WHY THE PRECLEARANCE AND BAILOUT PROVISIONS OF THE VOTING RIGHTS ACT ARE STILL A CONSTITUTIONALLY PROPORTIONAL REMEDY

PAUL WINKE*

INTRODUCTION

Of the extensive civil rights laws promulgated by Congress since the mid-1960s, the Voting Rights Act ("VRA" or "the Act")[1] would appear to be among the most constitutionally secure. The VRA was enacted in 1965 as a means of enabling direct federal intervention to enable African Americans to register and vote. Its passage was in part a response to the recalcitrance of Southern jurisdictions in the face of ineffective case-by-case litigation by the Department of Justice.[2] Section 5,[3] the controversial centerpiece of the Act,[4] mandates that certain electoral jurisdictions submit for approval any proposed procedural changes "with respect to voting."[5] Section 5 has received constitutional affirmation from

* Law Clerk, Hon. Robert W. Sweet, District Court of the Southern District of New York. A.B., 1990, Amherst College; M.A., 1999, The Johns Hopkins University; J.D., 2002, NYU School of Law. I thank Professor Richard Pildes for his invaluable support in the genesis and development of this article. For extremely helpful comments on later drafts, I thank Professor William Nelson and Gabriel Ross. Thanks also to the staff of NYU Review of Law & Social Change for greatly improving the article, especially Charles Hart, Madeleine Hensler and Una Kim.

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971 to 1974e (2000)).

2. *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 17 (Bernard Grofman & Chandler Davidson eds., 1992).

3. 42 U.S.C. § 1973c (2000).

4. The other major provision of the Act is Section 2, a permanent provision which initially enabled a statutory cause of action for any "denial or abridgment" of the right to vote on the basis of race. Voting Rights Act, § 2, 79 Stat. 437, 437. Section 2 was amended in 1982 to provide that a violation would be "established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens" on the basis of race or color, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). This amendment is known as the "results test" because it does not require a showing of intentional discrimination in order to find a violation.

5. Section 5 mandates that jurisdictions covered according to a statutory formula, based on a jurisdiction's voter registration rate and its general history of imposing restrictions on the franchise, must submit all proposed changes "with respect to voting" either to the Attorney General or to the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. In order to pass preclearance, the jurisdiction must demonstrate that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or because of membership in a minority language group. *Id.* Covered jurisdictions are those which used a "test or device" on the first day of November in either 1964, 1968, or 1972, and whose voter registration was below fifty percent for the presidential elections in 1964, 1968, or 1972. A "test or device" is defined as any requirement that a registrant or voter must "(1)

the Supreme Court as recently as 1999.[6] Even amid recent Court decisions reining in congressional power to enforce the Fourteenth[7]—and by extension, the Fifteenth[8]—Amendment, the VRA seemingly has emerged as exemplary civil rights legislation.[9]

However, closer inspection of recent cases interpreting the Act suggests a different story. While there has been no frontal assault on its constitutionality in Supreme Court opinions, the scope of the Act has been narrowed, with the most dramatic restrictions occurring in redistricting cases striking down racial gerrymandering.[10] Statutory interpretation, at least partly influenced by the canon of constitutional avoidance, has also been cited as a rationale for restricting the

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demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c). In 1975, the definition of a test or device was amended to include the use of election materials only in the English language in jurisdictions where the most recent census shows that more than five percent of voting age citizens are "members of a single language minority." 42 U.S.C. § 1973b(f)(3).

6. *See* Lopez v. Monterey County, 525 U.S. 266, 283–84 (1999) ("[W]e find no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law that may have [a discriminatory] effect in a covered county."); *see also* City of Rome v. United States, 446 U.S. 156, 180–82 (1980) (holding that a 1975 extension by Congress of the VRA Section 5 preclearance provisions was constitutional); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) ("We here hold that the portions of the Voting Rights Act[, including § 5,] properly before us are a valid means for carrying out the commands of the Fifteenth Amendment.").

7. The Fourteenth Amendment provides, in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

8. The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation."

U.S. CONST. amend. XV, §§ 1, 2.

9. The Court holds up the VRA as a standard for properly enacted legislation in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 373–74 (2001) (finding that provisions of the Americans with Disabilities Act (ADA) abrogated state sovereign immunity) and *City of Boerne v. Flores*, 521 U.S. 507, 525–33 (1997) (finding that the Religious Freedom Restoration Act (RFRA) was constitutionally suspect).

10. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900, 926–27 (1995) ("But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances [of racial discrimination in voting] does not mean they can be justified in the circumstances of this litigation."); Shaw v. Reno, 509 U.S. 630 (1993).

enforcement capacity of the Department of Justice ("DOJ") under the Act to what the Court believes are the parameters of the Reconstruction Amendments.[11] Such decisions suggest that the VRA may not be as immune from constitutional review as might appear from the Court's recent positive citations to *South Carolina v. Katzenbach*[12] and *City of Rome v. United States*,[13] two cases affirming the constitutionality of the VRA.

In this article I will argue that the concerns of the Court, as suggested by its recent VRA jurisprudence, are unwarranted because the currently implemented preclearance provisions of Section 5, as well as the relevant bailout provisions of Section 4,[14] pass constitutional muster. In part I, I briefly discuss the constitutional provisions underlying the Act and review recent Supreme Court cases that have curtailed congressional lawmaking authority under those provisions. I then survey in part II some current speculations on the constitutionality of VRA provisions, particularly Section 5 preclearance, followed immediately by a short review of Supreme Court discussions suggesting evidence of these concerns. Although the "congruence and proportionality" test for the validity of congressional enforcement power has become increasingly strict since it first appeared in *City of Boerne v. Flores*,[15] I argue that those provisions of Section 5 that may be subject to constitutional challenge[16] would each be a congruent and proportional remedy for the evil of voting discrimination.

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11. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 340–41 (2000) (*Bossier Parish II*) (holding that preclearance cannot be denied to a voting change with a discriminatory purpose but a nonretrogressive effect); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481–84 (1997) (*Bossier Parish I*) (invalidating a DOJ decision which had denied preclearance to proposed voting changes simply because they violated Section 2 of the VRA); Presley v. Etowah County Comm'n, 502 U.S. 491, 509–10 (1992) (holding that changes in the allocation of authority of county commissioners were not changes "with respect to voting," and were therefore not subject to preclearance).

12. 383 U.S. 301 (1966).

13. 446 U.S. 156 (1980).

14. Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973b (2000).

15. 521 U.S. 507 (1997). *See* Garrett, 531 U.S. at 389 (Breyer, J., dissenting) (arguing that the Court's "decision saps § 5 of independent force, effectively 'confin[ing] the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch [is] prepared to adjudge unconstitutional'") (ellipses in original) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966)).

16. The provisions prohibiting changes with a discriminatory purpose merely restate the constitutional standard and would thus not be subject to challenge. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that the Fifteenth Amendment prohibits only intentional discrimination in voting). As Pamela Karlan points out, "the only significant departure from the constitutional standards under the Fourteenth and Fifteenth Amendments" effected by the purpose prong of Section 5 is that the preclearance requirement "places the burden of disproving the presence of a discriminatory purpose on the covered jurisdiction, rather than placing the burden of proving an invidious motive on the plaintiff challenging a proposed change." Pamela Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies after* Flores, 39 WM. & MARY L. REV. 725, 731 n.34 (1998). She concludes nevertheless that the Court's equal protection jurisprudence casts no doubt on the question of "congressional power to structure the allocation of proof within lawsuits." *Id.*

In part III, I turn to a discussion of current VRA preclearance remedies in light of the limitations established by the Court. I first examine the guidelines used by the DOJ to determine whether a voting change employs a prohibited purpose under Section 5 and then look at the general prohibited effects prong of Section 5. I argue that under all permissible rationales for the prohibition of discriminatory effects, the aim is to root out the underlying wrong of intentional discrimination that violates the Constitution. I conclude this part with an analysis of Section 4 of the VRA, known as the "bailout provision" because it enumerates the conditions that a covered jurisdiction must meet in order to escape preclearance coverage.[17] The bailout provision was included to insure that only jurisdictions with a history of racial discrimination in voting would remain covered.[18] Under the 1965 Act, a jurisdiction needed only to show that it had not used a test or device in a discriminatory manner for a five-year period.[19] The Supreme Court upheld the initial bailout provision in *Katzenbach*.[20] Amendment of the bailout provisions in 1982 significantly tightened the standards for bailing out by placing the burden on a jurisdiction to demonstrate, among other things, that it has "eliminated voting procedures and methods of election which inhibit or dilute equal access to the voting process."[21] I argue that such strict standards are necessary in order to demonstrate that covered jurisdictions have engaged in a serious and sustained effort to root out voting discrimination. The bailout provisions also provide an incentive for covered areas to eliminate unconstitutional discrimination;[22] as such, they qualify as either "prophylactic" or preventive legislation designed to keep unconstitutional violations from happening again.[23]

I conclude the article by looking ahead to the necessary renewal of certain VRA provisions in 2007.

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17. *See* 42 U.S.C. § 1973b(a)(1)(A)–(F).

18. Several jurisdictions quickly took advantage of the provision. In the first five years after the VRA was enacted, the state of Alaska, along with Apache, Coconino and Navajo Counties, Arizona, Elmore County, Idaho and Wake County, North Carolina bailed out of coverage with the consent of the attorney general, who found that for the five years prior to their respective lawsuits, each jurisdiction "had not used a voting test or device with a racially discriminatory purpose or effect." 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).

19. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438.

20. 383 U.S. 301 at 332.

21. 42 U.S.C. § 1973b(a)(1)(F)(i).

22. *See* Hancock & Tredway, *supra* note 18.

23. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 64 (2000) ("Difficult and intractable problems often require powerful remedies, and this Court has never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.").

I.
CONSTITUTIONAL AUTHORITY

A. Congressional powers underlying the Voting Rights Act

Before turning to the analysis of the VRA in light of recent Supreme Court jurisprudence, a preliminary question needs to be addressed: is the source of Congress's power to enact the VRA drawn only from the Fifteenth Amendment, or from the Fourteenth Amendment as well? The original language of the substantive standards of the VRA—found in both Sections 2 and 5—is drawn practically verbatim from the Fifteenth Amendment.[24] Also, in the initial cases testing the constitutionality of the VRA, the Supreme Court analyzed the Act as an enforcement of the Fifteenth Amendment. Nevertheless, as private plaintiffs and the DOJ began to bring more subtle forms of voting discrimination to the attention of the courts, Supreme Court jurisprudence recognized that not all discrimination in voting is the result of direct denial or abridgement. For example, in *Gaston County v. United States*,[25] in which Gaston County sought the reinstatement of a literacy test for voter registration, the Court held that the County's history of denying African Americans equal educational opportunities meant that even a fairly administered literacy test would nonetheless result in a denial or abridgement of the right to vote, and therefore the County could not reinstate its literacy test under Section 4(a) of the VRA. To demonstrate that Congress was aware of such indirect discrimination, the Court quoted from Attorney General Katzenbach, who recognized that even a "uniformly applied literacy test" would violate the constitution: "Years of violation of the 14th amendment, right of equal protection through education, would become the excuse for continuing violation of the 15th amendment, right to vote."[26] The Court went on to observe that in light of the "obvious relationship" between the

24. Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Section 2 of the Voting Rights Act, as initially enacted, read: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . ." Voting Rights Act of 1965, Pub. L. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973 (2000)). The present language of Section 5, which has remained unchanged, provides that no voting change in a covered jurisdiction may be enforced unless the United States District Court for the District for Columbia has declared that such a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or if the Attorney General does not object based on the same standard. 42 U.S.C. § 1973c.

25. 395 U.S. 285 (1969).

26. *Gaston County*, 395 U.S. at 289 (quoting *Voting Rights: Hearing on S. 1564 to Enforce the 15th Amendment to the Constitution of the United States Before the Senate Comm. on the Judiciary*, 89th Cong. 22 (1965) (statement of Hon. Nicholas deB. Katzenbach, Attorney General of the United States)).

two amendments, "it is of no consequence that the Act was explicitly designed to enforce the Fifteenth, and not the Fourteenth, Amendment."[27]

In several vote dilution cases, the Court has also held that the rights at issue stem from the Fourteenth rather than the Fifteenth Amendment.[28] However, Justice Souter, concurring and dissenting in *Reno v. Bossier Parish School Board* ("*Bossier Parish II*"), argued that he knew of "no reason in text or history that dilution is not equally violative of the Fifteenth Amendment guarantee against abridgment."[29] Since the 1982 amendments to the VRA, when Congress explicitly distinguished the statutory standard for a Section 2 violation from the judicially enforceable Fifteenth Amendment standard,[30] the Court has attended more carefully to the language of the statute.[31] It is also worth noting that when the VRA was amended in 1975 to include language minorities, the statute also extended beyond the ambit of the Fifteenth Amendment, which prohibits only denials or abridgements of the right to vote based on race. The language

27. *Id.* at 290 n.5.

28. *See* Rogers v. Lodge, 458 U.S. 613, 617 (1982) ("Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases."); City of Mobile v. Bolden, 446 U.S. 55, 68 (1980) (examining whether multimember legislative districts unconstitutionally diluted voting strength in violation of the Fourteenth Amendment). Although the claimed injury in the racial gerrymandering cases is not so much the vote dilution of the white electorate as it is the implicit segregation of voters based on race, the claims in those cases have been cognized under the Fourteenth Amendment. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 81 (1997); Miller v. Johnson, 515 U.S. 900, 903–04 (1995); Shaw v. Reno, 509 U.S. 630, 645 (1993).

29. *Bossier Parish II*, 528 U.S. at 359 (Souter, J., concurring in part and dissenting in part). Justice Souter acknowledges that the Court has "suggested, but [ ] never explicitly decided, that the Fifteenth Amendment applies to dilution claims." Souter cites cases that are either ambiguous, or which consider dilution claims under the Fourteenth Amendment. *Id.* at 359 n.11 (citing *City of Mobile*, 446 U.S. at 62–63; Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960)). *See infra* part II.C for a full discussion of *Bossier Parish II*. The *City of Mobile* plurality does cite *Gomillion* for the proposition that racially motivated gerrymandering is cognizable under the Fifteenth Amendment. *See City of Mobile*, 446 U.S. at 62. But in *Shaw v. Reno*, the Court elected to follow Justice Whittaker's concurrence in *Gomillion*, in which he argued that dilution claims ought to be considered under the Equal Protection Clause. *See* Shaw v. Reno, 509 U.S. at 645, (citing *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring)).

30. After amendment, a Section 2 violation will be found "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

31. For Section 5 cases, in addition to the *Bossier Parish* and *Lopez v. Monterey County* cases, see, for example, Foreman v. Dallas County, 521 U.S. 979 (1997) (holding that changes in the manner of selecting election judges could be covered changes under Section 5); Morse v. Republican Party, 517 U.S. 186, 210 (1996) (holding that filing fees for delegates to party conventions is a change "with respect to voting" within the meaning of Section 5). For Section 2 cases, see, for example, Holder v. Hall, 512 U.S. 874 (1994) (holding that the size of a governing authority is not subject to a vote dilution challenge under Section 2); Thornburg v. Gingles, 478 U.S. 30 (1986) (laying out a three-part test for liability under amended Section 2).

minority provisions are therefore enacted under Section 5 of the Fourteenth Amendment.[32]

There has, however, been no apparent difference in the nature of the enforcement powers granted by the Fourteenth and Fifteenth Amendments. For almost a century, their power has been treated as coextensive.[33] Evan Caminker halfheartedly raises the argument that the *City of Boerne* Court may have

> contrasted RFRA with various provisions of the Voting Rights Act previously upheld as valid Fifteenth Amendment Section 2 enforcement measures merely to highlight the distinctions between a well-tailored and a poorly tailored enforcement measure, without meaning to hold that such well-tailoring is now a prerequisite for the constitutionality of Section 2 measures (i.e., without "rewriting" the *Katzenbach* and *City of Rome* decisions).[34]

But Caminker quickly acknowledges that a "fairer reading" is that *City of Boerne* narrowed the enforcement powers of both amendments.[35] While it is reasonable to conclude that *City of Boerne* applies to both amendments, the fact that the Court has taken note of non-voting related constitutional violations such as school segregation in supporting the validity of the VRA suggests that a congruence and proportionality analysis need not be restricted to findings of Fifteenth Amendment violations. In defending the effects prong of Section 5 below, I argue that findings of Fourteenth and even Thirteenth Amendment violations should be used to demonstrate the proportionality of the VRA's remedies.[36]

B. Limitations: the City of Boerne *test and its progeny*

The Supreme Court drastically altered its Fourteenth Amendment jurisprudence in 1997 when it struck down the Religious Freedom Restoration Act

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32. *See* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 21 (1992).

33. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001) (noting that Section 2 of the Fifteenth Amendment is "virtually identical" to Section 5 of the Fourteenth Amendment); *Lopez*, 525 U.S. at 294 n.6 (Thomas, J., dissenting) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive."); *City of Boerne*, 521 U.S. at 525–26 (discussing *South Carolina v. Katzenbach*—a Fifteenth Amendment case—to outline the limits on Congress's Fourteenth Amendment powers); City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting) (treating enforcement powers of both amendments as coextensive); United States v. Guest, 383 U.S. 745, 783–84 (1966) (Brennan, J., concurring in part and dissenting in part) (same); James v. Bowman, 190 U.S. 127, 138 (1903) (same); *see also* Mixon v. State of Ohio, 193 F.3d 389, 399 (6th Cir. 1999) (same).

34. Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1191 n.269 (2001).

35. *Id.*

36. *See infra* notes 203–39 and accompanying text.

("RFRA") in *City of Boerne v. Flores*.[37] Congress had overwhelmingly passed RFRA in order to overturn the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[38] In *Smith*, the Court held that the Free Exercise Clause of the First Amendment cannot be invoked to protect individuals from burdens on religious expression that result from facially neutral laws applied in a nondiscriminatory manner.[39] After *Smith,* laws burdening the exercise of religion could be challenged only if they intentionally burdened religious practices.[40] RFRA allowed broader challenges "by prohibiting laws that 'substantially burden[ed]' the exercise of religion unless they advanced a compelling governmental interest' and were 'the least restrictive means of furthering that compelling governmental interest.'"[41]

Since Congress had relied on its powers under the Fourteenth Amendment to enact RFRA, which attempted to overrule the Court's First Amendment jurisprudence, [42] the *City of Boerne* Court considered the limits of congressional power under Section 5 of the Fourteenth Amendment.[43] Before *City of Boerne*, Congress had proceeded under the standard provided in *Katzenbach v. Morgan*,[44] which held that under the Fourteenth Amendment, Congress possesses "the same broad powers expressed in the Necessary and Proper Clause."[45] The Court in *Morgan* had adopted the classic formulation of that clause's power as defined in *McCulloch v. Maryland*:[46] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[47]

The *City of Boerne* Court effectively overturned the *Morgan* standard, although it did not acknowledge doing so.[48] It insisted that, while Congress has the power to "enforce" the Fourteenth Amendment, "[t]he design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on

37. 521 U.S. 507 (1997).

38. 494 U.S. 872 (1990). *See City of Boerne*, 521 U.S. at 512 (noting that Congress enacted RFRA in response to *Smith*).

39. *Smith*, 494 U.S. at 878. *See also* Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity From Private Damage Suits After* Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 489–90 (1998).

40. *See* Hartley, *supra* note 39, at 490.

41. *Id.* (quoting 42 U.S.C. § 2000bb 1(a), (b)).

42. *Id.* at 516.

43. U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

44. 384 U.S. 641 (1966).

45. *Id.* at 650 (citing U.S. CONST. art I, § 8, cl. 18).

46. 17 U.S. (4 Wheat.) 316 (1819).

47. *Morgan*, 384 U.S. at 650 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

48. *See* Caminker, *supra* note 34, at 1144 (observing that while the *City of Boerne* Court draws language from *Morgan*, it "emphatically rejected" the *Morgan* interpretation of the scope of Congress's power under the Fourteenth Amendment).

the States."[49] The Court permitted Congress the "remedial" power to enforce existing constitutional provisions but barred legislation that alters the meaning of those provisions.[50] In exercising such remedial power, the Court required that there be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[51]

City of Boerne was followed by a series of decisions, roughly one each year, that have narrowed congressional enforcement capacity under the Fourteenth Amendment, and, by extension, the Fifteenth Amendment.[52] In 2003, the pattern was broken with *Nevada Department of Human Resources v. Hibbs*,[53] in which the Court upheld a provision of the Family and Medical Leave Act (FMLA) which permitted state employees to sue the state for violations of the family leave provision. The Court has repeatedly insisted that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[54] It follows that Congress may enact only "appropriate remedial legislation" which does not "effect[] a substantive redefinition of the Fourteenth Amendment right at issue."[55] To facilitate parsing what the Court admits is a fine distinction, the Court has given Congress "wide latitude" to decide where the line between substance and remedy lies.[56] However, it has continued to insist that "there must be a congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end."[57]

The areas of law considered by the Court regarding Congress's power under the Fourteenth Amendment, in addition to the religious accommodation at issue in *City of Boerne*, include state patent infringement,[58] age discrimination,[59] remedies for violence against women,[60] disability discrimination,[61] and sex discrimination with respect to family leave benefits.[62] In every case except *Hibbs*,[63] the Court determined that the remedy fashioned by Congress was not

49. *City of Boerne*, 521 U.S. at 519.

50. *Id.* at 519–20.

51. *Id.* at 520.

52. See *infra* notes 58–62 and accompanying text.

53. 123 S. Ct. 1972 (2003).

54. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (citing *City of Boerne*, 521 U.S. at 536).

55. *Id.*

56. *Id.*

57. *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

58. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v Coll. Sav. Bank, 527 U.S. 627 (1999).

59. *Kimel*, 528 U.S. 62.

60. United States v. Morrison, 529 U.S. 598 (2000).

61. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373–74 (2001).

62. Nev. Bd. of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003).

63. *Id.*

congruent and proportional to the injury under consideration and that the relevant provisions were therefore unconstitutional.

Over the course of these decisions, a two-step inquiry has emerged.[64] First, the Court asks whether the statute prohibits substantially more behavior "than would likely be held unconstitutional under the applicable equal protection . . . standard."[65] In *Kimel v. Florida Board of Regents*, the Court held that under the Fourteenth Amendment the state may discriminate on the basis of age if it has a "reasonable necessity" for doing so; age discrimination is reviewed by the court under its least restrictive "rational basis" standard.[66] In contrast, the Age Discrimination in Employment Act (ADEA) prohibits age discrimination except where age is a bona fide occupational qualification.[67] The Court therefore concluded that "[m]easured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposed substantially higher burdens on state employers."[68] In *Board of Trustees of University of Alabama v. Garrett*, the Court concluded that "special accommodations for the disabled" are not required by the Equal Protection Clause, so that any statutory requirement that states must make such accommodations cannot be derived directly from the Constitution.[69] In *Hibbs*, the Court contrasted the discrimination at issue in *Kimel* and *Garett*, which is judged under a rational basis standard, with the gender-based discrimination addressed by the FMLA, which "triggers a heightened level of scrutiny."[70] The difference in levels of scrutiny most likely explains the different outcome in *Hibbs*.

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank[71] and its companion case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[72] are the only two recent cases in which the Court has restricted the scope of congressional enforcement of the Due Process Clause. In *Florida Prepaid*, the Court acknowledged that, under some circumstances, patent infringement could amount to a deprivation of property without due process, but that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[73] In *College Savings Bank*, the analysis ended with the first step because the Court held that violations of the Lanham Act were not due process deprivations under

64. The following analysis is drawn from Robert C. Post & Reva B. Siegel, *Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

65. *Kimel*, 528 U.S. at 86.

66. *Id.* at 87.

67. *Id.* at 86.

68. *Id.* at 87.

69. *Garrett*, 531 U.S. at 368.

70. *Hibbs*, 123 S. Ct. 1972, 1982 (2003).

71. 527 U.S. 627 (1999).

72. 527 U.S. 666 (1999).

73. *Fla. Prepaid*, 527 U.S. at 640.

the Fourteenth Amendment, thus legislation prohibiting such infringement could in no way be understood to remedy a constitutional violation.[74]

The second step in the analysis is a more forgiving one, for it holds that the fact that the applicable statute "prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry."[75] In the face of "[d]ifficult and intractable problems," Congress may still enact "reasonably prophylactic legislation" as a means of preventing unconstitutional discrimination.[76] But if the statutory remedy is to be congruent and proportional, Congress must at least demonstrate a "pattern of discrimination by the States which violates the Fourteenth Amendment"[77] which prophylactic legislation could be said to address. In *City of Boerne*, for example, the Court was concerned that RFRA was enacted to combat religious bigotry despite the fact that there were no episodes of persecution in the legislative record "occurring in the past 40 years."[78] In *Garrett*, the question was whether the ADA properly abrogated the sovereign immunity of the states. The Court therefore looked specifically at the congressional record of disability discrimination by state entities, discounting local government discrimination because "the Eleventh Amendment does not extend its immunity to units of local government."[79] As with the first step, in each case in the *City of Boerne* line, the Court failed to find a sufficient record of unconstitutional discrimination to justify the imposition of prophylactic remedies on the states.[80]

Before applying the *City of Boerne* line of cases to the various preclearance provisions of the VRA, it is important to distinguish two possible interpretations of the second step in the analysis. According to one interpretation, advanced by Robert C. Post and Reva B. Siegel, this step "does not ask whether Fourteenth Amendment Section 5 legislation remedies or deters conduct that a court in adjudication would find unconstitutional, but instead asks whether Section 5 legislation remedies or deters conduct that *is* unconstitutional."[81] They argue that because of the institutional limitations of courts, only a subset of all constitutional violations will be captured by judicially enforceable standards. The most prominent example of the difference between the two standards is that of

74. *Coll. Sav. Bank*, 527 U.S. at 675.

75. *Kimel*, 528 U.S. at 88.

76. *Id.* In the present context, legislation is prophylactic if it prohibits conduct which is not unconstitutional in itself, but which has been determined to lead in some, but not all, cases to the commission of actual constitutional violations. For a discussion of the varying uses of the term by Supreme Court Justices, see Richard H.W. Maloy, *Can A Rule Be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2474–75 (2001).

77. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

78. *City of Boerne*, 521 U.S. at 530.

79. *Garrett*, 531 U.S. at 369.

80. *See Kimel*, 528 U.S. at 91 ("Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.").

81. Post & Siegel, *supra* note 64, at 462.

purpose versus effects; after *Washington v. Davis*,[82] only purposeful discrimination can be held to violate the Equal Protection Clause. Nonetheless, the Court has upheld the constitutionality of civil rights statutes, including the VRA, which prohibit state actions with a discriminatory impact.[83] Post and Siegel argue that the judicially enforceable purpose standard is drawn from Section 1 of the Fourteenth Amendment, while the broader effects standard is drawn from congressional power under Section 5.[84]

The Court has recognized a division of institutional labor, noting that "[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."[85] But the fact that the Court has recognized the validity of laws which prohibit actions with discriminatory effects does not necessarily lead to the conclusion that all such prohibited action violates the Constitution. Consider the following from *City of Rome*, the most recent case upholding the constitutionality of Section 5 of the VRA: "Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination."[86] While the Court does distinguish between the two sections of the Amendment, it does not hold that discriminatory effects violate Section 1. Rather, it finds that Congress has the authority, under Section 2, to prohibit discriminatory effects. Further, the reference to "past discrimination" suggests that Congress is authorized to prohibit effects only if the Court believes it is reasonable to infer discriminatory *purposes* in the past, even if none can be shown in the present.[87]

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82. 426 U.S. 229 (1976) (holding police department recruiting test not unconstitutional because of its racially discriminatory impact in absence of finding of intentional discrimination).

83. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (holding that plaintiffs were entitled to relief under Title VII because tests employed by respondent had discriminatory impact on minorities); City of Rome v. United States, 446 U.S. 156, 177 (1980) ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." (footnote omitted)); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that absence of discriminatory intent is not enough to avoid Title VII liability).

84. Post & Siegel, *supra* note 64, at 452. David Cole makes a similar argument with respect to the VRA in *The Value of Seeing Things Differently:* Boerne v Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 61 (1997) ("The best explanation for the constitutionality of the Voting Rights Act is that the Fifteenth Amendment means one thing for purposes of direct judicial enforcement and something else for purposes of legislative enforcement. A court could not have enforced the Fifteenth Amendment through judicial decree in the way that Congress has through the Voting Rights Act.").

85. Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979), *noted in* Post & Siegel, *supra* note 64, at 469.

86. *City of Rome*, 446 U.S. at 176.

87. This reading is confirmed a few paragraphs later when the Court recounts its decision in *Oregon v. Mitchell*, 400 U.S. 112 (1971), in which "[t]he Court concluded that Congress could rationally have determined that these provisions were appropriate methods of attacking the perpetuation of earlier, *purposeful* racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect." *Id.* at 176–77 (emphasis added).

The reference in recent cases to "prophylactic" or "preventive" legislation as a valid extension of congressional enforcement power further muddies the waters.[88] The rationale of preventing unconstitutional discrimination is the mirror image of the rationale in *City of Rome*, for it apparently wields the effects test to stop *future* discrimination rather than halting the collateral effects of past discrimination. How does the prophylactic rationale work? On the one hand, any law which prohibits X is clearly designed to prevent X from happening.[89] The Court, however, appears to envision a class of laws which prohibits X in order to prevent Y from happening; here, X would be discriminatory effects and Y purposeful discrimination.

But how do purpose and effects relate to one another in this instance? In arguing that discriminatory effects are not themselves constitutional violations but can still be prohibited as a means of enforcing the Constitution, the supposition would be that there are enough instances in which purposeful discrimination can be inferred from discriminatory effects without being provable in a court of law that Congress is justified in outlawing effects, despite the potential for overinclusiveness. But as Douglas Laycock argues, the Court's congruence and proportionality test leaves Congress guessing as to how many instances of discrimination are enough:

> Under this rule, sometimes Congress can dispense with proof of motive or overt discrimination, and sometimes it cannot. . . . The difference apparently depends on whether the Court thinks there are enough cases of unconstitutionality to justify dispensing with complete proof of unconstitutionality. If there are enough such cases, then dispensing with proof is remedial—a way of getting at real cases of unconstitutionality. If there are not enough such cases, then dispensing with proof is substantive; it changes the rules to reach other cases. Deciding how many cases of unconstitutionality are enough would seem to be a legislative judgment, but *Flores* [*City of Boerne*] makes it a judicial question.[90]

Kimel and *Garrett* applied the same approach to the abrogation of state sovereign immunity: as the Court read the legislative record, there were not enough instances of unconstitutional state age discrimination (*Kimel*) and disability discrimination (*Garrett*) for Congress validly to have enacted provisions providing for suits by individuals against state entities.[91] By contrast, in *Hibbs*,

88. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.").

89. Justice Stevens upbraided his colleagues with this point in his dissent in *Michigan v. Harvey*, 494 U.S. 344, 368–69 (1990) ("Apparently as a means of identifying rules it disfavors, the Court repeatedly uses the term 'prophylactic rule.' . . . It is important to remember, however, that all rules are prophylactic."), *quoted in* Maloy, *supra* note 76, at 2475.

90. Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 770 (1998).

91. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("The legislative

the Court found that the pattern of "limited state leave policies" found by Congress evidenced a sufficient record of "gender-based discrimination in the administration of leave benefits" to merit "the enactment of prophylactic § 5 legislation."[92]

The resolution of this issue is beyond the scope of this essay, and is also unnecessary to my argument. I will argue that the provisions of the VRA under consideration are congruent and proportional to the injury of voting discrimination whether or not voting practices with discriminatory effects are violations of the Fifteenth Amendment.

II.
RECENT CONSTITUTIONAL CONCERNS WITH THE VRA

A. Current literature on the constitutionality of the VRA

In light of the recent affirmation of the constitutionality of Section 5 of the VRA, lower courts have treated the validity of Section 5 as a non-issue, disposing of it summarily by citing precedent.[93] If the constitutionality of Section 5 is to be reconsidered judicially, it would therefore have to be by the Supreme Court. A number of academic commentators, however, have treated the issue more substantively. I consider here only treatments of the VRA which post-date the *City of Boerne* decision, in which the Court substantially modified the standard for the appropriateness of legislation enacted under Section 5 of the Fourteenth Amendment.[94]

Shortly after the *City of Boerne* decision was handed down, Pamela S. Karlan briefly but energetically defended the constitutionality of both Section 2 and Section 5 of the VRA.[95] Karlan argued that *City of Boerne* sanctioned the congressional prohibition of three kinds of invidious discrimination: internal, external, and prospective.[96] Under the internal model, voting practices them-

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record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."); *Kimel*, 528 U.S. at 64 ("A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.").

92. *Hibbs*, 123 S. Ct. 1972, 1981 (2003).

93. *See* Giles v. Ashcroft, 193 F. Supp. 2d 258, 265 (D.D.C. 2002) (stating that challenges to constitutionality of Section 5 "are entirely frivolous in light of overwhelming Supreme Court precedent"). *But see* Ward v. Alabama, 31 F. Supp. 2d 968, 979 (M.D. Ala. 1998) (De Ment, J., concurring) (acknowledging that precedent dictates § 5's constitutionality, but going on record as agreeing with Justice Black's dissent in *Katzenbach*, because "[n]ot only does § 5 require states to grovel at the feet of the Attorney General or the District Court of the District of Columbia, but also it strips southern Federal District Judges of their constitutional power under Article III" since they are precluded from reaching the merits of any Section 5 case).

94. *See supra* notes 37–92 and accompanying text.

95. Karlan, *supra* note 16, at 728–38.

96. *Id.* at 728.

selves may be a source of discrimination, as with literacy tests that are administered in an intentionally discriminatory manner.[97] Under the external model, the practice may be facially neutral, but other forms of governmental discrimination may lead to the practice having a disparate impact.[98] For example, past discrimination in education may have a negative impact on the ability of minorities to pass even a fairly administered literacy test.[99] Lastly, under the prospective model, voting practices may enable future discriminatory action, such as the exclusion of minorities from public services due to redistricting that results in minority disenfranchisement or vote dilution, allowing public officials to ignore them with impunity.[100] Karlan concludes that on the record before Congress in 1982, all three forms of discrimination were evident, and both Section 2 and Section 5 were proportional responses to these otherwise intractable forms of discrimination. In particular, she emphasizes that if the VRA were to be restricted to the judicial standard of intentional discrimination, there would be a significant risk that many constitutional violations will be missed simply because of the extreme difficulty of detecting intentional discrimination,[101] especially when officials are on notice that their conduct will be subject to scrutiny.

While Karlan's treatment of the constitutionality of Section 5 is the most comprehensive to date, it was published before the Supreme Court cases subsequent to the Court's affirmation of the constitutionality of Section 5 in *Lopez v. Monterey County*.[102] Subsequent cases may signal broader problems for enforcement of Sections 4 and 5 of the VRA than suggested by the affirmation in *Lopez*. After *Lopez*, there have been two brief discussions of its impact on the constitutionality of the VRA: one focusing on Section 2 and another focusing on Section 5.[103] John Matthew Guard takes up questions about the VRA generally, including the constitutionality of the effects test, but treats Section 5 as secure after *Lopez*, arguing instead for the constitutional infirmity of Section 2.[104] Guard's argument that Section 2 "could be unconstitutional" boils

97. *Id.*

98. *Id.* at 728–29.

99. *Id.*

100. *Id.* at 729.

101. *Id.* at 738 ("[T]he Court should conclude that the risk that constitutionally innocuous conduct will be banned is outweighed by the difficulty of detecting and stopping serious constitutional injuries.").

102. 525 U.S. 266 (1999). In *Lopez*, the Court held that preclearance coverage extends to voting changes made by a county even though California law required the changes and California as a whole was not covered under Section 5.

103. Charlotte Marx Harper, Lopez v. Monterey County*: A Remedy Gone Too Far?*, 52 BAYLOR L. REV. 435, 449–55 (2000) (discussing constitutionality of Section 5); John Matthew Guard, *"Impotent Figureheads"? State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act after* Lopez v. Monterey County *and* City of Boerne v. Flores, 74 TUL. L. REV. 329 (1999).

104. Guard's distinguishing of *Lopez* for Section 2 purposes is, however, mistaken. He argues that "Section 5's coverage scheme is based on actual evidence of discrimination somewhere

down to his assertion that the "heavy litigation burden" which Section 2 entails, combined with the fact that it curtails state control over redistricting, "substantially outweigh any constitutional misconduct that exists or existed."[105] Yet Guard undertakes no empirical survey of the extent of past or present constitutional violations in the area of voting.

Charlotte Harper, on the other hand, considers Section 5 in light of both *City of Boerne* and *Lopez*. She cites the holdings in *Katzenbach* and *City of Rome* to conclude that Section 5 is facially constitutional, but argues briefly that in light of *City of Boerne*, "[t]he application of Section 5 of the VRA to the laws enacted by a non-covered state does not fit within the remedial nature of the Fifteenth Amendment," and thus *Lopez* was wrongly decided.[106] She claims that *Katzenbach* and *City of Rome* can be distinguished from the facts in *Lopez* because in *Katzenbach* and *City of Rome*, "the intrusion was only justified by the Court's finding of a history of pervasive and systematic discriminatory voting practices. Prior to *Lopez* [], the Court had *never* justified federal intrusion in a state with no history of discrimination."[107] Like Guard, Harper confuses the myriad discriminatory practices, many of which occurred in the South and which justified the passage of Section 5, with the coverage scheme itself, which refers neither to race nor to discrimination, but only to voter registration rates and the use of "tests or devices." Racially discriminatory voting practices were clearly foremost on Congress's agenda when it crafted the preclearance formula.[108] But in neither *Katzenbach* nor *City of Rome* did the Court consider the history of discrimination *in those particular jurisdictions* when deciding on the validity of Section 5. In his *City of Rome* dissent, Justice Rehnquist pointedly mentioned the lower court's finding "that the city has engaged in no purposeful discrimination in enacting these changes, or otherwise, for almost two decades."[109] And even in *Katzenbach*, the Court noted that discrimination in voting had been found in "*a great majority* of the States and political subdivisions affected by the new remedies of the Act"[110]—not necessarily in every State. Harper's con-

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in the uncovered [sic] jurisdiction. Yet Section 2 applies even if there are no governmental entities with histories of discriminatory conduct." Guard, *supra* note 103, at 362. His assertion about Section 5 is flatly wrong; the coverage formula is an objective one, considering only the use of tests or devices and percentages of voters registered. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2000). Indeed, the fact that Section 5 applies even when there is no history of discrimination is one of Justice Rehnquist's central concerns in his dissent in *City of Rome v. United States*. *See* City of Rome v. United States, 446 U.S. 156, 211 (1980) (Rehnquist, J., dissenting).

105. Guard, *supra* note 103, at 363.

106. Harper, *supra* note 103, at 453.

107. *Id.* at 452.

108. *Katzenbach*, 383 U.S. at 329 ("Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination . . . .").

109. *City of Rome*, 446 U.S. at 211 (Rehnquist, J., dissenting).

110. *Katzenbach*, 383 U.S. at 329 (emphasis added). This is borne out by the fact that some states that were covered under the 1965 Act had no significant minority population, and were thus

stitutional argument—that federal intrusion must be directly linked to evidence of discrimination—thus fails on the weight of the very precedents she invokes.

Although there have been several published considerations of *Bossier Parish II*,[111] none of them address the question of the impact the case may have for future challenges to the constitutionality of either Section 4 or Section 5 of the Act.[112]

B. Federalism and the Voting Rights Act

Section 5 of the Voting Rights Act represents the most powerful intrusion into state and local sovereignty of the civil rights legislation passed in the postwar period. Unlike the ban on literacy tests which was applied nationwide following the 1970 Amendments to the VRA, Section 5 "applies only in those jurisdictions that used a test or device for voting and in which less than half of the voting age residents were registered or voted in either the 1964, 1968, or 1972 presidential elections."[113] While sixteen states are covered at least in part, including Alaska and parts of New York, New Hampshire, and Michigan, the bulk of the coverage is in the South.[114] No covered jurisdiction may implement any changes in voting practices without first receiving the approval of the Department of Justice. To receive approval, or preclearance, a covered jurisdiction has two options. It can either submit a proposed change to the DOJ or file for a declaratory judgment in the United States District Court for the District of Columbia. The standard for both the DOJ and the judicial approval is the same: the change will not be approved unless it is found both that it "does not

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able to bail out shortly after being covered.

111. 528 U.S. 320 (2000). *See* David Harvey, *Section 5 of the Voting Rights Act Does Not Bar Preclearance of a Redistricting Plan Enacted With Discriminatory But Nonretrogressive Purpose:* Reno v. Bossier Parish Sch. Bd., 39 DUQ. L. REV. 477, 512 (2001) (explicating the decision and brief history of Section 5 jurisprudence, ending with three paragraphs affirming that the decision "furthers the purpose of the VRA."); Alaina C. Beverly, *Lowering the Preclearance Hurdle:* Reno v. Bossier Parish School Board, 5 MICH. J. RACE & L. 695 (2000) (explaining the decision, criticizing it as at odds with prior jurisprudence, and speculating on its effects on future redistricting); Charlotte Marx Harper, *A Promise for Litigation:* Reno v. Bossier Parish School Board, 52 BAYLOR L. REV. 647, 661 (2000) (providing an overview of recent redistricting cases, explicating the decision, and speculating on the significance of the case for the "redistricting landscape").

112. The most recent consideration of both *Lopez* and *Bossier Parish II*, by Ellen Katz, is a reflection not on the constitutional impact of these cases but on the attitudes of the Court toward the DOJ that underlie the decisions and explain their apparent inconsistency. Ellen Katz, *Federalism, Preclearance and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001).

113. Voting Rights Act of 1965 § 5, 42 U.S.C. §§ 1973b(c), 1973c, 1973aa–1a(b) (2000); 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, 30–32 (1983) ("The term 'test or device' includes literacy tests, educational requirements, good character tests, and exclusively English language registration procedures or elections where a single linguistic minority comprises more than 5 percent of the voting age population of the jurisdiction.").

114. Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended, 28 C.F.R. app. § 51 (2002).

have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[115] Thus, there are two aspects to the pre-clearance process which are unique among federal civil rights legislation. First, enforcement is preemptive because jurisdictions must apply to the DOJ for approval rather than wait for an enforcement action by the DOJ or a private party that may not come. Second, the burden of proof is on the covered jurisdiction to show that its proposed change does *not* discriminate, rather than on the DOJ or the aggrieved party to show that the practice *is* discriminatory.

When South Carolina first challenged the implementation of the VRA in 1966, the Supreme Court under Chief Justice Warren held that the intrusion into state sovereignty was justified because "case-by-case litigation [by the DOJ] was inadequate to combat widespread and persistent discrimination in voting, and because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."[116] In light of this, Chief Justice Warren famously stated that "Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."[117]

From that moment on, some members of the Court have always been troubled by the implications of Section 5 on the balance of power between the federal government and the states. Justice Black's harsh dissent in *Katzenbach* evinced his concern about the persecution of the South when he declared that "the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces."[118] Justice Black reiterated this view in later dissents,[119] a view that has been shared by justices who do not hail from the South. Justice Powell recorded his reservations about the constitutionality of Section 5 in both dissents and concurrences.[120] In

115. 42 U.S.C. § 1973c.

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

117. *Id.*

118. *Id.* at 359–60 (Black, J., dissenting).

119. *See* Perkins v. Matthews, 400 U.S. 379, 401 (1971) (Black, J., dissenting) (arguing that in holding that town could not change polling places without federal approval, "[t]he fears which precipitated my dissent in *Katzenbach* have been fully realized"); Allen v. State Bd. of Elections, 393 U.S. 544, 595 (1969) (Black, J., dissenting) (arguing about Section 5 generally, "[T]his is reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did."); Gaston County v. United States, 395 U.S. 285, 297 (1969) (Black, J., dissenting) (dissenting for "substantially the same reasons he stated" in *Katzenbach*).

120. *See* City of Rome v. United States, 446 U.S. 156, 201–02 (1980) (Powell, J., dissenting) (arguing that preclearance raises constitutional problems both "because it destroys local control of the means of self-government" and because it "operates at an individual level to diminish the voting rights of residents of covered areas"); United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110, 139 (1978) (Powell, J., concurring in part and concurring in the judgment) (concurring despite fact that his "reservations as to the constitutionality of the Act have not abated"); Georgia

addition to his forceful dissent in *City of Rome*, Chief Justice Rehnquist has joined dissents which raise federalism concerns in a number of cases expanding the scope of Section 5.[121] In *United States v. Board of Commissioners of Sheffield*, the Court held that Section 5 applies not only to counties but to all entities with power over any aspect of the electoral process.[122] Justice Stevens, joined by Chief Justice Burger and then-Justice Rehnquist, dissented from the majority's interpretation of the Act and insisted that because the preclearance process marks "a substantial departure from ordinary concepts of our federal system," and because "its encroachment on state sovereignty is significant and undeniable," Section 5 must "be read and interpreted with care."[123]

I raise the concerns of the dissenters not merely for historical interest, but because at present, the Court has become more attuned to their arguments than at any other time in the recent past. Justice O'Connor's opinion in *Lopez* portrays the shift in the federal-state balance occasioned by the preclearance process as a settled affair, but there is considerable tension below the surface.

C. Current Supreme Court concerns about the constitutionality of VRA provisions or their application

Although the Court has not substantively taken up a constitutional challenge to Section 5 of the Voting Rights Act since *City of Rome*, it recently reaffirmed its holding in a brief section of *Lopez*.[124] In *Lopez*, the Court held that preclearance coverage extends to voting changes made by Monterey County, California, notwithstanding the fact that California law required the changes, and that the state of California as a whole was not covered under Section 5. Along with challenges to the plaintiff's reading of the statute, the state also argued that constitutional problems would be raised by coverage of changes dictated by an uncovered state. Citing both *Katzenbach* and *City of Rome*, Justice O'Connor noted that "we have specifically upheld the constitutionality of § 5 of the Act

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v. United States, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) ("It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for *advance* review.").

121. *City of Rome*, 446 U.S. at 209 (Rehnquist, J., dissenting) ("While I agree with Mr. Justice Powell's conclusion that requiring localities to *submit* to preclearance is a significant intrusion on local autonomy, it is an even greater intrusion on that autonomy to *deny* preclearance sought."). Justice Rehnquist has also joined in the dissents in *Bd. of Comm'rs of Sheffield*, 435 U.S. at 141 (Stevens, J., dissenting) (describing preclearance requirement as "'a substantial departure . . . from ordinary concepts of our federal system'") (alteration in original) (quoting *Hearings on S. 407 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess., 536 (1975 Senate Hearings) (testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division)), and in *Georgia*, 411 U.S. at 543–44 (White, J., dissenting) (asserting that states should not be forced to bear preclearance burden "where its proposed change is so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality").

122. *Bd. of Comm'rs of Sheffield*, 435 U.S. at 117–35.

123. *Id.* at 141 (Stevens, J., dissenting).

