

TIME IS STILL ON ITS SIDE: WHY CONGRESSIONAL REAUTHORIZATION OF SECTION 5 OF THE VOTING RIGHTS ACT REPRESENTS A CONGRUENT AND PROPORTIONAL RESPONSE TO OUR NATION’S HISTORY OF DISCRIMINATION IN VOTING

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INTRODUCTION

With congressional reauthorization of section 5 of the Voting Rights Act¹ an accomplished fact,² the question now at center stage is

1. 42 U.S.C. § 1973c (2006).

2. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577

whether Congress acted within its constitutional authority when it extended the life of this most important civil rights statute. Section 5 requires certain states and localities to obtain federal approval (“preclearance”) before implementing any change in their voting standards, practices, and procedures.³ Section 5 originally was enacted in 1965 for a five-year period, and subsequently was reauthorized for five years, seven years, and then twenty-five years in 1970, 1975, and 1982, respectively.⁴ The 1982 reauthorization was due to expire in June 2007, but in July of last year Congress extended the statute for another twenty-four years, to 2031.⁵ The renewal legislation made two modifications to the statute’s nondiscrimination standards but otherwise retained the existing remedial structure.⁶ This Article examines the constitutional question posed by the reauthorization, and concludes that Congress was fully empowered to reauthorize section 5 pursuant to its Fourteenth and Fifteenth Amendment authority to enact legislation aimed at remedying discrimination in voting.

That the Supreme Court might strike down the section 5 reauthorization seems, on one level, inconceivable. After all, it has been over one hundred years since the Court last overturned national legislation aimed at guaranteeing the civil rights of our country’s racial and ethnic minority citizens.⁷ In the modern era, the Supreme Court has broadly construed Congress’s authority to act against the

(codified as amended at 42 U.S.C. § 1973c (2006)) [hereinafter VRA Reauthorization Act of 2006].

3. 42 U.S.C. § 1973c(a).

4. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133.

5. VRA Reauthorization Act of 2006 § 4, 42 U.S.C. § 1973b(a)(8); Hamil R. Harris & Michael Abramowitz, *Bush Signs Voting Rights Act Extension*, WASH. POST, July 28, 2006, at A3. The reauthorization legislation specifies that section 5 shall remain in effect for another twenty-five years, but since the new twenty-five year period began in late July 2006—a little less than a year before section 5 was due to expire—the extension actually is for twenty-four years.

6. VRA Reauthorization Act of 2006 §§ 2(b)(3), 5, 42 U.S.C. § 1973c.

7. *James v. Bowman*, 190 U.S. 127, 139–40 (1903) (holding unconstitutional statute that outlawed intimidation of black voters by private individuals); *see also* *Civil Rights Cases*, 109 U.S. 3, 18–19, 25 (1883) (holding Civil Rights Act of 1875 unconstitutional insofar as it prohibited discrimination in public accommodations by private individuals); *United States v. Harris*, 106 U.S. 629, 640–41 (1883) (holding Civil Rights Act of 1871 unconstitutional insofar as it outlawed conspiracies by private individuals aimed at denying any person equal protection of laws); *United States v. Reese*, 92 U.S. 214, 221–22 (1875) (holding unconstitutional 1870 statute protecting right to vote).

evil of racial and ethnic discrimination,⁸ and those decisions, though they date back to the 1960s, continue to have great vitality today.⁹

Nonetheless, the winds of constitutional interpretation have shifted in recent years, and the Supreme Court is evidencing a willingness today to find that Congress exceeded its authority under the Civil War Amendments in enacting specific civil rights remedies. In the past decade, the Court has entirely or partially invalidated federal laws dealing with religious freedom,¹⁰ gender-motivated violence,¹¹ age discrimination in employment,¹² and disability discrimination in employment¹³ (although the Court recently turned back challenges to two other federal laws that address gender discrimination and disability discrimination¹⁴). The Court has also ruled that federal affirmative-action programs are unconstitutional unless they pass strict scrutiny.¹⁵

Now, with Congress having passed the section 5 reauthorization legislation, the Court is expected to decide whether Congress exceeds its authority when it seeks to vindicate rights that lie at the heart of the nondiscrimination guarantees of the Fourteenth and Fifteenth Amendments.¹⁶ And the Court's answer, surprisingly or not, is very much up in the air.

8. See *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (upholding constitutionality of provision of Voting Rights Act of 1965 that prohibited use of literacy tests for voting with regard to certain persons schooled in Puerto Rico); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding constitutionality of several other provisions of Voting Rights Act of 1965); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964) (upholding constitutionality of public accommodations provisions of Civil Rights Act of 1964).

9. See *City of Boerne v. Flores*, 521 U.S. 507, 517–18 (1997).

10. *Id.* at 536 (ruling Religious Freedom Restoration Act unconstitutional).

11. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Violence Against Women Act unconstitutionally provided victims with right to sue for damages).

12. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that Age Discrimination in Employment Act unconstitutionally permitted suits for damages against state governments).

13. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Title I of Americans with Disabilities Act unconstitutionally permitted suits for damages against state governments).

14. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (affirming constitutionality of allowing suits for damages against states under Family and Medical Leave Act); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (affirming constitutionality of allowing suits for damages against states under Title II of Americans with Disabilities Act, where issue is access for disabled persons to courts).

15. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

16. Within a few days of President Bush's signing of the reauthorization legislation, a lawsuit was filed alleging that the reauthorization is unconstitutional. *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-CV-01384-PLF (D.D.C. filed Aug. 4, 2006). At the time of this writing, a three-judge district court has been convened, and the court has set September 17, 2007 as the date for oral argument on dispositive

The Supreme Court's decision will be of far-reaching importance for several reasons. Section 5 is a central feature of the remedial scheme enacted by Congress to "banish the blight of racial discrimination in voting, which . . . infected the electoral process in parts of our country for nearly a century."¹⁷ Accordingly, a determination that section 5 no longer is constitutional would require a substantial reworking of the federal government's enforcement efforts in the area of voting rights, as well as the efforts of civil rights groups and private citizens. Second, the Court's determination will have tremendous symbolic significance, either signaling the Court's continuing commitment to protecting the civil rights of our country's racial and ethnic minority citizens, or suggesting to many a fundamental retrenchment by the Court and by the federal government as a whole. Lastly, the Court's ruling may have great legal significance. In modern times, the Court has never held that a civil rights law that was constitutional when enacted may lose its constitutional status because of the passage of time and a change in the factual circumstances that pertain to the law.¹⁸ A ruling that the passage of time and a change in circumstances have undermined section 5's constitutionality could form the basis for challenges to other civil rights statutes on the same ground, although this concern is tempered by the fact that section 5 has a unique remedial scheme and always has been understood to be a temporary remedy.

The argument that the 2006 reauthorization of section 5 is constitutional has on its side numerous Supreme Court rulings. The Court twice has held that the preclearance requirement is constitutional (first in 1966¹⁹ and then again in 1980²⁰), and the Court recently has reaf-

motions. Oral Argument in Federal District Court in *NAMUDNO* Case Set for September 17, <http://electionlawblog.org/archives/007776.html> (Feb. 1, 2007, 13:51 PST).

17. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). In all, over three thousand voting provisions have been invalidated under section 5. See U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION app. A at 67–69 tbls.A2–A4 (2006), available at <http://www.usccr.gov/pubs/051006VRASatReport.pdf> [hereinafter VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION].

18. In each of the cases noted above in which the Supreme Court recently invalidated or partially invalidated a civil rights law, the Court found the offending provision to be unconstitutional *ab initio*, i.e., the Court did not in any of these cases conclude that the offending provision initially was constitutional but had become unconstitutional due to the passage of time. See *supra* notes 10–13 and accompanying text. See also Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 730 (1998) (noting the "tantalizing [and unanswered] question" whether the passage of time could act to deprive a civil rights statute of its constitutional status).

19. *Katzenbach*, 383 U.S. at 329, 335.

firmed those rulings in the context of an “as applied” constitutional challenge to a narrow aspect of the section 5 enforcement scheme.²¹ Also, recently, in its decisions regarding the constitutionality of other civil rights statutes, the Court has pointed to section 5 and other provisions of the Voting Rights Act as paradigms for how Congress constitutionally may exercise its authority under the Fourteenth and Fifteenth Amendments.²² And the Court previously has rejected a claim that Congress’s decision to extend section 5 for an additional period of time rendered the statute unconstitutional (in a decision upholding the 1975 reauthorization of section 5).²³

Against this veritable army of precedent stand several concerns. The constitutional doubts mostly begin with the fact that section 5 exacts a substantial federalism cost. Unlike the typical federal statute, which presumes the validity of state and local laws, section 5 automatically suspends the implementation of state and local voting-related enactments pending their review and approval by the federal government.²⁴ Although the federalism concern did not persuade the Supreme Court in 1966 or 1980 to strike down section 5,²⁵ it may exert a much greater pull on the Court today. This in part is because the Court recently has placed a substantially higher value on protecting the states against what the Court views as improper intrusions by the federal government into areas of state autonomy.²⁶ Concomitantly, the Court has narrowed the scope of the remedial authority granted Congress by the Civil War Amendments.²⁷

20. *City of Rome v. United States*, 446 U.S. 156, 173–80 (1980).

21. *Lopez v. Monterey County*, 525 U.S. 266, 283–84 (1999).

22. *Tennessee v. Lane*, 541 U.S. 509, 518–19 n.4 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736–38 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001); *United States v. Morrison*, 529 U.S. 598, 626–27 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638–40 & n.5, 647 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518, 530, 532–33 (1997).

23. *Rome*, 446 U.S. at 182.

24. 42 U.S.C. § 1973c(a) (2006). See Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1181 (2001) (noting that section 5 “dramatically shifts the balance of power between the federal government and the States” “[p]erhaps more so than any other federal law”).

25. *Rome*, 446 U.S. at 178–80; *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966).

26. See *supra* notes 10–13 and accompanying text; see also *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that Congress exceeded its Commerce Clause authority in enacting the Gun-Free School Zones Act of 1990).

27. *Boerne*, 521 U.S. at 519–20, 527–29. See also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 947 (3d ed. 2000) (describing *Boerne* as having imposed a “significant and lasting cutback” on congressional power).

But the most significant reason why the federalism concern may have a more receptive judicial audience today is that the arguments in favor of overriding that concern are weaker today than in 1966 or 1980, although the extent to which they are weaker is the subject of intense dispute. The fact that section 5 always has been a temporary measure, with a fixed expiration date, has been viewed by the Court as a factor that mitigates the federalism cost.²⁸ However, with the latest extension, section 5 will be in effect for sixty-six years—a fact which on its face calls into question whether the statute may fairly be considered a temporary remedy. More particularly, the passage of time is chipping away at the underlying rationale for section 5. Section 5 was enacted in response to the history of pervasive and unremitting violations of the right to vote by those jurisdictions covered by the statute.²⁹ This history, Congress concluded, created a special risk that these jurisdictions' new voting-related enactments would be discriminatory, and thus required that these enactments be subjected to special review by the federal government.³⁰ But the time when these jurisdictions engaged in pervasive and unremitting violations is receding, and the extent to which the covered jurisdictions are continuing to engage in discrimination is moderating in large part because of the enforcement of section 5 and the other provisions of the Voting Rights Act.³¹ Whether or not the risk of new voting discrimination in these jurisdictions has moderated to the point that section 5 no longer is needed—or, to put it differently, whether the risk of new voting discrimination has moderated to the point that it no longer overrides section 5's federalism cost—is the factual question that is at the heart of the dispute regarding the reauthorization of section 5.³²

28. *See, e.g., Boerne*, 521 U.S. at 533.

29. *Katzenbach*, 383 U.S. at 308–13.

30. *Id.* at 334–35.

31. For an overview of the section 5 preclearance denials issued by the Justice Department since 1965 and a discussion of the impact of the discrimination prohibition contained in section 2 of the Act, 42 U.S.C. § 1973 (2006), *see* Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. OF CON. LAW & PUB. POL'Y 120, 144–55 (2006).

32. *Compare* CivilRights.org, Protecting Voting Rights: Renew the VRA Reports, <http://renewthevra.civilrights.org/resources/reports.html> (last visited Oct. 18, 2006) (listing reports that examine jurisdictions covered by section 5 and concluding that section 5 is still needed to combat ongoing discrimination), *and* LAUGHLIN McDONALD & DANIEL LEVITAS, THE CASE FOR AMENDING AND EXTENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 26 (2006), *available at* <http://www.aclu.org/pdfs/votingrightsreport20060307.pdf> (concluding that “[s]ection 5 should be extended for 25 years because there is still strong evidence of discrimina-

Other concerns relating to section 5's constitutionality also may exist. Section 5 prohibits jurisdictions from engaging in conduct that is not unconstitutional, since it invalidates voting changes that have a discriminatory effect as well as changes that have a discriminatory purpose.³³ In addition, there may be some tension between the Court's recent line of cases limiting the use of race when devising redistricting plans³⁴ and the race-conscious analyses that may be occasioned by section 5. Lastly, in several recent cases, the Court has expressed concern about the Justice Department's ability to fairly implement the preclearance requirement,³⁵ which is significant given the fact that almost all preclearance decisions are made by the Department.³⁶

In these circumstances, the manner in which the Supreme Court assesses the scope of Congress's authority under the Fourteenth and Fifteenth Amendments will be of critical importance, and may well spell the difference between the Court upholding the 2006 reauthorization of section 5 and the Court striking it down. Specifically, the question posed is how the Supreme Court will apply its recently minted "congruence and proportionality" test, under which Congress may act "to enforce" the Fourteenth and Fifteenth Amendments only by enacting remedies that are congruent and proportional to the unconstitutional conduct that is to be prevented or remedied.³⁷ This test

tion in voting, racially polarized voting, and manipulation of minority voters by covered jurisdictions," after surveying voting rights litigation brought by the ACLU in thirty-one states since June 1982), and NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS 98-103 (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf> (suggesting that there is a continuing need for section 5 based on the history of section 5 enforcement, testimony obtained at hearings conducted by the Commission, and other factors), with VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17 at 21-27 (noting decline in objections in relation to changes submitted), and American Enterprise Institute, Minority Voting Studies of Jurisdictions Covered by Section Five of the Voting Rights Act (Feb. 10, 2006), http://www.aei.org/publications/pubID.23859/pub_detail.asp (concluding that "the crisis for black voter disenfranchisement in the Deep South and elsewhere that existed in 1965 is over and Congress should allow this provision of the act to expire," based on an analysis of minority voter registration and turnout rates, the levels of racially polarized voting, and the extent to which minority candidates have been elected in the areas covered by section 5).

33. 42 U.S.C. § 1973c(a).

34. *E.g.*, *Miller v. Johnson*, 515 U.S. 900, 916, 927-28 (1995); *Shaw v. Reno*, 509 U.S. 630, 657-58 (1993).

35. Posner, *supra* note 31, at 122-23; Katz, *supra* note 24, at 1180-81.

36. From 1965 to June 30, 2004, section 5 jurisdictions submitted over 414,000 voting changes to the Justice Department, but filed only sixty-eight declaratory judgment actions, involving perhaps several hundred voting changes. VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, app. A at 67-69 tbls.A2-A4.

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

limits the authority Congress previously enjoyed under the Fourteenth and Fifteenth Amendments,³⁸ and was the basis for the Court's decisions in the past few years invalidating civil rights statutes enacted by Congress.³⁹

This Article contends that the proper application of the “congruence and proportionality” test should result in the Supreme Court upholding the constitutionality of the section 5 reauthorization. The argument has two principal parts.

First, the Article contends that proper application of this test requires that the Court hone its analytic approach in several ways. The Court must begin its analysis by pinpointing the essential problem posed by the reauthorization—the problem of the passage of time. The Court then must assess whether the passage of time has undermined section 5's constitutional status by tailoring its analysis to the rationale relied upon by Congress for enacting and reauthorizing this statute; specifically, the Court must consider whether the passage of time has undermined Congress's determination that the covered jurisdictions' pervasive history of unconstitutional conduct prior to the enactment of the Voting Rights Act continues to create a special risk of discriminatory decision making today. As was done when the Court reviewed and upheld the 1975 extension of section 5, this assessment requires that the Court analyze the impact that section 5 has had on the covered jurisdictions' decision making since the last reauthorization of section 5 (in 1982) and analyze current minority participation rates and electoral opportunities in these jurisdictions. The assessment does not, on the other hand, require that the Court engage in a search for new constitutional violations committed by the covered jurisdictions since the 1982 reauthorization or since the enactment of section 5 in 1965. Finally, the Court's analytic approach must reflect the uniquely difficult legal and factual questions engendered by the passage-of-time/continuing-risk-of-discrimination assessment. This is best done by the Court according substantial weight to Congress's determination when it reauthorized section 5 in 2006 that the special risk of discriminatory decision making continues to exist.

Second, the Article takes a hard look at the somewhat ambiguous factual record supporting the reauthorization of section 5, and concludes that application of the analytic approach detailed in this Article to a properly understood record demonstrates that the Court should

38. *See supra* note 27.

39. *See Boerne*, 521 U.S. at 533–34, 536; *see also* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000); *United States v. Morrison*, 529 U.S. 598, 625–27 (1999).

uphold Congress's constitutional authority to reauthorize section 5. Specifically, this review demonstrates that Congress reasonably could conclude that there is a continuing special risk of discriminatory decision making by the section 5 jurisdictions, thus demonstrating that the passage of time has not undermined the constitutional validity of section 5. The Article notes, however, that even with this determination, the Court still may not be prepared to uphold, as facially appropriate, the twenty-four-year extension period chosen by Congress. If that is the case, the Court should postpone ruling on this issue until after the 2006 extension has been in effect for a period of years, so as to enable the Court to evaluate the term selected by Congress based on concrete data regarding the ongoing need for the section 5 remedy.

Organizationally, the Article proceeds as follows. Part I provides an overview of the section 5 remedy and discusses the rationale for its enactment and reauthorization. Part II then provides an overview of the Supreme Court's constitutional decision making relative to section 5, and the Court's development of the "congruence and proportionality" test. Part III explains the key ways in which the Supreme Court should define the constitutional problem presented by the reauthorization of section 5. With this analytic framework in hand, Part IV reviews the historical record underlying the 2006 reauthorization determination. Finally, Part V puts all the pieces together to argue that Congress was fully empowered by the Fourteenth and Fifteenth Amendments to reauthorize section 5 in 2006. Part V also addresses the question of whether the extension period selected by Congress may be upheld at this time or whether resolution of this issue may be postponed.

I.

THE SECTION 5 PRECLEARANCE REQUIREMENT

A. *The Mechanics of Section 5*

1. *General Requirements*

Section 5 requires a subset of states and local governments (located principally, but not entirely, in the South and Southwest⁴⁰) to obtain federal preclearance whenever they "enact or seek to administer" a change in any voting standard, practice, or procedure.⁴¹ Preclearance may be obtained from either the United States District Court for the District of Columbia or the Attorney General.⁴² To ob-

40. See *infra* Part I.A.2.

41. 42 U.S.C. § 1973c(a) (2006).

42. *Id.*

tain preclearance, jurisdictions must demonstrate that the change neither has the purpose nor will have the effect of discriminating on the basis of race or color, or on the basis of membership in a “language minority group.”⁴³ Jurisdictions seeking preclearance bear the burden of persuasion, regardless of whether preclearance is sought from the district court or the Justice Department.⁴⁴ Unless and until preclearance is obtained, the change is unlawful and cannot be implemented.⁴⁵

2. *Geographic Coverage*

Section 5’s geographic reach has two determinants, both contained in section 4 of the Voting Rights Act.⁴⁶ First, section 4 employs a nondiscretionary formula to identify jurisdictions that automatically are covered.⁴⁷ Covered jurisdictions may include entire states and also may include local entities (typically counties) located in states that are not fully covered.⁴⁸ Second, section 4 establishes a procedure by which the automatically covered areas potentially may escape, or “bail out,” from coverage.⁴⁹ In addition, section 4 now includes, and historically has included, the time limits responsible for the limited term of the section 5 remedy.⁵⁰

43. *Id.* § 1973c(a); *id.* § 1973l(c)(3) (defining “language minority group” as “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage”).

44. Section 5 does not explicitly provide that covered jurisdictions have the burden of proof in section 5 preclearance lawsuits, but the Supreme Court has inferred such a burden from the statute. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). The Attorney General’s regulations governing section 5 administrative reviews specify that covered jurisdictions also have the burden of proof when they seek preclearance from the Justice Department. Procedures for the Administration of section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.52(a) (2005). The Attorney General’s determination in that regard was upheld by the Supreme Court. *Georgia v. United States*, 411 U.S. 526, 538–40 (1973).

45. *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996); *Clark v. Roemer*, 500 U.S. 646, 652–53 (1991).

46. 42 U.S.C. § 1973b.

47. *Id.* § 1973b(b).

48. *Id.*

49. *Id.* § 1973b(a).

50. *Id.* § 1973b(a)(8) (setting forth current time limit). The original five-year time limit enacted in 1965, as well as the time limits established by the 1970 and 1975 amendments, were not expressed as time limits per se in section 4. Instead, the section 4 bailout provision was designed in such a manner that, after the prescribed enforcement period elapsed, all the covered jurisdictions most likely would be able to bail out, thus terminating all section 4 coverage and the section 5 preclearance requirement. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 201, 89 Stat.

The section 4 coverage formula was designed to capture those jurisdictions that had a history of pervasive discrimination in voting that was in evidence at the time of the 1964, 1968, or 1972 presidential elections.⁵¹ These jurisdictions were identified by their comparatively low rate of voter registration or turnout (less than 50%) at the time of the benchmark election and their use at the same time of a discriminatory “test or device” for determining eligibility to register or vote.⁵²

The section 4 bailout provision allows covered jurisdictions to terminate their coverage by filing suit against the Attorney General in the United States District Court for the District of Columbia. As enacted in 1965 (and maintained without amendment when section 5 was extended in 1970 and 1975), the bailout provision was aimed at correcting any instances of a “false positive”—i.e., any instances where the coverage formula wrongly identified a particular jurisdiction as having been engaged in pervasive violations of the right to vote.⁵³ Few jurisdictions bailed out under this procedure,⁵⁴ indicating

400, 400–01. This changed in 1982 when Congress amended section 4 to set forth an explicit time limit on the section 4 coverage provisions (that operated without regard to the bailout procedure). Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133. This approach again was used in 2006. VRA Reauthorization Act of 2006 § 4, 42 U.S.C. § 1973b(a)(8).

