

# The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy

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*This Article advances the controversial thesis that the preclearance provision under section 5 of the Voting Rights Act (VRA) is not as intrusive as is generally assumed. It shows that the architecture of the preclearance regime is consistent with “new institutionalist” models of administration that favor devolution and learning through monitoring and disclosure. The Article thereby counters the unchallenged view—articulated in Supreme Court jurisprudence, the legislative record, and scholarship—that the U.S. Department of Justice’s authority to object to state and local election law changes under the preclearance regime has amounted to a heavy-handed intervention into state and local lawmaking processes.*

*More immediately, the Article speaks to the Supreme Court’s likely reconsideration of the constitutionality of the VRA as no longer “congruent and proportional to an ongoing constitutional violation” under the standard advanced in *City of Boerne v. Flores*. It argues that the purported “federalism costs” of the preclearance regime should not weigh as heavily in the constitutional balance as many have suggested.*

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“[T]he design features of both legal and organizational rules have surprisingly powerful influences on people’s choices.”<sup>1</sup>

## INTRODUCTION

Section 5 of the Voting Rights Act of 1965<sup>2</sup> (VRA) represents one of the most successful institutionalizations of civil rights. Section 5 has

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1. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003).

been a “major legal engine for transforming American democracy over the last forty years.”<sup>3</sup> The VRA has brought about a revolution in minority voting rights<sup>4</sup> and set the stage for the historic electoral success of Barack Obama.<sup>5</sup> Indeed, “[t]he Voting Rights Act has been hailed as the most important piece of Federal legislation in our Nation’s history, not just the most important piece of civil rights legislation, but the most important piece of legislation ever passed.”<sup>6</sup>

Prior to the passage of the VRA, African-Americans and other minorities were almost completely excluded from the political process throughout the South. Legal discrimination and outright fraud in voter registration, candidate slating, districting, and other voting practices and procedures kept minorities from registering, voting, and electing minority-preferred candidates. As late as 1967, fewer than 200 African-Americans were elected to political office at any level in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia.<sup>7</sup> In 1964, a single black was elected to a state legislature in all of the states originally targeted by the VRA.<sup>8</sup> By 2000, that number had reached 231.<sup>9</sup> The total number of black elected officials increased tenfold in Georgia, Louisiana, Mississippi, South Carolina, and Texas between 1970 and 2000.<sup>10</sup> Many experts believe the VRA, and in

2. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973c (2006)).

3. Pam Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21 (2004).

4. See, e.g., NAT’L COMM’N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 37, 40–49 (2006); Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990, at 379, 381 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION]; James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 896 (1997) (confirming that the Voting Rights Act is sometimes raised to the status of a “quasi-constitution” and critically examining this view); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1714 (2004) (arguing data shows that blacks are no longer “political outsiders in the covered jurisdictions”); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 644 (2006) (“The Voting Rights Act of 1965 . . . is one of the most remarkable and consequential pieces of congressional legislation ever enacted.”); Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 187, 208 (Ana Henderson ed., 2007) [hereinafter VOTING RIGHTS ACT REAUTHORIZATION OF 2006].

5. See Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. TIMES, Apr. 28, 2009, at A16.

6. *Renewing the Temporary Provisions of the Voting Rights Act: An Introduction to the Evidence, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Wis. Sen. Russell D. Feingold).

7. U.S. COMM’N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 15 (1968).

8. U.S. COMM’N ON CIVIL RIGHTS, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT’S SECTION 5 PRECLEARANCE PROVISION 38 tbl.4 (2006).

9. *Id.*

10. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A

particular, section 5, played a significant role in bringing about these dramatic changes.<sup>11</sup>

Nonetheless, section 5 continues to be one of the most controversial enactments by Congress. Section 5 requires covered state and local jurisdictions to submit all new laws that affect elections to the federal government for approval before they can be enforced.<sup>12</sup> Procedurally, it interjects the Department of Justice (DOJ) into state and local law-making processes, by some accounts turning the passage of every election-related law into a “federal case.”<sup>13</sup> Section 5 imposes an automatic sixty-day stay on the enforcement of any state and local election law in jurisdictions covered by the Act, during which time it grants the DOJ the authority to veto the new law unless and until the submitting jurisdiction has satisfied its burden of proving that the law will have neither a discriminatory purpose nor a discriminatory effect.<sup>14</sup>

As a result of this unusual institutional strategy, section 5 preclearance has, almost universally, been regarded as a uniquely heavy-handed federal intervention into state and local lawmaking. Justice Hugo Black’s dissent in *South Carolina v. Katzenbach*<sup>15</sup> epitomizes the conventional view. With section 5, Justice Black wrote, “States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, . . . [which amounts to treating them as] little more than conquered provinces.”<sup>16</sup> This charge has echoed throughout section 5 jurisprudence, most recently in a constitutional challenge in *Northwest Austin Municipal Utility District Number One v. Holder* (“*NAMUDNO*”).<sup>17</sup> Having filed their complaint within days of the 2006 Reauthorization of the VRA,<sup>18</sup> the petitioners described section 5 as “the most federally invasive law in existence,”<sup>19</sup> and argued that, in light of the

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STATISTICAL SUMMARY app. at 28 (2000).

11. See, e.g., Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1250–52 (1989).

12. “Coverage” extends to all or part of sixteen states: all of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; most of Virginia; four counties in California; five counties in Florida; two townships in Michigan; ten towns in New Hampshire; three counties in New York; forty counties in North Carolina; and two counties in South Dakota. See Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended, 28 C.F.R. § 51 app. (2010).

13. Personal Communication with Richard Bourne, Professor of Law, Univ. of Baltimore Sch. of Law (Nov. 2008). Mr. Bourne was a staff attorney with the DOJ Civil Rights Division just after the passage of the VRA in 1965. *Id.*

14. 42 U.S.C. § 1973(c) (2006).

15. 383 U.S. 301 (1966).

16. *Id.* at 358–60 (Black, J., dissenting).

17. 129 S. Ct. 2504, 2512 (2009).

18. 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 (codified as amended at 42 U.S.C. §§ 1973 to 1973aa-1 (2006)).

19. Jurisdictional Statement at 2, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322), 2008 WL 4181890.

dramatic improvements in vote discrimination since the VRA was passed in 1965, Congress’s 2006 reauthorization of section 5 preclearance no longer represented a “congruent and proportional” remedy for persisting constitutional violations.<sup>20</sup> The Court ultimately decided the matter on alternate grounds: It expressly avoided addressing the constitutionality of section 5, but emphasized in no uncertain terms that “the Act now raises serious constitutional concerns.”<sup>21</sup> Commenting on the Court’s decision, Professor Ellen Katz has written that “Chief Justice [Roberts] relentlessly pile[d] up reason after reason why the 2006 reauthorization is constitutionally infirm,” signaling that, unless Congress acts to remedy its deficiencies, the Court would not hesitate to step in.<sup>22</sup>

This Article argues, counterintuitively and contrary to the conventional wisdom, that the preclearance regime has been consistent with decentralization and is not nearly as intrusive as is generally assumed. Materially and substantively, section 5 is remarkably accommodating to state and local preferences and practices. It is much less disruptive than portrayed. Section 5 permits jurisdictions to retain or experiment with their election systems, so long as they comply with the information requests of an expanded monitoring system and show that their chosen laws affecting elections satisfy a rather lenient nonretrogression standard.<sup>23</sup> The contention that section 5 is consistent with decentralization and localism counters the unchallenged argument that section 5’s “federalism costs” should weigh heavily in the constitutional balance. To the contrary, the VRA’s relative sensitivity to local autonomy and to the promotion of political participation by governmental and nongovernmental actors contributed to its phenomenal success. This alternative reading of section 5 affords a critical perspective on the *NAMUDNO* decision, as well as of *Bartlett v. Strickland*,<sup>24</sup> which was decided during the previous term. I argue that the *NAMUDNO* Court’s expansion of the bailout provision, and the *Strickland* Court’s refusal to protect coalition districts are at cross-purposes.

The analysis presented in these pages also contributes to a broader literature on institutional change and civil rights administration. It compares the much more equivocal results of the one-person/one-vote rule to the success of section 5 preclearance. In stark contrast to the VRA’s “quiet revolution,” the Supreme Court’s one-person/one-vote command required immediate nationwide implementation of a uniform

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20. Appellant’s Brief at 23, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 453246.

21. *NAMUDNO*, 129 S. Ct. at 2505.

22. Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 998 (2009).

23. See generally Karlan, *supra* note 3 (describing the evolution of the retrogression standard).

24. 129 S. Ct. 1231, 1249 (2009).

one-size-fits-all rule, that ultimately failed to vindicate the inherently group-based rights threatened by vote dilution.<sup>25</sup> Comparing how the VRA succeeded in promoting a national antidiscrimination norm without treating states and local jurisdictions like “conquered provinces” speaks to the role of governance structures in the implementation of civil rights. In exploring these contrasts, this Article seeks to extend an institutional approach to the implementation of civil rights. It is sympathetic to the pragmatic model of “experimentalist, learning-by-monitoring institutions,” elaborated by what some have referred to as a “New Institutionalism.”<sup>26</sup> As a study of VRA administration pointed out:

[J]ust as the necessary elements of a social service program are in the hands of different individuals and groups, the capacity to comply (or not to comply) with the requirements of the Voting Rights Act is in the hands of officials in covered jurisdictions who are relatively independent of those federal government officials who are seeking to obtain compliance.<sup>27</sup>

More recently, Professor Heather Gerken’s call for a “Democracy Index” has issued the challenge of investigating and reporting more systematically on the practices and procedures of state and local election administration. Gerken’s purpose is to encourage best practices that engage local actors in the service of democratization.<sup>28</sup> Gerken and others deplore what they see as the hyper-decentralization of the U.S. election system.<sup>29</sup> They blame localism and partisanship for the dismal state of election administration.<sup>30</sup> This Article argues that the preclearance

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25. See, e.g., James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 3–4 (1982).

26. See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1017 (2007); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 271 (1998); Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 568 (2006); Susan Sturm, *Conclusion to Responses—The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 409, 410 (2007); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 6. For similar developments in the area of human rights, see Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 5 (2010).

27. HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 19 (1982).

28. HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 6 (2009); see also Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1077 (2010) (book review).

29. GERKEN, *supra* note 28, at 20, 21–23; Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007) (reviewing ROY G. SALTMAN, THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE (2006)); see also Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1586 (2009).

30. GERKEN, *supra* note 28, at 15; see also Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 792 (2010) (reviewing GERKEN, *supra* note 28).

provision of the VRA is a comparative bright spot. “Because the Democracy Index provides the right information in the right form,” writes Gerken, “it should harness the two major obstacles to reform—partisanship and localism—in the service of reform.”<sup>31</sup> This Article shows that the section 5 preclearance has embodied important aspects of such an approach.

Part I articulates the standard view of section 5, which reflects the widely held belief that progress in civil rights more generally has been driven by the derogation of local autonomy and a “nationalization of civil liberties.”

Part II discusses Congress’s 2006 Voting Rights Act Reauthorization (“VRARA”) and the constitutional challenge to the new VRA raised by the *NAMUDNO* case. It argues that the *NAMUDNO* Court’s decision to reinterpret and expand the VRA’s bailout provision offers key insights about the institutional structure of the VRA.

Part III is the heart of the Article. It probes the extent of the VRA’s encroachment on state and local autonomy. Part III.A clarifies how the term “localism” is understood in the context of a “new institutionalism.” III.B offers an alternative interpretation of the institutional architecture of section 5 preclearance and its impact on local jurisdictions. III.C considers the extent to which this alternative interpretation is consistent with the different phases of section 5’s historical development.

Part IV questions the insistence on “straightforward, reasonably administrable, mathematical” bright-line rules in the election context—such as the Supreme Court’s one-person/one-vote rulings and its recent 50% rule defining protected majority-minority districts in *Bartlett v. Strickland*. Part V sets forth the constitutional implications and then concludes.

## I. THE STANDARD VIEW: LOCALISM OR RIGHTS

The standard view of section 5’s intrusiveness reflects the standard view of civil rights as uniform national regimes that admit of no local variation, but are imposed by centralized authorities with the aim of suppressing deviant local practices. Part I.A briefly outlines this traditional liberal conception of rights. Part I.B describes in some detail the charge of section 5’s extraordinary intervention into state and local lawmaking.

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31. GERKEN, *supra* note 28, at 6.

### A. THE TENSIONS BETWEEN LOCALISM AND RIGHTS

There has always been a structural tension between localism and rights.<sup>32</sup> In the United States, federal civil rights that could be asserted against the states were first “born in a burst of national centralization” with the passage of the Reconstruction Amendments and the expansion of federal judicial power necessary to enforce them.<sup>33</sup> The subsequent “long march towards freedom” for African-Americans was, by most accounts, accomplished by what Herbert Wechsler called the “nationalization of civil rights.”<sup>34</sup> This nationalization of governmental authority, in the form of increasingly forceful federal civil rights regimes,<sup>35</sup> aimed precisely at the disruption of longstanding local practices in the Jim Crow South.<sup>36</sup> Meanwhile, elites in the South sought to perpetuate local regimes of domination, exploitation, and exclusion by appealing to States’ rights and constitutional limits on national governmental authority.<sup>37</sup>

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32. See, e.g., Robert Post, *Federalism and Civil Rights*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1007 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); see also HOWARD BALL ET AL., *supra* note 27, at 117 (“[T]he extension of civil liberties, including voting rights, in the United States has evolved out of a constant struggle to replace localized procedures with more standard, national ones.”).

33. Post, *supra* note 32, at 1007.

34. See Herbert Wechsler, *The Nationalization of Civil Liberties and Civil Rights*, 12 TEX. Q. 10, 10 (Supp. 1968); see also Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 177 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter CONTROVERSIES IN MINORITY VOTING].

35. See James T. Patterson, *The Rise of Rights and Rights Consciousness, 1930s–1970s*, in CONTESTING DEMOCRACY: SUBSTANCE AND STRUCTURE IN AMERICAN POLITICAL HISTORY 1775–2000, at 201, 213–15 (Byron E. Shafer & Anthony J. Badger eds., 2001).

36. See Post, *supra* note 32, at 1007. (“These rights . . . were self-conscious efforts to eradicate aspects of the indigenous culture of the southern states traceable to the institution of slavery.” (emphasis omitted)); see also Anthony W. Marx, *Race-Making and the Nation-State*, 48 WORLD POL. 180, 203–04 (1996) (“In the United States the South had been appeased by allowing formal racial discrimination on the local level. By midcentury . . . greater central state consolidation and white national unity [allowed] . . . [t]he federal balance of power [to be] gradually reconfigured toward the center. Meanwhile, despite Southern resistance, increased black protest encouraged by and pushing for further reforms, pressed for the application of central power against localized racial policies. By midcentury the centralized American polity had become strong enough to intervene in the historically most contentious and last bastion of states’ rights. . . . [O]fficial racial domination was ended by strong action from the center . . .”).

37. See, e.g., Governor J. Strom Thurmond of South Carolina Speaks to Southern Governors, February 7, 1948, in STATES’ RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 190–91 (Frederick D. Drake & Lynn R. Nelson eds., 1999) (reacting to President Truman’s call for a national Commission on Civil Rights); *The Southern Manifesto, 1956*, in STATES’ RIGHTS AND AMERICAN FEDERALISM, *supra*, at 203–04; *States’ Rights Platform of 1948, Southern Democratic Convention, Birmingham, Alabama, July 17, 1948*, in STATES’ RIGHTS AND AMERICAN FEDERALISM, *supra*, at 193–95. This pattern persists in that conservative opposition to expanded minority civil rights protections, including voting rights, frequently takes the form of deploring “arbitrary federal interference with local and state . . . arrangements in violation of the constitution.” ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 75 (1987).



The gradual "nationalization of civil rights" culminated in the Warren Court's doctrine that federal civil rights protections were minimum national standards of decency, below which no local experimentation or variation would be tolerated. The Supreme Court would stand as the final arbiter of such nationally uniform protections. Justice Brennan articulated this view most forcefully:

I believe that the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor. Experimentation which endangers the continued existence of our national rights and liberties cannot be permitted; a call for that brand of diversity is, in my view, antithetical to the requirements of the Fourteenth Amendment. While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment. This reconciliation of local autonomy and guaranteed individual rights is the only one consistent with our constitutional structure.<sup>38</sup>

Separate from the Court's (selective) incorporation of the Bill of Rights, Congress, by means of the Civil Rights Act of 1964<sup>39</sup> and the Voting Rights Act of 1965, "asserted centralized federal authority over areas of policy (customer choice, job discrimination, voting requirements) that had hitherto remained under local control" and produced novel national administrative structures and methods of enforcement.<sup>40</sup>

The tension between centralization and localism is also reflected in the universalism/particularism debate in liberal political theory.<sup>41</sup> Fundamental rights have generally been understood to somehow transcend the pluralistic give and take of national or local interest groups in a democratic polity, guaranteeing universal freedoms to individuals that apply uniformly throughout the nation and define what it means to be not merely a citizen, but a person.<sup>42</sup> Liberals disagreed on the list and definition of such rights. But they agreed on the "priority" of these rights over competing "conceptions of the good life," or, put differently, over

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38. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

39. 42 U.S.C. § 2000d-d(7) (2006).

40. Graham, *supra* note 34, at 177, 184.

41. This conceptual tension can be resolved. First, the elusiveness of the content of such concepts as natural rights, universal rights, human rights, and civil rights open up a space for diverse interpretations. Second, conceptual clarity can be achieved at the level of principle, while recognizing that the institutionalization of these principles, and their application and enforcement in practice, involve specifications that are largely underdetermined by any theory.

42. This view was expressed most forcefully by John Rawls's conception of the "priority of the right over the good," the classic philosophical statement of progressive liberalism in the 1960s and 1970s. JOHN RAWLS, *A THEORY OF JUSTICE* 31 (1971).

self-understandings and value-systems that differed across communities into which individuals were embedded.<sup>43</sup>

#### B. COVERED JURISDICTIONS AS “CONQUERED PROVINCES”

According to the standard view, the VRA was no exception to this narrative. Since its inception, the VRA, and the preclearance regime in particular, have been regarded as an unprecedented federal intrusion into state and local government autonomy that “destroys local control of the means of self-government” and “strips locally elected officials of their autonomy to chart policy.”<sup>44</sup>

In *South Carolina v. Katzenbach*, Justice Hugo Black wrote famously in dissent that, with section 5,

some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, [and this] so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. . . . I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.<sup>45</sup>

The Supreme Court has upheld preclearance as a constitutional, even if “uncommon,”<sup>46</sup> use of congressional power, not because section 5’s substantial intrusion on state and local autonomy was a subject of reasonable disagreement,<sup>47</sup> but because “principles of federalism that might otherwise be an obstacle to congressional authority [were] necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’”<sup>48</sup> In *Lopez v. Monterey County*, the Court explained that:

We have recognized that the Act, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial “federalism costs.” The Act was passed pursuant to Congress’ authority under the Fifteenth Amendment, however, and we have likewise acknowledged that the Reconstruction Amendments by their nature

43. The idea of “human rights” is, in this sense, a closely related concept. See generally LOUIS HENKIN ET AL., *HUMAN RIGHTS* (2009) (providing a comprehensive analysis of human rights law).

44. *City of Rome v. United States*, 446 U.S. 156, 201–02 (1980) (Powell, J., dissenting).

45. *South Carolina v. Katzenbach*, 383 U.S. 301, 358–60 (1966) (Black, J., dissenting).

46. *Id.* at 334 (majority opinion).

47. The impassioned dissent from Justice Black on the threat to the principles of federalism posed by section 5 has echoed down through later dissents of Justices Lewis Powell, John Paul Stevens, and William Rehnquist. See *City of Pleasant Grove v. United States*, 479 U.S. 462, 472–80 (1987) (Powell, J., dissenting); *City of Rome*, 446 U.S. at 206 (Rehnquist, J., dissenting); *United States v. Bd. of Comm’rs*, 435 U.S. 110, 140 (1978) (Stevens, J., dissenting).

48. *City of Rome*, 435 U.S. at 179 (majority opinion) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)); *Katzenbach*, 383 U.S. at 334 (majority opinion).

contemplate some intrusion into areas traditionally reserved to the States.<sup>49</sup>

The preclearance regime of the VRA departed decisively from the court-centered enforcement of the Civil Rights Act of 1957,<sup>50</sup> which required citizens to bring suit and prove violations in the traditionally more conservative courts.<sup>51</sup> Such civil rights actions against state and local officials vindicated violations *ex post* on a case-by-case basis.<sup>52</sup> A traditional civil rights action required that a plaintiff with standing show intent and surmount considerable procedural hurdles in addition to proving the facts and circumstances of the violation.<sup>53</sup> In the election context, the procedural hurdles are compounded by the fact that elections are usually over by the time a court can consider the constitutional violations.

In contrast, the preclearance regime is prophylactic and requires covered jurisdictions to obtain approval for new election related laws *ex ante*, that is, before such law can be placed on the books and enforced.<sup>54</sup> Section 5 requires covered state and local jurisdictions to submit all law changes affecting voting to the DOJ’s Civil Rights Division (or the District Court for the District of Columbia) for approval.<sup>55</sup> The submitting jurisdiction has the burden of showing that the law does not

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49. 525 U.S. 266, 282 (1999) (citations omitted) (citing *Miller v. Johnson*, 515 U.S. 900, 926 (1995); *City of Rome*, 446 U.S. at 179)); *see also* *United States v. Morrison*, 529 U.S. 598, 626–27 (2000).

50. Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (1957).

51. *Graham*, *supra* note 34, at 182.

52. *Katzenbach*, 383 U.S. at 360 (Black, J., dissenting) (“I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against state officials once and operative state law has created an actual case and controversy.”).

53. *See* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 4 (2d ed. 2008) (“[E]ven if a plaintiff establishes a violation of a federally protected right, she may not necessarily obtain relief. Courts may deny relief after resolving numerous other issues: jurisdictional questions, such as the *Rooker-Feldman* doctrine, the Eleventh Amendment, and standing and mootness; affirmative defenses, such as absolute and qualified immunity; and other issues, such as the statute of limitation, preclusion, and various abstention doctrines.”). Limitations on §§ 1971 and 1973 actions prior to 1960 were even more significant. *See generally* *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that Congress enacted § 1983 to provide an independent federal remedy supplement to the available state law remedies). This caused the NAACP and other civil rights organizations to shift their strategy from litigation to mass-based protest. FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 9 (1990).

54. *Katzenbach*, 383 U.S. at 360 (“A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country.”).

55. 28 C.F.R. § 51.52 (2010).

discriminate.<sup>56</sup> The Attorney General has the power to veto the law by interposing an “objection.”<sup>57</sup>

Because it operates *ex ante*, the preclearance process might be compared to an injunction. Relying on this analogy, conservatives have suggested that a heightened standard ought to apply to coverage by section 5. In an ordinary civil rights action, only an emergency that threatened irreparable harm to identifiable plaintiffs would justify issuance of an injunction.<sup>58</sup> In addition, such a remedy requires a showing, by the plaintiff, that no other remedy at law could offer adequate relief and that the preliminary injunction or temporary restraining order in fact serves to redress the harm of which some complain.<sup>59</sup>

Neither the statute nor the guidelines for the preclearance process impose a heightened standard on the preclearance decision. The covered jurisdiction must submit all new laws that affect voting for preclearance regardless of whether concerns have been raised about the new law. The submitting authority has the burden of proving it does not discriminate. No plaintiff need come forward. The injunction analogy therefore only highlights the unusual *ex ante* constraints placed on states and localities by the preclearance regime.

It follows that submitting jurisdictions do not enjoy the full procedural rights they would enjoy in court or under the Administrative Procedure Act.<sup>60</sup> The sixty-day review process is necessarily informal, there is no opportunity for a hearing, and the determinations themselves have been criticized as “standardless.”<sup>61</sup> The Attorney General’s decision is not subject to administrative review, except that a submitting jurisdiction has the option of bringing a *de novo* action for preclearance in the United States District Court for the District of Columbia<sup>62</sup>—a

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56. *Id.*

57. *Id.*

58. Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2006).

59. In this vein, conservative opponents of the VRA have argued that such a heightened standard should govern the inquiry under *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), as to the “congruence and proportionality” of Congress’s use of its Civil War Amendment enforcement powers in reauthorizing the VRA in 2006. FED. R. CIV. P. 65(a) & (b). Ed Blum and others have thus suggested that preclearance can no longer be justified, because the national emergency of extreme racism, exploitation, and political exclusion of the early- to mid-1960s in the South has passed. See EDWARD BLUM, UNINTENDED CONSEQUENCES OF SECTION 5 OF THE VOTING RIGHTS ACT 5 (2007).

