³

Section 5, in contrast, almost never requires additional minority-ability (i.e., “ability”⁸⁴) districts to be drawn.⁸⁵ Rather, the provision prohibits any *worsening* of the electoral position of minorities, that is, retrogression.⁸⁶ Retrogression is determined by examining a district plan in its entirety, not by assessing individual districts in isolation.⁸⁷ A plan is deemed retrogressive if it reduces, relative to the plan previously in effect, the total number of districts in which minorities

⁷⁸ 478 US 30 (1986); see also *Grove v Emison*, 507 US 25, 40-41 (1993) (applying the *Gingles* framework to single-member districts).

⁷⁹ *Thornburg*, 478 US at 50-51.

⁸⁰ See *id.* at 36-37, 44-45. These factors include any history of official discrimination, the extent of racial polarization in voting, the use of election rules that overly advantage the majority, access to the candidate slating process, the impact of discrimination on minorities’ political participation, the use of racial appeals in campaigns, minorities’ prior success in winning office, elected officials’ responsiveness to minority concerns, and the tenuousness of a jurisdiction’s justification for a policy. See *id.*

⁸¹ See *Johnson v De Grandy*, 512 US 997, 1000 (1994).

⁸² See *Holder v Hall*, 512 US 874, 880 (1994).

⁸³ See *LULAC v Perry*, 548 US 399, 437 (2006); *Johnson*, 512 US at 1008 (“[T]he first *Gingles* condition requires the possibility of creating more than the existing number of [minority-opportunity districts] . . .”).

⁸⁴ For the sake of simplicity, I use the term “ability districts” to refer to districts covered by both Section 2 and Section 5. But the term “opportunity districts” technically is more accurate for Section 2-covered districts since the provision refers to the “opportunity” rather than the “ability” to elect.

⁸⁵ The only exceptions are if the failure to draw additional ability districts establishes discriminatory intent or if a jurisdiction must draw a larger number of districts (due to population growth, for example). See *Texas v United States*, 887 F Supp 2d 133, 156-59 (DDC 2012), *vacd*, 133 S Ct 2885 (2013) (*Texas II*); see also note 129 (describing earlier period in which DOJ treated Section 2 violations as grounds for denying preclearance).

⁸⁶ See *Beer v United States*, 425 US 130, 141 (1976).

⁸⁷ See *Georgia v Ashcroft*, 539 US 461, 479 (2003).

are able to elect the candidate of their choice.⁸⁸ A plan also is unlawful under Section 5 if it is motivated by any kind of discriminatory intent.⁸⁹

At first blush, Section 2 and Section 5 would seem to have very similar coverage with respect to the elimination of an existing ability district. Under Section 2, a minority group easily would be able to show that an additional such district could be drawn because an additional such district *existed* before it was dismantled. Likewise, under Section 5, the erasure of a district in which minorities previously were able to elect their preferred candidate is the very definition of retrogression. The statutory text confirms the apparent overlap of the two provisions. Section 2 forbids district plans that give minority members “less opportunity . . . to elect representatives of their choice,”⁹⁰ while Section 5 bans plans that “diminish[] the ability” of minorities “to elect their preferred candidates of choice.”⁹¹ It would take no interpretive gymnastics to construe these passages identically.

But this is not the path the Court has taken. Instead, in a series of decisions spanning two decades, the Court repeatedly has narrowed the scope of Section 2. A clear substantive gap now exists between Section 2 and Section 5, even though neither the provisions’ language nor their logic requires that there be such a gap. Below I lay out the three principal ways in which Section 2 and Section 5 diverge in their coverage. These distinctions have not previously been identified, but together they mean that certain districts that used to be shielded by Section 5 now will be bereft of any legal protection.

1. Geographic Compactness

First, in a line of cases in the 1990s involving allegations that districts were unconstitutional racial gerrymanders, the Court held that highly non-compact districts are never required by Section 2. If minority members are geographically distributed in such a way that only a bizarre-looking district can enclose enough of them to enable the election of their preferred candidate, then there is no liability under the provision. Even if minorities reside in a manner that permits a reasonably compact ability district to be drawn (in which case there is liability), it is an impermissible remedy to create a district that is too strangely shaped.⁹² The Court thus declared that a district that tracked highway I-85 through North Carolina “could not remedy any potential § 2 violation.”⁹³ “No one looking at [the district] could reasonably suggest

⁸⁸ See *Texas v United States*, 831 F Supp 2d 244, 262 (DDC 2011) (*Texas I*) (noting that Section 5 inquiry “requires identifying districts in which minority citizens enjoy an existing ability to elect and comparing the number of such districts in the benchmark to the number of such districts in a proposed plan”). Under the approach adopted by the Supreme Court in *Georgia*, but rejected by Congress in its 2006 amendments, the retrogression inquiry also would have required consideration of the number of minority *influence* districts, the ability of minorities to participate in the political process, and minorities’ legislative power. See *Georgia*, 539 US at 479-85.

⁸⁹ See *Texas II*, 887 F Supp 2d at 151-52. Prior to its 2006 amendments, Section 5 had been interpreted to prohibit only *retrogressive* intent. See *Reno v Bossier Parish Sch Bd*, 528 US 320, 328 (2000).

⁹⁰ 42 USC § 1973(b).

⁹¹ *Id.* § 1973c(b).

⁹² See *Bush v Vera*, 517 US 952, 979 (1996) (“If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.”).

⁹³ *Shaw v Hunt*, 517 US 899, 916 (1996).

that the district contains a ‘geographically compact’ population of any race.’”⁹⁴ Similarly, the Court rejected a Texas district that “reaches out to grab small and apparently isolated minority communities.”⁹⁵ “These characteristics defeat any claim that the district[]” was necessitated by Section 2.⁹⁶

Under Section 5, on the other hand, compactness is largely irrelevant to the dispositive question: whether a district’s minority residents possess the ability to elect the candidate of their choice. Whether minorities possess this ability depends on their number, turnout, and political cohesion, but it is not a function of the oddness of a district’s shape. Not surprisingly, compactness has played no role in the Court’s Section 5 decisions (nor in those of the lower courts). It should be noted, however, that during the 2006 debate over Section 5’s reauthorization, several Republican senators argued that the goal of the amended provision was to “prevent states from dismantling . . . ‘geographically compact majority-minority districts.’”⁹⁷ The DOJ also has stated that one of the factors it considers in assessing retrogression is the “geographic compactness of a jurisdiction’s minority population.”⁹⁸ These views have not been embraced by the case law, but they do appear in the legislative history and agency guidance.

The upshot is that when a highly non-compact ability district is eliminated, there is retrogression under Section 5 but there (most likely) is no violation of Section 2. The district’s strange shape makes no difference in the Section 5 inquiry, but it clearly means that the district is an invalid Section 2 remedy, and it implies as well that no reasonably compact district could be drawn in the area. Accordingly, in the wake of *Shelby County*, most bizarre-looking ability districts in the South may be dismantled with legal impunity. How many such districts exist is a question to which I turn in Section II.B.

2. Minority Heterogeneity

The second way in which the Court has constricted the scope of Section 2 is by requiring that a district not combine overly dissimilar minority communities. In the 2006 case of *LULAC v Perry*, the Court held that Texas violated the provision when it disbanded an ability district near

⁹⁴ *Id.*

⁹⁵ *Bush*, 517 US at 979.

⁹⁶ *Id.* The case law is ambiguous as to whether it is the compactness of the *district* or of the *minority population* that is relevant under Section 2. The passages from *Bush* and *Shaw* suggest that it is district compactness that matters. This also has been the conclusion of lower courts adjudicating Section 2 cases. See Katz et al, 39 U Mich J L Reform at 662-63 (cited in note 11). However, the original language in *Gingles* that gave rise to the compactness requirement asks whether “the *minority group* . . . is sufficiently . . . geographically compact.” *Thornburg v Gingles*, 478 US 30, 50 (1986) (emphasis added). Justice Kennedy also has repeatedly expressed his view that “[t]he first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.” *Bush*, 517 US at 997 (Kennedy concurring); see also *LULAC v Perry*, 548 US 399, 432-33 (2006).

⁹⁷ S Rep No 109-295, at 19 (2006) (quoting testimony of attorney Anne Lewis); see also *id.* at 19 (claiming that new Section 5 language was “designed to prevent legislators from intentionally “cracking” or “fragmenting” geographically compact minority voting communities” (quoting testimony of NAACP president Theodore Shaw)).

⁹⁸ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed Reg 7470, 7471 (Feb 9, 2011).

Laredo that contained a “cohesive” Latino population with “an efficacious political identity.”⁹⁹ Had the district *not* contained such a unified Latino community, it likely would not have received Section 2 protection—a claim that can be made confidently thanks to the Court’s treatment of the remedial district that Texas created to compensate for its elimination of the Laredo-area district. The remedial district enclosed a clear Latino majority, but nevertheless was rejected by the Court because it merged “Latino communities . . . [with] divergent needs and interests owing to differences in socio-economic status.”¹⁰⁰ As the Court put it, “[t]here is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires.”¹⁰¹

Following *LULAC*, it appears that there is no liability under Section 2 when the relevant minority population is highly “spatially diverse”¹⁰² or “culturally non-compact.”¹⁰³ It also appears that a district including such a population is not a valid Section 2 remedy. This is the case, at least, when the minority groups at issue are both socioeconomically dissimilar and geographically separated.¹⁰⁴ However, the degree of uncertainty associated with this articulation of the legal standard is unusually high. *LULAC* remains the only Supreme Court case addressing this aspect of Section 2 doctrine, and the lower courts have yet to confront many *LULAC*-based defenses to otherwise valid Section 2 claims.¹⁰⁵

Under Section 5, in contrast, the heterogeneity of a district’s minority population is extraneous to whether the population has the ability to elect the candidate of its choice. If the population has this ability, then the district that contains it is protected under Section 5—no matter how similar or dissimilar the minority members may be. As with geographic compactness, there is no hint in the Section 5 case law that retrogression is permissible if a district happens to combine disparate minority communities. But as with compactness,

⁹⁹ 548 US 399, 435 (2006); see also *id.* (noting that “there has been no contention that different pockets of the Latino population in [the district] have divergent needs and interests”).

¹⁰⁰ *Id.* at 424 (citations and internal quotation marks omitted).

¹⁰¹ *Id.* at 433.

¹⁰² This is the term I have used in earlier work to describe geographic entities (such as districts) whose spatial subunits are highly heterogeneous. See Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 Harv L Rev 1905, 1912-17 (2012); see also *id.* at 1929-33 (arguing that spatial homogeneity has been an implicit Section 2 requirement for decades).

¹⁰³ See Daniel R. Ortiz, *Cultural Compactness*, 105 Mich L Rev First Impressions 48, 50 (2006) (“If the Court were to require that plaintiffs establish . . . cultural compactness, Section 2 claims would be much more difficult.”); Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 Ohio St L J 1139, 1146 (2007) (observing that after *LULAC* “the Act is not violated . . . unless an election district can be created . . . [that is] geographically and culturally compact”).

¹⁰⁴ See *LULAC*, 548 US at 435 (“We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes.”).

¹⁰⁵ Lower court cases that have addressed the heterogeneity of minority populations under Section 2 include *Ga State Conf of NAACP v Fayette Cty Bd of Comm’rs*, ___ F Supp 2d ___, 2013 WL 2948147, at *12 (ND Ga May 21, 2013) (finding that African Americans in two nearby towns “share common socioeconomic and political concerns”), *Perez v Texas*, 891 F Supp 2d 808, 836 (WD Tex 2012) (rejecting proposed district that was “nearly identical” to district rejected in *LULAC*), *Fletcher v Lamone*, 831 F Supp 2d 887, 899 (D Md 2011) (rejecting proposed district that combined distinct African American communities in Baltimore and Washington, DC suburbs), and *Benavidez v City of Irving*, 638 F Supp 2d 709, 722 (ND Tex 2009) (finding that although district contained Hispanic neighborhood that “may differ in some demographic characteristics from the core area,” neighborhood was “geographically close to that core” and thus district was valid Section 2 remedy).

Republican senators argued in 2006 that the retrogression inquiry *should* take this factor into account. According to the Senate report they penned, “the [new Section 5] language seeks to protect *naturally occurring* majority-minority districts” that correspond to distinct “minority voting communities.”¹⁰⁶ This position has not been adopted by any judicial decision—though the Supreme Court, of course, never had the opportunity to consider how the revised Section 5 should be applied to districts containing heterogeneous minority populations.

The consequence is that when a district that joins dissimilar minority communities is eliminated, retrogression occurs under Section 5 but Section 2 (probably) is not breached. The heterogeneity of the district’s minority population is immaterial under Section 5, but it indicates that the district is not a permissible Section 2 remedy, and it also suggests that no district containing a sufficiently homogeneous population could be created in the region. Thanks to *Shelby County*, then, most southern districts that merge disparate minority groups now lawfully may be dismantled. The number of these districts, again, is the subject of Section II.B.

3. Population Size

The final limitation the Court has imposed on Section 2 involves the size of minority groups. In the 2009 case of *Bartlett v Strickland*, the Court held that in order for there to be liability under the provision, it must be possible to create an additional district in which minority members make up a *majority* of the population.¹⁰⁷ “The special significance . . . of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and . . . is not put into a district.”¹⁰⁸ The Court hinted, however, that districts with minority populations below 50 percent might be relevant on the remedial side of the Section 2 analysis. “States can—and in proper cases should—defend against alleged § 2 violations by pointing to . . . effective crossover districts.”¹⁰⁹ After *Bartlett*, it is clear that plaintiffs must prove that another majority-minority district could be drawn, but it is uncertain whether a majority-minority district is the only permissible remedy once liability has been established.

Under Section 5, on the other hand, there is little doubt that districts with minority populations below 50 percent are protected if these populations in fact are able (with crossover support from white voters) to elect their preferred candidates. In the 2003 case of *Georgia v Ashcroft*, interpreting the pre-amendment version of Section 5, the Court held that the provision extends to “coalitions of voters who together will help to achieve the electoral aspirations of the minority group.”¹¹⁰ Similarly, the House report that accompanied Section 5’s 2006 reauthorization stated that it applies to “[v]oting changes that leave a minority group less able to

¹⁰⁶ S Rep No 109-295, at 19 (2006) (emphasis added) (quoting testimony of NAACP president Theodore Shaw); see also Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L J 174, 239 (2007) (flagging Senate report’s references to “naturally occurring” majority-minority districts).

¹⁰⁷ 556 US 1, 18-19 (2009).

¹⁰⁸ *Id.* at 19.

¹⁰⁹ *Id.* at 24.

¹¹⁰ 539 US 461, 480 (2003); see also *id.* at 484 (noting that “the addition or subtraction of coalitional districts is relevant to the § 5 inquiry”); *id.* at 492 (Souter dissenting) (agreeing that Section 5 extends to “coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters”).

elect a preferred candidate of choice, either directly or when coalesced with other voters.”¹¹¹ And in the lone case construing the amended version of Section 5 in the vote dilution context, the court explicitly ruled that “[s]ince . . . crossover districts provide minority groups the ability to elect a preferred candidate, they must be recognized as ability districts in a Section 5 analysis.”¹¹² However, the Republican-drafted Senate report contended that the provision’s new language “would *not* lock into place [crossover] districts.”¹¹³

This means, once again, that when an ability district with a minority population below 50 percent is eliminated, there is retrogression under Section 5 but there (likely) is no violation of Section 2. The smaller proportion of minority members is irrelevant under Section 5—as long as it is sufficient to enable the election of their preferred candidate—but it suggests that no majority-minority district can be drawn in the area, in which case there can be no Section 2 liability. How many ability districts exist in the South that are *not* majority-minority districts is the final empirical issue that I investigate in Section II.B.

4. Further Twists

But before turning to the empirical analysis it is important to make three more points about the relationship between Section 2 and Section 5 in the vote dilution context. First, while until now I have stressed the provisions’ distinctions, they also share a number of commonalities, including in areas where they could have been construed differently. For example, majority-minority and crossover districts do not exhaust the kinds of constituencies to which the VRA might apply. The district taxonomy also includes coalition districts, in which different minority groups join together to elect their mutually preferred candidate;¹¹⁴ and influence districts, in which the minority population cannot elect the candidate of its choice, but *can* exert some sway over who is elected and what she does once in office.¹¹⁵ Both Section 2 and Section 5 have been interpreted to apply to coalition districts (at least when the combined size of the minority groups is greater than 50 percent in the case of Section 2).¹¹⁶ And both Section 2 and Section 5 have been interpreted not to apply to influence districts (although Section 5 did extend to them prior to its 2006 revision).¹¹⁷

¹¹¹ HR Rep No 109-478, at 71 (2006).