51. 42 U.S.C. § 1973b(b); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 328–30 (1966).

52. For purposes of applying the coverage formula to the 1964 and 1968 elections, the term “test or device” included literacy tests, understanding tests, good moral-character requirements, and requirements that putative voters have a third person vouch for their qualifications to register or vote. 42 U.S.C. § 1973b(b)–(c). This was expanded for purposes of the 1972 coverage determination to also include the administration of elections only in the English language where more than 5% of the citizen voting age population belonged to a single language minority group. *Id.* § 1973b(f)(3).

53. To that end, section 4 provided that a jurisdiction could bail out by demonstrating that although it had implemented a “test or device” for registration or voting in connection with the 1964, 1968, or 1972 presidential elections, the test or device in fact was not implemented with a discriminatory purpose or effect either at the time of that election or thereafter. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 3–4, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 201, 89 Stat. 400. As noted *supra* note 50, the bailout provisions also had a second role up until the 1982 amendments, in providing an overall time limit on the section 5 requirement and the other requirements associated with section 4 coverage.

54. Just one entire state bailed out (Alaska in 1966), but that state subsequently was re-covered pursuant to a later revision of the coverage formula (the 1975 revision). U.S. COMM’N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 14–15 (1975); U.S. Department of Justice Civil Rights Division, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Apr. 16, 2007). A handful of covered localities also bailed out, almost all of which were located

that the coverage formula did a good job of identifying the jurisdictions requiring special treatment, with minimal overbreadth.⁵⁵

In 1982, the bailout provision was amended to focus instead on covered jurisdictions that establish a ten-year record of good behavior regardless of whether their initial coverage was proper.⁵⁶ The record of good behavior must include compliance with the prohibitions on voting discrimination contained in the Constitution and the Voting Rights Act, and also must include implementation of measures aimed at providing minority voters with an equal opportunity to participate in the political process.⁵⁷ The revised standard, which became effective on August 5, 1984,⁵⁸ was intended to make bailout available to a much larger group of jurisdictions by rewarding those that had established a positive record of post-Act conduct prior to 1984 and encour-

outside the South. VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, at 8 tbl.1; U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 6 n.27 (1981).

55. The coverage formula may have been somewhat underinclusive, omitting a few jurisdictions that had a history of pervasive discrimination in voting. PAMELA S. KARLAN, CONGRESSIONAL POWER TO EXTEND PRECLEARANCE UNDER THE VOTING RIGHTS ACT 17–18 (2006), <http://www.acslaw.org/files/Karlan%20Preclearance%20paper%206-14-06.pdf> (noting that Texas and Arkansas were omitted from original group of jurisdictions covered by the 1965 enactment despite evidence of discriminatory use of poll taxes).

56. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131.

57. The requisite compliance with legal requirements must include: no use of a discriminatory test or device; no court findings of voting discrimination except if the violation was trivial, promptly corrected, and not repeated; no consent decrees or settlements resulting in the abandonment of a voting practice challenged as being discriminatory; no implementation of voting changes that required section 5 preclearance without the requisite clearance having been obtained; no preclearance denials by the Justice Department or the District Court for the District of Columbia (not counting any change objected to by the Justice Department that subsequently was precleared by the district court); and no instances where the Justice Department sent federal registrars (“examiners”) to register voters in the jurisdiction. 42 U.S.C. §§ 1973b(a)(1)(A)–(E), (a)(3) (2006).

The additional “equal opportunity” measures that must be taken include: elimination of election methods and other voting procedures that interfere with minority voters’ equal access to the electoral process; constructive efforts to eliminate voter intimidation and harassment; and other constructive efforts such as making registration and voting more convenient, and appointing minorities as election officials and as poll workers. *Id.* § 1973b(a)(1)(F).

In order to bail out, a jurisdiction must demonstrate that it has met these requirements and that all governmental units within its territory also have met these requirements. *Id.* §§ 1973b(a)(1), (a)(3).

58. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131.

aging the others to establish such a record after 1984.⁵⁹ The opportunity to bail out also was substantially broadened by allowing local jurisdictions (typically counties) in the fully covered states to bail out;⁶⁰ previously, if an entire state was covered, just the state could file a bailout lawsuit.⁶¹

Contrary to expectations, however, only a small number of jurisdictions have tried to bail out under the revised standard, of which a slightly smaller number have succeeded.⁶² There are probably a large number of individual localities that are eligible to bail out, and the experience of those that have bailed out demonstrates that, in appropriate cases, bailout may be obtained with the Justice Department's consent.⁶³ A variety of explanations have been offered for the paucity of attempts.⁶⁴ However, no study has been conducted to specifically

59. S. REP. NO. 97-227, at 43–44, 59–60 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 221–23, 237–39.

60. Voting Rights Act Amendments of 1982, § 2(b)(4).

61. *City of Rome v. United States*, 446 U.S. 156, 167–69 (1980).

62. The only jurisdictions that have bailed out under the liberalized standard are fourteen counties and independent cities in Virginia. U.S. Department of Justice Civil Rights Division, Section 5 Covered Jurisdictions, *supra* note 54 (listing fourteen Virginia jurisdictions that have bailed out). One other jurisdiction of the type that is eligible to request bailout, Alaska, sought to bail out under the post-1984 standard, but was not successful. Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 415 (1985) (noting that Alaska filed a bailout suit shortly before the effective date of the 1984 standard and then amended its Complaint after the effective date to allege that it qualified for bailout under the new standard as well). The recent lawsuit filed by the Northwest Austin Municipal Utility District Number One, challenging the constitutionality of the 2006 reauthorization of section 5, also includes a bailout request. *Nw. Austin Mun. Util. Dist. No. One*, *supra* note 16 ¶ 1. However, the Utility District is not the type of jurisdiction eligible to seek bailout under section 4(a)(1) of the Voting Rights Act since it neither is a state nor is it a “political subdivision” within the meaning of section 14(c)(2) of the Act. 42 U.S.C. §§ 1973b(a)(1), 1973l(c)(2). As applied to Texas, the term “political subdivision” refers to counties since counties in Texas are responsible for supervising the conduct of voter registration. TEX. ELEC. CODE ANN. § 12.001 (Vernon 2003).

It also is noteworthy that the Virginia jurisdictions that have bailed out using the revised standard generally have minimal minority populations (all but two have combined minority population percentages of less than 15%). U.S. Census Bureau, State & County QuickFacts—Virginia, <http://quickfacts.census.gov/qfd/states/51000.html> (last visited Feb. 20, 2007).

63. U.S. Department of Justice Civil Rights Division, Section 5 Covered Jurisdictions, *supra* note 54.

64. *E.g.*, Posting of Rick Pildes to Election Law Blog, <http://electionlawblog.org/archives/005661.html> (May 18, 2006, 16:14 EST) (citing “(1) ignorance on the part of appropriate jurisdictions that bailout exists and they are eligible for it; (2) excessively high legal standards that make bailout impractical; (3) the charged nature of a jurisdiction seeking to ‘get out of the VRA,’ particularly for risk averse elected officials”); Hancock & Tredway, *supra* note 62, at 422–23 (citing ignorance of jurisdictions regarding eligibility for bailout, difficulty of bailout procedure compared to relatively

determine why so few bailout suits have been filed. It is possible that Congress's decision in 2006 to reauthorize section 5 for another twenty-four years will spur a greater number of covered jurisdictions into action.

Today, as a result of the coverage formula and bailout litigation, section 5 applies to all or part of sixteen states. Eight states are covered in their entirety—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas—and a ninth state, Virginia, is almost entirely covered (all of the state except a few counties and independent cities that recently bailed out⁶⁵). Section 5 also applies to substantial portions of New York (the Bronx, Brooklyn, and Manhattan) and North Carolina (forty of the state's one hundred counties), and to small portions of California, Florida, Michigan, New Hampshire, and South Dakota.⁶⁶

3. Covered Voting Changes

Section 5 applies whenever covered jurisdictions “enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from

small burden of coverage, recalcitrance of some covered jurisdictions, and possibility that jurisdictions are preparing for a future bailout attempt). Like any litigation, bailout lawsuits may be expensive and time consuming and may not be a sure winner for the plaintiff (that is, if the Justice Department opposes the request) and also could open up new controversies (as a result of the local minority community's response to the filing of the request and/or as a result of the Justice Department's responsive investigation). In addition, jurisdictions generally have routinized the process of making submissions to the Justice Department, which diminishes the potential benefits of bailing out, and covered jurisdictions may view preclearance approvals as a useful confirmation that they are not engaging in voting discrimination. Lastly, it is possible that some jurisdictions that may be eligible to bail out still lack necessary information about the bailout procedure.

65. See *supra* note 62.

66. The 1965 enactment led to coverage of the southern states (Alabama, Georgia, Louisiana, Mississippi, thirty-nine of the forty covered North Carolina counties, South Carolina, and Virginia). Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51 app. (2005). The 1970 extension brought the three New York City boroughs under section 5. *Id.* The 1975 extension brought in Alaska, Arizona, and Texas. *Id.*

Jurisdictions not covered by section 4 also may be required to obtain preclearance of their voting changes in certain circumstances, pursuant to section 3(c) of the Voting Rights Act. 42 U.S.C. § 1973a(c) (allowing a court in a voting rights lawsuit filed against a non-covered jurisdiction to require that the jurisdiction submit all, or a particular subset, of its voting changes for preclearance by the Justice Department or that local district court for a specified period of time). A relatively small number of jurisdictions have been ordered to preclear their voting changes pursuant to section 3(c). See VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, at 9.

that in force or effect” on the jurisdiction’s coverage date.⁶⁷ Depending on whether coverage resulted from the 1965 enactment or the 1970 or 1975 amendments, the coverage date is November 1, 1964, November 1, 1968, or November 1, 1972, respectively.⁶⁸

Section 5 covers all practices relating to voting when they are changed by a covered jurisdiction.⁶⁹ The covered practices include: (1) voter registration standards, procedures, and locations; (2) polling place and early voting locations, and precinct lines; (3) standards and procedures for voting on election day or before election day; (4) the use of languages in addition to English in administering elections; (5) election dates; (6) methods of election⁷⁰; (7) districting plans; (8) jurisdiction boundaries (because they determine eligibility to vote in particular elections); (9) candidate qualifications and qualifying procedures; (10) the number of elected officials and their term of office; and (11) initiative, referendum, and recall procedures.⁷¹

4. *Nondiscrimination Standards*

Section 5, by its terms, prohibits the implementation of voting changes that either have a discriminatory purpose or a discriminatory effect.⁷²

67. 42 U.S.C. § 1973c(a).

68. *Id.*

69. *See* *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (noting section 5 reaches “any state enactment which alter[s] the election law of a covered State in even a minor way”). Changes are covered even when they result from a federal court order, so long as the court-ordered change reflects the policy choices of the covered jurisdiction. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.18 (2005).

70. These include at-large elections (elections in which all positions are chosen by all voters in the jurisdiction), district-based elections, elections that use a mixture of districts and at-large positions, majority-win and plurality-win systems, and procedures that eliminate or limit the ability to “single-shot vote” where elections are wholly or partially conducted at large (single-shot voting may occur when all candidates for several at-large positions run together as a group rather than running for particular designated posts and consists of the voter casting a ballot for less than the total number of at-large positions that are up for election). *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.13(e)–(f) (2005) (listing types of election-method changes covered by section 5); *THE VOTING RIGHTS ACT: TEN YEARS AFTER*, *supra* note 54, at 206–08 (discussing single-shot voting).

71. 28 C.F.R. §§ 51.12–51.18 (2005). However, section 5 does not apply to the reallocation of decision-making authority among elected officials where the authority being reallocated is unrelated to voting. *Presley v. Etowah County Comm’n*, 502 U.S. 491, 510 (1992).

72. 42 U.S.C. § 1973c.

a. *Discriminatory Effect Standard*

Pursuant to the Supreme Court's 1976 decision in *Beer v. United States*, the effect standard has a specialized meaning and is violated only when a voting change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁷³ In other words, the effect analysis is conducted by comparing minority voters' electoral opportunity under the new and pre-existing provisions; the change has a discriminatory effect if (and only if) it would worsen that opportunity. If that opportunity remains the same or is improved, the effect standard is satisfied even if the opportunity afforded minority voters by the new provision is poor or even nonexistent.⁷⁴ The *Beer* Court rejected a broader construction under which discriminatory effect under section 5 would also have included any non-retrogressive dilution of minority voting strength, defined by the constitutional test for vote dilution that the Court was applying at that time.⁷⁵

Historically, the District Court for the District of Columbia and the Justice Department applied the *Beer* retrogression test to vote dilution issues (i.e., to changes such as redistrictings, the adoption of at-large and single-member-district election systems, and the adoption of majority-vote requirements and anti-single-shot provisions) by focusing almost exclusively on the opportunity of minority voters to elect candidates of their choice.⁷⁶ In 2003, in a controversial five-to-four decision, the Supreme Court in *Georgia v. Ashcroft* rejected this ap-

73. 425 U.S. 130, 141 (1976).

74. Thus, for example, the Bossier Parish, Louisiana, school board enacted a redistricting plan for its twelve districts after the 1990 Census that contained no black-majority districts, although the parish was 20% black, two compact black-majority districts could have been drawn, and the school board admitted that its plan had a dilutive effect on black voting strength. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 323–24 (2000); *id.* at 343–44 (Souter, J., concurring in part and dissenting in part). But the Justice Department was required to concede that the plan did not violate the section 5 effect standard since the pre-existing plan also did not include any black-majority districts. *Id.* at 323–24; *see also* *City of Lockhart v. United States*, 460 U.S. 125, 134–35 (1983) (holding that a voting change that neither decreases nor increases minority electoral opportunity does not violate the section 5 effect standard).

75. 425 U.S. at 157–58 (Marshall, J., dissenting).

76. *Bush v. Vera*, 517 U.S. 952, 983 (1996) (analyzing Texas congressional redistricting plan to determine whether it reduced the opportunity of minority voters to elect candidates of their choice); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 73 (D.D.C. 2002) (holding that the retrogression test addresses the opportunity of minority voters to elect candidates of their choice), *vacated and remanded*, 539 U.S. 461, 491 (2003) (explaining that District Court erred in focusing "too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts"); Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).

proach, and held that retrogression must be analyzed by looking at a combination of several effects, including the effect on the ability to elect, the effect on the ability of minority voters to have a non-decisive electoral influence, and the post-election effect on the ability of representatives chosen by minority voters to exert legislative leadership, influence, and power.⁷⁷ *Ashcroft* produced a substantial amount of comment, both favorable and critical,⁷⁸ and Congress in the 2006 reauthorization legislation directed the District Court for the District of Columbia and the Justice Department to return the retrogression analysis to its previous “ability to elect” focus, thus reversing the *Ashcroft* holding.⁷⁹

A somewhat different effect test is used when municipal annexations are reviewed under section 5. In 1975, the Supreme Court held that an annexation that meaningfully reduces a city’s minority population percentage in the context of racially polarized voting may be precleared only if the city’s election system “fairly reflects” minority voting strength in the enlarged city.⁸⁰

77. 539 U.S. 461, 483–85 (2003).

78. *E.g.*, Michael J. Pitts, *Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 268–69 (2004) (concluding that *Ashcroft* may reduce the ability of the federal government to protect minority voters against discrimination but also may mitigate concerns regarding the constitutionality of section 5); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1717–20 (2004) (applauding *Ashcroft* for substituting “a highly nuanced totality-of-the-circumstances approach for the relatively rigid *Beer* retrogression test,” but expressing concern as to the administrability of the new standard); Meghann E. Donahue, Note, “*The Reports of My Death Are Greatly Exaggerated*”: *Administering Section 5 of the Voting Rights Act After Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1653 (2004) (arguing that the retrogression test after *Ashcroft* is highly problematic but administrable); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21–22 (2004) (arguing that *Ashcroft* “dramatically undercuts” the anti-discrimination protections of section 5); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 96 (2004) (calling *Ashcroft* “the most important decision in a generation on race and political equality” and lauding it for giving covered states greater flexibility in selecting the manner in which minority voters should be accorded a nondiscriminatory electoral opportunity).

79. VRA Reauthorization Act of 2006 §§ 2(b)(6), 5(3), 42 U.S.C. § 1973c(b)–(d) (2006). The Supreme Court in *Ashcroft* also held that a minority group’s ability to elect its candidates of choice should be analyzed by looking at both the number of “safe” minority districts (districts in which minorities constitute a substantial majority of the population) and the number of “coalition” districts (districts in which minority voters join with a predictably supportive white vote to control elections), 539 U.S. at 480–82, and the dissenters in *Ashcroft* agreed. *Id.* at 492–93. The 2006 reauthorization legislation did not overturn this aspect of the *Ashcroft* ruling.

80. *City of Richmond v. United States*, 422 U.S. 358, 371 (1975).

b. Discriminatory Purpose Standard

The section 5 discriminatory purpose standard has followed a similar development arc. Historically, the courts and the Justice Department viewed the section 5 purpose test as prohibiting the implementation of changes motivated by any discriminatory purpose⁸¹—in other words, discriminatory purpose under section 5 was the same as discriminatory purpose under the Fourteenth and Fifteenth Amendments. In concrete terms, this meant that the purpose test not only barred jurisdictions from implementing retrogressive voting changes enacted with a discriminatory purpose but also precluded the implementation of non-retrogressive voting changes (i.e., changes that maintained or improved the electoral opportunity of minority voters) when a jurisdiction sought to minimize or dilute minority voting strength for a discriminatory reason.⁸² In 2000, however, the Supreme Court rejected this longstanding construction (also by a five-to-four vote), ruling in *Reno v. Bossier Parish School Board (Bossier II)* that discriminatory purpose under section 5 exists only when a jurisdiction intends to cause retrogression, and that a discriminatory purpose to cause other harm is not cognizable under the statute.⁸³ *Bossier II* also was highly controversial,⁸⁴ and Congress in the 2006 reauthorization legislation reversed this decision as well, specifying that the section 5 purpose standard “include[s] any discriminatory purpose.”⁸⁵

c. Violation of Other Provisions of the Voting Rights Act

Up until 1997, the Justice Department believed that it also was authorized to deny preclearance when the submitted change violated

81. *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 n.11 (1987) (citing *City of Richmond*, 422 U.S. at 378–79); *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982), *aff’d mem.*, 459 U.S. 1166, 1166 (1983); Posner, *supra* note 31, at 174 n.156, 184–87; Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 276, 284–86, 297 (2006).

82. Posner, *supra* note 31, at 184.

83. 528 U.S. 320, 328 (2000).

84. *See, e.g.*, McCrary et al., *supra* note 81, at 276 (arguing that the court’s decision in *Bossier* severely decreased protections for minority voting rights formerly provided by section 5); *The Voting Rights Act: Section 5—Preclearance Standards: Oversight Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 10, 19 (2005) (statements of Brenda Wright, Managing Attorney, National Voting Rights Institute, and Mark Posner, Adjunct Professor, American University, Washington College of Law), available at <http://judiciary.house.gov/media/pdfs/printers/109th/24283.pdf> (arguing that Congress should amend Voting Rights Act to overrule *Bossier II*).

85. VRA Reauthorization Act of 2006 §§ 2(b)(6), 5(3), 42 U.S.C. §§ 1973c(b)–(c) (2006).

another provision of the Voting Rights Act.⁸⁶ In that year, in its initial decision in the *Reno v. Bossier Parish School Board* litigation (*Bossier I*), the Supreme Court ruled that such objections are not permitted by the statute.⁸⁷ The 2006 reauthorization legislation did not reverse this decision.

5. *Preclearance Procedure*

Section 5 jurisdictions have the choice of seeking preclearance either by filing for a declaratory judgment in the D.C. District Court (naming the Attorney General or the United States as the defendant) or by making an administrative submission to the Attorney General.⁸⁸ In practice, jurisdictions almost always choose the administrative route,⁸⁹ because it is faster, simpler, and cheaper: the Justice Department generally is required to make preclearance determinations within sixty days of receiving a submission,⁹⁰ and the administrative preclearance process is more informal, and thus simpler and less costly, than litigation.⁹¹ In addition, if a jurisdiction fails to obtain preclearance from

86. The “other provision” violations that triggered section 5 objections included: “clear” violations of section 2, 42 U.S.C. § 1973 (2006), which prohibits the implementation of voting provisions that result in a denial of equal electoral opportunity to minority voters; violations of sections 4(f)(4) and 203, 42 U.S.C. §§ 1973b(4)(f)(4) and 1973aa-1a, which require certain jurisdictions to provide election materials in both English and one or more other languages; and violations of section 208, 42 U.S.C. § 1973aa-6, which provides that voters may obtain assistance at the polls from any person of their choice, other than their employer or union representative. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 490 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55(b)), *repealed by* 63 Fed. Reg. 24,108 (May 1, 1998) (objections based on “clear” section 2 violations); *see* VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, app. A at 72–73 tbl.A6 (listing objections interposed by Justice Department based, in whole or in part, on violations of provisions of the Voting Rights Act other than section 5 purpose/effect standard).

87. 520 U.S. 471, 480 (1997).

88. 42 U.S.C. § 1973c(a). The Attorney General has delegated the preclearance decision-making authority to the Assistant Attorney General for Civil Rights, and the Assistant Attorney General in turn has authorized the Chief of the Division’s Voting section to make all preclearance determinations other than objections and decisions whether to withdraw an objection. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.3 (2005).

89. *See* preclearance statistics *supra* note 36.

90. 42 U.S.C. § 1973c(a); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.9 (2005).

