

ARTICLE

SECTION 5 SQUARED: CONGRESSIONAL POWER TO EXTEND AND AMEND THE VOTING RIGHTS ACT

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I. INTRODUCTION

At the signing ceremony for the Voting Rights Act of 1965, President Lyndon B. Johnson called the Act “one of the most monumental laws in the entire history of American freedom.”¹ The Act is rightly celebrated as the cornerstone of the “Second Reconstruction.”² That we needed a *Second* Reconstruction is an important fact about American history: the *First* Reconstruction, which at one point saw levels of voter turnout among black men and black electoral success that would be the envy of any state today,³ ended with cynical political compromises, concerted vote suppression, and judicial indifference.⁴ It took the Civil Rights Movement of the 1950s and 1960s to resuscitate the Fourteenth and Fifteenth Amendments’ promise of political integration.

That promise still has not been fully redeemed. Certainly, we have not yet attained universal adult citizen suffrage. Over 1.4 million black citizens are disenfranchised today by offender disenfranchisement statutes that, like our continued embrace of the death penalty, distinguish the United States from every other advanced democracy.⁵ Many states have recently adopted restrictive voter identification (ID) requirements that threaten to become a new form of poll tax.⁶ Language barriers still prevent

1. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 841 (Aug. 6, 1965).

2. See, e.g., J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 53 (1999) (describing the key role played by the Voting Rights Act in enforcing the Fourteenth and Fifteenth Amendments).

3. See *id.* at 19 fig.1.1 (comparing the number of southern black legislators elected during Reconstruction with those elected after 1960); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 12 tbl.1.1 (1974) (providing statistics for voter turnout during Reconstruction).

4. See generally KOUSSER, *supra* note 2, at 12–53 (examining and providing a variety of statistics relating to the Voting Rights Act and the two Reconstructions); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 294–322 (1997) (comparing the end of the First Reconstruction to threats posed to minority political power today).

5. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004) (discussing minority felon disenfranchisement).

6. See, e.g., *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1366, 1370 (N.D. Ga. 2005) (issuing a preliminary injunction against Georgia’s new photo identification (ID) law as an undue burden on the fundamental right to vote in violation of the Fourteenth Amendment and as an unconstitutional poll tax in violation of the Twenty-fourth Amendment). For more extensive discussion of voter ID requirements, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 712–13 (2006) (describing the emerging case law). Professor Tokaji has also posted a number of valuable discussions of voter ID requirements and litigation on his blog—including a chart listing current litigation. See generally Dan

many citizens from effectively casting their ballots.⁷ And in many parts of the country, minority voters either remain unable to elect the candidates of their choice or are able to do so only from deliberately constructed majority-minority districts.⁸

One of the Voting Rights Act's most targeted remedies consists of the preclearance regime of sections 4 and 5,⁹ which requires certain jurisdictions to satisfy federal authorities that proposed changes in their election laws have neither a discriminatory purpose nor a discriminatory effect before implementing them.¹⁰ Initially passed as a temporary measure for five years in 1965, these provisions have been extended and amended four times, most recently in 2006.¹¹ The 2006 amendments extended the preclearance regime for another twenty-five years and amended the standards for granting preclearance in response to recent Supreme Court decisions that had narrowed the grounds for objecting to a proposed change.¹² Clearly, the world has changed since 1965. The question thus arises: Does Congress retain the power to impose this "complex scheme of stringent remedies"?¹³ Already, the first constitutional challenge to the Act has been filed,¹⁴ and the issue will surely reach the Supreme Court within the next few years.¹⁵

Tokaji, Equal Vote Blog, <http://moritzlaw.osu.edu/blogs/tokaji/> (last visited Mar. 3, 2007).

7. See, e.g., Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 32–33 (2004) (noting that 43% of Asian Americans over the age of eighteen have limited proficiency in English).

8. See, e.g., *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 545 (2006) (testimony of Fred Gray, Partner, Gray, Langford, Sapp, McGowan, Gray & Nathanson), available at http://judiciary.senate.gov/testimony.cfm?id=1894&wit_id=5358 (noting that all but one of Alabama's thirty-five black state legislators were elected from a majority African-American district, and the remaining legislator was elected from a district that was 48% black).

9. 42 U.S.C. §§ 1973b–1973c (2000).

10. 42 U.S.C. § 1973c (2000).

11. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (to be codified in scattered sections of 42 U.S.C. §§ 1973–1973aa-1a); see also *infra* text accompanying notes 25–29 (describing the amendments to the Voting Rights Act).

12. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4–5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. §§ 1973b–1973c).

13. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

14. See Complaint at 1, *Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales*, No. 1:06-CV-01384 (D.D.C. Aug. 4, 2006), available at <http://electionlawblog.org/archives/northwest%20austin.pdf> (seeking bailout or a "declaratory judgment that continued application of § 5 is unconstitutional").

15. The Voting Rights Act requires that all challenges to the Act's constitutionality be filed in the U.S. District Court for the District of Columbia. See 42 U.S.C. § 1973l(b)

In this Article, I address one question: How have recent changes in legal doctrine affected congressional authority? This question has occasioned a fair amount of recent commentary, much of it focused on the implications of the Rehnquist Court's "new federalism."¹⁶ I suggest, to borrow from Tennyson's *Ulysses*, that while much is taken, much abides: the preclearance regime continues to satisfy the Supreme Court's construction of congressional enforcement powers under the Reconstruction Amendments. And I go further to suggest that the Court's decisions under the Elections Clause of Article I, § 4 and under the Equal Protection Clause with respect to political gerrymanders reinforce the Act's constitutionality.

II. FROM "STRONG MEDICINE" TO WATERED *BEER*: THE EVOLUTION OF THE PRECLEARANCE REGIME

The provisions of the original Voting Rights Act were "strong medicine."¹⁷ Despite an earlier Supreme Court ruling that had

(2000) ("No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of [this Act]."); *see also* Shaw v. Barr, 808 F. Supp. 461, 466–67 (E.D.N.C. 1992) (holding that all other federal courts lack subject matter jurisdiction under section 14(b) of the Voting Rights Act), *rev'd on other grounds*, 509 U.S. 630 (1993). Moreover, "[a]ny action under [section 5] shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c (2000). Thus, issues involving section 5 remain within the Supreme Court's narrow mandatory appellate jurisdiction.

16. *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 183–88 (2005) (claiming that the Court's treatment of the preclearance regime in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), is part of the "seismic shift in power from the federal government to the states"); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2361–74 (2003) (claiming that the *Boerne* cases represent the Rehnquist Court's conservative attack on the Second Reconstruction); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 85–87 (2003) (noting the Justices' expressions of concern regarding Section 5's constitutionality); Victor Andres Rodríguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 794–98 (2003) (identifying strands of Rehnquist Court jurisprudence that suggest difficulties with Section 5); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-discrimination to the Right to Vote* 20 (N.Y. Univ. School of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 06-10, 2006), available at <http://ssrn.com/abstract=900161> (commenting on constitutional questions regarding the limited geographic scope of Section 5); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 729–31 (1998) (arguing that Section 5 remains constitutional under Rehnquist Court precedents).

17. *Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House*

upheld the constitutionality of literacy tests,¹⁸ section 4 immediately suspended such tests in various jurisdictions with a history of depressed political participation¹⁹—a suspension that was made nationwide and permanent by subsequent amendments to the Act.²⁰ Sections 6, 7, and 8 authorized the appointment of federal registrars and examiners to make sure that minority citizens' names were placed on the voting rolls and that they were actually able to cast ballots.²¹ Most importantly, section 5 “shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims,”²² providing that jurisdictions covered by section 4 could make no changes to their election laws without first obtaining federal approval through what came to be known as the “preclearance” process.²³ To obtain preclearance a covered jurisdiction bore the burden of proving that its proposed change would have neither a discriminatory purpose nor a discriminatory effect.²⁴

The preclearance regime was enacted originally for a five-year period, but Congress has since extended and expanded its scope four times. In 1970, the Act was amended to continue the regime for an additional five years, while bringing several additional jurisdictions (including three boroughs of New York City) within its scope.²⁵ In 1975, the regime was extended for an additional seven years, and Congress changed the triggering formula in section 4 to include the use of English-only election materials in jurisdictions with substantial numbers of voting-age citizens who were members of a language minority,²⁶ thereby

Comm. on the Judiciary, 89th Cong. 110 (1965) (statement of Representative Chelf).

18. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (holding that a literacy test was adequately related to the state’s legitimate interest in ensuring an informed electorate).

19. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973b(a)(1) (2000)).

20. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973b (2000)).

21. 42 U.S.C. §§ 1973d–1973f (2000).

22. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

23. Covered jurisdictions can obtain preclearance either through an administrative process within the Department of Justice or by obtaining a declaratory judgment from a three-judge district court in the District of Columbia. See 42 U.S.C. § 1973c (2000). For extensive discussions of the preclearance process, see, for example, HOWARD BALL ET AL., *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT* (1982); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 232–37 (2003).

24. See 42 U.S.C. § 1973c (2000).

25. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b(f) (2000)). The covered jurisdictions are listed at 28 C.F.R. app. pt. 51 (2006).

26. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 102, 203, 89

covering a number of additional jurisdictions, including Texas, Arizona, Alaska, and several counties in Florida, California, and South Dakota.²⁷ In 1982, Congress extended the preclearance regime for another twenty-five years while also creating a “bailout” process that released covered jurisdictions if they could show compliance with the Act’s requirements, the elimination of procedures that inhibited or diluted equal access, and “constructive efforts” to expand opportunities for political participation.²⁸ Finally, in 2006, Congress extended the preclearance and bailout regimes for another twenty-five years, while changing the standards for granting preclearance in two important respects: first, authorizing objections for a broader range of purposeful discrimination; and second, elaborating upon what counts as a “discriminatory effect.”²⁹

Section 5 has been critical to the Act’s success with respect to both first- and second-generation issues.³⁰ With respect to first-generation issues involving the right to register and to vote, section 5 has been used to block a variety of restrictive changes, such as voter ID requirements, voter purges and reregistration requirements, and changes in polling places that render them less accessible to minority voters.³¹ And the prospect of

Stat. 400, 400–02 (codified as amended at 42 U.S.C. §§ 1973b(f), 1973aa (2000)).

27. U.S. Dep’t of Justice Civil Rights Div., Voting Section Homepage, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Mar. 3, 2007) [hereinafter Voting Section Homepage].

28. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, secs. 2(b)(4), 2(b)(6), § (8), 96 Stat. 131, 131–33 (codified at 42 U.S.C. § 1973b(a)(1), (8) (2000)).

29. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4–5, 120 Stat. 577, 580–81 (to be codified at 42 U.S.C. §§ 1973b–1973c).

30. For discussions of this taxonomy, see, for example, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 & nn.75–76 (1991) (noting the shift from direct, first generation voting impediments to more indirect, structural barriers that dilute minority voting strength in the second generation); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–40 (1992) (recognizing the “built-in headwinds” facing second generation voters in the form of electoral arrangements that dilute minority political power). I have used a slightly different terminology to refer to three nested sets of voting-related interests: participation, which concerns the entitlement to cast a ballot and have that ballot counted; aggregation, which concerns rules for tallying votes to determine election winners, including such practices as apportionment; and governance, which involves the ability to achieve one’s policy preferences enacted within the process of representative decision making. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–19 (1993).

31. For discussions of section 5 objection letters, see, for example, BALL ET AL., *supra* note 23, at 85–86; LAUGHLIN McDONALD & DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT 7–8 (2006), <http://www.aclu.org/pdfs/votingrightsreport20060307.pdf>; Hiroshi Motomura, *Preclearance Under Section 5 of the Voting Rights Act*, 61 N.C. L. REV. 189, 210–21 (1983); Michael J. Pitts, *Let’s Not Call*

precipitating a section 5 objection letter from the Department of Justice or failing to obtain a declaratory judgment from a three-judge federal district court has undoubtedly deterred many jurisdictions from even adopting discriminatory changes in the first place.³²

With respect to second-generation issues involving the dilution of minority voting strength, section 5 has blocked and deterred practices such as discriminatory annexations and adoptions of at-large elections.³³ At roughly the same time that Congress adopted section 5, the Supreme Court imposed a “one person, one vote” requirement on virtually all elections conducted from districts.³⁴ The result of one person, one vote was to require decennial readjustment of district lines to account for population changes revealed by the census.³⁵ Thus, the Constitution requires covered jurisdictions to implement changes every ten years in their congressional, state-legislative, county-commission, city-council, and school-board districts; section 5 prevents them from implementing those changes unless the jurisdictions can show that the changes have neither a discriminatory purpose nor a discriminatory effect. The fortuitous, and fortunate, intersection of one person, one vote and section 5 has had a major impact in forcing covered jurisdictions to adopt apportionment plans that provide minority voters with opportunities to elect candidates of their choice.³⁶

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, 612–13 (2005).

32. For more discussion of the Act's deterrent function, see *infra* text accompanying notes 106–12.

33. See, e.g., *City of Richmond v. United States*, 422 U.S. 358, 370 (1975) (requiring that a jurisdiction change to the use of single-member districts when at-large elections would otherwise diminish the influence of minority voters in the newly configured city); *Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (holding that annexations are covered by section 5).

34. See *Avery v. Midland County*, 390 U.S. 474, 485–86 (1968) (imposing one person, one vote on local elected bodies); *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964) (imposing one person, one vote on state legislative bodies); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (imposing “one person, one vote” on congressional districts).

35. See *Reynolds*, 377 U.S. at 583–84 (explaining that decennial reallocation of seats following the census offers an appropriate balance between the need for stability and the need for adjustments to reflect current population).

36. For an empirical examination of the Act's effects, see Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, at 378 (Chandler Davidson & Bernard Grofman eds., 1994). The authors conclude that the creation of majority-black legislative districts in covered jurisdictions was “largely the result of Justice Department preclearance denial or southern legislators' expectations of it.” *Id.* at 381.

Section 5's force has been somewhat blunted over the years by four Supreme Court decisions. In *Beer v. United States*, the Court held that section 5 was designed "to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."³⁷ Thus, in considering a proposed change, the section 5 authority asks the question "whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the [proposed] change."³⁸ As long as minority voters will not be left worse off after the change, the jurisdiction is entitled to preclearance. Put somewhat differently, changes that merely perpetuate a preexisting level of exclusion are not objectionable for having a discriminatory effect.

For many years, the Department of Justice nonetheless objected to many such changes, declaring itself unable to conclude that jurisdictions proposing changes that perpetuated the exclusion of minority citizens had met their burden under section 5 of showing that such changes lacked a discriminatory purpose. But in *Reno v. Bossier Parish School Board* ("*Bossier II*"), the Supreme Court held that section 5 did not prohibit adoption of changes enacted with a racially discriminatory but nonretrogressive purpose.³⁹ Thus, the Department of Justice or the three-judge court was required to preclear even plans that violated the Fourteenth or Fifteenth Amendments, as long as those plans simply perpetuated (or deliberately failed to fully ameliorate) the existing denial or dilution of minority voting rights. Such plans are, of course, vulnerable to attack under both the Constitution and section 2 of the Voting Rights Act,⁴⁰ but the burdens of litigation and persuasion rest on the excluded citizens, rather than the jurisdiction.⁴¹

The *Beer* retrogression standard was applied in redistricting cases by asking whether the minority community's ability to elect candidates of its choice would be diminished by the proposed change. In *Georgia v. Ashcroft*, however, the Supreme Court

37. *Beer v. United States*, 425 U.S. 130, 141 (1976) (emphasis added).

38. *Id.* (quoting H.R. Rep. No. 94-196, at 60 (1975)).

39. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000).

40. The Fourteenth Amendment prohibits the use of purposefully discriminatory election procedures, and section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2000), prohibits the use of procedures with a discriminatory result.

41. *See* 42 U.S.C. § 1973(b) (2000) (requiring a showing that "the political processes leading to nomination or election in the State or political subdivision are not equally open" to minority voters to establish a violation of 42 U.S.C. § 1973(a) (2000)).

switched gears, declaring that “a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice” in deciding whether a plan was retrogressive.⁴² Rather, the Court held that section 5 “gives States the flexibility to choose [among] theor[ies] of effective representation”:⁴³ a state might choose in one redistricting cycle to “create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice,” and then decide in a subsequent cycle to “create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice,”⁴⁴ thereby giving minority voters less “descriptive representation” while presumably according them more “substantive representation.”⁴⁵

In looking at the question of substantive representation, the Court identified an additional metric for assessing the minority group’s ability to participate in the political process. Section 5 review might “examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts” under the old and new plans:

[I]n a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters’ representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.⁴⁶

Thus, because the plan under review in Georgia was designed to maintain Democratic control over the state senate and because the representatives elected by Georgia’s black voters were all Democrats, a plan that somewhat reduced black voters’ ability to elect their candidates of choice might satisfy section 5 if it bolstered the Democrats’ chance of retaining legislative control.⁴⁷

42. *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

43. *Id.* at 482.

