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Engineering the Endgame

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ENGINEERING THE ENDGAME

Ellen D. Katz*

This Article explores what happens to longstanding remedies for past racial discrimination as conditions change. It shows that Congress and the Supreme Court have responded quite differently to changed conditions when they evaluate such remedies. Congress has generally opted to stay the course, while the Court has been more inclined to view change as cause to terminate a remedy. The Article argues that these very different responses share a defining flaw, namely, they treat existing remedies as fixed until they are terminated. As a result, remedies are either scrapped prematurely or left stagnant despite dramatically changed conditions.

The Article seeks to map out a better response to changed conditions than the all-or-nothing options that presently define the debate. It argues that longstanding remedies should neither be terminated nor continued indefinitely, but instead should be adapted to better address changed circumstances. Specifically, the Article calls for a shift in remedial focus away from the effects of past discrimination to the local institutions that must deal with those effects most directly. It calls on courts, legislators, and voters to adapt remedies so that they provide institutions of local governance with the skills and resources needed to operate fairly in an environment inexorably shaped by past discrimination and in which some effects endure.

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INTRODUCTION

When should a remedy for racial discrimination end? The question comes up again and again. Has the time come to scrap the regional provisions of the Voting Rights Act ("VRA")? Or to dissolve a longstanding school desegregation decree? Is it now appropriate to get rid of affirmative action in university admissions or to discard the disparate impact tests that inhere in federal voting and employment law? Put differently, when is enough really enough?

Some effects of past discrimination are more lasting than others, and people and institutions differ in their willingness and ability to address persistent problems. But these factors do not best explain why some remedies have been tossed out or eroded substantially while others have been renewed or withstood challenge. It turns out that the durability of a remedy depends far more on the way key decision makers respond to changed conditions than on the conditions themselves. In particular, durability hinges on how such decision makers respond to a landscape that is, to varying degrees, much improved, but in which troubling problems nevertheless persist.

This Article examines the responses of two such decision makers. It shows that the U.S. Congress and the Supreme Court of the United States have responded quite differently to changed conditions when they evaluate longstanding remedies. And yet, I argue, their varied responses share a common flaw.

For its part, Congress has generally responded to change by staying the course. It has voted repeatedly to extend remedies beyond expiration dates and to restore those weakened by judicial interpretation. This stance suggests the view that improved conditions are dependent on a remedy's continued operation, and that persistent areas of deficiency are best addressed by maintaining existing remedies.¹

The Supreme Court, by contrast, has been more inclined to view change as cause to terminate a remedy. The Court has repeatedly pushed for closure by tying the termination of existing remedies to relatively weak or muddy criteria, or by relentlessly scaling back the remedy in sequential moves.² Defending this stance, the Justices have argued that intervening factors fuel persisting problems and that the discrimination under remedy is no longer the reason these problems endure.

These very different responses to changed conditions share a defining characteristic. They confront the altered landscape as if it were an on/off

1. See *infra* Sections I.A–C.

2. See *infra* Sections I.B, D, E.

switch. With few exceptions,³ both Congress and the Court have treated existing remedies as fixed in structure. Time and again, they have opted against adapting a remedy to better serve a changed environment, and instead have understood themselves to confront a stark choice: either terminate the remedy or let it continue, substantively unchanged.⁴ In other words, remedies remain fixed until they are terminated.

This result is a serious problem. It has led the Justices to precipitate termination prematurely because the only alternative they see is the status quo.⁵ But improved conditions are rarely as secure and unequivocal as this stance allows. Evidence may show, for instance, some diminution in racial polarization among voters, or in the racial achievement gap, but such encouraging trends require cultivation. Cutting short a remedy destabilizes improved conditions, and forgoes the opportunity to develop practices that might have made and kept them more secure.⁶

No less problematic, however, is Congress's proclivity to retain a remedy unchanged despite changed conditions. For one thing, this course is constitutionally unsustainable. While some improved conditions are fragile, the existing remedial regime is even more unstable and the Court is sure to scrap it in short order if left unchanged.⁷ Resistance might briefly prolong the project, or select components of it, but staying the course is not a viable long-term option.

Nor should it be. The conditions that prevailed when most remedies for racial discrimination were first instituted are, thankfully, no longer dominant. Racial discrimination indisputably persists today,⁸ but it is different in scale, scope, and tenor from what it once was. So too, the effects of past

3. See *infra* Section II.C.

4. The claim here is that the terms of the remedy rarely change, not that the method of enforcement is necessarily fixed. Cf. Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 754–55 (1992) (describing the flexibility with which courts twenty years ago handled the enforcement of existing remedial decrees, including sporadic efforts to modify the terms of such decrees).

5. Premature closure bears some resemblance to what is known as remedial deterrence, in that it is often motivated primarily by distaste for the remedy at issue. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) (discussing the concept of remedial deterrence and noting that in some instances “the threat of undesirable remedial consequences motivat[es] courts to construct . . . right[s] in such a way as to avoid those consequences”).

6. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 112–13 (1999) (describing remedies as being broader than rights and arguing that they “regulat[e] antecedent structures and practices that create the risk of such violations”).

7. See, e.g., *Nw. Austin Mun. Util. Dist. No. 1 v. Holder* (NAMUDNO), 129 S. Ct. 2504, 2512 (2009) (avoiding constitutional question in challenge to the VRA's constitutionality, but warning that “current burdens . . . must be justified by current needs”); see also *infra* notes 82–102 and accompanying text.

8. See, e.g., *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (finding employee was terminated because he was black, and because he complained about black coworkers being terminated); *United States v. Vulcan Soc'y, Inc.*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009) (finding that New York City Fire Department's use of a qualifying exam discriminated against minority candidates on the basis of race); *Consent Order, United States v. S & S Grp.*, No. 08-CV-4099 (N.D. Ill. Feb. 17, 2009) (enjoining real estate agency from “steering” minorities toward certain areas).

discrimination undeniably persist today, but these also now differ in type and intensity from what they once were.⁹ Failure to recognize these changes fundamentally distorts and trivializes history. As important, it disserves our present needs by wasting resources, imposing unnecessary burdens, and undermining existing achievements.

