Congressional Power to Extend Preclearance Under the Voting Rights Act

By Pamela S. Karlan

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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. 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[2] ended with cynical political compromises, concerted vote suppression, and judicial indifference.[3] It took the Civil Rights Movement of the 1950's and 1960's 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.[4] Many states have recently adopted restrictive voter I.D. requirements that threaten to become a new form of poll tax.[5] Language barriers still prevent many citizens from effectively casting their ballots.[6] 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

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[1] David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965, at 132 (1978).

[2] See J. Morgan Kousser, The Shaping of Southern Politics, Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910 (1974) (black turnout); J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 19 (1999) (black electoral success).

[3] See Pamela S. Karlan, Loss and Redemption: Voting Rights at the Turn of a Century, 50 Vand. L. Rev. 291 (1997); see also Kousser, Colorblind Injustice, supra note 2, at 12-53.

[4] See Pamela S. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, 56 Stan. L. Rev. 1147 (2004).

[5] See Common Cause/Georgia v. Billups, 406 F. Supp.2d 1326, 1361-66 & 1367-70 (N.D. Ga. 2005) (issuing a preliminary injunction against Georgia's new photo 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 I.D. requirements, see Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S. Car. L. Rev. 689, 711-12 (2006). Professor Tokaji has also posted a number of valuable discussions of voter I.D. requirements and litigation on his blog, Equal Vote, including a chart listing current litigation: http://moritzlaw.osu.edu/electionlaw/litigation/index.php.

[6] See 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 (2004); see also Ana Henderson, English Language Naturalization Requirements and the Bilingual Assistance Provisions of the Voting Rights Act (2006) (showing that the levels of English literacy necessary to pass naturalization tests, or possessed by many native-born citizens, are far below the level necessary to fully understand election materials) (on file with the author) .

from deliberately constructed majority-minority districts.[7]

One of the Act's most targeted remedies – the preclearance regime of sections 4 and 5,[8] 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 – is set to expire in 2007.[9] Congress is now considering proposals to extend the preclearance regime for another twenty-five years and to amend the standard for preclearance in response to recent Supreme Court decisions. The level of bipartisan support within both the House and the Senate makes it almost certain that the Act will be renewed in some form. The question thus arises: does Congress retain the power to impose this "complex scheme of stringent remedies"[10] or has the world changed?

In this position paper, I address one aspect of the question: have recent changes in legal doctrine undercut 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."[11] 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.

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

The provisions of the original Voting Rights Act were "strong medicine."[12] Despite an earlier

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[7] See, e.g., Testimony of Fred Gray Before the Sen. Judiciary Comm. (May 17,2006)(available at http://judiciary.senate.gov/testimony.cfm?id=1894&wit_id=5358) (noting that in Alabama all but one of the 35 black state legislators was elected from a majority African-American district, and the remaining legislator was elected from a district that was 48% black).

[8] 42 U.S.C. §§ 1973b, 1973c.

[9] The bilingual ballot provisions of section 203, which require certain jurisdictions to provide voting materials in languages other than English, are also set to expire in 2007. See 42 U.S.C. § 1973aa-1a.

[10] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

[11] 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 (2005); 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); Richard H. Pildes, The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote 20 (May 2006) (NYU Law School, Public Law Research Paper No. 06-10, available at http://ssrn.com/abstract=900161); Victor Andres Rodriguez, Comment, Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?, 91 Cal. L. Rev. 769 (2003); 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 (2003). See also Pamela S. Karlan; Two Section Twos and Two Section Fives: Voting Rights and Remedies After *Flores*, 39 Wm. & Mary L. Rev. 725 (1998).

[12] Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong. 110 (1965) (statement of Representative Chelf).

Supreme Court ruling that had upheld the constitutionality of literacy tests,[13] section 4 immediately suspended such tests in various jurisdictions with a history of depressed political participation[14] – a suspension that was made nationwide and permanent by subsequent amendments to the Act.[15] 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 able actually to cast ballots.[16] Most importantly, section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims,"[17] 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.[18] 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.

The preclearance regime was enacted originally for a five-year period, but Congress has thrice extended and expanded its scope. 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 strictures.[19] 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,[20] thereby covering a number of additional jurisdictions, including Texas, Arizona, Alaska, and several counties in Florida, California, and South Dakota. And in 1982, Congress extended the preclearance regime for another twenty-five years while also creating a more detailed "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.[21]

Section 5 has been critical to the Act's success with respect to both first- and second-generation issues.[22] With respect to first-generation issues involving the right to register and to vote, section 5

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[13] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[14] See 42 U.S.C. § 1973b(a)(1).