44. *Id.* at 480.

45. *Id.* at 481 (citing HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 60–91 (1967)).

46. *Id.* at 483–84.

47. I analyze and criticize this reasoning in Pamela S. Karlan, *Georgia v. Ashcroft*

This focus on minority group members' prospects within the process of representative decision-making stood in some tension with the Court's earlier decision in *Presley v. Etowah County Commission*.⁴⁸ There, the Court had held that "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting."⁴⁹ Thus, *Georgia v. Ashcroft* created an anomalous world in which changes that augment or preserve the political power of representatives elected from minority communities could be used to justify granting preclearance while changes that diminished that power could not be used to justify an objection.⁵⁰

III. FROM SECTION 5 TO ARTICLE I AND BACK AGAIN: SOURCES OF CONGRESSIONAL POWER TO PROTECT VOTING RIGHTS

Each time that Congress has taken up the Voting Rights Act of 1965, it has relied on its powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments.⁵¹ Those

and the Retrogression of Retrogression, 3 ELECTION L.J. 21, 36 (2004).

48. *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992).

49. *Id.* at 506.

50. This anomaly is reflected in the history of the recent mid-decade Texas congressional re-districting. See Memorandum from the U.S. Dep't of Justice 71-72 (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf> (recommending that the Attorney General object to the Texas redistricting plan because it resulted in a retrogression in light of *Georgia v. Ashcroft*); cf. Recent Case, *Election Law—Voting Rights Act—District Court Holds that Section 2 Vote Dilution Claim Does Not Extend to the Protection of Influence Districts*—Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), 117 HARV. L. REV. 2433, 2433-35 (2004) (describing the tension between *Georgia v. Ashcroft*'s analysis under section 5 and the district court's failure to find a section 2 violation in the Texas re-districting, which eliminated several "influence" districts). In the end, the Department of Justice did not object to the Texas plan—a decision that was itself immune from judicial review. See *Morris v. Gressette*, 432 U.S. 491, 504-05 (1977) (holding that the Department's decision not to interpose an objection is unreviewable). Subsequently, the plan was challenged on a variety of grounds by several different groups of plaintiffs. Ultimately, the Supreme Court held that the Texas plan violated section 2 of the Voting Rights Act insofar as it deprived Latino voters in one south Texas congressional district of their preexisting ability to participate effectively in the political process. See *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2623 (2006). The Supreme Court's analysis tracked quite closely an appropriate section 5 retrogression inquiry. See Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. (forthcoming 2007).

51. In 1965, Congress relied expressly on its power under section 5 of the Fourteenth Amendment (as opposed to under section 2 of the Fifteenth Amendment) only with respect to the suspension of literacy tests that determined the voting eligibility of citizens educated in U.S.-flag schools where the language of instruction was not English. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e)(1), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e)(1) (2000)). The remainder of the Act relied on its power under section 2 of the Fifteenth Amendment. See Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 3(a), 6, 79 Stat. 437, 437, 439 (codified as amended at 42 U.S.C. §§ 1973a,

amendments recognized a special role for Congress, as opposed to the courts, in protecting individual rights. As then-Professor Michael McConnell has explained:

Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power. . . . As Republican Senator Oliver Morton explained: “the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the Amendment itself provided that it shall be enforced by legislation on the part of Congress.”⁵²

The Supreme Court has continued to recognize that special role when it comes to the protection of fundamental rights and traditionally excluded groups. In *City of Boerne v. Flores*, the Court observed that a distinction exists between “measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law.”⁵³ It recognized that “Congress must have wide latitude” with respect to measures that fall in the first—remedial *or* prophylactic—category.⁵⁴ And the Court pointed to the Voting Rights Act of 1965—and, in particular, Congress’s decision to suspend literacy tests—as an exemplar of appropriate legislation under the Fourteenth Amendment, even though the provisions clearly “prohibit[ed] conduct which [was] not itself unconstitutional and intrude[d] into [legislative spheres of autonomy previously reserved to the States].”⁵⁵

So why have so many commentators suggested that the Rehnquist Court’s new federalism decisions cast doubt on Congress’s power to extend the Voting Rights Act? In part, their hesitation may reflect *City of Boerne*’s citation of only pre-1982 Voting Rights Act cases:⁵⁶ the Court’s opinion might be taken to

1973d (2000)). In later years, however, Congress has made clear that it is relying on its enforcement powers under section 5 of the Fourteenth Amendment with respect to the entire Act. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 205, 89 Stat. 400, 402 (codified as amended at 42 U.S.C. §§ 1973a, 1973d (2000)) (replacing “fifteenth amendment” each time it appears with “fourteenth and fifteenth amendment”).

52. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 182 (1997) (quoting CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872)).

53. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

54. *Id.* at 519–20.

55. *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

56. The Court cited *City of Rome v. United States*, 446 U.S. 156, 172–73, 182 (1980), which upheld a seven-year extension of the preclearance regime enacted in 1975 and the refusal to preclear changes that have a discriminatory effect, regardless of their purpose;

deliberately avoid passing on the question whether the 1982 extension of the preclearance regime satisfied the “congruence and proportionality” requirements articulated in *City of Boerne*.⁵⁷

But skepticism about congressional enforcement power under *City of Boerne* rests in significant part not on *City of Boerne* itself, but on a parallel line of cases involving one particular exercise of congressional enforcement power. The Term before *City of Boerne*, in *Seminole Tribe v. Florida*, the Supreme Court held that Congress cannot use its Article I powers (such as the commerce power) to abrogate the Eleventh Amendment sovereign immunity states enjoy against lawsuits by private citizens.⁵⁸ In the decade since *Seminole Tribe* and *City of Boerne*, the Supreme Court has frequently revisited the question of congressional power, and although it may be somewhat premature, even now, to say that the dust has settled completely, the following principles articulated in the decided cases may be helpful in understanding the scope of Congress’s power to amend and extend the Voting Rights Act.

Oregon v. Mitchell, 400 U.S. 112, 117–18 (1970), which upheld a five-year nationwide ban on literacy tests; *Katzenbach v. Morgan*, 384 U.S. 641, 643 & n.1, 646–47 (1966), which upheld the suspension of literacy tests for voters who were educated in “American-flag schools” in Puerto Rico where the language of instruction was not English; and *South Carolina v. Katzenbach*, 383 U.S. 301, 315–16, 318, 337 (1966), which upheld the suspension of literacy tests in covered jurisdictions, the appointment of federal registrars and examiners, and the imposition of a five-year preclearance requirement. The Court in *City of Boerne* notably did not cite decisions such as *Morse v. Republican Party of Virginia*, 517 U.S. 186, 193–94 (1995); *Clark v. Roemer*, 500 U.S. 646, 658–59 (1991); *City of Pleasant Grove v. United States*, 479 U.S. 462, 472 (1987); and *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182 (1984), that had broadly construed section 5 as it had been extended in 1982.

57. See *infra* note 96 and accompanying text (discussing the *City of Boerne* “congruence and proportionality” test). In *LULAC v. Perry*, decided shortly before Congress extended and amended the Voting Rights Act, eight members of the Court announced that they considered compliance with section 5’s nonretrogression mandate a “compelling state interest”—a conclusion whose virtually necessary antecedent was that the Act itself be constitutional. See *LULAC v. Perry*, 126 S. Ct. 2594, 2642 n.12 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part); *id.* at 2648 n.2 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); *id.* at 2667 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J., concurring in part and dissenting in part). Of course, the Court’s decision in *LULAC* does not necessarily dispose by itself of the question whether the extension and amendment of section 5 lie within Congress’s power.

58. *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996). There is voluminous academic criticism regarding the Court’s reliance on the Eleventh Amendment to preclude suits based not on diversity of citizenship but rather on the presence of a federal question, and at virtually every point over the last forty years the Court has been divided on this question 5–4—despite a nearly complete turnover in its membership. See, e.g., Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. 1927, 1930–32 & n.9 (2003) (discussing the 5–4 split of the Rehnquist court in state sovereignty cases).