This Article seeks to map out a better response to changed conditions than the all-or-nothing options that presently define the debate. The argument put forth here is that longstanding remedies should neither be terminated nor continued indefinitely, but instead should be adapted to better serve changed circumstances. The Article then proposes one way existing remedies might be adapted productively.

Part I identifies five ways Congress and the Court have responded to changed circumstances when called upon to evaluate existing remedies for racial discrimination. This Part labels these responses *expiration*, *compliance*, *normalization*, *repudiation*, and *attrition*, and argues that they share a common failing. All offer a blunt choice between termination on the one hand, and continuation on the other. When Congress and the Court respond in these ways, they do not investigate how they might adapt a remedy to better address developing circumstances.

Part II calls for a different response. It urges Congress, the Court, and other key decision makers to respond to changed conditions by adapting longstanding remedies rather than terminating or maintaining them. Adaptation is not a euphemism for either slow destruction or long-term maintenance. Decision makers adapting remedies should reduce or eliminate those remedies that no longer address current problems effectively, but they will also need to expand or reformulate remedial efforts when doing so is necessary to advance remedial goals.

At the same time, a remedy's goal cannot and should not be to create the environment that would have existed had discrimination never occurred. Our culture has been shaped irrevocably by the practice of racial discrimination and by our varied efforts to address it. No remedy can excise that experience. Instead, decision makers should adapt the remedial project with

9. See, e.g., NAT'L CENT. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 2008 tbls.109 & 293 (2008), available at http://nces.ed.gov/programs/digest/d08/tables/dt08_109.asp?referrer=list, and http://nces.ed.gov/programs/digest/d08/tables/dt08_293.asp?referrer=list (showing, respectively, declining racial gap in high school graduation rate and growing percentage of professional degrees conferred on minority students); U.S. CENSUS BUREAU, BLACK ELECTED OFFICIALS BY OFFICE, 1970 TO 2002, AND STATE, 2002 tbl.404 (2002), available at <http://www.census.gov/compendia/statab/2010/tables/10s0404.pdf> (showing steady increase in black elected officials since 1970); U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008 tbl.4b (2008), available at <http://www.census.gov/hhes/www/socdemo/voting/index.html> (showing black registration and voting rates almost equal to that of whites). But see COLLEGE BOARD, 2009 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT tbl.8 (2009), available at <http://professionals.collegeboard.com/profdownload/cbs-2009-national-TOTAL-GROUP.pdf> (showing large gaps in test scores by ethnicity); Stephen Ansolabehere et al., *Race, Region and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010) (showing persistence of racial bloc voting, particularly in regions with a strong history of racial discrimination).

awareness of the enduring ways past discrimination continues to shape the contemporary landscape.

Part II offers one proposal for how this might be accomplished. It urges a shift in remedial focus away from the effects of past discrimination to the local institutions that must deal with those effects most directly. The rampant “constitutional wrong[s]” that longstanding remedial measures were originally created to address no longer inhere in the local institutions subject to them.¹⁰ Work nevertheless remains to be done to ensure that these institutions are not only constitutional, but also that they are constituted in ways that allow for good governance in an environment shaped by past discrimination and in which some effects endure. Congress, the Court, and other key decision makers should adapt existing remedies to ensure these institutions are up to the task. Put differently, a remedy is complete only when the restoration of local control is an informed assumption of responsibility in light of adversity and not just a devolution of power.¹¹

A final word by way of introduction. This Article defines a remedy for past racial discrimination in expansive terms. It considers traditional judicial remedies, like school desegregation decrees, imposed, crafted, and enforced by courts to address specific, adjudicated misconduct,¹² and the federal oversight Congress mandated in Section 5 of the VRA to address pervasive, regionally based, race-based disenfranchisement.¹³ The discussion, however, also considers provisions of federal voting rights and employment law that bar state and local officials from actions that produce racially disparate impacts,¹⁴ as well as affirmative action plans voluntarily adopted to promote diversity in higher education and other venues.¹⁵

These measures, of course, vary considerably. Some are more closely tied to past discrimination than others; some designate explicit time limits while others rely on periodic oversight or implicit sunsets; and some employ more overt racial criteria than others. A premise of this Article is that these

10. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 11 (1978) (describing the structural injunction as a remedial device designed to “reorganiz[e] an institution” based on the idea that “[t]he constitutional wrong is the structure itself”).

11. See *infra* notes 143–156 and accompanying text; cf. *Freeman v. Pitts*, 50 U.S. 467, 490 (1992) (“Where control lies, so too does responsibility.”).

12. See *infra* note 34.

13. 42 U.S.C. § 1973c (2006).

14. See, e.g., Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982) (amended 2006); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (construing Title VII of the Civil Rights Act of 1965 to prohibit activity with a racially disparate impact); see also *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (describing the “‘remedial’ race-based actions” Title VII’s disparate impact provisions “affirmatively require[]”).

15. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding the use of racial classifications in a school district’s student assignment plan unconstitutional); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action plan adopted by the University of Michigan Law School); *BERKELEY UNIFIED SCHOOL DISTRICT, STUDENT ASSIGNMENT PLAN/POLICY* (2004), available at <http://www.berkeley.net/index.php?page=student-assignment-plan> (describing the race-conscious student-assignment system used in the Berkeley Unified School District).

differences are ones more of degree than kind, and should not mask a common purpose. Rather than discrete efforts operating in separate realms, these measures are better understood as a cohesive project meant to address the consequences of the rampant racial discrimination that once defined public life in America.¹⁶

Stepping back and examining the remedial project through this wider lens reveals a common flaw in the way two key institutions have addressed a crucial and recurring question. Termination and continuation of a remedy are not the only possible responses to changed conditions. This Article offers an alternative. The endgame requires structure, and its success will ultimately be measured not by duration alone, but also by the contours of the path selected.