¹¹² *Texas v United States*, 831 F Supp 2d 244, 267-68 (DDC 2011); see also Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed Reg 7470, 7471 (Feb 9, 2011) (“[T]he Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the [Section 5] assessment.”).

¹¹³ S Rep No 109-295, at 21 (2006).

¹¹⁴ See *Bartlett*, 556 US at 13.

¹¹⁵ See *id.*

¹¹⁶ See *Texas I*, 831 F Supp 2d at 268 (recognizing that under Section 5 “coalition districts are ability districts”); Katz et al, 39 U Mich J L Reform at 661 (cited in note 11) (finding that under Section 2 “[m]ost courts” regard coalition-district claims as “cognizable”). The Supreme Court has not explicitly addressed the status of coalition districts under Section 2. See *Bartlett*, 556 US at 13-14. The Republican-drafted Senate report also opposed the extension of Section 5 to coalition districts. See S Rep No 109-295, at 21(2006).

¹¹⁷ See *LULAC v Perry*, 548 US 399, 446 (2006) (holding that “the lack of [influence] districts cannot establish a § 2 violation”); *Texas I*, 831 F Supp 2d at 251 (observing that, in amending Section 5, “Congress sought to make clear that it was not enough that a redistricting plan gave minority voters ‘influence’”). But see *Georgia v Ashcroft*, 539 US 461, 482-83 (2003) (holding prior to 2006 reauthorization that “a court must examine whether a new plan adds or subtracts ‘influence districts’”).

Analogously, both Section 2 and Section 5 are violated when it is established that the intent underlying a district plan is racially discriminatory. The current text of Section 5 declares outright that the provision forbids “any discriminatory purpose.”¹¹⁸ The role of motive in Section 2 analysis is less clear, but most lower courts have concluded that the provision is offended by *both* discriminatory intent and discriminatory results.¹¹⁹ Notably, the Senate report that accompanied the 1982 amendments to Section 2 stated that “plaintiffs must either prove such intent, or, alternatively, must show” the presence of unequal effects.¹²⁰ Congress’s objective in revising Section 2 was to clarify that liability could stem from disparate impact, but it had no intention of precluding claims based on invidious motivation.

Furthermore, the array of additional elements that must be demonstrated to prevail on a Section 2 claim—minority political cohesion, racial polarization in voting, the nine Senate factors, a lack of proportional representation, and the existence of a suitable policy benchmark¹²¹—do not meaningfully distinguish the provision from Section 5. Minority cohesion and racial polarization are not formally part of the Section 5 inquiry, but in practice they must be shown in order to prove that a minority population has the ability to elect its preferred candidate. “[A] court addressing a proposed voting plan under Section 5 must determine whether there is cohesive voting among minorities and whether minority/White polarization is present in the jurisdiction submitting the plan.”¹²² Likewise, the Senate factors play no role in the Section 5 analysis, either formally or functionally, but they typically are easy to establish in Section 2 cases in formerly covered areas. Most of the factors relate to a jurisdiction’s history of discrimination, and the formerly covered areas include most of the jurisdictions with the most egregious such histories.¹²³

¹¹⁸ 42 USC § 1973c(c); see also note 89 (explaining how this language reversed an earlier Court interpretation).

¹¹⁹ See, for example, *United States v Brown*, 561 F3d 420, 432-33 (5th Cir 2009); *Cousin v McWhorter*, 46 F3d 568, 572 (6th Cir 1995); *Nipper v Smith*, 39 F3d 1494, 1520 (11th Cir 1994) (en banc) (“[A] plaintiff . . . may demonstrate a [Section 2] violation by proving *either*: (1) the subjective discriminatory motive of legislators or other relevant officials; *or* (2) [discriminatory results].”).

¹²⁰ S Rep No 97-417, at 107-08 (1982).

¹²¹ See notes 78-83 and accompanying text (setting forth elements of Section 2 claim).

¹²² *Texas v United States*, 831 F Supp 2d 244, 262 (DDC 2011). Moreover, even if racial polarization were relevant to Section 2 but not to Section 5, it remains rampant in most of the formerly covered jurisdictions, and thus could be established easily in most cases. See HR Rep No 109-478, at 34 (2006) (citing testimony that “the degree of racially polarized voting in the South is increasing, not decreasing” and is “in certain ways re-creating the segregated system of the Old South”); *Protecting Minority Voters* at 89-97 (cited in note 48); Stephen Ansolabehere et al, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv L Rev 1385, 1403, 1415-16, 1424 (2010) (reporting high and growing levels of polarization in formerly covered areas).

¹²³ See Katz et al, 39 U Mich J L Reform at 696 (cited in note 11) (noting that under Section 2 “courts in Southern states assumed or outlined a long local and state history of official discrimination”); Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 Am U L Rev 1575, 1602 (2010) (observing that “jurisdictions covered by Section 5 were subjected to the preclearance requirement in the first place because prima facie evidence of voting-related discrimination existed”); see also Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights*, 75 U Chi L Rev 1493, 1519-20 (2008) (describing “conventional wisdom that satisfaction of the *Gingles* factors correlates strongly with liability”); Katz et al, 39 U Mich J L Reform at 660 (cited in note 11) (finding that 57 of 68 opinions that ruled in minority group’s favor as to *Gingles* preconditions also ruled in its favor as to ultimate liability).

As for a lack of proportional representation, it too is not a requirement under Section 5, but it too can be demonstrated without difficulty in a Section 2 suit. Both African Americans and Hispanics are currently underrepresented in the state legislatures and congressional delegations of every formerly covered state.¹²⁴ Lastly, a suitable benchmark with which to compare a challenged policy does not exist in certain kinds of vote dilution cases, such as municipal annexations and objections to local governance structures.¹²⁵ But there is no benchmark problem in the redistricting context, in which the alternative district plan proposed by a Section 2 plaintiff always may be compared to the plan currently in effect.¹²⁶

The second point about the relationship between Section 2 and Section 5 is that it is both dynamic and ambiguous. The relationship is dynamic because it shifts whenever the Court interprets the provisions, Congress amends them, or the DOJ chooses how to enforce them. For instance, the provisions' gap was smaller with respect to redistricting before the Court began limiting the scope of Section 2 in the 1990s.¹²⁷ Similarly, the gap was larger before Congress amended Section 2 in 1982 to clarify that it could be violated by discriminatory results even in the absence of discriminatory intent.¹²⁸ The gap was smaller as well when, in the 1990s, the DOJ treated violations of Section 2 as grounds to deny preclearance under Section 5.¹²⁹ And had the Court responded to Section 5's reauthorization by construing the provision narrowly, rather than by striking it down, the gap again would have shrunk.

The relationship between the provisions also is ambiguous because their precise coverage is uncertain. A generation after its current text was adopted, it remains unclear whether Section 2 allows crossover districts to be considered as remedies, whether it extends to coalition districts, how it governs claims based solely on discriminatory intent, and how the homogeneity of minority groups is to be determined.¹³⁰ As Christopher Elmendorf has remarked, "the Supreme Court has failed to resolve basic conceptual questions about what constitutes an injury within the meaning of the statute."¹³¹ If anything, the scope of Section 5 is even hazier. Before the 2006

¹²⁴ See appendix table 1; see also Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U Chi L Rev 769, 834 (2013) (describing underrepresentation of minority groups throughout country).

¹²⁵ See *Holder v Hall*, 512 US 874, 884 (1994).

¹²⁶ See *id.* at 880 (observing that "[i]n certain cases, the benchmark for comparison in a § 2 dilution suit is obvious"); *Thornburg v Gingles*, 478 US 30, 50 note 17 (1986) (noting that "[t]he single-member district is generally the appropriate standard" in redistricting cases).

¹²⁷ Conversely, the Court shrank the gap when it made Section 5 more difficult to violate in *Reno v Bossier Parish Sch Bd*, 528 US 320, 328 (2000) (holding that only a retrogressive purpose violates Section 5), and *Georgia v Ashcroft*, 539 US 461, 482-85 (2003) (holding that ability districts may be eliminated if their elimination is offset by new influence districts or other gains for minorities). See McCrary et al, *The Law of Preclearance: Enforcing Section 5* at 27 (cited in note 77) (describing sharp decline in preclearance denials in wake of *Bossier Parish II*); Persily, 117 Yale L J at 199-200 (cited in note 106) (same).

¹²⁸ And when Congress overturned *Bossier Parish II* and *Georgia* in 2006, it widened the gap by making Section 5 easier to violate.

¹²⁹ See Bruce E. Cain and Karin MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, in Epstein et al, eds, *The Future of the Voting Rights Act* 125, 132 (cited in note 8) (commenting that during this period "the distinction between section 2 and section 5 standards blurred"); see also *Reno v Bossier Parish Sch Bd*, 520 US 471, 480-85 (1997) (*Bossier Parish I*) (rejecting this DOJ interpretation of Section 5).

¹³⁰ See Sections II.A.1-3.

¹³¹ Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U Pa L Rev 377, 394 (2012).

amendments to the provision, the Court addressed its application to redistricting only once, in a decision that Congress partially reversed just three years later.¹³² Since 2006, the Court has not expounded at all on the meaning of Section 5, and only a single lower court has explored how it relates to redistricting.¹³³ And congressional intent on the subject is more difficult than usual to ascertain, thanks to dueling House and Senate reports that take nearly opposite stances on the construction of key statutory terms.¹³⁴

The final point about how Section 2 and Section 5 interrelate is that the former is not always narrower than the latter. As I have discussed above, Section 2 is less effective than Section 5 in several respects as a *shield* for existing ability districts. But, unlike Section 5, Section 2 also can be wielded as a *sword* to win the creation of additional ability districts. When plaintiffs meet the *Gingles* preconditions and show that the totality of circumstances supports their claim, their reward—which is unavailable under Section 5—is an increase in the level of minority representation.¹³⁵

Because it can be used not just defensively but also for offense, Section 2 deserves much of the credit for the growing minority presence in the halls of power in recent years. Following the 1982 amendments to the provision, plaintiffs prevailed in many Section 2 suits throughout the country, usually obtaining as remedies new ability districts.¹³⁶ The result of this wave of litigation was “a quantum increase in minority representation” in the 1990s.¹³⁷ In the U.S. House of Representatives, for example, the number of African Americans elected from the South jumped from five to seventeen.¹³⁸ In the years since this representational spike, Section 5 has played a vital role in preserving the gains made by minorities.¹³⁹ But it was primarily Section 2, not Section 5, that made the gains possible in the first place.

B. Empirical Gap

¹³² This decision, of course, was *Georgia v Ashcroft*. See also Persily, 117 Yale L J at 234 (cited in note 106) (noting that “there is disagreement about what the standard [before *Georgia*] was”).

¹³³ See *Texas v United States*, 887 F Supp 2d 133 (DDC 2012), vacd, 133 S Ct 2885 (2013); *Texas v United States*, 831 F Supp 2d 244 (DDC 2011).

¹³⁴ See HR Rep No 109-478 (2006); S Rep No 109-295 (2006); see also Persily, 117 Yale L J at 218 (cited in note 106) (describing how “Democrats and Republicans hold dramatically differing views as to what [the new Section 5] standard requires”); Pildes, 68 Ohio St L J at 1155 (cited in note 103) (“[T]here is a great deal of ambiguity and uncertainty about what Congress understood the renewed Act to mean.”).

¹³⁵ But see note 85 (identifying certain rare circumstances in which Section 5 currently can be used for offense); note 129 and accompanying text (describing period in 1990s when DOJ treated Section 2 violations as grounds to deny preclearance, thus allowing Section 5 to be used for offense).

¹³⁶ See HR Rep No 109-478, at 52 (2006) (“In many of the [covered] jurisdictions . . . the initial gains made by minority voters were the result of Section 2 enforcement . . .”). But see Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Preclearance*, 49 How L J 785, 799-803 (2006) (arguing that Section 5 also deserves credit for minorities’ representation gains in 1990s).

¹³⁷ *Introduction*, in David A. Bositis, ed, *Redistricting and Minority Representation* 1, 1 (University Press 1998).

¹³⁸ See Bernard Grofman et al, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 NC L Rev 1383, 1394 (2001).

¹³⁹ See Grofman and Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics* at 312 (cited in note 8); Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 Ala L Rev 903, 922 (2008) (observing that Section 5 “prevent[ed] any backsliding . . . of gains in descriptive representation”).

The relationship between Section 2 and Section 5 thus is quite complex. But the key point for present purposes is that certain districts that used to be protected by Section 5 now may be eliminated without violating Section 2. How many such districts are there? Surprisingly, this is the first Article to tackle this important question. To answer it, I first identify the existing districts that, prior to *Shelby County*, were shielded by Section 5 because their minority residents have the ability to elect the candidate of their choice. I then calculate the number of ability districts that are too non-compact or that have minority populations that are too heterogeneous or small to qualify for Section 2 coverage. These are the districts that fall into the Section 2 – Section 5 gap.

1. The Section 5 Universe

The best way to determine if minority members in a district have the ability to elect their preferred candidate—in which case the district formerly was protected by Section 5—is to examine an array of past elections.¹⁴⁰ Both district-specific (i.e., “endogenous”) and statewide or national (i.e., “exogenous”) elections ideally should be considered.¹⁴¹ In combination, these elections capture the size, turnout, and political cohesion of the minority population as well as the extent of racial polarization in voting, and reveal how often the minority-preferred candidate in fact prevails.¹⁴² Aided by a ten-day trial¹⁴³ and fourteen separate experts,¹⁴⁴ this was the methodology that the only court to decide a Section 5 redistricting case after the provision’s 2006 reauthorization employed.

Unfortunately, the optimal methodology strained the resources of the court and litigants, and is infeasible for the entire universe of jurisdictions that previously were covered by Section 5. Exogenous data from the most recent presidential election, for example, is unavailable for most state legislative districts,¹⁴⁵ as is detailed knowledge about local political conditions. Since I was unable to carry out the first-best form of analysis, I instead took the following approach. First, I used Census data¹⁴⁶ to find all of the congressional and state legislative districts in formerly covered states in which minorities make up more than 50 percent of the citizen voting-age population (CVAP). I included in my analysis all of the southern and southwestern states to which Section 5 previously applied in large part or in full.¹⁴⁷ I combined the African American and Hispanic populations in each district because these groups tend to vote cohesively

¹⁴⁰ See *Texas v. United States*, 887 F Supp 2d 133, 141-44 (DDC 2012), vacd, 133 S Ct 2885 (2013).

¹⁴¹ See *id.*

¹⁴² See *id.* at 141-42 (noting that endogenous elections in particular help “determine whether a district in the existing, or benchmark, plan has an ability to elect”).

¹⁴³ See *id.* at 139.

¹⁴⁴ See *id.* at 141.

¹⁴⁵ See *2012 Election Results by Congressional and Legislative Districts*, Daily Kos (July 9, 2013), online at <http://www.dailykos.com/story/2013/07/09/1220127/-Daily-Kos-Elections-2012-election-results-by-congressional-and-legislative-districts> [hereinafter *Presidential Results by State Legislative Districts*] (data unavailable for Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas state legislative districts).

¹⁴⁶ See *Voting Age Population by Citizenship and Race (CVAP)*, US Census Bureau (last visited Oct 1, 2013), online at http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

¹⁴⁷ These states are Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. See *Section 5 Covered Jurisdictions*, US Dept of Justice (last visited Oct 1, 2013), online at http://www.justice.gov/crt/about/vot/sec_5/covered.php.