[15] See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, tit. 1, § 102, 89 Stat. 400 (codified as amended at 42 U.S.C. § 1973aa(b) (2000)).

[16] 42 U.S.C. §§ 1973d, 1973e, 1973f.

[17] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[18] 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. For extensive discussions of the preclearance process, see, e.g., Howard Ball, Dale Krane & Thomas Lauth, 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 Denver U.L. Rev. 25 (2003).

[19] The list of covered jurisdictions is contained in the appendix to 28 C.F.R. Part 51.

[20] See 42 U.S.C. § 1973b(f)(3).

[21] 42 U.S.C. § 1973b(a)(1)(F).

[22] For discussions of this taxonomy, see, e.g., Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the

has been used to block a variety of restrictive changes, such as voter I.D. requirements, voter purges and reregistration requirements, and changes in polling places that render them less accessible to minority voters.[23] And the prospect of precipitating a section 5 objection letter from the Department of Justice or of 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.[24] 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. At roughly the same time that Congress was adopting section 5, the Supreme Court was imposing an one-person, one-vote requirement on virtually all elections conducted from districts.[25] The result of one-person, one-vote is to require decennial readjustment of district lines to account for population changes revealed by the Census. 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 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.[26]

Section 5's force has been somewhat blunted over the years by four Supreme Court decisions, two of which – *Reno v. Bossier Parish School Board ("Bossier II")*[27] and *Georgia v. Ashcroft*[28] – are the subject of proposed amendments to section 5. Thirty years ago, in *Beer v. United States*,[29] the

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Theory of Black Electoral Success, 89 Mich L Rev. 1077, 1093 (1991); Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L Rev 1833, 1838-39 (1992). 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 decisionmaking). See Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705 (1993).

[23] For discussions of section 5 objection letters, see, e.g., Ball, *supra* note 18; Laughlin McDonald and Daniel Levitas, The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union 8-, http://www.votingrights.org (March 2006); Hiroshi Motomura, Preclearance Under Section 5 of the Voting Rights Act, 61 N.C.L. Rev. 189 (1983); Michael J. Pitts, Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act, 84 Neb. L. Rev. 605 (2005).

[24] For more discussion of the Act's deterrent function, see *infra* text accompanying notes 96-102.

[25] See Wesberry v Sander*s*, 376 U.S. 1 (1964) (congressional districts); Reynolds v. Sims, 377 U.S. 533 (1964) (state legislatures); Avery v. Midland County, 390 U.S. 474 (1968) (local elected bodies).

[26] For an empirical examination, see Chandler Davidson and Bernard Grofman, Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990, at 381 (1994) (stating 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").

[27] 528 U.S. 320 (2000).

[28] 539 U.S. 461 (2003).

[29] 425 U.S. 130 (1976).

Court limited what counts as a "discriminatory effect" for purposes of triggering a section 5 objection. 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."[30] 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."[31] 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 pre-existing level of exclusion – even one that would violate section 2 of the Voting Rights Act[32] because it results in minority voters having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"[33] – 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 *Bossier II*, the Supreme Court constricted the meaning of "discriminatory purpose," holding that section 5 does not prohibit adoption of changes enacted with a discriminatory but nonretrogressive purpose.[34] Thus, the Department of Justice or the three-judge court must preclear even plans that violate the fourteenth or fifteenth amendments as long as those plans simply intentionally perpetuate (or deliberately fail 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, but the burdens of litigation and persuasion rest on the excluded citizens, rather than the jurisdiction.

For thirty years, the 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 Court 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.[35] Rather, the Court held that section 5 "gives States the flexibility to choose" among "theor[ies] of effective representation"[36]: 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

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[30] Id. at 141.

[31] Id. (quoting H.R. Rep. No. 94-196, at 60 (1975) (emphasis in *Beer*)).

[32] 42 U.S.C. § 1973.

[33] 42 U.S.C. § 1973(b).

[34] See 528 U.S. at 336.

[35] 539 U.S. at 480.