I. EXISTING RESPONSES

Resisted from their inception, efforts to remedy racial discrimination have always been controversial. Calls to terminate these efforts are recurrent, and demands to do so are lodged repeatedly with various institutions. This Part focuses on how two institutions have responded. It culls from remedy-specific tests five distinct ways Congress and the Court have responded to changed conditions when evaluating challenged remedies.

A. Expiration

Both Congress and the Court have periodically placed expiration dates on remedial regimes. Such dates tie termination of a remedy to the calendar rather than to a specific condition addressed by the remedy itself. Reliance on such dates might accordingly suggest the irrelevancy of changed conditions, apart, of course, from the simple passage of time. Expiration dates nevertheless offer a means to force a critical evaluation of those changes, and, in principle at least, the opportunity to adapt an expiring remedy to them. In practice, however, neither Congress nor the Court has invoked or relied on expiration dates for this purpose.

For its part, Congress has used expiration dates in the VRA as junctures to reaffirm but not fundamentally restructure the remedy and to authorize its continued operation. The Court, by contrast, has suggested that an expiration date should be a nondiscretionary "off switch" triggered solely by the

16. Included among these measures are diversity-based affirmative action policies that proponents defend as nonremedial. *See, e.g., Parents Involved*, 551 U.S. at 725; *Grutter*, 539 U.S. at 337–40. Such policies are considered remedial here based on the view that, absent discrimination, however remote, race-blind admission criteria or school assignment should have produced the diversity in enrollment such policies sought to promote. *See, e.g.,* Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—And Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 714 n.45 (1999). A similar defense attaches to the disparate impact tests inhering in Title VII and the VRA, although here the remedial characterization is bolstered by the fact that congressional power to enact the provisions is contingent on it. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

passage of time. It has not, however, had the opportunity to put this inclination into practice.

Congress has repeatedly placed statutory expiration dates on critical provisions of the VRA. Four such dates—1970, 1975, 1982, and 2007¹⁷—have passed, each one requiring Congress to act affirmatively to keep the statutory provisions operational. Each time, Congress treated the expiration date not as a termination point or a point for serious reflection, but instead as a juncture to affirm existing provisions no one genuinely anticipated would expire.

At first, the endurance of the VRA reflected the magnitude of the problems the statute targeted. While the VRA swiftly enabled once-disenfranchised citizens to register and vote “without hindrance,”¹⁸ these developments quickly exposed other problems that hampered meaningful participation. Elected officials remained overwhelmingly unresponsive to minority voters despite a vast increase in minority voter participation.¹⁹ Minority-preferred candidates made little headway in elections marked by racial appeals, racially polarized voting, and the use of very large or at-large electoral districts.²⁰ Racial discrimination in various areas of public life continued unabated.²¹ Recognizing the severity of these problems, Congress repeatedly renewed the VRA’s temporary provisions.

As it did so, the VRA evolved from an iconic civil rights law into something of a sacred text. The statute’s symbolic resonance grew steadily over time, even as its specific terms remained largely obscure. Belief in the VRA’s salience became so entrenched that by 2006, most members of Congress saw little to gain and much to lose by opposing extension of the statute.²² They consequently treated the statute’s expiration date as reason to renew the existing remedy rather than as cause to terminate or fundamentally restructure the regime.²³

17. See, e.g., 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 at 42 U.S.C. §§ 1971–1973 (2006)) [hereinafter 2006 Reauthorization] (enacted one year prior to actual expiration date); Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971–1973 (2006)) [hereinafter 1982 Reauthorization]; Voting Rights Act Amendments of 1975, Pub. L. No. 94–73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1971–1973 (2006)) [hereinafter 1975 Reauthorization]; Voting Rights Act Amendments of 1970, Pub. L. No. 91–285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1971–1973 (2006)) [hereinafter 1970 Reauthorization].

18. See *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 84 (1980) (internal quotation marks omitted).

19. *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (citing S. REP. NO. 97–417, at 29 (1982)).

20. *Id.* at 47–48.

21. See, e.g., S. REP. NO. 97–417, at 14 (1982).

22. But see Carl Hulse, *Rebellion Stalls Extension of Voting Act*, N.Y. TIMES, June 22, 2006, at A23, available at <http://www.nytimes.com/2006/06/22/washington/22vote.html?scp=1&sq=&st=nyt> (noting that only a few House members did not support the bill).

23. For their part, the members of Congress who sought termination emphasized not the calendar but instead contemporary conditions they argued no longer justified the statutory regime. See, e.g., 152 CONG. REC. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood); Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148

The Supreme Court, by contrast, has seemed more inclined to view an expiration date as a nondiscretionary termination point. Seven years ago, the Court endorsed an expiration date for an admissions program at the University of Michigan Law School. *Grutter v. Bollinger*²⁴ upheld a program in which race operated not as a hard quota but instead as a “plus” factor meant to enroll a “critical mass” of minority students at the law school. Writing for a divided Court, Justice O’Connor held that the law school’s program employed a “narrowly tailored use of race” necessary “to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”²⁵ Justice O’Connor, however, made clear that the program’s validity depended on its temporary status. Insisting that the admission policy “must be limited in time,” Justice O’Connor set forth the Court’s “expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²⁶

Justice O’Connor did not elaborate, and by presenting the expiration date as an expectation rather than a firm requirement, she may have simply meant to allow some flexibility in *Grutter*’s application. In other words, Justice O’Connor may have hoped the law school’s program would be obsolete by 2028, but she nevertheless recognized that an examination of conditions at that time might show that the program remain necessary even then.²⁷

Read most strongly, however, *Grutter* suggests an intent to preclude such an outcome-oriented inquiry. Justice O’Connor insisted that the admissions program “must be limited in time,” and tied that limitation not to a particular observable condition but instead to an extrinsic, outcome-independent criterion. On this reading, the Court should hold the admissions policy obsolete in 2028 as a matter of law, even if nothing changes on the ground apart from the passage of time.