91. 28 C.F.R. §§ 51.20, 51.26–51.28, 51.34–51.48 (1986) (providing that administrative preclearance requests may be made by letter or using any other written form; describing the specific information to be included in the requests; and providing non-adversarial review procedure involving no hearings or depositions, and a modest form of written discovery). Preclearance submissions also now may be made electronically to the Justice Department. U.S. Department of Justice Civil Rights Division, How to

the Justice Department, it retains the option of filing suit for a de novo determination from the district court.⁹²

6. *Section 2 of the Voting Rights Act*

Section 2 of the Voting Rights Act contains the Act's general, all-purpose prohibition on voting discrimination.⁹³ Unlike section 5, it applies nationwide, applies regardless of when a voting provision was enacted or first administered, and is enforced through the usual method of case-by-case litigation.⁹⁴ Like section 5, it includes an effect standard, though the precise prohibition is a more broadly defined "results" test (enacted by Congress in 1982).⁹⁵ If the Supreme Court were to find that the reauthorization of section 5 is unconstitutional, section 2 by default would become the primary means for challenging discriminatory voting changes in the section 5 jurisdictions.

B. Why Section 5 Was Enacted, Twice Expanded to Cover Additional Jurisdictions, and Reauthorized Four Times

Section 5 was enacted in 1965 as part of a multi-faceted remedial scheme aimed at eradicating discrimination in voting in those jurisdictions which, for nearly a century following the adoption of the Fifteenth Amendment, had engaged in pervasive and unremitting violations of the right to vote of our Nation's black citizens.⁹⁶ Although the Act's focus since 1965 has expanded to address the right to vote of other minority groups and to address voting rights problems throughout the country, the core purpose of section 5 has not changed.

Congress's threshold concern in 1965 was to ensure that black citizens in the South would be able to freely register to vote and cast their ballots on election day. To accomplish this, Congress prohibited the jurisdictions covered under section 4 from continuing to use discriminatory tests and devices for determining eligibility to register or vote.⁹⁷ Congress also authorized the federal government to send fed-

File an Electronic Submission Under Section 5 of the Voting Rights Act, http://wd.usdoj.gov/crt/voting/sec_5/evs/ (last visited May 4, 2007).

92. See *Morris v. Gressette*, 432 U.S. 491, 505 n.21 (1977).

93. 42 U.S.C. § 1973.

94. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997); *Holder v. Hall*, 512 U.S. 874, 883 (1994).

95. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b)); see generally *Johnson v. De Grandy*, 512 U.S. 997, 1009-13 (1994) (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

96. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

97. See *supra* note 52 and accompanying text. These tests and devices had "been instituted with the purpose of disenfranchising Negroes, . . . framed in such a way as

eral examiners into the section 4 jurisdictions to assist in registering new black voters⁹⁸ and federal observers into the section 4 jurisdictions to monitor elections.⁹⁹

Congress concluded, however, that voting discrimination was so deeply embedded in the political fabric of the section 4 jurisdictions that it could not achieve its goal of ridding the jurisdictions of discrimination simply by halting the egregious constitutional violations and enfranchising black voters, and by allowing minority voters and the Justice Department to challenge other (pre-Act and post-Act) discriminatory measures in court. Given these jurisdictions' long history of discrimination, Congress realized that once the jurisdictions were prevented from using discriminatory tests and devices for determining eligibility to register and vote, and thus faced the prospect of an enfranchised black citizenry seeking to exercise full political power, the jurisdictions likely would seek to institute new voting standards, practices, and procedures aimed at limiting the opportunity of black voters to effectively participate in the political process.¹⁰⁰ Congress further

to facilitate this aim, and . . . administered in a discriminatory fashion for many years." *Id.* at 333–34; see also U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 43 tbl.3 (1975) (listing black registration rates in southern states at time Voting Rights Act was adopted). Because the ban on the use of these tests or devices originally was tied to the section 4 coverage formula, it (like the section 5 preclearance requirement) was to expire after five years. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438. In 1970, however, Congress extended the ban nationwide, for a five-year period, Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 3, 6, 84 Stat. 314, 315, and in 1975 the nationwide ban was made permanent. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400 (codified as amended at 42 U.S.C. § 1973aa).

In 1965, Congress chose not to completely outlaw one particular type of discriminatory test or device, the poll tax, which had been outlawed in federal elections by the Twenty-Fourth Amendment but which still could be legally used in state and local elections. The 1965 Act instead directed the Attorney General to file suit under the Constitution to bar its enforcement in state and local elections, 42 U.S.C. § 1973h, and in 1966, in a suit brought by Virginia residents, the Supreme Court held that the use of a poll tax in state and local elections is unconstitutional. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

98. Voting Rights Act of 1965, Pub. L. No. 89-110, § 6, 79 Stat. 437, 439–40. This authority, however, was rarely used in recent years, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, at 53, and was repealed by Congress in the 2006 reauthorization legislation. VRA Reauthorization Act of 2006, Pub. L. No. 109-246, § 3(c), 120 Stat. 577, 580.

99. 42 U.S.C. § 1973f (2006). The observer authority has been, and continues to be, time-limited by section 4 of the Act.

100. As the Supreme Court explained,

Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose

concluded that this special risk of new, discriminatory decision making by the section 4 jurisdictions could not be adequately addressed through the usual method of case-by-case litigation.¹⁰¹ Accordingly, Congress decided to “shift the advantage of time and inertia from the perpetrators of [discrimination] to its victims”¹⁰² by requiring section 4 jurisdictions to obtain preclearance from the federal government before implementing any new voting provisions.¹⁰³

The new preclearance requirement, however, represented “an uncommon exercise of congressional power,”¹⁰⁴ and the special remedies that were to be applied to the section 4 jurisdictions were, as a whole, “stringent” and “complex.”¹⁰⁵ Accordingly, Congress also provided that the preclearance requirement (and the other section 4 remedies) would remain in effect for only a limited period of time.¹⁰⁶

Congress has relied on the same set of considerations in expanding the section 4 geographic coverage formula in 1970 and 1975 and in reauthorizing section 5 in 1970, 1975, 1982, and 2006. The 1970 and 1975 expansions utilized essentially the same remedial approach of halting the use of tests and devices for registration and voting in the specially identified jurisdictions and then requiring that

that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

Katzenbach, 383 U.S. at 335 (footnote omitted).

101. *See id.* at 313–15.

102. *Id.* at 328.

103. After its decision in *South Carolina v. Katzenbach*, the Supreme Court has continued to recognize that the essential purpose of section 5 is to block the implementation of new, discriminatory voting measures. *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 335–36 & n.4 (2000); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (citing *Beer v. United States*, 425 U.S. 130, 140 (1976)). However, as indicated by Congress’s reversal of the *Bossier II* ruling, the Supreme Court was mistaken when it concluded that this blocking function is limited to preventing the implementation of retrogressive changes. *See supra* note 85 and accompanying text.

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

105. *Id.* at 315.

106. Congress did not, however, provide much of an explanation as to why five years was selected as the initial term. H.R. REP. NO. 89-439, at 15 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2446 (noting committee view that five years was “both reasonable and necessary”); S. REP. NO. 89-162 (1965) (statement of the joint views of twelve members of the Judiciary Committee), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2540 (five years was “appropriate”). As originally conceived by the Justice Department (the primary drafter of the Voting Rights Act), the section 4 jurisdictions initially were to be covered for a ten-year period. DAVID J. GARROW, *PROTEST AT SELMA* 70–71, 110, 115–16 (1978); Brian K. Landsberg, *Sumter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877, 946 (2003) (“The bill that became the Voting Rights Act was drafted by lawyers in the Department of Justice . . .”).

voting changes enacted or administered by these jurisdictions be subject to federal review to address the risk of new discriminatory decision making.¹⁰⁷ Each of the four reauthorizations has been based on Congress's determination that, notwithstanding the passage of time and the progress made in eradicating voting discrimination, there continues to exist a significant risk that the covered jurisdictions will enact or seek to administer new discriminatory voting practices.¹⁰⁸ And each reauthorization has included a determination by Congress that this special intrusion on the authority of the covered states and local jurisdictions should remain limited in time.¹⁰⁹

II.

THE LEGAL FOUNDATION FOR EVALUATING SECTION 5'S CONTINUED CONSTITUTIONALITY

A. *The Supreme Court's Rulings on the Constitutionality of Section 5*

As already noted, it would appear based on numerous Supreme Court rulings that the constitutionality of section 5's basic remedial

107. As noted *supra* note 97, the 1970 amendments actually extended the ban on the use of literacy tests, and other tests and devices, nationwide. The 1975 expansion halted the use of English-only elections in the newly covered jurisdictions for the period of time that these jurisdictions are covered by section 4. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401–402 (codified at 42 U.S.C. § 1973b(f)(1)–(4) (2006)).

108. H.R. REP. NO. 109-478, at 8–11, 25–45, 56–58 (2006) (summarizing bases on which Congress extended and expanded section 5 coverage in 1970, 1975, and 1982, and discussing continuing need for preclearance requirement in 2006); S. REP. NO. 97-417, at 4–15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181–92 (summarizing the bases on which Congress extended and expanded section 5 coverage in 1970 and 1975, and discussing continuing need for preclearance requirement as of 1982). Congress also noted in connection with each reauthorization that covered jurisdictions had failed during the previous authorization period to fully comply with the preclearance requirement by implementing numerous voting changes without first obtaining section 5 preclearance. *Id.*

109. Some may argue that section 5 has a much broader purpose: to provide minority voters with an equal electoral opportunity, or at least to protect minority voters against the effects of racially polarized voting until the time comes when elections in the covered jurisdictions are no longer characterized by racially polarized voting. *E.g.*, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, at 91 (dissenting statement of Commissioner Michael Yaki, joined by Commissioner Melendez) (“Section 5 provides a safeguard against vote dilution efforts that must remain in place until such time as we have achieved the type of society where race is not a factor in electoral politics.”). But this explanation finds no support in *Katzenbach* and subsequent Supreme Court rulings and also argues too much, since it suggests that section 5 should apply to all voting practices (not just those that constitute changes) and to a much larger number of jurisdictions (all jurisdictions where racially polarized voting is occurring).

structure is firmly established and seemingly immune from attack.¹¹⁰ On the other hand, the Supreme Court also has made it clear in several rulings that the question whether a new extension of section 5 is constitutional is separate and apart from the question whether the section 5 remedial scheme, in and of itself, is constitutional, and that the Court's recent reaffirmations of support for the section 5 remedial scheme do not necessarily mean that the Court will support a congressional decision to extend section 5 beyond the 2007 expiration date set in 1982. These varying aspects of the Supreme Court's decisions to-date regarding the constitutionality of section 5 are explored in detail below.

1. *The Constitutionality of the Section 5 Remedial Structure*

a. *Supreme Court Rulings Upholding the Section 5 Remedial Structure*

Within months after section 5 was enacted, the Supreme Court ruled, in *South Carolina v. Katzenbach*, that the preclearance requirement constitutes a fully appropriate exercise of congressional power under the Fifteenth Amendment, rejecting a plethora of alleged constitutional infirmities.¹¹¹ The Court began its analysis by reaffirming Congress's authority to enact remedies for Fifteenth Amendment violations¹¹² and its authority to implement remedies in the Voting Rights Act "which go into effect without any need for prior [court] adjudication."¹¹³ The Court then went on to make three key rulings with regard to section 5.

First, the Court found that the system used for identifying covered jurisdictions is appropriate.¹¹⁴ The Court concluded that the section 4 "coverage formula is rational in both practice and theory,"¹¹⁵ and that the bailout provision provided an appropriate and reasonable means by which jurisdictions could seek to terminate coverage.¹¹⁶

Second, the Court held that section 5 does not impermissibly alter our federal system of government by requiring covered states and localities to obtain preclearance from the national government before implementing any new voting provision.¹¹⁷ The Court recognized that

110. *See supra* notes 19–21 and accompanying text.

111. 383 U.S. 301, 308, 323 (1966).

112. *Id.* at 325–27.

113. *Id.* at 327–28.

114. *Id.* at 328.

115. *Id.* at 330.

116. *Id.* at 331–32.

117. *Id.* at 334–35.

section 5 constitutes an “uncommon exercise of congressional power,” but concluded that it is justified by “exceptional conditions”: the fact that the covered jurisdictions had, for nearly a century, engaged in pervasive discrimination in voting; the risk that these jurisdictions would seek to implement new discriminatory measures; and the inability of the national government to properly address this risk through case-by-case litigation.¹¹⁸

Third, the Court rejected challenges to the preclearance mechanism. The Court held that Congress acted within its authority when it required that judicial preclearance lawsuits be filed against the federal government, when it limited such suits to the District Court for the District of Columbia, and when it shifted the burden of persuasion in these suits to the jurisdictions seeking preclearance.¹¹⁹

The Court’s analysis did not make any mention of section 5’s limited term. This seems unsurprising given that section 5 had just been enacted, and that highlighting the preclearance requirement’s then brief term could very well have sent the wrong compliance signal to the newly covered jurisdictions. However, for the reasons set forth *infra* at Part III.B, this omission does not suggest, some forty years later, that the number of years that section 5 is to remain in effect is of little or no constitutional significance.

In 1980, the Supreme Court reaffirmed and expanded on *Katzenbach* in *City of Rome v. United States*.¹²⁰ In *Rome*, the Court addressed the two ways in which Congress built upon and expanded the requirements of the Civil War Amendments in fashioning the section 5 remedy and again held that Congress had not exceeded its constitutional authority under the Fifteenth Amendment in so doing:

First, the Court again concluded that section 5 does not improperly impinge on our federal system of government. The Court heavily relied on its decision four years earlier in *Fitzpatrick v. Bitzer*,¹²¹ a case that dealt with Congress’s authority under the Fourteenth Amendment. As the Court explained: “*Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’ Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”¹²²

118. *Id.*

119. *Id.* at 335.

120. 446 U.S. 156 (1980).

121. 427 U.S. 445 (1976).

122. *Rome*, 446 U.S. at 179.

Second, the Court upheld Congress's prohibition on voting changes that have a discriminatory effect but no discriminatory purpose. Such changes do not violate the Fifteenth Amendment, yet Congress was relying on its authority to enforce the Fifteenth Amendment when it adopted the effect standard. The Court held that Congress was authorized to prohibit voting practices that have a discriminatory effect as a way to guard against the risk that jurisdictions with a history of intentional racial discrimination may engage in further purposeful discrimination that does violate the Fifteenth Amendment.¹²³

With regard to the role that section 5's limited term plays in the constitutional analysis, the Supreme Court strongly intimated, but did not quite explicitly hold, that section 5's constitutionality does rest in part on its limited lifespan. As discussed in greater detail *infra* at Part II.A.2, the Court addressed whether Congress's 1975 extension of section 5 for seven years was constitutional, and held that it was, not because section 5's term is irrelevant, but because the historical record supported Congress's decision.¹²⁴ Thus, the Court indicated, time is an important element of the section 5 constitutional calculus.

The Supreme Court's most recent decision upholding the constitutionality of section 5, *Lopez v. Monterey County*, dealt with a more limited question regarding federalism that arises only where one or more of a state's political subdivisions are covered by section 5 but the entire state is not.¹²⁵ That question is whether section 5 applies when a voting change is enacted by the non-covered entity (the state) but is implemented by the covered entity—one of the state's covered political subdivisions.¹²⁶ Section 5 historically has been interpreted as applying to such enactments, and the Court held that this is proper both as a matter of statutory construction¹²⁷ and under Congress's Fifteenth Amendment constitutional authority.¹²⁸

123. *Id.* at 177. Technically, the issue presented in *Rome* was whether Congress could rely on the Fifteenth Amendment to prohibit voting changes with a discriminatory effect if the Fifteenth Amendment only reaches intentionally discriminatory voting practices. *Id.* at 173. The *Rome* Court noted that the scope of the Fifteenth Amendment's nondiscrimination requirement was, at that time, undecided, but chose to bypass that question and instead assume, for purposes of deciding Congress's authority to utilize an effect standard, that the Fifteenth Amendment only addresses purposeful discrimination. *Id.* Subsequently, the Supreme Court has confirmed that the Fifteenth Amendment only prohibits intentional discrimination. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997).

124. *Rome*, 446 U.S. at 182.

125. 525 U.S. 266, 269 (1999).

126. *Id.*

127. *Id.* at 282.

128. *Id.* at 283–85.

Lopez is of note here, in considering the constitutionality of the overall section 5 remedial scheme, because of the analytic path the Supreme Court took in reaching its decision and because this path was taken by the Court so recently. Specifically, in deciding that this third constitutional challenge was without merit, the Court fully embraced its rulings in *Katzenbach* and *Rome* that Congress did not improperly intrude on the authority of state governments by enacting section 5¹²⁹ and its ruling in *Rome* that Congress may prohibit the implementation of voting changes that have a discriminatory effect but no discriminatory purpose.¹³⁰

Yet *Lopez* also includes language that could be highlighted by the Supreme Court if it were to decide that the 2006 extension of section 5 is invalid. The *Lopez* Court observed that section 5 “authorizes federal intrusion into sensitive areas of state and local policymaking” and thus “imposes substantial ‘federalism costs,’” and cautioned that the Fifteenth Amendment only “contemplate[s] *some* intrusion into areas traditionally reserved to the States.”¹³¹ In other words, the cost of continuing the section 5 regime is potentially significant while the authority for doing so is not unlimited.

The year after *Lopez* was decided the Court again expressed concern about section 5’s federalism costs in ruling, in the *Bossier II* decision, that the section 5 purpose test only encompasses retrogressive purposes. The Court said that construing the purpose test to include “discriminatory but nonretrogressive vote-dilutive purposes . . . would . . . exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts, . . . perhaps to the extent of raising concerns about § 5’s constitutionality”¹³² Why or how a section 5 purpose test that is co-extensive with the constitutional test for discriminatory purpose could possibly raise any constitutional issue was not explained by the Court but, nonetheless, the Court expressed this federalism concern.

b. The Absence of Supreme Court Rulings Regarding the Constitutionality of Post-1965 Modifications to Section 5’s Coverage Provisions

Although the Supreme Court has upheld the basic statutory scheme for identifying the jurisdictions covered by section 5, neither the Supreme Court nor any other court has addressed the manner in

129. *Id.* at 283.

130. *Id.*

131. *Id.* at 282 (emphasis added).

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

which Congress has expanded and altered the coverage provisions since 1965. Thus, no court has ruled on Congress's 1970 determination to apply the original coverage formula to the 1968 presidential election; Congress's 1975 determinations to expand the coverage formula to include English-only elections in jurisdictions with more than a minimum language-minority citizen population and to apply the expanded formula to the 1972 presidential election; or Congress's 1982 determination to revise the bailout standard. Nonetheless, there is no indication from the Court that any of these determinations are open to challenge now, and the time would seem to be long past for questioning these amendments.¹³³

*c. Recent Supreme Court Decisions Reaffirming the
Constitutionality of Section 5's Remedial Scheme in
the Context of Challenges to Other Statutes*

In addition to *Lopez*, the Supreme Court has expressed strong support for the section 5 remedial scheme in recent decisions in which the Court applied the constitutional "congruence and proportionality" test in the context of challenges to other civil rights statutes. That test, as is discussed in more detail *infra* at Part II.B, was established by the Court in its 1997 decision in *City of Boerne v. Flores* as the standard for determining whether particular legislation enacted by Congress pursuant to the Fourteenth Amendment constitutes a valid exercise of Congress's Fourteenth Amendment enforcement authority.¹³⁴ As with *Lopez*, however, the statements of support for section 5 contained in *Boerne*, and repeated in the Court's post-*Boerne* line of decisions, are accompanied by language to which the Court potentially could cite to

133. A section 5 coverage challenge was filed with respect to the 1975 amendments by the State of Texas, which was newly covered under section 5 as a result of these amendments. However, the State chose not to dispute whether the 1975 expansion of the coverage formula was constitutional—i.e., whether the expansion was supported by the same type of considerations that led the Supreme Court in *Katzenbach* to uphold the 1965 version of the coverage formula. Instead, the State claimed that the coverage formula had been erroneously applied to it. *Briscoe v. Levi*, 535 F.2d 1259, 1262 n.15 (D.C. Cir. 1976) (quoting the State's complaint). In rejecting this challenge, however, the Supreme Court expressed support for Congress's decision to expand the coverage formula, noting that "Congress concluded after extensive hearings that there was 'overwhelming evidence' showing 'the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities.'" *Briscoe v. Bell*, 432 U.S. 404, 405–06 (1977). The Court upheld the application of the coverage formula to Texas on the ground that the Act precludes judicial review of the manner in which the federal government implements the formula, a preclusion which the Court found to be constitutional. *Id.* at 412, 414–15.

134. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

bolster a ruling that the 2006 reauthorization of section 5 is unconstitutional.

In *Boerne*, the Supreme Court specifically pointed to section 5, along with other provisions of the Voting Rights Act, as models of congruent and proportional legislation validly enacted by Congress pursuant to the Fifteenth as well as the Fourteenth Amendments. Indeed, the Court cited almost exclusively to various provisions of the Voting Rights Act in providing examples of how Congress properly may exercise its enforcement authority under these Amendments.¹³⁵ The Court unambiguously declared that section 5 and other provisions of the Act “are within Congress’s power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States,”¹³⁶ and noted with approval its decisions in *Katzenbach* and *Rome*.¹³⁷ More particularly, the Court stated that the history of discrimination the Voting Rights Act sought to remedy represents a model basis for congressional action,¹³⁸ and suggested that the limitations Congress placed on the reach of the preclearance requirement—the subject matter restriction (voting practices), the geographic restrictions (the coverage formula and the bailout procedure), and the termination date—help ensure that section 5 is congruent and proportional.¹³⁹

In its post-*Boerne* decisions, the Court has continued to affirm the constitutionality of section 5, referring with approval to its discussion of section 5 in *Boerne*.¹⁴⁰ The Court variously has emphasized in these decisions the significance of the extensive history of discrimination that formed the basis for the enactment of section 5, and the significance of the limitations Congress imposed on section 5’s remedial scope.¹⁴¹

135. *Id.* at 518.

136. *Id.*

137. *Id.* at 518, 525–27, 532–33.