[36] Id. at 482.

quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice,"[37] thereby giving minority voters less "descriptive representation" while presumably according them more "substantive representation."[38]

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.[39]

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 reduced somewhat black voters' ability to elect their candidates of choice might satisfy section 5 if it bolstered the Democrats' chance of retaining legislative control.[40] This focus on minority group members' prospects within the process of representative decisionmaking stood in some tension with the Court's earlier decision in *Presley v. Etowah County Commission*.[41] There, the Court had held that "[c]hanges which affect only the distribution of power among officials are not subject to section 5 because such changes have no direct relation to, or impact on, voting."[42] Thus, *Georgia v. Ashcroft* seems to create an anomalous world in which changes that augment or preserve the political power of representatives elected from minority communities can be used to justify granting preclearance while changes that diminish that power cannot justify an objection.[43]

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[37] Id. at 480.

[38] Id. at 481 (citing Hanna Pitkin, The Concept of Representation 60-91 (1967)).

[39] Id. at 483-84.

[40] I analyze and criticize this reasoning in Pamela S. Karlan, *Georgia v. Ashcroft* and the Retrogression of Retrogression, 3 Election L.J. 21 (2004).

[41] 502 U.S. 491 (1992).

[42] Id. at 506.

[43] This anomaly is reflected in the history of the recent mid-decade Texas congressional re-redistricting. See Section 5 Recommendation Memorandum at 28-29, 62-63, 72 (Dec. 5, 2003) (available at http://moritzlaw.osu.edu/blogs/tokaji/2005/12/more-concern-about-justice.html, by clicking through on the link "another leaked memo"); 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, 117 Harv. L. Rev. 2433 (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-redistricting, which eliminated several "influence districts").

II. 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.[44] Those 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."[45]

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."[46] And it recognized that "Congress must have wide latitude" with respect to measures that fall in the first – remedial *or* prophylactic – category.[47] In particular, the Court pointed to the Voting Rights Act of 1965 as an exemplar of appropriate legislation under the Fourteenth Amendment, even though some provisions clearly "prohibit[ed] conduct which [was] not itself unconstitutional and intrude[d] into 'legislative spheres of autonomy previously reserved to the States.'"[48]

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 *Boerne*'s citation of only pre-1982 Voting Rights Act cases[49]: the Court's opinion might

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[44] 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 with respect to the voting eligibility of citizens educated in U.S.-flag schools where the language of instruction was not English. See 42 U.S.C. § 1973b(e). The remainder of the Act relied on its power under section 2 of the Fifteenth Amendment. In later years, however, Congress has made clear that it is relying on its "fourteen-5" enforcement powers with respect to the entire Act.

[45] Michael 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)).

[46] 521 U.S. 507, 519 (1997).

[47] Id. at 519-20.

[48] Id. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[49] The Court cited South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the suspension of literacy tests in covered jurisdictions, the appointment of federal registrars and examiners, and the imposition of a 5-year preclearance requirement); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding the suspension of literacy tests for voters who were educated in American-flag schools where the language of instruction was not English); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding a 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote);

be taken to deliberately avoid passing on the question whether the 1982 extension of the preclearance regime satisfied the congruence and proportionality requirements *Boerne* articulates.

But skepticism about congressional enforcement power under *Boerne* more likely rests not on *Boerne* itself, but on a parallel line of cases involving one particular exercise of congressional enforcement power. The Term before *Boerne*, in *Seminole Tribe of Florida v. Florida*,[50] 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.[51] In the decade since *Seminole Tribe* and *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.

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*,[52] *Kimel v. Florida Bd. of Regents*[53] and *Board of Trustees v. Garrett*,[54] the Court expressly noted that Congress *could* bind the state officials and agencies involved and require them to follow federal law. What it could *not* do was enforce those constraints by authorizing private damages actions. The *Alden* Court explicitly compared private damages lawsuits, which it held foreclosed by the eleventh amendment, to 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" and "subsequent constitutional amendments" regarding the relationship between the federal and state governments.[55]

City of Rome v. United States, 446 U.S. 156 (1980) (upholding a 7-year extension of the preclearance regime enacted in 1975 and the refusal to preclear changes that have a discriminatory effect, regardless of their purpose). It notably did *not* cite decisions such as Morse v. Republican Party of Virginia, 517 U.S. 186 (1995), Clark v. Roemer, 500 U.S. 646 (1991), City of Pleasant Grove v. United States, 479 U.S. 462 (1987), and NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1984), that had broadly construed section 5 as it had been extended in 1982.

[50] 517 U.S. 44 (1996).

[51] There is a 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.

[52] 527 U.S. 706 (1999) (holding that the eleventh amendment bars suits for violations of federal law against unconsenting states even in state court).

[53] 528 U.S. 62 (2000) (holding invalid Congress' abrogation of sovereign immunity for claims under the Age Discrimination in Employment Act).