Grutter was widely read this way,²⁸ and much of the criticism the decision generated took aim at this reading. Opponents of affirmative action saw no reason to wait a quarter century before scrapping a program that they thought was presently misguided and unconstitutional.²⁹ Supporters of the

(2007), <http://thepocketpart.org/2007/12/10/pildes.html>. The complaint that the decision to reauthorize the VRA was mechanical and nondeliberative might have been lodged with equal force had Congress terminated the VRA based solely on the expiration date.

24. 539 U.S. 306 (2003).

25. *Id.* at 343.

26. *Id.* at 342–43.

27. See, e.g., Boyce F. Martin Jr., *Fifty Years Later, It’s Time to Mend Brown’s Broken Promise*, 2004 U. ILL. L. REV. 1203, 1219 (arguing the twenty-five year window was not meant to constitute a firm expiration date).

28. See, e.g., Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 201 (2003) (arguing O’Connor’s “expectation” constituted a warning to universities that if their affirmative action programs remained unchanged in twenty-five years they would be invalidated); Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced Grutter and Gratz*, 92 KY. L.J. 241, 260 (2004) (interpreting the twenty-five years as a firm expiration date).

29. E.g., *Grutter*, 539 U.S. at 386 (Rehnquist, C.J., dissenting); *id.* at 349 (Scalia, J., dissenting); *id.* at 350 (Thomas, J., dissenting); see also Richard H. Sander, *A Systematic Analysis of*

law school's admissions policy thought the expiration date ill-advisedly mandated closure long before the policy's goals could be realized.³⁰ Opponents and supporters alike deemed the expiration date capricious, being responsive neither to the policy's substance nor to its objectives. The expiration date seemed to bear no relation at all to the questions that seemed so pressing.

But that may have been its primary appeal. The Court may have embraced an expiration date in *Grutter* precisely because doing so could avoid a messy inquiry into ambiguous conditions on the ground and the need to engage with the merits of the policy itself. It nominally calls for neither expertise nor politics in its application. Look at the calendar and be done.³¹

We do not know whether the Court ultimately would have done so, opting to treat *Grutter's* expiration date as a nondiscretionary termination point.³² Even if the Court's decision in *Grutter* proves to be durable, the affirmative action plan it upheld was not. Voters in Michigan eliminated the law school's admissions policy long before *Grutter's* expiration date came to pass.³³

B. Compliance

At times, both Congress and the Court have responded to changed conditions by designating specified changes as criteria for termination. Both institutions have demanded a remedy's termination when compliance with the criteria is shown and continuation of the existing remedy when it is not. The Court has opted for weak criteria that are easily satisfied, and hence remedies have been terminated. Congress has relied on more rigorous conditions with which compliance has proven costly and thus remedies have endured. Both institutions treat compliance as an "off switch," albeit one that switches off at dramatically different rates.

The modern Court, for example, selected easy-to-meet criteria to govern the dissolution of school desegregation decrees. Back in the early 1990s, hundreds of public school districts operated under such decrees, some

Affirmative Action in American Law Schools, 57 STAN. L. REV. 367 (2004) (arguing that race-conscious affirmative action policies do more harm than good to black law students and lawyers).

30. E.g., Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 631 (2007) (objecting to *Grutter's* expiration date "given that racial minorities are unlikely to have secured any meaningful degree of parity in the allocation of societal resources within that time").

31. See Michael Greve, *Terminating School Desegregation Lawsuits*, 7 HARV. J.L. & PUB. POL'Y 303, 313–14 (1984) (calling on Congress to set a statute of limitations for terminating existing school desegregation lawsuits).

32. Assuming, of course, that *Grutter* as precedent would have survived that long. See, e.g., Martin D. Carcieri, *A Reply to the Editors of the Michigan Journal of Race and Law on "Grutter v. Bollinger and Civil Disobedience"*, 32 DAYTON L. REV. 47, 53 (2006). But see Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1538–39 (2007).

33. See MICH. CONST. art I, § 26.

dating back to the late 1960s, and others of more recent origin.³⁴ Calls to terminate desegregation decrees date from their inception, but most decrees withstood challenges well into the 1990s.³⁵ This changed, however, once the Supreme Court issued three decisions that defined new criteria for termination.

The first, *Board of Education v. Dowell*, set the general conditions—namely, that the school board in question “ha[s] complied in good faith with the desegregation decree since it was entered, and . . . [that] the vestiges of past discrimination have been eliminated to the extent practicable.”³⁶ *Freeman v. Pitts* followed, holding that the *Dowell* criteria might be satisfied absent the elimination of racially identifiable schools, at least when “reseggregation” was the product “not of state action but of private choices.”³⁷ *Freeman* added that satisfaction of the *Dowell* criteria might be accomplished incrementally and portions of a decree dissolved even as federal supervision continued over discrete elements.³⁸

A third decision, *Missouri v. Jenkins*, held that “white flight” from urban districts to surrounding suburbs was not among the vestiges of unconstitutional discrimination that need be addressed to satisfy the criteria for dissolution.³⁹ In *Jenkins*, this meant that a desegregation decree could not lawfully direct resources to city magnet schools if the reason for doing so was to make such schools more attractive to suburban students.⁴⁰ *Jenkins* further held that student achievement scores need not reach “national