138. *See id.* at 530.

139. *See id.* at 532–33.

140. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004).

141. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736–38 (2003) (noting importance of “pattern[s] of state . . . violations” to justification for the Voting Rights Act and upholding the Family Medical Leave Act based on a similar pattern); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373–74 (2001) (contrasting “pattern of constitutional violations” and “limited remedial scheme” justifying the Voting Rights Act with the insufficient evidence relied upon by Congress in applying certain provisions of the Americans with Disabilities Act to the states and the scope of the requirements imposed by these provisions on the states); *United States v. Morrison*, 529 U.S. 598, 626–27 (2000) (contrasting section 5’s limitation to “States that . . . had a history of discrimination” with Violence Against Women Act’s nationwide remedial scheme); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S.

The Supreme Court's references to the geographic and temporal limitations on section 5 at least implicitly raise the question, however, whether extending section 5 beyond the 2007 termination date may so expand the reach of the section 5 remedy as to vitiate the limitations that helped place section 5 safely within the confines of Congress's constitutional authority. The Court, unsurprisingly, did not specifically pose this question in *Boerne* or in its post-*Boerne* cases, let alone offer any answer. But should the Court decide to overturn the 2006 reauthorization of section 5, it no doubt will point to the language in *Boerne* and in the post-*Boerne* cases that underlines the potential importance of these limitations in determining the statute's continuing constitutionality.

2. *The Constitutionality of Extending Section 5's Termination Date*

The Supreme Court has ruled on the constitutionality of Congress extending section 5 for an additional period of time on just one occasion, in *City of Rome v. United States*, where the Court upheld under the Fifteenth Amendment Congress's 1975 reauthorization of the statute for seven years.¹⁴² In so doing, the Court looked to the historical record on which Congress relied in 1975,¹⁴³ in accord with the Court's observation in *Katzenbach* that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."¹⁴⁴ Specifically, the Court cited with approval two types of information Congress relied upon: information regarding section 5 preclearance denials following the previous extension in 1970; and information regarding minority participation rates.

The Court's consideration of the section 5 preclearance denials focused on the objections that the Attorney General interposed during the post-1970 renewal period. The Court emphasized Congress's con-

627, 640, 647 (1999) (contrasting "the undisputed record of racial discrimination confronting Congress in the voting rights cases" and "the various limits that Congress imposed in its voting rights measures" with paucity of state violations justifying applying the Patent Remedy Act to the states and the absence of limitations in that Act on potential state liability).

142. *City of Rome v. United States*, 446 U.S. 156, 182 (1980). (In *Rome*, the Court did not also address Congress's 1975 decision to expand the coverage formula since the plaintiff—the City of Rome, Georgia—was not affected by that change.) The District Court for the District of Columbia subsequently held, in a brief opinion, that the 1982 extension of section 5 was constitutional. *County Council of Sumter County v. United States*, 555 F. Supp. 694, 707–08 (1983).

143. *Rome*, 446 U.S. at 180–82.

144. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). *Accord*, *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997).

clusion that the objections “clearly bespeak the continuing need” for section 5 and noted Congress’s concern that covered jurisdictions were seeking to minimize the electoral significance of higher minority registration and voting rates by adopting measures that would dilute minority voting strength.¹⁴⁵ The Court did not engage in any independent analysis of the number or type of section 5 objections, simply noting that Congress had reviewed “the number and nature of objections interposed by the Attorney General” in deciding that reauthorization was appropriate.¹⁴⁶

The Court’s consideration of minority participation rates focused on the rates at which black citizens were registering to vote and the extent to which blacks were being elected to office. The Court again simply cited with approval Congress’s conclusions and analyses:

In considering the 1975 extension, Congress acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965. Congress determined, however, that “a bleaker side of the picture yet exists.” Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though “undeniable,” had been “modest and spotty,” extension of the Act was warranted.¹⁴⁷

In addition to relying upon the historical analysis conducted by Congress, the Supreme Court made one historical observation of its own. The Court noted that the seven-year extension (and, by implication, the seventeen-year term produced by that extension) was “unsurprising and unassailable” given that the pervasive voting discrimination that followed the adoption of the Fifteenth Amendment, and preceded the adoption of the Voting Rights Act, had lasted for ninety-five years.¹⁴⁸

The Court’s analysis of the constitutionality of the 1975 reauthorization did not include any discussion of the legal standard it relied upon in upholding Congress’s extension decision, and the Court similarly did not explain why it substantially deferred to Congress’s

145. *Rome*, 446 U.S. at 181 (internal quotation marks omitted).

146. *Id.*

147. *Id.* at 180–81 (citations omitted).

148. *Id.* at 182.

evaluation of the historical record. Perhaps these omissions stemmed from the fact that, in the Court's estimation, the historical record so unambiguously and overwhelmingly demonstrated that the extension was necessary and appropriate.

B. The Boerne "Congruence and Proportionality" Test

The Supreme Court established the "congruence and proportionality" test in *City of Boerne v. Flores* to define the scope of Congress's authority to enact remedial or "prophylactic" legislation pursuant to the Fourteenth Amendment.¹⁴⁹ Prophylactic legislation seeks to vindicate the Fourteenth Amendment's guarantees by expanding on the Amendment's specific protections, prohibiting conduct which the Amendment itself does not disallow, and/or by extending the authority of the national government into areas of state operational autonomy that previously were thought to be reserved to the states.¹⁵⁰

The Fourteenth Amendment grants Congress the power "to enforce[]" its provisions, but not the "power to decree the substance of the Fourteenth Amendment's restrictions on the States."¹⁵¹ Accordingly, prophylactic legislation is unconstitutional if it ventures so far beyond the bounds of what is required or prohibited by the Fourteenth Amendment as to constitute a substantive, and not a remedial or preventive, elaboration on the Amendment's requirements and prohibitions.

In order to ensure that Congress does not abuse its Fourteenth Amendment authority, the Court held in *Boerne* that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied [by the legislation] and the means adopted [by Congress] to that end."¹⁵² The historical injury to be prevented or remedied must involve constitutional violations.¹⁵³ However, these violations need not consist of specific violations that courts have identified through the exacting processes of litigation. A record of such violations is helpful, but the requisite violations also may be shown in part by a pattern of historical conduct that, in retrospect, strongly suggests constitutional infirmities.¹⁵⁴

149. *Boerne*, 521 U.S. at 519–20.

150. *Id.* at 518. *Accord*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

151. *Boerne*, 521 U.S. at 519.

152. *Id.* at 520.

153. *Hibbs*, 538 U.S. at 728.

154. *See Tennessee v. Lane*, 541 U.S. 509, 523–29 (2004); *Hibbs*, 538 U.S. at 729–35.

In applying this test, the Supreme Court follows what is essentially a four-step analysis. First, the Court identifies the constitutional right or rights the challenged legislation is designed to protect.¹⁵⁵ Second, the Court reviews the history of unconstitutional conduct that formed the basis for the congressional enactment by evaluating the evidence gathered by Congress as well as other relevant evidence.¹⁵⁶ Third, the Court examines the legislation's scope, both to assess the extent to which it goes beyond the facial prohibitions of the Fourteenth Amendment and to identify any ways in which Congress limited this impact by restricting how, when, where, to whom, or to what the legislation applies.¹⁵⁷ Finally, the Court decides whether Congress's chosen remedy is an appropriate response to the history of identified discrimination, or, in other words, whether the legislation is congruent and proportional.¹⁵⁸

The central role that history plays in this "congruence and proportionality" analysis has posed significant difficulties for the Court, because of the inherent difficulties that exist in interpreting historical evidence, the requirement that this evidence specifically demonstrate a pattern of constitutional violations, and the institutional limits on Congress's and the Court's historical expertise. The evidence relevant to a particular congressional enactment may have the requisite constitutional depth, but it may or may not have sufficient breadth.¹⁵⁹ Other evidence may have the requisite breadth, but may or may not have sufficient constitutional depth.¹⁶⁰ In sorting this out, there are a vari-

155. *Lane*, 541 U.S. at 522.

156. *Id.* at 522–23.

157. *Id.* at 523–24.

158. *Id.* at 523–24, 530–32. The Court itself merges steps three and four, and thus characterizes the analysis as involving three steps.

159. Past judicial findings of constitutional violations clearly identify historical conduct that was of a sufficiently noxious character, but such findings necessarily are limited to specific issues and specific actors and so may or may not deal with matters that are relevant to the challenged legislation and also are likely to be limited in number. For example, in *Lane* the Court majority and the dissenters disagreed as to whether past judicial findings of unconstitutional discrimination against the disabled supported Congress's decision to apply the access requirements of the Americans with Disabilities Act to state-run courthouses; in particular, the two groups of Justices differed as to the relevancy of the issues and governmental entities that were the subject of the findings and as to whether the number of findings was significant. *Compare id.* at 524–27 with *id.* at 541–44 (Rehnquist, C.J., dissenting).

160. Testimony and studies submitted to Congress during the process leading to the enactment of the legislation challenged as not being "congruent and proportional" may have broadly addressed relevant problems but may not have specifically addressed whether the problems were of a constitutional stature and may not otherwise have addressed the problems in depth. Testimony that provides examples of problems also may be dismissed as being merely anecdotal. These interpretive difficulties also

ety of institutional and practical limitations on Congress's factfinding capabilities, but the Court also has no particular expertise when it comes to historical analysis. In addition, since there is no purely objective means for measuring history's metes and bounds or for totaling up its collective weight, one's policy or political preferences inevitably affect how one interprets the historical evidence.¹⁶¹

The Justices agree, as a general matter, that Congress must be given some leeway in making its historical assessments.¹⁶² And the Court has been careful to say that legislation enacted pursuant to the Civil War Amendments need not have as its predicate an egregious history of constitutional violations.¹⁶³ Beyond this, however, there is sharp disagreement among the Justices as to the amount of leeway Congress should be allowed. Depending on which Justices form the majority in particular "congruence and proportionality" cases, the Court takes more a deferential or exacting approach.¹⁶⁴ Which direction the Court will go in the future is unclear, given the close division on the Court in the past with regard to this issue and the recent addition of two new Justices to the Court.

Several commentators have placed particular emphasis on the fact that, in the two most recent "congruence and proportionality" cases, the Court took a more deferential approach in the context of challenges to statutes that sought to guard against the use of a quasi-suspect classification or to protect a fundamental right.¹⁶⁵ From this,

divided the Justices in *Lane*. Compare *id.* at 527 with *id.* at 544–47 (Rehnquist, C.J., dissenting).

161. Justice Scalia expressed this concern in his dissent in *Lane*, stating that "the 'congruence and proportionality' standard . . . is a standing invitation to judicial arbitrariness and policy-driven decision making." *Id.* at 557–58 (Scalia, J., dissenting). See also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 382–85 (2001) (Breyer, J., dissenting) (arguing that Court should substantially defer to Congress's evaluation of historical basis for enacting particular legislation). See generally Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85–86 (2001) (criticizing the Court for displacing the role exercised by Congress in assessing facts and making policy choices).

162. See *City of Boerne v. Flores*, 521 U.S. 507, 531–32, 536 (1997).

163. See *id.* at 533.

164. See, e.g., *supra* notes 159 and 161; compare *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729–34 (2003) (holding that historical record supported Congress's enactment of Family and Medical Leave Act pursuant to Fourteenth Amendment) with *id.* at 745–54 (Kennedy, J., dissenting) (determining that historical record was inadequate); compare also *Garrett*, 531 U.S. at 368–72 (holding historical record did not support Congress's enactment of Title I of Americans with Disabilities Act pursuant to Fourteenth Amendment) with *id.* at 377–85 (Breyer, J., dissenting) (determining historical record was adequate).

165. See *Lane*, 541 U.S. at 528–29 (upholding protections provided by Americans with Disabilities Act regarding disabled persons' access to the courts as consistent

they posit a general rule that when Congress acts with respect to a core constitutional right or prohibition, Congress has broader authority than when it acts to enforce constitutional provisions in general.¹⁶⁶ The Court itself has offered a somewhat more specific interpretation of its actions in these cases. The Court has observed that Congress's judgment regarding the sufficiency of the historical record is more likely to be correct when it acts with respect to a core constitutional provision because the heightened level of constitutional scrutiny that accompanies that provision means that the historical problems that Congress identifies are more likely to have constitutional stature.¹⁶⁷

III.

THE LEGAL ISSUES UNDERLYING APPLICATION OF THE *BOERNE* "CONGRUENCE AND PROPORTIONALITY" TEST TO SECTION 5 REAUTHORIZATION

Given that the Supreme Court twice has broadly upheld the constitutionality of section 5, ruled a third time that the statute is constitutional in response to an as-applied challenge, and recently affirmed that section 5 exemplifies the "congruent and proportional" approach that Congress should follow in seeking to enforce the Civil War Amendments—and notwithstanding the Supreme Court's recent intimations of concern about extending section 5 beyond 2007—the fundamental question posed by yet another challenge to section 5's constitutionality is how Congress's decision to extend such a well-vetted statute could now present a serious constitutional problem.¹⁶⁸ Obviously, reauthorization must give rise to some new difficulty in applying the *Boerne* test to section 5 or reinvigorate some old difficulty that previously was dismissed as insufficiently significant. But what exactly is this potential defect? As discussed below, there are

with due process requirements); *Hibbs*, 538 U.S. at 735–36 (holding "gender-based discrimination in the administration of leave benefits . . . weighty enough to justify the enactment of" Family and Medical Leave Act).

166. KARLAN, *supra* note 55, at 9; Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 201–02 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 247 (2003).

167. *See Lane*, 541 U.S. at 528–29; *Hibbs*, 538 U.S. at 735–36.

168. Indeed, some proponents of section 5 reauthorization have argued that reauthorization is constitutional by relying almost exclusively on the Supreme Court's past rulings. *See, e.g., An Introduction to Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project, Atlanta, Georgia), available at http://judiciary.senate.gov/testimony.cfm?id=1877&wit_id=5320.

several possible answers. When properly analyzed, however, the essential reason the constitutionality of section 5 now hangs in the balance is the passage of time.

A. *The Constitutional Right at Issue Has Not Changed*

To begin with, clearly nothing has changed with regard to the first step in the “congruence and proportionality” analysis, since Congress’s decision to reauthorize section 5 did not alter the nature and scope of the constitutional right section 5 seeks to protect—the right to vote free from racial discrimination. Reauthorization did not, of course, alter the meaning of this Fourteenth and Fifteenth Amendment right, and Congress did not amend section 5 so as to expand the focus of the statute beyond the right to vote.¹⁶⁹

In applying *Boerne*, it is important to note that the analysis may proceed interchangeably under both the Fourteenth and Fifteenth Amendments, notwithstanding the fact that the two amendments have played somewhat different roles in the constitutional history detailed above—the Fifteenth Amendment has been the Amendment the Court thus far has relied upon, in *Katzenbach*, *Rome*, and *Lopez*, to uphold

169. Professor Karlan has suggested that another constitutional provision, which previously has not been relied upon to support section 5, now also may be utilized to buttress section 5’s continuing constitutional status. This provision, found in Article I, § 4, of the Constitution, grants Congress plenary authority to regulate the time, place, and manner in which congressional elections are conducted, with state regulations controlling in those instances where federal law is silent. KARLAN, *supra* note 55, at 10–11.

As suggested by Professor Karlan, this grant of authority would seem to support the section 5 preclearance regime insofar as that regime regulates the manner in which congressional elections are held, albeit that regulation occurs somewhat indirectly and applies only to certain states. It also would seem to support section 5 review of at least some changes by the covered states regarding the manner in which state and local elections are conducted since, as Professor Karlan points out, it is well established that Article I, § 4 grants Congress the authority to regulate so-called “mixed elections,” i.e., elections in which congressional contests and state and local contests appear on the same ballot. *Id.* at 11.

Still, Article I, § 4 does not appear to support including within the preclearance requirement many of the state and local voting changes currently covered by section 5, and thus it appears to fall well short of providing the necessary constitutional underpinning for section 5. First, the “mixed elections” rationale is of limited utility because not all state and local elections in the section 5 jurisdictions are held concurrently with federal elections. Second, even when the elections are concurrent, there are important aspects of the election procedures used for state and local offices that are completely independent of, and thus severable from, federal election procedures, such as the election methods, redistricting plans, and jurisdictional boundaries used to elect state and local officials. Changes in these types of election procedures have accounted for the great majority of all section 5 objections. See *infra* note 227 and accompanying text.

section 5,¹⁷⁰ while the Fourteenth Amendment has been the Amendment the Court has parsed, in *Boerne* and subsequent cases, using the “congruence and proportionality” test.¹⁷¹ The two Amendments, however, use almost identical language to describe the authority they confer upon Congress,¹⁷² and in *Boerne* the Court strongly intimated that the same analysis applies when assessing Congress’s authority under the two amendments to enact prophylactic legislation.¹⁷³ The two Amendments also do not have any relevant substantive differences, since both are limited to prohibiting intentional racial discrimination in voting.¹⁷⁴

B. The Extent to Which Section 5 Goes Beyond the Facial Prohibitions of the Civil War Amendments Has Not Changed

Similarly, the 2006 reauthorization of section 5 did not alter the extent to which the statute expands upon the requirements of the Fourteenth and Fifteenth Amendments—the issue posed by the third step in the “congruence and proportionality” analysis—although past criticism of the section 5 preclearance requirement has focused almost exclusively on this concern.¹⁷⁵

As discussed by the Supreme Court in *Katzenbach*, *Rome*, and *Lopez*, section 5 constitutes prophylactic legislation for two reasons: it significantly alters the usual federal relationship between the national government and the states; and it prohibits the implementation of voting changes that have a discriminatory effect but which were not motivated by a discriminatory purpose. In addition, it may be claimed that section 5 requires covered jurisdictions to engage in a level of race consciousness when enacting voting changes that is inconsistent with

170. See *supra* Parts II.A.1.a, II.A.2.

171. See *supra* Part II.B.

172. Section 5 of the Fourteenth Amendment specifies that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. Section 2 of the Fifteenth Amendment likewise provides that “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV, § 2.

173. The Court in *Boerne* referred to Congress’s grants of authority under the two Amendments as parallel, *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), and relied heavily on the Court’s Fifteenth Amendment decisions in assessing the scope of Congress’s authority under the Fourteenth Amendment. *Id.* at 518–20.

174. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (discussing the Fourteenth and Fifteenth Amendments); *City of Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980) (plurality opinion) (discussing the Fourteenth Amendment).

175. See *City of Rome v. United States*, 446 U.S. 156, 200–05 (1980) (Powell, J., dissenting); *id.* at 209–21 (Rehnquist, J., dissenting); *South Carolina v. Katzenbach*, 383 U.S. 301, 358–62 (1966) (Black, J., concurring and dissenting).

the equal protection guarantee of the Fourteenth Amendment. These alleged defects are discussed, in order, below.

1. *The Federalism Concern Has Not Changed*

Opponents of section 5 reauthorization likely will point to section 5's intrusion on state authority as a prime reason why the statute should be overturned. This might be seen as a strong argument given the unique and "uncommon" manner in which section 5 alters the typical relationship between the two levels of government,¹⁷⁶ the Court's keen interest in recent years in advancing state prerogatives as against the authority of the national government,¹⁷⁷ and the Court's recent statements regarding section 5's federalism costs.¹⁷⁸ Moreover, as noted above in Part I.A.4.b, the 2006 legislation has reinstated the constitutional purpose standard as the test for discriminatory purpose under section 5, an action which the Supreme Court warned in *Bossier II* would exacerbate section 5's federalism cost "perhaps to the extent of raising concerns about § 5's constitutionality."¹⁷⁹

Nonetheless, the nature and scope of section 5's intrusion on state authority is, in general, no greater after the reauthorization than during the past forty-plus years that the statute has limited state prerogatives with the full backing of the Supreme Court. The reauthorization did not change the essential feature of that intrusion, the requirement that all voting changes that covered jurisdictions enact or seek to administer be subjected to federal review and approval prior to implementation. Indeed, section 5 arguably is less intrusive today since, as is discussed *infra* in Part IV.A.2, many fewer section 5 objections currently are being interposed by the Justice Department than in the past.

With regard to Supreme Court's admonition in *Bossier II*, it might seem at first blush to be something that easily may be discounted since it is difficult to fathom how a legislative prohibition that mimics the Constitution can render section 5 constitutionally suspect or problematic.¹⁸⁰ However, the admonition may well have been directed not at the constitutional purpose standard itself, but at what the

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

177. *See, e.g.*, Michael C. Dorf, *Constitutional Interpretation and Aspirations to a Good Society: The Good Society, Commerce, and the Rehnquist Court*, 69 *FORDHAM L. REV.* 2161, 2171 (2001) (discussing "the Rehnquist Court's larger project of restricting federal power in favor of the States").

178. *See supra* note 26 and Part II.A.1.a.

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

180. *See United States v. Georgia*, 126 S. Ct. 877, 881 (2006) ("[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for ac-

Court believed was the broad and constitutionally suspect manner in which the Justice Department previously had been applying this standard.¹⁸¹ In its decision in *Miller v. Johnson*, four and a half years prior to the *Bossier II* ruling, the Court concluded that the Justice Department was implementing the section 5 purpose standard in an illegitimate, and near-unconstitutional, manner by purportedly following a policy of refusing to grant preclearance to submitted redistricting plans unless the plans included the maximum number of majority-minority districts that could be drawn.¹⁸² Thus, the Court may perceive that the restoration of the constitutional purpose standard poses a threat to federalism in that an overbearing Justice Department might use that standard to interfere with state and local decision making in an intolerable manner.