(particularly in general elections).¹⁴⁸ I treated 50 percent as the threshold above which a constituency automatically qualifies as an ability district because the Supreme Court took the same shortcut in *Georgia*.¹⁴⁹ And I focused on CVAP rather than total or voting-age population because the Court also has done so and because CVAP is a superior measure of minority voting strength.¹⁵⁰

Second, I used Census data as well as demographic information about elected officials¹⁵¹ to locate all districts with a minority CVAP above 40 percent *and* a minority representative. Political scientists have found that districts with CVAPs below 40 percent almost never elect minority representatives, meaning that they are highly unlikely to be ability districts.¹⁵² Conversely, both political scientists and courts commonly have assumed that minority representatives are the preferred candidates of minority members.¹⁵³ Accordingly, when a district has a CVAP over 40 percent as well as a minority representative, it is very probable that its minority residents have the ability to elect the candidate of their choice.

Finally, I cross-checked the ability districts I identified with the limited available exogenous data in order to see whether the districts voted for Barack Obama (the minority-preferred presidential candidate) over Mitt Romney in 2012.¹⁵⁴ At the congressional level, twenty-four of the twenty-five districts I identified voted for Obama, and the only one that did not was a toss-up.¹⁵⁵ At the state level, all fifty-six of the districts I identified, and for which data

¹⁴⁸ See *Texas II*, 887 F Supp 2d at 158 note 27 (“Our calculations use the combined Black and Hispanic share of the CVAP . . .”). Because there are rarely large black and Hispanic populations in the same districts—and rarely large Hispanic populations in any of the states I examine other than Arizona and Texas—it makes little difference whether or not the minority populations are combined. See *id* (obtaining same results if black and Hispanic populations are analyzed separately).

¹⁴⁹ See *Georgia v Ashcroft*, 539 US 461, 470-71, 487-88 (2003) (repeatedly citing number of majority-black districts in Georgia senate plan).

¹⁵⁰ See *LULAC v Perry*, 548 US 399, 423-25, 427-28, 436-38, 441, 443 (2006) (repeatedly referring to CVAP).

¹⁵¹ See Joint Center for Political & Economic Studies, *National Roster of Black Elected Officials* (2013); NALEO, *Directory of Latino Elected Officials* (2013). I supplemented this data by visiting the websites of the representatives from all districts with CVAPs above 30 percent.

¹⁵² See Grofman and Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics* at 313 (cited in note 8); Charles Cameron et al, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 Am Pol Sci Rev 794, 805 (1996) (finding that black population of 40.3 percent is needed in South for there to be 50 percent chance of electing black representative).

¹⁵³ See Bernard Grofman, *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity, and Control*, 5 Election L J 250, 256 (2006); Katz et al, 39 U Mich J L Reform at 665-66 (cited in note 11); Persily, 117 Yale L J at 221 (cited in note 106) (“[I]t is commonplace for courts to assume that minority candidates are the minority community’s candidates of choice.”).

¹⁵⁴ See *Texas v United States*, 887 F Supp 2d 133, 142 (DDC 2012), vacd, 133 S Ct 2885 (2013) (noting that “minority voters almost always prefer Democratic candidates” and that “minority voters lack an ability to elect in a benchmark district carried by John McCain over Barack Obama”).

¹⁵⁵ See *Presidential Results by Congressional District for the 2012 and 2008 Elections*, Daily Kos (Nov 19, 2012), online at <http://www.dailykos.com/story/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections?detail=hide>. The one exception was Texas Congressional District 23, which gave Obama 48.1 percent of the vote, but which has a combined minority CVAP of 64.5 percent and elected a Hispanic Democrat in 2012.

was available, voted for Obama as well.¹⁵⁶ These results help confirm that the districts I identified indeed are ones in which minorities are able to elect the candidate of their choice.

Table 1 in the Appendix, then, lists by body and state all of the districts that formerly were protected by Section 5.¹⁵⁷ There are a total of 404 such districts, 25 in the U.S. House, 92 in state senates, and 287 in state houses. In absolute terms, Georgia has the most such districts (77) while Arizona has the least (18). As a share of all districts, Texas has the highest proportion of previously shielded districts (33.6 percent) while Virginia has the lowest (12.6 percent). The gap between the proportion of previously shielded districts and the statewide minority CVAP share is highest in Virginia (10.4 percent) and lowest in Alabama (1.4 percent). Over the whole nine-state region, the deviation from proportionality is 5.1 percent.

2. Geographic Compactness

Which of these formerly protected districts now may be disbanded because they are too non-compact to qualify for Section 2 coverage? In a landmark 1993 study, Richard Pildes and Richard Niemi identified eleven majority-black and majority-Hispanic U.S. House districts that they believed might be in legal danger because of their odd shapes.¹⁵⁸ They included in their list all districts with sufficiently poor *dispersion* or *regularity* scores.¹⁵⁹ A district's dispersion refers to how spread out its territory is, i.e., whether the district is long and narrow or essentially circular.¹⁶⁰ A district's regularity indicates how even its perimeter is, i.e., whether the district's borders are contorted or smooth.¹⁶¹ Of the eleven districts that Pildes and Niemi named, seven were struck down by the courts over the course of the ensuing decade.¹⁶² Seven, that is, were so non-compact that they were both constitutionally suspect and beyond the scope of Section 2. This is a very impressive record that justifies my use here of the same compactness methodology.

Accordingly, I first calculated dispersion and regularity scores for all of the districts that previously were protected by Section 5.¹⁶³ I then used the same cutoffs as Pildes and Niemi in order to identify the districts that are so non-compact that they likely are uncovered by Section

¹⁵⁶ See *Presidential Results by State Legislative Districts* (cited in note 145). Data was available for state legislative districts in Arizona, North Carolina, and Virginia.

¹⁵⁷ See appendix table 1.

¹⁵⁸ See Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-district Appearances After Shaw v. Reno*, 92 Mich L Rev 483, 564 (1993). They also included seventeen other districts in their list. See *id.*

¹⁵⁹ See *id.* (using as cutoffs dispersion score of less than or equal to 0.15 and regularity score of less than or equal to 0.05); see also *id.* at 554 note 200, 555 note 203 (providing technical details for calculations of scores).

¹⁶⁰ See *id.* at 549.

¹⁶¹ See *id.*

¹⁶² See *Bush v. Vera*, 517 US 952 (1996) (striking down Texas Districts 18, 29, and 30); *Shaw v. Hunt*, 517 US 899 (1996) (striking down North Carolina District 12); *Diaz v. Silver*, 978 F Supp 96 (ED NY 1997) (striking down New York District 12); *Johnson v. Mortham*, 926 F Supp 1460 (ND Fla 1996) (striking down Florida District 3); *Hays v. La*, 862 F Supp 119 (WD La 1994) (striking down Louisiana District 4).

¹⁶³ I did so using Caliper Corporation's Maptitude for Redistricting software. I obtained congressional and state legislative district plans from *113th Congressional District TIGER/Line Shapefiles*, US Census Bureau (last visited Oct 1, 2013), online at <http://www.census.gov/cgi-bin/geo/shapefilesrd13/main>.

2.¹⁶⁴ As Table 2 in the Appendix reveals, there are twenty-two such districts, five in Congress, four in state senates, and thirteen in state houses.¹⁶⁵ North Carolina and Texas account for all of the strange-looking congressional districts, while Georgia and North Carolina lead the pack at the state house level.¹⁶⁶ (No state is especially noteworthy at the state senate level.) Figures 1 and 2 also display maps of the formerly protected districts with the very worst dispersion and regularity scores. North Carolina's Twelfth Congressional District, which closely resembles the constituency that gave rise to the racial gerrymandering cause of action in the 1990s,¹⁶⁷ has the lowest dispersion *and* regularity scores of any district in my study. North Carolina also features four of the five most irregular ability districts in the South.

FIGURE 1: ABILITY DISTRICTS WITH WORST DISPERSION SCORES

¹⁶⁴ See note 159 (identifying cutoffs).

¹⁶⁵ See appendix table 2.

¹⁶⁶ See *id.*

¹⁶⁷ See *Shaw v Reno*, 509 US 630 (1993). However, the district's current version is not quite as ugly as the one struck down in the 1990s. See Pildes and Niemi, 92 Mich L Rev at 564 (cited in note 158) (district formerly had dispersion score of 0.05 and regularity score of 0.01). Also, I only include the district in Figure 1. The four districts in Figure 2 thus are the second- to fifth-worst in the South with respect to regularity.

NC Congress 12

TX Congress 35

LA House 21

SC House 109

FIGURE 2: ABILITY DISTRICTS WITH WORST REGULARITY SCORES

LA Senate 29

NC House 48

NC House 7

NC Congress 1

But while there do exist districts that are likely beyond the legal pale, the more important point is that there are only very few such districts. If 22 districts are so non-compact that they might be uncovered by Section 2, then 382 districts have shapes that are unproblematic under the provision. Why are the vast majority of ability districts sufficiently compact to qualify for Section 2 protection? The answer is probably that contemporary line-drawers have learned from the dramatic events of the 1990s, when the courts struck down bizarre-looking ability districts throughout the country. Line-drawers have found ways, that is, to continue drawing ability districts while making their shapes less aesthetically offensive.¹⁶⁸ Notably, there are *more* ability districts today than there were in the 1990s, but, at least at the congressional level, the number of highly non-compact districts (using Pildes and Niemi's cutoffs) has fallen from eleven to five.

The other significant point about these statistics is that they are not a foolproof measure of either liability under the Constitution or lack of coverage under Section 2. First, compactness scores can be misleading because they stem, to some degree, from the shape of the *states* in

¹⁶⁸ See Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 Harv L Rev 28, 68 (2004) (“[L]egislators . . . internalized [the courts’ rulings], not as barring them from intentionally creating [ability] districts, but as imposing general, extrinsic limits on the extent to which districts could be non-compact.”).

which districts are located. It is not entirely surprising that North Carolina performs so poorly given the contorted profile of its eastern shore.¹⁶⁹ Second, the constitutional definition of a racial gerrymander is a district that was created with “race [as] the predominant, overriding factor.”¹⁷⁰ A district’s strange shape is “persuasive circumstantial evidence” that race was emphasized too heavily, but it is not a “necessary element of the constitutional wrong.”¹⁷¹ Third, a district’s strange shape also does not demonstrate conclusively that it is an invalid Section 2 remedy. As noted earlier, some uncertainty lingers as to whether *Gingles*’s compactness requirement applies to *districts* or to *minority populations*.¹⁷² And fourth, even if the requirement applies to districts, that a reasonably compact district was not drawn does not necessarily mean that one could not be drawn in the same area. If one could be drawn, then there indeed would be liability under Section 2 if an existing non-compact district was eliminated.

Notwithstanding these caveats, compactness scores are the best available proxy for both racial gerrymandering and lack of Section 2 coverage due to strange district shape. And the clear import of the scores is that very few current districts are so oddly configured that they now may be dismantled without violating Section 2. Next I consider the empirical evidence about the heterogeneity of ability districts’ minority populations—the second reason why a district formerly protected by Section 5 now may be beyond the scope of Section 2.

3. Minority Heterogeneity

In previous work of mine, I developed a technique for measuring the “spatial diversity” of districts.¹⁷³ A district is spatially diverse when its geographic subunits vary markedly with respect to a given factor. Conversely, a district is spatially homogeneous when its subunits are mostly alike with respect to the factor. Spatial diversity also can be applied to districts’ minority populations (as opposed to districts in their entirety).¹⁷⁴ In this case, the concept indicates whether similar or dissimilar groups of minorities have been combined in a district—that is, whether similar or dissimilar minority *communities* have been merged. If dissimilar minority communities have been merged, then a district may be an unlawful racial gerrymander, and it also may be uncovered by Section 2.¹⁷⁵

In my earlier work, I calculated spatial diversity scores with respect to composite factors derived from a very large set of demographic and socioeconomic data from the Census.¹⁷⁶ I also used the Census tract as the spatial subunit for my analysis, and included information about *all* of a tract’s residents (rather than just its minority members).¹⁷⁷ Here I have refined my approach in

¹⁶⁹ See Pildes and Niemi, 92 Mich L Rev at 565 (cited in note 158) (“One must make comparisons carefully because of the effects of state shapes.”).

¹⁷⁰ *Miller v Johnson*, 515 US 900, 910 (1995).

¹⁷¹ *Id* at 913.

¹⁷² See note 96.

¹⁷³ See Stephanopoulos, 125 Harv L Rev at 1936-41 (cited in note 102); see also Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 Stan L & Pol Rev 282, 289-93 (2012).

¹⁷⁴ See Stephanopoulos, 125 Harv L Rev at 1967-68 (cited in note 102).

¹⁷⁵ See Section II.A.2.

¹⁷⁶ See Stephanopoulos, 125 Harv L Rev at 1982-85 table 1 (cited in note 102) (listing nearly one hundred variables used in analysis); Stephanopoulos, 23 Stan L & Pol Rev at 315-18 table 1 (cited in note 172) (same).

¹⁷⁷ See Stephanopoulos, 125 Harv L Rev at 1938, 1967-68 (cited in note 102).

several ways. First, I use the Census block group rather than the Census tract as my spatial subunit. Block groups have about one-third the population of tracts,¹⁷⁸ and thus allow spatial diversity to be calculated more accurately, especially for smaller districts that contain relatively few tracts.¹⁷⁹ Second, I include only information about block groups' African American and Hispanic residents. I therefore am able to quantify the precise concept in which I am interested: the spatial diversity of ability districts' minority populations.¹⁸⁰ And third, I incorporate many fewer demographic and socioeconomic variables into my analysis, because the full range of data is unavailable for minority members at the block group level. The variables that I incorporate encompass age, marital status, education, occupation, and housing—a broad, though not exhaustive, list.¹⁸¹

After assembling this dataset, I carried out a statistical procedure known as factor analysis, which simplifies and renders intelligible large volumes of information.¹⁸² A single composite factor emerged from the analysis, corresponding closely to socioeconomic status.¹⁸³ The factor differentiates between block groups whose minority residents live in married households, have a high household income, work in professional jobs, and own their homes; and block groups whose minority residents have the opposite attributes.¹⁸⁴ I then calculated factor scores for all of the block groups in the nine states included in my study. These scores indicate how the block groups' minority populations perform in terms of the newly created factor.¹⁸⁵ Lastly, I determined the standard deviation, with respect to the new factor, of the block groups within each congressional and state legislative district. The higher the standard deviation, the more likely it is that a district merges dissimilar minority communities, and vice versa.¹⁸⁶

Table 4 in the Appendix, then, lists the 146 current districts whose spatial diversity scores exceed that of the remedial district rejected by the Court in *LULAC* because it “combine[d] two farflung segments of a racial group with disparate interests.”¹⁸⁷ These are the districts that now may be eliminated because their minority populations are too heterogeneous to qualify for

¹⁷⁸ See *Geographic Terms and Concepts – Block Groups*, US Census Bureau (last visited Oct 1, 2013), online at http://www.census.gov/geo/reference/gtc/gtc_bg.html.

¹⁷⁹ The use of a smaller spatial subunit also tends to increase the magnitude of the spatial diversity score. See David W.S. Wong, *Spatial Dependency of Segregation Indices*, 41 *Canadian Geographer* 128, 130–31 (1997).

¹⁸⁰ In my previous work, I was unable to quantify the concept directly because I used data about *all* residents of tracts in which minorities make up more than 40 percent of the population. See Stephanopoulos, 125 *Harv L Rev* at 1967–68 (cited in note 102). Here I merged the data about African American and Hispanic residents in order to produce estimates about block groups' *combined* minority populations.

¹⁸¹ All data is from the 2007–2011 release of the American Community Survey. See *2007–2011 ACS 5-Year Estimates*, US Census Bureau (last visited Oct 1, 2013), online at http://www.census.gov/acs/www/data_documentation/2011_release.

¹⁸² See Stephanopoulos, 125 *Harv L Rev* at 1938 (cited in note 102).

¹⁸³ See appendix table 3. More specifically, a single composite factor with an eigenvalue greater than two emerged. See Stephanopoulos, 125 *Harv L Rev* at 1938 note 179 (cited in note 102) (discussing methodology in more detail).

¹⁸⁴ See appendix table 3.

¹⁸⁵ See Stephanopoulos, 125 *Harv L Rev* at 1939 (cited in note 102).

¹⁸⁶ See *id.* at 1939–40. Because only a single noteworthy factor emerged from the factor analysis, I did not need to compute a weighted average of the scores for different factors. See *id.* at 1940.

¹⁸⁷ *LULAC v Perry*, 548 US 399, 433 (2006); see appendix table 4.