124. 525 U.S. 266, 282–85 (1999).

against a challenge that this provision usurps powers reserved to the States,"[125] and then went on to hold that *Katzenbach* does not "require a different result where, as here, § 5 is held to cover acts initiated by noncovered States."[126] Justice O'Connor concluded her brief constitutional analysis with a broad statement, holding that "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."[127]

Justice Thomas filed a lone dissent, reaching a different result by applying the *City of Boerne* test to the decision to cover changes dictated by state law.[128] His objection was based on the principle that "[t]here can be no remedy without a wrong,"[129] and on the fact that there had been "no legislative finding" of intentional discrimination on the part of the state of California.[130] He reasoned that California thus should not be subjected to the remedial scheme of Section 5. Justice Thomas reads the *City of Boerne* congruence requirement extremely rigidly, demanding that subjection to the preclearance requirements is constitutionally permissible only upon a showing of purposeful discrimination in each and every covered jurisdiction.[131] For Justice Thomas, then, there is no margin of error for overinclusiveness in the coverage formula. In light of the fact that that the coverage formula is race-neutral,[132] the risk of overinclusion is very high. Though he does not mention it, Justice Thomas's concern may also have been that the state of California could not bail out of preclearance scrutiny, since it was technically not covered at all.

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125. *Id.* at 283.

126. *Id.*

127. *Id.* at 284–85.

128. *Id.* at 295 (Thomas, J., dissenting) (arguing that the majority "overlooks our warning in *City of Boerne* that '[t]he appropriateness of remedial measures must be considered in light of the evil presented'").

129. *Id.* at 294.

130. *Id.* at 295.

131. *Id.* at 294 ("In both [*Katzenbach* and *City of Rome*], we required Congress to have some evidence that the jurisdiction burdened with preclearance obligations had actually engaged in such intentional discrimination."). In fact, neither case called for such jurisdiction-specific findings. The lack of such findings was the basis for then-Justice Rehnquist's dissent in *City of Rome*, where he noted that the Court's VRA cases had "never directly presented the constitutional questions implicated by the lower court finding in this case that the city has engaged in no purposeful discrimination in enacting these changes, or otherwise, for almost two decades." *City of Rome*, 446 U.S. at 211 (Rehnquist, J, dissenting). *See also Katzenbach*, 383 U.S. at 329 ("Congress began work with reliable evidence of actual voting discrimination in *a great majority* of the States and political subdivisions affected by the new remedies of the Act.") (emphasis added). Justice Scalia commits the same error in his dissent in *Hibbs*, 123 S. Ct. 1972 (2003) in which he insists that "[t]here is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations of another State, or by most other States, or even by 49 other States." *Id.* at 1985 (Scalia, J., dissenting). Justice Scalia even cites *City of Rome* as support for this principle despite Justice Rehnquist's dissent on the same issue.

132. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973b (2000) (determining coverage by use of "tests or devices" and percentage of all eligible voters registered as of certain dates).

The importance of Justice Thomas's dissent is magnified by the fact that its legal holding was endorsed by Justice Kennedy's concurrence, with which Chief Justice Rehnquist joined.[133] In his concurrence, Justice Kennedy takes account of "the constitutional concerns identified by Justice Thomas," though he ultimately joins the majority "because it is clear that the state enactments requiring the voting changes at issue in fact embodied the policy preferences and determinations of the county itself."[134] Three justices have therefore expressed their concerns that the VRA may fail the *City of Boerne* test as applied to circumstances in which intentional discrimination cannot be shown to underlie the coverage of a particular jurisdiction.

While the Court has looked favorably on the Act, and even Section 5 when considered as a whole, it has expressed concerns over the manner in which the Act has been implemented. Most notably, the Court has held that the Equal Protection Clause restricts the redrawing of voting districts, even if those districts are redrawn in an attempt to meet the requirements of the VRA (either Section 2 or Section 5).[135] The Court's redistricting jurisprudence demonstrates that the Court closely monitors the implementation of the VRA for possible unconstitutional overreaching. Justice O'Connor noted in one plurality opinion that while compliance with the results test of Section 2 of the VRA has been assumed to be a "compelling state interest," in fact the Court has never decided that question.[136] She followed up these speculations, however, with a solitary concurrence to her own opinion in which she emphasized that "we should allow States to assume the constitutionality of § 2 of the VRA, including the 1982 amendments."[137] A crucial strand of Justice O'Connor's argument is her respect for Congress's judgment that "without the results test, nothing could be done about 'overwhelming evidence of unequal access to the electoral system,' or about 'voting practices and procedures [that] perpetuate the effects of past purposeful discrimination.'"[138] The same analysis should apply by analogy to the effects prong of Section 5, insofar as the emphasis in Justice O'Connor's analysis is on the extension of congressional power beyond the prohibition of intentional discrimination.

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133. *Lopez*, 525 U.S at 288 (Kennedy, J., concurring).

134. *Id.*

135. *See, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

136. *Vera*, 517 U.S. at 977 (citing Growe v. Emison, 507 U.S. 25, 37–42 (1993); Shaw v. Hunt, 517 U.S. at 915; *Miller*, 515 U.S. at 920–21). The plurality opinion in *Vera* was joined by Justice Kennedy and Chief Justice Rehnquist. Justice Kennedy has twice mentioned the fact that the Court has left open the question of the constitutionality of Section 2. *See* Johnson v. DeGrandy, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

137. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring).

138. *Id.* (O'Connor, J., concurring) (quoting S. REP. NO. 97-417, at 26, 40 (1982), *reprinted in* 1982 U.S.C.C.A.N. 204, 218).

The most recent narrowing of the scope of Section 5 came in *Bossier Parish II*,[139] where the Court, in a 5-4 decision,[140] held that a redistricting plan with a "discriminatory but nonretrogressive" purpose does not violate Section 5. That ungainly term refers to a proposed voting change in which despite evidence of purposeful discrimination, the change in voting proposed by the jurisdiction still manages to improve on the status quo ante with respect to the position of minority voters, or at least maintains the same relative position. The DOJ had previously interpreted Section 5 to deny preclearance to any purposefully discriminatory voting change without regard to its effects.[141] The Bossier Parish School Board had adopted a plan "which, like the plan then in effect, contained no majority-black districts, although blacks made up approximately 20% of the parish's population."[142]

Bossier Parish II thus extends the Court's treatment of Section 5 in the 1976 case *Beer v. United States*.[143] In *Beer*, the Court held that a city's reapportionment plan of its councilmanic districts was improperly rejected under Section 5 because the plan created the possibility for African Americans to elect one council member while under the previous plan, none could have realistically been elected.[144] The *Beer* Court reasoned that if the prospects for minorities to elect a candidate had improved, the right to vote could not have been "abridged."[145] The Court stated that "the purpose of § 5 has always been 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."[146] The *Beer* Court seemed to leave a loophole, since it also argued that no "ameliorative" change (i.e., one that improved the position of minority voters) could violate Section 5 unless it "so discriminates on the basis of race or color as to violate the Constitution."[147] *Bossier Parish II* closed that loophole, reading the latter statement in *Beer* as "pure dictum."[148] Using both constitutional and non-constitutional arguments, the *Bossier Parish II* decision holds that *Beer* applies to the purpose prong of

139. 528 U.S. 320 (2000).

140. *Id.* One part of Justice Scalia's opinion addressed a mootness question on which the Court was unanimous. The remainder of the opinion was joined by Justices O'Connor, Kennedy, and Thomas, and by Chief Justice Rehnquist.

141. *Id.* at 324–25.

142. *Id.* at 323.

143. 425 U.S. 130 (1976).

144. *Id.* at 141.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Bossier Parish II*, 528 U.S. 320, 338 (2000). The Court also argues that the statement in *Beer* "referred to a constitutional violation *other than* vote dilution—and, more specifically, a violation consisting of a 'denial' of the right to vote, rather than an 'abridgement'," and that "the word 'deny' (unlike the word 'abridge') does not import a comparison with the status quo." *Id.* at 337–38.

Section 5 as well as to the effects prong. The *Bossier Parish II* Court, with Justice Scalia writing for the majority, interpreted the statute to read the word "abridging" as applying to both the purpose and effect prongs.[149] The Court also consults Webster's New International and the American Heritage dictionaries, arguing that as defined, "the term 'abridge'... necessarily entails a comparison."[150] In its constitutional argument, the Court warned that extending Section 5 to "discriminatory but nonretrogressive vote-dilutive purposes... would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts [citing *Lopez*], perhaps to the extent of raising concerns about § 5's constitutionality."[151] The Court provided no insight as to why this particular extension would raise constitutional concerns; it is especially puzzling in light of the Court's acknowledgement that such discriminatory changes are already unconstitutional according to the judicially enforceable standard.[152]

III.

APPLYING THE *CITY OF BOERNE* TEST TO THE VRA: ARE CURRENT PRECLEARANCE PROCEDURES AND REMEDIES CONGRUENT AND PROPORTIONAL?

After *Bossier Parish II*, changes in voting practices that are discriminatory in purpose but not retrogressive in effect meet the standard for preclearance approval.[153] To overcome this holding, Congress would need to amend the VRA and make explicit that a discriminatory purpose alone is sufficient for the DOJ to object to such changes,[154] although the DOJ and private parties may still

149. *Id.* at 329 ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.").

150. *Id.* at 333–34.

151. *Id.* at 336. The first *Bossier Parish* decision also mentioned federalism concerns in explaining why a Section 2 violation was not by itself reason to deny preclearance, but constitutional concerns were not explicitly raised. *See Bossier Parish I,* 520 U.S. 471, 480 (1997) ("To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive 'result' before it can implement that plan... is to increase further the serious federalism costs already implicated by § 5.").

152. *See Bossier Parish II*, 528 U.S. at 336.

153. *Id.*

154. A bill to this effect was introduced in the House in July 2000, but no action has been taken on it since it was sent to the Subcommittee on the Constitution a month later. *See* Voting Rights Clarification Act of 2000, H.R. 4961, 106th Cong. (2000). Congress could also enact legislation which would have the effect of restoring the DOJ regulations to the status quo before the first *Bossier Parish* decision, which held that a proposed voting change cannot be denied preclearance simply because it violates Section 2. *See Bossier Parish I*, 520 U.S. 471. That decision resulted in the removal of 28 C.F.R. § 51.55(b)(2), which automatically denied preclearance to changes which violated Section 2. *See* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended; Revision of Procedures, 63 Fed. Reg. 24,108, 24, 109 (May 1, 1998) (to be codified at 28 C.F.R. § 51.55) (amending Section 5 regulations). For arguments that the incorporation of Section 2 into Section 5 is dictated by legislative history, see Heather K. Way, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439 (1996), and Mark Haddad, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L. J. 139 (1984).

file a Section 2 suit to block the implementation of such changes.[155] Accordingly, with the exception of the DOJ's guidelines on prohibited purposes, I consider in this section only the constitutionality of the effects prong, as opposed to the purposes prong, of Section 5. I conclude with a consideration of the bail-out provisions of Section 4 as they relate to preclearance.

A. DOJ guidelines: Section 5 prohibited purposes and the Bossier Parish II *holding*

On January 18, 2001, as one of his last acts as outgoing Assistant Attorney General in the Civil Rights Division, Bill Lann Lee issued a notice entitled "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c."[156] It was released prior to the rounds of redistricting that followed the 2000 Census. The notice largely recapitulates the DOJ's regulations on Section 5[157] and points to case law of specific relevance in the redistricting context. It includes, however, one interpretation of the statute which does not follow as a matter of course. The notice explains that for redistricting plans which are "alleged to have a retrogressive effect but a functional analysis does not yield clear conclusions about the plan's effect," closer examination is required.[158] In addition to the search for present intentional discrimination, the examination may also "include consideration of whether there is a purpose to retrogress in the future even though there is no retrogression at the time of the submission."[159] Although this may seem like an attempt by the DOJ to stretch the standard for a prohibited purpose beyond the breaking point, the explanation is in fact an appropriate encapsulation of a discussion at the end of the *Bossier Parish II* opinion of an earlier Section 5 case, *City of Pleasant Grove v. United States*.[160] In that case, the Supreme Court upheld the denial of preclearance to Pleasant Grove, Alabama, a city that proposed to annex "two parcels of land, one inhabited by a few whites, and the other vacant but likely to be inhabited by whites in the near future."[161] Although the immediate effect of the annexation would not impact minority voting strength because no African Americans lived in Pleasant Grove at the time, the Court held that "Section 5 looks not only to the present effects of changes, but

155. The appellants in *Bossier Parish II* argued that preclearance should be denied because the Board's plan violated Section 2 of the Voting Rights Act. *See Bossier Parish II*, 528 U.S. at 324.

156. Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (January 18, 2001).

157. Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51 (1987).

158. Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. at 5413–14.

159. *Id.* at 5414.

160. 479 U.S. 462 (1987).

161. Id. at 464.

their future effects as well . . . . Likewise, an impermissible purpose under § 5 may relate to anticipated as well as present circumstances."[162] The *Bossier Parish II* Court criticized the dissent for characterizing *City of Pleasant Grove* as a prior instance of a discriminatory but nonretrogressive purpose that was deemed to violate Section 5.[163] The purpose in *City of Pleasant Grove* was retrogressive at the time of the annexation, the Court held, because the jurisdiction was "intending to worsen the voting strength of *future* minority voters."[164] The explanation in the 2001 notice, then, simply operationalizes this discussion in *Bossier Parish II* by giving jurisdictions warning that not only will present demographics be considered in evaluating minority voting strength, but future trends as well. For obvious reasons, the DOJ guidelines do not control the United States District Court for the District of Columbia in Section 5 determinations concerning purpose.

B. The effects prong of Section 5

The Act's language pertaining to the results test in Section 2[165] and the effects prong in Section 5[166] is notably different. This difference can be explained by the fact that although both Section 2 and Section 5 originally tracked the language of the Fifteenth Amendment, Section 2 underwent extensive debate and revision during the 1982 amendments,[167] while Section 5 did not..[168] Both sections, however, are clearly designed to get at serious limitations on minority voting power even where no intentional discrimination has been found. Further, the Court's repeated holdings that "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect,"[169] seems to indicate that both would pass constitutional muster. For many significant abridgements of the right to vote, the Court will no doubt continue to uphold the validity of both Section 2 and Section 5 to prohibit discriminatory effects. However, the restrictive interpretation of Section 5 in *Bossier Parish II* in light

162. *Id.*; *see also Bossier Parish II*, 528 U.S. at 340 (quoting *City of Pleasant Grove*, 479 U.S. at 471).

163. *See Bossier Parish II*, 528 U.S. at 340–41.

164. *Id.*

165. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(b) (2000).

166. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2000).

167. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (documenting the legislative battles over the amendments to Section 2).

168. The 1982 amendments to Section 2 changed the original wording slightly, but added a new subsection making it clear that a violation could be found on basis of discriminatory results alone. *Compare* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (current version at 42 U.S.C. § 1973 (2000)) *with* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (current version at 42 U.S.C. § 1973 (2000)).

169. Lopez v. Monterey County, 525 U.S. 266, 283 (1999) (quoting City of Rome v. United States, 446 U.S. 156, 175 (1980)).

of the "substantive federalism costs,"[170] along with the increased scrutiny to Congress's Fourteenth Amendment power, suggests that the effects prongs of both sections will no longer receive the deference they once received, and that congressional findings from the '60s, '70s, and '80s may no longer suffice to demonstrate to the Court that widespread voting discrimination continues to exist. In light of these concerns, I argue for the continuing validity of the effects prong of Section 5.