34. U.S. COMM’N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 22, 35 (2007) [hereinafter BECOMING LESS SEPARATE?]. The terms varied considerably. Some decrees still required mandatory busing, although far fewer had done so in the 1970s and early 1980s. *Id.* at 21 (stating that the Department of Justice (“DOJ”) placed lesser reliance on busing as a remedy after 1982); see also *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 659 F. Supp. 363, 371 (E.D. Ark. 1987) (providing one example of a court including busing in settlement plan). More reliance came to be placed on magnet schools, financing orders, and administrative reforms. See, e.g., *id.* at 370 exhibit A (ordering financing from the state); *Smiley v. Blevins*, 514 F. Supp. 1248 (S.D. Tex. 1981) (allowing continuation of magnet school program in lieu of busing); Order Approving Consent Decree, *Lee v. Lee Cnty. Bd. of Educ.*, 963 F. Supp. 1122 (M.D. Ala. 1997), available at <http://www.justice.gov/crt/edo/documents/leeor.php> (requiring administrative reforms to correct racial imbalance in special education programs). For more examples, see U.S. Dep’t of Justice, *Educational Opportunities Section: Race*, CIVIL RIGHTS DIVISION, <http://www.justice.gov/crt/edo/documents/classlist.php#race> (last visited Sept. 12, 2010).

35. See, e.g., BECOMING LESS SEPARATE?, *supra* note 34, at 22, 36–37 (showing that the number of open consent orders only decreased from 444 to 430 between 1991 and 2000, but decreased from 430 to 266 between 2000 and 2007, and that 121 of 193, or 62.7%, of districts in the southeastern U.S. that have been granted unitary status have been unitary since 2000); Challen Stephens, *Feds keep city school on hold*, HUNTSVILLE TIMES, Aug. 13, 2009, at 2A (noting another 54 decrees were terminated between 2007 and 2009).

36. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991).

37. *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

38. *Id.* at 496.

39. *Missouri v. Jenkins*, 515 U.S. 70, 100 (1995) (finding that the district court acted beyond its authority in seeking to improve the “desegregative attractiveness” of city schools in an attempt to attract suburban students).

40. *Id.*

norms” prior to dissolution of a decree, thereby suggesting that a racial test score gap, like white flight, was not among the vestiges of discrimination that needed to be addressed to satisfy the criteria to dissolve a decree.⁴¹

Dowell, *Freeman*, and *Jenkins* minimized the causal connection between original de jure segregation, on the one hand, and things like weak test scores and white flight, on the other. The decisions held that a desegregation remedy could be complete notwithstanding the persistence of these problems. Indeed, they held that desegregation was complete even as school districts operated racially identifiable schools—schools where the racial identification had grown more, rather than less, pronounced over the years the decree had been in operation.⁴² In all three cases, the Justices expressed impatience with the project of desegregation⁴³ and suspicion that prolonging the existing endeavor would change little of substance on the ground.⁴⁴

Critics called the *Dowell*, *Freeman*, and *Jenkins* criteria misguided and the withdrawal of federal supervision based on them premature.⁴⁵ Prompt withdrawal was nevertheless what the Court intended. As Jim Ryan has explained, the three decisions “sent the unmistakable message that district courts should get out of the business of school desegregation and return school districts to local control.”⁴⁶ The message was received. In the years since the three decisions, federal courts have repeatedly found school

41. *Id.* at 117 n.1 (Thomas, J., concurring) (“It appears that the low achievement levels were never properly attributed to any discriminatory actions on the part of the State or of KCMSD, [that the district court] simply found that the KCMSD’s test scores were below national norms in reading and mathematics, [and that,] [w]ithout more, these statistics are meaningless.”).

42. *See, e.g.*, *BECOMING LESS SEPARATE?*, *supra* note 34, at 67 tbl.5.7 (showing litigated school districts becoming less integrated between 1992 and 2005).

43. *Jenkins*, 515 U.S. at 102 (instructing district courts to “bear in mind” that the goal “is not only ‘to remedy the violation’ to the extent practicable, but also ‘to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution’”) (quoting *Freeman*, 503 U.S. at 489); *Freeman*, 503 U.S. at 505 (noting that desegregation efforts were meant to be temporary, and that “no one’s interest is furthered by subjecting the Nation’s educational system to ‘judicial tutelage for the indefinite future’”) (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249 (1991)).

44. *See Freeman*, 503 U.S. at 495 (“It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.”).

45. *See, e.g.*, GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 314–18 (1996); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS L.J. 885, 885 (1993); Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597 (1996); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1218 (2000); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 358 (2002); Mark V. Tushnet, *The “We’ve Done Enough” Theory of School Desegregation*, 39 HOW. L.J. 767, 775 (1996); Bradley W. Joondeph, Note, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 167 (1993).

46. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 142–43 (2007); *see also* Greve, *supra* note 31, at 305–06 (stating in 1984 that “desegregation suits are never terminated”).

districts to be in compliance with the *Dowell*, *Freeman*, and *Jenkins* criteria and have accordingly dissolved hundreds of desegregation decrees.⁴⁷

By contrast, only a handful of jurisdictions have established their compliance with criteria Congress set back in 1982 to terminate or “bailout” from the VRA’s preclearance requirement.⁴⁸ Part of the reason is that technical compliance with the criteria is comparably difficult.⁴⁹ The bailout standard employs more criteria than do *Dowell*, *Freeman*, and *Jenkins*, and the criteria Congress selected are more detailed and concrete. Five separate grounds facially disqualify a locality from release,⁵⁰ and several other criteria are potentially disqualifying.⁵¹ No state in which preclearance operates statewide is presently able to satisfy these criteria.⁵²

47. See *BECOMING LESS SEPARATE?*, *supra* note 34, at 22. Between 1991 and 2009, federal courts have dissolved at least 236 DOJ-monitored desegregation decrees, *see id.* at 27 (showing 128 consent decrees terminated between 1991 and 2007, bringing number of monitored consent decrees down to 266 from 444); Stephens, *supra* note 35 (showing the DOJ estimate of monitored consent decrees down to 208, for a total of 236 terminated decrees), and allowed modification of 128 consent decrees between 1995 and 2001 alone, *see BECOMING LESS SEPARATE?*, *supra* note 34, at 27 fig.3.3.