Section 2 protection. Of these districts, sixteen are in Congress,¹⁸⁸ forty-one are in state senates, and eighty-nine are in state houses.¹⁸⁹ Georgia and Texas have the largest numbers of these districts (thirty-three each), while Arizona has the fewest (just four).¹⁹⁰ Figure 3 also displays maps of the five worst-performing districts in the South, along with the district rebuffed in *LULAC*. The darker a block group is colored, the higher its factor score is (and thus the higher the socioeconomic status of its minority population).¹⁹¹ All of the mapped districts merge dissimilar minority communities—typically disadvantaged urban areas and more affluent suburbs—and therefore are likely beyond the scope of Section 2.

FIGURE 3: ABILITY DISTRICTS WITH WORST SPATIAL DIVERSITY SCORES

¹⁸⁸ Using my original methodology, I found in previous work that twenty-one congressional districts in the 2010 cycle contained minority populations that were more heterogeneous than that of the district rejected in *LULAC*. See Stephanopoulos, 125 Harv L Rev at 1978 (cited in note 102). The consistency of these findings is encouraging.

¹⁸⁹ See appendix table 4.

¹⁹⁰ See *id.*

¹⁹¹ Data is missing for uncolored block groups, which were omitted as well from the factor analysis.

The most startling aspect of these findings is the sheer number of potentially unprotected districts. The 146 districts with overly heterogeneous minority populations amount to more than *one-third* of all districts formerly shielded by Section 5. If all of these districts were disbanded, minority representation in the South would decline precipitously, thus realizing the worst fears voiced by commentators after *LULAC*.¹⁹² Why is this segment of the Section 2 – Section 5 gap so large when the compactness segment is so small? One possible answer is that line-drawers have not yet internalized *LULAC* the way they have the Court’s racial gerrymandering decisions.¹⁹³ *LULAC* is a much more recent case, and to date it is the *only* Section 2 case to focus so intently on the composition of districts’ minority populations. Another possibility is that ability districts simply cannot be drawn in many areas in the South without combining disparate minority communities. Minorities may be geographically distributed in such a way that districts with more spatially homogeneous minority populations cannot be created—even if line-drawers would like to create them.¹⁹⁴

As with the compactness analysis, certain caveats about these findings must be mentioned. First, the concept of spatial diversity captures variation only with respect to quantifiable demographic and socioeconomic variables. To the extent that communities are generated by subjective feelings of affiliation, their improper fusion cannot be detected by a numerical score. Second, that a district contains an overly heterogeneous minority population does not necessarily mean that liability under Section 2 cannot be established if the district is eliminated. It may be possible in some circumstances to design a district with a sufficiently homogeneous minority population in the same area, in which case there would be liability. And third, the Court declared in *LULAC* that the remedial district was invalid *both* because it joined dissimilar minority communities *and* because these communities were very far from one other.¹⁹⁵

¹⁹² See Ortiz, 105 Mich L Rev First Impressions at 50 (cited in note 103); Pildes, 68 Ohio St L J at 1146 (cited in note 103); Stephanopoulos, 125 Harv L Rev at 1978-79 (cited in note 102).

¹⁹³ See Pildes, 118 Harv L Rev at 68 (cited in note 168) (making internalization point in racial gerrymandering context).

¹⁹⁴ However, the record of Arizona, the only state in my study that relies on an independent commission to design its districts, counsels against this interpretation. Arizona has fewer ability districts with overly spatially diverse minority populations than any of the other eight states, perhaps because its independent commissioners indeed are able to create ability districts without combining dissimilar minority communities.

¹⁹⁵ See *LULAC*, 548 US at 435.

Districts that join dissimilar minority communities located *near* one another therefore may fall within the ambit of Section 2.

To determine how many districts violate both of the *LULAC* criteria, I computed an additional measure of compactness that indicates the dispersion of a district's minority population.¹⁹⁶ When a district's minority population is highly dispersed, minority communities are likely to be far from one another (or at least to comprise a small share of the total minority population in the broader area). As Table 4 in the Appendix reveals, only six ability districts contain minority populations that are both more heterogeneous and more dispersed than that of the district rejected in *LULAC*. If *LULAC* is construed narrowly, then, its impact may be much less dramatic than my analysis initially suggested. Like the compactness criterion, it may expose only a handful of unusual districts to elimination without any Section 2 recourse.

4. Population Size

The final reason why an ability district may fall into the Section 2 – Section 5 gap is that its minority population is too small to qualify for Section 2 coverage. As discussed above, Section 2 plaintiffs must demonstrate that an additional *majority-minority* district could be drawn, while under Section 5 minorities may be able to elect their preferred candidate even if they make up less than 50 percent of a district's population.¹⁹⁷ To determine how many ability districts in the South are not majority-minority districts, I simply counted the number of ability districts with minority CVAPs below 50 percent. As Table 5 in the Appendix shows, there are seventeen such districts, zero in Congress, six in state senates, and eleven in state houses.¹⁹⁸ Arizona and South Carolina account for five of the six state senate districts, while Arizona, Georgia, and South Carolina account for nine of the eleven state house districts.¹⁹⁹

The key point about these findings again is the scarcity of ability districts that are not majority-minority districts. If 17 districts are beyond the scope of Section 2 because of their relatively small minority populations, then 387 districts have enough minority residents to raise no legal hackles. The explanation for the scarcity likely is twofold. First, the Supreme Court explicitly held in 2009 that there can be liability under Section 2 only if an additional majority-minority district can be drawn.²⁰⁰ Risk-averse jurisdictions may have sought to forestall Section 2 litigation by creating majority-minority districts in almost all areas in which their creation was feasible. Second, the formation of majority-minority districts probably served the political interests of the Republicans who controlled the redistricting process in eight of the nine states in my study.²⁰¹ If ability districts must be drawn, it is preferable from the Republican perspective to

¹⁹⁶ See Richard G. Niemi et al, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J Pol 1155, 1165-66 (1990) (discussing population measures of compactness). Specifically, I calculated the population circle measure of compactness, but using *minority* rather than *total* population as the input for the analysis.

¹⁹⁷ See Section II.A.3.

¹⁹⁸ See appendix table 5. In another thirty-seven ability districts, a *single* minority group does not make up a CVAP majority (though African Americans and Hispanics *combined* do).

¹⁹⁹ See *id.*

²⁰⁰ See *Bartlett v Strickland*, 556 US 1, 18-19 (2009).

²⁰¹ See All About Redistricting (last visited Oct 1, 2013), online at <http://redistricting.lls.edu/> (featuring clickable map showing party in control of redistricting in each state).

make their minority populations as large as possible, thus inefficiently packing Democrats into a small number of constituencies.²⁰²

Some evidence for the partisan hypothesis comes from the record of Arizona, which unlike all the other states in my study relies on an independent commission to draw its district lines.²⁰³ Arizona has less than 5 percent of the 404 formerly protected districts, but it has more than 40 percent of the ability districts with minority CVAPs below 50 percent.²⁰⁴ Because Arizona's commission did not try to enact a pro-Republican gerrymander, it had no reason to create districts with artificially inflated minority populations. The below density curve, showing the distribution of minority populations in all Republican-drawn districts in previously covered states, provides further support for the partisan hypothesis. The distribution is clearly bimodal, with one peak around 20 percent CVAP, where districts tend to be securely (but not overwhelmingly) Republican, and a smaller peak around 60 percent CVAP, where Democrats usually win by enormous margins. The distribution thus is close to optimal for maximizing the number of Republican seats while still drawing the requisite number of ability districts. Notably, there are almost no districts in the 30-50 percent CVAP range, in which Democrats are able to prevail without wasting their votes in landslide victories.²⁰⁵

²⁰² See Cox and Holden, 78 U Chi L Rev at 588 (cited in note 7) (noting that “packing African American voters [is] a second-best strategy” for Republicans who are compelled by VRA to create majority-minority districts).

²⁰³ See note 194 (noting that Arizona commission also created very few districts with overly heterogeneous minority populations).

²⁰⁴ See appendix table 5.

²⁰⁵ See *Georgia v Ashcroft*, 539 US 461, 470, 487 (2003) (noting larger number of these districts in plan drawn by Democrats). The size of this segment of the Section 2 – Section 5 gap thus depends on the partisanship of the redistricting authority. This segment of the gap is small when Republicans draw district lines and large when Democrats are in charge.

FIGURE 4: DISTRIBUTION OF REPUBLICAN-DRAWN DISTRICTS IN FORMERLY COVERED AREAS

Once again, a few caveats about these findings must be noted. First, because of the Supreme Court’s ambiguity in *Bartlett*, it is not entirely clear that ability districts with minority CVAPs below 50 percent are beyond the scope of Section 2. These districts may be valid *remedies* even if the fact that they can be drawn cannot establish *liability*.²⁰⁶ Second, even if these districts are not valid remedies, that a majority-minority district was not created does not necessarily mean that one could not be created in a given area. If one could be created, then there indeed would be liability if an existing ability district was dismantled. Lastly, the distribution of minority populations suggests, but does not quite prove, that partisan advantage was the dominant line-drawing motivation in the formerly covered states. The distribution was not very different in earlier decades when Democrats were largely responsible for redistricting, probably because the DOJ pressured states to draw majority-minority districts rather than ability districts with minority CVAPs below 50 percent.²⁰⁷

C. Odds of Exploitation

²⁰⁶ See note 109.

²⁰⁷ See Lisa Handley et al, *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, in Bernard Grofman, ed, *Race and Redistricting in the 1990s* 13, 32-33 (Algora 1998) (documenting enormous 1990s decline in districts with minority proportions between 30 percent and 50 percent); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 NC L Rev 1517, 1568 (2002) (same).

There are quite a few ability districts in the South, then, that *may* be eliminated in the wake of *Shelby County*. Which of these districts in fact *will* be eliminated? It is too soon to know for certain, but I explore below the reasons why both Republican and Democratic line-drawers sometimes may wish to preserve the districts that populate the Section 2 – Section 5 gap—but sometimes may wish to disband them.

To begin with, line-drawers from both parties may be unsure at times whether particular districts may or may not be jettisoned. As discussed above, the contours of both Section 2 and Section 5 are quite hazy,²⁰⁸ meaning that it often is unclear whether districts previously protected by Section 5 now are covered by Section 2. Line-drawers may decide that discretion is the better part of valor, preserving districts that perhaps do not need to be preserved in order to avoid the cost and uncertainty of litigation. According to Bruce Cain and Karin MacDonald, this is precisely the course that many jurisdictions chose after earlier Court decisions that allowed ability districts to be eliminated. “[T]he legal advice that most jurisdictions [received] was [p]reserve the status quo and do not attract attention.”²⁰⁹

Line-drawers from both parties also may be disinclined to exploit the Section 2 – Section 5 gap because they are satisfied with the status quo. Republicans, first, have found that the creation of majority-minority districts allows the enactment of district plans that tilt dramatically in their favor. By packing their opponents into majority-minority districts, they often can ensure that popular support for Democrats does not translate into a commensurate number of legislative seats.²¹⁰ Notably, when many new majority-minority districts were drawn in the 1990s, Republicans won about a dozen more congressional seats as a direct consequence,²¹¹ while also making gains in every southern state legislature.²¹² Similarly, the recently enacted plans for the 2010 cycle—all passed while Section 5 was still in effect—arm Republicans with a distinct electoral advantage. At the congressional level, the pro-Republican bias in the eight Republican-controlled states in my study averaged 9.7 percent in 2012. If Republicans had received 50 percent of the vote in these states, that is, they would have won 59.7 percent of the available

²⁰⁸ See notes 130-134 and accompanying text.

²⁰⁹ Cain and MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations* at 135 (cited in note 129); see also *id.* (noting preference of incumbents to minimize alterations to existing districts); Pitts, 59 Ala L Rev at 955 (cited in note 139) (“[M]any . . . politicians . . . have a self-interest in maintaining the *status quo* with regard to minority voting rights.”).

²¹⁰ See Pildes, 80 NC L Rev at 1558 (cited in note 207) (“[T]he Republican Party has come to recognize that the ‘safe districting’ approach of the 1990s favors its partisan interests”); Persily, 117 Yale L J at 250 (cited in note 106).

²¹¹ See Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J Pol 384, 399 (1995); David Lublin & D. Stephen Voss, *The Partisan Impact of Voting Rights Law*, 50 Stan L Rev 765, 772 (1998).

²¹² See David Epstein et al, *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J L, Econ & Org 499, 506 (2007); David Lublin and D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 Am J Pol Sci 792, 793 (2000).

seats.²¹³ One can see why Republicans might hesitate to upset such an auspicious political landscape.²¹⁴

In the increasingly rare instances when they are responsible for redistricting in the South, Democrats too may have an incentive to retain the status quo. Minorities are very influential members of the Democratic coalition (especially in the South, where whites are overwhelmingly Republican), and they typically do not want existing ability districts to be eliminated. Quite understandably, minorities tend to assign a high value to descriptive representation, even if it comes at some cost to Democratic electoral prospects.²¹⁵ But just as Republicans may keep constant the number of ability districts while increasing their minority populations, Democrats may maintain their number while reducing their minority populations to the lowest level that still enables the election of the minority-preferred candidate. This, at any rate, was the approach the Democrats took in Georgia in 2000, when they still controlled the redistricting process in a state growing steadily more Republican. As the Supreme Court later recounted, Democrats did not dismantle a single majority-black district, but they did “reduce[] by five the number of districts with a black voting age population in excess of 60 percent,” and “increase[] the number of districts with a black voting age population of between 25 percent and 50 percent by four.”²¹⁶

But while there may be *favorable* strategies for both parties that are consistent with the preservation of existing ability districts, it does not follow that these strategies are *optimal*. In fact, there is good reason to think that both parties could benefit electorally by eliminating at least some current ability districts. Starting with the Republicans, they often could win even more seats by converting ability districts, which are almost always carried by Democrats, into Republican-leaning constituencies. Consider Georgia again, which has fourteen congressional districts, four of which are ability districts whose minority populations likely are too heterogeneous to qualify for Section 2 coverage.²¹⁷ Free from Section 5’s constraints, Republicans easily could redraw one or more of these districts so that their minority populations no longer are large enough to elect Democrats (let alone minority-preferred candidates). The only price Republicans would pay for such revisions is a somewhat lower margin of victory for their candidates in the state’s other districts.

That the Section 5 regime was not optimal for Republicans also can be inferred from Texas’s actions since *Shelby County* in its ongoing redistricting litigation. The Supreme Court’s decision voided a lower court’s refusal to preclear Texas’s district plans,²¹⁸ at which point the DOJ petitioned a different lower court to subject the state to preclearance under Section 3 of the

²¹³ This data is on file with the author. See Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 UC Irvine L Rev (forthcoming 2013) (manuscript at 9, 12-13) (describing assembly of electoral database and calculation of partisan bias).

²¹⁴ And even if Republicans believe they can make gains by upsetting the landscape, the gains may not be large enough to be worth the controversy of redrawing district lines in the middle of a decade. The districts that populate the Section 2 – Section 5 gap thus are likely safe until the next redistricting cycle.

²¹⁵ See *Georgia v Ashcroft*, 539 US 461, 470 (2003) (describing goal of African American legislators in Georgia to “maintain[] at least as many majority-minority districts” as prior plan).

²¹⁶ Id at 470-71.

²¹⁷ See appendix table 4.

²¹⁸ See *Texas v United States*, 133 S Ct 2885 (2013).