The potential vulnerability of the effects prong comes from the abandonment of the *McCulloch* standard for congressional power to enforce the Fourteenth and Fifteenth Amendments.[171] *Lopez* seems to reaffirm in a straightforward manner the holding of *City of Rome* with respect to the effects prong, even though *Lopez* dealt not with the effects prong but with what kinds of voting changes were subject to preclearance review. As has been observed, however, *Lopez* is an "odd decision" because it is out of step with both the *City of Boerne* line of cases and with both *Bossier Parish* decisions.[172] Since *Lopez* comes between decisions which have restricted congressional enforcement power,[173] it certainly does not portend any kind of reversal in the *City of Boerne* trend. It might be explained as part of the "VRA exceptionalism" that led the Court in *City of Boerne* and *Garrett* to single out the Act as an example of an appropriate exercise of congressional power. One possible reason for singling out the VRA is that it addresses racial discrimination, the only specific form of discrimination directly addressed by the Reconstruction Amendments—it may be that the current Court demands more for statutes which prohibit discrimination based on religion, gender,[174] age, or disability.[175] But that does not explain the restrictive

170. *Bossier Parish II*, 528 U.S. 320, 336 (2000).

171. See *supra* notes 37–92 and accompanying text.

172. Katz, *supra* note 112, at 1179–80.

173. *Lopez* was decided in 1999, two years after *City of Boerne*, which was decided in 1997, and shortly before *Florida Prepaid* and *College Savings*, which were decided in 1999. *Florida Prepaid* and *College Savings* came down on the same day. *Lopez* was also decided a year before *Bossier Parish II*, which was decided in 2000.

174. While *United States v. Morrison*, 529 U.S. 598 (2000), might have suggested that legislation addressing gender discrimination will not receive the same deference as that addressing race discrimination, the Supreme Court's most recent case in the *City of Boerne* line showed otherwise. In *Nevada Dep't of Human Resources v. Hibbs*, a 6-3 majority upheld a provision of the Family and Medical Leave Act [FMLA] permitting State employees to sue the State for violations of the family leave requirements. 123 S. Ct. 1972 (2003). Writing for five Justices, Chief Justice Rehnquist argued that the statute could be upheld as a means of fighting gender discrimination under the Fourteenth Amendment. Because "the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations." *Id.* at 1982. The opinion also noted the analogy to the Voting Rights Act, where "[b]ecause racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment." *Id.* The opinion does not reveal which acts of racial discrimination were not unconstitutional.

175. The *Florida Prepaid* cases are the only ones in the *City of Boerne* line which are not about the Equal Protection Clause. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (focusing on whether violations of the Lanham Act constituted

reading placed on the VRA by the *Bossier Parish* decisions, unless the Court is hostile to the Act but unwilling to rule it unconstitutional, because that would require the overruling of two high-profile precedents, *Katzenbach* and *City of Rome*. That explanation has the converse problem of having to explain why the Court *expanded* the reach of Section 5 in *Lopez*, holding for the first time that voting changes in a covered jurisdiction are subject to Section 5, notwithstanding the fact that they were required by state law in a state that was not itself subject to preclearance.

Ellen Katz explains the Court's apparent hostility to the VRA in the *Bossier Parish* cases and the contrasting generosity in *Lopez* by calling attention to the differing institutional contexts of the cases.[176] The *Bossier Parish* cases addressed the substantive standard applied either by the DOJ or the United States District Court for the District of Columbia, while *Lopez* is a coverage case. Coverage questions are addressed by a federal three-judge panel in the district where the Section 5 case is brought.[177] Katz argues that "[t]he Rehnquist Court has long been convinced that DOJ has abused its authority in administering the preclearance process and has intruded unjustifiably in state sovereign processes."[178] On coverage questions, by contrast, "the DOJ has no say," and although it means that the DOJ will be able to subject more voting changes to preclearance, "[t]he Rehnquist Court, with one major exception, has construed Section 5 coverage broadly when confronted with coverage questions of this sort."[179] Katz interprets the different stances toward coverage and standards cases as a subtle gradation in the Court's federalism doctrine: while the Court has demonstrated "an underlying commitment to preclearance as a legitimate federal structure enforcing the Fourteenth and Fifteenth Amendments," notwithstanding the *City of Boerne* line of cases, that "does not diminish the Court's concern that those exercising power within that structure have abused their authority and consequently intruded unjustifiably into state sovereignty."[180] Katz's explanation has the virtue of accounting for an apparent anomaly *within*

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a deprivation of property without due process of law); Fla. Prepaid Postsecondary Educ. Expense Bd. v Coll. Sav. Bank, 527 U.S. 627 (1999) (focusing on whether Congress could enact patent infringement prohibitions as a means of enforcing the Due Process Clause).

176. *See* Katz, *supra* note 112, at 1208–18.

177. *Id.* at 1208.

178. *Id.* The primary area of the concern for the Court in recent years has been in the area of racial redistricting, where the Court has been critical of what it sees as the DOJ's "max-black" policy. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74 (1997); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995). Note that these are only indirectly Section 5 cases; they concern Equal Protection challenges to the redistricting plans that covered jurisdictions negotiated with the DOJ in order to gain preclearance. The preclearance itself and the applicable standards are not at issue in these cases. *See generally* MAURICE CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING AND THE DEPARTMENT OF JUSTICE (2001).

179. Katz, *supra* note 112, at 1208–09; *see also id.* at 1208–09 n.183 ("The major exception is *Presley v. Etowah County Commission* [502 U.S. 491 (1992)], which held Section 5 inapplicable to laws altering the powers exercised by elected county commissioners.").

180. *Id.* at 1218.

the category of voting rights cases. But it fails to explain why preclearance —the uniquely intrusive federal antidiscrimination remedy, the only one in which the presumption of discrimination must be rebutted on each occasion by states and localities—should be reaffirmed in the midst of the Court's federalism revolution. In other words, Katz's reconciliation of *Lopez* and the *Bossier Parish* cases makes sense in the context of the Court's voting rights jurisprudence, but not in the larger context of the Court's federalism jurisprudence.

Despite my criticism of Katz's explanatory framework, I do not propose an overarching explanation that could reconcile the *City of Boerne* cases with the voting rights cases. Most likely one cannot be found, beyond the fact that the justices have thus far agreed to respect the precedents of the four voting rights cases discussed in *City of Boerne,*[181] which marked the last period in which the Court seriously considered the scope of congressional enforcement power under the Reconstruction Amendments. My aim is the more modest one of demonstrating that even if the Court were to bring the full weight of the congruence and proportionality test to scrutinize the effects prong, the effects prong should withstand that scrutiny, even if the Court were to note that congressional findings regarding racial discrimination are now over twenty years old.[182]

The most obvious rejoinder is that racial discrimination in voting has by no means disappeared since 1982. Congress has not undertaken to gather findings in this area since the 1982 amendments. But other organizations have done so, most recently in the context of the 2000 Presidential Election.[183] Although only a few counties in Florida are covered by Section 5,[184] the review of election

181. City of Boerne v. Flores, 521 U.S. 507, 517–536 (1997). Besides *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980), the two other cases discussed are *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970).

182. It is quite possible that the age of congressional findings is of no constitutional moment. The *City of Boerne* Court "seemed to disclaim any requirement that Congress ensure that the legislation survives only as long as the danger of unconstitutional state action persists." Karlan, *supra* note 16, at 730 (citing *City of Boerne*, 521 U.S. at 533 (noting that legislation passed under Section 5 need not include termination dates)).

183. *See* U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM: AN ANALYSIS OF PROPOSALS AND THE COMMISSION'S RECOMMENDATIONS FOR IMPROVING AMERICA'S ELECTION SYSTEM (Nov. 2001) [hereinafter U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM], *available at* http://www.usccr.gov/pubs/vote2000/elecref/main.htm (finding that despite numerous laws prohibiting discrimination in voting, "there is a lack of coherent enforcement of existing laws—state and federal—protecting the rights of voters"); U.S. COMMISSION ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (June 2001) [hereinafter U.S. COMMISSION ON CIVIL RIGHTS, VOTING IRREGULARITIES], *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm. Private foundations have also issued reports on their findings and recommendations following the 2000 elections. *See* NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (Aug. 2001), *available at* http://www.reformelections.org/data/reports/99_full_report.pdf.

184. Collier, Hardee, Hendry, Hillsborough and Monroe Counties were covered following the 1975 amendments to the Voting Rights Act. *See* U.S. Department of Justice, Civil Rights Division, Voting Section, Section 5 Covered Jurisdictions, *at* http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last revised Jan. 28, 2003).

procedures by national commissions did not focus on Florida alone. In the area of felon disenfranchisement, for example, the United States Commission on Civil Rights reported that "13 percent of the black adult male population are disenfranchised, a rate seven times the national average."[185] Mississippi and Virginia, both covered states, are among five states in which "one in four black men is permanently disenfranchised."[186] The Commission's report does not explicitly allege that such laws are racially discriminatory,[187] but it does recommend that the voting rights of former convicted felons be restored.[188] Felon disenfranchisement laws had been in effect well before the passage of the Act,[189] and so would be beyond the scope of Section 5, absent further disenfranchising action.[190] Nevertheless, the continuation for decades of a voting practice enacted in many cases with a discriminatory purpose,[191] and which has been shown to have a discriminatory effect, certainly counts as evidence of two phenomena. It is evidence that, first, there is an abiding need for strong remedial measures to combat such discrimination, and second, the temporary preclearance measures have by no means abolished the evil of

185. U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM, *supra* note 183, at ch. 4 (citing THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (Oct. 1998)).

186. *Id.* The other three states are Iowa, New Mexico, and Wyoming.

187. A lawsuit filed recently by the Brennan Center for Justice and the Lawyer's Committee for Civil Rights Under Law, however, does make this allegation with respect to the Florida Constitution. *See* Complaint—Class Action in *Johnson v. Bush*, *available at* http://www.brennancenter.org/programs/downloads/flacomplaint92100.pdf. Summary judgment was granted for Florida in *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1343–45 (S.D. Fla. 2002), and the Brennan Center has appealed the case to the Eleventh Circuit, *see* Johnson v. Bush, No. 02-14469C (11th Cir.). I co-authored an amicus brief in support of the plaintiffs on behalf of a group of former law enforcement officials who believe that the Florida law serves no valid penological interest. *See* Brief of Amici Curiae Eric Holder, Jr. et al., Johnson v. Bush, No. 02-14469C (11th Cir. filed October 15, 2002).

188. *See* U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM, *supra* note 183, at ch. 4.

189. Many states have had felony disenfranchisement laws that date from before the enactment of the Fifteenth Amendment, but during the Reconstruction period in the South, "disenfranchisement provisions were often tailored so that their effect would be to exclude mostly, or only, blacks." Andrew Shapiro, *The Disenfranchised*, AM. PROSPECT, November 1, 1997, *available at* http://www.prospect.org/print/V8/35/shapiro-a.html. For example, in 1890, Mississippi modified a constitutional provision barring the vote for persons convicted of "any crime" with narrower language "barring only those convicted of certain petty crimes that blacks were supposedly more likely than whites to commit." *Id.*

190. Further disenfranchising action may be in the offing: "In Mississippi, some politicians have proposed expansion of the state's prohibition on voting from 10 types of felony offenses to all felony offenses." *See* U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM, *supra* note 183, at ch. 4.

191. In its legal challenge to felon disfranchisement in Florida, the Brennan Center attempted to introduce the testimony of Professor Jerrell Shofner, a historian of Florida's Reconstruction, that "Florida's ban on ex-felon voting was enacted in 1868 for racially discriminatory purposes." Press Release, Brennan Center for Justice, Florida Law Denying Vote to Ex-Felons Faces Critical Court Date (March 21, 2002), *available at* http://www.brennancenter.org/presscenter/pressrelease_2002_0325.html.

discrimination in voting.[192] But even if felon disenfranchisement is excluded from any findings on the grounds that this practice has been held constitutional,[193] Congress could undoubtedly compile a record of voting discrimination in covered jurisdictions that may not be as widespread as twenty years ago but still constitutes a "history and pattern of unconstitutional . . . discrimination by the States,"[194] as well as political subdivisions.

Section 5 might nevertheless be decried as overbroad because voting changes by covered jurisdictions may be denied preclearance even when there is no discriminatory animus, either explicitly or buried beneath the surface. To understand the nature of this objection, the rationale for implementing any kind of effects test, in the voting rights context or otherwise, must be understood. As the discussion of the *City of Boerne* line of cases indicates, the current Court has shown its willingness to approve the prohibition of conduct that is not itself unconstitutional, so long as "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[195] The logic of this extension is that after finding a pattern of unconstitutional behavior by, for example, states and municipalities in voting practices, Congress need not require those challenging discrimination to prove intentional discrimination in each and every case because such a burden is so heavy that many such challenges would fail despite the existence of purposeful discrimination.[196] Instead, the plaintiffs (or the DOJ, in the case of preclearance proceedings) need only show a discriminatory effect to be entitled to a remedy—discriminatory effect acts as a proxy for intentional discrimination. Under this rationale for prohibiting discriminatory effects, there will be cases in which there

192. In light of the Court's recent skepticism that the failure to remedy the effects of past discrimination is a compelling interest (see *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)), merely demonstrating the history and present effect of felon disenfranchisement may be insufficient. It may also be necessary to show that state legislatures had some cognizance of the racist modifications of such laws following Reconstruction along with their present discriminatory impact, and in the face of this awareness declined to act. It may be, however, that Justice O'Connor, who provides the swing vote on this issue, would consider voting rights to be an exception to this trend. *See* Bush v. Vera, 517 U.S 952, 991 (1996) (O'Connor, J., concurring) (citing Fullilove v. Klutznick, 448 U.S. 448, 477 (1980) (arguing that congressional authority under Section 2 of the Fifteenth Amendment "extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination")).

193. *See* Richardson v. Ramirez, 418 U.S. 24, 42–43 (1974) (upholding the constitutionality of felon disenfranchisement laws against an equal protection challenge based on Section 2 of the Fourteenth Amendment, which exempts the denial or abridgement of the right to vote based on "participation in rebellion, or other crime" from the sanction of reduced representation).

194. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

195. City of Boerne v. Flores, 521 U.S. 507, 532 (1997). *See also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v Coll. Sav. Bank, 527 U.S. 627, 647 (1999).

196. *See* City of Rome v. United States, 446 U.S. 156, 177 (1980) ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact" (footnote omitted)).

has in fact been *no* intentional discrimination, present or past, and yet the conduct will still be statutorily prohibited.

To justify the continued application of the effects prong under this rationale, it would need to be shown that there remains a significant likelihood that changes in voting practices found to have a discriminatory effect are also in fact the product of intentional discrimination. But such a finding may be extraordinarily difficult to establish. One factor making identification of racial discrimination troublesome is that partisan politics is entangled with race in complex ways.[197] If, for example, a Republican-controlled state legislature enacts a provision disenfranchising felons, it may have been motivated by a desire to prevent potential Democrats from voting, but the reason the prison population's partisan affiliation is so easily identified may be because it is overwhelmingly African American. Another factor is that the effect of a widely publicized prohibition on intentional discrimination will make any discrimination more furtive than ever.[198] It is difficult, then, to know exactly how many incidents of recent intentional discrimination must be offered—either in the face of a current constitutional challenge, or when Section 5 comes up for renewal in 2007—in order to support the continued congruence and proportionality of the law, especially as the Court has begun "[r]eviewing the congressional record as if it were an administrative agency record."[199]

Another rationale for the prohibition of discriminatory effects rests not on the presumption that discriminatory impact is a proxy for present-day intentional discrimination, but on the idea that the effects of even racially-neutral practices are discriminatory due to the effects of past discrimination. The Court articulated this rationale in *Katzenbach* with respect to the banning of literacy tests in covered jurisdictions. At issue was not whether such tests were enacted

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197. *See, e.g.*, Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CALIF. L. REV. 1201, 1223 (1996) ("The many difficulties attending the disaggregation of race and politics . . . all result from the fact that race and political affiliation are, in fact, substantially correlated. It is thus impossible to determine which of the two is a better *explanation*—as opposed to a *predictor*—of voting patterns.").