60. 5 U.S.C. §§ 551–559, 701–06 (2006).

61. In *Miller v. Johnson*, for example, plaintiffs argued that the flexibility was so great that the DOJ’s Voting Section “has no established fact-finding procedures, no administrative hearing and no discernible standards for evaluating information.” Brief of the Appellees at 41–42, *Miller v. Johnson*, 515 U.S. 900 (1995) (No. 94-631).

62. Voting Rights Act of 1965, 42 U.S.C. § 1973c(a) (2006); *Morris v. Gresette*, 432 U.S. 491, 502 (1977). But this alternative to administrative preclearance is rarely pursued. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 525 (3d ed. 2007).

forum intentionally removed from the local district courts.<sup>63</sup> A related but separate issue is the persistent concern that section 5 gives a federal executive agency undue discretion over state and local political geography that can be manipulated for partisan political purposes.<sup>64</sup>

The scope of the preclearance requirement has also been criticized as overbroad and burdensome. *Allen v. State Board of Elections*,<sup>65</sup> together with *Perkins v. Matthews*,<sup>66</sup> interpreted voting changes subject to preclearance very broadly.<sup>67</sup> The Supreme Court included at least seven basic types of voting changes within the scope of section 5: redistricting, annexation, changes in polling places, precinct changes, re-registration procedures, incorporations, and changes in election laws such as filing fees and at-large elections.<sup>68</sup> *Allen* also required preclearance for changes mandated by federal law.<sup>69</sup>

The perceived intrusiveness of section 5 informed debates about the VRARA.<sup>70</sup> During the reauthorization debate, critics and defenders of preclearance agreed that section 5 authorized a “unique” intrusion into state and local autonomy with significant “federalism costs.”<sup>71</sup> Echoing the Rehnquist Court’s retrogression decisions, critics of section 5 urged

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63. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) (majority opinion) (“South Carolina and certain of the *amici curiae* maintain that §§ 4(a) and 5, buttressed by § 14(b) of the Act, abridge due process by limiting litigation to a distant forum.”).

64. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act*, 86 TEX. L. REV. 667, 668 n.4 (2008) (“Republicans on the House Judiciary Committee in 1965 stressed the partisan dangers of assigning preclearance to the Department of Justice.”); see also Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785 (2006).

65. 393 U.S. 544, 566–69 (1969).

66. 400 U.S. 379, 388 (1970) (holding that voting booth changes, annexation of land, and changes from ward to at-large elections were voting changes subject to preclearance).

67. 42 U.S.C. § 1973c (declaring that preclearance extends to any “voting qualifications or prerequisite, standard, practice, or procedure” without further specification).

68. See *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 502–503 (1992); *Allen*, 393 U.S. at 565–69; HOWARD BALL ET AL., *supra* note 27, at 19, 66–67.

69. HOWARD BALL ET AL., *supra* note 27, at 565 n.29. This became critically important during the implementation of the National Voter Registration Act of 1993 (Motor Voter Act), 42 U.S.C. §§ 1973gg to 1973gg-10 (2006), and the Help America Vote Act of 2002 (HAVA), 42 U.S.C. §§ 15301–15545 (Supp. II 2002); see *Young v. Fordice*, 520 U.S. 273, 283 (1997) (rejecting Mississippi’s argument that Motor Voter’s implementation was not a covered change).

70. 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 (codified as amended at 42 U.S.C. §§ 1973 to 1973aa-1 (2006)).

71. BLUM, *supra* note 59, at 4–5 (“Many legal observers noted that Section 5 was a significant departure from the way responsibilities between the federal and state governments were allocated at the time the Constitution was ratified. Section 5 did something no other bill in the history of the nation had ever done before: For a limited period of time, it required every political subdivision targeted by the act to get permission from the federal government before any change to election procedures could take place. In other words, the federal government was no longer limited to challenging in the courts a racially discriminatory change in election procedures or practices after it had gone into effect; the federal government now had the power to prevent such changes from going into effect at all.”); see also U.S. COMM’N ON CIVIL RIGHTS, *supra* note 8, at 25–28 (statement of Roger Clegg).

that the preclearance regime's disproportionate interference in state and local law should weigh heavily in the constitutional balance.<sup>72</sup> Proponents of section 5 conceded the "unique procedures it requires of states and localities that want to change their laws."<sup>73</sup> Congress's "vote was remarkable," wrote Professor Nathaniel Persily, "in that almost all participants in the policy debate recognize[d] that section 5 of the VRA represents a unique exception to the normal functioning of federalism . . . ."<sup>74</sup>

## II. CONTROVERSIES IN THE WAKE OF THE VRARA

A constitutional challenge to section 5 was expected to reach the Court after Congress passed the VRARA. The VRARA renewed key sunset provisions of the VRA for another twenty-five years.<sup>75</sup> It also overturned two important decisions by the Court that had rolled back the kind of racial vote discrimination that would trigger an objection by the Attorney General under section 5.<sup>76</sup> In reversing these decisions, Congress threw down the gauntlet to the Court.<sup>77</sup>

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72. Appellants in *NAMUDNO* echoed the Rehnquist Court's retrogression decisions, which stressed the heavy "federalism costs" of section 5 preclearance and repeated the arguments of critics on record against VRARA. See, e.g., *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 336 (2000); *Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)*, 520 U.S. 471, 480 (1997); BLUM, *supra* note 59, at 5; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 8, at 53–54 (statement of Abigail Thernstrom, Vice Chair).

73. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) ("[Section 5] stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws. No other statute applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law.").

74. *Id.* at 180.

75. 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 (codified as amended at 42 U.S.C. §§ 1973 to 1973aa-1 (2006)); see also Persily, *supra* note 73.

76. The monitoring and preclearance provision under section 5 had been interpreted by the Court to permit de facto constitutional violations, but not changes in the law that would roll back or "retrogress" the voting rights gains by blacks and other protected minorities. In *Bossier Parish I*, the Supreme Court took this doctrine to its extreme when it held that only a specific "intent to retrogress" could trigger an objection. 520 U.S. at 328. In *Georgia v. Ashcroft*, the Court redefined how safeguarding the "minority group's effective exercise of the electoral franchise" would henceforth be understood, permitting trade-offs between influence districts and majority-minority districts under section 5's nonretrogression standard and undercutting the "ability to elect" minority-preferred candidates as the measure of progress. 539 U.S. 461, 479 (2003). The VRARA restored the intent standard and reaffirmed ability-to-elect districts as the focus of minority vote dilution inquiry. Sec. 5, § 5(b)–(c), 120 Stat. at 580–81.

77. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 153 (2007), <http://thepocketpart.org/2007/12/10/pildes.html>.

## A. CONGRESS'S FAILURE OF DELIBERATION

The Supreme Court had, over the years, made it increasingly clear that it would carefully scrutinize the congressional record to police Congress's use of its enforcement powers under the Civil War Amendments.<sup>78</sup> The VRARA was generally perceived to have rendered section 5 and its related provisions particularly vulnerable in this regard. The VRARA renewed section 5 and the other sunset provisions of the Act for another twenty-five years without further amendment. Due to political pressure and the complexity of the issues involved, Congress inadequately addressed how the VRA might be amended to reflect the dramatic progress in racial and minority inclusion in voting since 1965.<sup>79</sup> Conservatives argued that section 5 was a "temporary, emergency" regime in 1965 and that "the emergency has passed."<sup>80</sup> During the period leading up to the passage of the VRARA, leading scholars on all sides recognized that progress in racial vote discrimination should be reflected in the renewal legislation.<sup>81</sup>

For example, coverage by the preclearance provision continues to be triggered by a formula that singles out the Southern states. Coverage is, *inter alia*, based on the proportion of minority voter registrants or votes cast in a given state in 1964 or 1968.<sup>82</sup> But the numbers have changed significantly since then, with the proportion of registered minority voters in some covered states exceeding those in states that are exempt from preclearance.<sup>83</sup> Evidence that private enforcement actions under section 2 were no more common in covered jurisdictions than in jurisdictions exempt from preclearance has been taken to suggest that discrimination was just as likely to occur in jurisdictions not covered by

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78. See generally Ellen Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001) (describing the Supreme Court's increasingly hostile position on the Attorney General's exercise of her preclearance powers).

79. See Katz, *supra* note 22, at 991-95, 997-1000; Persily, *supra* note 73, at 119-44.

80. See, e.g., Abigail Thernstrom, *Emergency Exit*, N.Y. SUN (Jul. 29, 2005), <http://www.nysun.com/article/17784>; see also BLUM, *supra* note 59, at 5-10; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 8, at 26 (statement of Roger Clegg); *id.* at 21-23 (statement of Edward Blum); *id.* at 53-54 (statement of Abigail Thernstrom); Abigail Thernstrom & Edward Blum, *Voting Rights Act: After 40 years, It's Time for Virginia to Move on*, RICHMOND TIMES-DISPATCH, Aug. 1, 2005, at A11.

81. See, e.g., Issacharoff, *supra* note 4, at 1710; Richard H. Pildes, *Political Competition and the Modern VRA*, in *THE FUTURE OF THE VOTING RIGHTS ACT I*, 7-8 (David Epstein et al. eds., 2006) (concluding that political developments with regard to racial minorities had so improved in this country, in large part due to the success of the Voting Rights Act, that section 5 as applied pre-*Ashcroft* could actually harm the rights of minority voters); Tokaji, *supra* note 64, 785-86; see also *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11-13, 198-207 (2006) (testimony and prepared statement of Richard H. Pildes). *But see id.* at 4-6, 8-9 (2006) (testimony of Professors Pamela S. Karlan and Theodore S. Arrington).

82. See 42 U.S.C. §§ 1973a, 1973b(a), 1973c (2006).

83. Tokaji, *supra* note 64, at 273.

the Act.<sup>84</sup> Instead, the persistence of racially polarized voting in covered (Southern) states was heavily relied upon as evidence for the continued need for the special provisions of the VRA; however, racially-polarized voting is also prevalent in many non-covered jurisdictions, which are not subject to preclearance.<sup>85</sup>

Some commentators therefore proposed changes in the coverage formula.<sup>86</sup> Gerken, for example, argued for expanding potential coverage nationwide, but limiting actual coverage to only those jurisdictions that had “opted in.”<sup>87</sup> Under the “opt-in” proposal, coverage by the preclearance regime would be triggered upon the application of local minority representatives to the DOJ.<sup>88</sup> An “opt-in” trigger, according to Gerken, would preserve the power of minority groups to bargain for equal representation in the shadow of section 5.<sup>89</sup> Gerken’s proposal had the virtue of basing coverage on actual state and local conditions as they currently exist, rather than on an outdated formula that many deem arbitrary.

Another proposal to update coverage was to expand the bailout provision.<sup>90</sup> Jurisdictions covered by section 5 can apply to terminate coverage, or “bail out.” To terminate coverage, a jurisdiction must show that it has not discriminated for at least ten years and has made consistent efforts to expand minority participation in all aspects of the political process.<sup>91</sup> Few jurisdictions have availed themselves of the bailout provision, in part, because bailout was restricted.<sup>92</sup> Towns, cities,

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84. See Katz, *supra* note 4, at 188 (showing that although roughly the same number of section 2 decisions were identified in covered jurisdictions and uncovered jurisdictions, plaintiffs were more likely to prevail in covered jurisdictions). Whereas section 5 of the VRA requires covered jurisdictions to submit all new laws that affect voting to the United States Attorney General for “preclearance,” section 2 of the VRA, as amended, provides a private right of action to challenge racial vote discrimination nationwide. 42 U.S.C. § 1973 (2006). Section 2 essentially tracks the language in the Fifteenth Amendment to the U.S. Constitution.

85. Katz, *supra* note 4, at 188; see also Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 745 (2006). Katz argues, based on the empirical record in section 2 cases, that racially polarized voting in covered jurisdictions is often more extreme. See Katz et al., *supra* note 4. Ultimately, Congress relied on Katz’s study, which appears in the Appendix to the congressional record of the VRARA. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 964–1124 (2005) (including study from the Voting Rights Initiative of the University of Michigan Law School).

86. See, e.g., Gerken, *supra* note 85; Michael P. McDonald, *Who’s Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 81, at 255.

87. Gerken, *supra* note 85.

88. *Id.*

89. *Id.*

90. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006*, *supra* note 4, at 257; McDonald, *supra* note 86, at 268.

91. 42 U.S.C. § 1973b(a) (2006).

92. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2599–834 (2005)



and other local government units within covered states could not bail out separately from their counties.<sup>93</sup> Because states or counties eligible for bailout must show that all of their political subdivisions are eligible for bailout, statewide elections in that county are still covered until the entire state can show that it meets the criteria for bailout, even if counties can make that showing.<sup>94</sup> As a result, only twelve jurisdictions—out of more than 12,000 covered political subdivisions—have successfully bailed out of the Act since 1982.<sup>95</sup> To expand the bailout provision would have provided one way to phase out preclearance over time.<sup>96</sup> One proposal made during the reauthorization debate was for Congress to examine the possibility of allowing local governmental subunits within a covered county to bail out.<sup>97</sup>

Neither these nor other proposals for reform were adopted.<sup>98</sup> Instead, Congress amended the VRA only to reinstate the construction of the Act that had existed prior to the Supreme Court’s decisions in *Reno v. Bossier Parish School Board (Bossier Parish II)* and *Georgia v. Ashcroft*, while renewing the Act for another twenty-five years.<sup>99</sup> Many commentators have described congressional action on the VRARA as a “failure of deliberation.”<sup>100</sup> In the *NAMUDNO* case, the Supreme Court “found a way to send the statute back to Congress for deliberation.”<sup>101</sup>

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(detailing the bailouts).

93. In the rare exception that a town or city conducted its own voter registration, it could seek bailout under section 4(a), as amended in 1982. 42 U.S.C. § 1973b(a) (1988).

94. See generally *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 231 (D.D.C. 2008) (discussing the expansion of bailout eligibility in the 1982 amendments to include political subdivisions), *rev’d sub nom. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009); Hebert, *supra* note 90, at 257 (discussing the number of bailouts since the 1982 amendments).

95. Hebert, *supra* note 90, at 257.

96. See Rick Hasen, *Drafting a Proactive Bailout Measure for VRA Reauthorization*, ELECTION LAW BLOG (May 18, 2006, 9:37 AM), <http://www.electionlawblog.org/archives/005655.html> (proposing a “proactive bailout measure” as part of the VRA reauthorization). *But see* J. Gerald Hebert, *Bailouts and the Voting Rights Act: Observations About Rick Hasen’s Proposals*, CAMPAIGN LEGAL CTR. BLOG (June 20, 2006), [http://www.clcblog.org/blog\\_item-34.html](http://www.clcblog.org/blog_item-34.html) (critiquing Hasen’s proposal).

97. Hebert, *supra* note 90, at 274. Hebert has served as legal counsel to all of the jurisdictions that have bailed out since the 1982 amendments were enacted. *Id.* at 257 n.1.

98. See, e.g., McDonald, *supra* note 86, at 262–70 (discussing modification of the definition of “Test or Device,” modification of the participation component in the coverage formula, modification of the bailout mechanism, and certain technical amendments to section 4, upon which section 5 depends); Tokaji, *supra* note 64, at 830–35 (arguing for the establishment of an independent bipartisan commission or “super agency” for voting to administer preclearance, and allowing opponents to challenge a DOJ preclearance decision in court); Abigail Thernstrom & Edward Blum, Op-Ed., *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10 (arguing that Congress should let section 5 expire in 2007).

99. FANNIE LOU HAMER, ROSA PARKS, CORETTA SCOTT KING, AND CÉSAR E. CHÁVEZ VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006, S. REP. NO. 109-295, at 15 (2006) (citing *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320 (2000)).

100. Katz, *supra* note 22, at 999.

101. *Id.*

## B. *NAMUDNO*'S PROMISE

Congress's failure to tailor the VRARA to changed circumstances was front and center in *Northwest Austin Municipal Utility District No. One v. Mukasey*, a case that reached the Supreme Court in 2009.<sup>102</sup> The plaintiff in *NAMUDNO* was a special purpose district in Texas that sought relief from the burdens of preclearance by seeking bailout under section 4(b) of the VRA.<sup>103</sup> In the alternative, *NAMUDNO* claimed that section 5 was unconstitutional, because the severe encroachments of the preclearance requirement could no longer be justified as a "congruent and proportional" remedy for ongoing constitutional violations.<sup>104</sup> *NAMUDNO* was filed with the District Court for the District of Columbia within days of the passage of the VRARA. Its progress was closely watched.

To bail out from under the special provisions of the act, an eligible jurisdiction must seek a declaratory judgment from a three-judge panel in the D.C. court and essentially prove that during the past ten years, it had not engaged in any racial vote discrimination.<sup>105</sup> A jurisdiction must show that for the previous ten years, it had not used any forbidden voting test, had not received a valid objection under section 5, and had not been found liable for other voting rights violations. It must also show that it had "engaged in constructive efforts to eliminate intimidation and harassment" of voters, and similar measures.<sup>106</sup> The plaintiff argued that the district had never engaged in racial vote discrimination, had never been found guilty of racial vote discrimination, and had made constructive efforts to counter racial vote discrimination.<sup>107</sup>

*NAMUDNO*'s first claim turned on whether the district was a "political subdivision" eligible for bailout under the Act.<sup>108</sup> Bailout is available to smaller political units that are covered separately under the Act, such as parts of New York City or Southern California.<sup>109</sup> The VRA, however, did not at first permit political subdivisions to bail out separately if they were covered as part of a covered state. The 1982 amendments expanded bailout to permit "political subdivisions," such as counties or parishes to terminate coverage, even if their state did not

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102. 573 F. Supp. 2d 221, 268 (D.D.C. 2008), *rev'd sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

103. 42 U.S.C. § 1973b(b) (2006).

104. *NAMUDNO*, 573 F. Supp. 2d at 268.

105. 42 U.S.C. §§ 1973b(a)(1), 1973c(a).

106. *Id.* § 1973b(a)(1)(A)–(F).

107. Appellant's Brief at 9–10, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322), 2009 WL 453246.

108. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009).

109. *City of Rome v. United States*, 446 U.S. 156, 167 (1980) (finding a city ineligible to seek bailout, because "the coverage formula of § 4(b) ha[d] never been applied to it.").

satisfy the bailout requirements.<sup>110</sup> More specifically, section 14(c)(2) provides that “[t]he term ‘political subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”<sup>111</sup> Thus, cities, towns, and other political subdivisions covered as part of a larger political unit could not bail out separately; their fate depended on the status of the larger political unit: the county, parish, or state.<sup>112</sup> NAMUDNO was neither a county nor a city; nor did it register voters.<sup>113</sup> Accordingly, the district court ruled that NAMUDNO was not entitled to bail out, because it was not a “political subdivision” within the special meaning of section 14(c)(2) of the VRA.<sup>114</sup> The district court’s interpretation of the bailout provision was unsurprising. It complied with Supreme Court precedent and long-settled statutory interpretation principles.<sup>115</sup>

The bulk of the district court’s opinion focused on the constitutional challenge to section 5, as reauthorized by the VRA: It contained a lengthy and detailed examination of the facts and data adduced by Congress in support of reauthorization.<sup>116</sup> Judge Tatel rejected the plaintiff’s constitutional challenge to section 5 and held that the evidence of continuing violations that Congress relied on was sufficient to justify the restrictions imposed on states and localities by the preclearance regime.<sup>117</sup>

The case went up to the Supreme Court on direct appeal. In a unanimous opinion written by Chief Justice Roberts, the Supreme Court reversed.<sup>118</sup> The Court granted NAMUDNO the right to seek bailout by revisiting and substantially expanding the scope of the statutory bailout provision.<sup>119</sup> The Court held that bailout was not limited to political subdivisions within the special meaning of the Act.<sup>120</sup> Under the Court’s reinterpretation of the statute, bailout would now be available to any political subunit that could meet the criteria. The bailout provision thus

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110. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 1, 96 Stat. 131, 131–34 (codified as amended at 42 U.S.C. § 1973 (2006)).

111. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(c)(2), 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973(c)(2) (2006)).

112. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 231–32 (D.D.C. 2008).

113. *Id.* at 283.

114. *Id.*

115. *See* Katz, *supra* note 22, at 997–98.

116. *NAMUDNO*, 573 F. Supp. 2d at 248–83.

117. *Id.* at 279–82.

118. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2517 (2009).

119. *Id.* at 2514–16.

120. *Id.* at 2516.

became available to thousands of cities, townships, and special purpose districts, such as NAMUDNO.

Notably, the Supreme Court refrained from striking down the preclearance regime, but instead tweaked the existing statutory and administrative framework to permit incremental changes. It empowered local actors to apply for bailout. The bailout determination is henceforth based on local conditions, which local jurisdictions have the power to affect.

Because many more political units and subunits are now eligible for preclearance, observers expected an increase in bailout requests.<sup>121</sup> Presumably, cities that achieve bailout will reflect something like “best practices” or at least better practices. Cities that have not yet bailed out, but are interested in doing so, can presumably look to cities that have in order to see how it is done and what it takes. The new bailout scheme should, therefore, encourage the adoption of something like “best practices.”<sup>122</sup> Furthermore, the more cities that bail out, the greater the stigma to those that do not. Political units can now come clean if they want. After *NAMUDNO*, their fate is in their own hands. Lingering local resentment against being singled out as racist, and subjected to ongoing monitoring by Washington, reasonably should give way to self-examination. Cities surrounded by neighbors who have successfully bailed out can no longer blame outdated conceptions or unfounded bias for their subjection to the preclearance regime.<sup>123</sup>

Whereas the Court expressly avoided the broader constitutional issue, it emphasized in no uncertain terms that the Act “raises serious

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121. Telephone Interview with J. Gerald Hebert, Attorney (Nov. 18, 2010); see also Jeremy Duda, *Dumping a Burden: Counties Pick Right Time to Challenge Voting-Rights Strictures*, AZCAPITOLTIMES.COM (Feb. 4, 2011, 8:10 AM), <http://azcapitoltimes.com/news/2011/02/04/dumping-a-burden-counties-pick-right-time-to-challenge-voting-rights-strictures/>.

122. See, e.g., Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 381–82 (1985) (arguing that bailout standard provides incentive to comply with federal antidiscrimination standard).

123. See, e.g., *Jackson's Plan Would Extend Voting Wrongs*, MOBILE REG., Mar. 12, 2005, at A12 (“In today’s United States, 140 years after the Civil War and 40 years after the passage of the original Voting Rights Act of 1965, there is no reason to treat Southern states differently than other states. . . . The problem with the current system is that it treats the Southern states as guilty until proven innocent, and makes all those states’ residents into second-class citizens compared to the rest of the country.”). So far, only two cities have bailed out post-*NAMUDNO*: Sandy Springs, Georgia, and Kings Mountain, North Carolina. Press Release, Dep’t of Justice Office of Pub. Affairs, U.S. Reaches Agreements with Kings Mountain, N.C., and Sandy Springs, Ga. to Terminate Coverage from Preclearance of the Voting Rights Act (Sept. 22, 2010), <http://www.justice.gov/opa/pr/2010/September/10-crt-1067.html>. Another eight bailout applications are pending. This represents an increase in bailout applications. But Gerry Hebert, who is the attorney handling bailouts for many of these jurisdictions, believes this increase is likely related to the upcoming redistricting rounds. To the extent that more bailouts have not occurred, Hebert suggests that the very limited costs of 99% of preclearance submissions (as low as \$100 in County time), relative to the upfront cost of bailout, may be responsible for the lack of activity. Telephone Interview with J. Gerald Hebert, *supra* note 121.

constitutional questions,” which the Court would not shrink from addressing the next time the issue came before it.<sup>124</sup> “[T]he Act imposes current burdens and must be justified by current needs,” the Chief Justice wrote.<sup>125</sup> Commentators have noted that the “Chief Justice relentlessly pile[d] up reason after reason why the 2006 reauthorization is constitutionally infirm[,]” signaling that unless Congress acts to remedy its deficiencies, the Court would not hesitate to step in.<sup>126</sup>

The *NAMUDNO* Court’s decision is all the more remarkable because it can only be seen as a willful reinterpretation of the bailout statute. Katz writes that in *NAMUDNO*, “all nine Justices agreed that the VRA allowed the plaintiff to apply for a statutory exemption that Congress never authorized and never intended to allow . . . [T]he Justices simply rewrote it.”<sup>127</sup> In *Citizens United v. FEC*,<sup>128</sup> the Court went out of its way to strike down congressional limits on corporate and union expenditures on political campaigns in a case that could easily have been treated as an applied challenge to the McCain-Feingold Act.<sup>129</sup> In *NAMUDNO*, the Court did the opposite. It interpreted a facial constitutional challenge to the VRA as an applied challenge, granting relief to the plaintiff where the statute clearly prohibited such relief. The only way of granting relief was for the Court to step into the shoes of the legislature and rewrite the statute.