VRA.²¹⁹ If preclearance were consistent with the most pro-Republican possible outcomes, then Texas might have been expected to accede to the DOJ's Section 3 request. But Texas did not accede, instead filing a furious memorandum in opposition to the DOJ's motion.²²⁰ Texas's "redistricting decisions [are] designed to increase the Republican Party's electoral prospects at the expense of the Democrats," stated the memorandum—a goal that presumably can be achieved more easily in the absence of preclearance.²²¹

The status quo's non-optimality for Republicans is further confirmed by recent theoretical work by Adam Cox and Richard Holden.²²² Cox and Holden demonstrate that the ideal strategy for maximizing a party's seats is not to "pack and crack" the opposing party's voters, but rather to "match slices" of the party's most committed supporters with slightly smaller cohorts of the opposing party's most loyal backers.²²³ In southern states in which African Americans vote more reliably Democratic than any other group, the implication is that Republican line-drawers should create districts in which blacks make up slightly less than a majority and steadfast conservatives make up slightly more than a majority. The implication, in other words, is that Republican line-drawers should not create any ability districts at all. As Cox and Holden put it, "there is no plausible distribution of African American voters that would make it optimal for Republican redistricting authorities to create districts in which African Americans make up a []majority of voters."²²⁴

If blacks in fact are the most dependable Democratic voters in the South, then the best strategy for Democrats would be to maintain (or even increase) the number of ability districts, but to combine slim black majorities with minorities of staunch conservatives.²²⁵ Such districts, unlike most current ability districts, would elect black Democrats by very small margins. But if there are at least some whites in the South who are as likely as blacks to vote for Democrats (in college towns, for instance), then the best Democratic strategy would be to create districts in which this liberal inter-racial coalition constitutes a slender majority. If the white populations of such districts are large enough, then minorities might not be able to elect the candidates of their choice. Similarly, if whites as heavily Republican as blacks are Democratic do not exist, or cannot be joined with black communities due to geographic constraints, then the best Democratic strategy would be to create districts in which blacks are a minority and white voters carry Democratic candidates to victory. Again, minorities might not be able to elect the candidates of their choice in such districts if their white populations are large enough.

²¹⁹ See Statement of Interest of the United States with Respect to Section 3(c) of the Voting Rights Act, *Perez v Texas* (WD Tex July 25, 2013).

²²⁰ See Defendants' Response to Plaintiffs and the United States Regarding Section 3(C) of the Voting Rights Act, *Perez v Texas* (WD Tex Aug 5, 2013).

²²¹ *Id* at 19.

²²² See Cox and Holden, 78 U Chi L Rev at 553 (cited in note 7).

²²³ See *id* at 564-72.

²²⁴ *Id* at 574. However, geographic constraints sometimes may prevent the enactment of optimal pro-Republican gerrymanders. Staunch conservatives sometimes may not live close enough to large black populations to permit their combination in the same districts. In these cases, "pack and crack" would be the best Republican strategy, and at least some ability districts would be created, albeit with overwhelming black majorities.

²²⁵ See *id* at 573 (arguing that ideal tactic for Democrats is to "draw the maximum possible number of majority-minority districts in the state").

It should come as little surprise that the pre-*Shelby County* status quo was not optimal for either party. The point of Section 5, after all, is to prevent the diminution of minority voting strength, not to assure either party the most efficient possible conversion of its popular support into legislative power. But now that Section 5 effectively has been nullified, both parties are freer than they used to be to pursue their most electorally beneficial strategies. In at least some cases, these strategies will entail the exploitation of the Section 2 – Section 5 gap—that is, the elimination of districts previously protected by Section 5 but now uncovered by Section 2.

III. VOTE DENIAL

The VRA prohibits not only the *dilution* of the vote but also its *denial*. The vote may be denied when franchise restrictions—such as photo ID requirements for voting, proof-of-citizenship requirements for registering to vote, limits on voter registration drives, cutbacks to early voting, and the like—prevent minority members from casting ballots. After several decades in which few were adopted, franchise restrictions have surged in popularity in recent years. In 2011 and 2012 alone, nineteen states enacted some kind of ballot access limitation.²²⁶

In this Part, then, I explore the Section 2 – Section 5 gap in the context of vote denial. I begin by describing how the provisions diverge substantively when vote denial claims are asserted. Under Section 2, plaintiffs typically need to show not only that a statistical disparity exists between minorities and whites, but also that a franchise restriction interacts with social and historical conditions to cause the disparity. Under Section 5, on the other hand, a disparate impact alone usually suffices to prevent a restriction from taking effect. However, these statements of the operative standards necessarily are rather tentative. Thanks to the paucity of lower court decisions—and the lack of *any* relevant Supreme Court precedent—it remains quite unclear how either provision applies to vote denial.

Next I rely on case outcomes to estimate the magnitude of the Section 2 – Section 5 gap. For instance, no plaintiff yet has prevailed in a Section 2 challenge to a photo ID law, while three such laws were blocked, at least temporarily, by Section 5. Similarly, a Florida law that curtailed early voting was denied preclearance with respect to the state's five formerly covered counties, but upheld under Section 2 with respect to the rest of the state. But too much should not be made of these few examples. Several franchise restrictions have been struck down under Section 2, and several Section 2 defeats should be attributed to poor litigation tactics rather than the provision's inherent limitations.

Lastly I assess the likelihood that the space between Section 2 and Section 5 will be seized. Franchise restrictions commonly are thought to disadvantage Democrats, whose supporters are considered less likely to be able to comply with them. Accordingly, when Republicans are in control of state governments, their political incentives will point uniformly toward the enactment of new ballot access limitations. Indeed, a spate of such measures already have been passed by southern states in the brief period since *Shelby County* was decided. Conversely, when Democrats are in charge, they will have no reason to try to restrict minorities' ability to vote.

²²⁶ See Brennan Center for Justice, *Voting Law Changes: Election Update* 1-6, 17-21 (2012).

A. Conceptual Differences

Unfortunately, the Supreme Court has never decided a vote denial case under either Section 2 or Section 5 of the VRA, likely because few franchise restrictions were adopted between the statute's enactment and the mid-2000s.²²⁷ In order to determine how the VRA applies to vote denial claims, it thus is necessary to turn to the case law of the lower courts—which itself is both sparse and somewhat muddled.²²⁸ Beginning with Section 2, the lower courts are in agreement that a mere statistical disparity between minorities and whites does not suffice to establish liability. As a Florida court recently put it, “a plaintiff must demonstrate something more than disproportionate impact to establish a Section 2 violation.”²²⁹

But the lower courts disagree as to what this “something more” actually is. Some courts require proof of proximate causation, that is, proof that the franchise restriction at issue is directly responsible for the disparity between minorities and whites.²³⁰ If some other factor is significantly implicated—e.g., lack of minority interest in the election,²³¹ poverty unrelated to discrimination,²³² a different electoral regulation not contested in the litigation²³³—then a Section 2 claim cannot succeed. Other courts focus on the interaction between the franchise restriction and social or historical patterns of discrimination.²³⁴ They grant relief only when the restriction's disproportionate impact occurs because of such an interaction, for example, if discrimination is

²²⁷ See *Florida v United States*, 885 F Supp 2d 299, 311 (DDC 2012) (“[T]he Court has not specifically addressed how the retrogression test applies to ‘ballot access’ laws.”); Tokaji, 57 SC L Rev at 709 (cited in note 10) (“While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge.”).

²²⁸ See Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 BC L Rev 579, 595 (2013) (“[T]he legal contours of vote denial claims remain woefully underdeveloped”); Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 Loy LA L Rev 1171, 1188-89 (2001) (noting that “through the cloud of [lower court] cases the applicable liability standard is much tougher to discern”). According to the Katz study, at most 72 out of 322 reported Section 2 cases between 1982 and 2005 involved vote denial rather than vote dilution. See Katz et al, 39 U Mich J L Reform at 656 (cited in note 11); Tokaji, 57 SC L Rev at 709 (cited in note 10).

²²⁹ *Brown v Detzner*, 895 F Supp 2d 1236, 1249 (MD Fla 2012); see also, for example, *Smith v Salt River Project Agr Imp & Power Dist*, 109 F3d 586, 595 (9th Cir 1997) (“Several courts of appeal have rejected § 2 challenges based purely on a showing of some relevant statistical disparity between minorities and whites.”); *Wesley v Collins*, 791 F2d 1255, 1260-61 (6th Cir 1986) (“[A] showing of disproportionate racial impact alone does not establish a per se violation of the Voting Rights Act.”).

²³⁰ See, for example, *Gonzalez v Arizona*, 677 F3d 383, 405 (9th Cir 2012) (en banc) (noting that “proof of ‘causal connection between the challenged voting practice and a prohibited discriminatory result’ is crucial” (quoting *Smith*, 109 F3d at 595)); *Sw Voter Registration Educ Project v Shelley*, 344 F3d 914, 918 (9th Cir 2003) (en banc); *Ortiz v City of Phila Office of City Comm'rs Voter Registration Div*, 28 F3d 306, 312 (3d Cir 1994) (“Section 2 plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result.”); *Irby v Va Suite Bd of Elections*, 889 F2d 1352, 1359 (4th Cir 1989).

²³¹ See *Ortiz*, 28 F3d at 313.

²³² See *Smith*, 109 F3d at 595-96.

²³³ See *Ortiz*, 28 F3d at 317-18.

²³⁴ See, for example, *Gonzalez*, 677 F3d at 407 (examining whether franchise restriction, “interacting with the history of discrimination and racially polarized voting,” resulted in disproportionate impact); *Stewart v Blackwell*, 444 F3d 843, 851, 879 (6th Cir 2006), superseded by 473 F3d 692 (6th Cir 2007); *Wesley*, 791 F2d at 1260; see also Nelson, 54 BC L Rev at 618 (cited in note 228) (recommending this approach); Tokaji, 57 SC L Rev at 724 (cited in note 10) (same); compare to *Thornburg v Gingles*, 478 US 30, 47 (1986) (“The essence of a § 2 claim is that a certain electoral law . . . interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters . . .”).

responsible for minorities' lesser education, which in turn makes them more likely to misuse complicated voting machines.²³⁵ And still other courts demand not just a statistical disparity but also the satisfaction of relevant factors from the 1982 Senate report.²³⁶ Responsiveness to minority concerns,²³⁷ a legacy of discrimination,²³⁸ and socioeconomic differences²³⁹ are the factors that these courts most often have examined.

In contrast, a trio of decisions since Section 5 was reauthorized in 2006 have made clear that a disproportionate impact *does* suffice for preclearance to be denied (as long as there also is a non-trivial burden on voting). First, a court considering Florida's cutback to early voting declared that a franchise restriction is retrogressive if "(1) the individuals who will be affected by the change are disproportionately likely to be members of a protected minority group; and (2) the change imposes a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise."²⁴⁰ Next, a court evaluating Texas's photo ID law denied preclearance because the law disproportionately affected the state's minority voters and these voters could not procure valid IDs "without cost or major inconvenience."²⁴¹ Lastly, a court assessing South Carolina's photo ID requirement concurred that "[a] state voting law has a discriminatory retrogressive effect if the law disproportionately and materially burdens minority voters when measured against the pre-existing state law."²⁴²

The upshot of these divergent standards is that some franchise restrictions that previously would have been blocked by Section 5 now will be sustained under Section 2. Sometimes a plaintiff will be able to establish a statistical disparity between minorities and whites as well as a material burden on voting—meaning that preclearance would have been denied—but will be unable to show the "something more" required for Section 2 liability. For instance, a state might enact a non-trivial ballot access limitation that disproportionately affects minority members. But it might be unclear that the limitation itself is directly responsible for the disparate impact, or that the limitation interacts in any meaningful way with patterns of discrimination, or that enough of the relevant Senate factors are satisfied. In this scenario, the limitation would be retrogressive but it would not contravene Section 2.

It is important, though, not to overstate the likelihood of this scenario. If a franchise restriction disproportionately affects minorities, then it typically will be directly responsible for the disparate impact that ensues. Only if another unrelated factor intervenes will the restriction not be the proximate cause of the disparity. Similarly, the usual reason why a restriction disproportionately affects minorities is that they are poorer or less educated, and the usual reason

²³⁵ See *Stewart*, 444 F3d at 879.

²³⁶ See, for example, *Johnson v Governor of State of Florida*, 405 F3d 1214, 1227 note 26 (11th Cir 2005) (en banc); *United States v Berks Cty*, 277 F Supp 2d 570, 581 (ED Pa 2003); *Roberts v Wamser*, 679 F Supp 1513, 1530 (ED Mo 1987), revd on other grounds, 883 F.2d 617 (8th Cir 1989) ("The Court will then consider each of the [Senate] factors . . ."); *Ct Citizen Action Group v Pugliese*, 1984 US Dist LEXIS 24869, at *12 (D Conn Sept 27, 1984).

²³⁷ See *Pugliese*, 1984 US Dist LEXIS 24869, at *12.

²³⁸ See *Roberts*, 679 F Supp at 1531.

²³⁹ See *Berks Cty.*, 277 F Supp 2d at 581; *Roberts*, 679 F Supp at 1531.

²⁴⁰ *Florida v United States*, 885 F Supp 2d 299, 312 (DDC 2012).

²⁴¹ *Texas v Holder*, 888 F Supp 2d 113, 126, 138 (DDC 2012), vacd, 133 S Ct 2886 (2013).

²⁴² *South Carolina v United States*, 898 F Supp 2d 30, 39 (DDC 2012).

why they are poorer or less educated is a history of discrimination. It thus will be straightforward in many cases to show that a restriction's interaction with discriminatory conditions gives rise to the disparate impact. Lastly, as noted earlier, the Senate factors generally are not difficult to establish in the mostly southern jurisdictions that formerly were covered by Section 5.²⁴³ Accordingly, few franchise restrictions that previously would have been denied preclearance now will be upheld due to an inability to substantiate these factors.

B. Empirical Gap

The limited number of vote denial cases not only complicates the effort to determine how Section 2 and Section 5 differ conceptually. It also makes it difficult to estimate the empirical gap between the provisions—that is, the kind and quantity of franchise restrictions that could not have withstood Section 5 review but that can survive scrutiny under Section 2. Still, it is possible to reach some cautious conclusions based on both the recent spate of state-level restrictions and the much larger volume of local policies assessed under the VRA over the last generation.

Beginning with the highest-profile limitations enacted in recent years, photo ID requirements for voting, they have been sustained in both of the cases to date that addressed their validity under Section 2. First, a challenge to Georgia's photo ID law failed because of inadequate proof of a disparity in ID possession between minorities and whites. "[T]he Court simply cannot agree . . . that the evidence is sufficient to demonstrate . . . a substantial likelihood of succeeding on the merits [on a] § 2 vote denial claim."²⁴⁴ Next, the Ninth Circuit, sitting en banc, rebuffed a suit against Arizona's photo ID law, again on evidentiary grounds. The court noted that the plaintiff "*alleged* that 'Latinos . . . are less likely to possess the forms of identification required under [the law] to . . . cast a ballot,' but produced no evidence *supporting* this allegation."²⁴⁵

In contrast, three photo ID requirements were denied preclearance, at least temporarily, under Section 5. In 1994, the DOJ objected to Louisiana's photo ID law because African Americans were "'four to five times less likely than white persons in the state to possess a driver's license or other picture identification card.'"²⁴⁶ In 2012, a court denied preclearance to Texas's photo ID law because "the burdens associated with obtaining ID will weigh most heavily on the poor" and "racial minorities in Texas are disproportionately likely to live in poverty."²⁴⁷ And also in 2012, another court denied preclearance to South Carolina's photo ID law for the next election, but allowed the measure to take effect thereafter.²⁴⁸

The fate of Florida's recent cutback to early voting also suggests that franchise restrictions fare better under Section 2 than under Section 5. A statewide Section 2 challenge to the cutback failed because of pledges by several counties to offer the largest possible number of

²⁴³ See note 123 and accompanying text.

²⁴⁴ *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326, 1375 (ND Ga 2005).

²⁴⁵ *Gonzalez v Arizona*, 677 F3d 383, 407 (9th Cir 2012) (en banc) (emphasis added).

²⁴⁶ Department of Justice, *Section 5 Recommendation Memorandum* 45 (Aug 25, 2005) [hereinafter *DOJ Georgia Memo*] (quoting DOJ letter to state).

²⁴⁷ *Texas v Holder*, 888 F Supp 2d 113, 138 (DDC 2012), vacd, 133 S Ct 2886 (2013). The DOJ also objected to the law prior to the judicial proceeding. See id at 117-18.