[54] 531 U.S. 356 (2001) (holding invalid Congress's abrogation of sovereign immunity for claims involving employment discrimination in violation of the Americans with Disabilities Act). I discuss the entire line of cases more fully in Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. Ill. L. Rev. 183.

[55] Alden, 527 U.S. at 756.

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*,[56] 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*,[57] the Court upheld Congress's abrogation of states' sovereign immunity under Title II of the Americans with Disabilities Act with respect to the fundamental right of access to the courts, and in *Nevada Dep't of Human Resources v. Hibbs*,[58] 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. Moreover, *Hibbs* and *Lane* also reaffirm the principle that Congress can "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."[59]

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*,[60] the Court revisited the constitutionality of partisan political gerrymanders.[61] 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.[62] And yet, a majority of the Court refused to adjudicate the plaintiffs' challenge to Pennsylvania's congressional redistricting. Justice Scalia, in a plurality opinion for himself, Chief Justice Rehnquist, and Justices O'Connor and Scalia, would have held political gerrymandering claims nonjusticiable altogether, because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."[63] Justice Kennedy, concurring in the judgment, was unwilling to foreclose the possibility that such standards might

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[56] 427 U.S. 445 (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).

[57] 541 U.S. 509 (2004).

[58] 538 U.S. 721 (2003).

[59] Lane, 541 U.S. at 520.

[60] 541 U.S. 267 (2004).

[61] For more extensive discussions of the case, see, e.g., 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 and Pamela S. Karlan, Where To Draw the Line?: Judicial Review of Political Gerrymandering, 153 U. Pa. L. Rev. 541 (2004); Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 55-66 (2004).

[62] See Vieth, 541 U.S. at 292, 293 (plurality opinion) (expressing an assumption that severe partisan gerrymandering is "incompatib[le] . . . with democratic principles" and "unlawful"); id. at 313-14, 316 (Kennedy, J., concurring in the judgment); id. at 319 (Stevens, J., dissenting); id. at 347-52 (Souter & Ginsburg, JJ., dissenting); id. at 365 (Breyer, J., dissenting).

[63] Id. at 281 (plurality opinion).

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."[64]

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.[65] 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."[66] 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.[67] The decision to use such districts reflects, among other things, a commitment to a form of proportionality, in which one faction or party cannot capture a state's entire congressional delegation (as might be true under an at-large system) and a preference for geographically discrete and insular groups over groups whose members are not geographically concentrated.[68] Thus, Congress has a special role to play in ensuring fair representation in federal elections that includes choosing among theories of effective representation.

Arguably, that role should carry over to ensuring fair representation in state and local elections as well.[69] The fourteenth and fifteenth amendments expressly confer enforcement power on Congress, and the abrogation analysis in *Fitzpatrick v. Bitzer* recognizes that the amendments marked a profound "shift in the federal-state balance."[70] The new allocation of authority parallels the allocation under the elections clause: under section 45 of the fourteenth amendment and section 2 of the fifteenth amendment, Congress can override the states' initial decisions if the intervention safeguards the equal protection, due process, and antidiscrimination values expressed by those amendments.

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[64] Id. at 307 (Kennedy, J., concurring in the judgment).

[65] Id. at 275 (plurality opinion).

[66] U.S. Const. Art. I, § 4.

[67] See Vieth, 541 U.S. at 276 (plurality opinion).

[68] See Rosemarie Zagarri, The Politics of Size (1987); see also Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 1156-1160 (rev. 2d. ed. 2002); see also Branch v. Smith, 538 U.S. 254 (2003) (discussing the single-member district requirement of 2 U.S.C. § 2c.

[69] 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 representative," and that "[w]ithout these powers in Congress, the people can have no remedy." The elections clause, however, would "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 2d ed. 1876)).

Moreover, the guaranty clause of Art. IV, § 4 (which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government") has also been construed to confer power on Congress to safeguard the political processes of the states.

[70] See Fitzpatrick, 427 U.S. at 455-56.

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*,[71] 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.'"[72] And it is "well settled" that Congress can "override state regulations" involving these matters."[73] 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.[74]

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.[75] 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 *uncontested* primaries for congressional office.[76]

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.

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

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[71] 531 U.S. 510 (2001).

[72] Id. at 523-24 (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' election clause power includes recounts, see Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972), registration and certification of results, see United States v. Gradwell, 243 U.S. 476, 483 (1917), and violations of state-imposed duties involving congressional elections, see Ex parte Clarke, 100 U.S. 399, 404 (1879).