198. Discrimination will never be so furtive that incidents of intentional discrimination will not emerge. *See Bossier Parish II*, 528 U.S. 320, 348 n.3 (2000) (Souter, J., dissenting) (reporting answer of parish board member when asked why the parish's school in Plain Dealing was predominantly black: "[T]hose people love to live in Plain Dealing . . . . And most of them don't want to get a big job, they would rather stay out there in the country, and stay on Welfare, and stay in Plain Dealing.")

199. *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting). In its decision upholding the Family and Medical Leave Act as a valid exercise of Congress's Section 5 powers, the Ninth Circuit held that requiring Congress to "gather and document sufficient evidence to support the exercise of its constitutionally granted powers[] would raise fundamental separation of powers concerns—the courts would be treating Congress more like an administrative agency than like a co-equal branch of the federal government." *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 856–57 (9th Cir. 2001) (citing A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 378–83 (2001)). While the Supreme Court upheld the Ninth Circuit's decision, see *Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), it did not address this argument.

with the purpose of disenfranchising African Americans—the congressional record showed that "in most of the States covered by the Act," they were[200]—but whether they could be banned despite the Court's holding in *Lassiter v. Northampton County Board of Elections*[201] that literacy tests were constitutional. Much of the discriminatory effect of the tests resulted from their unfair administration by officials who could make it very easy for whites to pass and very difficult for African Americans. But Congress chose to ban the tests altogether rather than to attempt to ensure that they were administered fairly because it recognized that "continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants."[202]

In *Gaston County v. United States*, [203] discussed earlier, the Court recognized even more indirect effects of past discrimination by looking to the impact that decades of unequal educational opportunities in the county had on the ability of African Americans to take even a fairly administered literacy test. The Court still required that there be some form of intentional discrimination behind the discriminatory impact, but this was not hard to find since the inequities in education were a direct result of the segregated school system in the county.[204] As Attorney General Katzenbach argued before the Judiciary Committee, "[y]ears of violation of the 14th amendment, right of equal protection through education, would become the excuse for continuing violation of the 15th amendment, right to vote."[205] Taking *Gaston County* into account when applying the congruence and proportionality test leads to a broadening of what may count as constitutional violations for which Section 5 is a remedy. The inquiry need not be limited to intentional violations of the Fifteenth Amendment. Any constitutional violation which leads to the denial or abridgement of the right to vote should count as evidence of violations which "have a significant likelihood of being unconstitutional."[206] An even more ambitious connection might be drawn between intentional violations of the Thirteenth Amendment, which has been held to apply to both private and public forms of racial discrimination, and their deleterious effects on the ability of African Americans to cast an effective ballot.[207] The effects of racial residential segregation in the South that are the

200. South Carolina v. Katzenbach, 383 U.S. 301, 333 (1966).

201. 360 U.S. 45, 54 (1959).

202. *Katzenbach*, 383 U.S. at 334.

203. 395 U.S. 285 (1969).

204. *See id.* at 293–96 (listing the numerous disparities between the white school system and the black school system in Gaston County in the years 1908 through 1949).

205. *Id.* at 289 (quoting *Voting Rights: Hearing on S. 1564 to Enforce the 15th Amendment to the Constitution of the United States Before the Senate Comm. on the Judiciary*, 89th Cong. 22 (1965)).

206. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

207. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–43 (1968) (holding that the Thirteenth Amendment allows Congress to prohibit private racial discrimination as a means of abolishing all "badges and incidents of slavery").

result of over a century of both de jure and de facto discrimination undoubtedly resonate in complex ways with many voting practices, such as the use of at-large districts or the placement of polling places.[208] The use of these forms of discrimination as the underlying intentional constitutional violations for purposes of a congruence and proportionality analysis would amply demonstrate the "significant likelihood" of unconstitutional conduct[209] needed to affirm the constitutionality of the VRA.[210] The most significant policy argument for the continued relevance of the VRA—that the persistence of extreme racial bloc voting in the South means that any electoral progress made by African Americans will come not from cultural change but from VRA victories[211]—is not available directly as an argument for congressional enforcement power (absent an extremely clever Thirteenth Amendment claim) since even the most racist of intentions are protected inside the voting booth.[212]

It is nevertheless possible to make a more indirect argument that the persistence of racial bloc voting[213] could be used as evidence of intentional racial discrimination. To begin, the Court has given many different answers concerning what counts as intentional discrimination in violation of the Constitution. Daniel Ortiz argues that, contrary to expectation, ever since the Court's holding in *Washington v. Davis*[214] that only intentional discrimination violates the Equal Protection Clause, the kind of evidence needed to find a

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208. Pamela S. Karlan and Daryl J. Levinson conclude that in certain circumstances, "state action has caused polarized voting," noting that "racially correlated differences in political preferences are the product of socioeconomic disparities produced by inferior access to schools, government services, and the like." Karlan & Levinson, *supra* note 197, at 1229, *quoted in* Karlan, *supra* note 16, at 739. Karlan supports this proposition by citing the district court in *Thornburg v. Gingles*, which concluded that "'historic discrimination' resulted in blacks in North Carolina having a lower socioeconomic status than whites: this disparity in status 'gives rise to special group interests and hinders blacks' ability to participate effectively in the political process.'" Karlan, *supra* note 16, at 739 (citing Thornburg v. Gingles, 478 U.S. 30, 39 (1986) (describing the district court's analysis)).

209. *City of Boerne*, 521 U.S. at 532.

210. There is reason nevertheless to be pessimistic about the Court's current receptivity to arguments considering the indirect effects of past discrimination on the operation of otherwise neutral laws. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that remedial race-based classifications by federal government actors, as well as by state and local government actors, must be held to a strict scrutiny standard under the Fifth and Fourteenth Amendments).

211. Richard Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1368 (1995) (drawing this conclusion from empirical studies of the VRA's effects).

212. *See* Kirksey v. City of Jackson, 663 F.2d 659, 662 (5th Cir. 1981) ("The first amendment assures every citizen the right to 'cast his vote for whatever reason he pleases . . . .' Baser motives are protected along with the grand and noble. Stigmatized racial attitudes, neither socially admirable nor civically attuned, are not constitutionally proscribed." (internal citation omitted)).

213. The incidence of racial bloc voting did not diminish throughout the 1990s. *See* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1400 (2001) (surveying evidence from congressional elections in the South).

214. 426 U.S. 229 (1976).

constitutional violation "often has little to do with purpose or motivation."[215] Instead, Ortiz contends that this evidence is explained more cogently by analogy to the disparate impact standard of Title VII,[216] which works by "allocating burdens of proof between the individual and the state."[217] Ortiz's claim is borne out in the voting rights context in *Rogers v. Lodge*,[218] which was the first and only case to interpret the intentional discrimination standard laid out in *City of Mobile v. Bolden*.[219] The *Rogers* opinion was handed down two days after President Reagan signed the 1982 amendments to the VRA into law, rendering it unnecessary for plaintiffs to bring voting abridgement claims as constitutional violations.[220] While the *City of Mobile* test for intentional discrimination was extremely exacting, dismissing as it did the possibility of inferring intent from the behavior of Mobile officials,[221] the *Rogers* Court eased the burden considerably.

In *Rogers*, the Court summarized the holdings of *Arlington Heights v. Metropolitan Housing Development Corporation*[222] and *Washington v. Davis* as follows: "both cases recognized that discriminatory intent need not be proved by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that

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215. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1106 (1989).

216. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1982), prohibits discrimination in employment, and a violation can be found by showing that the employer's actions had a disparate impact on a member of a protected class. *See, e.g.*, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

217. Ortiz, *supra* note 215, at 1107.

218. 458 U.S. 613 (1982) (finding county's at-large system for electing commissioners unconstitutional because purposefully racially discriminatory).

219. 446 U.S. 55 (1980) (finding no constitutional violation in city's at-large system of electing commissioners in absence of evidence of intentional discrimination).

220. *See* Joan Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standard*, 50 GEO. WASH. L. REV. 689, 720 n.203 (1982). While the racial gerrymandering cases also implicate the Equal Protection Clause, the Court has declined to apply the discriminatory purpose doctrine to such cases, in particular the interpretation from *Personnel Administrator v. Feeney* that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects on a particular group." 442 U.S. 256, 279 (1979), *quoted in* Karlan & Levinson, *supra* note 197, at 1213. As Karlan and Levinson note:

> Had the Court tried to fit wrongful districting claims into this framework, it would have required plaintiffs to show more than that the legislature had intended to create majority-black districts . . . . It would have demanded proof that the legislature did so precisely because it would adversely affect the white voters placed in those districts.

Karlan & Levinson, *supra* note 197, at 1213–14.

221. The Court discounted the relevance of evidence that "no Negro had ever been elected to the City Commission," that "city officials had not been as responsive to the interests of Negroes as those of white persons," and of "the substantial history of official racial discrimination in Alabama." City of Mobile v. Bolden, 446 U.S. 55, 71–74 (1980).

222. 429 U.S. 252 (1977).

the law bears more heavily on one race than another.'"[223] The Court continued, "determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"[224] It went on to consider the kind of evidence it had found irrelevant in *City of Mobile*, such as the effect of past discrimination on political participation, the unresponsiveness and insensitivity of elected officials, and "the depressed socioeconomic status"[225] of African Americans in the jurisdiction.[226] Significantly, the Court also recognized racial bloc voting as a factor for the first time,[227] stating that "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race."[228]

If the courts can consider racial bloc voting as evidence of a constitutional violation—even if such voting patterns alone are not unconstitutional—then the range of evidence that can be used by Congress or by any party defending the constitutionality of the VRA to establish a pattern of unconstitutional behavior may widen considerably over the kind of "smoking gun" evidence compiled by Congress in 1965 and 1982. Demonstrating intentional discrimination after *Rogers* would be less of a search for the mens rea of state officials in the design and implementation of electoral systems, and more about taking the measure of the circumstances under which African Americans and language minorities participate in electoral politics. As the *Rogers* case suggests, no one piece of evidence of discriminatory effect can be dispositive, even if that evidence includes the diminished ability of minorities to participate in elections. The constitutional standard and the statutory standard remain distinct in that neither the results test of Section 2 nor the effects test of Section 5 requires the wide array of evidence that would be required to establish an inference of intentional discrimination. But following *Rogers*, it should nevertheless be possible to compile evidence of discriminatory effects that, past a certain threshold, can count as evidence of unconstitutional discrimination.

A further argument for the usefulness of racial bloc voting in establishing constitutional violations relies not on the softness of the Supreme Court's equal protection jurisprudence generally but on the uniqueness of the voting context. As Pamela S. Karlan and Daryl J. Levinson contend, "voting is different":[229] elections combine official state action and private behavior in a manner that is almost singular in the context of antidiscrimination law.[230] The act of casting a

223. *Rogers*, 458 U.S. at 618 (quoting *Arlington Heights*, 429 U.S. at 265; Washington v. Davis, 426 U.S. 229, 242 (1976)).

224. *Id.* at 618 (quoting *Arlington Heights*, 429 U.S. at 266).

225. *Id.* at 626.

226. *See id.* at 623–26.

227. *See* Hartman, *supra* note 220, at 721.

228. *Rogers*, 458 U.S. at 623.

229. Karlan & Levinson, *supra* note 197.

230. *Id.* at 1227.

vote effectively functions as a moment of state action because it determines who will occupy official positions. While the voting decisions of private citizens are absolutely protected, the public component of electoral discrimination can nevertheless be addressed. But if the only official actions that are recognized as constitutional violations are those which are *wholly* public, such as poll taxes or official voter intimidation, much discrimination will become constitutionally immunized, even where intentional racial discrimination on the part of voters is present.[231] Where government actors can rely on a racially divided electorate in structuring the electoral process, discrimination can take subtle and facially neutral forms. Redistricting, for example, can work to minimize the political participation of minorities when those drawing boundary lines take cognizance of the willingness of their constituents to support minority candidates. If racial bloc voting were nonexistent, redistricting could neither increase nor decrease minority participation, for the racial composition of the district would have no correlation to the ability of minorities to elect candidates of their choice. Changes made to the voting procedures in the context of a racially-divided electorate should therefore be interpreted analogously to the Court's constitutional jurisprudence permitting the regulation of primaries despite their independence from the state.[232] Just as the Court in the so-called "white primary" cases recognized that handing responsibility for choosing candidates to racially exclusive private organizations was tantamount to the state taking the same action itself,[233]

231. While evidence of intentional voter discrimination may be as hard to uncover as official intentional discrimination, social science data can create a strong inference of intentional discrimination by isolating the effect of race in the decisionmaking process. For example, David Lublin examined several factors which might effect the race of a congressional district's representative in elections from 1972 to 1994 and concluded that "the racial composition of a district has a large and regularly predictable effect on the probability of a district electing a black representative to Congress." DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 44 (1997). White voters, in other words, are extremely unlikely to support an African American candidate in districts where they are the majority. *See id.* at 45. Inferring racial motivation from statistical data also has the considerable advantage of avoiding the divisiveness attendant in requiring findings of racial animus, as a plurality of the Court recognized in *Thornburg v. Gingles*, 478 U.S. 30, 72 (1986) (rejecting an intent requirement whereby "plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief," noting that, "[i]t is difficult to imagine a more racially divisive requirement"). But see Justice O'Connor's concurrence in the same case, arguing that the motivations of white voters should be considered. *Gingles*, 478 U.S. at 100–01 (O'Connor, J., concurring).

232. *See* Smith v. Allwright, 321 U.S. 649, 661 (1944) (finding resolution adopted at state party convention restricting party membership to "white citizens" unconstitutional despite not having been authorized by statute); Nixon v. Condon, 286 U.S. 73, 82 (1932) (prohibiting members of State Executive Committee of the Democratic Party from adopting a rule restricting primary elections to "white democrats" although state legislature specified no such restrictions); *see also* Morse v. Republican Party, 517 U.S. 186, 210–16 (1996) (considering these cases in holding that political party activities are covered under Section 5 of the VRA).

233. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469 (1953) ("Everyone concedes that such a proviso [excluding blacks] in the county-operated primaries would be unconstitutional. . . . When [the private association] produces the equivalent of the prohibited election, the damage has been done.").

a politically savvy political body should also bear responsibility for the enactment of facially neutral voting changes with an obviously detrimental impact on minorities from racial bloc voting. Even without recourse to the Thirteenth Amendment then, evidence of racial discrimination on the part of private citizens is relevant in considering whether the right to vote has been unconstitutionally abridged. Voter discrimination cannot be considered in isolation, of course, but when combined with government actions that affect the electoral process enough to diminish minority political participation, it should be cognizable as a constitutional violation to demonstrate the appropriateness of a statutory effects-based remedy.

A final, practical argument is that gathering evidence of intentional racial discrimination in voting is potentially divisive, and may undermine the fragile good will that may have been created in communities attempting to heal racial divisions from the recent past. In considering the limits of the intent test during their deliberations over the 1982 amendments, the Senate heard the testimony of Arthur Flemming, then Chairman of the United States Commission on Civil Rights, who argued that "litigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any racial progress in a community."[234] Conversely, evidence of racial bloc voting and other circumstantial evidence can create an inference of intentional discrimination without pointing fingers. This is especially true outside of the litigation context, where legislative factfinders need not present evidence in a court or face recalcitrant opponents.

It is worth emphasizing that the fact of racial bloc voting alone is not enough to establish that an unconstitutional denial or abridgement of the right to vote based on race has occurred. Most obviously, more information about the electoral structure is required that demonstrates whether or not racial voting patterns would lead to minority exclusion from the political process. For example, in a jurisdiction where the districts are racially divided even without racial gerrymandering, African Americans may already be able to elect candidates of their choice. The kind of evidence needed, then, is current data analogous to that gathered for earlier censuses and redistricting.[235] Such evidence would establish, given present racial voting patterns and electoral structures absent remedial government intervention, that the opportunity for minority participation was sufficiently restricted to create an inference that intentional racial discrimination was at work; hence, it could establish a pattern

234. S. REP. NO. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214; *see also* Karlan, *supra* note 16, at 735 (quoting Senate Report and arguing that "[r]equiring proof of purpose, therefore, might exacerbate purposeful discrimination").