²⁴⁸ See *South Carolina v United States*, 898 F Supp 2d 30, 48-51 (DDC 2012).

hours of early voting (which was equal to the number required under prior law).²⁴⁹ But a court denied preclearance to the cutback with respect to the five Florida counties formerly covered by Section 5, reasoning that “there is much that we do not know about how the new law will be implemented.”²⁵⁰ The court in the Section 2 case unsubtly hinted that it would have reached a different decision had it evaluated the cutback under Section 5. “The important distinction between a Section 5 and a Section 2 claim plays a significant role in the Court’s decision in this case.”²⁵¹

Further evidence for the greater efficacy of Section 5 comes from a comparison I conducted of the DOJ’s preclearance objections since 1982²⁵² with recorded Section 2 decisions over the same period.²⁵³ As Table 6 in the Appendix shows, the scorecard of Section 2 litigation was mixed with respect to most kinds of franchise restrictions, while several restriction types were blocked repeatedly by Section 5. For example, polling place eliminations were prevented nineteen times by Section 5, but only three successful suits and three unsuccessful suits against such actions were filed under Section 2.²⁵⁴ Similarly, election date alterations were thwarted fifteen times by Section 5, but there was not a single Section 2 challenge, victorious or otherwise, to such changes.²⁵⁵ And revisions to voter registration procedures were blocked ten times by Section 5, while five Section 2 cases against such amendments succeeded and four failed.²⁵⁶ In sum, I counted seventy-three denials of preclearance to franchise restrictions, compared to eighteen successful Section 2 claims and nineteen unsuccessful claims.²⁵⁷

²⁴⁹ See *Brown v Detzner*, 895 F Supp 2d 1236, 1250-52 (MD Fla 2012).

²⁵⁰ *Florida v United States*, 885 F Supp 2d 299, 320 (DDC 2012).

²⁵¹ *Brown*, 895 F Supp 2d at 1251.

²⁵² See *Section 5 Objection Determinations*, US Dept of Justice (last visited Oct 1, 2013), online at http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php; *Voting Rights Act: Objections and Observers*, Lawyers’ Comm for Civil Rights Under Law (last visited Oct 1, 2013), online at http://www.lawyerscommittee.org/projects/section_5.

²⁵³ I relied primarily on Katz’s database of Section 2 decisions over the 1982-2005 period, but supplemented the database with searches for more recent cases. See Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), online at <http://www.votingreport.org> [hereinafter VRI Database].

²⁵⁴ See appendix table 6; see also *Mark Wandering Medicine v McCulloch*, 906 F Supp 2d 1083, 1091 (D Mont 2012) (unsuccessful); *Spirit Lake Tribe v Benson Cty*, 2010 WL 4226614, at *3 (DND Oct. 21, 2010) (successful); *Prescod v Bucks Cty*, 2009 WL 3617751, at *1 (ED Pa Nov 2, 2009) (successful); *Jacksonville Coalition for Voter Protection v Hood*, 351 F Supp 2d 1326, 1335 (MD Fla 2004) (unsuccessful); *Trevino v Pastrick*, 573 F Supp 806, 809 (ND Ind 1983) (unsuccessful); *Brown v Dean*, 555 F Supp 502, 505 (DRI 1982) (successful).

²⁵⁵ See appendix table 6.

²⁵⁶ See id; see also *Janis v Nelson*, 2009 WL 5216902 (DSD Dec 30, 2009) (successful); *Smith v Commonwealth of Va*, 2009 WL 2175759, at *7 (ED Va July 16, 2009) (unsuccessful); *Coleman v Board of Educ of City of Mount Vernon*, 990 F Supp 221, 229 (SD NY 1997) (unsuccessful); *Hernandez v Woodard*, 714 F Supp 963, 969 (ND Ill 1989) (successful); *Ashe v Bd of Elec of City of New York*, 1988 WL 95427, at *1 (ED NY Sept 8, 1988) (unsuccessful); *Central Del Branch of NAACP v City of Dover, Del*, 123 FRD 85, 87 (D Del 1988) (successful); *Miss State Chapter, Operation Push v Allain*, 674 F Supp 1245, 1268 (ND Miss 1987) (successful); *Ct Citizen Action Group v Pugliese*, 1984 US Dist LEXIS 24869, at *12 (D Conn Sept 27, 1984) (successful); *Trevino*, 573 F Supp at 808-09 (unsuccessful).

²⁵⁷ See appendix table 6. Of the thirty-nine Section 2 challenges to “election procedures” in Katz’s database, thirteen were successful. See VRI Database (cited in note 253); see also Cox and Miles, 108 Colum L Rev at 12 (cited in note 39) (finding success rate of 22 percent for “remaining catch-all category of [Section 2] challenges”). In addition to the cases mentioned above, successful Section 2 suits in the vote denial context include *Brooks v Gant*, 2012 WL 4482984 (DSD Sept 27, 2012), *Diffenderfer v Gomez-Colon*, 587 F Supp 2d 338 (DPR 2008), vacd as moot, 587 F3d 445 (1st Cir 2009), *Stewart v Blackwell*, 444 F3d 843 (6th Cir 2006), superseded by

However, it is unclear whether these statistics should be attributed to the provisions' divergent standards for liability or to their procedural distinctions.²⁵⁸ The reason why franchise restrictions were upheld more often under Section 2 could be its allocation of the burden of proof to the plaintiff—not subtle distinctions between disparate impact alone and disparate impact plus “something more.”²⁵⁹ Likewise, the reason why the volume of blocked restrictions was higher under Section 5 could be that private parties lacked the resources to mount Section 2 challenges to all of the measures they believed to be discriminatory. Unlike in the vote dilution context, where it can be determined with some certainty whether districts are protected under Section 2 and/or Section 5,²⁶⁰ the provisions' substantive and procedural differences are almost impossible to disentangle with respect to vote denial.

In addition, neither the potency of Section 5 nor the frailty of Section 2 in this domain should be exaggerated. For instance, while three photo ID requirements were blocked by Section 5, at least temporarily, the DOJ did not object to several other such measures. It allowed photo ID laws passed by South Carolina in 1984, by Louisiana in 1997, by Alabama in 2002, by Arizona in 2004, by Georgia in 2005, and by New Hampshire and Virginia in 2012, all to go into effect.²⁶¹ Conversely, that past Section 2 suits against photo ID laws have failed does not mean that future actions will be doomed as well. The plaintiffs in the Arizona and Georgia cases both lost because they were unable to present evidence of a disparity in ID possession between minorities and whites.²⁶² But this sort of evidence has proliferated in recent years, in both academic studies²⁶³ and Section 5 proceedings,²⁶⁴ and it likely will feature prominently in future Section 2 challenges.

Analogously, a key reason why Florida's cutback to early voting was sustained under Section 2, but struck down under Section 5, is the more accurate information about counties' intentions that was available by the time of the Section 2 decision. The Section 5 court emphasized that it “ha[d] not been presented with a specific voting plan from any of the five

473 F3d 692 (6th Cir 2007), *United States v Berks Cty*, 277 F Supp 2d 570 (ED Pa 2003), *Black v McGuffage*, 209 F Supp 2d 889 (ND Ill 2002), *Marks v Stinson*, 1994 WL 146113 (ED Pa Apr 26, 1994), *Roberts v Wamser*, 679 F Supp 1513 (ED Mo 1987), rev'd on other grounds, 883 F2d 617 (8th Cir 1989), *Campaign for a Progressive Bronx v Black*, 631 F Supp 975 (SDNY 1986), *Goodloe v Madison Cty Bd of Election Comm'rs*, 610 F Supp 240 (D Miss 1985), and *Harris v Graddick*, 593 F Supp 128 (D Ala 1984).

²⁵⁸ See Part I (discussing provisions' procedural distinctions).

²⁵⁹ See *Texas v Holder*, 888 F Supp 2d 113, 127 (DDC 2012), vac'd, 133 S Ct 2886 (2013) (noting that “case does not hinge *solely* on the burden of proof” (emphasis added)).

²⁶⁰ See Part II (identifying and quantifying provisions' substantive differences with respect to redistricting).

²⁶¹ See *DOJ Georgia Memo* at 42-47 (cited in note 246); see also *Voter Identification Requirements*, Natl Conf of State Legislatures (last visited Oct 1, 2013), online at <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx>. Though it should be noted that these laws varied substantially in their stringency.

²⁶² See notes 244-245 and accompanying text; see also *Gonzalez v Arizona*, 677 F3d 383, 442 (9th Cir 2012) (en banc) (Berzon concurring) (“A different record in a future case could produce a different outcome with regard to the § 2 causation question.”); Tokaji, 57 SC L Rev at 713 (cited in note 10).

²⁶³ See Nicholas O. Stephanopoulos, *Elections and Alignment*, 113 Colum L Rev (forthcoming 2014) (manuscript at 39-40) (summarizing academic findings about effects of photo ID laws).

²⁶⁴ See *South Carolina v United States*, 898 F Supp 2d 30, 40 (DDC 2012) (“About 96% of whites and about 92–94% of African-Americans currently have one of the R54-listed photo IDs.”); *Texas v Holder*, 888 F Supp 2d 113, 130-38 (DDC 2012), vac'd, 133 S Ct 2886 (2013) (discussing series of studies on disparities in ID possession).

covered counties,” and thus was unaware whether, and to what degree, the counties would reduce their early voting hours.²⁶⁵ In contrast, the Section 2 court received notice that “32 of Florida’s 67 counties will offer the maximum number of early voting hours,” and based its decision largely on this data.²⁶⁶ Had the Section 5 court known about the counties’ plans, “Florida would likely [have been] able to meet its burden of demonstrating that the overall effect of the changes would not be retrogressive.”²⁶⁷ And had the Section 2 court *not* known about the plans, it would have concluded that the “change [would] impose a material burden on ‘African-American voters’ effective exercise of the electoral franchise.”²⁶⁸

The figures I provided about DOJ objections and Section 2 cases since 1982 also must be taken with a grain of salt. For one thing, the number of objections is dwarfed by the number of preclearance submissions that the DOJ did *not* oppose. According to a report by the U.S. Commission on Civil Rights, between 1982 and 2004, the DOJ objected to only 0.1 percent of changes involving precincts, polling places, or absentee voting, 0.1 percent of changes involving voter registration procedures, and 0.2 percent of changes involving special elections.²⁶⁹ Compared to these tiny percentages, the near-50 percent success rate I calculated for Section 2 litigation over franchise restrictions seems quite respectable.²⁷⁰ Moreover, my count of Section 2 cases almost certainly is underinclusive because I, like Katz, was able to identify only recorded decisions.²⁷¹ Katz found 160 total Section 2 suits in formerly covered areas between 1982 and 2005,²⁷² but, including unpublished decisions, there actually were 653 successful such actions over this period.²⁷³ The true volume of Section 2 activity in the vote denial context therefore must be substantially higher than my data indicates.

A final caveat is that, under certain unusual circumstances, Section 2 may be *more* effective than Section 5 at invalidating franchise restrictions. In particular, when a jurisdiction loosens but does not eliminate an existing restriction, the policy change may be non-retrogressive but still in violation of Section 2. This sort of scenario unfolded in Mississippi in the 1980s, when the state partially dismantled its notorious dual registration system, which had long required voters to register in two different ways in order to be able to participate in all elections.²⁷⁴ The amendments to the system were precleared by the DOJ because they made it easier for African Americans to register.²⁷⁵ But in a subsequent Section 2 action, a court struck down the revised regime, which still required dual registration for residents of smaller towns, because of its “disparate impact on blacks . . . ‘who are unable, because of disproportionate lack

²⁶⁵ *Florida v United States*, 885 F Supp 2d 299, 312, 320 (DDC 2012).

²⁶⁶ *Brown v Detzner*, 895 F Supp 2d 1236, 1250 (MD Fla 2012).

²⁶⁷ *Florida*, 885 F Supp 2d at 322.

²⁶⁸ *Brown*, 895 F Supp 2d at 1252 (quoting *Florida*, 885 F Supp 2d at 329).

²⁶⁹ US Commission on Civil Rights, *Voting Rights Enforcement and Reauthorization: The Department of Justice’s Record of Enforcing the Temporary Voting Rights Act Provisions* 30 (2006). Of course, the vast majority of these changes were unproblematic under any standard. Section 5 objection rates thus cannot be compared directly to Section 2 success rates.

²⁷⁰ See note 257.

²⁷¹ See Katz et al, 39 U Mich J L Reform at 654-55 (cited in note 11).

²⁷² See id at 656.

²⁷³ See *Shelby Cty v Holder*, 679 F3d 848, 868, 872 (DC Cir 2012), revd, 133 S Ct 2612 (2013).

²⁷⁴ See *Miss State Chapter, Operation Push v Allain*, 674 F Supp 1245, 1248-50 (ND Miss 1987).

²⁷⁵ See id at 1261-62.

of transportation . . . to travel to the offices of the county registrar.”²⁷⁶ It thus was Section 2, not Section 5, that finally brought to an end one of the South’s most discriminatory registration practices.

Accordingly, the empirical evidence on the size of the Section 2 – Section 5 gap is mixed. On the one hand, more franchise restrictions, especially of the higher-profile sort, have been blocked by Section 5 than by Section 2. On the other hand, the available data likely understates the true performance to date of Section 2, and there is reason to think that the provision could be even more effective in the future. On balance, the safest conclusion is that there *is* substantive space between Section 2 and Section 5—but that it is not as extensive as it first might seem.

C. Odds of Exploitation

If there indeed is space between the provisions, will it be seized now by politicians in formerly covered areas? This question is easier with respect to vote denial than it was with respect to vote dilution.²⁷⁷ When Republicans are in control of jurisdictions, the answer almost certainly is yes. When Democrats are in charge, the answer most likely is no.

Franchise restrictions commonly are thought to benefit Republicans because they are more difficult for poorer and less educated voters, who lean Democratic by large margins, to comply with.²⁷⁸ When Pennsylvania passed a photo ID requirement in 2012, for instance, the majority leader of the state house famously declared that “[v]oter ID . . . is gonna allow Governor Romney to win the state.”²⁷⁹ This is an area in which the conventional wisdom is correct (if somewhat overstated). According to several studies, photo ID laws reduce overall turnout by 2-3 percent and produce a pro-Republican swing of 1-2 percent.²⁸⁰ Other common restrictions, such as the elimination of election-day registration and felon disenfranchisement, also give rise to modest pro-Republican shifts.²⁸¹

The political incentives of Republicans in formerly covered areas thus support the enactment of additional ballot access limitations. By enacting such limitations, they favorably alter the composition of the electorate and make it more likely that Republican candidates will win office. Not surprisingly, southern states controlled by Republicans have passed or implemented an array of new limitations in the brief period that has elapsed between *Shelby County* and the writing of this Article.²⁸² Photo ID laws that had been blocked in Mississippi

²⁷⁶ See *id.* at 1264 (quoting complaint).

²⁷⁷ See Section II.C (discussing odds of exploitation of Section 2 – Section 5 gap in vote dilution context).

²⁷⁸ See, for example, Alex Slater, *Voter ID Laws: The Republican Ruse to Disenfranchise 5 Million Americans*, *Guardian* (Aug 10, 2012), online at <http://www.theguardian.com/commentisfree/2012/aug/10/voter-id-laws-republican-ruse-disenfranchise> (“[T]hese laws are almost uniformly designed to disenfranchise young people and minorities—the very demographics that make up part of Obama’s base.”).

²⁷⁹ Mackenzie Weinger, *Mike Turzai: Voter ID Helps GOP Win State*, *Politico* (June 25, 2012), online at <http://www.politico.com/news/stories/0612/77811.html>.

²⁸⁰ See Stephanopoulos, 113 *Colum L Rev* (cited in note 263) (manuscript at 39-40) (summarizing these studies).

²⁸¹ See *id.* at 40.

²⁸² See Brief of Political Science and Law Professors as Amici Curiae in Support of Respondents at 26-30 *Shelby Cty v Holder*, 133 S Ct 2612 (No 12-96) (showing that even before *Shelby County* covered jurisdictions were more likely to enact photo ID laws, proof-of-citizenship requirements, and permanent felon disenfranchisements).

(due to the DOJ's request for more information) and Texas (due to the court's denial of preclearance) now are on the verge of becoming operative.²⁸³ Photo ID laws scheduled to go into effect in 2014 in Alabama and Virginia now will do so without any prior need for preclearance.²⁸⁴ Florida has resumed its effort to purge non-citizens from its voter rolls.²⁸⁵ And North Carolina has passed an omnibus bill that includes a photo ID requirement, a cutback to early voting, and the elimination of election-day registration.²⁸⁶ It has not taken very long, then, for Republicans to begin exploiting the Section 2 – Section 5 gap.