[73] Foster v. Love, 522 U.S. 67, 69 (1997).

[74] Cook, 531 U.S. at 522. 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., ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997); ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996).

[75] See In re Coy, 127 U.S. 731 (1888).

[76] See United States v. McCranie, 169 F.3d 723 (11th Cir. 1999).

preservative of all rights."[77] 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.'"[78]

Second, the Voting Rights Act protects groups – racial and ethnic minorities[79] – that are normally entitled to heightened scrutiny under the equal protection clause. To be sure, the Act reaches conduct that would not itself violate the equal protection clause, since it reaches acts that have a discriminatory effect regardless of the purpose behind them. 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.

Third, the Voting Rights Act involves an area – regulation of the political process – that both raises important issues of political fairness that are not fully determined by the sweeping commands of sections 1 of the Fourteenth and Fifteenth Amendment and that are 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 theories of effective representation. To give just one example that bears on the proposed amendment to section 5 responding to *Georgia v. Ashcroft*, people active in and knowledgeable about politics differ vociferously about whether, in crafting electoral districts, 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 grossly disproportionate legislative bodies) or 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).[80] Thus, 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

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[77] 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); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Harper v. State Board of Elections, 383 U.S. 663, 667 (1966).

[78] Foster, 522 U.S. at 72 n.2 (emphasis added) (quoting Smiley v. Holm, 285 U.S. at 366)).

[79] Although the Act's terminology prohibits discrimination on the basis of race or membership in a "language minority group," 42 U.S.C. § 1973b(f), the way "language minority group" is defined – it refers only to "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973l(c)(3) – shows that the Act is reaching various forms of racial discrimination.

[80] For one recent exchange on this issue, compare Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649 (2002), with Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002) and Samuel Issacharoff, Why Elections?, 116 Harv. L. Rev. 684 (2002).

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 the enforcement provisions of the Reconstruction amendments.

The necessary parties to a judicial preclearance proceeding are the covered jurisdiction and the United States.[81] And 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.[82] Most recently, in *Lopez v. Monterey County*, the Court rejected a covered jurisdiction's *Boerne*-inflected challenge, stating that while "the Voting Rights Act, by its nature, intrudes on state sovereignty[, t]he Fifteenth Amendment permits this intrusion."[83] 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 not only the absence of a discriminatory purpose, but also the absence of a retrogressive effect.[84] 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 process[85] – even the more atmospheric federalism of the tenth amendment holds little sway.

Ironically, one of the policy-based criticisms of the current administration's policies – that preclearance decisions are often subject to political considerations and that the recommendations of career personnel are overridden by presidential appointees – may actually reinforce the constitutionality of the preclearance regime by showing that it *is* subject to "the exercise of political responsibility."[86]

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

Under *Boerne*, legislation constitutes appropriate enforcement of the provisions of the

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[81] In an administrative preclearance proceeding, the jurisdiction files a submission. Individuals and groups are permitted to comment on the submission. 28 C.F.R. § 51.29. Individual voters may be permitted to intervene in a preclearance declaratory judgment action if they satisfy the requirements of Fed. R. Civ. P. 24. See Georgia v. Ashcroft, 539 U.S. at 476-77; NAACP v. New York, 413 U.S. 345, 365 (1973). Finally, if a jurisdiction fails to seek preclearance of a voting change, individuals can sue, seeking an injunction barring use of the new practice unless and until the jurisdiction obtains preclearance. But these so-called "coverage lawsuits" are normally brought using the Ex parte Young fiction and naming a state official as the formal defendant.

[82] See, e.g., Lopez v. Monterey County, 525 U.S. 266 (1999); City of Rome v. United States, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[83] 525 U.S. at 284-85.

[84] See id. at 283.

[85] The major exception concerns annexations, which are a major source of concern under section 5, and which it 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.

[86] Alden, 527 U.S. at 756.

Reconstruction era amendments if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[87] Given *Boerne*'s implicit reaffirmance of *City of Rome v. United States*,[88] which had upheld both the substance and duration of the 1975 extension of the preclearance regime, and *Lopez*'s rejection of a *Boerne*-based attack on section 5,[89] the only 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 longer warranted – what Rick Hasen colorfully calls "the 'Bull Connor is Dead' problem."[90] As evidence of this change, commentators cite the huge increase in minority registration and the numbers of minority elected officials within covered jurisdictions.[91] Some scholars have claimed that minority turnout in covered jurisdictions has come to exceed minority turnout in other parts of the nation.[92] Others have pointed to the minuscule, and declining, number of objections interposed under section 5.[93]

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 changes in race relations have worked a fundamental transformation in politics within the covered jurisdictions: minority citizens are now integrated into the political process in a way that will not be undone by lifting preclearance. 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 Democrats – that depends on minority electoral support (often even for the success of its non-minority 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

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[87] 521 U.S. at 520.