235. *See, e.g.*, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994).

of unconstitutional action. Recent empirical data has undermined the earlier belief that only majority-minority districts can assure an equal opportunity for participation.[236] Recent cases have shown that white and African American Democrats can form coalitions that make party affiliation more important than racial composition in drawing legislative districts.[237] However, it has yet to be demonstrated that no state remedy is necessary to overcome the combination of persistently racially-divided electorates in covered jurisdictions[238] and redistricting practices that together restrict minority political participation.[239] Until racial bloc voting has become statistically insignificant, or until jurisdictions have shown that they will counteract the effects of such behavior without federal oversight, the effects prong of Section 5 will remain a congruent and proportional remedy.

C. Section 4 bailout provisions

1. Tailoring and strengthening the bailout standards through the 1982 amendments

In contrast to the preclearance standards, which demand only that covered jurisdictions show that they have not regressed from prior election procedures—however discriminatory or unconstitutional those procedures may be[240]—the bar for jurisdictions to escape from the requirement of submitting all proposed changes to the DOJ is considerably higher. When the VRA was

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236. *See, e.g.*, Grofman et al., *supra* note 213; Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209 (1999); LUBLIN, *supra* note 231.

237. Both the majority and the dissent in the Supreme Court's most recent VRA Section 5 decision, Georgia v. Ashcroft, 539 U.S. ___, 2003 WL 21467204 (June 26, 2003), explicitly state that coalition districts which reduce minority voting strength over majority-minority districts may be included in redistricting plans without violating Section 5 provided the plan as a whole is not retrogressive. *See Georgia*, 2003 WL 21467204, at *13–*14, (O'Connor, J.) and *20 (Souter, J., dissenting). The argument between the majority and the dissent in *Georgia* is over the inclusion of "influence districts," in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at *14. On coalition districts see *Page v. Bartels*, 248 F.3d 175 (3rd Cir. 2001); Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002); and Richard Pildes, *Is Voting Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

238. *See* Grofman et al., *supra* note 213, at 1401 (stating that in minority congressional districts "the average percentage of white voters casting their vote for black candidates in the general election varied only one percentage point . . . between 1992 and 1998").

239. For example, the DOJ objected in November 2001 to the redistricting plan by the Texas House of Representatives, which it found would lead to "a net loss of three districts in which the minority community would have had the opportunity to elect its candidate of choice." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Geoffrey Connor, Acting Secretary of State of Texas (November 16, 2001), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_111601.htm.

240. *See Bossier Parish II*, 528 U.S. 320, 336 (2000).

amended in 1982, most of the attention focused on the restoration of the Section 2 "results" test after the Supreme Court held that Section 2 was coextensive with the Fifteenth Amendment and that violations required a showing of intentional discrimination.[241] But the amendments also included a wholesale revision of the bailout procedure in Section 4[242] of the VRA. In this section, I examine the current bailout procedures in light of the *City of Boerne* line of cases and conclude that such procedures should survive constitutional scrutiny.

The bailout procedure in the VRA of 1965 was relatively simple. Any covered jurisdiction wishing to exempt itself from coverage was required to seek a declaratory judgment in the United States District Court for the District of Columbia determining that it had not employed a test or device "during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color."[243] Further, if the Attorney General also found no discriminatory use of a test or device, he was directed to "consent to the entry of such judgment."[244] Any jurisdiction covered under the 1965 Act could not bail out before 1970 unless they could show that "their tests and devices in effect before coverage had not been administered with a discriminatory purpose or effect for at least the preceding five-year period from the date bailout was sought."[245] The bailout provisions of the 1965 Act also forbade any subdivision located in a covered state from bailing out independently. The Supreme Court upheld this last provision in *City of Rome*.[246]

Reviewing the bailout provisions as part of its overbreadth analysis of the Act, the Supreme Court held that the burden of proof was "quite bearable," given that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests or devices in the last five years, then refute whatever evidence to the contrary may be adduced by the Federal Government."[247] It also noted that "an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings."[248]

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241. *See* City of Mobile v. Bolden, 446 U.S. 55, 60–65 (1980).

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

243. *Id.*

244. *Id.*

245. 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). Using this method, the State of Alaska; Wake County, North Carolina; Elmore County, Idaho; and Apache, Coconino, and Navajo Counties, Arizona successfully bailed out before 1970. *See* Hancock & Tredway, *supra* note 22, at 392.

246. 446 U.S. 156 (1980).

247. South Carolina v. Katzenbach, 383 U.S. 301, 332 (1966) (citing *Hearings on H.R. 6400 before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 92–93 (1965); *Voting Rights: Hearing on S. 1564 to Enforce the 15th Amendment to the Constitution of the United States Before the Senate Comm. on the Judiciary*, 89th Cong. 26–27 (1965)).

248. *Id.*

After 1970, Section 5 would have expired because every covered jurisdiction that was enjoined from using tests and devices would by then have fulfilled the five-year requirement. The subsequent amendments to the Act in 1970 and 1975, however, extended the five-year period to ten and seventeen years, respectively,[249] making bailout impossible until 1982 for any jurisdiction employing a test or device with a discriminatory purpose or effect on November 1, 1964 (the original Act's trigger date) or on November 1, 1968 or November 1, 1972 (the trigger dates added by the 1970 and 1975 amendments).[250]

When Congress set out to amend the VRA yet again in 1982, it initially considered a straight ten-year extension of the bailout provision.[251] The problem with a simple extension, however, was that it provided no incentive for covered jurisdictions to end discriminatory voting practices that were already in place at the time the original Act went into effect, for there was no provision for covered jurisdictions to demonstrate rehabilitation.[252] Instead, a bailout provision was enacted which would not burden covered jurisdictions with conduct that had occurred nearly two decades before. A jurisdiction's ability to bail out depends on the record of discrimination in the years preceding a bailout suit. As enacted, the new bailout provisions require a covered jurisdiction to demonstrate in an action for declaratory judgment filed before the District Court for the District of Columbia that:

> during the ten years preceding the filing of the action, and during the pendency of such action—
>
> (A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;
>
> (B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that

249. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315; Voting Rights Act Amendments, Pub. L. No. 94-73, §§ 101, 201, 206, 89 Stat. 400, 400–02 (1975).

250. The provisions of Section 4 are geared to voting registration in presidential elections; as a result, the formula was applied to census data as of November 1, 1964. As a result of the straight extension of the Act in 1970 and 1975, the trigger formula was also applied using census data from November 1, 1968, and November 1, 1972. *See* Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973b(b) (2000).

251. Hancock & Tredway, *supra* note 22, at 404–05. Then-Attorney General William French Smith advocated this position. *Id.*

252. *See Id.* at 408 (citing *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 1, 1816 (1981) (wherein Representative Henry Hyde "characterized the existing bailout provision as a 'disincentive to progressive change.'")); Williamson, *supra* note 245, at 18.

denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory—

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I- C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election

> officials throughout the jurisdiction and at all stages of the election and registration process.[253]

Bailout will also be denied if it is found that "during the period beginning ten years before the date the judgment is issued," the plaintiff jurisdiction "engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color" or on account of membership in a language minority group.[254] Such violations will not lead to a denial if "the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated."[255] The provisions of 42 U.S.C. § 1973b(a)(1)(A)–(E) and § 1973b(a)(3) are designed to monitor strict compliance with Section 5 of the Act over a ten-year period, while 42 U.S.C. § 1973b(a)(1)(F) creates affirmative obligations for jurisdictions wishing to escape from preclearance coverage. Among the notable changes, discrimination no longer must be through the use of a test or device—any discrimination with respect to voting will suffice to deny bailout[256]—and covered subdivisions may now bail out independently of the covered state of which they are a part,[257] effectively overruling *City of Rome*.[258] Within each subdivision, however, the discriminatory voting practices of any locality or municipality will suffice to deny bailout to the entire jurisdiction, even if the subdivision exercises no control over the choices made by that locality or municipality.[259]

2. Bailout as a solution to Section 5 overbreadth concerns

Before analyzing the specific bailout provisions, it is worth asking whether the bailout option could be done away with altogether, mandating continuing preclearance coverage of all jurisdictions until the Act expires. Applying the trigger formula of Section 4(b) without a possibility of escape from coverage raises overbreadth concerns, as the Court recognized in *Katzenbach*.[260] But the

253. 42 U.S.C. § 1973b(a)(1) (2000).

254. 42 U.S.C. § 1973b(a)(3).

255. *Id.*

256. *See* 42 U.S.C. § 1973b(a)(1)(B).

257. *See* 42 U.S.C. § 1973b(a)(1).

258. This amendment to the bailout provision addresses the concern of Justice Powell in his dissent in *City of Rome v. United States* that the inability of subdivisions to bail out would discourage compliance. *See* City of Rome v. United States, 446 U.S. 156, 206 (1980) (Powell, J., dissenting) ("Such an outcome must vitiate the incentive for any local government in a State covered by the Act to meet diligently the Act's requirements.").

259. The phrase "political subdivision and all governmental units within its territory" is found at 42 U.S.C. § 1973b(a)(1)(D) and § 1973b(a)(1)(F). Richard A. Williamson calls this the "all-or-nothing" requirement; he approves of it for state governments, but argues that it is inappropriate for local governments because political subdivisions are not accountable for their subunits in the same way that states are accountable for local governments. *See* Williamson, *supra* note 245, at 41–42.

260. South Carolina v. Katzenbach, 383 U.S. 301, 329–32 (1966).

Court there held that the formula was an appropriate one which was "relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by Section 4(b) of the Act. No more was required to justify the application to these areas of Congress's express powers under the Fifteenth Amendment."[261] Such a strong statement might suggest that, notwithstanding the Court's consideration of the bailout provisions later in the opinion, the trigger formula alone was held sufficient to render Section 5 an appropriate exercise of congressional power. But whether or not this interpretation captures the position of the Court (and I suspect that it does not), the congruence and proportionality requirement in *City of Boerne* now strongly suggests that more is required, and therefore that some means of escape for jurisdictions that never discriminated—or have not for an extended period—must be made available. The bailout provisions are thus required to cut the potentially overbroad preclearance remedy down to a size congruent with the problem of persistent racial discrimination in voting.

The main problem is that nearly forty years have elapsed since the enactment of the original VRA and thirty years since the last application of the trigger formula, and the congressional findings that led to the imposition of coverage then may not be as relevant today. In *City of Boerne*, the Court's comparison of RFRA and the VRA focused on the fact that the "history of [religious] persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."[262] While it is certainly true that significant voting discrimination persists in the United States today that could be part of a congressional finding,[263] it is not necessarily the case that a formula applied in 1964, 1968, or 1972 will accurately capture the extent of the problem today. It is important, then, to create an escape route—not only to reward jurisdictions that have remedied voting discrimination, but also to insure that the VRA remains a sufficiently accurate tool to continue to fight present-day discrimination.

While the amended compliance section of the bailout provisions is highly exacting, it opens a route to bailout that was not previously available to any covered jurisdiction under the pre-1982 bailout provisions. The bailout provisions are no longer insensitive to the possibility that voting discrimination may have been remedied in the intervening years. The compliance provisions thus make the remedy of preclearance coverage even more congruent and proportional to the injury of present-day voting discrimination. Further, the ability of covered subdivisions to bail out independently minimizes the danger of overbreadth since cities and counties with clean records may bail out even while the

261. *Id.* at 329.

262. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

263. *See* U.S. COMMISSION ON CIVIL RIGHTS, ELECTION REFORM, *supra* note 183.

state continues to be covered.[264] Overbreadth concerns have been raised with respect to the specification at two places in the bailout section of 42 U.S.C. § 1973b that "all governmental units" of a covered jurisdiction must meet the bailout standard.[265] It is true that some jurisdictions will necessarily be held responsible for the actions of entities, such as school boards or special districts, over which they do not exercise control. But the only imaginable alternatives would either be to exempt such units from coverage, which would allow those units in areas that have already been identified as potentially discriminatory, the chance to make changes without DOJ oversight, or to cover each unit of government separately. The latter alternative would be extraordinarily difficult to administer because it would be nearly impossible to gather accurate registration data for such units, since they may cross county lines or have idiosyncratic registration requirements that would make it extremely difficult to determine whether they fell below fifty percent voter registration.

The only possible constitutional difficulty faced by the compliance provisions, then, is that they may be too strict.[266] But strictness alone is not enough to raise a problem as long each aspect of the standards relates to the wrong that the VRA, and ultimately the Fifteenth Amendment, was designed to remedy. As is clear from the language of the bailout provision, each requirement in the compliance formula relates directly either to a court's finding of discrimination, or to a jurisdiction's willingness to abandon a challenged voting practice before a judicial determination of whether the practice is discriminatory.[267] My analysis will therefore focus not on the compliance provisions but on the affirmative obligations encoded in 42 U.S.C. § 1973b(a)(1)(F).

Even within a statute known for its intrusiveness into state and local autonomy,[268] the affirmative obligations of § 1973b(a)(1)(F) are notable. Covered jurisdictions must not only eliminate all voting practices which "inhibit

264. Under the amended bailout procedures, three jurisdictions in Virginia have bailed out—the City of Fairfax in 1997, and Frederick and Shenandoah Counties in 1999. *See* U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act, Section 5 Requirements, *at* http://www.usdoj.gov/crt/voting/sec_5/types.htm (last revised Feb. 11, 2000). Alaska filed a complaint in 1985 seeking bailout which amended an earlier complaint it had filed before the effective date of the 1982 amendments. Although it was adjudicated under the prior bailout provision, bailout was nevertheless denied, and Alaska remains covered at present. *See* Hancock & Tredway, *supra* note 22, at 415.

265. *See* Williamson, *supra* note 245, at 42.

266. For example, 42 U.S.C. § 1973b(a)(1)(B) requires not only that no final judgment of a federal court has found voting discrimination in a jurisdiction, but also that there have been no consent decrees, settlements, or agreements that resulted "in any abandonment of a voting practice" on grounds of discrimination. Williamson, *supra* note 245, at 44. It is even sufficient to deny bailout because an action is pending which "alleg[es] such denials or abridgments of the right to vote" regardless of the merits of the action. *Id.* at 46.

267. 42 U.S.C. § 1973b(a)(1)(A)–(E), (a)(3).

268. *See* Lopez v. Monterey County, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) ("The section's interference with state sovereignty is quite drastic . . . .").

or dilute equal access to the electoral process,"[269] they must also show that they have made "constructive efforts to eliminate intimidation and harassment" of voters.[270] The jurisdiction must also demonstrate efforts to expand "opportunity for convenient registration and voting" for everyone of voting age in the jurisdiction and also for the "appointment of minority persons as election officials."[271] The provision at § 1973b(a)(1)(F)(i) demands that the jurisdiction, which is the plaintiff in a bailout proceeding, establish what has been dubbed a "reverse Section 2" case, so named because it has the burden of proving a negative—the elimination of discriminatory voting practices.[272] Though the language does not precisely track that of Section 2, the reference to "equal access" matches closely the prohibition in Section 2 of "political processes" that "are not equally open to participation by members of a class of citizens protected" by the VRA.[273] One commentator has written that the affirmative action provisions "introduce wholly new features to the Act" and "new substantive requirements for covered jurisdictions, albeit under the guise of the bailout standard."[274] Taking the three affirmative steps as a whole, a covered jurisdiction must, in order to escape coverage, show not only that it has immunized itself against any possible constitutional or statutory challenge, but that it has also worked to create circumstances that *exceed* both constitutional and prior statutory minimum requirements.