Conversely, Democrats have little reason to take advantage of the gap. They realize that franchise restrictions disproportionately harm their own most loyal supporters, and thus oppose the measures fiercely wherever they are proposed.²⁸⁷ Were Democrats to find themselves in power in any southern state, their political calculus clearly would counsel against the adoption of any new restrictions. In fact, the optimal Democratic strategy would be to *expand* access to the polls, through policies such as longer voting hours, more flexible registration procedures, and greater absentee and early voting. This is the approach that Democrats have taken recently in states where they are in charge of the elected branches.²⁸⁸ It also is the approach that Democrats would likely espouse were they to win back control of any formerly covered jurisdiction.

IV. CLOSING THE GAP

The analysis to this point has been descriptive rather than prescriptive. It has demonstrated that substantial space exists between Section 2 and Section 5, both procedurally and substantively, and that the space is likely to be seized by southern politicians. But it has not addressed how the Section 2 – Section 5 gap might be *closed*, either legislatively or judicially. In this Part, then, I discuss a series of steps that Congress or the Supreme Court could take in response to *Shelby County*. I explain how the steps would shrink the Section 2 – Section 5 gap, while also pointing out their legal and political limitations.

But before turning to these options, it is worth considering the case for doing nothing—always the most likely scenario in our cumbersome political system. From a partisan perspective, Republicans should cheer inactivity at the national level since it would enable them to enact more favorable district plans as well as more stringent franchise restrictions.²⁸⁹ Putting aside partisan advantage, one can agree with this Article's findings and still support the status quo if one does not consider the cause of minority representation to be particularly important. The interaction of politicians' incentives with the Section 2 – Section 5 gap probably will give rise to

²⁸³ See Cooper, *After Ruling, States Rush to Enact Voting Laws* (cited in note 17); *Photo Identification Requirements* (cited in note 261).

²⁸⁴ See *id.*

²⁸⁵ See Alvarez, *Ruling Revives Florida Efforts to Police Voters* (cited in note 17).

²⁸⁶ See Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, Wash Post (Aug 12, 2013), online at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/>.

²⁸⁷ See, for example, *Crawford v Marion Cty Elec Bd*, 553 US 181, 203 (2008) (“Democrats were unanimous in opposing [Indiana’s photo ID law.]”); *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326, 1331 (ND Ga 2005) (Georgia’s photo ID law voted for by just two Democrats in state house and zero in state senate).

²⁸⁸ See Reid Wilson, *Democrats Push Back on Voting Rights*, Wash Post (Aug 19, 2013), online at <http://www.washingtonpost.com/blogs/govbeat/wp/2013/08/19/democrats-push-back-on-voting-rights/>.

²⁸⁹ See Sections II.C, III.C.

policies that are electorally worse for minorities than those adopted under the prior regime. But this is a problem only if one is concerned about minorities' electoral position in the first place. If one is indifferent to their position, or more interested in other issues, then indifference is indeed the appropriate reaction to *Shelby County*.

A. Section 4

Assuming that Congress *is* concerned about minority representation, however,²⁹⁰ there are several actions it could take to undo the damage inflicted by the Court's decision. First, Congress could accept the Court's invitation to "draft another formula based on current conditions."²⁹¹ Most of the metrics that commentators have suggested would result in many of the formerly covered jurisdictions once again becoming subject to preclearance, thus eliminating in one stroke the bulk of the Section 2 – Section 5 gap.²⁹² For example, Bernard Grofman²⁹³ and Ellen Katz²⁹⁴ have proposed basing a new formula on the rate of successful Section 2 litigation in each state. Setting the bar at five winning cases per million residents would cause Alabama, Arkansas, Georgia, Mississippi, Montana, North Carolina, South Carolina, South Dakota, and Texas to be covered.²⁹⁵ All of these states except Montana formerly were covered in part or in full by Section 4 or were bailed in under Section 3.

Similarly, Stephen Ansolabehere and others have written extensively about racial polarization in voting,²⁹⁶ which "increase[s] the political vulnerability of racial and language minorities."²⁹⁷ The seven states in which white voters preferred McCain to Obama by at least forty percentage points in 2008 were Alabama, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas.²⁹⁸ All of these states except Oklahoma used to be covered by Section 4. And Christopher Elmendorf and Douglas Spencer have focused attention on the persistence of racially discriminatory attitudes among white voters, which may make de jure discrimination more likely. The six states that have the highest proportions of whites whose views of blacks'

²⁹⁰ I realize, of course, that this may not be an accurate assumption for many members of Congress.

²⁹¹ *Shelby Cty v Holder*, 133 S Ct 2612, 2631 (2013).

²⁹² For additional efforts to devise new coverage formulas, see Spencer Overton, *The Coverage Curve: Identifying States at the Bottom of the Class*, in Epstein et al, eds, *The Future of the Voting Rights Act* 242, 245, 252 (cited in note 8) (employing eight separate metrics and finding that all seven worst-performing states formerly were covered in part or in full), and Michael P. McDonald, *Who's Covered? Coverage Formula and Bailout*, in Epstein et al, eds, *The Future of the Voting Rights Act* 255, 262-67 (cited in note 8) (exploring how coverage would change if original formula was updated with current data on voter participation and use of tests or devices).

²⁹³ See Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 Election L J 332, 334-35 (2013) (using cutoff of ten successful Section 2 challenges and identifying Alabama, Arkansas, Georgia, Illinois, Louisiana, Mississippi, South Carolina, Texas, and Virginia as states that would be covered).

²⁹⁴ See generally Katz et al, 39 U Mich J L Reform (cited in note 11); Katz, *VRA Reauthorization* (cited in note 39).

²⁹⁵ See *Shelby Cty v Holder*, 679 F3d 848, 876 (DC Cir 2012), revd, 133 S Ct 2612 (2013). This figure includes both published and unpublished Section 2 decisions from the 1982-2005 period. See id.

²⁹⁶ See Ansolabehere et al, 123 Harv L Rev 1385 (cited in note 122); see also Stephen Ansolabehere et al, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv L Rev F 205 (2013).

²⁹⁷ *Shelby Cty*, 133 S Ct at 2636 (Ginsburg dissenting).

²⁹⁸ Exit poll data from 2008 is available at *Election Center 2008 – Results*, CNNPolitics.com (last visited Oct 1, 2013), online at <http://www.cnn.com/ELECTION/2008/results/president/>. Unfortunately, 2012 exit poll data is not available for all states.

intelligence and work ethic are more negative than the national median are Alabama, Louisiana, Mississippi, South Carolina, Texas, and Wyoming.²⁹⁹ All of these states except Wyoming previously were covered jurisdictions.

These metrics have decent hopes of being upheld by the Court because, unlike the stricken Section 4, they rely on “current data reflecting current needs.”³⁰⁰ The racial polarization and racial attitude figures are only a few years old, while the Section 2 statistics capture cases from the last couple decades. The metrics also are attractive because they would neatly close most of the Section 2 – Section 5 gap. The majority of the formerly covered jurisdictions once again would be subject to preclearance, thus largely restoring the status quo ante.

However, it is unclear whether the Court is willing to countenance *any* further use of the preclearance remedy. Its opinion in *Shelby County* emphasized that preclearance can be justified only by “exceptional” conditions,³⁰¹ and observed in dicta that the claim that preclearance is now inherently invalid “ha[s] a good deal of force.”³⁰² The probability of Congress passing a new coverage formula also is low. Any new formula would sweep in at least a few additional jurisdictions, which likely would complain vociferously about their inclusion.³⁰³ And even formerly covered jurisdictions might object to being singled out by current data that implies that they continue to discriminate against minorities.³⁰⁴

B. Section 3

The second option for shrinking the Section 2 – Section 5 gap is for plaintiffs to use Section 3 more aggressively to bail in jurisdictions—or, even better, for Congress to amend the provision so that it is easier to satisfy. To date, plaintiffs rarely have invoked Section 3 and courts rarely have subjected jurisdictions to preclearance pursuant to it.³⁰⁵ But in the future, plaintiffs could insert Section 3 claims into almost all of their voting rights lawsuits.³⁰⁶ If they were to prevail on these claims, then a substantial number of jurisdictions would be compelled to preclear their election law changes, thus reinstating part of the regime struck down in *Shelby County*. However, even if many Section 3 claims succeeded, the result would be an odd patchwork in which coverage corresponded to litigation victories but not necessarily to actual racial discrimination in voting. And many claims probably would *not* succeed because Section 3,

²⁹⁹ See Christopher S. Elmendorf and Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 Cal L Rev (forthcoming 2014) (manuscript at 38).

³⁰⁰ *Shelby Cty*, 133 S Ct at 2629.

³⁰¹ Id at 2618, 2624, 2630-31.

³⁰² Id at 2625.

³⁰³ See Persily, 117 Yale L J at 210 (cited in note 106) (“[I]t is quite another [thing] to heap a new and costly administrative scheme onto jurisdictions unaccustomed to needing federal permission for their voting laws.”).

³⁰⁴ See id at 211 (noting that a state’s coverage under a new formula would be perceived as “a national condemnation of its recent voting rights record”).

³⁰⁵ See note 65 (noting that only two states, Arkansas and New Mexico, ever have been subjected to preclearance under Section 3).

³⁰⁶ Notably, the DOJ already has included Section 3 claims in its challenges to Texas’s photo ID law and district plans. See note 219; see also Complaint, *United States v Texas* (SD Tex Aug 22, 2013), *13. Private parties challenging North Carolina’s new omnibus franchise restriction law also have filed Section 3 claims. See, for example, Complaint, *NAACP v McCrory* (MDNC Aug 12, 2013), *31-32.

unlike Section 2, requires a judicial finding that a jurisdiction has engaged in intentional discrimination.³⁰⁷ Courts often are reluctant to deem a jurisdiction a deliberate discriminator; indeed, this was the very reason why Section 2 was revised in 1982 to permit liability based solely on discriminatory effects.³⁰⁸

Both of these shortcomings, though, could be mitigated somewhat by congressional action. If Congress were to amend Section 3 so that preclearance applies not only to the jurisdiction found to have engaged in discrimination, but also to all of its constituent subunits, then bail-in claims would result in more geographically uniform coverage. More importantly, if Congress were to make a violation of Section 2 rather than a constitutional breach the trigger for Section 3 preclearance, then Section 3 claims would become much easier to win. As Travis Crum has commented, “[a]n effects test [for Section 3] . . . would likely result in many more jurisdictions covered,” thus producing greater convergence with the former scope of Section 4.³⁰⁹ However, Congress may be unable to pass any legislation on the controversial subject of preclearance as long as it remains under divided partisan control. Moreover, even a supercharged Section 3 would not result in *all* of the formerly covered jurisdictions once again becoming subject to preclearance (barring an unprecedented effusion of voting rights suits). And the Court may not look kindly on an attempt to link the Section 3 remedy of preclearance to a violation of Section 2. A garden-variety Section 2 offense may not be sufficiently “exceptional,” in the Court’s view, to justify preclearance.³¹⁰

C. Section 2

Congress’s final option for reducing the size of the Section 2 – Section 5 gap—and the one that follows most directly from this Article’s analysis—is to amend Section 2 itself so that it more closely resembles Section 5. On the procedural side, Congress could (1) institute a burden-shifting framework under which the onus would switch to the jurisdiction once a plaintiff makes a preliminary showing of harm; (2) increase the availability of preliminary injunctions, perhaps by authorizing their issuance whenever the preliminary showing is made; and (3) consolidate or eliminate some of the elements that must be proven to establish liability (especially the plethora of Senate factors). In combination, these steps would address all of the process-related reasons why policies that formerly would have been blocked by Section 5 now may go into effect. They would make the jurisdiction bear more of the burden of proof; they often would make suspension of a policy the default before a decision on the merits is reached; and they would reduce the cost and complexity of Section 2 litigation. Section 2 suits would not be *identical* to Section 5 preclearance proceedings, but they would be as close as possible while still retaining their character as conventional causes of action.

With respect to vote dilution, similarly, Congress could reverse the Court decisions that have made Section 2 inapplicable to districts that are bizarrely shaped or whose minority

³⁰⁷ See 42 USC § 1973(c) (requiring constitutional violation for Section 3 to apply, which in turn requires showing of discriminatory intent).

³⁰⁸ See note 120 and accompanying text.

³⁰⁹ See Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L J 1992, 2037 (2010).

³¹⁰ See *id.* (“But this change may also make section 3 more vulnerable to constitutional attack.”).

populations are overly heterogeneous or below 50 percent in size. If Congress undid these decisions, then there generally would be Section 2 liability if a constituency in which minorities were able to elect the candidate of their choice was dismantled. There generally would be Section 2 liability, that is, in the exact circumstances in which there is retrogression under Section 5. The shape of a district and the makeup and magnitude of its minority population would be immaterial under both provisions. Lastly, with respect to vote denial, Congress could make disparate impact alone the standard for a Section 2 violation (in this case without disturbing any Court precedents). The criteria for liability under Section 2 and retrogression under Section 5 then would be identical. Additional elements such as causation or interaction with patterns of discrimination would not have to be demonstrated under either provision.

These Section 2 revisions may be easier for Congress to pass than changes to Section 3 or Section 4 because they do not aim to impose preclearance on any jurisdiction. It is preclearance, with its attendant loss of state sovereignty, that always has been the most provocative feature of the VRA, and it is preclearance whose salience recently was heightened by *Shelby County*. Responses to the decision that focus on *other* aspects of the VRA therefore may be more palatable in the current political environment. In 1982, notably, a divided Congress and a Republican President managed to enact more sweeping amendments to Section 2 than those proposed here after an earlier Court case limited both constitutional and statutory claims of vote dilution.³¹¹ Political dynamics have changed over the last generation, but this is still an auspicious precedent.

Revisions to Section 2 have the further advantage that they may be more likely to survive the Court's scrutiny than efforts to recreate the preclearance regime. There is now a decision on the books striking down the only coverage formula ever passed by Congress and casting doubt on the validity of preclearance under any circumstances. But there is no equivalently adverse decision in the Section 2 context. Individual Justices occasionally have expressed their dissatisfaction with the provision,³¹² but the full Court never has implied that it is unconstitutional. Accordingly, a procedurally streamlined and substantively strengthened Section 2 would have reasonable odds of repelling a constitutional attack. None of the changes advocated here would make the provision much more legally vulnerable than it already is.

On the other hand, that Congress is *more* likely to amend Section 2 than Section 3 or Section 4 does not mean that it actually is *likely* to do so. Congressional inaction is always the safest bet in periods of divided government, especially with respect to laws that touch on highly sensitive issues of race and political power. The case for the constitutionality of a fortified Section 2 also is far from ironclad. Because it is a disparate impact provision, Section 2 already prohibits a wide range of conduct that is not motivated by invidious intent and thus is constitutionally permissible. If it were revised to prohibit even more such conduct, one could easily imagine the Court that decided *Shelby County* concluding that it too exceeds Congress's

³¹¹ The Court decision targeted by the 1982 amendments was *City of Mobile v Bolden*, 446 US 55 (1980), which made discriminatory intent the standard for constitutional vote dilution and construed Section 2 as mirroring the constitutional test.

³¹² See, for example, *Holder v Hall*, 512 US 874, 891-945 (1994) (Thomas concurring in the judgment); *Chisom v Roemer*, 501 US 380, 418 (1991) (Kennedy dissenting).

enforcement powers under the Reconstruction Amendments.³¹³ A reinforced Section 2 might clash as well with the Court’s ban on racial gerrymandering, which forbids race from playing too large a role in districting decisions. Indeed, Justice Kennedy warned in *Bartlett* that, “[i]f § 2 were interpreted to require crossover districts throughout the Nation, ‘it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.’”³¹⁴

One final (though unlikely) scenario for strengthening Section 2 also should be noted. In the event that Congress is unable to act, the Court itself could eliminate much of the Section 2 – Section 5 gap by revisiting its Section 2 precedents and deciding open questions in favor of greater liability.³¹⁵ On the procedural front, the Court probably could not change the burden of proof or the availability of preliminary injunctions—which are set, respectively, by the statutory text³¹⁶ and by unrelated case law on courts’ equitable powers³¹⁷—but it could greatly simplify the elements that must be proven to establish a Section 2 violation. The profusion of these elements is squarely the fault of the Court’s own decisions, not the language of Section 2,³¹⁸ meaning that doctrinal rationalization could be accomplished through judicial intervention. With respect to vote dilution, likewise, it is the Court, not the statutory text, that has produced the geographic compactness, minority heterogeneity, and minority size requirements for redistricting.³¹⁹ The Court therefore could waive these requirements even if Congress remains inactive. And with respect to vote denial, the Court has not yet specified the standard for Section 2 liability, and the language of the provision does not resolve the matter either.³²⁰ The Court thus would be writing on a clean slate if it were to embrace disparate impact alone as the operative test.