The Court essentially remanded the VRARA to Congress for further deliberation. As Katz puts it, the Court “wisely focused on getting Congress to do its job.”<sup>130</sup> But it also gave Congress important positive guidance on how to proceed. When the Court stepped into the shoes of Congress and rewrote the statute, the Court exercised its judgment about the functions of the VRA. The decision, as I argue in the following parts, reflects the original architecture of the VRA as a learning/monitoring regime that seeks to harness local energies in the service of a national antidiscrimination policy—even as it promotes compliance.

### III. LOCAL AUTONOMY UNDER SECTION 5 RECONSIDERED

The conventional assumption that the federal preclearance regime represents heavy-handed federal interference with state and local law-making has not been adequately considered in light of intergovernmental

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124. *NAMUDNO*, 129 S. Ct. at 2513.

125. *Id.* at 2512.

126. Katz, *supra* note 22, at 998–99.

127. *Id.* at 992, 997.

128. 130 S. Ct. 876, 917 (2010).

129. Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

130. Katz, *supra* note 22, at 999.

practice or developing conceptions of institutional design. The view rests almost exclusively on constitutional theories of state sovereignty narrowly applied to black letter law.<sup>131</sup> This Part will show that the preclearance regime appears in a different light when viewed through the lens of contemporary models of decentralization, regulatory competition, and pragmatic “learning/monitoring institutions.” Contrary to the conventional view, I argue that preclearance has maintained local autonomy and encouraged local participation. It has built on existing practices and local knowledge. At the same time, it has advanced a fundamental political transformation and brought thousands of jurisdictions into greater compliance with a demanding and evolving national antidiscrimination standard. Part III.B shows how preclearance shares many features of what is sometimes referred to as a “new institutional” approach to governance.

Before moving on to this argument, some clarification of my theoretical framework and terminology is in order. In particular, the following provides some theoretical context for the meaning and normative significance of “localism” in the context of a “new institutionalism,” as it is understood here.<sup>132</sup>

#### A. THE SIGNIFICANCE OF “LOCALISM” FOR THE “NEW INSTITUTIONAL” FRAMEWORK

Critics of modern nation-building and statism since Friedrich Hayek have aptly described state bureaucracies and other national state actors as “vexed institutions,” characterized by the need to obtain information about and intervene into complex local systems that they can ultimately only survey and control by means of “thin simplifications.”<sup>133</sup> Such thin simplifications abstract considerably from the social practices and

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131. Resnik and others have pointed out the questionable nature of judgments that rely on such theories of sovereignty. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926–28 (2003).

132. Note that the understanding presented here draws on a number of sources and literatures. The treatment to some extent hijacks the term “new institutionalism” and expands on its more narrow understanding in legal academia by a group of scholars who have been associated with Columbia Law School. See generally Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (proposing a new paradigm for understanding “federal empowerment of local governments”); Dorf & Sabel, *supra* note 26 (discussing a new form of government in which local actors are granted autonomy while also sharing their information with regional and national bodies); Susan Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 409 (2007) (addressing structural inequality and the “concepts of institutional citizenship, organizational catalyst, and institutional intermediary”). The perspective adopted here draws firsthand from insights in various disciplines and debates, including new institutional economics, the democracy and decentralization debates (for want of a better term), and conceptions of local knowledge in economics, anthropology, and political science.

133. See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 11 (1998).

institutions that they seek to describe, thus failing to satisfy the informational requirements of centralized decisionmakers. Different approaches and outcomes are likely to emerge in different geographies to the extent that interested local actors respond contextually and experientially to identical system-wide goals.<sup>134</sup> Unintended consequences thus bedevil transformations driven by excessive government centralization that fails to appreciate the need for local variation in the development and implementation of policy goals. Examples abound among the grand projects of nation-building and modernization during the twentieth century.<sup>135</sup>

Critiques of excessive centralization have promoted a healthy skepticism about finding one right solution that applies system-wide. They have instead emphasized the importance of "local knowledge," contextual judgment, or praxis—whatever the preferred term. Local knowledge is based on experiential learning, is embedded in meaningful practices, and cannot be readily standardized and transferred in the form of information.<sup>136</sup> Centralized decisionmakers cannot adequately replicate or anticipate the experientially-based and contextual response of interested local actors who base their judgments on their "particular circumstances of time and place."<sup>137</sup> Thus, social scientists have increasingly become sensitive to the way in which the attempt at *rendering legible* diverse local populations, social practices, political interests, and geographies to a central state authority—in standardized, formal, often mathematical terms deemed suitable to bureaucratic administration—has contributed to positively shaping and homogenizing the social and natural objects of such an abstracting gaze with unintended consequences.<sup>138</sup> Existing local patterns are forced into informational grids that render them accessible to the central authority in

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134. Professor Friedrich A. Hayek has argued that central planning is inefficient (and socially and politically destructive), because such planning cannot satisfy its own informational requirements. F.A. Hayek, *The Use of Knowledge in Society*, 1 N.Y.U. J.L. & LIBERTY 5, 7–8 (2005). Central planning must necessarily operate based on limited knowledge that abstracts from particular local conditions and exigencies. *Id.* In contrast, Hayek argued that a market-based allocation through the price-mechanism relies on millions of transactions between individuals who base their decisions on their context-specific local, often tacit knowledge, thus harnessing local and tacit knowledge by millions of individuals. *Id.* According to Hayek, each person "has some advantage over all others in that he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active cooperation." *Id.*

135. See generally SCOTT, *supra* note 133 (discussing the recurring patterns of failure and authoritarianism in certain social engineering programs).

136. See, e.g., CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167–234 (1983); MICHAEL POLANYI, THE TACIT DIMENSION 3–25 (1966); SCOTT, *supra* note 133; MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD 85–104 (1994); Hayek, *supra* note 134, at 521–22.

137. Hayek, *supra* note 134, at 521.

138. SCOTT, *supra* note 133.

ways that answer to state administrative goals and policies, but abstract from key features of social and ecological systems that support or render them meaningful. To mitigate the vicissitudes of these (and other) difficulties of centralized actors, researchers and policymakers across the political spectrum have advocated increased local autonomy to specify policy goals, tailor policy implementation, and set priorities.<sup>139</sup>

In legal literature, “localism” has been identified with the normative call for greater local autonomy and the positive claim of local legal powerlessness advanced by Professor Gerald Frug and other communitarian or progressive (“grassroots”) local government scholars in the 1970s and 1980s.<sup>140</sup> In the 1980s and 1990s, conservative neo-federalists increasingly embraced localism, justifying limits on federal authority under the U.S. Constitution by appealing to these benefits of decentralization and then tracing them back to the values of Tocquevillian democracy.<sup>141</sup>

139. See generally U.S. AID, DEMOCRATIC DECENTRALIZATION PROGRAMMING HANDBOOK (2009) (setting forth comprehensive policy recommendations); Dorf & Sabel, *supra* note 26; John M. Cohen & Stephen B. Peterson, *Methodological Issues in the Analysis of Decentralization* (Harvard Inst. for Int'l Dev., Discussion Paper No. 555, 1996), available at <http://www.cid.harvard.edu/hiid/555.pdf>; T.N. Srinivasan, *Federalism, Decentralization, Globalization and Economic Reforms: Some Issues* (Ctr. for Research on Econ. Dev. & Pol'y Reform, Working Paper No. 158, 2003), available at <http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/redpr158.pdf> (discussing IMF, World Bank, and National Policies).

140. See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 17, 64–65 (1999) [hereinafter FRUG, CITY MAKING]; Richard Briffault, *Our Localism: Part I—The Structure of Local Government*, 90 COLUM. L. REV. 1, 1–2 (1990); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996) [hereinafter Frug, *Geography*]; Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 254 (1993) [hereinafter Frug, *Decentralization*]; Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 627–28 (2001).

141. See, e.g., *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (cataloguing the benefits of federalism); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Th[e] federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . .”); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 980 (1993) (discussing “normative federalism” and the general agreement on the Court that “federalism exists for a purpose”); Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 999 (2001) (“[F]ederalism . . . promotes policy diversification and decentralization.”); Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 26–29 (2001) (describing federalism as “constitutionally mandated decentralization” that promotes local preferences); Dennis M. Cariello, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1559 (1999) (“Federalism is theory of decentralization in government. As such, it shares a number of the economic benefits of decentralization.”); A.E. Dick Howard, *Does Federalism Secure or Undermine Rights?*, in FEDERALISM AND RIGHTS 11–12 (Ellis Katz & G. Alan Tarr eds., 1996) (discussing some of the benefits and drawbacks of federalism); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000) (“Federalism must be understood as . . . an institutional strategy formulated to assure a greater degree of decentralization than is ever likely to be seen in a unitary system.”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) (presenting the intellectual case for federalism); John O. McGinnis, *In Praise of the Efficiency of Decentralized Traditions and Their Preconditions*, 77 N.C. L. REV. 523, 526 (1999)



But just as the progressive localism of the 1980s and 1990s has been criticized for relying on formal legal categories and relatively abstract ideal terms in its positive descriptions and normative critiques of American local government law,<sup>142</sup> so too has the neo-federalist version of localism.<sup>143</sup> Professor Richard Briffault has convincingly argued that these claims—that local governments lack sufficient legal power—are based on black-letter law but do not reflect intergovernmental practice, and that the “new localists” tend to exaggerate the virtues of enhancing local government.<sup>144</sup> As Briffault has shown, and as has increasingly been recognized in the literature, descriptive analysis of constraints placed on local power by legal regimes must be policy-specific and take into account the broader institutional setting.<sup>145</sup> More recently, a small group of legal scholars—such as Briffault—have drawn more explicitly on developments in economics, history of economics, organizational theory, and management theory, to probe and address public policy, including questions involving the administration of civil rights that are generally not viewed in such terms.<sup>146</sup> And in the private law area, Erica Gorga and the Author have argued for a “knowledge-based theory of the firm,” relying on similar sources as these “new institutionalists.”<sup>147</sup>

The analysis of the VRA’s preclearance regime provided in Parts III.B and III.C attempts to provide the type of policy-specific contextual assessment of local autonomy under the VRA called for by Briffault. It reexamines the standard description of the constraints that the preclearance process is said to place on local power, accounts for the details of intergovernmental practices, considers concrete burdens and results, and compares the regime to other enforcement measures. In so doing, it also takes into account that institutions are practices and routines that fix power relations between individuals and groups but, importantly, also embody social techniques and learning. However fervent are the attempts at fixing such power relations, institutional

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(“[F]ederalism . . . was the Framers’ most important contribution to protecting decentralized traditionmaking.”); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 504 (1999) (“[D]iversity is part of the genius of federalism, which allows for . . . efficiency-enhancing decentralization . . .”).

142. Briffault, *supra* note 140, at 1–2; *see also* Rodriguez, *supra* note 140, at 627–28.

143. *See* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378–82 (2001).

144. *See* Briffault, *supra* note 140, at 1–2.

145. *Id.* at 1–3; *see also* Barron, *supra* note 143, at 378–82; Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 1–2 (2002) [hereinafter Cross, *Folly of Federalism*]; Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000) [hereinafter Cross, *Institutions and Enforcement*].

146. Dorf & Sabel, *supra* note 26, at 323–39.

147. Erica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123, 1125–27 (2007).

change is constant and inevitable. The resulting disruption of both power relations and knowledge sets has been managed successfully by the design and implementation of the preclearance regime.

#### B. SECTION 5 AS A LEARNING/MONITORING REGIME

It is rarely observed that preclearance leaves the design of local election systems in the hands of state and local officials. State and local officials decide on voter registration qualifications, practices and procedures, what type of voting systems to adopt, how to district, where to locate polling places, and where to expand cities by annexing neighboring populations. So long as the new law, practice, or procedure does not violate the antidiscrimination standard, there is no substantive federal input. Decisions on election design remain in local hands.<sup>148</sup>

Section 5's liability rule is an open standard, not a categorical, one-size-fits-all rule. It requires that the new laws that affect voting "neither ha[ve] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."<sup>149</sup> The standard does not specify what changes a state, county, or city should adopt. The practices and the standard itself have evolved to accommodate changing circumstances and changing conceptions and measures of vote discrimination. Section 5 is, therefore, nothing like the categorical, one-size-fits-all rule of strict equality imposed by the one-person/one-vote cases,<sup>150</sup> the universal ban on literacy tests,<sup>151</sup> or the recently announced 50% rule for majority-minority districts under section 2 of the VRA.<sup>152</sup> It does not impose a fixed rule.

The preclearance process promotes incremental change. Only new laws and practices must be precleared.<sup>153</sup> Existing laws and practices are

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148. To be sure, Congress has increasingly federalized election law by other means. In particular it passed the National Voter Registration Act in 1993, and the Help America Vote Act in 2002. These laws have imposed substantial requirements on states, issuing specific directives to adopt concrete practices and procedures, such as requiring automatic voter registration at all motor vehicle divisions, forcing states to accept a standardized federal voter registration form drafted by federal officials, forcing states to permit "provisional votes" at polling places, requiring them to create a "statewide computerized voter registration database," and setting forth detailed requirements for the system (such as the requirement to "match" a voter registration applicant's driver's license number or last four digits of her social security number with those on file with the state DMV or the federal SSA, respectively). *See generally* Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (Supp. II 2002); National Voter Registration Act of 1993 (Motor Voter Act), 42 U.S.C. §§ 1973gg to 1973gg-10 (2006). The constitutionality of Congress's power to impose these laws has never been seriously challenged, even though their burdens are huge by comparison.

149. 42 U.S.C. § 1973c (2006). Prior to VRARA, section 5's antidiscrimination standard read: "does not have the purpose and will not have the effect . . ." 42 U.S.C. § 1973c (2000).

150. *See* discussion *infra* Part IV.A.

151. *See Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

152. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009); *see also* discussion *infra* Part IV.B.

153. 42 U.S.C. § 1973(c); *see also* *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).

not disrupted, either all at once or wholesale. Congress specified that the preclearance regime should reach only *changes* in voting qualifications, prerequisites, standards, practices or procedures.<sup>154</sup> Existing law and practices are not subject to preclearance, even if they were established with discriminatory purpose and are retained with the intent to discriminate.<sup>155</sup> Only a change will trigger section 5 preclearance review. Moreover, after *Beer v. United States*,<sup>156</sup> the Attorney General may not object based on the effects prong to any vote changes that improve upon or replicate the status quo in a different form. *Beer* interprets the effects prong narrowly to prohibit only those vote changes that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>157</sup> The preclearance regime is, therefore, intrinsically gradualist and incrementalist. It tolerates variation and experimentation at the local levels—even below nationally accepted constitutional standards of racial vote discrimination.

The standard account of preclearance is that Congress acted to prevent jurisdictions from circumventing judicial remedies to racial discrimination.<sup>158</sup> Whereas section 2, authorizing civil rights actions, is called the “sword,” section 5 is called a “shield.”<sup>159</sup> Instead of waiting for victims to bring civil rights actions for voter discrimination, only to have offending jurisdictions undo any judicial remedy by subsequently tinkering with other elements of a complex election system, section 5 declared every election-related change presumptively discriminatory unless the jurisdiction satisfied its burden of proving that the new law had neither a discriminatory purpose nor a discriminatory effect.<sup>160</sup> In *South Carolina v. Katzenbach*, the Supreme Court thus explained that

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154. § 1973(c).

155. *Lockhart v. United States*, 460 U.S. 125, 134 n.10 (1983) (clarifying that changes that are neither ameliorative nor retrogressive do not violate the section 5 effect standard).

156. 425 U.S. 130 (1976).

157. *Id.* at 141.

158. U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS 2 (2006) [hereinafter VRA ENFORCEMENT RECORD].

159. See e.g., Heather K. Way, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1453–54 (1996).

160. See *Simmons v. Galvin*, 575 F.3d 24, 55 (1st Cir. 2009) (“There is nothing illogical about creating a per se ban on certain *presumptively* discriminatory qualifications in ‘covered jurisdictions’ only . . . .”); 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. CONST. L. & PUB. POL’Y 79, 88 (2006) (“This reversal of the ordinary legal presumption is at the heart of the Section 5 remedy.”). But the burden-shifting statute is not properly described as a legal presumption. Jurisdictions that seek preclearance from the DOJ bear the burden of proving that their voting changes are nondiscriminatory. *Georgia v. United States*, 411 U.S. 526, 538–39 (1973) (upholding burden-shifting in administrative preclearance); see also Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.52(a) (2005).

Congress intended to “shift the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>161</sup>

But the standard account is incomplete. Section 5 does not, in fact, “shift the advantage of time and inertia from the perpetrators of the evil to its victims.” It splits the difference. Time and inertia still work in favor of offending jurisdictions to the extent that the statute does not require jurisdictions to change their procedures. Covered jurisdictions can avoid preclearance for a time by refraining from vote changes.<sup>162</sup>

Similarly, the section 5 effects test is not as “all-encompassing, stringent, unconditional, and uncompromising,” as is suggested.<sup>163</sup> To pass muster under section 5, vote changes need not conform to uniform national standards or best practices. A vote change that is not purposefully discriminatory must be precleared if it does not make minorities worse off or “retrogress.”<sup>164</sup> For example, a districting plan that merely retains the number of majority-minority districts but does not draw additional ones does not necessarily violate section 5, even if it does not afford minorities proportional representation in the legislature. An attorney in the DOJ’s Voting Section once put it this way: “If a change makes something better, we’re not supposed to object even if it is still not very good.”<sup>165</sup>

Objections by the DOJ have predominately based on retrogressive effect (or on a combination of retrogression and other bases).<sup>166</sup> But critics have suggested that the DOJ’s increased reliance on discriminatory intent during the 1980s and 1990s was used to impose

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161. 383 U.S. 301, 328 (1966).

162. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION*, *supra* note 4, at 21, 33; *see also* BALL ET AL., *supra* note 27, at 179 (During the 1970s and early 1980s, “many counties . . . simply ignored the 1965 Voting Rights Act by not modifying their election laws or procedures.”). The requirement of reapportionment in accordance with the decennial census and other legal and internal exigencies of the electoral process place limits on such a strategy of delay. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733–34 (1998). Furthermore, successful lawsuits against minority vote discrimination under section 2 force changes that are later subject to preclearance. Nonetheless, preclearance has been avoided for decades in certain cases. *See, e.g.*, Bartlett v. Strickland, 129 S. Ct. 1231, 1239 (2009) (considering the “whole county” provision).

163. *See, e.g.*, Reno v. Bossier Parish Sch. Bd. (Bossier Parish II), 528 U.S. 320, 363 (2000) (Souter, J., concurring in part and dissenting in part).

164. *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”).

165. BALL ET AL., *supra* note 27, at 88 (citing the Hunter interview).

166. Posner, *supra* note 160, at 108 & tbl.2. Posner notes that “[a] small percentage (about nine percent) of the retrogression objections interposed in the 1980s were based on the analysis developed” in *Wilkes County v. United States*, 450 F. Supp. 1171, 1174–76 (D.D.C. 1978), *aff’d mem.*, 439 U.S. 999 (1978). Posner, *supra* note 160, at 108 n.92. The *Wilkes* test, however, “did not measure whether minority voters in fact would be worse off . . .” *Id.*

rigid federal requirements on state and local jurisdictions.<sup>167</sup> Nevertheless, persuasive arguments have been advanced to suggest that the DOJ has been quite flexible and much less intrusive than generally presumed in its enforcement of both the purpose and the effects prongs of the section 5 standard.<sup>168</sup> For example, the DOJ interposed objections to over 150 redistricting plans based on discriminatory purpose during the 1990s. But these objections rested on an interpretation of the purpose standard that required jurisdictions to provide specific evidence of non-discriminatory purpose, where a “plan substantially minimized minority voting strength, and that minimization was not required by adherence to traditional race-neutral districting principles . . . .”<sup>169</sup> In other words, the Attorney General would defer to, and prioritize, traditional race-neutral justifications for drawing district lines—even in cases where the districting plans minimized minority voting strength. Only where the justification of district boundaries—in terms of incumbency protection, preserving political subdivisions, geographic compactness, contiguity, representation of communities of interest, and so on—could not explain why a jurisdiction had minimized minority voting strength, did the DOJ insist on further explanation.

Critics complained of this use of section 5 as a tool of affirmative action.<sup>170</sup> But, affirmative action is associated with quotas that are privileged over—or at least valued the same as—other legitimate considerations in admissions or hiring, among others. Here, nonretrogressive changes that minimized minority voting strength would not prompt an objection under the purpose prong, so long as those changes could be accounted for reasonably. Consistent with this approach, the DOJ relied on discriminatory purpose under a few other circumstances that, in its eyes, delegitimized a jurisdiction’s nonretrogressive voting change and thus raised questions of intent. The

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167. See MAURICE T. CUNNINGHAM, *MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE* 68 (2000) (“Whereas the DOJ had a history of seeking moderately progressive legal interpretations, in the nineties it transformed purpose and *Gingles* in order to push and defend maximization.”); see also *id.* at 119–40.

168. See generally *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. app. at 96–181 (2005) [hereinafter *Preclearance Hearing*] (prepared testimony of Peyton McCrary et al.); Peyton McCrary et al., *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 (2006); 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*, at 80, 96–98 (Bernard Grofman ed., 1998); Posner, *supra* note 160, at 84; James P. Turner, *Case-Specific Implementation of the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 34, at 296–99. The authors cited here have all been longtime career staff with the DOJ’s Voting Section.

169. Posner, *supra* note 160, at 145; Posner, *supra* note 168, at 101.

170. See, e.g., THERNSTROM, *supra* note 37, at 27 (stating that section 5 has been wrongfully turned “into an instrument for affirmative action in the electoral sphere”).

controversy surrounding the DOJ's resort to section 5's discriminatory intent standard is taken up below.

The preclearance regime was designed to address regional and local variation in other fundamental ways. The VRA's unusual coverage provision singled out the worst offenders by keying coverage to the abuse of literacy or moral character tests used to keep blacks off the rolls and to the resulting very low registration rates.<sup>171</sup> Southern states complained that "the coverage formula . . . disregard[ed] various local conditions which have nothing to do with racial discrimination."<sup>172</sup> The fact that some Southern states, like Florida, were not covered in their entirety weakens this criticism. Moreover, additional jurisdictions would become subject to preclearance based on the trigger. Indeed, the coverage provision was later amended to include discrimination against minority language groups. Finally, a bailout provision allowed jurisdictions to apply for termination of coverage under section 5, if they could prove they had not engaged in racial vote discrimination.<sup>173</sup>

The DOJ's preclearance procedures developed to accommodate local variation in exchange for local jurisdictions' agreement to share information with the federal agency.<sup>174</sup> The implementation of preclearance occurred against the background of significant resistance and defiance by covered jurisdictions and a severely understaffed Voting Section at the DOJ's Civil Rights Division ("CRD").<sup>175</sup> The CRD responded with an enforcement process that rested heavily on informal exchange, negotiation, and compromise between local governments, the CRD staff, and the minority groups and representatives who were most affected by vote changes.<sup>176</sup> This approach has been partially credited for the steady increase of submissions, following the first publication of submissions guidelines in 1971.<sup>177</sup> Hugh Graham, who has studied the evolution of administrative agencies during this period concluded that the "CRD never treated the South like Hugo Black's feared 'conquered province.' Instead, it pre-cleared 95 percent of the 35,000 proposed electoral changes [as of 1982], objected to only 2.3 percent, and litigated only 240 of the most intractable cases."<sup>178</sup>

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171. *South Carolina v. Katzenbach*, 383 U.S. 301, 329-34 (1966).

172. *Id.* at 329.

173. Relatively few jurisdictions took advantage of this provision. See generally Hebert, *supra* note 90; Hebert, *supra* note 96.

174. This is one of the features that characterize "democratic experimentalist" institutions, according to Dorf and Sabel. See Dorf & Sabel, *supra* note 26, at 438-44.

175. See BALL ET AL., *supra* note 27, at 201-02.

176. *Id.* at 74-78.