[88] 446 U.S. 156 (1980); see Boerne, 521 U.S. at 518 (citing City of Rome).

[89] See Lopez, 527 U.S. at 282-83.

[90] Hasen, supra note 11, at 179.

[91] See e.g., Samuel Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success?, 104 Colum. L. Rev. 1710, 1712-14 (2004); Pildes, supra note 61, at 86-93.

[92] See, e.g., Charles S. Bullock, III, and Ronald Keith Gaddie, Assessment of Voting Rights Progress in Oklahoma, tbl. 2 (2006) (comparing levels of black registration in covered and non-covered states) (available at http://www.aei.org/publications/pubID.24279/pub_detail.asp). For reasons Nate Persily has explored, Bullock and Gaddie seem to have overestimated the degree of black turnout relative to white turnout because they incorrectly lumped Latinos in with other non-black voters. See Nathaniel Persily, Thoughts on VRA Reauthorization, Election Law Blog, May 18, 2006 (http://electionlawblog.org/).

[93] See Hasen, supra note 11, at 190-92.

minority citizens have achieved since the passage of the Act are sufficiently recent[94] and the incentives for officials to ignore the interests of minority voters are sufficiently attractive that backsliding would 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 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. 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.[95]

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 that 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.[96] The cost of such suits, however, is often prohibitive. Consider one famous example. In *City of Mobile v. Bolden*,[97] the Supreme Court held that the fourteenth amendment and the 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. In order to prove such a 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 that found a series of discriminatory modifications.[98] 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 expenses, 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,[99] which are not now compensable.[100]

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[94] 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) (providing a long list of unprecleared changes in covered jurisdictions) (hereafter McDonald, Continued Need). Some jurisdictions remain in defiance of the submission requirement even today. See 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.

[95] See McDonald and Levitas, supra note 23, at 4-5.

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

[97] 446 U.S. 55 (1980).

[98] Bolden v. City of Mobile, 542 F. Supp. 1050, 1056-68, 1074-77 (S.D. Ala. 1982).

[99] Chandler Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution, supra note 26, at 21, 29.

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 – means many discriminatory changes may go unchallenged.

This deterrent function is especially important with respect to changes at the local level.[101] Local minority communities may be unaware of the potential political consequences of some changes and especially ill equipped to find attorneys and fund litigation.[102] 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 changes, there would of course be no objection letters at all: jurisdictions wouldn't attempt to make retrogressive changes and so 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 would 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.[103] 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 costlessly 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 non-retrogression requirement, the Democratic Party might be tempted to spread concentrations of minority voters among several districts, rather than preserving 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 non-retrogression principle forecloses that particular strategy, at least in part, and requires white Democrats to offer more of the potential electoral gains from redistricting to their minority colleagues.

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[100] The proposed amendments to the Voting Rights Act would make experts' fees compensable as part of an attorney's fees award to a prevailing plaintiff.

[101] Mike Pitts explores this point in more detail. See Pitts, supra note 23, at 611-18.

[102] 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, leaving it to "community representatives, public interest groups, and other parts of civil society" to negotiate with the jurisdiction and to demand preclearance review only if the negotiations break down. See Heather K. Gerken, A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach, 106 Colum. L. Rev. 708, 717 (2006).

[103] Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

Finally, section 5 provides *political cover*. It enables political actors in covered jurisdictions to blame federal authorities for adopting voting-related practices that benefit minority voters, rather than having to take full responsibility for those changes. While the anti-commandeering jurisprudence of *New York v. United States*[104] and *Printz v. United States*[105] may rest on the view that clear lines of responsibility are important for political accountability, when it comes to protecting the voting rights of minority citizens, there may be a countervailing consideration. As an historical matter, white voters in the south have tended to resist minority political aspirations, and to punish politicians they see as catering to minority interests.[106] 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."[107] 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.

The other 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. The current formulas look at turnout in the 1964, 1968, and 1972 presidential elections.[108] Given that all these elections occurred decades ago, is there any warrant for continuing to single out these jurisdictions for preclearance?[109]

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 tool for covering jurisdictions because of a pervasive history of minority disenfranchisement. The triggering formula has always been a product of principle mixed with pragmatic politics. To be sure, not every jurisdiction with a history of pervasive racial

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[104] 505 U.S. 144 (1992).