First, the Court has drawn a sharp distinction between the scope of Congress's *regulatory* power, to which it continues to give broad effect, and Congress's *remedial* arsenal, which *Seminole Tribe* and its progeny have narrowed. In cases such as *Alden v. Maine*, *Kimel v. Florida Board of Regents*, and *Board of Trustees v. Garrett*, the Court expressly stated that Congress *could* bind the state officials and agencies involved and require them to follow federal law.⁵⁹ What it could *not* do was enforce those constraints by authorizing private damages actions.⁶⁰ The *Alden* Court explicitly distinguished private damages lawsuits, which it held foreclosed by the Eleventh Amendment, from lawsuits brought by the United States to enforce individuals' rights, noting that "[s]uits brought by the United States itself require the exercise of political responsibility . . .," which brings them within the "plan of the [Constitutional] Convention or to subsequent constitutional amendments . . ." regarding the relationship between the federal and state governments.⁶¹

Second, with respect to Congress's power under the Fourteenth and Fifteenth Amendments, the Court has not only continued to recognize the vitality of *Fitzpatrick v. Bitzer*, which upheld congressional abrogation of states' sovereign immunity,⁶² but has further held that congressional remedial and prophylactic power is at its strongest when Congress acts to remedy or prevent the kinds of practices that the Court has subjected to heightened judicial scrutiny. Put in simple terms, when Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are broader than when it acts to promote equality more generally. Thus, in *Tennessee v. Lane*, the Court upheld Congress's abrogation of states' sovereign immunity under Title II of the Americans with Disabilities Act (ADA) with respect to the fundamental right of access to the courts.⁶³ In *Nevada*

59. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 368–69 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 93 (2000); *Alden v. Maine*, 527 U.S. 706, 756–57 (1999). I discuss the entire line of cases more thoroughly in Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 189–90.

60. See *Garrett*, 531 U.S. at 374 (holding that a state employee cannot sue a nonconsenting state under Title I of the Americans with Disabilities Act); *Kimel*, 528 U.S. at 66–67 (holding the Age Discrimination in Employment Act abrogation provision unconstitutional); *Alden*, 527 U.S. at 712 (holding Congress lacks authority to allow individuals to sue states under the Fair Labor Standards Act).

61. *Alden*, 527 U.S. at 755–56.

62. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress has the power, under section 5 of the Fourteenth Amendment, to abrogate states' sovereign immunity in order to enforce the prohibitions of section 1 of the Fourteenth Amendment).

63. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (calling Title II's requirement "a

Department of Human Resources v. Hibbs, it upheld Congress's abrogation of states' sovereign immunity under the Family and Medical Leave Act because the Act was intended to prevent sex discrimination in violation of the Equal Protection Clause.⁶⁴ And in *United States v. Georgia*, the Court upheld Congress's abrogation of states' sovereign immunity under Title II of the ADA with respect to claims of discrimination against disabled inmates that rises to the level of an Eighth Amendment violation.⁶⁵

Third, the Court has implicitly recognized a special role for Congress in addressing equal protection values in situations where courts are ill-equipped to confront those issues without congressional guidance. In *Vieth v. Jubelirer*, the Court revisited the constitutionality of partisan political gerrymanders.⁶⁶ All nine Justices acknowledged that excessive partisan gerrymanders raise serious constitutional questions, and all nine located the constitutional infirmity at least in part in the Equal Protection Clause.⁶⁷ And yet, a majority of the Court refused to adjudicate the plaintiffs' challenge to Pennsylvania's congressional redistricting.⁶⁸ Justice Scalia, in a plurality opinion for himself, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas, would have held political gerrymandering claims nonjusticiable

reasonable prophylactic measure, reasonably targeted to a legitimate end").

64. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724–27 (2003) (finding that the Family Medical Leave Act involved an appropriate use of congressional enforcement power).

65. *United States v. Georgia*, 126 S. Ct. 877, 880–81 (2006) (holding that to the extent that the private plaintiff had stated a claim under the Eighth Amendment as well as under the ADA itself, Congress could abrogate the state's sovereign immunity because the Eighth Amendment was incorporated against the states through the Due Process Clause).

66. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). For more extensive discussions of the case, see, for example, Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397 (2005); Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J.L. & PUB. POL'Y 423 (2005); Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004) (describing the essay as a "preliminary reaction" to *Vieth*); Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55–76 (2004) ("*Vieth* was a moment of exceptional importance.>").

67. *See Vieth*, 541 U.S. at 292 (plurality opinion) (agreeing with the assumption that severe partisan gerrymandering is "incompatib[le] . . . with democratic principles"); *id.* at 313–14 (Kennedy, J., concurring in the judgment); *id.* at 332–34 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 361–62 (Breyer, J., dissenting).

68. *See id.* at 306 (plurality opinion) (stating that the issue is "incapable of principled application"); *id.* (Kennedy, J., concurring in the judgment) (stating that the plurality opinion "is correct to refrain from directing this substantial intrusion into the Nation's political life").

altogether, because “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”⁶⁹ Justice Kennedy, concurring in the judgment, was unwilling to foreclose the possibility that such standards might emerge in the future, but he explained that “[t]he lack . . . of any agreed upon model of fair and effective representation” made it difficult for courts to determine, “by the exercise of their own judgment,” whether a particular plan unconstitutionally “burden[s] representational rights.”⁷⁰

But although the plurality thought *courts* could not provide a remedy for partisan gerrymanders, it recognized that “the Framers provided a remedy,” at least for gerrymandered congressional districts, in the Elections Clause.⁷¹ While the Clause locates initial control over congressional elections in the state legislatures, it provides that “Congress may at any time by Law make or alter such Regulations.”⁷² Since 1842, Congress has used this power to impose a particular theory of representation on the states, by requiring the use of geographically defined single-member districts to elect Representatives.⁷³ The decision to use such districts reflects, among other things, a commitment to a form of proportionality, in which one faction or party usually cannot capture a state’s entire congressional delegation (as might be true under an at-large system) and a preference for geographically contiguous groups over groups whose members are not geographically discrete.⁷⁴ Thus, Congress has a special role to play in ensuring fair representation in federal elections.

Arguably, that role should carry over to ensuring fair representation in state and local elections as well.⁷⁵ The

69. *Id.* at 281 (plurality opinion).

70. *See id.* at 307 (Kennedy, J., concurring in the judgment). I discuss the issue of representational rights more fully in Karlan, *supra* note 50.

71. *See Vieth*, 541 U.S. at 275 (plurality opinion).

72. U.S. CONST. art. I, § 4, cl. 1.

73. *See Vieth*, 541 U.S. at 276 (noting that Congress’s power to regulate elections “has not lain dormant”).

74. *See* ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE* 126, 131 (1987) (discussing the impact of district versus at large voting and Congress’s response); *see also* Branch v. Smith, 538 U.S. 254, 266–67 (2003) (discussing the single-member district requirement of 2 U.S.C. § 2c); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1156–60 (rev. 2d ed. 2002) (chronicling the history of territorial districting in the United States).

75. Although the Elections Clause does not speak directly to state or local elections, one of the rationales voiced in support of the Clause in the ratifying debates resonates here as well. A delegate at the Massachusetts convention warned that state legislatures might often be tempted to “make an unequal and partial division of the states into districts for the election of representatives,” and that “[w]ithout these powers in Congress, the people can have no remedy.” The Elections Clause, however, would

Fourteenth and Fifteenth Amendments expressly confer enforcement power to protect voting rights on Congress, and *Fitzpatrick v. Bitzer* recognizes that the Amendments marked a profound “shift in the federal-state balance.”⁷⁶ The new allocation of authority parallels the allocation under the Elections Clause: Congress can override the states’ initial decisions if the intervention safeguards the equal protection, due process, and antidiscrimination values expressed by the Amendments.

The Supreme Court’s recent decisions under the Elections Clause have confirmed the longstanding interpretation of the clause as a grant of essentially plenary authority. In *Cook v. Gralike*, the Court stated that the clause “encompasses matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.’”⁷⁷ And it is “well settled” that Congress can “override state regulations” involving these matters.⁷⁸ Moreover, even when Congress does *not* intervene, the states’ regulatory power is not an aspect of their sovereignty:

Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power “had to be delegated to, rather than reserved by, the States.” . . . No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment.⁷⁹

“provid[e] a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election.” *Vieth*, 541 U.S. at 276 (plurality opinion) (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 27 (J. Elliot ed., 2d ed. 1876)).

76. See *Fitzpatrick v. Bitzer*, 527 U.S. 445, 455 (1976).

77. *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (emphasis added) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The list of practices that the Supreme Court has found within the scope of Congress’s Election Clause power includes recounts, *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972), registration and certification of results, *United States v. Gradwell*, 243 U.S. 476, 483 (1917), and violations of state-imposed duties involving congressional elections, *Ex parte Clarke*, 100 U.S. 399, 403–04 (1879).