48. See, e.g., *NAMUDNO*, 129 S. Ct. 2504, 2516 (2009). Prior to 1982, the only way such places could escape the preclearance obligation was to demonstrate that they should have never been subjected to the regime in the first instance. Several places had been subjected due to imprecision with the original trigger, which linked coverage with turnout and registration data, and thus subjected some places to preclearance even though they never employed the discriminatory tests and devices the statute was targeting. See Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 *HOUS. L. REV.* 33, 56–57 (2007); *see also infra* notes 67–69 and accompanying text.

49. E.g., Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the Voting Rights Act?*, 68 *MD. L. REV.* 481, 536–37 (2009); Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 *WASH. U. L.Q.* 1, 42 (1984) (“[T]he conditions for termination of coverage have been made so restrictive that bailout will continue to be impossible for most jurisdictions.”). *But see* J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006* 257, 257 (Ana Henderson ed., 2007).

50. A locality is disqualified from release if it has been found by a federal court to have violated Section 2 of the VRA; it was a party to a consent decree, settlement, or unfavorable judgment that ended Section 2 litigation; it required the presence of federal registrars or election observers; it failed to comply with Section 5; or the attorney general interposed an objection (not overturned by a court) to the state or political subdivision’s change to its voting procedures. 42 U.S.C. § 1973b(a)(1)(A)–(E) (2006). *See generally* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 *URB. LAW.* 379, 380 (1985).

51. 42 U.S.C. § 1973b(a)(1)(F) (requiring the state or subdivision to eliminate voting procedures that dilute equal access to the electoral process, to engage in “constructive efforts” to eliminate intimidation and harassment of minority voters, and to engage in such efforts to expand voter registration opportunities and to appoint minority election officials); *see also* Williamson, *supra* note 49, at 68. *But see* Hebert, *supra* note 49, at 273 (arguing that compliance with the bailout criteria is less difficult than typically suggested because the DOJ often employs a “common sense” approach that allows bailout despite minor Section 5 violations); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 *N.Y.U. REV. L. & SOC. CHANGE* 69, 116 n.288 (2003).

52. See Pitts, *supra* note 49, at 536; U.S. Dep’t of Justice, *Section 5 Covered Jurisdictions*, CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/voting/sec_5/covered.php (last visited Sept. 12, 2010) (providing a map indicating which states, counties, and townships are subject to Section 5 of the VRA).

Many smaller jurisdictions are widely thought to be in compliance, but the showing they must make to demonstrate their compliance is potentially daunting. To obtain the exemption, a county or similar political unit must show not only its compliance with the statutory criteria but also the compliance of all subunits of local government located within its borders. Even when factually possible, making this showing is burdensome when, as is often the case, many subunits are involved.⁵³

The bailout statute, moreover, adds to the task by placing on the covered jurisdiction the burden of coming forward with evidence demonstrating compliance. By contrast, the *Dowell*, *Freeman*, and *Jenkins* criteria set forth what needs to be shown, but not who needs to show it. Thus states and private groups have sought the dissolution of desegregation decrees even when school districts were unwilling to do so,⁵⁴ and the prospect of such actions has prompted school districts otherwise disinclined to seek dissolution to pursue it.⁵⁵ Covered jurisdictions, by contrast, face no comparable pressure to pursue bailout.⁵⁶ If they are not inclined to seek the exemption, petitions are not filed.⁵⁷

A recent Supreme Court ruling may prod some additional bailout applications.⁵⁸ Still, public officials who might easily show local compliance with

53. See, e.g., J. Gerald Hebert, *Could the Voting Rights Act Use a Bailout?*, CAMPAIGN LEGAL CENTER BLOG (Oct. 5, 2006), http://www.clcblog.org/blog_item-76.html. The few places that have obtained bailout in recent years were all in Virginia, where overlapping local governments have not proliferated to the degree they have elsewhere. See, e.g., 1 ECON. & STATISTICS ADMIN. & U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *INDIVIDUAL STATE DESCRIPTIONS: 2002 287* (2005) (showing Virginia to be 43rd out of the 50 states in number of local governments with 521).

54. See *supra* note 147 and accompanying text; see also *BECOMING LESS SEPARATE?*, *supra* note 34, at 28 (showing the DOJ has actively sought dissolution of consent decrees since 2000); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1202, 1207 (2000); Tajuana Cheshier, *County requests unitary status*, JACKSON SUN, Dec. 13, 2008, at B1 (county brought suit seeking declaratory judgment that school district is unitary, after school board declined to do so); Tajuana Cheshier, *Decades searching for unity*, JACKSON SUN, July 15, 2007, at A1 (school board did not initiate application for unitary status, but joined in application after it was initiated by the DOJ); *Walker critics fight his bid to freeze school-case appeal*, ARK. DEMOCRAT-GAZETTE, July 26, 2007 (private parties brought action to block settlement agreement and immediately seek unitary status after school board voted to settle with party seeking partial continuation of consent decree).

55. See, e.g., Tajuana Cheshier, *Many residents give the School Board mediocre mark*, JACKSON SUN, Sep. 17, 2007, at A1 (showing community displeasure with school board for not seeking unitary status); Tajuana Cheshier, *County Requests Unitary Status*, JACKSON SUN, Dec. 13, 2008, at B1 (showing district applying for unitary status fourteen months later).