Any such concern, however, does not justify a conclusion that section 5's federalism cost will be exacerbated by the restoration of the constitutional purpose standard. Notwithstanding the Court's case-specific determination in *Miller*, a detailed review of the Justice Department's complete history of preclearance decision making demonstrates that the Justice Department historically has implemented section 5—including the constitutional purpose standard—in a manner fully consistent with the Constitution, court decisions interpreting the statute, and congressional intent.¹⁸³ Thus, the Department's implementation of section 5 does not provide any basis for questioning the statute's constitutionality.¹⁸⁴ In particular, the claim that the Department ever adopted or implemented a maximization policy or a policy of proportional representation finds no support in explicit Department policies or in its record of objections.¹⁸⁵

Furthermore, even if the Court was correct that the Justice Department had adopted and implemented an improper preclearance standard in the past, it certainly is clear now, based upon the Court's ruling in *Miller*, that the Department may not equate constitutional

tual violations of those provisions.”) (ellipses in original); KARLAN, *supra* note 55, at 20–21.

181. See Posner, *supra* note 31, at 122–23; Katz, *supra* note 24, at 1213–16.

182. 515 U.S. 900, 924–27 (1995). Majority-minority districts may be variously defined as districts in which minority persons constitute a majority of the population, citizen population, voting-age population, or citizen voting-age population.

183. See Posner, *supra*, note 31 at 158–62, 170–200.

184. See *id.*

185. *Id.* at 158–62, 192–93. This is not to say that the Justice Department never erred in its factual interpretations when it concluded in various submissions that covered jurisdictions had enacted voting changes with a discriminatory purpose. But identifying any such submission-specific misjudgments is something quite different than claiming that the Department adopted an illegitimate preclearance standard.

purpose with a failure to maximize (or a failure to achieve proportional representation). Accordingly, there is no reason today for believing that the Department might misuse the constitutional purpose standard.¹⁸⁶

It follows, therefore, that unless the Court is prepared to suddenly turn its back on its many holdings and statements that section 5 does not violate principles of federalism, the federalism concern should not, in and of itself, provide a basis for the Court ruling that the 2006 reauthorization is unconstitutional. Instead, the federalism concern should continue in the role it always has played, as a concern that must be overcome by the historical record underlying the enactment and subsequent reauthorizations of section 5.

2. *The Discriminatory Effect Standard Concern Has Not Changed*

The fact that section 5 bars the implementation of changes that have a discriminatory effect but lack any discriminatory purpose, and thus outlaws conduct that the Civil War Amendments themselves do not disallow, would appear to be a non-issue. The Supreme Court upheld the effect standard in *Rome*, reaffirmed that decision in *Lopez*, and strongly embraced the retrogression test in *Bossier II*.¹⁸⁷ The Court also recently reaffirmed Congress's general authority "to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."¹⁸⁸

As explained *supra* Part I.A.4.a, the one thing that is different about the effect standard as a result of the 2006 legislation is that its precise meaning has been modified by Congress, re-establishing the "ability to elect" focus that was rejected by the Supreme Court in *Georgia v. Ashcroft*.¹⁸⁹ This adjustment, however, should not trigger any constitutional concern.¹⁹⁰

186. In addition, Congress has made clear that, in implementing the constitutional purpose standard, the Justice Department must follow the mode of analysis for analyzing such claims set forth by the Supreme Court in its decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977). H.R. REP. NO. 109-478, at 68 (2006).

187. See *supra* Part II.A.1.a.

188. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

189. 539 U.S. 461, 482–85 (2003).

190. In *Ashcroft*, the Supreme Court concluded that a minority group's electoral influence should be factored into the section 5 effect analysis because the statute purportedly "le[ft] room" for such considerations, and not because of any constitutional concern. *Id.* at 483. Subsequently, in *League of United Latin American Citizens v. Perry*, the Court's highly fractured decision applying section 2 of the Voting Rights Act to a Texas congressional redistricting plan, three Justices concluded that it was

3. Section 5 Does Not Impermissibly Promote Race Consciousness in the Electoral Process

In *Shaw v. Reno*¹⁹¹ and *Miller v. Johnson*,¹⁹² the Supreme Court established a new constitutional limitation on the use of race by government officials when enacting a redistricting plan or other voting provision. These decisions reflect a deep unease among many of the Justices on the Court with regard to the role that race plays in our nation's political affairs, and a concern that affirmative efforts to overcome voting discrimination may go too far and create the very evil those efforts are seeking to remedy.¹⁹³

Formally speaking, however, these decisions are not in conflict with section 5. A majority of the Justices have indicated that compliance with section 5 may supply the compelling state interest needed to

within Congress's discretion not to incorporate the *Ashcroft* electoral-influence factor in the section 2 "results" effect test, suggesting that Congress enjoys the same discretion in defining the retrogression effect test utilized in section 5. 126 S. Ct. 2594, 2625–26 (2006) (Kennedy, J., joined by Roberts, C.J., and Alito, J.). Two other Justices argued for a partial application of *Ashcroft* to section 2, but appealed to policy rather than any constitutional concern. *See id.* at 2648 (Souter, J., joined by Ginsburg, J.). The remaining four Justices did not discuss how *Ashcroft* might apply to section 2. *See id.* at 2626–47 (Stevens, J.), 2651–52 (Breyer, J.), 2663 (Scalia, J., joined by Thomas, J.). *See also* KARLAN, *supra* note 55, at 21–22 (noting that the 2006 legislation and *Ashcroft* simply adopt different theories of effective minority representation, and arguing that Congress has the constitutional power to choose which theory to implement in the Voting Rights Act). *But see* Hasen, *supra* note 166, at 203–04 (arguing that *Ashcroft* made it easier for jurisdictions to obtain preclearance and thus reduced section 5's federalism cost in a potentially constitutionally significant manner); Pitts, *supra* note 78, at 300 (arguing that *Ashcroft* moved the retrogression test closer to being a test of discriminatory purpose, making the retrogression test more constitutionally palatable).

191. 509 U.S. 630, 649 (1993) (holding that facially neutral reapportionment plan may be invalidated under the Equal Protection Clause if it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and . . . the separation lacks sufficient justification").

192. 515 U.S. 900, 916 (1995) (holding that, in bringing a *Shaw* challenge, plaintiff will trigger strict scrutiny by proving "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

193. *Miller*, 515 U.S. at 927 (arguing that eliminating discrimination from "our political system and our society . . . is neither assured nor well served . . . by carving electorates into racial blocs"); *Shaw*, 509 U.S. at 647–49 (characterizing reapportionment based solely upon race as "resembl[ing] political apartheid"). *See also League of United Latin Am. Citizens*, 126 S.Ct. at 2663 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (remarking, after undertaking a section 2 analysis of the Texas congressional redistricting plan, that "[i]t is a sordid business, this divvying us up by race"); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (expressing concern that "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5").

counter a finding that a jurisdiction relied excessively on race in enacting a particular redistricting plan.¹⁹⁴ Furthermore, in *Miller* the Court did not express any concern that section 5's nondiscrimination requirement itself conflicts with the Fourteenth Amendment but instead indicated that the Justice Department's purported illegitimate application of that standard did not comport with the Amendment's dictates.¹⁹⁵

More fundamentally, so long as the Court is convinced that there is a continuing need for the section 5 preclearance requirement, the extent to which section 5 may engender the race-conscious enactment of voting changes by covered jurisdictions should be viewed as a necessary, if perhaps unfortunate, consequence of our Nation's continuing effort to remedy discrimination in voting. If, on the other hand, the case for reauthorizing section 5 is not made, the concern about race-conscious political decision making may emerge as another reason for overturning the 2006 reauthorization legislation.

C. The Problem of Time and the Historical Justification for the Reauthorization of Section 5

Plainly, the most fundamental difference between section 5 before and after the 2006 reauthorization legislation involves the element of time. And, indeed, it is the problem of time that lies at the heart of the constitutional question posed by Congress's decision to reauthorize section 5.

1. Three Ways to View the Problem of Time

As noted above, the Supreme Court in *Boerne* highlighted the fact that section 5 has a fixed term in discussing the constitutionality of section 5's remedial structure.¹⁹⁶ Specifically, the Court observed that the inclusion of a termination date, as well as the inclusion of limitations on section 5's subject-matter coverage and its geographic coverage, "tend[s] to ensure [that] Congress' means are proportionate to ends legitimate under § 5 [of the Fourteenth Amendment]."¹⁹⁷ The

194. *League of United Latin Am. Citizens*, 126 S. Ct. at 2642 & n.12 (Stevens, J., concurring in part and dissenting in part); *id.* at 2648 n.2 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); *id.* at 2667 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J., concurring in the judgment in part and dissenting in part).

195. *Miller*, 515 U.S. at 926–27.

196. *See supra* Part II.A.1.c.

197. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Supreme Court did not, however, explain precisely why the inclusion of a termination date (or the other limitations) has this effect.

a. Time as a Limitation on Section 5's Prophylactic Scope

One explanation as to why time may be constitutionally significant is the somewhat common-sense notion that an uncommon exercise of national authority, which burdens state and local governments, may be smaller in scope—and thus less constitutionally special and burdensome—if it occurs over a limited period of time (and also over a limited geographic area regarding a limited set of state actions). If this is true, repeated extensions of section 5 could raise a concern that the limitations placed on the scope of section 5 are being compromised, at least to some extent.

The difficulty with this analysis, however, is that it views the passage of time as being constitutionally significant in and of itself. But the period of time that section 5 is to remain in effect is a continuum, and, as the Supreme Court indicated in *Rome*, at least some extensions of section 5 do not impermissibly prolong the time that section 5 is to remain in effect.¹⁹⁸ Accordingly, there would not appear to be any principled way of ascertaining when, according to this analysis, section 5 might reach the tipping point and grow “too large” in scope due to the passage of time such that it would be transformed from appropriate enforcement legislation into legislation that improperly seeks “to decree the substance of the Fourteenth Amendment’s restrictions on the States.”¹⁹⁹ It therefore does not appear to be particularly useful for purposes of the constitutional analysis to think of time as something that places an external *limit* on the extent to which section 5 constitutes prophylactic legislation.

b. Time as an Integral Part of Section 5's Historical Justification

A second and more profound reason why time may be constitutionally significant is that it is integral to whether the historical *justification* for section 5 is still valid. In other words, the problem of time goes to the central factual question posed by the Supreme Court in both *Boerne* and *Katzenbach*.

198. See *supra* Part II.A.2.

199. *Boerne*, 521 U.S. at 519. Cf. *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (noting an evaluation of Congress’ decision, in Copyright Term Extension Act of 1998, that newly obtained copyrights should last for seventy years rather than previous term of fifty years, was “not a judgment meet for th[e] Court”).

As described above, section 5's historical justification involves three separate factual determinations by Congress: (1) the covered jurisdictions had a substantial history of pre-Act voting discrimination; (2) this history of discrimination created a significant risk that these jurisdictions would seek to establish new forms and methods of voting discrimination after becoming subject to sections 4 and 5 of the Voting Rights Act; and (3) this special risk of post-Act discriminatory decision making is continuing today.²⁰⁰ The first two determinations do not appear to be at issue now: they were made by Congress when it enacted section 5 in 1965 and then expanded the statute's geographic coverage in 1970 and 1975²⁰¹; they were clearly and unequivocally upheld in *Katzenbach* with regard to the jurisdictions brought under section 5 by the 1965 enactment²⁰²; and although the Supreme Court has not addressed these determinations with regard to the jurisdictions brought under section 5 by the 1970 and 1975 amendments, it does not appear, as discussed above, that this aspect of the first two determinations now is subject to reconsideration.²⁰³

On the other hand, the third determination—that the risk of discriminatory decision making is continuing today—is subject to review each time Congress reauthorizes section 5, and time is an integral part of this determination because of the hope or expectation that, with the passage of time, the special risk that covered jurisdictions will enact or seek to administer new discriminatory voting provisions will diminish and ultimately disappear. Put differently, the hope or expectation is that, after a period of time, the risk either will become negligible or at least will become no different than the risk that exists in the non-covered areas of the country, where Congress has determined it adequately may be addressed through case-by-case litigation under section 2 and other provisions of the Voting Rights Act. The passage of time may have this beneficial effect because of changes that may occur in societal attitudes as a result of efforts to implement the Voting Rights Act and other civil rights statutes, and as a result of other historical forces.

Unlike the analytic difficulty posed when time is considered as a limitation on section 5's prophylactic scope, consideration of whether the passage of time has undermined section 5's historical justification presents a legal question that is fully capable of judicial resolution. Indeed, the Supreme Court already has set forth the types of informa-

200. See *supra* Part I.B.

201. *Id.*

202. See *supra* notes 111–119 and accompanying text.

203. See *supra* Part II.A.1.b.

tion that should be considered in this regard, in its decision in *Rome* concluding that Congress was justified in 1975 in determining that the risk of discriminatory decision making was continuing at that time.²⁰⁴

c. *Time and the Putative Boerne Requirement of “Recent” Constitutional Violations*

There is, however, a third potential explanation for why the passage of time is significant in assessing the constitutionality of the 2006 reauthorization, an explanation which, if valid, would indicate that Congress’s three-part historical rationale for extending section 5 in 2006 is not a constitutionally permissible approach to establishing the requisite historical justification and that the Supreme Court’s decision in *Rome* is no longer good law.

According to this explanation, time is constitutionally significant because the Supreme Court in *Boerne* purportedly established an inflexible requirement that any and all prophylactic legislation, including the reauthorization of section 5, must be supported by a history of constitutional violations that is sufficiently close in time to the enactment of the challenged legislation. The Court in *Boerne* did not explicitly state that such a requirement exists. However, in analyzing the legislation that was at issue in that case, the Court discounted as too dated episodes of invidious discrimination that had occurred more than forty years in the past,²⁰⁵ and it is from this determination that one might infer that a “recency” requirement exists and that violations more than forty years old are per se unacceptable as a historical justification for the enactment of prophylactic legislation.

Several commentators writing on the section 5 constitutionality question have accepted this reading of *Boerne*, and accordingly have argued that the more than forty-year old constitutional violations that preceded the passage of the Voting Rights Act, and on which Congress relied when it enacted section 5, can no longer fulfill the Supreme Court’s dictate that prophylactic legislation be based on a history of constitutional violations. Instead, they contend that the 2006 reauthorization legislation must be based on a recent history of constitutional violations—i.e., a history of violations that occurred since the most recent previous reauthorization of section 5, in 1982.²⁰⁶

204. See *supra* Part II.A.2.

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

206. E.g., Hasen, *supra* note 166, at 188–89; Pitts, *supra* note 166, at 251–52. Professor Hasen has picturesquely called this purported “recency” issue the “Bull Conner is Dead problem,” referring to the notorious Commissioner of Public Safety in Bir-

If this interpretation is correct and a “recency” requirement indeed exists, this would create a kind of “double whammy” that would completely scuttle the analytic framework discussed in the immediately preceding subpart (*supra* Part III.C.1.b), which relies on a marriage of Congress’s three-part historical rationale for section 5 with the *Rome* specification of the types of information relevant to assessing the constitutionality of a section 5 reauthorization. First, that framework identifies the discrimination risk that section 5 seeks to remedy as originating in the section 5 jurisdictions’ pre-coverage history of pervasive voting discrimination. But the putative *Boerne* “recency” requirement would mean that the discrimination history for most section 5 jurisdictions—i.e., the pre-1965 history—is no longer constitutionally meaningful, and that the discrimination history for the remaining section 5 jurisdictions (covered pursuant to the 1970 and 1975 amendments to the Voting Rights Act) soon would become constitutionally meaningless as well. Second, the framework specifies that the determination of whether the special risk of discriminatory decision making is continuing depends on an evaluation of the types of information relied upon by the Court in *Rome*. But the Court in *Rome* did not inquire into whether the section 5 jurisdictions had engaged in constitutional violations during the preceding reauthorization period; i.e., the Court did not ask whether the Justice Department’s section 5 objections represented instances of unconstitutional conduct or whether the minority/white participation rate differentials resulted from constitutional violations.²⁰⁷ Accordingly, the putative *Boerne* “recency” requirement would mean that the *Rome* evidentiary analysis cannot provide a constitutionally adequate predicate for the enactment of the 2006 reauthorization legislation.

The commentators who have accepted the “recency” interpretation of the *Boerne* holding recognize that this interpretation creates a substantial constitutional problem for section 5. This is because it would be difficult (though perhaps still feasible) to demonstrate that the section 5 jurisdictions have engaged in a pattern of recent constitutional violations: the remedies included in the Voting Rights Act ended the egregious conduct that preceded the Act and have largely obviated the need to challenge new discriminatory voting measures on constitutional grounds.²⁰⁸

mingham, Alabama, who sought to stop civil rights marches with attack dogs and who died in 1973. Hasen, *supra* note 166, at 188–89.

207. *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

208. See Hasen, *supra* note 166, at 189–94; Pitts, *supra* note 166, at 252–63. See also *The Continuing Need for Section 5 Pre-Clearance: Hearing on S. 2703 Before*

2. *The Constitutionality of the 2006 Reauthorization Should Be Determined by Relying on Congress's Historical Rationale for Reauthorizing Section 5, and on the Rome Approach to Evaluating the Recent Historical Record*

Upon closer examination, however, the putative conflicts between *Boerne* and Congress's historical rationale for reauthorizing section 5, and between *Boerne* and *Rome*, evaporate. Instead, *Boerne* fully supports reliance on that historical rationale and on *Rome* to determine whether the 2006 reauthorization of section 5 is constitutional.

More specifically, the Court in *Boerne* was concerned that Congress base prophylactic legislation on constitutional violations that are *relevant* to the present day and did not dictate that the only way to achieve "relevancy" is "recency." The Court recognized that Congress has utilized a variety of approaches when establishing the historical predicate for enacting prophylactic legislation, and so long as Congress's chosen approach fairly ties the predicate for congressional action to the action taken, the predicate will pass constitutional muster. The approach utilized by Congress in establishing the historical predicate for reauthorizing section 5 satisfies this relevancy requirement provided that its factual underpinning is still viable, and therefore it provides a proper basis on which to judge whether the 2006 reauthorization is constitutional.

The Court in *Boerne* recognized the principle of "historical predicate" flexibility when, in discussing the nature and scope of Congress's Fourteenth Amendment remedial authority, it noted with approval its past willingness, in upholding civil rights legislation, to approve a variety of historical predicates Congress may have relied upon in enacting those laws. Specifically, the Court reviewed its decisions upholding Congress's 1970 enactment of a temporary nationwide ban on literacy tests and Congress's 1965 enactment of a ban on the use of English-only elections as to certain persons educated in Puerto Rico. With regard to the 1970 legislation, the Court observed that it properly had evaluated congressional authority to ban literacy tests

the S. Comm. on the Judiciary, 109th Cong. 3 (2006) (statement of Anita S. Earls, Director of Advocacy, University of North Carolina Center for Civil Rights), available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/28753.pdf> (arguing that there is an adequate record of intentional discriminatory conduct by covered jurisdictions since 1982 to support reauthorization of section 5); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of Ted Shaw, Director-Counsel and President, NAACP Legal Defense and Educational Fund), available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/28213.pdf> (making the same argument).

from two distinct perspectives: Congress's reliance on the history of jurisdictions using discriminatory literacy tests; and, in the alternative, Congress's potential reliance on the history of discriminatory educational practices and the link between that discrimination and the inability of individuals to pass a literacy test.²⁰⁹ Likewise, with regard to the 1965 legislation, the Court noted that it had appropriately considered two distinct rationales for upholding the partial ban on English-only elections: Congress's potential reliance on a history of discrimination relating to English-only elections; and Congress's potential reliance on the fact that English-only elections diminished political participation by Puerto Ricans which in turn opened the way to public officials discriminating in the future against Puerto Ricans in the provision of governmental services.²¹⁰

Similarly, the constitutionality of Congress's 2006 reauthorization of section 5 should be assessed by considering the validity of the historical rationale Congress relied upon. That rationale begins with an established and pervasive history of constitutional violations (found in the pre-Act conduct of the covered jurisdictions) and then appropriately seeks to link those violations to the present day through what Congress has concluded is a continuing special risk of discriminatory decision making engendered by those violations. It follows, therefore, that so long as this risk continues, Congress's approach satisfies the *Boerne* requirement that prophylactic legislation be based on a history of relevant constitutional violations, dispenses with any need to establish a record of recent (post-1982) constitutional violations, and allows the assessment of whether there is a continuing risk of discriminatory decision making to be based on consideration of a broad array of information in the manner prescribed by the Supreme Court in *Rome*.

In sum, the problem of time lies at the heart of the constitutional question posed by the 2006 reauthorization of section 5 because time is integral to the historical rationale relied upon by Congress in enacting and reauthorizing this statute. And the Supreme Court's decision in *Rome* provides the key to determining whether, notwithstanding the passage of time, that rationale continues to provide a constitutionally valid predicate for the section 5 preclearance requirement.

209. *Boerne*, 521 U.S. at 526 (construing *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

210. *Id.* at 528 (construing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). See also Karlan, *supra* note 18, at 727–29 (discussing the Supreme Court's recognition in *Boerne* of the variety of approaches Congress may take in establishing the necessary predicate for enacting prophylactic legislation).

3. *Evaluating the Passage of Time: The Nature and Scope of the Rome-Type Information That May Be Utilized*

In utilizing the *Rome* analysis to determine whether the 2006 reauthorization is constitutional, it is important to understand the reasons why the types of information relied upon in *Rome* are relevant and probative, rather than simply mechanically applying *Rome* to today's set of circumstances, since this understanding can clarify the precise scope of the information that should now be considered and also may guide the manner in which this information should be utilized. However, the Court in *Rome* did not explain why information on recent preclearance denials and current minority/white participation differentials are relevant and probative, other than noting that Congress relied upon them when it reauthorized section 5 in 1975.²¹¹

Nonetheless, the reason why recent preclearance denials should be considered seems plain. Actions taken by an individual or entity in the recent past often are the best predictor of future behavior. Thus, the extent to which the covered jurisdictions enacted or sought to administer discriminatory changes between the 1982 reauthorization of section 5 and the 2006 reauthorization provides direct and highly probative evidence on the question whether there is a significant risk that the jurisdictions will continue to engage in voting-related, discriminatory decision making.