78. *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832–33 (1995)).

79. *Cook*, 531 U.S. at 522–23 (quoting *U.S. Term Limits*, 514 U.S. at 804). Thus, for example, courts have uniformly rejected states’ Tenth Amendment-based challenges to the expansive voter registration requirements of the National Voter Registration Act (the “Motor Voter” law). See, e.g., *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997) (rejecting Michigan’s assertion that the Act violated the Tenth Amendment by directly compelling state legislation); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (rejecting California’s constitutional challenge of the Act); *Ass’n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 796 (7th Cir. 1995)

Finally, the Elections Clause has long been interpreted to give Congress power over so-called “mixed elections”—that is, to permit Congress to regulate all aspects of an election (or an electoral process) used even in part to select members of Congress.⁸⁰ So, for example, defendants have been convicted in federal court for vote buying with respect to local offices that appeared on the same ballot as even uncontested primaries for congressional office.⁸¹

Taken together, these various lines of cases suggest that congressional power is at its apogee when Congress acts to protect fundamental rights, to protect suspect or quasi-suspect classes, to regulate electoral processes that involve the selection of members of Congress, to deal with issues relating to politics and political value judgments that are relatively unamenable to judicial resolution under the Constitution alone, and does so through mechanisms that “require the exercise of political responsibility” by the federal government.⁸²

All of these factors are in play with respect to the preclearance regime. First, the Supreme Court has recognized for over a century that the right to vote is a “fundamental political right, because preservative of all rights.”⁸³ Indeed, one of the reasons the Elections Clause “gives Congress ‘comprehensive’ authority to regulate the details of elections” is because “experience shows [that safeguards] are necessary in order to enforce the *fundamental right* involved.”⁸⁴

Second, the Voting Rights Act protects groups—racial and ethnic minorities⁸⁵—that are normally entitled to heightened scrutiny under the Equal Protection Clause. To be sure, the Act goes beyond prohibiting unconstitutional state actions to reach

(responding to the Illinois challenge by proclaiming that the Tenth Amendment had been “put back in its bottle”).

80. See *In re Coy*, 127 U.S. 731, 751–52 (1888) (holding that Congress’s decision to permit election of members of Congress at elections that also select state and municipal officials extends congressional regulatory powers to the entire election process).

81. See *United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999).

82. *Alden v. Maine*, 527 U.S. 706, 756 (1999).

83. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (describing the right to vote as fundamental); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)) (same); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (same).

84. *Foster v. Love*, 522 U.S. 67, 71 n.2 (1997) (emphasis added) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

85. The Act’s terminology merely prohibits discrimination on the basis of race or membership in a “language minority group.” 42 U.S.C. § 1973b(a), (f) (2000). However, “language minority group” is defined by reference only to “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,” showing that the Act reaches various forms of racial discrimination. 42 U.S.C. § 1973(c)(3) (2000).

conduct that would not itself violate the Equal Protection Clause—it reaches acts that have a discriminatory effect regardless of the purpose behind them.⁸⁶ But *Hibbs*, as well as the Court’s own voting rights cases applying various results tests, all rest on an understanding that Congress can prohibit practices that have a disparate impact as part of its enforcement of the rights protected by the Equal Protection Clause.⁸⁷

Third, the Voting Rights Act involves an area—regulation of the political process—that raises important issues of political fairness that are both not fully determined by the sweeping commands of sections 1 of the Fourteenth and Fifteenth Amendments and particularly within the expertise of politicians. Part of the reason the Supreme Court has grappled with the justiciability of political gerrymandering claims for nearly forty years is precisely because the issue calls on courts to decide among hotly contested principles of political philosophy. To give just one example that bears on the amendment to section 5 responding to *Georgia v. Ashcroft*, people active in and knowledgeable about politics differ vociferously about how best to ensure political fairness in crafting electoral districts.⁸⁸ Some observers say political fairness is better ensured by drawing each district to be as competitive as possible, which increases both the chances that any individual voter will cast a decisive ballot and the risk that small changes in electoral preferences can produce large swings in election results and grossly disproportionate

86. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 172–78 (1980) (holding that section 5 of the Voting Rights Act is constitutional even though it prohibits changes—those with a discriminatory effect but no discriminatory purpose—that would not independently violate the Fourteenth or Fifteenth Amendments).

87. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735–38 (2003) (applying this reasoning to the Family Medical Leave Act). Most recently, Justice Kennedy, who had earlier expressed reservations about the constitutionality of section 2, see, for example, *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting), wrote an opinion for the Court striking down the reconfiguration of a majority-Latino congressional district in south Texas as a violation of the results test. *LULAC v. Perry*, 126 S. Ct. 2594, 2623 (2006).

88. For one recent exchange on this issue, compare Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600 (2002) [hereinafter Issacharoff, *Gerrymandering*] (arguing that political gerrymandering reduces competition in the political process, and thus reduces accountability by “constrict[ing] the competitive processes by which voters can express choice”), and Samuel Issacharoff, Surreply, *Why Elections?*, 116 HARV. L. REV. 684, 685 (2002) (asserting that a competitive electoral process is essential to educate voters and to “provide evaluative accountability” of the elected to the electorate), with Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668 (2002) (countering Issacharoff’s argument with the assertion that voters’ welfare is best served not by maximizing intradistrict competition, but by dividing the jurisdiction “into politically homogeneous constituencies” to ensure that “the legislature is more reflective of the underlying partisan composition of the electorate”).

legislative bodies.⁸⁹ Others counter that political fairness is ensured by drawing districts that are predictably controlled by identifiable blocs of voters, which can produce proportional representation of the blocs within the legislative body but which results in larger numbers of voters casting essentially meaningless, or “wasted,” votes.⁹⁰ Thus, at least with respect to apportionment, any regulation of the process demands choosing among theories of representation: if the Court cannot do this in the first instance, then Congress should perhaps have more leeway to make initial choices.

Finally, the preclearance regime of section 5 represents a quintessential exercise of political responsibility. In replacing case-by-case adjudication directly under the Constitution with an administrative regime designed to deter as well as to remedy denials of the right to vote, Congress (and ultimately the executive branch in the course of administrative preclearance) finally exercised the power it had been given by section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment to enforce the voting rights of racial minorities.

The necessary parties to a judicial preclearance proceeding are the covered jurisdiction and the United States.⁹¹ The covered jurisdiction is always the plaintiff, invoking the jurisdiction of the federal court. Thus, section 5 raises none of the specific concerns that the abrogation cases involve, since it does not implicate the Eleventh Amendment. Nor does the preclearance regime inherently run afoul of general federalism concerns. In fact, the Supreme Court has repeatedly turned aside constitutional challenges based on the structure of the preclearance regime itself.⁹² Most recently, in *Lopez v. Monterey*

89. Issacharoff, *Gerrymandering*, *supra* note 88, at 600.

90. Persily, *supra* note 88, at 668.

91. In an administrative preclearance proceeding, the jurisdiction files a submission. *See* 42 U.S.C. § 1973(c) (2000). Individuals and groups are permitted to comment on the submission. 28 C.F.R. § 51.29 (2006). Individual voters may be permitted to intervene in a preclearance declaratory judgment action if they satisfy the requirements of the Federal Rules of Civil Procedure. *Georgia v. Ashcroft*, 539 U.S. 461, 476–77 (2003) (referring to Rule 24). Finally, if a jurisdiction fails to seek preclearance of a voting change, individuals can seek an injunction barring use of the new practice unless and until the jurisdiction obtains preclearance. *NAACP v. New York*, 413 U.S. 345, 352 (1973). But these so-called “coverage lawsuits” are generally brought using the *Ex parte Young* fiction and naming a state official as the formal defendant.

92. *See, e.g., Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (acknowledging the “substantial ‘federalism costs’” imposed by the preclearance regime, but recognizing that congressional authority under the Fifteenth Amendment “contemplate[s] some intrusion into areas traditionally reserved to the states”); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (concluding that the Civil War Amendments giving rise to Congress’s power to enact the preclearance regime “were specifically designed as an

County, the Court rejected a covered jurisdiction's *City of Boerne*-inflected challenge, stating that while "the Voting Rights Act, by its nature, intrudes on state sovereignty[, t]he Fifteenth Amendment permits this intrusion."⁹³ The permissible intrusion involves not only the requirement of preclearance, but also the imposition of the burden of proof on the covered jurisdiction to show both the absence of a discriminatory purpose and the absence of a retrogressive effect.⁹⁴ And as we have already seen, with respect to the Act's regulation of a mixed electoral process—and the bulk of the voting practices preclearance reaches occur within the mixed process⁹⁵—even the more atmospheric federalism of the Tenth Amendment holds little sway.