56. See, e.g., 152 CONG. REC. H5198 (daily ed. July 13, 2006) (considering, but rejecting, proposals requiring the DOJ to actively solicit bailout applications during the 2006 reauthorization of the VRA).

57. See, e.g., *id.* (noting proposals to require the DOJ to solicit bailout applications).

58. The Court recently read the bailout statute to allow political subdivisions within counties to seek bailout directly. *NAMUDNO*, 129 S. Ct. 2504, 2516–17 (2009). Unlike counties, these smaller units of local government need only make the case for their own eligibility, and need not acquire information from other subunits that may be resistant or otherwise unable to satisfy the requisite criteria. See, e.g., *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, available at <http://www.justice.gov/opa/pr/2010/September/10-crt-1067.html>; J. Gerald Hebert, *Few*

the bailout criteria often have little interest in doing so. Some see preclearance as an important deterrent against misconduct, one that gives them political cover to block discriminatory moves that might otherwise be implemented.⁵⁹ Others fear a political backlash from constituents who might equate a bailout application with opposition to minority voting rights.⁶⁰ Some hope to secure partisan advantage from federal oversight.⁶¹ For all, proving compliance with the statutory criteria is costly not because satisfying the specific criteria is always factually difficult, but because demonstrating compliance proves to be costly in other ways.

Petitions showing compliance with the bailout criteria have accordingly been rare and the regime endures even in places eligible to be released from it. Compliance with the criteria to dissolve school desegregation decrees is much easier, and petitions for dissolution are eagerly pursued.⁶² These outcomes diverge dramatically, and yet the criteria used in both contexts share a common characteristic. They function as an “off switch.” Show compliance and the remedy ends, or fail to make this showing and the remedy continues. Adaptation based on changed conditions never occurs.

C. Normalization

A third response to changed conditions views improved conditions and deficient ones alike as cause to persevere with the status quo. This response, called here *normalization*, deems such perseverance the best way to tackle persistent problems and to protect salient improvements.⁶³ Normalization views the remedial regime as a regulatory one, flatly rejecting the idea that remedies are exceptional, time-limited devices justified by exigent circumstances. Instead, it views the remedial project as an enduring one, with terms and conditions capable of lasting indefinitely.

Congress’s 2006 decision to reauthorize the VRA’s preclearance provision was, in many respects, a move to normalize that regime. Considerable evidence showed that opportunities for minority political participation in regions subject to the remedy were much improved both from 1965, when Congress first enacted the remedy, and 1982, when it had last reauthorized the statute. Still, various obstacles to full participation persisted and trou-

Local Governments Embracing Bailout Provision, Aug. 11, 2010, available at http://www.clcblog.org/blog_item-344.html.

59. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 24 (2007).

60. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 214 (2007).

61. *Id.* at 224–29. See generally Ellen D. Katz, *Some Governance Issues in Anti-Discrimination Law* (draft on file with author).

62. Cf. Chris Kirkham, *Civil rights struggle lives on in La.’s public schools*, NEW ORLEANS TIMES-PICAYUNE, July 29, 2007, at 1 (stating black community leaders referred to a desegregation decree as a “sacred document”).

63. See, e.g., Pamela Karlan, *The Second Reconstruction, the Third Reconstruction, and the Reconstruction of Voting Rights*, *The Futures of Elections Scholarship*, A Tobin Project/ALI Conference at Duke University.

bling, albeit no longer blatant, discrepancies remained between the places subject to preclearance and those that fell outside the statutory regime.⁶⁴

Congress's response to this evidence was to stay the course it first set in 1965. It extended the preclearance requirement for twenty-five more years, and made sure the regime would operate just as it historically had. A core argument in favor of this approach posited that opportunities for minority voters in places subject to preclearance looked as good as they did in 2006—and decidedly did not look any worse—only because the statutory regime was continuously deterring misconduct. Eliminate the statute as a deterrent, and that misconduct promised once again to find expression.⁶⁵

Some anecdotal evidence supported this claim,⁶⁶ but it was primarily a predictive judgment that bad stuff would happen if Congress scrapped preclearance. Not everyone, to be sure, was convinced, and Chief Justice Roberts, among others, expressed some colorful skepticism on this point.⁶⁷ The prediction, however, was a prediction, and as such, was necessarily non-falsifiable absent repeal. It rested on the idea that preclearance operated less as a remedy and more as a treatment for a chronic condition. The condition may be controlled, but ultimately not cured. Call it the legislative equivalent of Lipitor for life.

This view fueled Congress's commitment to preserve preclearance in its original form and to maintain its original scope. Congress thus refused to ease the bailout criteria, which, as noted above, allow places subject to preclearance to escape the obligation by demonstrating their compliance with specific statutory criteria.⁶⁸ Congress enacted these criteria back in 1982, and by 2006 many places indisputably had come into compliance with them.⁶⁹ Even so, very few jurisdictions had, in fact, bailed out.⁷⁰

64. See, e.g., *Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey* (*Mukasey*), 573 F. Supp. 2d 221, 247–66 (D.D.C. 2008) (discussing this evidence); 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*, *supra* note 49, at 183–221.

65. See, e.g., *Mukasey*, 573 F. Supp. 2d at 258–59; *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 160 (2006) [hereinafter *Hearing: Introduction*] (written response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Education Fund, Inc.); *Motion to Affirm* at 17, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322).

66. See *Mukasey*, 573 F. Supp. 2d at 264–65.

67. See Transcript of Oral Argument at 28, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322) (“Well, that’s like the old -- you know, it’s the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that’s silly. Well, there are no elephants, so it must work.”); see also *Hearing: Introduction*, *supra* note 65, at 8 (statement of Richard L. Hasen, Professor, Loyola Law School) (“The problem with [the deterrent rationale] is that it would justify preclearance for an undetermined amount of time into the future.”).