What also follows from this is that other information that may illuminate the recent impact of section 5 on the decision making of the covered jurisdictions similarly is highly relevant. In that regard, as described by Professor Karlan, there is a universe "of things not seen" that may provide an important additional indicator of section 5's impact.²¹² This includes, most particularly, the deterrent effect section 5 may have on covered jurisdictions, potentially inducing them to steer clear of enacting or seeking to administer discriminatory voting changes out of a concern that such changes, if submitted, would simply lead to a preclearance denial.²¹³ Another "unseen" effect involves the political leverage section 5 may offer minority legislators and voters during negotiations leading to the adoption of particular voting changes.²¹⁴ Lastly, section 5 may provide political cover to white officials allowing them to enact nondiscriminatory voting provisions

211. *Rome*, 446 U.S. at 180–82.

212. KARLAN, *supra* note 55, at 13.

213. *Id.* at 15.

214. *Id.* at 16.

that white voters oppose and which the officials therefore also might otherwise oppose to avoid displeasing their white constituents.²¹⁵

It is less clear why information about minority/white registration differentials and elected-official differentials is relevant. One explanation could be that the existence of these differentials may indicate that past discrimination has not yet been overcome and that minority voters still are being denied an equal electoral opportunity in the covered jurisdictions. However, as explained previously, section 5 has a narrower, no-new-discrimination focus, and is not aimed, at least directly, at eliminating the continuing effects of past discrimination or achieving equal electoral opportunity for minority voters (although either or both may be a byproduct of preventing jurisdictions from implementing new discriminatory measures).²¹⁶ Accordingly, to the extent that registration differentials and elected-official differentials indicate that the political processes in the covered jurisdictions remain tainted by discrimination, that does not make this information relevant to and probative of whether Congress acted appropriately in reauthorizing section 5.

The better explanation is that this information is relevant because it describes the electoral circumstances in which voting changes are being enacted and administered in the covered jurisdictions, and these circumstances in turn have a direct impact on the likelihood that these jurisdictions may enact or seek to administer voting changes that either have a discriminatory purpose or a discriminatory effect. For example, if minorities are registered at a lower rate than whites, that may affect their ability to elect candidates of their choice to office, and if minorities are substantially underrepresented among elected officials, it may be more likely that changes will be adopted that unintentionally or intentionally disregard minority interests and thereby have a retrogressive effect and/or a discriminatory purpose.

It follows that consideration also should be given to other factors that may impact on the electoral circumstances in which the covered jurisdictions are enacting or seeking to administer voting changes. Most especially, consideration should be given to the extent to which elections in the covered jurisdictions continue to be characterized by racially polarized voting, since the presence or absence of polarized voting is often one of the most important determinants of whether or not a particular voting change will discriminate against minority vot-

215. *Id.* at 17.

216. *See supra* Part I.B.

ers.²¹⁷ If voting is indeed racially polarized, it is more likely that voting changes enacted by covered jurisdictions will have a discriminatory effect,²¹⁸ and polarized voting may lead to a disregard for minority interests that, in particular situations, may translate into a discriminatory purpose.²¹⁹

Thus, in addition to the specific types of information relied upon by the Supreme Court in *Rome*, the other information that should be considered in determining the constitutionality of the 2006 reauthorization legislation includes information regarding the three “unseen” ways in which section 5 affects the decision making of covered jurisdictions and the extent to which voting in the covered jurisdictions continues to be racially polarized.

4. *The Problem of Time, and Proper Supreme Court Deference to Congress’s Evaluation of the Historical Record*

Whether the passage of time has or has not eliminated the special risk of discriminatory decision making will present the Supreme Court with a unique and difficult legal question as well as with a formidable factual question. These problems, in turn, should lead the Court to accord substantial weight to Congress’s determination that the historical record justifies the reauthorization of section 5.

First, as was noted previously, the Supreme Court has never held that a modern civil rights statute may lose its constitutional status simply as a result of the passage of time.²²⁰ Thus, the Court would cross a line it never has crossed before were it to hold that section 5 no longer represents a constitutional exercise of congressional authority.

Moreover, applying the “congruence and proportionality” test to the section 5 reauthorization requires a very different and much more difficult analysis than the analyses engaged in by the Court when it decided *Boerne* and each of the post-*Boerne* cases. In all of those cases, the Court applied the “congruence and proportionality” test to decide whether particular prophylactic legislation enacted by Congress

217. See *Thornburg v. Gingles*, 478 U.S. 30, 47–51 (1986) (emphasizing the importance of determining whether there is racially polarized voting when analyzing the impact of a particular election method on minority electoral opportunity); Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in *RACE AND REDISTRICTING IN THE 1990S* 80, 102 (Bernard Grofman ed., 1998) (concluding that “[a]n integral part of every review of a redistricting plan under Section 5 is an analysis of voting patterns”).

218. See *id.*

219. See *Rogers v. Lodge*, 458 U.S. 613, 623–24 (1982).

220. See *supra* note 18.

was constitutional *ab initio*.²²¹ In so doing, the Court was free to broadly consider the full panoply of *Boerne* factors, including the nature of the constitutional right Congress was seeking to protect, the historical basis for Congress's action, the extent to which the challenged legislation expanded on the prohibitions of the Fourteenth Amendment, and the remedial means chosen by Congress. However, when the Court reviews the constitutionality of the section 5 reauthorization, the Court will be addressing a statute that already has been found to be constitutional *ab initio*, where only one element in the "congruence and proportionality" calculus has been changed—the sunset date. Determining whether or not changing that one element has altered the bottom-line constitutional determination could require a high degree of particularly exacting constitutional analysis by the Court.

The difficulty of this challenge is further magnified by the fine scrutiny likely to be required in examining the historical record. This is not just a case where the opposing litigants will disagree about the nature and scope of historical record, although as noted in the Introduction to this Article there are indeed sharply different views among proponents and opponents of reauthorization as to whether the historical record supports Congress's decision.²²² Rather, the determination whether the special risk of discriminatory decision making has dissipated poses a complicated political and sociological question which requires an analysis of the extent to which the conduct of the covered jurisdictions has improved and, most importantly, the reasons why any such improvements have occurred (particularly, whether the improvements have occurred because of changes in underlying attitudes regarding minority political participation and/or because of outside constraints on the jurisdictions' conduct). Furthermore, since the extent of the risk of discriminatory decision making depends to a large degree on evolving political, social, and cultural circumstances, the risk is likely to diminish gradually rather than suddenly disappear. This expectation of gradual change makes it even more difficult to determine whether the risk has been completely eliminated; it also

221. *Tennessee v. Lane*, 541 U.S. 509, 513, 520 (2004) (Title II of the Americans with Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724–25, 728 (2003) (Family and Medical Leave Act); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 365 (2001) (Title I of the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598, 601–02, 625–26 (2000) (Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67, 81 (2000) (Age Discrimination in Employment Act); *Boerne*, 521 U.S. at 511, 520 (Religious Freedom Restoration Act).

222. *See supra* note 32.

raises the question whether, if the present state of the risk is ambiguous, it may be appropriate to err to some reasonable degree on the side of continuing the preclearance requirement both to make sure that the risk really has been eliminated and to make sure that it does not reoccur.

Given the uniquely fine legal and factual analyses that a constitutional review of the section 5 reauthorization will require, the Supreme Court faces a significantly greater danger in conducting this review, compared to the typical “congruence and proportionality” dispute, that it may ultimately resolve the legal and factual difficulties by substituting its policy preferences for those of our democratically elected representatives. To ensure that this does not occur, the Court should give substantial weight to the factual determinations made by Congress in deciding to reauthorize section 5, regardless of how the Justices resolve their dispute as to the amount of deference Congress is owed in the typical “congruence and proportionality” case.²²³ This does not mean that the Court should blindly accept congressional findings, but rather that Congress’s determinations should be upheld so long as they have a reasonable basis in fact.²²⁴

Finally, to the extent that there is a general rule that Congress is owed greater deference when it legislates with regard to core constitutional rights, this rule also dictates that Congress’s reauthorization determinations should be accorded substantial weight by the Supreme Court.²²⁵

IV.

THE POST-1982 HISTORICAL RECORD ON WHICH THE REAUTHORIZATION OF SECTION 5 IS BASED

Three key sets of facts emerge when the Supreme Court’s *Rome* analysis is applied to the historical record created since the 1982 reauthorization of section 5:

223. See *supra* notes 162–64 and accompanying text.

224. Congress, of course, also faced the same fact-assessment difficulties in deciding to reauthorize section 5, but Congress, unlike the Court, is expected to bring its policy preferences to bear in assessing the evidentiary support for particular pieces of legislation.

225. This rule, however, may have limited relevance to the section 5 reauthorization issue. As explained *supra* note 167 and accompanying text, this rule may be based on Congress’s greater ability to identify a historical pattern of constitutional violations when legislating with regard to core constitutional rights, but the determination as to whether the 2006 reauthorization legislation is constitutional does not depend on identifying a new pattern of constitutional violations. See *supra* Part III.C.2.

First, the Justice Department's record of section 5 objections from 1983 to the mid-1990s is substantial and is consistent with the objection records established during previous reauthorization periods; however, for several reasons, the Department has interposed relatively few objections since the mid-1990s. Specifically, from 1983 until the mid-1990s, the number of section 5 objections, the rate at which the objections were interposed, and the types of voting changes to which the Justice Department objected were similar to the objections interposed during the prior reauthorization periods, particularly the immediately preceding 1976 to 1981 period. The decrease in objections that began in the mid-1990s in part resulted from the Supreme Court's decision in *Bossier II*, which substantially narrowed the test for identifying discriminatory conduct. Thus, the decrease at least in part does not reflect a decrease in voting discrimination by the covered jurisdictions. However, the decrease in objections also in part appears to be a result of the Act's success in nudging, pushing, and forcing covered localities to abandon at-large elections in favor of district election systems, which in turn has meant that fewer localities are adopting the types of changes that historically have been responsible for a large percentage of the Justice Department's section 5 objections. But there is no indication that the decrease in objections is the result of any substantial change in the covered jurisdictions' attitudes toward minority participation in the political process.

Second, section 5 continues to have a significant impact on the decision making of the covered jurisdictions above and beyond the objections interposed by the Justice Department, due to section 5's deterrent effect and the other "unseen" effects.

Third, minority participation rates in the covered areas continue to improve, but significant problems remain. Black persons still do not register to vote and turn out at the same rate as white voters, though they generally are not far behind, and a substantial but still limited number of blacks have been elected to office. Hispanics (the other principal minority group located in the section 5 jurisdictions) lag substantially behind whites in their registration and turnout rates (even when citizenship is taken into account) and have enjoyed limited success in electing members of their minority group to office. The ability of minority voters to effectively participate in the electoral process also continues to be significantly limited by the widespread existence of racially polarized voting.

A. Justice Department Objection Record

1. Objection Data: Technical Specifications

The Justice Department's history of section 5 objections, from 1965 through 2005, is summarized in Table 1 set forth in Part IV.A.2, *infra*. The objection data are broken into five time periods. The first three periods—1965 to 1969, 1971 to 1974, and 1976 to 1981—roughly correspond to the time intervals that Congress reviewed when it decided first in 1970, then in 1975, and again in 1982 to reauthorize section 5. The last two—1983 to 1995, and 1996 to 2005—approximate the time interval reviewed by Congress when it decided to reauthorize section 5 in 2006. That interval is divided into two time periods to reflect the fact that a much larger number of objections were interposed before the mid-1990s than after. The five time periods omit the objections interposed in 1970, 1975, 1982, and 2006 since those are the years in which Congress adopted the reauthorization statutes, and accordingly the objections interposed in those years either were not before Congress or were before Congress only to a limited extent.

The objection data are set forth using the two ways in which the Justice Department tallies its section 5 review activity, by submission and by voting change.²²⁶ Table 1 provides objection data for all submissions (by time period) and all changes (by time period). In addition, the table provides objection data for three specific types of voting changes (by time period)—annexations, method of election changes, and redistrictings—since these change types have accounted for over 80% of all the objections since 1965.²²⁷ In order to facilitate comparisons between the different time periods, the data are displayed by specifying the average number of objections per year for each time period, and, where the necessary data are available, the rate at which

226. "Voting changes" are the discrete modifications of voting practices that covered jurisdictions enact or seek to administer (e.g., a redistricting plan or a polling place change). "Submissions" are groups of voting changes that particular jurisdictions send to the Justice Department as part of one preclearance request (e.g., a redistricting plan combined with several polling place changes). Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. §§ 51.2, 51.13 (2005).

227. From 1965 through 2005, the Justice Department interposed objections to a total of about 3,126 voting changes. Annexations have accounted for about 40% of the objections, election method changes have accounted for about 25%, and redistrictings for about 16%, for a grand total of 81% for these three types of voting changes. See U.S. Dep't of Justice, Number of Changes to Which Objections Have Been Interposed by Type (on file with the *New York University Journal of Legislation and Public Policy* and available by request from the Justice Department).

objections were interposed during each time period (i.e., the number of objections divided by the total number of submitted matters).

Data on the number of objections and the total number of submitted matters were obtained from tables maintained by the Department of Justice, with one significant adjustment.²²⁸ The Department's tables include data for all objections regardless of whether the Department subsequently withdrew an objection or a court subsequently found an objection to be improper. But objections that after-the-fact were found to have been improperly interposed provide little or no substantive support for reauthorizing the preclearance remedy, and accordingly I have adjusted the Department's objection numbers by deleting the deficient objections from the Department's section 5 statistics. The deleted objections include: (1) objections withdrawn by the Department when additional factual information, a new court ruling, or further legal analysis demonstrated that the objected-to changes did not violate the section 5 nondiscrimination standard;²²⁹ (2) objections that the District Court for the District of Columbia negated by granting a declaratory judgment preclearing changes to which the Justice Department previously had objected; (3) redistricting objections that courts in racial gerrymandering cases determined were unjusti-

228. *See id.*; U.S. Dep't of Justice, Number of Submissions to Which Objections Have Been Interposed (on file with the *New York University Journal of Legislation and Public Policy* and available by request from the Justice Department); U.S. Dep't of Justice, Number of Changes by Type of Change, available at http://www.usdoj.gov/crt/voting/sec_5/changes.htm; U.S. Dep't of Justice, Number of Submissions by State (on file with the *New York University Journal of Legislation and Public Policy* and available by request from the Justice Department). These tables include data on section 5 submissions and on the few submissions made pursuant to section 3(c) of the Voting Rights Act.

229. *See* Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.48 (2005) (detailing procedure for reconsidering objections). The Justice Department also sometimes withdraws objections because the objected-to changes were modified or an additional change was adopted that cured the objection. *See* U.S. Dep't of Justice, Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965, available at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm [hereinafter Complete Listing of Objections]. These withdrawals are not based on a conclusion that the objection was faulty, and accordingly these withdrawn objections have not been deleted from the objection numbers.

fied;²³⁰ and (4) objections that courts invalidated because they were not interposed within the requisite sixty-day review period.²³¹

It turns out, however, that deleting the deficient objections does not substantially affect the analysis when the data for the different reauthorization periods are compared to one another. In other words, both the adjusted and the unadjusted data present the same basic picture when one compares the objection activity in the different reauthorization periods.²³²

2. *Objection Data: Comparing the Post-1982 Objection Record with Objections from Previous Reauthorization Periods*

As noted above, the first thirteen years following the 1982 reauthorization of section 5 looked a lot like the prior two reauthorization periods in a number of ways.²³³

First, looking at the objection *averages*, the average number of objections interposed to submissions each year from 1983 to 1995 was similar to (actually, somewhat higher than) the average numbers for the previous two reauthorization periods. And the objection averages

230. In a racial gerrymandering case, a court may be called upon to rule on the validity of a redistricting objection interposed by the Justice Department if the plan that is the subject of the court challenge was adopted to replace a prior plan to which the Department objected, and if the defendant jurisdiction contends that the objection provided it with the requisite compelling state interest for enacting the current challenged plan. *See supra* note 194 and accompanying text. The validity of this defense would turn on the court's determination of whether or not the Justice Department had a strong basis in evidence for interposing the objection to the prior plan. *Miller v. Johnson*, 515 U.S. 900, 922 (1995).

231. The deficient objections were identified by reviewing copies of section 5 objection letters and withdrawal letters (on file with author), the Complete Listing of Objections, *supra* note 229 (identifying objections that were withdrawn and, in many cases, the reason for withdrawal), and cases in which section 5 jurisdictions have been found to have enacted redistricting plans that were unconstitutionally based on race. *See Posner, supra* note 31, at 161 n.126 (listing such cases).

232. For example, the adjusted rates for Justice Department objections to all changes are 6.8% (1965 to 1969), 5.9% (1971 to 1974), 0.9% (1976 to 1981), 0.8% (1983 to 1995), and 0.1% (1996 to 2005). The unadjusted rates are, respectively, 6.8%, 6.4%, 1.2%, 0.9%, and 0.1%.

233. While it is appropriate to compare the post-1982 reauthorization period with the two previous reauthorization periods (the 1971 to 1974 period and the 1976 to 1981 period), it is less useful to compare the post-1982 period with the period that immediately followed the enactment of section 5. The 1965 to 1969 period is idiosyncratic because during those years the Justice Department received very few submissions from the covered jurisdictions—a total of only about 320 changes from August 1965, when section 5 was enacted, through 1969. Since then, the Department has received, on average, over 12,000 changes per year. *See* U.S. Dep't of Justice, Number of Changes by Type of Change, *supra* note 228.

for voting changes from 1983 to 1995 (for all changes, and for the three specific change types) were generally substantially higher.

Second, with regard to the objection *rates*, the rate of objections for all submitted changes remained about the same from 1976 to 1981 and from 1983 to 1995, while the objection rates for the three change types that produce the most objections generally were higher from 1983 to 1995 than during the 1976 to 1981 reauthorization period. The objection rates for both periods were generally substantially lower than the rates during the 1971 to 1974 period; however, this may largely have occurred because the number of submitted changes, i.e., the denominator numbers, dramatically increased after Texas became covered by section 5 in 1975.²³⁴

Lastly, with regard to the *types* of changes to which the Justice Department objected from 1983 to 1995, the Department's objections almost entirely concerned changes that diluted minority voting strength (annexations, election method changes, and redistrictings). These were precisely the types of changes that accounted for the great majority of the objections during the previous two reauthorization periods as well.

Table 1 also clearly shows the dramatic reduction in the number and rate of objections beginning in the mid-1990s. For example, the average number of submission objections per year dropped from 39, from 1983 to 1995, to 7, and the average number of change objections dropped from 137 to 10.

234. Since 1976, Texas has accounted for over two-fifths of all submitted changes, but has not produced a concomitant increase in the number of objections. See U.S. Dep't of Justice, Number of Submissions by State, *supra* note 228, and Number of Changes to Which Objections Have Been Interposed by State (on file with the *New York University Journal of Legislation and Public Policy* and available by request from the Justice Department). The number of submitted changes also increased substantially in the early 1980s due to substantial increases in submissions of types of changes that almost never lead to an objection (polling place, precinct, and voter registration changes, as well as other miscellaneous changes). See U.S. Dep't of Justice, Number of Changes by Type of Change, *supra* note 228, and Number of Changes to Which Objections Have Been Interposed by Type, *supra* note 227.

TABLE 1: DEPARTMENT OF JUSTICE OBJECTIONS, 1965–2005

| Objections | 1965–69 | 1971–74 | 1976–81 | 1983–95 | 1996–2005 | All Years ²³⁵ |
|---|---------|---------|---------|---------|-----------|--------------------------|
| Submission Objections | 4/yr | 34/yr | 32/yr | 39/yr | 7/yr | 25/yr |
| Per-year average Rate ²³⁶ | n/a | n/a | n/a | n/a | 0.2% | n/a |
| Voting Change Objections | 5/yr | 58/yr | 56/yr | 137/yr | 10/yr | 66/yr |
| Per-year average Rate | 6.8% | 5.9% | 0.9% | 0.8% | 0.1% | 0.6% |
| Annexation Objections | 0 | 2/yr | 15/yr | 73/yr | 1/yr | 28/yr |
| Per-year average Rate | 0.0% | 0.7% | 1.3% | 2.3% | 0.0% | 1.3% |
| Election Method Objections | 1/yr | 34/yr | 24/yr | 22/yr | 2/yr | 16/yr |
| Per-year average Rate ²³⁷ | n/a | n/a | n/a | 3.0% | 0.5% | n/a |
| Redistricting Objections | 0 | 12/yr | 6/yr | 22/yr | 4/yr | 11/yr |
| Per-year average Rate | 0.0% | 12.3% | 3.9% | 5.7% | 1.1% | 4.5% |

It also should be noted that since 1965, the District Court for the District of Columbia has issued very few decisions granting or denying preclearance. Accordingly, as was true when the Supreme Court reviewed the 1975 reauthorization in *Rome*, the district court numbers do not provide much assistance in evaluating the historical basis for reauthorizing section 5 in 2006.²³⁸

235. The “all years” numbers include data for all years from 1965 through 2005, including the years 1970, 1975, and 1982.

236. The Justice Department did not begin to maintain contemporaneous data on the total number of submissions received until 1990, and accordingly the denominator data for calculating the rate at which submission objections have been interposed are not available except for the 1996 to 2005 time period.

237. The Justice Department did not begin to maintain data on the number of election method changes submitted until 1980, and accordingly the rates of election method objections are not available for the 1965 to 1969, 1971 to 1974, and 1976 to 1981 time periods.

238. From 1965 through 2004, sixty-eight declaratory judgment actions were filed. VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, app. A at 67 tbl.A2. In eight of these suits, preclearance was granted over the opposition of the Justice Department, in seven preclearance was granted with the Justice Department’s consent, and in eleven preclearance was denied (the remaining forty-two suits were dismissed for a variety of reasons). *Id.* The numbers since the 1982 reauthorization

3. *Validity of the Justice Department's Post-1982 Objection Record*

In considering whether the Justice Department's post-1982 record of objections supports reauthorization of section 5, Professor Hasen has suggested that substantially more post-1982 objections should be discounted than the number I have set aside. This concern is mistaken, however.