Of course, there is little chance that the same Court that consistently has narrowed the scope of Section 2 over the last generation suddenly will change course. It probably would take a shift in the Court’s membership for it to begin loosening the procedural and substantive

³¹³ For an extended discussion of whether Section 2 constitutes a valid exercise of Congress’s enforcement powers, see Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 Vt L Rev 39 (2006).

³¹⁴ *Bartlett v Strickland*, 556 US 1, 21 (2009) (quoting *LULAC v Perry*, 548 US 399, 446 (2006)). Likewise, if Section 2 were amended so as to require the construction of bizarre-looking districts or districts that merge dissimilar minority communities, the Court also might conclude that it improperly requires racial gerrymanders to be drawn. However, the recommended changes to the procedure of Section 2 litigation and the standard for vote denial liability do not seem to raise the same sorts of constitutional red flags. Congress thus may be on safer legal ground if it does not alter how Section 2 applies to vote dilution.

³¹⁵ For a recent proposal along these lines, see Christopher S. Elmendorf and Douglas M. Spencer, *Administering Section 2 of the VRA After Shelby County* (Sept 2013) (unpublished manuscript) (on file with author).

³¹⁶ See 42 USC § 1973(b) (“A violation . . . of this section is established if . . . *it is shown*” (emphasis added)).

³¹⁷ See, for example, *Prendergast v NY Tel Co*, 262 US 43, 50 (1923) (“It is well settled that the granting of a temporary injunction . . . is within the sound discretion of the trial court.”).

³¹⁸ See notes 79-83 and accompanying text (summarizing array of judicially created elements of Section 2 claim).

³¹⁹ See Sections II.A.1-3.

³²⁰ See Section III.A.

limitations that it has imposed on Section 2 over the years.³²¹ Judicial revision of Section 2 doctrine also is complicated by the “special force” of stare decisis in the statutory interpretation context.³²² Because Congress is free to overturn statutory constructions of which it disapproves—a power it repeatedly has exercised vis-à-vis the VRA³²³—the Court tends to adhere to its rulings unless they have proven manifestly unworkable. Strikingly, there does not seem to be a single instance in which the Court explicitly has reversed one of its earlier readings of the VRA.

* * *

The upshot of this analysis is that there are no easy ways to close the Section 2 – Section 5 gap. There are no options, that is, that are clearly effective from a policy perspective, passable by Congress given the current political climate, *and* likely to survive review by the Court. This conclusion should not be especially surprising. A provision as potent as Section 5 is hard to replace, a divided government typically enacts little legislation of any kind, and the Court cannot be expected to turn a blind eye to attempts to sidestep *Shelby County* when the ink on the decision is barely dry. But the conclusion also does not necessarily apply in the long run. If Democrats were to win unified control of the federal government, and if the Court’s membership were to shift in a more progressive direction, then there would be a high likelihood that amendments to the VRA would be both passed and upheld. Accordingly, the Section 2 – Section 5 gap probably will persist in the short term. But it need not endure indefinitely.

CONCLUSION

Everyone agrees that *Shelby County* inaugurated a new era in the South. As Heather Gerken commented on the day of the decision, the future “will look nothing like what existed at 9:59 this morning, before the Court handed down its opinion.”³²⁴ But until now there has been no systematic effort to figure out what the new era actually *will* look like—what the state of minority representation will be now that Section 5 has been struck down but Section 2 lives on. In this Article, I have tried my hand at charting the contours of the unfamiliar legal and political landscape in which we now find ourselves. The conclusions of my investigation are sobering if not quite calamitous. Procedurally, Section 2 and Section 5 diverge in several major ways, all of which mean that policies that formerly would have been blocked now will go into effect. With respect to vote dilution, many districts that previously were protected now may (and probably will) be dismantled without running afoul of Section 2. And with respect to vote denial, many

³²¹ See Pildes, 68 Ohio St L J at 1140-41 (cited in note 103) (noting that “a majority of the Court has continuously sought, without interruption, to cabin and confine safe minority districting to a narrower and narrower domain”).

³²² *Patterson v McLean Credit Union*, 491 US 164, 172 (1989).

³²³ In 1982, Congress reversed a Court decision limiting Section 2 to liability for discriminatory intent, see note 120, and in 2006, Congress reversed Court decisions confining Section 5 to cases in which a retrogressive purpose was shown or minorities’ overall political influence was diminished, see notes 127-128.

³²⁴ Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, Slate (June 25, 2013), online at http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html.

franchise restrictions that used to be barred now may (and probably will) be enacted with legal impunity.

To some, this new era may seem worse than the regime it replaced. But there do exist measures that could largely restore the status quo ante. A new coverage formula could be adopted, preclearance could be imposed on offending jurisdictions pursuant to a more flexible bail-in provision, and Section 2 could be amended to mirror the stricken Section 5 more faithfully. However, all of these steps face serious legal and political obstacles, at least for the time being. A divided government is unlikely to pass legislation that may have uneven partisan consequences. Likewise, the current Court probably would thwart any efforts to circumvent its recent decision. Section Two minus Section Five thus may come to equal zero once again. But odds are it will not do so for a while.

APPENDIX

TABLE 1: DISTRICTS FORMERLY PROTECTED UNDER SECTION 5

State	Minority CVAP %	Congress: Total Districts	Congress: Section 5 Districts	State Senate: Total Districts	State Senate: Section 5 Districts	State House: Total Districts	State House: Section 5 Districts
Alabama	26.6%	7	1	35	8	105	28
Arizona	22.4%	9	2	30	6	60	10
Georgia	33.5%	14	4	56	16	180	57
Louisiana	32.9%	6	1	39	11	105	29
Mississippi	36.3%	4	1	52	15	122	42
North Carolina	24.0%	13	2	50	10	120	25
South Carolina	29.2%	7	1	46	11	124	32
Texas	38.7%	36	12	31	10	150	51
Virginia	23.0%	11	1	40	5	100	13
Total	31.1%	107	25	379	92	1066	287

Districts formerly protected under Section 5 either (1) have a combined minority CVAP above 50 percent or (2) have a combined minority CVAP above 40 percent *and* are represented by a minority member.

TABLE 2: HIGHLY NON-COMPACT ABILITY DISTRICTS

District	Dispersion	Regularity
AL Senate 18	0.14	0.13
GA Senate 39	0.14	0.11
GA House 55	0.15	0.12
GA House 57	0.14	0.12
GA House 83	0.14	0.12
GA House 84	0.13	0.09
LA Senate 29	0.12	0.04
LA House 21	0.11	0.05
NC Congress 1	0.29	0.04
NC Congress 12	0.07	0.03
NC Senate 21	0.34	0.05
NC House 7	0.28	0.04
NC House 12	0.12	0.05
NC House 48	0.23	0.04
SC House 109	0.11	0.11
SC House 113	0.12	0.13
TX Congress 15	0.15	0.12
TX Congress 33	0.23	0.05
TX Congress 35	0.10	0.05
TX House 131	0.14	0.15
TX House 145	0.13	0.11
VA House 95	0.14	0.14

List includes all ability districts in formerly covered areas with dispersion scores less than or equal to 0.15 or regularity scores less than or equal to 0.05.

TABLE 3: RESULTS OF FACTOR ANALYSIS

Variable	Composite Factor 1 (Socioeconomic Status)
Median Age	
Married Household %	0.65
Nonfamily Household %	-0.50
High School Enrollment %	
College Enrollment %	
Median Household Income	0.54
Occupation – Professional %	0.41
Occupation – Sales %	
Occupation – Construction %	
Occupation – Manufacturing %	
Owner-Occupied %	0.90
Renter-Occupied %	-0.90
Variance Explained	35.1%

Nine states (AL, AZ, GA, LA, MS, NC, SC, TX, VA) and 38,381 Census block groups incorporated into analysis.

All variables apply to combined African American and Hispanic populations.

Single retained factor explains 35.1 percent of variance in data.

Only loadings greater than 0.4 or less than -0.4 displayed.

TABLE 4: ABILITY DISTRICTS WITH HIGHLY SPATIALLY DIVERSE MINORITY POPULATIONS

District	Spatial Diversity	Minority Dispersion
AL Congress 7	0.83	0.59
AL Senate 18	0.88	0.33
AL Senate 19	0.81	0.49
AL Senate 26	0.90	0.81
AL House 19	0.89	0.51
AL House 52	0.86	0.39
AL House 53	0.99	0.50
AL House 54	0.98	0.25
AL House 55	0.78	0.24
AL House 60	0.98	0.27
AL House 76	0.83	0.47
AL House 77	1.01	0.40
AL House 78	0.88	0.27
AL House 83	0.80	0.57
AZ Congress 7	0.79	0.72
AZ Senate 3	0.82	0.61
AZ House 3	0.82	0.61
AZ House 3	0.82	0.61
GA Congress 2	0.80	0.63
GA Congress 4	0.91	0.60
GA Congress 5	0.86	0.58
GA Congress 13	0.79	0.30
GA Senate 2	0.83	0.87
GA Senate 5	0.89	0.39
GA Senate 15	0.84	0.63
GA Senate 22	0.89	0.78
GA Senate 26	0.80	0.53
GA Senate 34	0.90	0.41
GA Senate 38	0.86	0.43
GA Senate 39	0.88	0.19
GA Senate 41	1.01	0.33
GA Senate 43	0.80	0.61
GA House 55	0.87	0.14
GA House 61	0.88	0.19
GA House 62	0.83	0.14
GA House 63	0.82	0.12
GA House 64	0.83	0.21
GA House 66	0.87	0.51

GA House 74	0.85	0.38
GA House 84	0.92	0.11
GA House 86	0.85	0.25
GA House 87	0.92	0.23
GA House 88	1.13	0.20
GA House 91	0.84	0.39
GA House 100	0.79	0.72
GA House 132	0.85	0.57
GA House 136	0.88	0.37
GA House 142	0.85	0.70
GA House 153	0.87	0.53
GA House 162	0.82	0.32
GA House 163	0.82	0.36
LA Congress 2	0.87	0.59
LA Senate 3	0.79	0.20
LA Senate 4	0.86	0.46
LA Senate 7	1.04	0.49
LA Senate 15	0.92	0.52
LA House 4	0.90	0.32
LA House 34	0.78	0.80
LA House 61	0.79	0.52
LA House 87	0.83	0.37
LA House 97	0.84	0.44
LA House 99	0.80	0.35
LA House 100	0.92	0.88
LA House 101	1.01	0.47
LA House 102	0.98	0.34
MS Senate 26	0.86	0.21
MS Senate 29	0.97	0.23
MS House 45	0.81	0.29
MS House 55	0.91	0.73
MS House 57	0.86	0.37
MS House 66	0.85	0.28
MS House 69	0.81	0.25
MS House 71	0.80	0.40
MS House 72	0.96	0.22
NC Congress 12	0.87	0.51
NC Senate 14	0.97	0.69
NC Senate 20	0.95	0.44
NC Senate 21	0.79	0.54
NC Senate 28	0.88	0.74

NC Senate 32	0.91	0.88
NC Senate 38	0.84	0.41
NC Senate 40	0.85	0.60
NC House 29	0.89	0.72
NC House 31	0.95	0.54
NC House 33	0.94	0.57
NC House 38	0.92	0.57
NC House 42	0.82	0.48
NC House 57	0.98	0.57
NC House 58	0.84	0.44
NC House 60	0.85	0.59
NC House 71	0.96	0.59
NC House 72	0.85	0.71
NC House 99	0.84	0.57
NC House 101	0.83	0.48
NC House 107	0.87	0.30
SC Senate 7	0.89	0.61
SC Senate 19	0.87	0.58
SC Senate 21	0.89	0.53
SC House 12	0.80	0.57
SC House 73	0.82	0.41
SC House 76	0.92	0.33
SC House 111	0.83	0.44
TX Congress 9	0.99	0.43
TX Congress 16	0.81	0.87
TX Congress 18	0.85	0.41
TX Congress 20	0.83	0.61
TX Congress 30	0.88	0.58
TX Congress 33	0.79	0.46
TX Congress 35	0.84	0.35
TX Senate 6	0.79	0.48
TX Senate 13	0.95	0.36
TX Senate 15	0.94	0.28
TX Senate 21	0.81	0.20
TX Senate 23	0.86	0.68
TX Senate 26	0.81	0.60
TX House 34	0.79	0.59
TX House 42	0.78	0.80
TX House 46	0.86	0.46
TX House 51	0.95	0.68
TX House 77	0.80	0.69

TX House 95	0.84	0.43
TX House 100	0.82	0.30
TX House 101	1.01	0.40
TX House 103	0.85	0.39
TX House 111	1.00	0.33
TX House 116	0.85	0.30
TX House 120	0.80	0.65
TX House 123	0.81	0.34
TX House 131	0.93	0.16
TX House 139	0.85	0.28
TX House 141	0.92	0.28
TX House 142	0.79	0.24
TX House 145	0.82	0.20
TX House 146	0.89	0.26
TX House 147	0.86	0.24
VA Congress 3	0.85	0.59
VA Senate 2	0.84	0.49
VA Senate 5	0.91	0.49
VA Senate 9	0.95	0.29
VA Senate 16	0.82	0.50
VA Senate 18	0.86	0.25
VA House 70	0.98	0.33
VA House 74	0.85	0.14
VA House 77	0.98	0.24
VA House 80	0.89	0.46
VA House 95	0.85	0.35

List includes all ability districts in formerly covered areas with spatial diversity scores higher than remedial district rejected in *LULAC* (0.78).

Spatial diversity scores computed with respect to composite factor 1 (socioeconomic status) from factor analysis.

Spatial diversity and dispersion scores computed for districts' minority populations only.

Districts with minority dispersion scores lower than remedial district rejected in *LULAC* (0.18) shown in bold.

TABLE 5: ABILITY DISTRICTS WITH COMBINED MINORITY CVAPs BELOW 50 PERCENT

District	Black CVAP %	Hispanic CVAP %	Combined Minority CVAP %
AL House 85	46.7%	1.1%	47.8%
AZ Senate 2	4.4%	42.3%	46.8%
AZ Senate 3	3.0%	44.7%	47.7%
AZ Senate 30	8.1%	33.9%	42.0%
AZ House 2	4.4%	42.3%	46.8%
AZ House 3	3.0%	44.7%	47.7%
AZ House 3	3.0%	44.7%	47.7%
AZ House 4	3.5%	46.2%	49.7%
GA House 38	40.0%	6.5%	46.5%
GA House 66	37.5%	2.8%	40.3%
GA House 132	42.9%	1.5%	44.3%
NC Senate 32	45.3%	4.2%	49.5%
SC Senate 7	46.2%	2.6%	48.8%
SC Senate 29	46.9%	0.7%	47.6%
SC House 90	43.4%	0.6%	44.0%
SC House 116	45.1%	1.3%	46.4%
VA House 52	31.0%	12.2%	43.2%

List includes all ability districts in formerly covered areas with combined minority CVAPs below 50 percent.

TABLE 6: FRANCHISE RESTRICTIONS UNDER SECTION 2 AND SECTION 5 (1982 – PRESENT)

Policy	Section 5 Preclearance Denials	Section 2 Successful Claims	Section 2 Failed Claims
Polling place eliminations	19	3	3
Election date changes	15	0	0
Voter registration procedures	10	5	4
Bilingual election procedures	10	2	0
Voter roll purges	5	0	1
Lack of assistance to voters	4	2	2
Photo ID laws	3	0	2
Absentee voting procedures	3	2	4
Cutbacks to voting hours	2	1	1
Voting machine problems	1	3	2
Citizenship requirements for registration	1	0	0
Total	73	18	19

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