IV. THE EVIDENCE OF THINGS NOT SEEN: THE PROPRIETY OF EXTENDING PRECLEARANCE

Under *City of Boerne*, legislation constitutes appropriate enforcement of the provisions of the Reconstruction era amendments if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁹⁶ Given *City of Boerne*'s implicit reaffirmance of *City of Rome v. United States*, which had upheld both the substance and the duration of the 1975 extension of the preclearance regime,⁹⁷ and *Lopez*'s rejection of a *Boerne*-based attack on section 5,⁹⁸ the plausibly open constitutional question is whether something has changed between *City of Rome*, *City of Boerne*, *Lopez*, and today to render an act Congress once had the power to pass now beyond its authority to renew.

The predicate for such a holding would presumably be that political conditions in the covered jurisdictions have changed so substantially that the strong medicine of preclearance is no

expansion of federal power and an intrusion on state sovereignty"); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (upholding section 5 as a valid exercise of Congress's "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting").

93. *Lopez*, 525 U.S. at 284–85.

94. *Id.* at 283.

95. The major exception concerns annexations, which are a major source of concern under section 5, and which would be hard to characterize as part of a mixed election system. By contrast, no state now operates dual voter registration systems and the majority of all state and local offices are filled at elections where federal candidates also appear on the ballot.

96. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

97. *City of Rome*, 446 U.S. at 161, cited in *City of Boerne*, 521 U.S. at 518.

98. *Lopez*, 527 U.S. at 282–83 (citing *City of Boerne*, 521 U.S. at 518) (recognizing that Congress has the power to deter and remedy Fourteenth Amendment violations through the preclearance process).

longer warranted—what Rick Hasen colorfully calls “the ‘Bull Connor is Dead’ problem.”⁹⁹ As evidence of this change, commentators cite the huge increase in minority registration and the numbers of minority elected officials within covered jurisdictions.¹⁰⁰ Some scholars have claimed that minority turnout in covered jurisdictions has come to exceed minority turnout in other parts of the nation.¹⁰¹ Others have pointed to the minuscule and declining number of objections interposed under section 5.¹⁰²

The difficulty with all this evidence is that it is entirely consistent with two contradictory stories. Under the optimistic story, either the preclearance regime or secular change in race relations has worked a fundamental transformation in politics within the covered jurisdictions: minority citizens are now integrated into the political process in a way that would not be undone if preclearance were lifted. The political situation of minority citizens within covered jurisdictions thus no longer differs in a legally significant way from their position in the remainder of the country. The decline in the number of objections reflects the lack of either the desire or the practical ability of covered jurisdictions to make retrogressive changes. Minority elected officials and the political party—the Democratic Party—that depends on minority electoral support, often even for the success of its nonminority candidates and officials, can prevent backsliding.

Under the realist story, the preclearance regime both played and continues to play a more critical role in minority citizens’ political integration. Put simply, the realists (among whom I count myself) think that the political gains minority citizens have

99. Hasen, *supra* note 16, at 179.

100. See, e.g., Samuel Issacharoff, Essay, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1713–14 (2004) (noting the increase in minority political power in the South); Pildes, *supra* note 66, at 86–93 (discussing changes, brought about by increased percentages of minorities in elected offices in the South, in the role played by the Voting Rights Act in bringing about political equality).

101. See, e.g., CHARLES S. BULLOCK, III & RONALD KEITH GADDIE, ASSESSMENT OF VOTING RIGHTS PROGRESS IN OKLAHOMA 6–7 tbls.2 & 3 (2006), available at http://www.aei.org/publications/pubID.24279/pub_detail.asp (follow “Click here to view the complete study as an Adobe Acrobat PDF” hyperlink) (comparing levels of black registration in covered and noncovered states). For reasons Nate Persily has explored, Bullock and Gaddie may be overestimating the degree of black turnout relative to white turnout because they incorrectly lumped Latinos in with other nonblack voters. See Posting of Rick Hasen for Nate Persily to Rick Hasen’s Election Law Blog, <http://electionlawblog.org> (May 18, 2006, 10:07 EST).

102. See Hasen, *supra* note 16, at 190–92 & fig.3 (showing that the percentage of objections to preclearance submission has fallen sharply during the life of the Voting Rights Act).

achieved since the passage of the Act are sufficiently recent,¹⁰³ and the incentives for officials to ignore the interests of minority voters are sufficiently attractive that backsliding could occur in the absence of the Act's substantive and procedural protections.

To understand why the evidence regarding section 5 objections does not answer the question of whether circumstances have changed, it is important to understand that section 5 operates in four distinct, albeit related, ways. First, section 5 performs a *blocking* function: the Department of Justice or the three-judge district court can deny a covered jurisdiction the right to implement discriminatory changes.¹⁰⁴ Section 5 has been used, even since the last extension in 1982, to block more than 1,000 changes that would have impaired the rights of literally millions of voters in covered jurisdictions.¹⁰⁵

But the other three ways section 5 functions are *not* captured in the record of objections. Most obviously, section 5 performs a *deterrent* function. Jurisdictions that know a change will not be precleared may decide not even to attempt making it. Here, preclearance performs a valuable function not fully captured by other, more global prohibitions on discriminatory election practices. Under all of the other prohibitions, the burden of challenging a government practice falls on the affected individuals.¹⁰⁶

The cost of such suits, however, is often prohibitive. Consider one famous example. In *City of Mobile v. Bolden*, the Supreme Court held that the Fourteenth Amendment and then-existing version of section 2 of the Voting Rights Act required plaintiffs who claimed racial vote dilution to prove that the challenged electoral system was adopted or maintained for purposefully discriminatory reasons.¹⁰⁷ In order to prove such a

103. In the first years following passage of the Act, there was widespread noncompliance with section 5. See Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 77–79 (1983) [hereinafter McDonald, *Continued Need*] (providing a long list of unprecleared changes in covered jurisdictions). Some jurisdictions even today remain in defiance of the submission requirement. See, e.g., Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 44 (2004) (“From the date of its official coverage in 1976 until 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.”). And it was not really until after the 1982 amendments to the Act that minority voters began to elect significant numbers of representatives to many public bodies.

104. McDonald, *Continued Need*, *supra* note 103, at 45–46.

105. McDONALD & LEVITAS, *supra* note 31, at 4–5.

106. To be sure, the United States can bring suit on behalf of citizens who suffer disenfranchisement or dilution, but such suits are relatively rare.

107. *City of Mobile v. Bolden*, 446 U.S. 55, 62–65 (1980).

purpose, on remand the plaintiffs hired three historians to trace the history of Mobile's election system. Based on the evidence they uncovered after months of archival work, the district court ultimately issued a lengthy opinion tracing the tortuous history of the city's electoral practices and found a series of discriminatory modifications.¹⁰⁸ But the cost of proving what turned out to be a blatant series of constitutional violations was staggering. The plaintiffs' lawyers "logged 5,525 hours and spent \$96,000 in out-of-pocket fees," and these figures do not include the expenses incurred by the Department of Justice after it intervened or the costs of hiring the expert witnesses,¹⁰⁹ which were not then compensable.¹¹⁰ Given the minuscule size of the voting rights bar, placing the burdens on individual voters—who, after all, may have relatively little incentive to vote in the first place, let alone litigate their right to vote or their right to undiluted political power—means many discriminatory changes may go unchallenged.

This deterrent function is especially important with respect to changes at the local level.¹¹¹ Local minority communities may be unaware of the potential political consequences of some changes and especially ill-equipped to find attorneys and fund litigation.¹¹² Moreover, in contrast to statewide legislative or congressional redistricting, where there are often political incentives for one of the major parties to raise claims on behalf of minority voters, changes at the local level—particularly if they involve issues such as annexations or setting the date for special elections—may be of insufficient interest to groups outside the local community for them to fund the litigation.

The fact that there are relatively few objection letters does not undercut the conclusion that section 5 performs a valuable deterrent function. If section 5 perfectly deterred retrogressive

108. *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1056–68, 1074–77 (S.D. Ala. 1982).

109. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990*, *supra* note 36, at 21, 29.