First, he has suggested that post-1982 objections to purposefully discriminatory, but non-retrogressive, redistricting plans should be set aside because of the Supreme Court's 1995 conclusion in *Miller v. Johnson*²³⁹ that the Justice Department utilized an illegitimate maximization policy in applying the section 5 purpose test to submitted redistricting plans.²⁴⁰ Subtracting out these purpose-based redistricting objections would have a significant impact on the Justice Department's post-1982 objection record.²⁴¹

However, one must engage in a significant amount of speculation, and aim that speculation in a highly scatter-shot manner, to justify discounting these purpose-based redistricting objections. With a few exceptions, these objections have not been found invalid by any court or by the Justice Department.²⁴² Furthermore, the Justice Department's purported maximization policy was of an entirely uncertain scope (as to when it allegedly began and where and when it then was allegedly applied): the Supreme Court did not address the scope of the purported policy in deciding *Miller* and has not done so in any subsequent case,²⁴³ and the evidence relied upon by the *Miller* Court pro-

(through 2004) are as follows: forty-one suits filed; five preclearances granted despite Justice Department opposition; three preclearances granted by consent; and three preclearance requests denied. *Id.*

239. See 515 U.S. 900, 924–27 (1995); *supra* note 182 and accompanying text.

240. Hasen, *supra* note 166, at 192–93.

241. For example, from April 1991 through June 1995, the Justice Department interposed objections to about 150 non-retrogressive redistricting plans based on discriminatory purpose. Posner, *supra* note 31, at 152. Of these objections, I have identified nine as being deficient for the reasons set forth above. See *supra* notes 229–231 and accompanying text.

242. As noted, those objections that were specifically invalidated in racial gerrymandering lawsuits already have been excluded. See *supra* note 230 and accompanying text.

243. The Court found in one other case, involving a Justice Department objection to North Carolina's post-1990 congressional redistricting plan, that the Justice Department had utilized the same maximization policy. *Shaw v. Hunt*, 517 U.S. 899, 913 (1996). However, in making this finding, the Court did not provide any further explanation of its understanding of the scope of the Department's purported maximization policy.

vided no clue as to the scope of the policy.²⁴⁴ Thus, it is quite a large leap from the existing case-specific judicial findings regarding maximization to a wholesale factual judgment that all purpose-based redistricting objections should be discounted.²⁴⁵

Secondly, Professor Hasen has suggested that Justice Department objections based on section 2 violations should be discounted since the Supreme Court subsequently ruled in its *Bossier I* decision that objections may not be interposed on this basis (this argument also would apply to pre-*Bossier I* objections that were based on violations of other provisions of the Voting Rights Act).²⁴⁶ However, very few of the Department's post-1982 objections were based solely on a section 2 violation, or solely on a violation of another provision of the Voting Rights Act,²⁴⁷ and so whether or not these objections are included in the post-1982 objection record is of slight significance.²⁴⁸

4. *Decrease in Purpose Objections Beginning in the Mid-1990s: Impact of the Bossier II Decision*

As noted above, the fact that substantially fewer objections were interposed from the mid-1990s to 2006 may be attributed in part to the

244. In *Miller*, the Supreme Court could not identify any written statement by the Justice Department discussing this policy. Instead, the Court relied almost entirely on facts relating to the Justice Department's review of two congressional redistricting plans for the State of Georgia (to which the Department had objected), and even with regard to those reviews the Court made its determination based largely on circumstantial evidence. Posner, *supra* note 31, at 158–59.

245. As noted above, I strongly disagree with the Supreme Court's conclusion that the Justice Department ever adopted a maximization policy. See *supra* notes 184–85 and accompanying text. However, it is unnecessary to reject the Court's finding in *Miller* to conclude that the finding does not support a wholesale rejection of all purpose-based objections to post-1982 redistricting plans.

246. Hasen, *supra* note 166, at 192–93.

247. VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, app. A at 72–73 tbl.A6.

248. These objections are included in the table set forth in the text above. See *supra* Part IV.A.2. I decided not to remove them because this type of post-hoc, non-case-specific discrediting of objections does not take into account that the Justice Department may have found another basis for objecting if it knew at the time that it made the preclearance decision that an objection could not be based on section 2 or another provision of the Act.

In his article, Professor Hasen also suggested discounting all purpose-based objections to non-retrogressive voting changes since these objections could not have been interposed under the *Bossier II* “intent to retrogress” standard, as well as all retrogression objections that could not have been interposed under the *Georgia v. Ashcroft* definition of retrogression. Hasen, *supra* note 166, at 193. However, Professor Hasen published his article prior to the enactment of the 2006 reauthorization legislation, and Congress's decision to overrule the *Bossier II* and *Ashcroft* interpretations of the section 5 nondiscrimination test renders these suggestions moot.

Supreme Court's decision in *Bossier II*, holding that only retrogressive purposes violate the section 5 purpose standard. The impact of the *Bossier II* decision may be seen from a brief review of the Justice Department's history of section 5 objections.

Starting in the 1980s and continuing into the mid-1990s, the Justice Department increasingly relied on discriminatory purpose as the basis for interposing section 5 objections, finding that voting changes that were not retrogressive nonetheless were barred by section 5 because they had been adopted, at least in part, with a discriminatory purpose.²⁴⁹ This trend began during the generally conservative stewardship of the Civil Rights Division by Assistant Attorney General William Bradford Reynolds. Under Reynolds, the Department interposed a large number of purpose objections to post-1980 redistricting plans and also to changes from at-large systems for electing local governmental bodies to mixed systems of districts and at-large seats.²⁵⁰ This continued in the Bush I and Clinton Administrations, when again a large number of purpose objections were interposed to redistricting plans and to mixed election systems, as well as to the establishment of additional state court judgeships in the context of at-large systems for electing the judges.²⁵¹ As a result, whereas less than a twentieth of the objections interposed from 1968 through 1979 were based in whole or in part on non-retrogressive discriminatory purpose, about a fourth of the 1980s objections and slightly over half the 1990s objections were interposed on this basis.²⁵² Among redistricting objections, non-retrogressive discriminatory purpose was the basis for about a third of the objections to post-1980 Census plans and about four-fifths of the objections to post-1990 Census plans.²⁵³

The number of purpose objections substantially tailed off for several reasons beginning in the mid-1990s, before the Supreme Court issued its decision in *Bossier II*. This in part was a cyclical phenomenon, since fewer redistricting plans were submitted for preclearance during the latter half of the decade as the redistricting efforts follow-

249. Posner, *supra* note 31, at 149–53, 184–87 (providing data on objection bases by time period and describing the development of the Justice Department's purpose analysis); McCrary et al., *supra* note 81, at 297–99 (providing data on objection bases by time period).

250. Posner, *supra* note 31, at 153–54, 186–87; Complete Listing of Objections, *supra* note 229.

251. *Id.* See also Posner, *supra* note 217, at 100–09 (describing the manner in which the Justice Department applied the purpose test to post-1990 redistricting plans).

252. McCrary et al., *supra* note 81, at 297.

253. Posner, *supra* note 31, at 152.

ing the 1990 Census largely came to an end.²⁵⁴ Jurisdictions also submitted many fewer changes from at-large to mixed systems during the latter half of the decade, apparently because the great majority of the jurisdictions that had been using at-large elections already had switched to district or mixed systems and had obtained preclearance.²⁵⁵ Court decisions in the mid-1990s also played a role. In several section 5 declaratory judgment decisions issued in 1995, the District Court for the District of Columbia rejected the Justice Department's approach to applying the purpose test to the establishment of additional judgeship positions.²⁵⁶ And in *Miller*, the Supreme Court foreshadowed its 2000 decision in *Bossier II* by intimating that the fact that a redistricting plan is ameliorative should go a long way toward demonstrating that the plan is deserving of preclearance.²⁵⁷

Nonetheless, but for the Supreme Court's holding in *Bossier II* (and the Court's related commentary in *Miller*), it appears likely that a much larger number of purpose objections would have been interposed in recent years. In particular, based on the Justice Department's record of interposing purpose objections to redistricting plans following both the 1980 and 1990 Censuses, it appears reasonable to conclude that a large number of purpose objections again would have been interposed to redistrictings adopted after the 2000 Census, although of course it is impossible to know precisely how many such objections would have been interposed.

5. *Decrease in Retrogression Objections Beginning in the Mid-1990s: Impact of Jurisdictions Abandoning At-Large Election Systems*

Starting in the 1970s, and then occurring with greater frequency in the 1980s and early 1990s, a substantial number of cities, counties,

254. From 1991 to 1995, jurisdictions submitted about 2900 redistrictings to the Justice Department for preclearance, while only about 400 plans were submitted from 1996 to 2000. U.S. Dep't of Justice, Number of Changes by Type of Change, *supra* note 228.

255. Jurisdictions submitted 222 mixed election systems for preclearance from 1991 to 1995, but submitted only thirty-three such changes from 1996 to 2000. U.S. Dep't of Justice, Method of Election Changes, July 1, 1982 to June 30, 2004 (custom report, on file with author and the *New York University Journal of Legislation and Public Policy*). The shift away from at-large elections is discussed in greater detail *infra*, Part IV.A.5.

256. See *Texas v. United States*, No. 94-1529, 1995 WL 769160, at *1-2 (D.D.C. July 10, 1995); *Georgia v. Reno*, 881 F. Supp. 7, 14 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 398-402 (D.D.C. 1994), *reh'g denied per curiam*, 880 F. Supp. 37, 39-40 (D.D.C. 1995).

257. *Miller v. Johnson*, 515 U.S. 900, 924 (1995).

and school districts covered by section 5 changed from at-large election systems to mixed systems of districts and at-large seats or to district-only election systems. This sea change in the manner in which local officials are elected in large part was the result of Congress's adoption of the section 2 results test in 1982, and the subsequent section 2 court decisions and settlements, and the anticipatory changes adopted by local jurisdictions to avoid the filing of a section 2 lawsuit.²⁵⁸ In addition, some jurisdictions changed to district or mixed systems because of objections interposed by the Justice Department to dilutive annexations, from the 1970s to the mid-1990s.²⁵⁹

By the mid-1990s, the cumulative changeover from at-large to district-based election systems began to have a significant impact on the number of retrogression objections interposed by the Justice Department. From the inception of section 5, the Department regularly and frequently interposed retrogression objections based in one way or another on local jurisdictions' use of an at-large election system. These included: (1) objections to changes from districts to at-large elections; (2) objections to changes that enhanced the discriminatory impact of a pre-existing at-large system (e.g., the adoption of a majority-vote requirement, and the adoption of practices such as numbered posts, residency districts, and staggered terms that preclude or limit the ability of minority voters to single-shot vote); and (3) objections to municipal annexations that diluted minority voting strength in the context of an at-large election system.²⁶⁰ These objections almost entirely

258. NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 32, at 81–88; QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994), at 35–36 (overview), 54–56, 61–64 (Alabama), 78, 99–100 (Georgia), 112–13, 120–21, 133 (Louisiana), 142–43, 151–52 (Mississippi), 171–73, 189 (North Carolina), 226–27 (South Carolina), 254–55, 264–68 (Texas), 297 (Virginia).

259. *See* Complete Listing of Objections, *supra* note 229 (identifying jurisdictions which changed to district-type election systems to remedy annexation objections). *See also* *City of Port Arthur v. United States*, 459 U.S. 159, 162, 164–65, 168 (1982) (involving election method change by Texas city following denial of preclearance for city boundary expansions).

260. VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, at 33–35. Since 1965, the Justice Department has interposed approximately 90 objections to the adoption of at-large election systems, 100 objections to the adoption of a majority-vote requirement in the context of a pre-existing at-large system, 130 objections to the adoption of anti-single-shot provisions in the context of a pre-existing at-large system, and 55 objections to submissions of dilutive annexations. *See* Complete Listing of Objections, *supra* note 229. The Justice Department's statements of reasons for interposing these objections, contained in the objection letters, demonstrate that these objections generally were based, at least in part, on a finding of retrogression. *See also* Hiroshi Motomura, *Preclearance Under Section 5 of the Voting Rights Act*, 61 N.C. L. REV. 189, 210–42 (1983) (describing numerous individual objections).

disappeared beginning in the mid-1990s, apparently in large part because at-large elections were vanishing from the political landscape in the covered jurisdictions.

It does not appear that the near disappearance of these election method and annexation objections can be attributed, to any significant extent, to other factors. The drop-off had almost nothing to do with the Supreme Court's decisions in *Bossier II* and *Miller*, or *Bossier I*, since these decisions did not affect the retrogression standard. There also is no reason for concluding that the covered jurisdictions suddenly had a significantly increased appreciation for what the retrogression standard requires or suddenly had a substantially more positive attitude toward minority political participation, and for either of these reasons abruptly and sharply reduced their submissions of retrogressive voting changes. Finally, while there are significant concerns regarding the politicization of section 5 reviews by the current Bush Administration, the sharp reduction in the number of retrogression objections that began in the mid-1990s cannot be attributed to politics.²⁶¹

Thus, the abandonment of at-large elections by counties, cities, school boards, and other local government entities in the covered areas (done voluntarily or involuntarily) has produced a real and substantial reduction in the number of discriminatory voting changes being adopted by the covered jurisdictions in the last decade or so.²⁶²

B. Section 5's Deterrent, Political Cover, and Leverage Effects

There is general agreement that section 5 continues to have a significant deterrent effect on the covered jurisdictions, causing jurisdictions to shy away from selecting discriminatory or potentially discriminatory changes, and also to shy away from implementing such changes that have been adopted, once their potential discriminatory nature is highlighted either before or during the preclearance process.²⁶³ There has been less discussion of section 5's "political cover"

261. Posner, *supra* note 31, at 190–92; MARK A. POSNER, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? 12–13 (2006), available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>.

262. Although the substantial increase in the number of district election systems potentially could result in an increased number of redistricting objections, this has not occurred thus far. During the first half of the 1990s, the great majority of the redistricting objections interposed by the Justice Department were to plans enacted by jurisdictions that used a district election system prior to the enactment of the section 2 results test in 1982. Posner, *supra* note 217, at 93.

263. Professor Bernard Grofman has referred to the deterrent effect of section 5 as a "brooding omnipresence." Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the*

and “political leverage” effects, but it would seem to follow that these effects also are not insubstantial.²⁶⁴

Although in a global sense, as Professor Karlan has noted, these are “things not seen,”²⁶⁵ they also have visible manifestations that broadly confirm the significant role they play in the decision making of covered jurisdictions. Justice Department records indicate that some jurisdictions that submit controversial voting changes decide to withdraw the changes from review, and forego implementation, after the Justice Department examines the submission and responds by requesting that additional information be provided; while there may be several reasons why these withdrawals occur, at least in part the withdrawals are evidence of the statute’s deterrent effect.²⁶⁶ Particular examples of the “unseen” effects in operation also have been observed and reported.²⁶⁷

The global invisibility of these effects does mean, however, that it is difficult, if not impossible, to pinpoint the precise extent to which they have affected and continue to affect the decision making of the section 5 jurisdictions. Other factors also may influence covered jurisdictions to not adopt or implement discriminatory voting changes, such as the participation of minority elected officials in the decision-making process or a positive desire not to engage in discrimination. The relative invisibility of all the factors that influence the voting-related decision making of the covered jurisdictions also makes it difficult to evaluate whether the deterrent, political cover, and leverage

Only *Thing*”?, 14 *CARDOZO L. REV.* 1237, 1264 (1993). I previously have discussed how deterrence affected redistricting plans enacted following the 1990 Census. Posner, *supra* note 217, at 94–96. See also KARLAN, *supra* note 55, at 15; Pitts, *supra* note 166, at 259–60.

264. KARLAN, *supra* note 55, at 16–17.

265. *Id.* at 13.

266. NAT’L COMM’N ON THE VOTING RIGHTS ACT, *supra* note 32, at 58–59.

267. E.g., *The Continuing Need for Section 5 Preclearance: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Anita S. Earls, Director, University of North Carolina Center for Civil Rights), available at http://judiciary.senate.gov/testimony.cfm?id=1888&wit_id=5349 (citing statement by President of the Caswell County, North Carolina NAACP that she is regularly contacted by county officials to consult on proposed voting changes); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 18 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project), available at <http://www.access.gpo.gov/congress/senate/pdf/109hr/28213.pdf> (citing Georgia legislators’ consciousness of section 5’s requirements when adopting 2005 congressional redistricting plan).

effects of section 5 have become stronger, weaker, or remained at relatively the same levels since 1982.²⁶⁸

C. Minority Participation Rates

Although a detailed analysis of minority participation rates in each of the fully and partially covered states is beyond the scope of this Article, several basic facts regarding the present electoral situation in these states seem relatively clear.

First, while black and white registration rates fluctuate from election to election and from state to state, it appears that black registration and turnout rates still lag somewhat behind the white rates.²⁶⁹ For

268. Although reauthorization proponents have sought to emphasize the concrete impact of section 5 deterrence by noting the number of post-1982 submission withdrawals that have occurred following Justice Department requests for information, their data do not compare the post-1982 number to the number that occurred during prior reauthorization periods. *See supra* note 266 and accompanying text.

269. The following table shows the Census Bureau estimates for voter registration and turnout rates for the 2004 presidential election for non-Hispanic whites (NHW) and blacks (B) as a function of citizen voting age population.

| State | Voter Registration | | Voter Turnout | |
|----------------|--------------------|------|---------------|------|
| | % NHW | % B | % NHW | % B |
| Alabama | 75.5 | 73.0 | 63.6 | 64.0 |
| Arizona | 76.5 | 59.6 | 70.3 | 48.5 |
| Georgia | 68.9 | 67.8 | 58.3 | 57.5 |
| Louisiana | 77.0 | 71.7 | 65.6 | 62.7 |
| Mississippi | 73.9 | 76.1 | 60.2 | 66.8 |
| South Carolina | 76.3 | 71.3 | 65.0 | 59.7 |
| Texas | 74.8 | 70.7 | 64.5 | 57.7 |
| Virginia | 73.0 | 60.2 | 67.5 | 52.1 |
| United States | 75.1 | 68.7 | 67.2 | 60.0 |

U.S. DEP'T OF CENSUS, REPORTED VOTING AND REGISTRATION OF THE TOTAL VOTING-AGE POPULATION, BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES, *available at* <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls> (the Census Department also reports the small margins of error associated with its estimates, which are not reflected in the point estimates set forth in this footnote). The Census registration and turnout data were cited in the House Judiciary Committee Report for the 2006 legislation; however, that Report overstated the white registration and turnout rates for several states by failing to use the non-Hispanic white registration and turnout rates provided by the Census Bureau. *See H.R. REP. NO. 109-478*, at 12–15 (2006).

The comparisons between the white and black registration and turnout rates in these states are affected, to some extent, by the states' felon disenfranchisement laws, since the persons affected by these laws are disproportionately black. All of these states disenfranchise certain persons convicted of crimes, and four (Alabama, Arizona, Mississippi, and Virginia) also disenfranchise certain persons convicted of crimes after they are released from prison or their sentences are completed. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE tbl.7 (2006), *available at*

example, according to state-by-state registration and turnout estimates prepared by the Census Bureau for the 2004 presidential election, black registration rates and turnout rates were a few percentage points below the rates for whites in three of the eight states fully or almost fully covered by section 5 (excluding Alaska); were substantially lower in two states; were about the same in two states; and were slightly higher in the eighth state.²⁷⁰ It should be noted, however, that the Census Bureau estimates also indicate that blacks lag behind whites in the non-covered areas of the country as well.²⁷¹

The registration and turnout rates for Hispanics are substantially below the white rates, even when noncitizens are factored out. This is illustrated by the Census Bureau's estimates for the 2004 presidential election for the two covered states with substantial Hispanic populations, Arizona and Texas. Again, however, the disparities in these states generally are similar to the disparities elsewhere in the country.²⁷²

Second, a substantial number of black persons serve in elected office in the covered states, but the percentages of elected officials that are black in each state still are far below the black percentage of each state's voting age population. As of 2001, about 4,200 black elected officials were serving in the nine states that are fully or almost fully covered, but the black percentage of all elected officials in each state generally was one-half to one-third of the black voting age percentage in that state.²⁷³ The great majority of the black elected offi-

http://www.sentencingproject.org/rights_restoration/table7.html. State-by-state estimates of the total number of persons (i.e., not broken down by race) that are ineligible to vote because of incarceration, or because of probation or parole status, are set forth in United States Election Project, 2004 Voting-Age and Voting-Eligible Population Estimates and Voter Turnout, available at http://elections.gmu.edu/Voter_Turnout_2004.htm. Racial data, however, do not appear to be available.

270. See U.S. DEP'T. OF CENSUS, *supra* note 269.

271. See *id.*

272. The Census Bureau estimates for voter registration and turnout rates for the 2004 presidential election for non-Hispanic whites (NHW) and Hispanics (H), as a function of citizen voting age population, are as follows:

| State | Voter Registration | | Voter Turnout | |
|---------------|--------------------|------|---------------|------|
| | % NHW | % H | % NHW | % H |
| Arizona | 76.5 | 56.3 | 70.3 | 47.1 |
| Texas | 74.8 | 58.8 | 64.5 | 41.6 |
| United States | 75.1 | 57.9 | 67.2 | 47.2 |

U.S. DEP'T. OF CENSUS, *supra* note 269 (again, the margins of error associated with Census Bureau estimates are not reflected in the point estimates set forth above).

273. DAVID A. BOSITIS, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY, 2001, at 16 tbl.3 (2003). As of 2001, the number of black elected officials (BEOs),

cials were elected to local office.²⁷⁴ Each of the covered or partially covered southern states was represented by at least one black congressperson and each had black persons serving in the state legislature, but very few blacks were elected to statewide positions in these states.²⁷⁵

The story with regard to the number of Hispanic elected officials is similar. As of 2006, there were about 2,500 Hispanic elected officials in Arizona and Texas, but the percentage of elected officials in each state that was Hispanic was substantially below each state's Hispanic citizen voting-age population percentage.²⁷⁶ The great majority of these officials again were elected to local office; there were several

the percentage of black elected officials, and the black voting age population (VAP) percentage in each of the nine states fully covered under section 5, or almost fully covered, were as follows:

| State | No. of BEOs | % BEOs | % Black VAP |
|----------------|-------------|--------|-------------|
| Alabama | 756 | 17.2 | 24.0 |
| Alaska | 3 | 0.2 | 3.3 |
| Arizona | 12 | 0.4 | 2.9 |
| Georgia | 611 | 9.3 | 26.6 |
| Louisiana | 705 | 13.9 | 29.7 |
| Mississippi | 892 | 18.7 | 33.1 |
| South Carolina | 534 | 13.5 | 27.2 |
| Texas | 460 | 1.7 | 11.0 |
| Virginia | 246 | 7.9 | 18.4 |

Id.