177. VRA ENFORCEMENT RECORD, *supra* note 158.

178. Hugh Graham, *Book Review*, 49 J. S. HIST. 145, 146 (1983) (reviewing BALL ET AL., *supra* note 27).

Commentators have argued that the Supreme Court’s decisions in *City of Richmond* and *Beer* endorsed and validated the CRD’s emerging case-specific and flexible administrative process.<sup>179</sup> This is consistent with criticisms that the preclearance process and the Supreme Court’s decisions in *City of Richmond* and *Beer* failed to implement Congress’s “stringent, unconditional, and uncompromising” section 5 standard as intended.<sup>180</sup> Because, under *Beer*, the DOJ’s review is based on comparing vote changes to the state or local status quo, the DOJ’s enforcement of section 5 has necessarily continued to be case-specific: Under section 5, “a practice that is legal and proper in one jurisdiction may be illegal and improper in another . . . .”<sup>181</sup>

As discussed above, the DOJ’s power to object has been criticized as akin to giving the federal government a veto, or permitting it to strike down a state or local law, without having to bring a lawsuit. But this analogy is misleading. There is no finding of liability under the preclearance regime. If the DOJ fails to object within sixty days of the receipt of a submission, the change of law goes into effect. The ultimate “remedy,” an objection by the Attorney General, is to send the jurisdiction back to the drawing board. The DOJ has no power to craft and impose a particular solution on state or local jurisdictions, as does a court in a section 2 case.<sup>182</sup> If a jurisdiction refuses to comply, the DOJ must still go to court to obtain an injunction.<sup>183</sup> Initially, the DOJ did not even focus on following up to determine whether jurisdictions implemented changes that had been denied preclearance.<sup>184</sup> Given the very low number of objections—less than 1% of submissions on average—the principal imposition on covered jurisdictions is the requirement that they create and produce the information demanded by

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179. See *infra* notes 275–95 for a fuller discussion.

180. See, e.g., BALL ET AL., *supra* note 27 (arguing that the DOJ implemented a regime that “compromised compliance”); Karlan, *supra* note 3 (deploring the increasingly lenient interpretation given to section 5’s standard by the U.S. Supreme Court). But see Posner, *supra* note 160, at 124. (rejecting Ball’s thesis of “compromised compliance” without, however, specifically addressing evidence marshaled by Ball and his co-authors). While different in emphasis, I do not believe that Posner’s showing is inconsistent with Ball’s interpretation of the CRD’s implementation of administrative preclearance.

181. Turner, *supra* note 168, at 297; see also Posner, *supra* note 160, at 127; Posner, *supra* note 168.

182. To be sure, courts that enter a finding of liability are first required to let the offending jurisdiction come up with an alternative. *Williams v. City of Texarkana*, 32 F.3d 1265, 1268 (8th Cir. 1994) (citing *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)). But judicial remedies are not infrequent under section 2. See generally Katz, *supra* note 4.

183. See, e.g., Drew S. Days, *Section 5 and the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 34, at 63 n.45. (citing *United States v. City of Houston*, C.A. No. 78-4-2407 (S.D. Tex. July 19, 1979)).

184. As of 1978, the Attorney General had objected to 257 of the reported 13,433 submissions between 1965 and 1976 but had yet to initiate any formal compliance reviews. U.S. GEN. ACCOUNTING OFFICE, *VOTING RIGHTS ACT—ENFORCEMENT NEEDS STRENGTHENING* 17 (1978); Days, *supra* note 184, at 64.

the submissions guidelines and any required follow-up requests for information by the Voting Section staff.<sup>185</sup>

Preclearance requires covered jurisdictions to continuously report all changes in voting-related laws, practices, and procedures, even if no complaints have been received by the DOJ and no law suits have been filed in the courts. If the Voting Section is not persuaded that a vote change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group,” it may either object or seek further information from the jurisdiction (so-called More Information Requests, or “MIR”).<sup>186</sup> Objections, as already stated, are rare; MIRs are more common.<sup>187</sup>

For these reasons, preclearance has functioned, for the most part, as a monitoring regime. But, preclearance has not been toothless. Participants in the process have pointed out that “a denial of preclearance may result in overturning actions a jurisdiction has already taken or in suspending changes such as annexations and bond elections that have enormous economic consequences. At the very least, a denial may promise lengthy and expensive litigation.”<sup>188</sup> But section 5 does not impose additional burdens or legal requirements on jurisdictions.<sup>189</sup> A federal antidiscrimination norm already applies nationwide to all jurisdictions under section 2 of the VRA and under the Fourteenth and Fifteenth Amendments of the United States Constitution.<sup>190</sup> Section 5 does not go beyond what is substantively already required of states and localities. To the contrary, in making preclearance decisions, the DOJ was forced to tolerate unconstitutional and, under *Bossier Parish II*, even intentional discrimination, so long as it did not make minorities worse

185. Contrast that with the significant success rates for plaintiffs in voting rights litigation. A recent study by Professor Katz finds that:

Electoral practices implemented by counties in covered jurisdictions have been most vulnerable to challenge under Section 2, with plaintiffs obtaining favorable outcomes in 55.3% of the suits against county practices since 1982. Practices adopted by schools and by states as a whole, in covered and noncovered jurisdictions alike, have been more resilient, with plaintiffs succeeding in 28.6% of the lawsuits brought against these entities.

Katz, *supra* note 4, at 190–91. These numbers do not include settlements; nor do they include withdrawals. *Id.*

186. 28 C.F.R. § 51.1 (2010); *id.* § 51.37(a).

187. Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, *supra* note 4, at 47, 60 tbl.3.2 (identifying 2282 objections relative to 387,673 submitted changes but 13,697 MIRs).

188. Days, *supra* note 184, at 61; *see also* Posner, *supra* note 168.

189. Posner, *supra* note 168.

190. Voting Rights Act of 1965, Pub L. No. 89-110, § 2, 79 Stat. 437, 437 (codified at 42 U.S.C. § 1973 (2006)); *see also* U.S. CONST. amend XIV; U.S. CONST. amend XV.



off.<sup>191</sup> Section 5, as the Supreme Court has stated on several occasions, is therefore less burdensome than the Constitution itself.<sup>192</sup> Neither objections based on the retrogression prong,<sup>193</sup> nor the purpose prong,<sup>194</sup> imposed requirements that exceeded what the Fourteenth and Fifteenth Amendments already demanded. In any case, the application of the purpose standard in the administrative preclearance process, is necessarily much less burdensome to jurisdictions than litigating the matter.

In sum, preclearance has operated as a regime of forced disclosure, or “information-pushing.”<sup>195</sup> Every election-related change in the law, or in practices and procedures must be precleared.<sup>196</sup> Depending on how one counts, there have been over 117,000 submissions between 1965 and 2004, or 435,000 reviews of voting changes between 1965 and 2006.<sup>197</sup> For each vote change, covered jurisdictions must make detailed submissions that are standardized to the requirements of the DOJ guidelines. Covered jurisdictions must submit detailed information concerning vote changes, including a copy of the ordinance, enactment, or order; information concerning the authority enacting the change; an explanation of the change, including its date, scope, the reasons for the change, and its impact on minority groups; and a statement of past or pending litigation concerning the change or related voting practices.<sup>198</sup> If the change is more complex, involving redistricting, annexations, or other complex changes, additional information is required—including demographic information based on U.S. Census data, the number of registered voters for affected areas, estimates of population, census block data for redistricting, maps, data on election returns, information on publicity of the changes and participation by local groups in the decision process, and any other information required by the DOJ to make its assessment.<sup>199</sup>

Information on thousands of jurisdictions is kept in databases at the DOJ.<sup>200</sup> The detailed submissions are public and are made available to

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191. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 340 (2000) (weakening the concept of discriminatory intent under section 5 by requiring that an objection must be founded on “retrogressive intent,” instead of the stricter constitutional standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–66 (1977)); McCrary et al., *supra* note 168, at 288–89.

192. *See, e.g., Veith v. Jubelirer*, 541 U.S. 267, 286 (2004).

193. *See discussion infra* notes 284–94 and accompanying text.

194. *See discussion infra* notes 369–96 and accompanying text.

195. The term “information-pushing” was suggested to me by Pam Karlan.

196. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969).

197. VRA ENFORCEMENT RECORD, *supra* note 158, at 26.

198. 28 C.F.R. § 51.27 (2010).

199. *Id.* § 51.28.

200. *Id.* § 51.50 (pertaining to maintenance of records concerning submissions).

local politicians, minority representatives, and civil rights groups as a matter of course, as well as to anyone else who requests the information.<sup>201</sup> Governmental and nongovernmental actors routinely access the DOJ's current and historical information on election law changes in covered jurisdictions.<sup>202</sup> The information is current and accurate, because the change of law at issue is described and takes effect only after it is precleared.<sup>203</sup> If, upon review, the DOJ is unsatisfied with the proffered explanation of the change, it will ask for supplementation of the file.<sup>204</sup> Preclearance submissions produce usable information, because they are standardized to the requirements set forth by the DOJ in the guidelines.<sup>205</sup>

The contrast with litigation is instructive. A lawsuit enforcing the prohibition against racial vote dilution under section 2 of the VRA typically produces a voluminous and detailed historical record.<sup>206</sup> But it takes years to develop that record in the context of a judicial proceeding. By the time the lawsuit is over, the situation on the ground often has changed. More importantly, such lawsuits are brought only where a violation is strong enough to justify the considerable investment required to bring a case. There are relatively few organizations that engage in such litigation and their resources are limited.<sup>207</sup> Katz's study of section 2 cases

201. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. §§ 51.32–33, 51.36, 51.38, 51.45 (2010).

202. *Id.* § 51.50.

203. *Id.*

204. *Id.* §§ 51.37, 51.39.

205. Note that the current regulations also require that “submissions should be no longer than is necessary for the presentation of the appropriate information and materials.” See 28 C.F.R. § 51.26 (2010).

206. Notwithstanding the simplification of vote dilution claims under section 2 by *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs in such cases will make voluminous factual submissions to satisfy their burden under the totality of circumstances test further specified by the factors listed in the Senate Report to the 1982 amendments of section 2 of the Voting Rights Act, which were originally distilled from case law, specifically *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc). See Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 34, at 68; see also ISSACHAROFF ET AL., *supra* note 62, at 543. In *Thornburg v. Gingles*, for example, the factual record before the court supported the court's finding under

the totality of the circumstances . . . that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice.

478 U.S. at 80.

207. Most cases are brought by a limited number of civil rights groups. See generally Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Bar*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 34, 230–57 (arguing that “litigation on voting rights has developed into something of a cottage industry;” but construing the emerging “voting rights bar” broadly to include non-litigators,

identified 331 lawsuits, encompassing 763 decisions, since the passage of the 1982 amendments authorized disparate impact claims under section 2.<sup>208</sup> Contrast that with the DOJ’s almost 320,000 voting changes processed since 1982.<sup>209</sup>

Preclearance has taken the form of a relatively informal process of advisement, assistance, and negotiation between local government officials and the DOJ on the one hand, and between minority representatives and (federal and local) public officials on the other hand. The process promotes learning at several levels, even as it has involved varying degrees of political and intergovernmental conflict that occasionally must be settled in Court.

This submission process creates a constant intergovernmental information exchange regarding thousands of changes in local law or election procedure each year. DOJ experts analyze the submissions and communicate about changes with local officials. As already mentioned, the regulations include record keeping requirements that ensure access to current and historical information for each of thousands of covered jurisdictions about every “ordinance, enactment, order, or regulation embodying a voting practice that [was] proposed to be repealed, amended, or otherwise changed.”<sup>210</sup> The material is accessible to government officials, to local minority groups, national civil rights organizations, minority representatives and office holders, and the general public. More recently, the regulations have provided for electronic submissions and standardized electronic coding of demographic data, maps, census blocks, and so forth, increasingly rendering this information electronically searchable.<sup>211</sup>

The information exchange is a two-way street. Local officials seek guidance from the DOJ about filing submissions, what changes might

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and discussing throughout a small number of “well-established institutions” who have been repeat players in voting rights litigation, such as the NAACP Legal Defense Fund, the ACLU National Voting Rights Project, the Mexican American Legal Defense and Educational Fund, and the Lawyers’ Committee for Civil Rights Under Law). Additional institutions, such as The Advancement Project and the Brennan Center for Justice, among others, have recently joined this group.

208. According to Katz’s estimate (based on interpolation from the ACLU’s data concerning section 2 cases brought in Georgia), more than 1600 section 2 cases have been filed nationwide during that period, 800 of them in covered jurisdictions. Katz et al., *supra* note 4, at 654. Katz also notes,

Of the total number of cases filed, some plaintiffs failed to pursue their claims, some obtained relief through settlement, and others saw their cases go to judgment, but the courts involved did not issue any published opinion or ancillary ruling published on the electronic databases surveyed. The total number of claims filed under Section 2 since the 1982 amendment is, accordingly, not known.

*Id.*

209. VRA ENFORCEMENT RECORD, *supra* note 157, at 31 tbl.A3.

210. 28 C.F.R. § 51.27(b) (2010).

211. *Id.* § 51.20.

raise concerns, and how to comply with the preclearance procedures.<sup>212</sup> DOJ staffers respond by applying precedent from prior preclearance decisions by the federal courts and the DOJ.<sup>213</sup> The requirement to submit by use of a standardized form, in turn, forces submitting jurisdictions to consider the federal antidiscrimination norm in their decision process. This happens at every level of government, because local jurisdictions must submit directly to the DOJ. Moreover, at least as important as the assessment itself, it forces the jurisdiction to put together the information in a manner that permits such consideration in the first place.<sup>214</sup>

The regulations also encourage local jurisdictions to consult and involve local minority representatives in the preclearance process. For important or controversial changes, jurisdictions must provide evidence that the public has been notified of the changes, that residents have had the opportunity to be heard about the changes, and about the extent of minority participation in the decision process.<sup>215</sup> This encourages local officials to consult and engage with minority representatives at the local level and to negotiate with them. The case of *Georgia v. Ashcroft* is perhaps exemplary in showing how significant participation by minorities in the decision process might be deemed more important than DOJ expert reports in determining whether to preclear complicated and far-reaching changes.<sup>216</sup> In *Ashcroft*, the Supreme Court based its decision to reject the DOJ's objections to Georgia's post-2000 redistricting plan on the extensive input and participation of black legislatures in devising and approving the plan. In so doing, the Court privileged minority participation in the decisionmaking process at the state level over an

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212. BALL ET AL., *supra* note 27, at 146.

213. 28 CFR §§ 51.52, 51.54–57 (2010). See generally *Preclearance Hearing*, *supra* note 168, app. at 109–69 (prepared testimony of Peyton McCrary et al.); see also *id.* at 8 (testimony of Mark A. Posner, Professor, Am. Univ.) (“The [Justice] Department utilized the well-established framework for conducting discriminatory purpose analyses set forth by the Supreme Court in the Arlington Heights case and also relied on the analytic factors described in the Department’s procedures for the administration of section 5.”).

214. Ball and his co-authors note:

The importance of initial campaigns to educate subnational officials should not be overlooked. . . . [It is a key to creating] a common language . . . . [T]he content of submissions, the form of communications from local groups, and the basic appeal routes were specified. Such elementary steps often seem rather simple when compared to grander events like a pivotal Supreme Court case . . . or a long-running enforcement struggle . . . but without a standard linguistic code and standard operational procedures, neither the negotiations necessary for inducing compliance nor the procedural fairness necessary for ensuring obedience can be achieved.

BALL ET AL., *supra* note 27, at 117.

215. 28 C.F.R. § 50.7-(7) (1971); see also 28 C.F.R. § 51.28 (2010); 28 C.F.R. § 51.28 (1987).

216. 539 U.S. 461, 469–72 (2003).

objective test for retrogression in the redistricting context that had previously been applied by the courts.<sup>217</sup>

The regulations also required submissions to identify and include contact information for individuals of minority groups residing in the affected areas “who can be expected to be familiar with the proposed change or who have been active in the political process.”<sup>218</sup> The DOJ maintained a file with contact information for local and regional minority representatives, minority leaders, and civil rights organizations.<sup>219</sup>

Finally, the preclearance regime has relied heavily on enlisting local knowledge in the various ways described above. Instead of overriding local preferences, choices remain in local hands. Changes are identified and justified by local officials, who are charged with getting input at the local level from affected minorities. Self-interested local minority representatives and civil rights groups are relied upon at various stages in the process: to comment at the local level on the effects of the changes before their adoption, to flag problematic changes for the Voting Section staff, to raise objections with the Voting Section, and to contribute information on the effects of submissions during the review process.<sup>220</sup> In addition, they help identify unreported changes, which would otherwise go unnoticed.<sup>221</sup>

### C. PHASES OF IMPLEMENTATION

It is helpful to consider these features of the preclearance regime in connection with the different phases of the VRA’s implementation. The following distinguishes five phases: (1) the focus on registration during the 1960s, (2) the implementation of preclearance as a process of bargaining and compromise in the 1970s, (3) the relative impact of litigation and the evolution of vote dilution claims during the 1970s and 1980s, (4) the focus on redistricting during the 1990s and the Supreme Court’s *Shaw* jurisprudence, and (5) the evolution of the nonretrogression standard during the post-*Shaw* period.

#### 1. *The Focus on Registration During the 1960s*

The first phase focused on voter registration in the South. The VRA mandated that literacy tests and poll taxes be abolished in covered jurisdictions and gave the Attorney General the authority to send federal

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217. *Id.*; see discussion *infra* notes 406–26 and accompanying text.

218. 28 C.F.R. § 51.28 (2010).

219. See *infra* note 252 and accompanying text.

220. See, e.g., *infra* notes 402–03 and accompanying text for criticism of the DOJ’s Voting Section for relying too heavily on civil rights groups in this process.

221. The reliance on local minority groups has led to arguments of administrative capture. See CUNNINGHAM, *supra* note 167, at 94–97.

marshals and examiners or observers to covered jurisdictions.<sup>222</sup> During the 1960s, black voter registration ratios rose from 29% to 60% as a result of these and other factors.<sup>223</sup> Both the elimination of literacy tests and the dispatch of county-level federal examiners had a significant impact.<sup>224</sup>

That initial phase, which involved a significant and direct interference with the police powers of covered jurisdictions, came to an end in the late 1960s.<sup>225</sup> Faced with attempts to roll back gains in black registration by instituting re-registration programs in the late 1960s, the DOJ began to focus on section 5, which had been enacted to preclude precisely these attempts at undermining progress in minority vote discrimination.

2. *The Implementation of the Preclearance Regime as a Process of Bargaining and Compromise in the 1970s*

Compliance with preclearance was sporadic in the late 1960s. There was uncertainty about what changes were subject to preclearance until the U.S. Supreme Court ruled in *Allen v. State Board of Elections* that section 5 reached a broad range of election-related changes, including racial vote dilution.<sup>226</sup> *Allen* changed the situation dramatically. *Allen* involved the change to at-large elections of all county boards of supervisors and boards of election in Mississippi.<sup>227</sup> The changes threatened to significantly dilute black voting strength.<sup>228</sup> Voting rights activists brought suit, arguing that these changes were subject to preclearance.<sup>229</sup> The Supreme Court ultimately agreed, holding that the VRA “gives a broad interpretation to the right to vote, recognizing that voting includes ‘all action necessary to make a vote effective.’”<sup>230</sup> Not merely registration procedures, but all laws affecting voting would thereafter require preclearance, including annexations, districting, and the use of at-large voting to dilute minority voting strength.<sup>231</sup>

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222. Voting Rights Act of 1965, Pub L. No. 89-110, §§ 4, 6, 79 Stat. 437, 438-40 (codified at 42 U.S.C. § 1973 (2006)).

223. Davidson & Grofman, *supra* note 4, at 366.

224. *Id.* at 367.

225. BALL ET AL., *supra* note 27, at 73.

226. 393 U.S. 544 (1969).

227. *Id.* at 550.

228. Davidson, *supra* note 162, at 32.

229. *Allen*, 393 U.S. at 554.

230. *Id.* at 565-66 (quoting Voting Rights Act of 1965, Pub L. No. 89-110, § 4(c)(2), 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973(c)(2) (1964 & Supp I)).

231. See *supra* text accompanying note 68. See generally *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 502-03 (1992); *Allen*, 393 U.S. 544 (1969); BALL ET AL., *supra* note 27, at 19, 66-67.

In 1970, Congress renewed section 5.<sup>232</sup> In 1971, the DOJ published guidelines that detailed the submission requirements and process.<sup>233</sup> Submissions increased substantially from 1542 between 1965 and 1974, to 13,874 between 1975 and 1981, even as the percentage of objections fell steeply during the same periods (from 14.2% to 3.1%).<sup>234</sup>

Preclearance had to be initiated in a context of conflict, mistrust, and absence of respect between federal and state actors.<sup>235</sup> The DOJ’s CRD did not have enough staff to fully review all the vote changes.<sup>236</sup> Lacking judicial powers, the CRD had to seek injunctions in court to force a submission or enforce an objection. And it did not have the capability to identify voting changes down to the county, city, and school board levels for thousands of jurisdictions in the first place.<sup>237</sup> The CRD depended on the regulated entities to come forward and participate in the compliance process voluntarily and on assistance from increasingly important civil rights organizations.<sup>238</sup> In the face these challenges, the DOJ adopted a more flexible strategy of information exchange and negotiation. In the words of one DOJ official, the CRD handled submissions by “establishing a mutually acceptable set of objectives and values and accommodating these to the solution of the problems of different political constituencies.”<sup>239</sup>

A study by Howard Ball, Dale Krane, and Thomas P. Lauth documents that the CRD assumed the role of mediator and educator:

In order to elicit compliance, the Voting Section had to overcome its inherent administrative weaknesses and had to build working relationships with southern election officials and southern civil rights leaders. Ultimately, to prevent the racial conflict from swamping its limited regulatory capacities, the only feasible approach to enforcement rested on the ability and ingenuity of the CRD attorneys

232. VRA ENFORCEMENT RECORD, *supra* note 158, at 2.

233. *See* discussion *infra* note 241.

234. VRA ENFORCEMENT RECORD, *supra* note 158, at 26 tbl.4 (periods correspond to legislative changes).

235. *See* BALL ET AL., *supra* note 27, at 115.

236. *See id.* at 116–17; VRA ENFORCEMENT RECORD, *supra* note 158, at 24 (“The Justice Department does not have the capacity to monitor all the covered jurisdictions to ensure that all voting changes are precleared prior to implementation.”). Jurisdictions originally covered by the 1965 Act

include[d] approximately 550 counties and several thousand cities, towns, villages, and other special districts. From the viewpoint of the Voting Section, the logistics of enforcement pose a nearly insurmountable task because the relatively small staff of the Submission Unit located in Washington, D.C., must monitor the actions of elected officials (in often isolated communities) throughout the Deep South without the aid of their own field personnel.

BALL ET AL., *supra* note 27, at 80–81.

237. Days, *supra* note 184, at 60–61. In spite of computerization, even today the identification of changes is not a straightforward matter because of the decentralization of the election system.

238. *See* Lorn S. Foster, *Section 5 of the Voting Rights Act: Implementation of an Administrative Remedy*, 16 PUBLIUS: J. FEDERALISM 17, 23 (1986).

239. BALL ET AL., *supra* note 27, at 116 (internal citations omitted).

to bring together the local contenders and to strike a bargained voting change between the two sides, which could then be “precleared” by the Attorney General. Despite its poverty of compliance-inducing resources, the Voting Section has been able to develop and implement such a bargaining strategy.<sup>240</sup>

The negotiation strategy of the CRD is evidenced by the 1971 regulations.<sup>241</sup> The regulations forced information sharing between, and participation by, local jurisdictions, the DOJ, affected minorities, and their local representatives.<sup>242</sup> Submissions were to include “evidence of public notice, of opportunity for the public to be heard[.]”<sup>243</sup> The regulations strongly encouraged submission of newspaper articles, broadcast and television notices, minutes of public meetings or hearings, and pertinent minority group contacts.<sup>244</sup> In considering submissions, “substantial weight” would be given

to evidence of public notice or, where appropriate, opportunity for interested parties to participate in the decision to adopt or implement the proposed change and to indications that such participation in fact took place or to evidence of notice to the public that a submission has been made soliciting comment to the Department of Justice.<sup>245</sup>

In effect, the administrative agency outsourced part of the administrative process to local jurisdictions. The study concluded that “[d]espite the resistance of die-hard segregationists and the absence of financial incentives of most other federal programs, voting rights policy implementation has tended to be a form of intergovernmental relations and interorganizational communications characterized more by cooperation than conflict.”<sup>246</sup> Even as Drew Days rejected the study’s suggestion “that the Justice Department negotiate[d] with covered jurisdictions from a position of weakness,” he admitted that “[t]he department’s response to the technical-legal problems [of monitoring and compliance] has been to rely primarily on negotiation with submitting jurisdictions rather than on coercive measures.”<sup>247</sup>

240. *Id.*

241. The proposed guidelines were first published for comment in the Federal Register. Administration of Voting Rights Act of 1965, 36 Fed. Reg. 9781 (May 28, 1971). They were then published in final form and have been codified since 1972. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 36 Fed. Reg. 18186 (Sept. 10, 1971) (codified at 28 C.F.R. pt. 51 (1972)). The regulations governing the preclearance process have not changed significantly since the original codification. See 28 C.F.R. pt. 51 (2010).