110. The Voting Rights Act now allows the court to award reasonable attorney's fees. *See* 42 U.S.C. § 1973l(e) (2000).

111. Mike Pitts explores this point in more detail. *See* Pitts, *supra* note 31, at 611–18 (noting the aspects of local governance that give section 5 more importance).

112. The lack of financial and organizational resources is one of the reasons I am somewhat skeptical of Heather Gerken's recent proposal, which would require covered jurisdictions only to provide advance public notice of proposed changes and leave it to "community representatives, public interest groups, and other parts of civil society" to negotiate with the jurisdiction and to demand preclearance review if the negotiations break down. Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 717 (2006).

changes, there would of course be no objection letters at all: jurisdictions would not attempt to make retrogressive changes, and as a result would never have to submit such changes for review. So we need to look beyond blocking and deterrence to ask whether there would be incentives to retrogress (or not to ameliorate existing exclusion) in the absence of section 5. The other two functions performed by section 5 suggest there might well be.

Section 5 creates a *bargaining chip* that may play a critical role in the ability of minority representatives “to pull, haul, and trade” within the political process.¹¹³ Since all political deals take place in the shadow of the law, the negotiations among politicians in covered jurisdictions are inflected by the preclearance standards. The minority community’s ability to “appeal” relatively cost-free to federal authorities increases its leverage in demanding accommodation of minority concerns. This is particularly true when it comes to redistricting. In the absence of section 5’s nonretrogression requirement, the Democratic Party would often be tempted to spread concentrations of minority voters among several districts, rather than to preserve majority-minority seats. Such a strategy would increase the probability of Democrats winning elections, and minority voters’ only alternative to voting for white-sponsored Democratic candidates in so-called “influence” districts would be to stay home, thereby potentially throwing the election to even more objectionable Republican candidates. Section 5’s nonretrogression principle forecloses the most aggressive versions of that particular strategy and requires white Democrats to offer more of the potential electoral gains from redistricting to their minority colleagues.

Finally, section 5 provides *political cover*. It enables official actors in covered jurisdictions to blame federal authorities for adopting voting-related practices that benefit minority voters or forgoing changes that would injure them, rather than having to take full responsibility for those changes. While the anti-commandeering jurisprudence of *Printz v. United States* and *New York v. United States* rests on the view that clear lines of responsibility are important for political accountability,¹¹⁴ when it comes to protecting the voting rights of minority citizens there may be a countervailing consideration. As a historical matter, white voters in the South have tended to resist minority political

113. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

114. *Printz v. United States*, 521 U.S. 898, 919–23 (1997); *New York v. United States*, 505 U.S. 144, 168–69 (1992).

aspirations and punish politicians they see as catering to minority interests.¹¹⁵ This backlash phenomenon seems to be alive and well today: one of the factors behind the way Texas Republicans redrew the state's congressional map was to eliminate the seats of white Democrats in order to "marginalize Democrats as the black-and-brown party and drive white voters to the Republican side of the political divide."¹¹⁶ Thus, even when officials know that avoiding retrogression in the adoption of new voting practices is the right thing to do, they may be deterred from doing so by the political consequences. Section 5 provides them with a justification for doing the right thing.

Another potential constitutional question arises with respect to the carrying forward of the earlier triggering formulas for deciding which jurisdictions should be covered by the preclearance regime. As a technical matter, the jurisdictions covered by the preclearance regime are placed within it based on turnout in the 1964, 1968, and 1972 presidential elections.¹¹⁷ Given that all these elections occurred decades ago, is there any warrant for continuing to single out these jurisdictions for preclearance?¹¹⁸

Phrasing the question this way, however, may distort the inquiry. The triggering formula was never intended to capture jurisdictions because of problems on one particular election date. Rather, it was simply a facially neutral, politically palatable tool for covering jurisdictions tainted by a pervasive history of minority disenfranchisement. The triggering formula has always

115. See generally V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 8–9 (1949) (detailing the history of southern politics); Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 *MISS. L.J.* 271, 308 (1995) (summarizing V.O. Key's findings in his "classic study of southern politics" as concluding that "the presence of increased numbers of blacks in a jurisdiction was associated with white backlash and greater levels of turnout by whites who felt their dominance threatened").

116. Editorial, *The Ghettoization of Texas Democrats*, *AUSTIN AM.-STATESMAN*, Jan. 16, 2004, at A16. As I have explained elsewhere, to the extent that the Voting Rights Act has caused the political realignment of the South, the causal connection is not primarily that the creation of majority-minority districts has deprived other Democratic candidates of sufficient support, but that the very enfranchisement of black voters created the opportunity for the Republican "Southern Strategy." Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 *VAND. L. REV.* 291, 314–20 (1997).

117. 42 U.S.C. § 1973b(b) (2000).

118. The Supreme Court has never developed a doctrine of constitutional desuetude, although its affirmative action cases have suggested, with respect to race-conscious remedies, that the temporary nature of such remedies plays a role in their constitutionality. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (noting the requirement that race-conscious admissions programs must have a termination point). But the preclearance regime does not involve conventional affirmative action: it imposes no burden or disadvantage on white individuals on account of their race. Moreover, the recent amendment again involves only a temporary extension.

been a product of principle mixed with pragmatic politics. To be sure, not every jurisdiction with a history of pervasive racial discrimination in voting was originally covered. For example, the trigger rested on use of a literacy test, not a poll tax, even though there was substantial evidence of the discriminatory purpose and effect of poll taxes.¹¹⁹ Thus, section 5 provided protection to blacks on the Mississippi side of the Mississippi River Delta but not on the opposite shore in Arkansas.¹²⁰ And Texas became a covered jurisdiction only in 1975¹²¹ as a result of its discrimination against language minorities. Still, the trigger did a reasonably good job of picking up most, if not all, of the places with a history of pervasive violations of the Fourteenth and Fifteenth Amendments.¹²²

Moreover, the Act already contains mechanisms for more closely tailoring coverage to continued need. Under section 4(a) of the Act, as amended in 1982, “bailout” has been available to jurisdictions brought within the triggering formula that can show their compliance with both the Act and the underlying constitutional commands for fair and inclusive political processes.¹²³ Thus, the bailout provision provides for lifting section 5 coverage from jurisdictions where it is no longer appropriate.¹²⁴ The extension of the Act works in tandem with the

119. The year before the Voting Rights Act was passed, the Twenty-fourth Amendment forbade conditioning the right to vote in elections for federal office on payment of “any poll tax or other tax,” U.S. CONST. amend. XXIV, § 1, and the next year, in striking down Virginia’s attempt to circumvent the amendment by imposing a certificate of residency requirement on citizens who sought to register without paying the commonwealth’s poll tax, the Supreme Court stated that “[t]he Virginia poll tax was born of a desire to disenfranchise the Negro.” *Harman v. Forssenius*, 380 U.S. 528, 543 (1965). The Supreme Court subsequently struck down imposition of a poll tax in *any* election as a violation of the fundamental right to vote. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

120. Voting Section Homepage, *supra* note 27.

121. *Id.*

122. See *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966) (“Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.”).

123. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(4), 96 Stat. 131, 131–33 (codified at 42 U.S.C. § 1973b(a)(1) (2000)). An earlier, more lenient bailout standard was upheld in *Katzenbach*, 383 U.S. at 332. The bailout provision has been discussed further in academic literature. See Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 389–93 (1985); McDonald, *Continued Need*, *supra* note 103, at 47–53; Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L.Q. 1, 6 (1984); Winke, *supra* note 16, at 106–10.

124. According to the Department of Justice, “[t]hirteen political subdivisions in Virginia . . . have ‘bailed out,’” in each case with the consent of the federal government. Voting Section Homepage, *supra* note 27.

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bailout provision to create a meaningful incentive for jurisdictions to undertake the affirmative inclusion efforts bailout demands in order to avoid remaining under the coverage regime for a lengthy period of time.¹²⁵

At the same time, section 3(c) of the Act contains a “bail-in” as well: a court that finds a violation of the Fourteenth or Fifteenth Amendment can order coverage of a jurisdiction not already subject to preclearance.¹²⁶ In light of the possibilities for bailout and bail-in, that the list of formulaically covered jurisdictions might be somewhat over- or under-inclusive does not by itself pose a serious constitutional problem.