[105] 521 U.S. 898 (1997).

[106] See, e.g., V.O Key, Jr., Southern Politics in State and Nation (1949); Laughlin McDonald, The Counterrevolution in Minority Voting Rights, 65 Miss. L.J. 271, 308 (1995).

[107] The Ghettoization of Texas Democrats, Austin American-Statesman, Jan. 16, 2004, at A16 (editorial).

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 so much 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." See Pamela S. Karlan, Loss and Redemption: Voting Rights at the Turn of a Century, 50 Vand. L. Rev. 291, 314-20 (1997).

[108] See 42 U.S.C. § 1973b(b).

[109] 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). But the preclearance regime does not involve conventional affirmative action: it imposes no burden or disadvantage on white individuals on account of their race.

discrimination in voting was originally covered. For example, the trigger rested on use of a literacy test, and not a poll tax, even though there was substantial evidence of the discriminatory purpose and effect of poll taxes.[110] Thus, section 5 provided protection to blacks on the Mississippi side of the Mississippi River Delta but not on the opposing shore in Arkansas. And Texas became a covered jurisdiction only in 1975, as a result of its discrimination against language minorities. Still, the trigger did a reasonably good job of picking up most, if not all, the places with a history of pervasive violations of the Fourteenth and Fifteenth Amendments.[111]

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 with the underlying constitutional commands for fair and inclusive political processes.[112]

Thus, the bailout provision provides for lifting section 5 coverage from jurisdictions where it is no longer appropriate.[113] The extension of the Act works in tandem with the 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.[114] At the same time, under section 3(c) of the Act, there is "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.[115] In light of the possibilities for bailout and bail-in, the fact that the list of formulaically covered jurisdictions might be somewhat over- or under-inclusive does not pose a

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[110] The year before the Voting Rights Act was passed, the Twenty Fourth Amendment forbid conditioning the right to vote in elections for federal office on payment of "any poll tax or other tax," 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). In Harper, the Supreme Court struck down imposition of a poll tax in *any* election as a violation of the fundamental right to vote.

[111] See South Carolina v. Katzenbach, 383 U.S. at 331 ("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.").

[112] An earlier, more lenient bailout standard was upheld in South Carolina v. Katzenbach, 383 U.S. at 332. For a discussion of the bailout provision, see Paul F. Hancock & Lora L. Tredway, The Bailout Standards of the Voting Rights Act: An Incentive to End Discrimination, 17 Urb. Law. 379, 392 (1985); McDonald, Continued Need, supra note 94, 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 11, at 106-10.

[113] According to the Department of Justice, "Eleven political subdivisions in Virginia (Augusta, Frederick, Greene, Puliaski, Roanoke, Rockingham, Shenandoah, and Warren Counties and the Cities of Fairfax, Harrisonburg, and Winchester) have 'bailed out'," in each case with the consent of the federal government. http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited May 25, 2006).

[114] See McDonald, Continued Need, supra note 94, at 53 (citing See S. Rep. No. 97-417, at 60-61 (1982)).

[115] 42 U.S.C. § 1973a(c). 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 country under section 3(c)); McDonald, Continued Need, supra note 94, at 30 n.191 (discussing pocket trigger cases).

serious constitutional problem.

Finally, a subsidiary evidentiary question concerns the relevance of evidence that covered jurisdictions continue to use practices that have a racially disparate impact to the continued *risk* of constitutional violations in the absence of strong prophylactic measures such as section 5. Some commentators have suggested that the large number of section 2 lawsuits in covered jurisdictions provides little warrant for extending section 5 given that, since 1982, section 2 has prohibited the use of voting and election-related practices that have a discriminatory effect regardless of the underlying purpose.

One consequence of the 1982 amendment of section 2 is that plaintiffs are rarely called upon to prove, and courts are rarely called upon to find, that a defendant jurisdiction has engaged in purposeful racial discrimination that would violate the Constitution as well. This is not to say that such purposeful discrimination does not exist. Evidence of discriminatory effects remains powerfully probative of the risk of an underlying unconstitutional purpose in adopting or maintaining the exclusionary system.[116] Moreover, it is important to remember *why* Congress amended section 2 to impose an effects test. Eliminating the requirement that jurisdictions be labeled intentional discriminators was not simply a means of making it easier for minority voters to attack existing exclusion from the political process. Congress also chose to move attention away from a jurisdiction's intent because, even in cases where such intent can be proved, an intent test is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities."[117] Requiring findings of purposeful race discrimination in order to remedy the continued political exclusion of minority citizens can actually *exacerbate* racial tensions. Congress has made the eminently sensible judgment that the best way of combating the lingering effects of past, unconstitutional racism in the political process is *not* to require name-calling and condemnation in the litigation process but to simply bring about the effective integration of minority citizens into the political process.