242. 28 C.F.R. pt. 51; Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 36 Fed. Reg. at 18186; Administration of Voting Rights Act of 1965, 36 Fed. Reg. at 9781.

243. 28 C.F.R. § 51.28(f) (2010); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 36 Fed. Reg. at 18186; Administration of Voting Rights Act of 1965, 36 Fed. Reg. at 9781.

244. 28 C.F.R. § 51.28(f).

245. 28 C.F.R. § 50.7-(7) (1971); see also 28 C.F.R. § 51.28(f) (2010); 28 C.F.R. § 51.28 (1987).

246. BALL ET AL., *supra* note 27, at 28–29.

247. Days, *supra* note 184, at 61.



A covered jurisdiction was required to submit to the CRD the law it sought to repeal or amend, together with a statement of the reasons for the change.<sup>248</sup> An explanation of the difference between the submitted change and the existing law or practice was required, including a statement of the anticipated effect of the change on members of racial or minority groups.<sup>249</sup> Pending litigation relating to the change must be disclosed.<sup>250</sup> Redistrictings, annexations, and other boundary changes required additional demographic information on how the proposal would change the boundaries of the voting unit or units and details concerning the effects this would have on the total and voting-age population by race and language group.<sup>251</sup> The submission of additional information might be required in response to MIRs from the Voting Section's attorneys. As part of the review process, the developed submission file was made available to local interest groups and politicians for input.<sup>252</sup> All these provisions are substantially retained in the current version of the guidelines.<sup>253</sup>

Separately, the regulations have explicitly required the Voting Section to obtain information from local minorities and civil rights groups through unofficial channels of communication.<sup>254</sup> The submitting jurisdiction has had to identify and include contact information for individuals of minority groups residing in the affected areas "who can be expected to be familiar with the proposed change or who have been active in the political process."<sup>255</sup> Such informants have been encouraged directly by Voting Section staff to submit information not only concerning pending submissions, but also concerning vote changes that have not been reported to the Voting Section.<sup>256</sup>

The following is a description of the section 5 review process by Mark Posner, who was an attorney with the CRD from 1980 to 2003:

Because the Justice Department must review submitted changes within a limited time period, the Department utilizes a relatively informal process for conducting the Section 5 reviews. As specified in the Procedures for the Administration of Section 5, jurisdictions initiate the administrative process by sending a letter to the Voting Section identifying the voting changes at issue and providing certain background data and documentation. The Section then conducts a factual investigation by examining the written information provided by the jurisdiction and requesting additional written information from the

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248. 28 C.F.R. § 50.7-(10) (1971).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* § 50.7.

253. *See* 28 C.F.R. pt. 51 (2010).

254. 28 C.F.R. § 50.7 (1971); 28 C.F.R. pt. 51, subpt. D (2010).

255. 28 C.F.R. § 50.7 (1971); 28 C.F.R. pt. 51, subpt. D (2010).

256. 28 C.F.R. § 50.7 (1971); 28 C.F.R. pt. 51, subpt. D (2010).

jurisdiction when appropriate, reviewing any written information provided by others, speaking on the telephone with the jurisdiction's representatives and with minority contacts and other interested citizens, occasionally conducting an in-person meeting in Washington, D.C. with the jurisdiction's representatives or separately with other interested individuals, and considering information on file with the Section (such as census data or information located in old submission files).<sup>257</sup>

Such *ex parte* communications would, of course, be prohibited in judicial proceedings. The informality of the review process was also in other respects very different from a judicial proceeding and more like alternative dispute resolution:

The Department does not conduct formal or informal hearings, does not require or encourage the presentation of testimony under oath through affidavits or declarations, and does not have the authority to subpoena documents. The Department also does not apply the Federal Rules of Evidence to the information received during the course of its reviews.<sup>258</sup>

The CRD's strategy of informal negotiation and compromise in exchange for cooperative disclosure emerged in the context of significant pressure on the DOJ by the Nixon administration, which sought to kill the VRA.<sup>259</sup> Nixon's "Southern Strategy" involved withdrawing federal officials from the South.<sup>260</sup> The new Attorney General, John Mitchell, insisted that the CRD limit its objections under section 5 to only those instances in which it saw clear cases of racial discrimination.<sup>261</sup> Civil rights lawyers believed that during the early years of the Nixon administration, the CRD's actual practices removed the burden on submitting jurisdictions by requiring that either the department or interested private parties develop evidence that the proposed change would be iniquitous to blacks.<sup>262</sup>

Voting rights supporters and independent observers viewed the process that emerged as one of "compromised compliance," in which the CRD settled for "suboptimal levels of compliance."<sup>263</sup> Drew Days, who served as Assistant Attorney General for Civil Rights under President Carter from 1977 to 1980, and as President Clinton's Solicitor General from 1993 to 1996, conceded that the Voting Section largely relied on

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257. Posner assisted in supervising the CRD's section 5 preclearance review from the mid-1980s to 1995. 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?* 9 (2006).

258. *Id.*

259. BALL ET AL., *supra* note 27, at 67-70.

260. *Id.*

261. *Id.*

262. DAVID GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 198 (1978).

263. *See generally* BALL ET AL., *supra* note 27.

voluntary compliance by covered jurisdictions, even as it prosecuted a number of significant voting changes.<sup>264</sup>

Several other factors, some at cross-purposes, contributed to the CRD's implementation of the new preclearance strategy. Nixon reorganized the DOJ in 1969, during his first year in office.<sup>265</sup> The change was consistent with Nixon's stated desire to ensure that the young liberal lawyers in the CRD would be prevented from running wild through the South, enforcing compliance with extreme or punitive requirements they had formulated in Washington, D.C.<sup>266</sup> But the shift from regional to functional assignments led to the creation of the Voting Section in the CRD, whose staff was committed to voting rights and developed an expertise in preclearance.<sup>267</sup> Nixon's attempt to kill section 5 aroused resistance, and Congress passed the 1970 Amendments to the Act.<sup>268</sup> Once it was clear that section 5 would now be enforced, conservatives in the South asked the administration for guidelines and procedures for section 5 preclearance.<sup>269</sup> Finally, civil rights groups were spreading in the South and were becoming much more powerful regionally and in their influence on Congress.

Far from dealing with covered jurisdictions with an iron fist, the preclearance procedures emerged in a context of significant challenges to the federal enforcement of civil rights during the 1970s and were shaped by compromise. Indeed, “[t]he strongest demands for regulations came from conservative southern lawyers who had to comply with the Act but did not know how to comply because there were no preclearance procedures in existence.”<sup>270</sup> The new preclearance regime can hardly be said to have represented the intensification of DOJ intervention. It emerged during the early years of the Nixon administration, in a political climate much less punitive of Southern institutions of racism and segregation than the period immediately following the protest at Selma.<sup>271</sup> In fact, civil rights activists were concerned during this period about a retrenchment by Southern jurisdictions, and viewed the DOJ's

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264. Days, *supra* note 184, at 64.

265. BALL ET AL., *supra* note 27, at 68.

266. RICHARD M. NIXON, THE MEMOIRS OF RICHARD NIXON 440 (1978).

267. Posner notes that the delegation of the preclearance decision (but not the decision to interpose objections) to the Assistant Attorney General for Civil Rights, procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.3 (2005), and the further delegation of a large portion of the decisional authority to knowledgeable, committed, expert career government employees in the Voting Section, 28 C.F.R. § 51.3 (2004), were perhaps the most important provisions in the section 5 procedures. Posner, *supra* note 160, at 98–99.

268. Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified as amended at scattered sections of 42 U.S.C. (2006)).

269. BALL ET AL., *supra* note 27, at 72.

270. *Id.*

271. See, e.g., Kousser, *supra* note 64, at 686–87 (2008).

implementation of section 5 as part and parcel of the federal government's greater leniency.<sup>272</sup>

A different explanation for the preclearance's informal, dialogic enforcement process has been advanced by historians who have described the rise of an administrative model of civil rights reform in the 1960s with the Civil Rights Act of 1964 and the VRA of 1965.<sup>273</sup> The implementation of the preclearance regime can be seen as part of a broader historical shift away from a tort-based model of civil rights enforcement in the courts, resulting in a fundamental transformation of social regulation. Instead of assigning liability, the new focus was on compliance. Instead of identifying and prosecuting civil rights violations, the new administrative regime imposed strict liability. The adversarial relation between civil plaintiffs or government prosecutors on the one hand, and defendant jurisdictions on the other gave way to less formal administrative procedures that were more dialogic.<sup>274</sup>

In *City of Richmond v. United States*,<sup>275</sup> the Supreme Court essentially validated the DOJ's enforcement strategy. The case involved a land annexation by Richmond, Virginia that decreased the black population from 52% to 42%.<sup>276</sup> The DOJ had interposed an objection to an earlier annexation plan in 1971 but subsequently negotiated a compromise with the city.<sup>277</sup> Richmond would be permitted to go ahead with the annexation, so long as it dropped its plan to adopt at-large elections.<sup>278</sup> The city and the DOJ together sought entry of a consent decree that would approve an enlarged nine-ward city in which four wards were predominantly white, four were predominantly black, and one was three-fifths white and two-fifths black.<sup>279</sup> The district court refused to issue the consent judgment, because it felt that the new plan diluted black voting strength.<sup>280</sup> On appeal to the Supreme Court, the question presented was whether the annexation plan had either the purpose or the effect of denying or abridging the right to vote.<sup>281</sup>

The Supreme Court reversed and remanded for further consideration.<sup>282</sup> It held that, assuming it could be established after further proceedings that the annexation had no discriminatory purpose, section 5 could be satisfied if Richmond created an electoral system that

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272. *Id.*

273. See generally Graham, *supra* note 34, at 179.

274. *Id.*

275. 422 U.S. 358 (1975).

276. *Id.* at 362-63.

277. *Id.* at 363-64, 366.

278. See *id.* at 366.

279. *Id.*

280. *Id.* at 366-67.

281. *Id.* at 367.

282. *Id.* at 379.

afforded blacks “representation reasonably equivalent to their political strength in the enlarged community.”<sup>283</sup> *City of Richmond* has been interpreted as a victory for the DOJ’s bargaining-compromise approach to preclearance.<sup>284</sup> But it also vitiated the “effects” standard in annexation cases, and imposed on the Attorney General the difficult burden of proving discriminatory purpose in order to prevent the dilution of minority political voting strength by annexation.<sup>285</sup>

Under section 5, a covered jurisdiction had to prove to the satisfaction of the Attorney General, that the new “voting, or standard, practice, or procedure with respect to voting . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”<sup>286</sup> Both purpose and effect under section 5 were given special meanings by the Supreme Court, making the enforcement of section 5 more difficult and lowering the bar for local jurisdictions.

In *Beer v. United States*, the Supreme Court interpreted the effects prong.<sup>287</sup> It held that the purpose of section 5 had always been that “no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>288</sup> In *Beer*, the District Court for the District of Columbia declared a redistricting plan for New Orleans municipal elections to be in violation of section 5 because the plan failed to justify New Orleans’s retention of two at-large seats.<sup>289</sup> The redistricting plan, however, did improve minority prospects overall as compared to the 1961 plan previously in effect. Under the 1961 plan, none of the five councilman districts had a clear black majority of registered voters, and no black had been elected to the New Orleans City Council while the plan was in effect.<sup>290</sup> By contrast, under the new plan—

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283. *Id.* at 370.

284. BALL ET AL., *supra* note 27, at 100 (“Working together, the city officials and the federal regulators had worked out an agreement that might have pleased municipal managers but greatly displeased civil rights supporters. And the message was fairly clear to those city managers who were not overly enthusiastic about the Voting Rights Act: dilution of black voting strength was possible through annexation if the manager and his city attorneys, working with the DOJ, could develop a nonracial, that is, economic, administrative, etc., justification for the enlargement of a city that might be approaching a situation where a black voting majority could materialize.”).

285. *Days*, *supra* note 184, at 56.

286. 42 U.S.C. § 1973c (1970). The statute was revised by section 5 of the VRARA. Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580 (codified as amended at 42 U.S.C. § 1973c (2006)) (striking “does not have the purpose and will not have the effect” and inserting “neither has the purpose nor will have the effect”).

287. 425 U.S. 130, 139–40 (1976).

288. *Id.* at 141.

289. *Id.* at 137–38.

290. *Id.* at 135.

to which both the CRD and the court objected—blacks constituted a majority of the population in two of the five districts and a clear majority of the registered voters in one of them.<sup>291</sup> The new plan therefore represented a considerable improvement in minority access to representation, although it did not cure minority vote dilution. The Supreme Court held that this was all that section 5 required.<sup>292</sup> By way of justification the Court cited the legislative history of the VRA in *South Carolina v. Katzenbach*,<sup>293</sup> and Justice Brennan's dissent in *City of Richmond v. United States*,<sup>294</sup> explaining that the VRA was enacted because "Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes," but not to perfect those rights.<sup>295</sup>

3. *The Relative Impact of Litigation, and the Evolution of Vote Dilution Claims During the 1970s and 1980s*

Objections to the preclearance regime have been directed at transferring court-based authority to an administrative agency and, in particular, to an executive agency vulnerable to partisanship and ideology.<sup>296</sup> The implication was that the Attorney General now had all the powers of a federal court, but none of the constraints, given the more limited procedural safeguards and the absence of a presumptively neutral judge.<sup>297</sup> Depending on the administration in power, the Attorney General's significant discretion had the potential for underenforcement, as claimed by voting rights advocates in the 1970s and 1980s and again during the Bush II administration,<sup>298</sup> or for overreaching, as repeatedly charged by conservative critics, especially in the 1990s.<sup>299</sup>

There is general agreement among historians that the preclearance process was an informal, pragmatic, dialogic process that applied a relatively lenient retrogression rule in case-by-case assessments in the 1970s and 1980s.<sup>300</sup> The DOJ's preclearance policies in the 1990s, however, have been more controversial. During the 1980s, laws on

291. *Id.* at 135–38.

292. *Id.* at 140–41.

293. *Id.* at 140 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)).

294. *Id.* at 141 n.12 (citing *City of Richmond v. United States*, 422 U.S. 359, 388 (1974)).

295. *Id.* at 140 (citing and quoting H.R. REP. NO. 91-397, at 8 (1970), reprinted in 1970 U.S.C.C.A.N. 3284).

296. Republicans on the House Judiciary Committee in 1965 stressed the partisan dangers of assigning preclearance to the DOJ. Kousser, *supra* note 64, at 688 (citing H.R. REP. NO. 89-439, at 46 (1965)).

297. CUNNINGHAM, *supra* note 167, at 95.

298. POSNER, *supra* note 257, at 2.

299. See generally CUNNINGHAM, *supra* note 167.

300. See generally BALL ET AL., *supra* note 27; CUNNINGHAM, *supra* note 167; Graham, *supra* note 34.

majority-minority districting changed and the accuracy of computerized districting—right down to the census block level—made both partisan manipulation and racially sensitive districting inescapable in the 1990s redistricting round.<sup>301</sup> Critics of the DOJ have argued that civil rights advocates captured the Voting Section in the 1990s, and that the CRD implemented an inflexible strategy of maximizing majority-minority districts during this period.<sup>302</sup> This specific charge of “maximization” will be addressed in the following Part.

A comprehensive study concludes that throughout the 1970s and 1980s, jurisdictions rarely switched from at-large to district elections voluntarily.<sup>303</sup> These changes were largely due to litigation.<sup>304</sup> In contrast, “[t]he reach of section 5 in protecting against dilution was limited . . . .”<sup>305</sup> These findings contradict the critics who charge that preclearance has been *far more intrusive* than other enforcement regimes, echoing Justice Powell’s rather shrill warning that section 5 “destroys local control of the means of self-government” and “strips locally elected officials of their autonomy to chart policy.”<sup>306</sup> This view cannot be maintained. Indeed, the DOJ could never do anything but enforce the law as it was written by Congress and interpreted by the Supreme Court. What had changed during the 1980s was the national political culture. Congress and the Supreme Court had accepted majority-minority districts as a necessary remedy for minority vote dilution, even as the measure produced significant controversy.<sup>307</sup>

The submission process was undoubtedly much less onerous than litigation. Indeed, the initial proposal of section 5 before Congress did not provide for administrative preclearance but required that, in every case, jurisdictions seek a declaratory judgment from the district court in D.C.<sup>308</sup> The administrative preclearance procedure was intended to lighten the burden on covered jurisdictions,<sup>309</sup> as administrative

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301. CUNNINGHAM, *supra* note 167, at 148 (“Technology presented a revolutionary capacity to aggregate minority populations in previously unthinkable manners.”); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1726 (1993) (“Technology has largely marginalized the substantive impact of one-person, one-vote.”).

302. *See generally* CUNNINGHAM, *supra* note 167 (making the case); Ellen Katz, *supra* note 78 (describing the Supreme Court’s increasing suspicion of the Voting Section’s preclearance decisions).

303. Peyton McCrary et al., *Alabama*, in QUIET REVOLUTION, *supra* note 4, at 56; Laughlin McDonald et al., *Georgia*, in QUIET REVOLUTION, *supra* note 4, at 99–100.

304. Davidson, *supra* note 162.

305. *Id.*

306. *City of Rome v. United States*, 446 U.S. 156, 201–02 (1979) (Powell, J., dissenting).

307. KARLAN, *supra* note 301 at 1738–39.

308. POSNER, *supra* note 257, at 6–7. *See generally Preclearance Hearing*, *supra* note 168, app. at 106 (prepared testimony of Peyton McCrary et al.) (“Preclearance review by the Department provides a quicker and less expensive alternative to litigation and the Department seeks to function as a ‘surrogate’ for the District of Columbia trial courts.”).

309. *See Morris v. Gressette*, 432 U.S. 491, 503–04 (1976) (noting that the availability of expeditious

preclearance is far more informal, expeditious, and economical than a court action for declaratory judgment.<sup>310</sup> The mere fact that covered jurisdictions have sought preclearance from the court in only the rarest of cases is telling.<sup>311</sup> Since 1965, the DOJ has reviewed over 435,000 voting changes, while only sixty-eight declaratory judgment actions have been filed.<sup>312</sup> Covered jurisdictions approach preclearance as an administrative matter. They do not treat it like litigation, and they frequently rely on administrative personnel to process the submission.<sup>313</sup> There is thus no doubt that administrative preclearance is “substantially faster, simpler, and cheaper” than a declaratory judgment action.<sup>314</sup>

Regardless, the Attorney General’s determinations must conform to the determinations reached in the federal courts. As already noted, preclearance did not impose any additional legal requirements on redistrictings, annexations, voter registration procedures, or ballot access rules other than those guaranteed by the Constitution.<sup>315</sup> To the contrary, the retrogression standard lowered the bar.

It was the persistent litigation by civil rights groups under section 2 of the VRA that would establish and refine a new standard for racial vote dilution. These lawsuits forced the creation of majority-minority districts and led to significant increases in minority representation.<sup>316</sup> Section 2 of the VRA was not one of the key provisions of the original Act.<sup>317</sup> In 1982, Congress amended section 2 to adopt an explicit results standard,<sup>318</sup> and in so doing adopted the standards for minority vote dilution that the Court had recognized in *White v. Regester*, after many years of litigation by the voting rights bar.

In *White v. Regester*, the Supreme Court, for the first time, found that minority vote dilution through the use of at-large elections had been proven.<sup>319</sup> *White* struck down multi-member districts in Dallas and Bexar

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preclearance rulings is central to the section 5 scheme, and that degrading this feature would substantially increase the severity of the section 5 remedy); *see also* POSNER, *supra* note 257, at 17.

310. POSNER, *supra* note 257, at 6.

311. *See* Days, *supra* note 184, at 53 n.2 (noting that, while the DOJ reviewed over 188,000 changes between 1965 and 1991, only twenty jurisdictions sought judicial preclearance between 1965 and 1969).

312. POSNER, *supra* note 257, at 6.

313. *Id.*

314. *Id.*; *see also* SPENCER OVERTON, STEALING DEMOCRACY 106 (2006) (estimating that South Carolina spends less than \$500 on each preclearance request); Tokaji, *supra* note 64, at 795–97.

315. *See supra* notes 148–65 and accompanying text.

316. Davidson, *supra* note 162, at 32–36.

317. *Id.*; *see* Voting Rights Act of 1965, Pub L. No. 89-110, § 2, 79 Stat. 437, 437 (codified at 42 U.S.C. § 1973 (1964 & Supp. I)).

318. 42 U.S.C. § 1973(a) (2006) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this title, as provided in subsection (b) . . .”).

319. 412 U.S. 755, 765 (1973).



Counties, Texas, based on its examination of a “laundry list” of factors<sup>320</sup> that pointed to the use of multi-member districts as discriminatory or as enhancing the opportunity for discrimination.<sup>321</sup> The *White* majority concluded that, based on its examination of the “totality of circumstances,” blacks and Mexican-Americans “had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”<sup>322</sup> In *Zimmer v. McKeithen*, the Fifth Circuit refined the standard by systematizing the factors and giving them additional analytic content.<sup>323</sup> The *White/Zimmer* test demanded an inquiry into the facts and circumstances surrounding the adoption of the local plan and the maintenance of the local voting practices, the history of past racial discrimination in the community, whether alternative practices would give minorities a better chance to elect candidates of their choice, whether racial groups tended to vote in blocs, and whether minorities had previously been elected to office, in addition to other factors.<sup>324</sup>

The *White/Zimmer* factors provided plaintiffs in voting rights cases with a roadmap for bringing vote dilution cases. Despite the heavy burden of proof, plaintiffs filed at least forty constitutional challenges to at-large election schemes throughout the covered states between 1973 and 1980.<sup>325</sup>

In 1980, however, to the great consternation of the voting rights bar and the civil rights community, the Supreme Court struck a blow to this litigation strategy.<sup>326</sup> Following its 1976 decision in *Washington v. Davis*, requiring plaintiffs claiming race discrimination under the Equal Protection Clause to show discriminatory intent,<sup>327</sup> the Supreme Court held in *City of Mobile v. Bolden* that plaintiffs bringing racial vote dilution claims also had to show discriminatory intent.<sup>328</sup> The passage of

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320. Davidson, *supra* note 162, at 28.

321. 412 U.S. at 769.

322. *Id.* at 766.

323. 485 F.2d 1297, 1305 (5th Cir. 1973).

324. *Id.* (“[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates from running from particular geographical subdistricts. . . . [A]ll these factors need not be proved in order to obtain relief.”).

325. Davidson, *supra* note 162, at 28.

326. Armand Derfner called the decision “devastating. Dilution cases came to a virtual standstill; existing cases were overturned and dismissed while plans for new cases were abandoned.” Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in *MINORITY VOTE DILUTION* 149 (Chandler Davidson ed., 1989).

327. 426 U.S. 229, 239–45 (1976).

328. 446 U.S. 55, 66 (1980) (“[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.”).

the 1982 amendments reversed the Supreme Court's intent requirement, reinstated a multifactor test, and adopted a results standard. Henceforth, racial vote discrimination would be:

[E]stablished if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation [by members of a protected racial or language minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>329</sup>

Construing amended section 2 in *Thornburg v. Gingles*, the Supreme Court substantially streamlined the evidentiary requirements for minority plaintiffs.<sup>330</sup> The plaintiffs in *Gingles* challenged the dilutive effect of multi-member districts in North Carolina's 1981 legislative plan and sought relief in the form of single-member majority-minority districts.<sup>331</sup> The *Gingles* Court identified three criteria for claims of at-large dilutionary effects: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."<sup>332</sup> A minority plaintiff's case would depend on showing sufficient levels of racial bloc voting and establishing that a reasonably compact majority-minority district could be drawn to afford members of the minority group the ability to elect a candidate of their choice.<sup>333</sup> Only then would the Court proceed to the "intensely local appraisal" contemplated by the *White/Zimmer* totality of circumstances inquiry.<sup>334</sup>

At-large elections all but disappeared in covered jurisdictions. A remarkable shift to single-member districts with majority-minority districts occurred, driven, for the most part, by litigation. Alabama presents an illustrative case. An empirical study shows that forty-two of forty-eight Alabama cities with a population equal to or greater than 6000 switched from at-large elections to district-based elections or a mixed plan.<sup>335</sup> The study concludes that "[l]itigation was the principal cause of these changes, accounting for 26 of the new district systems and 1 of the shifts to a mixed plan[.]"<sup>336</sup> Whereas the preclearance process "was sometimes the cause of changes to district elections in Alabama[.] . . . [i]n most jurisdictions[.] . . . the principal means of

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329. 42 U.S.C. § 1973(b) (2006).