V. SECTION 5 AND AMENDING SECTION 5:
CONGRESS’S AUTHORITY TO CHANGE
THE STANDARD FOR PRECLEARANCE

Each time Congress has addressed the question whether to extend the preclearance period, it has also amended the Act in some way or another to strengthen its protections. In 1970, when Congress extended preclearance for another five years, it also extended the ban on literacy tests nationwide.¹²⁷ In 1975, when it extended preclearance for seven years, it made the ban on literacy tests permanent.¹²⁸ In 1982, when it extended preclearance for another twenty-five years, it also amended section 2 of the Act to bar, nationwide, the use of any voting practices or procedures that had a racially discriminatory result, regardless of the purpose behind them.¹²⁹

This time around, Congress responded to two recent Supreme Court decisions that significantly altered the preclearance regime by amending the standards for section 5 preclearance to change what counts as a discriminatory purpose

125. See McDonald, *Continued Need*, *supra* note 103, at 53.

126. 42 U.S.C. § 1973a(c) (2000). See, e.g., *Jeffers v. Clinton*, 740 F. Supp. 585, 586, 601–02 (E.D. Ark. 1990) (ordering Arkansas to preclear any new majority-vote (or runoff) requirements before putting them into place because the state had “committed a number of constitutional violations of the voting rights of black citizens” related to such requirements), *aff’d*, 498 U.S. 1019 (1991); *McMillan v. Escambia County*, 559 F. Supp. 720, 727 (N.D. Fla. 1983) (referring to the Fifth Circuit’s imposition of a preclearance requirement on the county under section 3(c)); McDonald, *Continued Need*, *supra* note 103, at 30 n.191 (listing several “pocket trigger” cases).

127. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 201(a), 84 Stat. 314, 315 (codified as amended at 42 U.S.C. 1973aa (2000)).

128. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973aa (2000)).

129. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (2000)).

or a discriminatory effect.¹³⁰ The change with respect to the meaning of discriminatory purpose seems relatively uncontroversial, as a matter of either policy or constitutional doctrine. And the latter change involving what counts as a discriminatory result, while it may be controversial as a matter of policy, nonetheless lies within Congress's enforcement power.

A. *The Expansion of Objectionable Purposes*

In *Bossier II*, the Supreme Court held that section 5 does not prohibit adoption of changes enacted with a racially discriminatory but nonretrogressive purpose.¹³¹ Such changes do, of course, violate the Constitution. For example, a jurisdiction that deliberately chooses a redistricting plan that continues to ensure the electoral exclusion of minority-sponsored candidates violates the Fourteenth Amendment. A jurisdiction that responded to the National Voter Registration Act's requirements for making registration more accessible by locating polling places used by minority voters in inaccessible locations in order to depress turnout would violate the Fifteenth Amendment as well.

In the 2006 amendments, Congress explicitly provided that in section 5 cases, the term "purpose" includes "any discriminatory purpose,"¹³² and not merely a retrogressive purpose. In light of the Supreme Court's recent unanimous decision in *United States v. Georgia*,¹³³ this amendment should not pose any constitutional issues. There, the Court addressed the question whether Congress could abrogate states' sovereign immunity under Title II of the Americans with Disabilities Act, which prohibits discrimination in public services or programs.¹³⁴ "[N]o one doubts," the Court declared, "that § 5 grants Congress the power to 'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for actual violations of those provisions."¹³⁵ Thus, even with respect to the most tightly constrained form of congressional action—explicit override of the Eleventh Amendment's conferral of sovereign immunity against private citizen lawsuits—Congress

130. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5(c), 120 Stat. 577, 581 (to be codified at 42 U.S.C. § 1973c(c)).

131. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000).

132. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5(c), 120 Stat. 577, 581 (to be codified at 42 U.S.C. § 1973c(c)) (emphasis added).

133. *United States v. Georgia*, 126 S. Ct. 877 (2006).

134. *Id.* at 878–79.

135. *Id.* at 881.

has wide-ranging power to adopt remedies for actually unconstitutional conduct.

The *Bossier II* “fix” authorizes objections only with respect to proposed changes that are themselves unconstitutional. Here, section 5 adds two features to the self-executing prohibition of the Fourteenth and Fifteenth Amendments. First, if a jurisdiction chooses to seek administrative preclearance before the Department of Justice, rather than judicial preclearance from a three-judge federal district court, section 5 permits the executive branch to object to such unconstitutional conduct,¹³⁶ at least temporarily,¹³⁷ in any event, section 5 prevents the jurisdiction from implementing the change until some federal authority preclears it.¹³⁸ Second, section 5 places the burden of proof on the jurisdiction rather than the party challenging the proposed change.¹³⁹ But to the extent that these burdens are imposed on changes that are ultimately determined to reflect a discriminatory purpose, Congress’s remedial scheme is entirely appropriate.

B. The Recasting of Objectionable Effects

The *Georgia v. Ashcroft* “fix” responds to a different sort of problem. In that case, as we have already seen, the Court held that section 5 “gives States the flexibility to choose one theory of effective representation over [an]other,” and thus to adopt a redistricting plan that reduces the minority’s ability to elect candidates of its choice in favor of one that increases the number of minority influence districts and preserves the intra-legislative power of officials elected from minority communities.¹⁴⁰ Explicit in the Court’s analysis was an acknowledgment that the decision about how best to protect minority voters’ right to fair, equal, and effective representation involves a choice among very different theories.¹⁴¹

In the 2006 amendments, Congress chose among those theories, providing that the purpose of section 5 is “to protect the ability of [minority] citizens to elect their preferred candidates of

136. 42 U.S.C. § 1973c (2000).

137. While a decision by the Department of Justice to object to a change submitted for administrative preclearance is unreviewable, a jurisdiction that receives an objection letter from the Department can still file suit seeking judicial preclearance. *Morris v. Gressette*, 432 U.S. 491, 504–05 & n.21 (1977).

138. 42 U.S.C. § 1973c (2000).

139. *Id.*

140. *Georgia v. Ashcroft*, 539 U.S. 461, 479–82 (2003).

141. *Id.* at 480–81.

choice.”¹⁴² Thus, the creation of influence districts—from which minority voters *cannot* elect the candidate they prefer, but can instead only choose among candidates preferred by other groups¹⁴³—will not substitute for the elimination of districts from which minority voters currently elect the candidate of their choice.

It is not my aim here to explain why Congress should embrace the theory that minority voters are most effectively represented when they can actually elect candidates of their choice—a theory that groups with control over the redistricting process almost always adopt for themselves—rather than simply having some “influence” over the election of candidates sponsored by, and beholden to, other communities.¹⁴⁴ To some extent, Congress has already embraced that theory in section 2 of the Voting Rights Act, which protects the right both to “participate” and to “elect,”¹⁴⁵ showing that the two rights are discrete. I simply want to highlight one point to which I have already adverted. Once we recognize that this is a choice among theories, Congress has the constitutional power to make that choice. Congress, and not the courts, decided in 1842 that congressional elections should be conducted from single-member districts—and has since then neither retreated to permitting elections at large nor adopted any of the systems of proportional representation used by most other Western democracies—thereby embracing a particular “theory of representation” from among the constitutionally available ones. So too, Congress can choose, particularly in the context of ensuring equal political opportunity for historically excluded groups, to impose a standard that looks at changes in the groups’ ability to elect candidates of their choice rather than a more nebulous and speculative standard that poses a threat of once again relegating minority voters’ political aspirations to an afterthought. Particularly in light of *Vieth’s* invitation to Congress to address difficult questions of fair

142. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5(d), 120 Stat. 577, 581 (to be codified at 42 U.S.C. § 1973c(d)).

143. For a discussion of the difference between “influence” districts and “coalitional” districts—that is, districts in which majority voters can actually elect their preferred candidate by attracting nonminority support—see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539–40 (2002).

144. I have addressed this question in Karlan, *supra* note 47, at 30.

145. 42 U.S.C. § 1973(b) (2000).

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representation,¹⁴⁶ the *Georgia v. Ashcroft* “fix” lies well within Congress’s constitutional competence.

VI. CONCLUSION

The preclearance regime of the Voting Rights Act has properly been characterized as strong medicine. But the disease to which it was addressed was pervasive and persistent and had proved itself resistant to less stringent remedies. Congress should have the authority, under its enforcement powers, to conclude that the course of treatment is not yet fully complete and to prescribe another round of medicine. Particularly given the Supreme Court’s most recent decisions dealing with congressional power, there is no reason to revisit the unbroken line of cases upholding the provisions of the Voting Rights Act as appropriate legislation.

146. See *Vieth v. Jubelirer*, 541 U.S. 267, 274–77 (2004) (plurality opinion) (suggesting that perhaps Congress, rather than the courts, is the appropriate body for constraining the degree of gerrymandering).