It should be noted, however, that the number of black elected officials and the percentage of black elected officials increased substantially during the 1980s and 1990s. According to an analysis undertaken in connection with the 1982 extension of section 5, the percentages of black elected officials in 1980 in the six southern states originally covered under section 5 were as follows: Alabama, 5.7%; Georgia, 3.7%; Louisiana, 7.7%; Mississippi, 7.3%; South Carolina, 7.4%; and Virginia, 3.0%. H.R. REP. NO. 97-227, at 9 tbl.1 (1981).

274. BOSITIS, *supra* note 273, at 14–15 tbl.2.

275. *Id.* See also NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 32, at 36–40 (detailing how blacks have made significant progress in gaining election to office and ways in which that progress continues to be limited).

276. NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS, 2006 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS 6, 122 (2006). According to this Directory, there were a total of 369 Hispanic elected officials in Arizona and 2,169 in Texas as of 2006. Comparing these data with the information from Bositis on the total number of elected officials in these states as of 2001, *supra* note 273, it appears that Hispanics constituted 11.2 percent of the elected officials in Arizona and 7.8 percent of the elected officials in Texas as of 2006. The Hispanic percentages of the voting-age citizen populations in these states, as of 2004, were significantly higher, 17.9 percent in Arizona and 26.5 percent in Texas. U.S. DEP'T OF CENSUS, *supra* note 269.

Like the 2001 figures for black elected officials, the 2006 figures for Hispanic elected officials reflect an increase in the number of Hispanics elected to office. A decade earlier, in 1996, there were 299 Hispanic elected officials in Arizona (compared to 369 in 2006) and 1,689 Hispanic elected officials in Texas (compared to

Hispanic congresspersons and a larger number of Hispanic state legislators, but, in these two states, there was only one Hispanic elected to statewide office (in Texas).²⁷⁷

Third, probably the biggest reason that black and Hispanic voters continue to face substantial difficulties in seeking to participate in the political processes of the covered jurisdictions on a full and equal basis is that racially polarized voting continues to play a large role in these jurisdictions' elections, essentially imposing a ceiling on effective minority participation by limiting the ability of minority voters to elect candidates of their choice to office. Although there has not been a recent comprehensive study of racially polarized voting in the covered areas, numerous court rulings and studies show that polarized voting generally continues to be a fact of life in these jurisdictions' elections.²⁷⁸ While there has been a substantial increase in the number of minority persons elected to office in the covered areas in the last several decades,²⁷⁹ this is largely attributable to the abandonment of at-large elections and the adoption of district or mixed systems with majority-minority districts, as well as to Justice Department objections to discriminatory election method changes and redistricting plans.²⁸⁰ Accordingly, the increase in the number of minority elected officials is not an indication that polarized voting entirely or even mostly has disappeared. On the other hand, it is important to recognize that racially polarized voting also exists in many non-covered states, and it is un-

2,169 in 2006). NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS, DIRECTORY OF LATINO ELECTED OFFICIALS 2, 122 (1996).

277. NAT'L ASS'N OF LATINO ELECTED AND APPOINTED OFFICIALS, *supra* note 276 at 6, 122.

278. *See* NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 32, at 89–97 (summarizing numerous court rulings and studies demonstrating racially polarized voting). Most recently, the Supreme Court affirmed the ruling of a three-judge district court in Texas which found that polarized voting exists throughout the State of Texas. *League of Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2615 (2006). Even the authors of state-by-state studies arguing that Congress should have allowed section 5 to expire agree that racially polarized voting remains an important factor in elections in southern states. CHARLES S. BULLOCK III & RONALD KEITH GADDIE, AN ASSESSMENT OF VOTING RIGHTS PROGRESS IN ALABAMA (2006), http://www.aei.org/docLib/20060505_VRAAlabamastudy.pdf (“As in most of the South, voting in Alabama breaks down along racial/partisan lines . . .”); Charles S. Bullock III & Ronald Keith Gaddie, *Voting Rights Progress in Georgia*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 40–48 (describing Georgia's historical pattern of race- and party-based voting).

279. *See supra* notes 271–73 and accompanying text.

280. *See, e.g.*, QUIET REVOLUTION IN THE SOUTH, *supra* note 258, at 248–54 (analyzing increase in black and Hispanic elected officials in Texas), 301–21 (analyzing increase in black elected officials throughout the South), 335–44 (same).

clear the extent to which the levels of polarized voting in the covered and non-covered areas are significantly different.²⁸¹

Lastly, the Justice Department on numerous occasions since 1982 has sent federal observers to monitor elections in selected portions of the covered areas,²⁸² acting pursuant to the authority granted by section 8 of the Voting Rights Act.²⁸³ This is further evidence that minority voters in the covered jurisdictions continue to experience significant problems with regard to their ability to participate in the political process on a nondiscriminatory basis.²⁸⁴

V.

CONGRESS'S CONSTITUTIONAL AUTHORITY TO REAUTHORIZE SECTION 5 UNTIL 2031

A. *The Fourteenth and Fifteenth Amendments Grant Congress the Authority to Reauthorize Section 5*

Taken together, the considerations and facts discussed and analyzed in this Article demonstrate that the Fourteenth and Fifteenth

281. Compare ELLEN D. KATZ, VOTING RIGHTS INITIATIVE, NOT LIKE THE SOUTH? REGIONAL VARIATION AND POLITICAL PARTICIPATION THROUGH THE LENS OF SECTION 2 10–11 (2006), <http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf> (noting that a study of all published opinions in section 2 lawsuits decided nationwide since 1982 found: (1) courts in section 5 jurisdictions concluded that elections were racially polarized in a larger proportion of cases than courts in non-covered areas; and (2) in cases where racially polarized voting was found, the levels were more extreme in the section 5 jurisdictions than in the non-covered areas), with *The Continuing Need for Section 5 Pre-Clearance: Hearing on S. 2703 Before the Senate Comm. on the Judiciary*, 109th Cong. 4 (2006) (testimony of Professor Richard H. Pildes, Sudler Family Professor of Law, New York University School of Law) (questioning whether there are any significant differences between levels of polarized voting in covered and non-covered areas), available at http://judiciary.senate.gov/testimony.cfm?id=1888&wit_id=5353, and Issacharoff, *supra* note 78, at 1728 (questioning rationale for differences in administration of section 5 between covered and non-covered areas).

282. VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION, *supra* note 17, at app. A 79–81 tbl.A10.

283. 42 U.S.C. § 1973f (2006).

284. The available information indicates that Asian-Americans, American Indians, and Native Alaskans also continue to experience significant problems in seeking to fully and equally participate in the political processes of the covered states. See *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 13–14, 18 (2005) (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund); *Modern Enforcement of the Voting Rights Act: Hearing on S. 2703 Before the Senate Comm. on the Judiciary*, 109th Cong. 18–20 (2006) (statement of Natalie Landreth, Staff Attorney, Native American Rights Fund), available at http://judiciary.senate.gov/testimony.cfm?id=1885&wit_id=5332; NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 32, at 43–49.

Amendments grant Congress full authority to reauthorize section 5. Specifically, a *Rome*-based analysis of the post-1982 historical record demonstrates that Congress reasonably could conclude that there is a continuing special risk that the jurisdictions subject to the preclearance requirement will enact or seek to administer discriminatory voting changes. Because this determination is entitled to substantial deference,²⁸⁵ it conclusively establishes the necessary link between the history of constitutional violations that preceded section 5 and the present day, and thus establishes that a reauthorized section 5 continues to represent a congruent and proportional response to this history of constitutional violations.

For over half of the post-1982 reauthorization period, the number of objections interposed by the Justice Department and the rate at which they were interposed were comparable to the numbers and rates during previous reauthorization periods. Moreover, the continuing predominance of objections to redistricting plans, election method changes, and annexations demonstrates that the concern which Congress identified when it reauthorized section 5 in 1975, and which the Court highlighted when it upheld the 1975 extension in *Rome*, remains: “‘As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength.’”²⁸⁶ Accordingly, this portion of the post-1982 historical record clearly points to a continuing need for section 5. Indeed, if it constituted the entire record for the post-1982 reauthorization period, the case for reauthorization would be very strong.

The question then is whether the paucity of section 5 objections since the mid-1990s significantly undermines the case for reauthorization. This requires an examination of the reasons why the number of objections has fallen and, in addition, an examination of the impact of section 5's deterrent, political cover, and political leverage effects.

At the outset, it is clear that the decline in the number of objections may be discounted to some extent, since it is partially attributable to what Congress now has concluded was an incorrect interpretation of the section 5 purpose standard by the Supreme Court in *Bossier II*. Thus, the ongoing level of discriminatory decision making is higher than that indicated by the number of recent objections, albeit the precise extent to which it is higher (i.e., the precise extent to which *Bossier II* reduced the number of recent objections) is uncertain.

285. See *supra* Part III.C.4.

286. *City of Rome v. United States*, 446 U.S. 156, 181 (1980) (quoting H.R. REP. NO. 94-196, at 10-11 (1975) (alteration in original)).

On the other hand, the reduction in the number of objections that resulted from local jurisdictions changing to district and mixed election systems does represent a true decrease in the amount of voting discrimination. This may point to a time when section 5 no longer is needed, since section 5 has had its greatest impact in blocking the implementation of voting changes that would have diluted minority voting strength in local elections,²⁸⁷ and since the abandonment of at-large elections may establish the foundation for minority voters achieving an equal opportunity to elect candidates of their choice to local office and thus prevent the adoption of discriminatory voting changes.

But given the recency of the shift in election systems and the fact that minority voting strength in district elections may be diluted by discriminatory redistricting plans, it would be reasonable for Congress to conclude that it is premature to ascribe such great significance to the election systems shift. Congress reasonably could be concerned about potential backsliding, through efforts to revert to at-large elections, and also reasonably could be concerned that the gains won as a result of the adoption of district and mixed election systems may be undermined by the enactment of discriminatory redistricting plans. With the passage of additional time, the need for the section 5 remedy may be tempered by the strengthening of other forces that may operate to preclude the covered jurisdictions from adopting such changes, but Congress reasonably could conclude that this moment in time has not yet arrived.

Section 5's deterrent, political cover, and political leverage effects provide an important additional basis for concluding that there is a continuing need for section 5. Though generally unseen, they have had a significant, concrete impact on the decision making of covered jurisdictions with regard to the full range of covered voting changes, including local election method changes and redistrictings, other locally-adopted voting changes (such as polling place changes), and voting changes adopted at the state level (such as congressional and state legislative redistricting plans). It is true that the precise magnitude of this impact is unclear, but so long as the unseen effects of section 5 are

287. As indicated above, over eighty percent of the changes to which the Justice Department has objected have been changes that sought to dilute minority voting strength. See *supra* note 227 and accompanying text. In addition, over eighty percent of the Department's objections have been to changes enacted or administered by or for local governmental entities. Complete Listing of Objections, *supra* note 229.

just one of several bases for reauthorizing the statute, this quantification problem does not present a major concern.²⁸⁸

As indicated by *Rome*, the analysis of Congress's constitutional authority to reauthorize section 5 also must include consideration of the current electoral circumstances in which the covered jurisdictions are enacting or seeking to administer voting changes. An examination of these circumstances provides further support for the conclusion that Congress reasonably could determine that there is a continuing need for section 5. Minority participation rates, particularly for Hispanics, remain below white participation rates, the minority proportions of elected officials still fall well below the minority proportions of the eligible electorates, and racially polarized voting continues to play a significant role in limiting the opportunity of minority voters to elect their preferred candidates to office. Accordingly, the electoral conditions in the covered jurisdictions remain ripe for the enactment of discriminatory voting changes.

Three other concerns regarding Congress's constitutional authority need to be addressed. The first relates to the historical comparison that the Supreme Court found persuasive in *Rome*: the seventeen-year period of section 5 reauthorization Congress concluded was necessary in 1975 compared to the ninety-five years that elapsed from the enactment of the Fifteenth Amendment to the enactment of the Voting Rights Act. The same type of comparison is much less compelling today, and indeed some might argue that the less uneven ratio between section 5's new term of sixty-six years and the preceding ninety-five year interval suggests that the risk of discriminatory decision making engendered by the pre-Act discrimination has been overcome. But this analysis boils down to a kind of "I know it when I see it" evaluation that is far too subjective and imprecise to provide a basis for concluding that there is or is not a reasonable historical basis for reauthorizing section 5.

The second concern is whether the risk of discriminatory decision making is any greater in the covered jurisdictions than in the non-covered areas of the country.²⁸⁹ As noted in Part IV.C, *supra*, the differentials between minority and white participation rates in the covered and non-covered portions of the country are generally similar, and racially polarized voting exists in both portions as well (though

288. On the other hand, if maintaining the deterrence, political cover, and leverage benefits was the *only* reason for reauthorizing section 5, overstating their importance could cause section 5 to be extended beyond the time that this "uncommon" remedy is actually needed.

289. See *supra* note 281 and accompanying text.

perhaps to a greater extent in the covered areas). If this means that there is no meaningful difference between the two portions of the country in the risk that new discriminatory voting measures will be adopted, that could suggest either that section 5 should be extended nationwide or that the risk in the covered areas has been attenuated to the point that it may be addressed through the usual means of case-by-case litigation, just as in the non-covered areas. Since the non-covered areas lack the history of pervasive voting discrimination that is the central reason section 5 was enacted, it would seem that a determination of no meaningful difference would mean that Congress lacks the constitutional authority to reauthorize section 5.

But basing the constitutional analysis on a comparison of participation rates and polarized voting rates between the two portions of the country ignores the fundamental fact that the covered areas *are* different because of their history of voting discrimination, and it is this special history that is the source of the special risk, not the participation differentials or racially polarized voting. As explained above,²⁹⁰ the participation differentials and polarized voting establish an environment in which the history-induced risk of discriminatory decision making may continue to thrive, but whether or not a particular state or locality (non-covered or covered) exhibits that environment does not determine whether or not the jurisdiction has a special discrimination risk. A comparison of covered and non-covered areas also is problematic since it ignores the Court's holding in *Rome* that the extent of the discrimination risk must be assessed in large part by considering the recent history of section 5 enforcement actions, and of course this type of evidence is not available for the non-covered areas of the country. That a comparison between the two portions of the country is not helpful in resolving the constitutional issue does not somehow mean, however, that the covered areas always must remain covered (because they alone have the requisite history of discrimination). Instead, it simply indicates that the constitutional inquiry must focus on what the historical record shows specifically with respect to the risk of discriminatory decision making in the covered areas.

The last concern has to do with the fact that Congress did not amend the coverage formula or the bailout procedure in reauthorizing section 5 in 2006. Several commentators have suggested that such changes probably were needed in order to convince a majority of the Supreme Court that the 2006 reauthorization legislation should be up-

290. See *supra* Part III.C.3.

held.²⁹¹ It is true that such changes could perhaps have resulted in a more precise identification of the jurisdictions where the passage of time has not eliminated the special decision-making risk and, as indicated in *Boerne*, the adoption of any additional limitations on section 5's reach could strengthen the argument that section 5 continues to represent a congruent and proportional exercise of Congress's authority under the Civil War Amendments. But a decision by Congress not to adopt provisions that potentially may have further strengthened the constitutional argument for section 5 does not necessarily mean that Congress thereby has diminished this argument in any regard. Choosing to retain a coverage approach that thrice has been upheld by the Supreme Court clearly was a reasonable decision by Congress, and developing a new approach that both covers a significant number of jurisdictions and passes muster under *Boerne* might well have been a difficult endeavor. Furthermore, the uncertainty as to why jurisdictions have not sought to bail out to a much greater extent made it difficult for Congress to assess whether or in what manner the bailout procedure might have been modified to remove any unnecessary barriers to bailout while also not undermining the requirement that bailout occur only in appropriate circumstances.

In sum, the Justice Department's record of objections from 1983 to the mid-1990s, the impact of *Bossier II* on the number of post-2000 objections, the recent and still tentative nature of the advances achieved through local jurisdictions' abandonment of at-large elections, the deterrent and related effects of section 5, and the minority/white participation differentials and the continued existence of racially polarized voting in the covered areas together demonstrate that Congress could reasonably conclude that there is continuing need for the section 5 preclearance requirement. This conclusion is entitled to substantial deference by the Supreme Court, and thus the constitutionally mandated historical basis for reauthorizing section 5 is present.

B. The Constitutionality of the Reauthorization Period Selected by Congress

Congress's decision regarding the specific length of the new reauthorization period could pose a separate concern. The twenty-four year period selected almost exactly repeats the term adopted in 1982, thus suggesting that Congress considered the risk of discriminatory

291. E.g., *Modern Enforcement of the Voting Rights Act: Hearing on S. 2703 Before the Senate Comm. on the Judiciary*, 109th Cong. 9–10 (2006) (statement of Professor Richard L. Hasen, Professor, Loyola Law School); Pitts, *supra* note 166, at 286.

decision making today to be the same as the risk that existed in 1982. Yet, the section 5 jurisdictions are now a generation further away from the pre-Act history of discrimination that engendered this risk, and the electoral situation for minority voters is significantly better today than in 1982, due in large part to the combined impact of section 2 and section 5.²⁹²

Still, if the Supreme Court concludes that Congress acted within its Fourteenth and Fifteenth Amendment authority in deciding to reauthorize section 5, it would be very difficult for the Court to then conclude that the reauthorization period Congress selected is constitutionally invalid on its face. The choice of a particular reauthorization period is largely a legislative policy determination as to how much longer section 5 may be needed, and there is no legal principle or existing set of facts on which the Court could rely to essentially select its own time period by rejecting Congress's choice in favor of some shorter reauthorization period.²⁹³ The one certainty may be that, given the significant role that section 5 plays in ensuring that nondiscriminatory redistricting plans are implemented,²⁹⁴ an extension at least into the middle of the next decade is appropriate in order to take the preclearance requirement through at least one additional redistricting cycle. This concern identifies a policy-based floor for how long section 5 should remain in effect and also most likely identifies the minimum extension period that is constitutionally unobjectionable, but does not, without more, establish a constitutional ceiling on what constitutes a permissible reauthorization period. Thus, it may well be that the extension period included in the 2006 legislation also should be upheld now, even though the twenty-four-year period Congress selected may seem overly long.

The alternative is for the Court to postpone ruling on this question by treating it as an issue that may be best addressed through an as-applied challenge in a subsequent case. This would allow the Court to evaluate the term issue on the basis of the actual historical record that will be developed during the new reauthorization period regarding the nature and scope of the continuing need for the section 5 remedy.

292. Congress provided no explanation for selecting a twenty-four-year extension period, but stated only that the extension was "appropriate." H.R. REP. NO. 109-478, at 58 (2006). *See also* S. REP. NO. 109-295, at 32 (2006).

293. *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (noting that Congress's decision, in Copyright Term Extension Act of 1998, that newly obtained copyrights should last for seventy years rather than previous term of fifty years, was "not a judgment meet for th[e] Court").

294. As previously noted, redistricting objections accounted for the third highest percentage of objections interposed to voting changes since 1965. *See supra* note 227.

The Court, accordingly, would be able to render a decision on the length of the extension period based on additional *Rome*-type information, and also would have the benefit of further information as to the extent to which jurisdictions seek and/or obtain bailout from coverage.

The difficulty with this approach is deciding when such an as-applied challenge would be ripe. At a minimum, it likely would need to wait until after the 2010 redistricting cycle is more or less complete, since there would seem to be no basis on which to challenge a reauthorization period that does not reach that length. Beyond that, there is a natural appeal to undertaking the review more or less at the mid-point of the twenty-four year reauthorization period, i.e., toward the end of the next decade. The Court also might wait until after Congress undertakes the reconsideration of section 5 mandated by the 2006 legislation, which is to occur fifteen years into the new reauthorization period.²⁹⁵ Timing the as-applied challenge using any of these benchmarks would allow the Court to decide the twenty-four-year reauthorization question based on a substantial amount of additional information.

VI.

CONCLUSION

Politically, socially, and culturally, the anticipated Supreme Court showdown regarding the constitutionality of Congress's decision to reauthorize section 5 of the Voting Rights Act may prove to be a significant turning point in American history. Although section 5 constitutes just one of several key provisions of the Voting Rights Act, and the Voting Rights Act is just one of several important civil rights statutes that Congress has enacted in the past four to five decades, the question whether the section 5 preclearance requirement will continue in force may be viewed by many in this country as a litmus test for judging America's ongoing commitment to remedy discrimination against its racial and ethnic minority citizens.

Yet, as demonstrated by this Article, upholding the constitutionality of the 2006 reauthorization legislation does not depend on a dramatic appeal to high principles or a descent into politically expedient constitutional decision making. Instead, it requires that the Supreme Court narrowly tailor its analysis to the specific issues presented: it requires that the Court pay close attention to the specific reason section 5 was enacted and then expanded and extended; it requires that the Court apply the "congruence and proportionality" test of *City of*

295. VRA Reauthorization Act of 2006 § 4, 42 U.S.C. § 1973b(a)(7) (2006).

Boerne v. Flores in a flexible and sensible manner so as to honor both Congress's rationale for reauthorizing the statute and the framework the Court established in *City of Rome v. United States* for reviewing a congressional decision to reauthorize section 5; it requires that the Court recognize its own limitations in evaluating whether the section 5 remedy still is needed; and it requires that the Court engage in a sensitive review of the post-1982 historical record. Undertaking this type of analysis may yield a narrowly drawn legal opinion, but an opinion that, by reaffirming the continuing constitutionality of section 5, will broadly reverberate through our nation.