330. 478 U.S. 30 (1986).

331. *Id.* at 35.

332. *Id.* at 48–51.

333. *Id.*; see also *Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994).

334. 478 U.S. at 78.

335. McCrary et al., *supra* note 303, at 55.

336. *Id.*

securing equitable election plans was through litigation."<sup>337</sup> The authors note that the preclearance requirements did, however, "serve at least an educational function" in cases that appeared purely voluntary.<sup>338</sup> The relative impact of litigation on the abandonment of discriminatory at-large voting systems is similar in the other southern states.<sup>339</sup>

These developments show that the CRD was far less coercive in forcing majority/minority districts on covered jurisdictions than litigation, even as critics generally maintained that preclearance was far more intrusive. Rather, the CRD followed determinations by the federal courts.<sup>340</sup> As the federal courts began to recognize vote dilution challenges to at-large election systems in jurisdictions with evidence of racially-polarized voting and of a history of racial discrimination, the CRD increasingly objected to those plans as well. Similarly, when, as a result of *Thornburg v. Gingles*, section 2 was interpreted to require additional majority-minority districts as a remedy for minority vote dilution, the CRD became more insistent on the creation of additional majority-minority districts when reviewing submissions in the preclearance process.<sup>341</sup>

If anything, the switch in covered jurisdictions from at-large to district-based election systems during the 1980s resulted in fewer objections. As noted by Posner, "A significant percentage of the Department's Section 5 objections historically have been directed at election changes that generally are discriminatory only in the context of at-large elections (majority vote requirements, anti-single-shot voting provisions, and annexations)."<sup>342</sup> A switch to districting rendered many of these issues moot. Indeed, the number of objections significantly

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337. *Id.* at 48.

338. *Id.* at 55 n.146.

339. McDonald, *supra* note 303, at 78 ("Seventy-seven law suits were filed against the surveyed jurisdictions alone, challenging at-large elections under the Fourteenth and Fifteenth amendments, the preclearance provisions of section 5, and amended section 2. While the Justice Department played a key role in the enforcement of section 5, virtually all of the litigation challenging election structures was brought by civil rights organizations on behalf of the minority community."). As McDonald notes, "Section 5 has successfully blocked the introduction of many new attempts at vote dilution. Section 2, since its amendment in 1982, has proved a potent force in challenging existing discriminatory practices." *Id.* at 90.

340. Turner, *supra* note 168, at 296–99.

341. See *Preclearance Hearing*, *supra* note 168, app. at 133–34 (prepared testimony of Peyton McCrary et al.) ("During the 1970's, at-large elections and enhancing devices together were denied preclearance 292 times, 59 percent of all objectionable changes, but only 86 redistricting plans (17 percent) were the subject of objections . . . . By the 1980s, the picture . . . is more mixed: the Department interposed objections to 150 at-large election plans and enhancing devices (35 percent of objectionable changes) and denied preclearance to 165 redistricting plans (16 percent). In the 1990s, at-large elections and enhancing devices were the subject of objections only 104 times, 26 percent of objectionable changes, but the Department denied preclearance to a striking 209 redistricting plans (52 percent)—over half of all changes to which objections were interposed . . . .").

342. Posner, *supra* note 168, at 15 n.28.

declined in the 1980s, even as the number of submissions increased dramatically.

Finally, the open antidiscrimination standard governing preclearance determinations evolved as voting rights law evolved. Preclearance did not take place in an institutional vacuum. It was guided by the developments in the federal courts. Two social scientists have described this institutional capacity for innovation as follows:

Because the Voting Rights Act does not formulate specific tests for vote dilution, the meaning of that concept has been the topic of continuous case-by-case adjudication, while at the same time there has been an ongoing evolution of administrative standards within the Voting Section of the Justice Department. The interpretation of the Act has involved a remarkable sequence of interactions, leading perhaps to a kind of 'reflective equilibrium' in which social scientists' courtroom testimony in voting rights cases in the 70s and late 60s influences judicial interpretation of the statute, which in turn set the stage for law review articles and further social science testimony in the 1980s on the proper interpretation of terms such as 'racially polarized voting' culminating in [*Thornburg v. Gingles*], which in turn becomes the basis for subsequent lower court decisions.<sup>343</sup>

In other words, the evolving preclearance standards fed into, and reflected, the evolution of standards nationwide, particularly in the more complicated area of racial vote dilution. The increasingly accurate tests for racial vote dilution naturally influenced the review of submissions and submission requirements.

#### 4. *The Focus on Redistricting During the 1990s and the Supreme Court's Shaw Jurisprudence*

Congress effectively issued a mandate to create majority-minority districts to remedy vote dilution in the 1982 amendments to section 2.<sup>344</sup> But the statute was approved in the Senate with the proviso that "[n]othing in this Section shall be read to guarantee the election of minority group representatives in proportion to the minority group's share of population."<sup>345</sup> This created a conceptual difficulty, as proportionality was the most obvious measure of fair representation and the natural stopping-point for drawing additional majority-minority districts.<sup>346</sup> Section 2, however, provides that "nothing in this section establishes a right to have members of a protected class elected in

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343. Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 34, at 197, 223-24.

344. 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 (2006)).

345. 42 U.S.C. § 1973 (2006).

346. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1392 (1983).

numbers equal to their proportions in the population.”<sup>347</sup> This language codified the considerable ambivalence and distaste for majority-minority districts on the part of conservatives.<sup>348</sup> Majority-minority districts have been a major focus of controversy about the VRA ever since.

Majority-minority districts have produced cross-cutting allegiances. Political strategists for the Republican National Party eager to pack black (predominantly Democratic) voters into highly concentrated districts sided with the ACLU and other civil rights organizations in advocating for maximizing majority-minority districts.<sup>349</sup> There are many empirical studies that show majority-minority districts cost Democrats seats Congress in 1992 and 1994.<sup>350</sup> Majority-minority districts have further offended conservative opponents of affirmative action and have troubled academics concerned about competitive elections.<sup>351</sup> Moreover majority-minority districts involve trade-offs concerning minority voice and integration. Like democracy itself, however, majority-minority districts may be the best of many less-than-ideal choices for improving access to the political process.

During the 1990s, the Voting Section became heavily embroiled in this controversy, because it was perceived to have embarked on an aggressive policy of “maximization” in the preclearance process. In an article published in 1992, Days expressed his view that “the 1982 amendments . . . incorporat[ed] . . . the new Section 2 standards into the section 5 preclearance process” and that the DOJ “has taken the position that such an incorporation was mandated by Congress.”<sup>352</sup> Citing an objection letter issued in 1991 by President Bush’s Assistant Attorney General for Civil Rights, John Dunne, Days observed that:

Under the department’s approach, of course, the retrogression standard of *Beer* no longer poses an obstacle to full evaluation of proposed changes. The question instead becomes whether the changes provide minority voters with the greatest feasible access to the political

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347. 42 U.S.C. § 1973. This provision is also referred to as the “Dole proviso.”

348. Boyd & Markman, *supra* note 346, at 1339, 1389–94.

349. CUNNINGHAM, *supra* note 167, at 104–10; *see also* DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 74–75 (1999).

350. Grant Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1609–10 (2004). Models by political economists show there were no such “perverse” effects. *See, e.g.*, Keisuke Nakao, *Racial Redistricting for Minority Representation*, 23 ECON. & POL. 132 (2006). The debate continues. Canon is correct in suggesting that “[i]n any event it seems clear that white incumbents have not been as harmed as Democratic partisans feared, nor as much as Republican partisans hoped.” CANON, *supra* note 349, at 74.

351. *See* authorities cited *supra* note 170; *see also* Bruce E. Cain et al., *From Equality to Fairness: The Path of Political Reform Since Baker v. Carr*, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 6, 26 (Thomas E. Mann & Bruce E. Cain eds., 2005).

352. Days, *supra* note 184, at 57.

process in light of the “totality of the circumstances.” This issue will have to be resolved ultimately by the Supreme Court.<sup>353</sup>

Conservatives charged that civil rights groups captured the CRD, and that when John Dunne took office in 1990, the CRD adopted a much more aggressive and rigid strategy of requiring jurisdictions to draw as many majority-minority districts as possible.<sup>354</sup> In 1991, Dunne objected to Mississippi’s state house and senate plans and to five of the first six state legislative maps in Texas.<sup>355</sup> The rulings engendered intense interest. Voting rights advocates hailed Dunne’s more aggressive policy, proclaiming that it addressed “the central question in redistricting: maximization.”<sup>356</sup> An article in the *Congressional Quarterly* concluded that the objections meant that covered jurisdictions now would be required to draw as many majority-minority districts as possible.<sup>357</sup> John Dunne himself acknowledged that he might have “wandered into maximization.”<sup>358</sup>

The Supreme Court intervened in *Shaw v. Reno*<sup>359</sup> and *Miller v. Johnson*,<sup>360</sup> strongly rebuking the DOJ for having gone too far in pushing majority-minority districts. In *Shaw*, white voters challenged two majority-minority congressional districts that North Carolina had drawn as part of their redistricting plan after the 1990 Census gave the state an additional congressional seat.<sup>361</sup> The first plan that North Carolina had submitted for preclearance contained only one majority black district out of twelve total districts statewide.<sup>362</sup> Blacks constituted 20% of the population in the state.<sup>363</sup> The DOJ objected to the plan on the grounds that it diluted the minority vote, claiming that the North Carolina General Assembly could have created a second majority-minority district but failed to do so for “pretextual reasons.”<sup>364</sup> In 1991, the legislature then enacted a new plan with two majority-black districts, and the DOJ precleared the plan.<sup>365</sup> White voters challenged the plan, claiming that it was as an unconstitutional racial gerrymander that violated the Fourteenth Amendment.<sup>366</sup> Writing for the majority, Justice O’Connor

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353. *Id.*

354. CUNNINGHAM, *supra* note 167, at 97.

355. *Id.*

356. *Id.*

357. Beth Donovan, *Nation Watches as Texas Struggles to Create Minority Districts*, 49 CONG. Q. WKLY. REP. 2293, 2293–95 (Aug. 17, 1991).

358. CUNNINGHAM, *supra* note 167, at 144.

359. 509 U.S. 630 (1993).

360. 515 U.S. 900 (1995).

361. 509 U.S. at 633–34.

362. *Id.* at 634–35.

363. *Id.* at 633.

364. *Id.* at 635.

365. *Id.* at 635–36.

366. *Id.* at 633–34.

found the shape of the district “so bizarre on its face” and such a departure from traditional districting criteria (geographic compactness, contiguousness, conformity to geographic boundaries or political subdivisions) that it seemed “unexplainable on grounds other than race.”<sup>367</sup> According to Justice O’Connor, the plan thus bore “an uncomfortable resemblance to political apartheid” that reinforced “impermissible racial stereotypes.”<sup>368</sup> White voters had thus stated “an analytically distinct claim” under the Equal Protection Clause that gave them standing to sue on the grounds that they were unconstitutionally classified based on race.

In *Miller v. Johnson*, Georgia redrew its congressional redistricting plan in response to a DOJ objection under section 5.<sup>369</sup> Ruling on a constitutional challenge to the new plan, the Supreme Court held that the DOJ had inappropriately interposed objections to maximize the number of majority-minority districts.<sup>370</sup> In doing so, the DOJ had exceeded its authority under the statute.<sup>371</sup> “Instead of grounding its objections on evidence of a discriminatory purpose,” the Court found that “it would appear the [department] was driven by its policy of maximizing majority-black districts,” thereby expanding its Section 5 authority “beyond what Congress intended” and the Court previously upheld.<sup>372</sup> The Court charged the DOJ with forcing states to “engage in presumptively unconstitutional race-based districting.”<sup>373</sup> Congressional districts were “presumptively unconstitutional” if race was the “predominant factor” in their creation. And a jurisdiction’s interest in complying with section 5, the Court held, did not constitute a compelling justification for this type of government action.<sup>374</sup>

Arguably, then, the DOJ intruded significantly on covered jurisdictions during the early 1990s with regard to the preclearance of districting plans—if, that is, one grants the conservative interpretation of these events. Can this be reconciled with the argument presented here, that preclearance is consistent with localism and functioned, for the most part, as a flexible monitoring/learning regime?

Much ink has been spilled on the question of whether the DOJ exceeded its authority in the early 1990s. CRD career staff has persistently denied that a maximization policy was ever followed, but

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367. *Id.* at 644 (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)) (internal quotation marks omitted).

368. *Id.* at 647.

369. 515 U.S. 900, 907 (1995).

370. See generally CUNNINGHAM, *supra* note 167.

371. Posner, *supra* note 168, at 80.

372. 515 U.S. at 924–25.

373. *Id.* at 927.

374. *Id.* at 926–27.

have maintained that, after *Beer*, the Voting Section relied on discriminatory intent as articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>375</sup> and *Wilkes County v. United States*<sup>376</sup> in analyzing districting cases.<sup>377</sup> Critics countered that the Voting Section considered failure to maximize majority-minority districts evidence of discriminatory purpose per se.<sup>378</sup> But this is a misunderstanding of the *Arlington Heights* standard. Under *Arlington Heights*, so long as other legitimate reasons for not drawing a majority-minority district were not deemed pretextual, the Attorney General would not object to vote changes.<sup>379</sup> Career staff, serving both Republican and Democratic administrations, claim that they did not change the standard or significantly alter preclearance procedures in the 1990s.<sup>380</sup>

They also reject the charge of a politicization of preclearance during the Bush I and Clinton years.<sup>381</sup> The “bottom up” review process of section 5 preclearance, according to staff, has been a “key institutional bulwark in the DOJ against political decision-making.”<sup>382</sup> Only after the staff of the Voting Section has decided to recommend an objection unanimously does the decision go up to the politically appointed Assistant Attorney General.<sup>383</sup> Decisions to preclear are forwarded to the Assistant Attorney General for decision only “where the change is of great significance (such as a statewide districting) or otherwise particularly controversial.”<sup>384</sup> Historically, the Attorney General has never interposed an objection to a preclearance plan when the Voting Section unanimously recommended it.<sup>385</sup> Even if the DOJ became more aggressive in pushing for majority-minority districts, by far the most important factor in the creation of majority-minority districts was litigation.

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375. 429 U.S. 252, 265–66 (1977).

376. 450 F. Supp. 1171, 1174–78 (D.D.C. 1976), *aff'd mem.*, 439 U.S. 999 (1976).

377. See Posner, *supra* note 168, at 80; McCrary et al., *supra* note 168, at 284–86.

378. CUNNINGHAM, *supra* note 167, at 148.

379. See *Preclearance Hearing*, *supra* note 168, at 8 (testimony of Mark A. Posner, Professor, Am. Univ.) (“[A] five-Justice majority of the Court averred that the Department was using the purpose test as a cover for implementing a near-unconstitutional policy of maximization. . . . Since purposeful discrimination is the core conduct prohibited by the 15th [A]mendment, this statement seems explainable only if the five Justices were referring to the false purpose test they believe the Justice Department was enforcing. It is my conclusion, however, that the Justice Department, in fact, did not apply the section 5 purpose test in an unlawful or inappropriate manner.”).

380. See, e.g., *id.* app. at 113, 125–26 (prepared testimony of Peyton McCrary et al.) (providing an empirical study of the grounds on which the DOJ interposed objections during this period); see also Posner, *supra* note 168, at 80, 100.

381. See generally Posner, *supra* note 168.

382. POSNER, *supra* note 257, at 13

383. *Id.* at 9.

384. *Id.*

385. *Id.*



In addition, the *Shaw* line of cases placed significant limits on the ability of the DOJ to require covered jurisdictions to draw additional majority-minority districts. Critics of the Court were appalled by the creation of a new cause of action under the Fourteenth Amendment that threw the “relatively orderly process of elaborating and refining the host of questions raised by Congress . . . to an abrupt end.”<sup>386</sup> *Shaw* and its progeny threatened to undermine gains in black representation by casting the creation of majority-minority districts into doubt. Even as Justice O’Connor provided additional guidance to “[s]tates and lower Courts . . . toil[ing] with the twin demands of the Fourteenth Amendment [i.e. *Shaw* challenges] and the VRA,” in *Bush v. Vera*, the Court never clarified what it meant by an impermissible “predominant racial motive” in the creation of majority-minority districts.<sup>387</sup> Clearly any remedial effort would, in one sense, be driven by a racial motive, whereas in another sense, as Justice Breyer pointed out in his dissent in *Abrams v. Johnson*, “racial motives . . . never explain a predominant portion of a district’s entire boundary . . . .”<sup>388</sup>

By 1993–1994, at any rate, the Supreme Court had started to put the brakes on any DOJ attempts to push a maximization agenda via preclearance. If, indeed, the preclearance process had become too intrusive, inflexible, and commandeering in the redistricting context, *Shaw* and its progeny insisted on a more passive approach by the DOJ by undercutting objections to redistricting plans based on discriminatory purpose.<sup>389</sup> Grofman and Brunell have insisted that “in comparing the 1990s round and the 2000 round of redistricting, we believe it hard for anyone to dispute that, in 2000, DOJ was exercising much greater caution in deciding on which district merited an objection under section 5 than in the 1990s . . . .”<sup>390</sup> That the Supreme Court would play a role in defining the limits of preclearance was, of course, contemplated by the statutory scheme, even if one believes that the choice to do so in the case of North Carolina’s redistricting plan in *Shaw* on Fourteenth Amendment grounds was ill considered.

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386. CANON, *supra* note 349, at 77.

387. 517 U.S. 952, 990 (1996) (O’Connor, J., concurring).

388. 521 U.S. 74, 116 (1997) (Breyer, J., dissenting).

389. Objections based on retrogression constituted 83%, 66%, 40%, and 98% of all objections interposed during 1965–1979, the 1980s, the 1990s, and during 2000–2005, respectively. See Posner, *supra* note 160, at 108 tbl.2. Thus, while the Attorney General interposed an increasing percentage of total objections based on discriminatory purpose during the 1980s and the early 1990s, that trend was abruptly curtailed by 2000. See *id.* Moreover, the total number of submissions by the Attorney General dropped significantly, beginning in 1996. See Luis Fuentes-Rohwer & Guy-Uriel Charles, *The Politics of Preclearance*, 12 MICH. J. RACE & L. 512, 519–21 (2007).

390. Bernard Grofman & Thomas Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 81, at 311, 326.

Other observers, however, have interpreted the *Shaw* line of cases as relatively tentative. Professor Sunstein has written:

[F]ollowing Justice Sandra Day O'Connor's cautious lead, the heart of the current Court avoids clear rules and final resolutions. It allows room for Congress's and the states' continued democratic deliberation, and to accommodate new judgments about facts and values. It is a court that leaves fundamental issues undecided . . . .

. . . .

. . . [T]he court has avoided simple rules in its series of cases involving bizarrely shaped voting districts redrawn to produce a different racial makeup; it has insisted instead that constitutional challenges would have to be decided on the basis of the details . . . .

. . . .

. . . [The decisions are] ambivalent or catalytic rather than final or decisive. If these points are right, O'Connor's distinctive concurring opinions represent not a failure of judicial nerve, but a healthy reminder that judges are mere participants in America's process of democratic deliberation . . . .<sup>391</sup>

In other words, the maximization controversy related primarily to redistricting. But redistricting constituted only a small percentage of all submissions. From 1982 to 2004, only 2.4% of changes involved redistrictings (8622 of about 320,000 changes).<sup>392</sup> Redistrictings drew proportionately 16.4% of all objections.<sup>393</sup> But the DOJ interposed many more objections to other types of changes, such as annexations and boundary changes (45%), and changes to methods of election (24.4%).<sup>394</sup> These three types of changes comprised an overwhelming 85.8% of all objections interposed. Precinct, polling places, and absentee ballot changes made up only 3.7% of all objections, despite accounting for the highest percentage of submitted changes, at 43.7%.<sup>395</sup> Objections to redistrictings declined significantly during the period from 1995 to 2004, from 318 between 1982 and 2004 to 46 between 1995 and 2004: 87.4% objections to redistrictings were lodged before 1995.<sup>396</sup>

##### 5. *The Nonretrogression Standard During the Post-Shaw Period*

In its post-*Shaw* jurisprudence, the Supreme Court interpreted *Beer's* nonretrogression standard ever more narrowly in other areas as well, cabining DOJ discretion, reducing its authority to interpose

391. Cass R. Sunstein, *Supreme Caution: Once Again, the High Court Takes Only Small Steps*, WASH. POST, July 6, 1997, at C1.

392. VRA ENFORCEMENT RECORD, *supra* note 158, at 34 tbl.6.

393. *Id.* at 36 & fig.4.

394. *Id.*

395. *Id.*

396. *Id.* at 35 & tbl.5. But redistrictings declined less than other types of changes and, during the period between 1995 and 2004, constituted the greatest absolute number of objections. *Id.*

objections, and limiting its ability to communicate with local jurisdictions.<sup>397</sup> In *Reno v. Bossier Parish School Board (Bossier Parish I)*, the Court elaborated its view that the retrogression standard did not authorize the Attorney General to interpose an objection on the grounds that a voting change violates the Constitution or section 2 of the VRA.<sup>398</sup> In *Bossier Parish II*, the Court went even further in advancing the somewhat bizarre judgment that even discriminatory intent could not justify an objection to a vote change by the DOJ; only a strangely metaphysical “retrogressive intent” would justify a DOJ objection.<sup>399</sup> The Court fixated on the “federalism costs” of preclearance, as it increasingly limited its reach.<sup>400</sup> Katz has argued that these decisions reflected the Supreme Court majority’s view that the DOJ was overreaching.<sup>401</sup> In several decisions, the lower courts had specifically criticized the administration of section 5 review, condemning the DOJ’s practice of informal negotiations and exchanges between the Voting Section staff and covered jurisdictions, as well as the close relationship between the staff and civil rights groups who were active in enforcing the VRA.<sup>402</sup> The district court in *Miller* had vehemently criticized the “close cooperation” between the DOJ and the ACLU, calling the frequent communication between the two “disturbing” and “an embarrassment.”<sup>403</sup>

This cramped interpretation of retrogression misinterpreted the compromise struck in the 1970s and 1980s to accept gradual, incremental change. After *Beer*, the DOJ could still rely on discriminatory purpose to push for incremental change. Now the DOJ was barred from urging any amelioration on covered jurisdictions, limiting it entirely to preventing “backsliding.” Discriminatory purpose could also no longer serve as a basis for objections as it had in the past.<sup>404</sup> The Supreme Court thereby undercut the dialogic strategy that characterized the administrative

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397. Posner, *supra* note 168, at 94–95.

398. 520 U.S. 471, 475–76 (1997). This invalidated the DOJ’s regulation that specified that a “clear” results violation should trigger an objection. “A ‘results violation’ refers to a voting plan or proposal intentionally drawn to minimize minority voting strength[], and which has a discriminatory result in violation of Section 2 of the Voting Rights Act.” VRA ENFORCEMENT RECORD, *supra* note 158, at 21 n.85.

399. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 337–41 (2000).

400. Posner, *supra* note 168, at 80.

401. See generally Katz, *supra* note 78.

402. See, e.g., CUNNINGHAM, *supra* note 167, at 54.

403. *Johnson v. Miller*, 864 F. Supp. 1354, 1362, 1368 (S.D. Ga. 1994).

404. As Posner told Congress,

[T]he section 5 purpose test now only applies if, per chance, a jurisdiction were to intend to cause a retrogression in minorities’ electoral opportunity, but somehow messes up and adopts a change that, in fact, is not retrogressive. This is highly unlikely to occur, and in fact, in the nearly 5 years since *Bossier Parish* was decided, the Justice Department has reviewed approximately 76,000 voting changes and no such incompetent retrogressor has appeared.