IV. 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. In 1975, when it extended preclearance for seven years, it made the ban on literacy tests permanent. 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

[116] See Rogers v. Lodge, 458 U.S. 613, 618 (1982) (evidence of an invidious purpose can be inferred from the fact that a challenged practice has a racially disparate impact).

[117] S. Rep. 97-417, p. 36 (1982).

discriminatory result, regardless of the purpose behind them.

This time around, Congress has 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 or a discriminatory effect. 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, while it may be controversial as a matter of policy, nonetheless lies within Congress's enforcement power.

In *Bossier II*, the Supreme Court held that section 5 does not prohibit adoption of changes enacted with a discriminatory but nonretrogressive purpose. 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. [118]

Congress has proposed amending section 5 to provide that the term "purpose" includes "*any* discriminatory purpose,"[119] and not merely a retrogressive purpose. In light of the Supreme Court's recent unanimous decision in *United States v. Georgia*,[120] this amendment should pose no constitutional issue. 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. "No 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."[121] 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 has wide-ranging power to adopt remedies for actually unconstitutional conduct. The *Bossier Parish II* "fix" authorizes objections only with respect to proposed changes that are themselves unconstitutional. Here, section 5 adds to the self-executing prohibition of the fourteenth and fifteenth amendments only two relatively narrow features. First, if a jurisdiction chooses to seek

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[118] Prior to the passage of the Fifteenth Amendment, many states expressly limited the franchise to whites. A state that adopted a new strategy for perpetuating that past, purposeful disenfranchisement B for example, Oklahoma, with its adoption of the "Agrandfather clause," see Guinn v. United States, 238 U.S. 347 (1915), and its subsequent attempt to circumvent Guinn by giving excluded voters only a two-week window to register or forever lose their rights, see Lane v. Wilson, 307 U.S. 268 (1939) B would violate the Fifteenth Amendment even if the new device "served only to perpetuate those old laws and to effect a transparent racial exclusion." Rice v. Cayetano, 528 U.S. 495, 513 (2000). Indeed, had only retrogressive purposes justified section 5 objections, it is not clear how section 5 would have operated immediately after its enactment since substituting one discriminatory stratagem for another would not necessarily produce retrogression, rather than simple perpetuation of existing exclusion.

[119] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, § 5(c) (emphasis added).

[120] 126 S.Ct. 877 (2006).

[121] Id. at 881.

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 block such unconstitutional conduct, at least temporarily;[122] in any event, section 5 prevents the jurisdiction from implementing the change until some federal authority preclears it. Second, section 5 places the burden of proof on the jurisdiction rather than the party challenging the proposed change. But to the extent that these burdens are imposed on changes that are allegedly unconstitutional, Congress's remedial scheme is entirely appropriate.

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,"[123] 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. 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.

In the 2007 amendments, Congress has chosen among those theories, providing that a change that "will have the effect of diminishing the ability of" minority voters "to elect their preferred candidates of choice denies or abridges the right to vote" for purposes of section 5 review.[124] 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 groups[125] – cannot 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.[126] To some extent, Congress has already embraced that theory in section 2 of the

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[122] While a decision by the Department of Justice to object to a change submitted for administrative preclearance is unreviewable, Morris v. Gressette, 432 U.S. 491, 504-05 (1977), a jurisdiction that receives an objection letter from the Department can still file suit seeking judicial preclearance. The court addressing the jurisdiction's request for a declaratory judgment gives no weight to the Department's objection.

[123] 539 U.S. at 482.

[124] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, § 5(b) (emphasis added) .

[125] 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 non-minority 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).

[126] I have addressed this question in Karlan, Retrogression of Retrogression, supra note 40.

Voting Rights Act, which protects the right both to "participate" and to "elect,"[127] showing that the two rights are discrete. I want simply 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 representation, the *Georgia v. Ashcroft* "fix" lies well within its constitutional competence.

IV. 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 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.

[127] 42 U.S.C. § 1973(b).