Can such requirements fit within Congress's recently limited power to "prohibit[] conduct which is not itself unconstitutional and which intrudes into legislative spheres of autonomy previously reserved to the States"?[275] As a first pass, one could argue that the bailout provisions don't prohibit *any* conduct; they merely set the bar for escape from the preclearance requirements established by the trigger formula. If jurisdictions are unwilling for whatever reason to meet the demanding bailout standards, they may simply acquiesce to continued preclearance coverage.[276] Such an argument has the advantage of deflecting the constitutional issue back to questions about the fairness of the trigger formula and the intrusiveness of the preclearance requirement; both of these aspects of

269. Voting Rights Act of 1965, 42 U.S.C. § 1973b(a)(1)(F)(i) (2000).

270. 42 U.S.C. § 1973b(a)(1)(F)(ii).

271. 42 U.S.C. § 1973b(a)(1)(F)(iii).

272. Drew Days & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, *in* MINORITY VOTE DILUTION 153 (Chandler Davidson ed., 1984).

273. 42 U.S.C. § 1973(b). *See also* S. REP. NO. 417, at 54 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 232 ("In determining whether procedures or methods 'inhibit or dilute equal access to the electoral process,' the standard to be used is the results test of *White* [*v. Regester*, 412 U.S. 755 (1973)]. In other words, the test would be the same as that for a challenge brought under Section 2 [as amended], . . . except that the burden of proof would be on the jurisdiction seeking to bail out.").

274. Williamson, *supra* note 245, at 59.

275. Lopez v. Monterey County, 525 U.S. 266, 283 (1999) (quoting City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

276. That nearly every jurisdiction has done just that may explain the virtual absence of protest over the strictness of the bailout provisions.

the VRA were upheld in *Katzenbach*, and have been at least implicitly reaffirmed several times since then.[277] But such an argument may prove too much because it would apparently also permit standards that would make bailout a practical impossibility, such as requiring that jurisdictions attempting to bail out demonstrate a one hundred percent registration record for all citizens of voting age. As argued above, there must be at least the possibility that any jurisdiction is eligible to bail out either at some specified time after its last discriminatory voting practice has been identified, or if no discrimination has *ever* been identified.

Three jurisdictions from Virginia have already bailed out, demonstrating that the possibility of bailout can be realized.[278] If mere possibility were enough, this empirical evidence would suffice. But the concerns about the constitutional infirmity of having no bailout provision also require that bailout must be a *realistic* possibility for any jurisdiction that desires to do so. The current bailout provisions would be problematic if a jurisdiction could not escape coverage, through no fault of its own, simply because the standards were too onerous. It may be that the Virginia bailouts were outliers, and that for most jurisdictions bailout is all but foreclosed. Timothy O'Rourke suggests that this may be the case in his account of why no bailout actions had been filed from the 1982 amendments up until 1992, when his essay was published:

> For a covered jurisdiction, the costs of attempting bailout—both in terms of political fallout and legal fees—would be large, the chances of success small, and the benefits even smaller. A jurisdiction attempting to bail out might open itself to the charge that it was attempting to evade the force of the law. Although a successful bailout might remove the stigma that attaches to preclearance, a failed action could enhance the stigma.[279]

But while O'Rourke may have explained why a bailout action may be humiliating to a covered jurisdiction, he has not argued that such humiliation would be undeserved. If the chance of success is small, it is presumably because

277. South Carolina v. Katzenbach, 383 U.S. 301, 329–31, 334–35 (1966) (upholding coverage formulas and preclearance requirements). *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001) ("Congress' response was to promulgate in the Voting Rights Act a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."); City of Rome v. United States, 446 U.S. 156, 180 (1980) (rejecting argument that "even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness in 1975, when Congress extended the Act for another seven years").

278. *See* U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act, Section 5 Requirements, *at* http://www.usdoj.gov/crt/voting/sec_5/types.htm (last revised Feb. 11, 2000).

279. Timothy O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, *in* CONTROVERSIES IN MINORITY VOTING 98 (Bernard Grofman & Chandler Davidson eds., 1992).

the jurisdiction's record is less than clean, or because its constructive efforts have been half-hearted.

The two key arguments for demonstrating the constitutionality of the bailout provisions are: (1) to show that the affirmative obligation provisions act as an *incentive* for covered jurisdictions to clean up their act, and (2) that they also provide an escape hatch for covered jurisdictions that had never discriminated but were covered only through the formal application of the trigger formula, which makes no reference either to race or to discrimination.[280] And of course, there must be nothing about the bailout standard that makes it impossible to achieve; if a jurisdiction fails to achieve or even to attempt bailout, the failure must be a political one. The Senate report on the 1982 amendments makes clear that Congress intended that the bailout provisions provide a realistic goal to target, and that it thus act as an incentive.[281] Congress even included a provision for reviewing the operation of the coverage and bailout provisions after fifteen years.[282]

The fact remains, however, that only three out of hundreds of political subdivisions have successfully bailed out, and that the first bailout suit was not even filed until 1997, fifteen years after the bailout provision was amended.[283] In 1985, two attorneys from the Voting Section of DOJ's Civil Rights Division speculated that the absence of bailout actions might indicate that "a substantial number of jurisdictions are laying the required groundwork for bailout, as evidenced by the increase in Section 5 submissions."[284] Nearly two decades later, such an explanation is difficult to sustain. More likely are their dispiriting

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280. *See* Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973b(b) (2000) (establishing that trigger formula takes into account use of a "test or device" and percentage of eligible voters registered in 1964, 1968, and 1972). There is, however, a reference to language minorities in 42 U.S.C. § 1973(b)(f)(3), which construes "test or device" also to include the provision of election materials "only in the English language" when more than five percent of eligible voters "are members of a single language minority." 42 U.S.C. § 1973(b)(f)(3). Language minorities are defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973b(c)(3). The addition of 42 U.S.C. § 1973b(f)(3) as part of the 1975 amendments led to the re-coverage of Alaska, which had bailed out successfully in 1972. *See* Hancock & Tredway, *supra* note 22, at 396, 402.

281. The Senate report states:

> We repeat that the goal of the bailout in the Committee bill is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process. . . . Each and every requirement of the bailout is minimally necessary to measure a jurisdiction's record of non-discrimination in voting.
>
> The Committee believes that these criteria work together as a consistent package to provide a reasonable avenue for jurisdictions to bail out of preclearance at a time appropriate for them.

S. REP. NO. 97–417, at 59–60 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 238.

282. 42 U.S.C. § 1973b(a)(7). I have not found a record of the fifteen-year reconsideration by Congress, but the preclearance requirement remains in effect, unchanged since 1982.

283. *See supra* note 264.

284. Hancock & Tredway, *supra* note 22, at 422.

explanations that "[c]overed jurisdictions may view the standard as difficult when compared to the burdens of continued coverage and may simply have elected to remain covered," and that "[o]ther jurisdictions may remain unwilling to take the corrective action necessary to allow minority citizens a fair opportunity for full and effective political participation."[285] While these plausible speculations suggest that a bailout suit is not feasible for a vast majority of jurisdictions, its unfeasibility stems not from an undue burden placed on them by the federal government, but from a lack of political will to remedy the discrimination that gives the act its continuing relevance and constitutional validity. While commentators such as O'Rourke and Abigail Thernstrom may question a standard that is set so high that almost no one is willing to try to clear it,[286] theirs is a political assessment about how incentives are appropriately calibrated rather than a constitutional judgment on whether the bailout provision is an appropriate exercise of congressional power. In the absence of any empirical data suggesting that covered jurisdictions find the constructive efforts requirements[287] impossible to meet, whether for financial or other structural reasons,[288] the bailout requirements can be presumed to be a congruent and proportional response to the evil of widespread voting discrimination. Each requirement directly addresses forms of discrimination, whether they be in official voting procedures or in more informal methods such as failing to act on reports of intimidation or making registration a burdensome process in areas with concentrations of minorities.[289]

Because the last two affirmative obligation provisions hold covered jurisdictions to a standard that exceeds even the Section 2 results test—the elimination of intimidation and the encouragement of registration are not

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285. *Id.*

286. *See* ABIGAIL THERNSTROM, WHOSE VOTES COUNT? 90–97 (1987); O'Rourke, *supra* note 279; Timothy O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765 (1983) (arguing for more liberal judicial interpretation of the bailout provisions); *see also* Williamson, *supra* note 245, at 76 ("[I]t is clear that under the revised bailout system covered jurisdictions will be held hostage to the preclearance requirement . . . .").

287. Meeting the compliance provisions for bailout should impose no more cost on jurisdictions than the preclearance process already imposes; covered jurisdictions simply have to submit nonretrogressive changes or work with the DOJ on potentially retrogressive changes to avoid a formal interposition of an objection.

288. Williamson points to problems with defining the standards for meeting the constructive efforts requirements, such as what efforts would be required to eliminate intimidation and harassment in jurisdictions where there is no previous record of such activity. *See* Williamson, *supra* note 245, at 68. Such problems can be worked out in the course of negotiations with the DOJ, and pose no credible barrier to the achievement of bailout.

289. *See* S. REP. NO. 417, at 55 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 232 ("The Committee hearing record is replete with examples of restrictive registration practices and procedures, such as restricted hours and locations for registration, dual registration practices, and discriminatory reregistration requirements, which continue to exist throughout the covered jurisdictions."). As the Florida election debacle—where hundreds of law-abiding citizens were purged from the registration rolls as felons—indicates, registration irregularities continue into this century. *See* U.S. COMMISSION ON CIVIL RIGHTS, VOTING IRREGULARITIES, *supra* note 183.

required by Section 2[290]—it is worth considering the source of congressional power to enact such provisions. As mentioned above, in the *City of Boerne* line of cases, the Court has explicitly permitted "prophylactic" legislation:[291] legislation that prevents unconstitutional discrimination by prohibiting conduct not itself unconstitutional. Given the findings of election-related intimidation[292] and registration problems that affect minorities, these two constructive efforts requirements can clearly be interpreted as prophylaxis, if of a particularly strong variety. With respect to the intimidation prevention requirement, one commentator has raised concerns that it appears to lack a "state action" component,[293] which was the sticking point in *United States v. Morrison*, another case in the *City of Boerne* line.[294] The Senate report, however, clearly indicates that jurisdictions are not held liable for any intimidation taking place in their jurisdiction; however, once

> there is evidence that such intimidation and harassment, or a credible threat of it occurring, has been a factor in limited minority participation, then the jurisdiction must take reasonable steps to eliminate that danger and to make clear that such abhorrent activity by private citizens, officials or public employees, will not be tolerated within its territory.[295]

It is the failure to take such steps, then, that would create cause for denying bailout.

IV.
CONCLUSION: LOOKING TO THE 2007 RENEWAL OF THE VRA

In the late 1990s, a rumor circulated around the Internet that African Americans would lose their right to vote in 2007 when the VRA was said to expire.[296] Although the rumor is patently false—Section 2 of the VRA[297] is

290. Section 11(b) of the VRA does prohibit intimidation, threats and coercion in the act of voting, but the law is directed at persons, not jurisdictions. 42 U.S.C. § 1973i(b).

291. *See supra* notes 75–92 and accompanying text.

292. *See* S. REP. NO. 417, at 55 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 232 ("[T]he House and Senate committee records indicate that in many areas [the requirement to make efforts to eliminate intimidation] is still necessary to insure that minority citizens are not inhibited or discouraged from participating in the political process.").

293. Williamson, *supra* note 245, at 68.

294. *See* United States v. Morrison, 529 U.S. 598, 621–27 (2000) (holding private civil remedy for victims of gender-motivated violence unconstitutional because it "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias").

295. See S. REP. NO. 417, at 54–55 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 231–32.

296. *See* Lawyers' Committee for Civil Rights Under Law, Your Right to Vote Does Not Expire, *at* http://www.lawyerscomm.org/projects/blackvote2007.html (last visited May 7, 2003) (reporting this rumor and emphasizing its falsity); U.S. Department of Justice, Civil Rights Division, Voting Section, Voting Rights Act Clarification, *at*

permanent, and Section 2 itself provides only for statutory enforcement of the right to vote already enshrined in the Fifteenth Amendment—there is nevertheless a grain of truth to the rumor. Section 5 of the VRA *does* expire in 2007 (and with it the bailout provisions) and for many covered jurisdictions the preclearance process provides the only effective means of realizing the right to vote. While it is always possible to bring a Section 2 lawsuit, such suits are expensive and time-consuming, since the burden is on the plaintiffs to prove that discrimination has taken place. The DOJ brings a small number of Section 2 suits each year,[298] and the remainder are largely brought by national advocacy organizations such as the ACLU and the NAACP, which operate with very limited resources. Section 5 is therefore the only effective tool for preventing voting discrimination for the vast majority of covered jurisdictions.

The real impact of the foregoing arguments about the congruence and proportionality of the preclearance and bailout provisions may become evident not in the course of litigation but in congressional hearings on the 2007 renewal. As it did in 1982, Congress will attend to the relevant Supreme Court jurisprudence as it chooses among possible options. Congress may also decide that it does not share the Court's reading of the Act, and it may clarify the statute accordingly. But for those provisions which raise constitutional issues, Congress must be careful not to intrude on the Court's province "to say what the law is."[299] Even if Congress were to extend the VRA unmodified for a period of years, it would need to demonstrate that the intrusion into state sovereignty represented by the preclearance and bailout procedures continues to be warranted, and hence that Section 5 remains a *remedial* scheme rather than having been transformed into a *substantive* interpretation of the Fifteenth Amendment by virtue of changed historical circumstances.

I have argued in this article that Congress should be able to demonstrate the continuing appropriateness of the preclearance process as a remedial scheme for the kinds of racial discrimination in voting that still occur in covered jurisdictions today. I have not amassed the evidence of discrimination needed to demonstrate that required preclearance submissions are either capturing or discouraging unconstitutional discrimination—that is a job for a congressional committee. Instead, I have shown that it is necessary to find such evidence. While it is clearly important to adduce instances of intentional discrimination in assessing the continuing need for Section 5 enforcement measures, evidence of this nature will be increasingly hard to find due to the combined effect of the

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http://www.usdoj.gov/crt/voting/misc/clarify3.htm (posted April 2, 1998) (same).

297. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (2000).

298. *See* U.S. Department of Justice, Civil Rights Division, Voting Section, Recent Section 2 Activities, *at* http://www.usdoj.gov/crt/voting/sec_2/recent.htm (last revised Feb. 2, 2000) (describing fourteen "enforcement activities" brought by the DOJ between August 29, 1996, and February 2, 2000).

299. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803)).

gradual diminution of overt racial discrimination and the adeptness of officials at concealing their intentions. As I have shown, evidence of racial bloc voting can function as a proxy for intentional discrimination in some circumstances. In those cases where racial bloc voting is severe enough to consistently deny minorities the opportunity to elect representatives of their choice, the acquiescence of election officials in such a process amounts to a form of racial discrimination. While such discrimination may not be intentional in every case, it is reasonable to surmise that inaction or grudging action in the face of racial bloc voting must, in many circumstances, be the result of intentional, and hence unconstitutional, discrimination.

Many details still need to be worked out, such as determining what level of racial bloc voting should trigger the call for corrective action on the part of elected officials.[300] But congressional findings need not have the level of specificity that would be required in litigation, or even in deciding whether to object to the preclearance submission of covered voting changes.[301] The most important elements of any evidence gathered should be a consistent and significant pattern of minority underrepresentation combined with an inadequate governmental response after being apprised of the nature of the problem.

300. On the level of statewide redistricting, one recent article begins to answer the empirical question of what concentration of minorities is needed in a racially divided district to have an even chance of electing a minority. *See* Grofman et al., *supra* note 213, at 1383.

301. Given how strictly the Court has read the congressional record of civil rights statutes, it would be in the best interests of Congress to make the record as comprehensive as possible. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 380 (2001) (Breyer, J., dissenting) ("In reviewing [Fourteenth Amendment] § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate . . . . Nor has the Court traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category.").