*Preclearance Hearing*, *supra* note 168, at 20 (testimony of Mark A. Posner, Professor, Am. Univ.).

preclearance process—an ironic outcome, given the Court’s criticism of what it perceived as the DOJ’s unilateral maximization policy. Against the background of the Supreme Court’s increasing limitation on both the DOJ’s authority and the reach of the retrogression standard, the Supreme Court’s decision in *Georgia v. Ashcroft* was viewed as one further step in the “retrogression of retrogression.”<sup>405</sup>

In *Georgia v. Ashcroft*, the Court addressed the flexibility of the preclearance standard and reaffirmed the importance of local voice.<sup>406</sup> On both counts the Court arguably solved a problem that did not exist. The case likely arose in the first place because of the straightjacket that the Court had imposed on the Voting Section. When the parties arrived in court, the first question that one of the panel judges asked was why they had not been able to work something out, given the small differences in their positions.<sup>407</sup> The answer was that the Court’s severe condemnation of DOJ pressure on covered jurisdictions made it very difficult for the DOJ to carry on such conversations.<sup>408</sup>

*Ashcroft* involved Georgia’s post-2000 legislative redistricting plan.<sup>409</sup> The plan was the result of a partisan gerrymander by white and black Democratic legislators.<sup>410</sup> In an effort to hold onto the statehouse in the face of an inevitable Republican trend, Georgia’s legislative redistricting committee proposed a plan that unpacked existing black majority-minority districts in order to redistribute black (read Democratic) voters to democratic candidates in adjacent districts.<sup>411</sup> The redistricting plan shaved existing majority-minority districts precariously thin, reducing by five the number of districts with a black voting age population in excess of 60%, and added only one majority-minority district of more than 50% black voting age population (“BVAP”).<sup>412</sup> Because of low levels of registration and turnout in African-American communities, and high levels of racially-polarized voting, a BVAP over 60% or 65% had frequently been necessary to afford blacks the ability to elect candidates of their choice in Georgia state legislative districts.<sup>413</sup> Nonetheless, the plan was approved near unanimously by the black

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405. Karlan, *supra* note 3.

406. 539 U.S. 461 (2003).

407. Telephone Interview with David Becker, Project Dir., Election Initiatives for the Pew Ctr. on the States (Dec. 5, 2009).

408. *Id.*

409. Specifically, *Ashcroft* involved Georgia’s senate plan, which was also at issue in *Miller. Ashcroft*, 539 U.S. at 466–69.

410. *Id.* at 469 (“The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats.”); see also Issacharoff, *supra* note 4, at 1716.

411. Issacharoff, *supra* note 4, at 1716.

412. *Id.*

413. *Id.*

legislative delegation.<sup>414</sup> Robert Brown, who chaired the subcommittee that had drawn up the senate plan, was also African-American.<sup>415</sup> Brown testified at trial in support of the plan, as did other leading African-American legislators.<sup>416</sup>

The DOJ precleared the statehouse plan, but objected that the reductions in black voting age populations in Senate Districts 2 (from 60.58 % to 50.31%), 12 (from 55.43% to 50.66%), and 15 (from 62.45% to 50.80%) threatened the ability of minority voters to reelect black incumbents.<sup>417</sup> At trial, the DOJ relied on expert testimony that the percentages were not sufficient for black voters to elect candidates of their choice, given the levels of racial bloc voting.<sup>418</sup> The district court sided with the DOJ and refused to preclear the plan.<sup>419</sup>

In an opinion written by Justice O'Connor, the Supreme Court adopted the dissenting district court judge's view that “would have given ‘greater credence to the political expertise and motivation of Georgia's African-American political leaders’” than to the DOJ experts.<sup>420</sup> The Court cited testimony by Georgia's black legislative leaders and Congressman John Lewis that emphasized the importance of unpacking black majority-minority districts to extend the influence of the black vote, and, most importantly, to preserve the Democratic majority in the statehouse, which guaranteed valuable committee chairmanships and leadership positions to blacks.<sup>421</sup> Specifically,

Congressman Lewis testified that “giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made,” and that the Senate plan “will give real meaning to voting for African Americans” because “you have a greater chance of putting in office people that are going to be responsive.”<sup>422</sup>

According to the Court, the new plan was not retrogressive. It preserved black legislative leadership positions. It promoted coalition-building across racial lines by lowering BVAP. And it created additional so-called “influence districts” in which minorities could play a substantial, if not decisive role, in electing a candidate for office.<sup>423</sup>

Even as the Court questioned the DOJ's application of the old preclearance standard to the facts of the case, it redefined the nonretrogression standard in the vote-dilution context. Whereas

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414. *Id.* at 1716–17.

415. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 40, 42 (D.D.C. 2002), vacated, 539 U.S. 461 (2003).

416. *See id.* at 42, 89.

417. *Ashcroft*, 539 U.S. at 472–73.

418. *Id.* at 473.

419. *Id.* at 474.

420. *Id.* at 475 (quoting *Georgia v. Ashcroft*, 195 F. Supp. 2d at 102 (Oberdorfer, J., dissenting)).

421. *Id.* at 472.

422. *Id.* at 489.

423. *Id.* at 487–88.

previously the retrogression inquiry had focused on a minority's "ability . . . to elect candidates of [their] choice," the Court now emphasized a much broader metric: "the extent of the minority group's opportunity to participate in the political process."<sup>424</sup> The Court rejected any "single statistic," and called for a "totality of circumstances" assessment that included the creation of minority "influence districts" and legislative leadership positions as relevant factors.<sup>425</sup> Justice O'Connor wrote for the majority:

[A]ny assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. . . .

In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive. . . .

. . . .

In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process. "[T]he power to influence the political process is not limited to winning elections."

Thus, a court must examine whether a new plan adds or subtracts "influence districts"—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.<sup>426</sup>

The *Ashcroft* decision was highly controversial. The decision clearly reaffirmed the case-by-case assessment and flexibility of the preclearance standard. It also explicitly deferred to local knowledge over expert analysis. Commentators concerned about competitive elections, and increasingly skeptical about the continued need for guaranteed safe seats for black legislators in the South, welcomed the Court's abandonment of what they saw as the "relatively mechanical assessment of voting practices" under section 5 that had turned the assessment of black electoral opportunity into "little more than . . . sixth-grade arithmetic."<sup>427</sup> *Ashcroft* supporters suggested that the pre-*Ashcroft* standard was a rigid understanding of the VRA that completely inverted the Act's policies.<sup>428</sup>

424. *Id.* at 482.

425. *Id.* at 480–81.

426. *Id.* at 479–80, 482 (citations omitted) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring)) (internal quotation marks omitted).

427. Issacharoff, *supra* note 4, at 1713.

428. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the*

On the other hand, voting rights advocates feared that *Ashcroft* spelled the end of descriptive representation, which had been the baseline for gains in black representation.<sup>429</sup> They also questioned the *Ashcroft* Court’s assessment of the pre-*Ashcroft* standard. David Becker, a DOJ attorney who litigated *Ashcroft*, contends that “the pre-*Ashcroft* standard, as first established in *Beer*, was not nearly as rigid, mechanical or simple as some would suggest.”<sup>430</sup> Becker and others pointed out that the DOJ had always applied an “intensely local appraisal” akin to the one that evolved under section 2’s prohibition against vote dilution; that *Gingles* had never “streamlined” the standard to the extent that it eliminated the multifactor analysis altogether; and that the DOJ’s own guidelines made this explicit.<sup>431</sup> As Meghann Donahue points out, “Contrary to the common perception that section 5 enforcement under *Beer* was merely a matter of looking at the number of majority-minority districts in the proposed plan compared with the benchmark, examination of the Department’s past enforcement practices reveals a rich history of localized and nuanced review.”<sup>432</sup> At any rate, Professor

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*Judiciary*, 109th Cong. 11 (2006) (testimony of Richard H. Pildes).

429. Karlan, *supra* note 3, at 30–31.

430. David J. Becker, *Saving Section 5: Reflections on Georgia v. Ashcroft, and Its Impact on the Reauthorization of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, *supra* note 4, at 223, 226 (“In reality, neither the courts nor the DOJ have relied upon the simplistic, mechanistic approach that some perceive. While remaining true to *Beer*’s requirement that there can be no retrogression in minority voters’ effective exercise of the franchise, as defined by their ability to elect candidates of their choice, the DOJ and the lower court in *Ashcroft* (as well as courts in other cases) reviewed massive amounts of evidence, including: expert testimony regarding voting patterns, racially polarized voting, and whether certain candidates (regardless of race) were the preferred candidates of minority voters; the demographic makeup of districts and the plans as a whole, the success of minority-preferred candidates in past elections; the approval or disapproval of minority legislators (as evidenced by not only their votes, but also their public statements expressed in the legislature and otherwise); and the expressed opinions of minority leader, candidates, and voters regarding the plans.”).

431. Karlan, *supra* note 3, at 30–31; see also generally Becker, *supra* note 430.

432. Meghann E. Donahue, “*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, 1672 (2004). Donahue further notes,

Analysis of the section 5 administrative review process confirms that the regulations’ call to evaluate myriad “complex” facts actually is heeded by Voting Section reviewers. Although some commentators have recognized the Department’s increasingly functional approach to submissions since the Supreme Court’s sharp rebuke of DOJ practices in the 1990s, studies of section 5 submissions from the 1980s reveal that jurisdiction-specific review has been a mainstay of the DOJ’s section 5 enforcement far longer. For example, the studies disclosed situations in which the same changes in different locations received disparate treatment by the Voting Section. In Midland, Texas, the Attorney General precleared the institution of a majority vote requirement and numbered posts for independent school district elections because of an absence of racially polarized voting within the jurisdiction, but the Department objected to precisely the same change in Comal, Texas. The Department approved an open primary system in Louisiana while objecting to the adoption of such a system in Mississippi due to different election patterns in the two states.

Bernard Grofman noted that especially after 2000, the DOJ proceeded with a “greater caution and functional approach” that “does not seem to have been much noticed by legal commentators,” but was “all-pervasive” and “apparent.”<sup>433</sup> Each “district was evaluated in an intensely local and fact-specific appraisal (regarding) whether or not there appeared to be a substantively significant change in the likelihood that [the district] would elect minority candidates of choice.”<sup>434</sup>

Even as they expressed their concern about the increased burden that the new standard imposed, those with greater familiarity of the administration of preclearance conceded that the new standard could be navigated.<sup>435</sup> The *Ashcroft* opinion could indeed be read narrowly as reaffirming the VRA’s institutional evolution as a regime that would leave electoral design in the hands of local constituencies where possible, promote incremental improvement, afford covered jurisdictions flexibility to experiment, promote participation and negotiated compromise between local minorities and the white majority, and credit local knowledge—even as the opinion carves out a narrow exception to the pre-*Ashcroft* retrogression standard. On this reading, the *Ashcroft* retrogression standard has “a presumptive protection for ability-to-elect districts, with the qualification that reducing the number of ability-to-elect districts in an effort to protect legislative leadership positions for minority legislators would not be retrogressive if that effort is supported by the relevant minority state legislators.”<sup>436</sup> In other words, there could be situations in which the loss of majority-minority districts still accrued to the overall advantage of minorities, precisely in the kind of situation with which *Ashcroft* dealt. Professor David Canon, for example, argued,

One virtue of *Ashcroft* was that it allowed that flexibility in the totality of circumstances test for retrogression. There is no doubt that the representation of racial interests is much stronger in legislatures that are controlled by the Democratic party. Trading a few ability-to-elect districts for influence districts to maintain majority control would be worth it—if the trade could be made with some certainty.<sup>437</sup>

Ultimately, *Ashcroft*’s critics prevailed, and the “ability to elect” standard was written into section 5 in the VRARA, thereby prohibiting

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*Id.* at 1473 (footnotes omitted); *see also* Karlan, *supra* note 3, at 30–31.

433. Grofman & Brunell, *supra* note 390, at 326.

434. *Id.* at 15.

435. Telephone Interview with David Becker, *supra* note 407. *See generally* Bernard Grofman, *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control*, 5 ELECTION L.J. 250 (2006).

436. David T. Canon, *Renewing the Voting Rights Act: Retrogression, Influence, and the “Georgia v. Ashcroft Fix”*, 7 ELECTION L.J. 3, 24 (2008).

437. *Id.* *But see* Karlan, *supra* note 3, at 32–33 (arguing that the possibility of successfully balancing such trade-offs was purely theoretical, given all the other political variables).



tradeoffs between majority-minority districts (or rather ability-to-elect districts) and mere influence districts.<sup>438</sup>

#### IV. THE FALSE PROMISE OF CENTRALIZATION, STANDARDIZATION, AND BRIGHT-LINE RULES

The preceding analysis of section 5 preclearance is brought into better relief by contrasting the VRA's preclearance regime with other voting rights laws that have relied on one-size-fits-all, bright-line rules with a straightforward mathematical application. This Part briefly compares the Supreme Court's one-person/one-vote rulings, with its more recent decision in *Bartlett v. Strickland*.<sup>439</sup> In both instances, the Court insisted on imposing "mathematically administrable" bright-line rules justified by reference to purportedly self-evident, geometrical principles of democracy.

##### A. ONE-PERSON/ONE-VOTE

It has frequently been said that bright-line rules are "a key virtue in the context of voting rights cases, a context that 'cries out for any legal oversight to take the form of clear, readily-followable rules.'"<sup>440</sup> The one-person/one-vote rule is the classic case in point. Professor Samuel Issacharoff has called it "the single most successful remedial effort by the Supreme Court in our history."<sup>441</sup> It is widely viewed as a fundamental principle of democratic institutions, the Supreme Court's application of which has "solved the problem of grossly malapportioned districts."<sup>442</sup> Professor Richard Hasen identifies it as the exemplar of a "professionalized, centralized, and nonpartisan election administration" that is the "hallmark[]" of a mature democracy.<sup>443</sup>

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

439. 129 S. Ct. 1231 (2009).

440. Luke McLaughlin, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312, 316-17 (2005) (quoting Richard H. Plides, *Is Voting Rights Law Now at War with Itself?: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1556 (2002)).

441. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 688 (2006) (testimony of Samuel Issacharoff, Professor, N.Y. Univ. Sch. of Law). Issacharoff has noted that the principle of one-person/one-vote is regarded by many as "so deeply embedded in our culture as to seemingly defy any controversy." *Id.* It is generally deemed to be "so in keeping with the most rudimentary sense of democracy and legitimacy" that any student of the apportionment cases could not "fathom that a . . . democratic society could be organized on any other basis." *Id.*

442. Richard L. Hasen, *Election Administration and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1075 (2010) (reviewing GERKEN, *supra* note 28).

443. *Id.*

This view, however, is not universally shared among election law experts. Even as it promised fair representation and majority rule in the face of egregious vote dilution across the country, the rule was highly contested and has generated significant controversy.<sup>444</sup> Although the one-person/one-vote rule may well represent the most extraordinary exertion of power on the part of the Court, its success has been mixed at best.<sup>445</sup>

In *Colegrove v. Green*, the Supreme Court refused to wade “into the political thicket” to reform state legislative districting, calling the issue a nonjusticiable political question.<sup>446</sup> In *Baker v. Carr*, the Court reopened the issue, suggesting that the “crazy quilt” of legislative districts in Tennessee was unconstitutional, because it lacked any justification.<sup>447</sup> When *Baker* came down several states started reforming their legislative redistricting schemes on their own.<sup>448</sup> But the Supreme Court was not satisfied to prod states into reforming their own systems. Instead it announced the equipopulation rule in *Gray v. Sanders*,<sup>449</sup> *Reynolds v. Sims*,<sup>450</sup> and *Wesberry v. Sanders*.<sup>451</sup> *Reynolds* read the Equal Protection Clause of the Fourteenth Amendment as requiring “equal representation” of individuals and imposed the one-person/one-vote rule on state apportionment for its legislature. It interpreted that rule—more aptly referred to as a principle—as the equipopulation rule: “[A]s a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis,” meaning that “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”<sup>452</sup> In *Wesberry*, the Court applied this principle to congressional districts.<sup>453</sup> In subsequent cases, the Supreme

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444. See, e.g., Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 214 (2003); see also Blacksher & Menefee, *supra* note 25, at 31 (articulating principles of section 2 of the VRA that the Congress subsequently adopted in its 1982 amendments of the VRA); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 103 (2000). But see LAUGHLIN McDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 80 (2003) (“*Baker v. Carr* was not a racial discrimination case, but its concept that voting districts must be composed of substantially equal populations was to prove one of the keys that opened the door to minority officeholding in Georgia.”).

445. See, e.g., Karlan, *supra* note 301, at 1707, 1740; Nathaniel Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1351 (2002); see also Hayden, *supra* note 444.

446. 328 U.S. 549, 556 (1946).

447. 369 U.S. 186, 254 (1962).

448. Persily et al., *supra* note 445, at 1336.

449. 372 U.S. 368, 379 (1963).

450. 377 U.S. 533, 568 (1964).

451. 376 U.S. 1, 17–18 (1964).

452. *Reynolds*, 377 U.S. at 577.

453. Note that the one-person/one-vote rule is just as likely to be interpreted as requiring legislative districts with equal numbers of voting age population, the measure the Supreme Court adopted for limits on actionable vote dilution under section 2 in *Bartlett v. Strickland*, 129 S. Ct. 1231,

Court adopted a zero deviation standard for congressional districts, and a 10% deviation tolerance for state and local electoral districts.<sup>454</sup>

The rule unhinged longstanding state and local practices, replacing them with a formula that appeared to be a neutral deduction from democratic principles by an almost geometric logic. Rather than devise a remedy against state and local lock-ups of the political process that could be tailored to particular circumstances, the Court legislated a one-size-fits-all solution. And the subsequent extensions of the rule interpreted that solution ever more rigidly and ideologically.<sup>455</sup>

The Court’s action seemed intent on rendering the “crazy quilt” of congressional, state, and local districts measurable and transparent along a dimension that was administrable with “mathematical precision.”<sup>456</sup> Administrability by the federal judiciary was a key reason the Court chose the equipopulation rule.<sup>457</sup> The rule would trump all other districting considerations. Traditional districting criteria, such as conforming district lines to the boundaries of political subdivisions, maintaining communities of interest, and incorporating considerations of natural geography, were subordinated.<sup>458</sup> According to Justice Stevens’s critical assessment in *Lucas v. Forty-Fourth General Assembly of Colorado*, the one-person/one-vote rulings

convert[ed] a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State’s distinct history, distinct geography, distinct distribution of population, and distinct political heritage.<sup>459</sup>

It is instructive to see the Court’s approach in the one-person/one-vote cases as a high-water mark of a faith in the centralization of authority in the federal government.<sup>460</sup> The moral authority of the Supreme Court and the national government during this period was

1249 (2009).

454. *Karcher v. Daggett*, 462 U.S. 725, 742 (1983); *Toombs v. Fortson*, 241 F. Supp. 65, 70 (N.D. Ga. 1965) (holding “that a variance of more than 15 percent” for Georgia state legislative districts “would be difficult, if not impossible, to justify”).

455. *Bd. of Estimate v. Morris*, 489 U.S. 688, 692–93 (1989) (abolishing New York City’s Board of Estimate on one-person/one vote grounds).

456. *Wesberry*, 376 U.S. at 18.

457. John Hart Ely famously quipped about the rigid demands of one-person/one-vote that “administrability is [the doctrine’s] long suit, and the more troublesome question is what else it has to recommend it.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121 (1980).

458. *Reynolds v. Sims*, 377 U.S. 533, 622 (1964) (Harlan, J., dissenting); Richard L Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 278–79.

459. *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 748 (1964) (Stevens, J., dissenting).

460. See *Patterson*, *supra* note 35, at 214; see also *Graham*, *supra* note 34, at 179.

unquestioned. The faith in the Warren Court's civil rights jurisprudence by liberals was matched, at the time, perhaps only by their faith in modern science to address social ills.<sup>461</sup> The mathematically precise equipopulation rule answered an ideal of surveillability from the center.<sup>462</sup> In subjecting the states and localities to an equipopulation rule, standardization did not merely effect substantial changes, but it did so in a manner that made an otherwise unsurveillable thicket of local political divisions and distributions of power legible to a centralized federal authority.<sup>463</sup> The rule reshaped political geography to promote mechanical administrability from Washington.<sup>464</sup>

Notwithstanding its failure to specify a precise remedy for vote dilution, *Baker* resulted in a nationwide reassessment of state districting schemes because it exposed state districting plans to likely constitutional challenge. Charles Rhyne, the counsel for appellants in *Baker*, summed up the promise of *Baker* as follows:

[I]t is certain that archaic state legislative machinery will now be modernized.

Genuine state constitutional reform is now possible.

The extensive nation-wide dialogue on the fundamentals of our system of government provides an opportunity to restudy and reallocate public powers and functions to those levels of government best able to perform them under twentieth-century conditions.<sup>465</sup>

This dialogue about fundamentals, however, was cut short by the direction that the Court would take. The Court's decisions in *Sanders*, *Reynolds*, and the other one-person/one-vote cases bypassed existing state and local political arrangements to directly require every jurisdiction throughout the country to reshape its political geography by adopting a measure of vote dilution that would rigidly standardize districts.<sup>466</sup> The Court's ruling applied nationwide, regardless of whether

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461. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 11–12 (1973).

462. See SCOTT, *supra* note 133, at 4 (“[H]igh-modernist ideology... is best conceived as a... muscle-bound [] version of the self-confidence about scientific and technical progress, the expansion of production, the growing satisfaction of human needs, the mastery of nature (including human nature), and, above all, the rational design of social order commensurate with the scientific understanding of natural laws.”).

463. See James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1238–41 (2002) (arguing that the “liberal and nationalizing,” “top-to-bottom regime of one person, one vote” served to “flatten and homogenize local identity” by replacing a “thicker conception of democracy in which citizens are firmly situated” in a local political community with a “thin variety” of democratic politics).

464. See *id.* at 1251.

465. Gordon E. Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 257, 261 (Bernard Grofman & Arend Lijphart eds., 2003) (quoting Charles Rhyne).

466. See *Karcher v. Daggett*, 462 U.S. 725 (1983) (striking down a congressional redistricting plan despite a less than one percent population deviation between the largest and smallest districts);

it was "congruent and proportional" to an ongoing constitutional violation.<sup>467</sup>

A perceived virtue of the equipopulation rule was that it could apparently be justified on nonpartisan, politically neutral, normative grounds. Treating vote dilution as a violation of an individual's fundamental right to equal protection under state and local laws translated directly into a geometric principle that could be applied like a grid to the electoral map without mediation by a potentially partisan process. The equipopulation rule thus promised to render an unsurveillable state and local "political thicket" legible and subservient to formal, nonpartisan national purposes by eliminating the ability of entrenched and partisan local elites to take cover behind confusing local institutions and practices. The hope was that political elites would be exposed to, and chastened by, the electorate.<sup>468</sup> Moreover, the imposition of a grid permitted federal courts to readily step in when needed by establishing simple, precise, and mathematically demonstrable criteria for the constitutional violation.

The Court had high hopes that its vote dilution standard would give "each citizen . . . an equally effective voice in the election of members of his state legislature."<sup>469</sup> In fact, the equipopulation principle could guarantee no such thing. On its own, it would not necessarily improve the rights of individuals to full and fair participation in the political process. It would not necessarily eliminate "minority rule." And it did not necessarily improve the situation of racial minority voters in the South.<sup>470</sup>

The limitations of the equipopulation rule have been the source of much frustration both among scholars and on the bench. *Reynolds's* framing of vote dilution as an individual right under the Equal Protection Clause has limited the possibilities of a more comprehensive institutional response.<sup>471</sup> Many, including the Supreme Court, have since been looking

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Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1481 (2002) ("[T]he lion's share of elections even on the local level are conducted using the one-person, one-vote standard.").

467. See generally Blacksher & Menefee, *supra* note 25 (identifying the Supreme Court's incongruent treatments of malapportionment and racial vote dilution under the Equal Protection Clause).

468. Persily, et al., *supra* note 445, at 1316.

469. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

470. While it increased the voting power of blacks in Atlanta until the legislature adopted new rules (including a countywide run-off), it significantly diminished the voting power of blacks in the Alabama "black belt" who were beginning to register and vote. McDONALD, *supra* note 444, at 80-103 (describing the events in Georgia); Blacksher & Menefee, *supra* note 25, at 39 n.261 (noting that *Reynolds* stripped Alabama's rural, predominantly black counties of their legislative influence virtually on the eve of the massive black enfranchisement brought about by the Voting Rights Act of 1965).

471. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 645 (2002) ("[T]he current doctrines of individual rights of access and protection against discrimination do

for another silver bullet that would supplement the silver bullet that the equipopulation rule had promised, but failed, to be.<sup>472</sup> Such a response, as experts increasingly agree, is exceedingly unlikely.<sup>473</sup>

The problem with fixing vote dilution by treating the issue as a violation of an individual right under the Equal Protection Clause, as has been generally acknowledged to be the case in the literature, is that it misunderstands that an individual's vote is valuable only to the extent that her vote is aggregated with the votes of other politically like-minded individuals, and is therefore better understood as a right of association with a group.<sup>474</sup> Minorities in control of the districting process can, in theory, crack, pack, and stack even majorities so as to defeat majority rule, notwithstanding the equipopulation rule.<sup>475</sup>

The Court mandated that redistricting take place every ten years based on population changes reflected in the decennial census.<sup>476</sup> Insofar as districting is left in the hands of the state legislatures in the majority of states, legislators are afforded significant opportunity for gerrymanders. The equipopulation rule, as already stated, does not preclude line-drawing that protects incumbents, cracks, packs, and stacks unfriendly constituencies, and otherwise distributes political capital according to the whims of those who control the line-drawing process. It has been argued that by supervening and acting as a constraint on other traditional districting criteria—such as maintaining political subdivisions, following natural geographical boundaries, and so forth—the equipopulation rule facilitates self-interested line drawing.<sup>477</sup> Today's precise computerized precinct-by-precinct, block-by-block mapping of political and racial demographics, compiled in databases that can be manipulated with the help of readily available but sophisticated districting software, makes it increasingly likely that election outcomes are already decided before the ink on the redistricting plan is dry. The equipopulation rule does little, if anything, to curtail such gerrymanders and may, indeed, be partially responsible for the ever-increasing number of uncompetitive congressional districts resulting from bi-partisan gerrymanders.

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not capture the potential risk to the competitive legitimacy of the political process.”).

472. See, e.g., *Veith v. Jubelirer*, 541 U.S. 267, 279–80 (2004).

473. *Id.* at 281 (“As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable . . .”). The one-person/one-vote rule was directed at curbing political gerrymandering. A flexible standard, however, would have better addressed the issue of political process failure. See Hasen, *supra* note 466, at 1489–98.

474. As Justice Kennedy has recently remarked in *Veith*, the First Amendment might have opened up a more considered approach to the problem. *Veith*, 541 U.S. at 314 (Kennedy, J., concurring); see also Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 884 (1995).

475. See, e.g., DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 103–05 (4th ed. 2008).

476. *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

477. Engstrom, *supra* note 458, at 278–79.

The equipopulation rule, moreover, did little to improve minority vote dilution, notwithstanding its association with other voting rights reforms, such as the VRA. Many assume that reapportionment brought benefits to black urban communities, because the legislatures became more responsive to urban voters. But in Tennessee, as elsewhere in the South, the beneficiaries were generally adversaries of black vote equalization.<sup>478</sup> Those who benefited directly from reapportionment were not minorities, but urban and suburban whites.<sup>479</sup> Whatever benefits blacks achieved through the resulting increase in urban voting strength were quickly wiped out in subsequent elections by instituting multi-member districts.<sup>480</sup>

As the Court had recognized in *Colegrove v. Green*, invalidating a state's districting scheme, and thus potentially moving to a statewide at-large scheme, could damage minorities by submerging their vote into the population at large.<sup>481</sup> This was true for Southern urban blacks, who often constituted a geographically discrete minority large enough to elect a representative from a single-member geographical district.<sup>482</sup> Southern jurisdictions increasingly shifted to at-large election systems after the imposition of the equipopulation rule.<sup>483</sup> In at-large systems, of course, the one-person/one-vote formula could get no purchase on vote dilution, because there were no districts to equalize. Hence jurisdictions could avoid the constitutional violation without giving up their ability to keep blacks out altogether by districting alone, where, as throughout the South (but also nationwide), racial bloc voting prevailed.<sup>484</sup> The only way to remedy such an evasion was to require electing representatives from

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478. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 165–70* (1999); Blacksher & Menefee, *supra* note 25, at 18–19 (discussing the Court's failure to address racial vote dilution in Atlanta in *Fortson v. Dorsey*, 379 U.S. 433 (1965), and concluding that "[t]he Court failed . . . to engage in any thorough exploration of the implications for racial minorities of the one-person, one-vote rule."); Douglas Smith, *Into the Political Thicket: Reapportionment and the Rise of Suburban Power*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM* 263, 289 (Matthew D. Lassiter & Joseph Crespino eds., 2010).

479. See Blacksher & Menefee, *supra* note 25, at 2–4; see, e.g., Orville Vernon Burton et al., *South Carolina*, in *QUIET REVOLUTION*, *supra* note 4, at 190, 201; McCrary et al., *supra* note 303, at 38, 47; McDonald et al., *supra* note 303, at 67, 73; Frank R. Parker et al., *Mississippi*, in *QUIET REVOLUTION*, *supra* note 4, at 136.

480. After *Reynolds v. Sims* forced the reapportionment of the Alabama statehouse, one black representative, the first since reconstruction, was elected to the legislature. Blacksher & Menefee, *supra* note 25, at 2–4. However, at the same time, the clout of the rural "black belt" was effectively diminished. *Id.*

481. 328 U.S. 549, 565 (1946).

482. See generally *QUIET REVOLUTION*, *supra* note 4 (providing statistics).

483. See authorities cited *supra* note 479.

484. See Grofman, *supra* note 435, at 280 ("[N]othing in the discussion in Epstein or O'Halloran (or the sources to which they cite) is persuasive about their claim that racially polarized voting in the South is now declining."). See generally Katz et al., *supra* note 4 (showing that racial bloc voting remains a significant problem).

single-member districts. Recognizing the harm of vote dilution required an altogether different analysis than the one provided by *Reynolds*.

There is a large literature on the vicissitudes of the equipopulation rule that need not be rehearsed here. The point here is merely to contrast the intrusiveness of the one-person/one-vote rule, the merits of which are never raised as a constitutional matter, with the flexibility and local sensitivity of the VRA's preclearance regime, which is somehow held to a much higher constitutional standard.

B. *BARTLETT V. STRICKLAND*: DEFINING MAJORITY-MINORITY DISTRICTS WITH MATHEMATICAL PRECISION

In its recent decision in *Bartlett v. Strickland*,<sup>485</sup> the Supreme Court appears to have looked for the same type of magic bullet that the one-person/one-vote rule promised to provide. Questionably relying on an abstract principle of majoritarianism (which most district-based elections do not espouse),<sup>486</sup> the Court defined "majority-minority" districts as districts with a 50% or higher minority voting age population.<sup>487</sup> The superficially appealing rule of *Strickland*, however, threatens to undermine coalition-building and the broader inquiry into minority participation that the *Ashcroft* Court sought to encourage under section 5. Instead of encouraging incremental change, it threatens to lock existing majority-minority districts in place.

In *Strickland*, the North Carolina legislature created an additional minority opportunity district that crossed Pender County and Hannover County lines in the southeast of the state.<sup>488</sup> The legislature justified the additional district as one mandated by section 2 of the VRA.<sup>489</sup> The new district was a coalition district with a total black population of 42.9%, a BVAP of 39.4%, and a population in which 53.7% of registered Democratic voters were black.<sup>490</sup> Plaintiffs challenged the new district based on a whole-county provision ("WCP") in the North Carolina Constitution, which provides that "no country shall be divided" in the formation of state house and senate districts.<sup>491</sup> In an earlier decision, the North Carolina Supreme Court had held that "any new redistricting

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485. 129 S. Ct. 1231 (2009).

486. Most U.S. district-based elections are plurality vote, first-past-the-post systems in which the winner is the one who gains the most votes, but not necessarily a majority of the votes cast. In the United States, Congress and the President are elected this way. So are most state legislatures. See ANDREW REYNOLDS ET AL., INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, ELECTION SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 31, 32 35, 132, 172 (reprt. 2008) (comparing the U.S. system to other national systems).

487. 129 S. Ct. at 1244.

488. *Id.* at 1239.

489. *Id.* at 1247.

490. Brief for Petitioners at 6, *Strickland*, 129 S. Ct. 1231 (No. 07-689).

491. N.C. CONST. art. II, §§ 3(3), 5(3).



plan[] . . . shall depart from strict compliance with the legal requirements set forth herein [including the WCP] only to the extent necessary to comply with federal law.”<sup>492</sup> The plaintiffs in *Strickland* claimed that section 2 only mandated “majority-minority” districts, defined as districts in excess of 50% minority voting age population, and that the new district therefore could not be justified in the face of the WCP.<sup>493</sup>

Construing the amended section 2 in *Gingles*, the U.S. Supreme Court had identified three “necessary preconditions” for a claim that a use of multimember districts constitutes actionable vote dilution.<sup>494</sup> Under *Gingles*, a plaintiff must show: (1) that the minority group “is sufficiently large and geographically compact to constitute a de facto majority in a single-member district,” (2) that the minority group is “politically cohesive,” and (3) that “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”<sup>495</sup> Only when a party has established these requirements<sup>496</sup> does a Court go on to analyze whether a section 2 violation has occurred based on the totality of circumstances.<sup>497</sup> Following precedent, the North Carolina panel that heard the *Strickland* case explained that “the first *Gingles* precondition ‘depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district.’”<sup>498</sup> The critical question, according to the panel, was whether minority voters form “a *de facto* majority that can elect candidates of their choosing,” considering the totality of circumstances and not “sheer numbers alone.”<sup>499</sup> Citing *Ashcroft*, the state panel

described the challenged District 18 as an “ability to elect” or “coalition” district in which African-American voters “are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their own choice.”<sup>500</sup>

The North Carolina Supreme Court reversed, holding that section 2 claims require a threshold showing that the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district”—a requirement that, as a matter of law, could

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492. *Stephenson v. Bartlett*, 582 S.E.2d 247, 250–51 (N.C. 2003) (emphasis added) (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 397 (N.C. 2002)).

493. Brief for Petitioners, *supra* note 490, at 16–20.

494. It later held that those requirements applied equally to section 2 cases involving single member districts. *Grove v. Emison*, 507 U.S. 25, 40–41 (1993).

495. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

496. *Id.*

497. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994).

498. Brief for Petitioners, *supra* note 490, at 10 (quoting state court panel).

499. *Id.* (quoting state court panel) (internal quotation marks omitted).

500. *Id.* at 11 (quoting state court panel) (internal quotation marks omitted).

not be met by districts with a minority voting age population below 50%.<sup>501</sup> The North Carolina Supreme Court also held that the appropriate measure of population was the “minority voting age population.”<sup>502</sup> Neither issue had been previously settled.

In an opinion written by Justice Kennedy, a majority of the Justices on the U.S. Supreme Court agreed. Only minority opportunity districts with a 50% or greater black voting age population are mandated by section 2.<sup>503</sup> Mandatory recognition of crossover claims, the Court reasoned, would create serious tension with the third *Gingles* requirement: To the extent that minorities could rely on white crossover voting in the district, the majority was not voting as a bloc to defeat the minority preferred candidate.<sup>504</sup>

In oral argument, petitioners had urgently invoked Justice O’Connor’s vision that “[t]he Voting Rights Act should be interpreted in such a way as to encourage a transition to a society where race no longer matters.”<sup>505</sup> Coalition districts, they argued, were “crucial” in promoting this goal:

Coalition districts bring races together by fostering political alliances across racial lines. As a result they serve to diminish racial polarization over time. Coalition districts help us in reaching the point where race will no longer matter in drawing district lines. These districts bring us one step closer to fulfilling our Nation’s moral and ethical obligation to create an integrated society.<sup>506</sup>

The majority, however, rejected this reasoning. The majority argued that “[r]ecognizing a § 2 claim where minority voters cannot elect their candidate of choice based on their own votes and without assistance from others would grant special protection to their right to form political coalitions that is not authorized by the section.”<sup>507</sup> According to the Court, the 50% rule drew a “clear line” that served the need for “workable standards for sound judicial and legislative administration.”<sup>508</sup> Like the one-person/one-vote rule, the 50% rule constituted:

[A]n objective, numerical test...[that was n]ot an arbitrary invention...[but] has its foundation in principles of democratic governance. The special significance in the democratic process, of a majority, means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a

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501. *Pender Cnty. v. Bartlett*, 649 S.E.2d 364, 370, 372 (N.C. 2007).

502. *Id.* at 374.

503. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009).

504. *Id.*

505. Transcript of Oral Argument at 3, *Strickland*, 129 S. Ct. 1231 (No. 07-689).

506. *Id.*

507. *Strickland*, 129 S. Ct. at 1237.

508. *Id.* at 1244.

compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.<sup>509</sup>

Whereas the *Ashcroft* Court had urged that simple math and bright-line rules be abandoned as measures for vote dilution under section 5, *Strickland* insists that judicial manageability and the algebra of democracy compel that minority voting age population in an ability-to-elect district must exceed 50% of the population in that district. Whereas *Ashcroft* held that coalition districts and influence districts could, under appropriate circumstances, satisfy federal requirements under section 5, *Strickland* now holds that neither can serve as a remedy for minority vote dilution claims under the Constitution, regardless of state or local circumstances. In so ruling, the *Strickland* Court undercut *Ashcroft*'s vision of political progress through the gradual integration that appears, more generally, to have animated Justice O'Connor's voting rights decisions.

The rationale behind the 50% rule in *Strickland* represents a significant departure from vote dilution principles. As Justice Souter pointed out in his dissent, the number of minority seats in the legislature and the other senate factors should guide the appropriate vote dilution analysis, including a history of government-sponsored racial discrimination.<sup>510</sup> It makes no sense to focus on "equal opportunity" in the particular remedial district.

Moreover, *Strickland* further complicates the relationship between section 5 and section 2. In the past, as in *Ashcroft*, for example, the DOJ carefully scrutinized population reductions in minority opportunity districts. But it has neither relied solely on BVAP, nor has it objected to reductions below 50% BVAP in every case. The Attorney General has not objected to even massive reductions in minority voting age populations in majority-minority districts, so long as a minority candidate in the district could rely on sufficient cross-over voting.<sup>511</sup> Under *Strickland*, it now appears that crossover or coalition districts are no longer protected as ability-to-elect districts. If the Court's definition of "ability to elect" districts under section 2 also applies to ability-to-elect districts under the new section 5, then it would seem to follow that section 5 also no longer protects coalition districts. In other words, the DOJ cannot object to the elimination of coalition districts under the

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509. *Id.* at 1245.

510. *Id.* at 1251 (Souter, J., dissenting).

511. For example, in the state senate districting plan at issue in *Georgia v. Ashcroft*, the Attorney General did not object to Senate District No. 22, which "has a total black population of 54.71%. The proposed Senate District 22 would experience a decrease in BVAP from 63.51% (Ga.) or 62.65% (U.S.), to 51.15% (Ga.) or 50.76% (U.S.). The percentage of black registered voters would also fall from 64.07% to 49.44%." 195 F. Supp. 2d 25, 63 (D.D.C. 2002) (citations omitted), *vacated*, 539 U.S. 461, 472-73 (2003).

retrogression standard, if coalition districts no longer count as protected minority opportunity districts. Either the DOJ must now insist on packing minorities into 50%-plus BVAP districts, even in instances where this is entirely unnecessary, or risk losing those districts forever. *Strickland* thereby threatens to reverse the trend of gradual reductions in minority voting age population that the Supreme Court had previously welcomed. Instead of empowering state and local jurisdictions to adopt “best practices” and to unpack majority-minority districts as much as possible, depending on local conditions, *Strickland* now requires adherence to a rigid 50% rule, giving jurisdictions no choice in the matter. Unlike *NAMUDNO*, which interpreted the coverage provision to grant local jurisdictions the autonomy to bail out from under section 5, thereby encouraging the adoption of best practices, *Strickland* insists on uniformity and locks majority-minority districts in place.

#### CONCLUSION

Decentralization has frequently been invoked as a justification for our constitutional federalism. In *Gregory v. Ashcroft*, for example, Justice O’Connor wrote that:

Th[e] federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting States in competition for a mobile citizenry.<sup>512</sup>

Others have similarly justified federalism in terms of the democratic and pragmatic benefits of state and local autonomy.<sup>513</sup> If we credit this functional, substantive account of constitutional federalism, the scope and extent of section 5’s actual interference with state and local decision making matters greatly in assessing the “federalism costs” of the preclearance regime.

Part I described the conventional view of section 5 preclearance as a “nationalization” of governmental authority over state and local election laws. This view suggests the imposition of uniform minimum standards below which no experimentation is permitted. The one-person/one-vote rule is exemplary in this respect. It is a one-size-fits-all rule that tolerates no variation.<sup>514</sup> Conservative critics of the VRA claim that section 5

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512. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

513. See, e.g., Calabresi, *supra* note 141, at 27 (describing federalism as “constitutionally mandated decentralization” that promotes local preferences); Cariello, *supra* note 141, at 1558–69 (arguing that “federalism is [a] theory of decentralization in government,” discussing literature, and urging that the Supreme Court adopt a functional approach to federalism); McGinnis, *supra* note 141, at 526 (“[F]ederalism . . . was the Framers’ most important contribution to protecting decentralized traditionmaking.”).

514. Standards for variation of state and local legislative districts are slightly more flexible than

preclearance is even more intrusive. A leading opponent of affirmative action, who held senior positions under Presidents Reagan and Bush in the CRD deplors that “Section 5 prohibits more state voting practices than those necessarily encompassed by the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment.”<sup>515</sup>

But as we have shown in Part III, section 5 has, in many respects, been far more permissive than the Fourteenth and Fifteenth Amendments, both of which also apply. The institutional architecture of section 5 preclearance did not require strict compliance with uniform minimum constitutional standards. Only new laws must be precleared. Laws that were not changed were not subject to preclearance. The DOJ’s initial implementation during the 1970s and 1980s, furthermore, did not require strict compliance for new laws either, but took a pragmatic approach that aimed at workable incremental improvements. The Supreme Court’s decision in *City of Richmond*<sup>516</sup> institutionalized this approach by approving a compromise that fell short of the disparate impact provision in the preclearance standard. In *Beer*, the Supreme Court further insisted that preclearance could only be denied in cases of retrogression or “backsliding.”<sup>517</sup> In other words, a pure discriminatory effects standard was never applied. The DOJ typically relied on discriminatory intent after *Beer*, and when it did apply retrogressive effect, it was usually in combination with discriminatory intent or other standards articulated by the federal courts.<sup>518</sup> Unlike the equipopulation rule, preclearance did not require covered jurisdictions to adopt a particular election design and did not apply to existing laws. It required decisionmakers to take changing national antidiscrimination standards into account. As these standards evolved in the courts, the DOJ’s standards of review evolved as well. But, as has been shown in the examination of the different phases of implementation, the DOJ’s preclearance standard has always remained more permissive. Moreover, the Supreme Court increasingly narrowed the discretion of the DOJ to push for any improvement in racial vote discrimination, prohibiting the

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standards for congressional districts, but the rule is nationally uniform. Hasen, *supra* note 466, at 1480–81.

515. Roger Clegg, *The Future of the Voting Rights Act After Bartlett and NAMUDNO*, in CATO SUPREME COURT REVIEW 2008–2009, at 35, 46 (Ilya Shapiro ed., 2009) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2523 (2009) (Thomas, J., dissenting)) (internal quotation marks omitted), available at <http://www.cato.org/pubs/scr/2009/BartlettNAMUDNO-Clegg.pdf>; see also DEP’T OF JUSTICE, BRIEFING REPORT: VOTING RIGHTS ENFORCEMENT FOR THE 2008 U.S. PRESIDENTIAL ELECTION 60–61 (2009) (testimony of Roger Clegg, President & Gen. Counsel, Ctr. for Equal Opportunity).

516. 422 U.S. 359 (1974).

517. *Beer v. United States*, 425 U.S. 130, 141–42 (1975).

518. See Posner, *supra* note 168, at 98–99.

DOJ from applying even the undisputed constitutional intent standard.<sup>519</sup> The VRARA restored the constitutional intent standard, but the *Shaw* decisions, precluding redistricting efforts from relying “predominantly” on race, still restrict the DOJ’s discretion.

Given the continuing hyper-decentralization of election law and administration, it would be disingenuous of critics to suggest that preclearance has undermined state and local participation in decisionmaking. The preclearance regime has not displaced decisionmakers, nor diminished local participation in the process. To the contrary, the very design of the administrative preclearance process has encouraged increased levels of local participation and deliberation by requiring submissions to include evidence of public notice, comment, and participation of those affected by election law changes. It has required decisionmakers to take antidiscrimination standards into account. But that was an obligation they had under the Constitution anyhow—whether or not they were covered by Section 5. Section 5 certainly has encouraged jurisdictions to integrate those standards into their decisionmaking procedures. Moreover, preclearance has enforced antidiscrimination with a minimum of litigation, primarily by requiring jurisdictions to publicize information standardized to permit an assessment of discriminatory impact or intent. The production of information to the DOJ and minority groups has enabled negotiations among affected interests and has educated local decisionmakers about the application of antidiscrimination standards in their decisionmaking. It has also put local jurisdictions in direct dialogue with the DOJ.

The ratio of objections to submissions was highest when preclearance first became mandatory, and declined dramatically as submissions increased and antidiscrimination standards became well established. This means that the relative burden on jurisdictions significantly declined as conditions improved. With less than 1% of submissions drawing objections in the 1990s, and many fewer objections interposed during the period from 2000 to 2006, the burden in all but the rarest of cases has involved producing the information relating to new election laws to the DOJ and the public. Even if the DOJ lodged an objection, preclearance was still much less burdensome than litigation, much faster, much less costly, much less adversarial, and permitted a much speedier resolution.

The *NAMUDNO* Court signaled that it would revisit the constitutionality of preclearance, but did not resolve what standard would apply.<sup>520</sup> Under the more stringent standard that the Supreme Court

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

520. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512–13 (2009) (“The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress

articulated in *City of Boerne v. Flores*, Congress’s enforcement powers under the Civil War Amendments are limited to legislating a “congruent and proportional” remedy to an ongoing constitutional violation.<sup>521</sup>

Part III also showed that preclearance has functioned for the most part as a learning/monitoring regime that, in over 99% of all cases, has simply required the production of information. In those rare cases in which an objection has been lodged, the DOJ’s concerns usually could be satisfied by limited changes to the jurisdiction’s chosen election design. The showing that preclearance is not nearly as invasive as suggested counters arguments that the VRA’s federalism costs are “disproportionate.” It detracts considerably from the conventional, heretofore unchallenged, claim that the VRA’s federalism costs should weigh heavily in the constitutional balance. It is, moreover, important to understand the success of the VRA in institutionalizing a national antidiscrimination policy as being closely linked to its relative tolerance of local decisionmaking, its encouragement of transparency and dialogue at the local level about acceptable governance of electoral design and administration, and the broader local participation in the political process that it has fostered—without cutting previously existing powerful constituencies out of these negotiations, but engaging them. These insights should be helpful in the current debate about how the preclearance regime, and the VRA as a whole, should be modified to reflect historical developments—including, for example, the transformation of election administration at the state and local levels due to the impact of technological innovation. Key issues that will have to be addressed are the coverage provision and the *Ashcroft* fix. Both issues have been the subject of ongoing debate and are beyond the immediate scope of this Article.

Section 5 preclearance exemplifies an approach to social and political change that has received attention in the legal literature by so-called “new institutionalists.” New institutional economists have shown the way here. New institutionalists share the recognition that “institutions” are practices of informal and formal social orderings. Formal legal rules and standards—namely, governments—shape institutions, but are significantly constrained and shaped by existing structures and their path-dependent processes of evolution.<sup>522</sup> Institutions embody power relations and

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exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that ‘[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end’; the Federal Government asserts that it is enough that the legislation be a ‘rational means to effectuate the constitutional prohibition.’ That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.” (internal citations omitted).

521. 521 U.S. 507, 520 (1997).

522. According to economist Douglass North, institutions are “rules of the game in a society,” or more formally “the human devised constraints that shape human interaction.” DOUGLASS NORTH,

arrangements between individuals and groups but, importantly, also embody social techniques and learning. My own emphasis here is on the persistence and structure of institutional change, which is not something to be contended with only occasionally, but is the context in which all policymaking takes place. In addition to the constitutional implications set forth above, this examination of section 5 preclearance serves as a case study in this larger theoretical inquiry.

Even stable institutions must evolve in response to social and demographic changes. New social groups emerge and pursue institutional changes to promote their own interests. As reformers, we want to progress existing social structures to promote rights, welfare, or more particular values. Sophisticated reformers all recognize that institutional change produces dislocation of existing practices, but the focus is all too often on innovation and progress. A natural blind spot is the failure sufficiently to recognize not merely the disruption of existing practices, but that all change involves intervention into complex ecosystems, inevitably causing unintended consequences. Existing practices and routines embody particular techniques, experiences, and knowledge sets acquired and passed on by local actors and groups. Institutional change compromises those power positions—often intentionally so. But it also threatens the disruption, displacement, or loss of the techniques and knowledge sets that underwrite contested practices. Local knowledge connected with contested practices, however, may produce positive externalities or spillovers in areas that are not targeted for reform, or in practices related to reform efforts that must nonetheless be preserved or fostered for reform to succeed. In the area of civil rights, the emphasis has understandably often been on the elimination of violations. What the success of section 5 shows, however, is that civil rights efforts answer to the more general dynamics of institutional change.