68. See *supra* notes 48–52 and accompanying text.

69. See, e.g., 152 CONG. REC. H5198 (2006) (statement of Rep. Westmoreland) (“So today, hundreds of jurisdictions that are otherwise able to bail out simply are not doing so . . .”).

70. *NAMUDNO*, 129 S. Ct. at 2516 (2009) (noting that only seventeen jurisdictions have bailed out since 1982).

Several proposals to facilitate bailout by eligible jurisdictions were presented in the course of the 2006 reauthorization,⁷¹ but they garnered little support and much opposition.⁷² It turned out that few people wanted to encourage bailout even by jurisdictions widely recognized to be eligible for release under the existing criteria. Some fretted that many of these places still needed federal oversight⁷³ while others insisted that the burden pre-clearance placed on local authority was minimal.⁷⁴ Underlying these sentiments was the conviction that the remedial regime should continue as is.

This aversion to change also propelled Congress's decision to overrule the result of the Supreme Court's 2003 ruling in *Georgia v. Ashcroft*.⁷⁵ The case addressed the validity under the VRA of a state districting plan which "unpacked" several districts in which African American voters had comprised a majority. Pushed through by Georgia Democrats, the plan dispersed these loyal Democratic voters among several districts and thereby expanded Democratic influence. Doing so, however, meant that some minority voters would no longer be able to elect their preferred candidates as they had done previously from the majority-minority districts the plan demolished.

The Supreme Court's response had been to let Georgia do whatever it wanted. The Court said the state could choose whether minority voters should have diffuse influence or instead secured representation, and endorsed a multifaceted inquiry that seemed designed to render any degree of influence sufficient.⁷⁶ As others have explained, this ruling effectively terminated preclearance as an operational remedy in the redistricting context.⁷⁷

71. See 152 CONG. REC. H5198 (Westmoreland amendment proposing to require annual determination by the attorney general as to which jurisdictions are eligible for bailout and to inform such jurisdictions of their eligibility); see also *Hearing: Introduction*, *supra* note 65, at 14 (testimony of Samuel Issacharoff, Professor, New York University School of Law); Rick Hasen, *Drafting a Proactive Bailout Measure for VRA Reauthorization*, ELECTION LAW BLOG (May 18, 2006 09:37 AM), <http://electionlawblog.org/archives/005655.html>.

72. See, e.g., Luci Baines Johnson & Lynda Johnson Robb, Op-Ed, *Don't Dismantle the Voting Rights Act*, N.Y. TIMES, July 7, 2006, at A17; see also Hebert, *supra* note 49.

73. See *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9–10 (2006) [hereinafter *Hearing: Benefits and Costs*] (testimony of Armand Derfner, Attorney, Derfner, Altman & Wilborn); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3–4 (2006) (testimony of Anita Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights); *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcommittee on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005) (testimony of Jack Kemp, Former Member of Congress, Former Secretary of Housing and Urban Development, Founder and Chairman, Kemp Partners) ("[T]he loss of Federal authority to control voting procedures could enable local governments to easily discriminate against minority voters").

74. See *Hearing: Benefits and Costs*, *supra* note 73, at 10 (testimony of Armand Derfner).

75. 539 U.S. 461 (2003).

76. *Id.* at 482–83; see also *id.* at 491–92 (Kennedy, J., concurring) (expressing skepticism on Section 5). For criticism, see *id.* at 493 (Souter, J., dissenting) and Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31–32 (2004).

77. *Ashcroft*, 539 U.S. at 492–94 (Souter, J., dissenting); Brief Amicus Curiae of Georgia Coalition For The People's Agenda in Support of Appellees at 4–5, *Ashcroft*, 539 U.S. 461 (No. 02–

In 2006, Congress responded by restoring the remedy to what it had been prior to *Georgia v. Ashcroft*. It eliminated the discretion the Supreme Court had given the state, and prohibited covered jurisdictions from using influence, however defined, as a replacement for the secured election of a preferred representative.⁷⁸

The *Georgia* litigation left no doubt that much had changed in Georgia since Congress had last reviewed and reauthorized the preclearance statute. The challenged districting plan had been crafted by African American representatives in the Georgia legislature—that is, by representatives who had been elected in numbers sufficiently substantial to play a decisive role in the state’s legislative process.⁷⁹ This new political environment, while hardly infallible, was indisputably very different from what had existed previously.⁸⁰

Congress nevertheless concluded that no change evident in the litigation, or, for that matter, in the large record it amassed in support of preclearance more generally, warranted changing the preexisting remedial regime in any meaningful way. Without doubt, conditions had changed, but Congress saw this altered landscape not as an “off switch” or as cause to adapt the regime, but rather as reason to stay the course. It accordingly voted overwhelmingly to reauthorize the regime with its historic contours.

D. Repudiation

A fourth response to change, repudiation, demands the immediate termination of an existing remedy. Repudiation posits that particular remedial methods impose serious costs that presently outweigh any benefits the remedies produce. While some believe these costs were never justified, proponents of repudiation more often argue that changed conditions have transformed once-justified costs into unjustified ones.⁸¹ Promoting this view, a number of individual Justices have repeatedly called on the Court to

182); Karlan, *supra* note 76, at 21–22; *see also infra* notes 110–111 and accompanying text (discussing *Georgia v. Ashcroft* as an example of attrition).

78. The vehicle for this security has long been the majority-minority district, or its functional equivalent, the so-called coalition district, and thus the statutory “fix” sought to prohibit jurisdictions subject to Section 5 from dismantling such districts in the name of purported influence. *See* Persily, *supra* note 60, at 179–92, 217 (discussing legislative history to the *Georgia v. Ashcroft* “fix” and suggesting a lack of consensus as to what was intended).

79. *See generally* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

80. *See* Karlan, *supra* note 76, at 32–33 (arguing that black participation doesn’t resolve concerns).

81. *See, e.g., Freeman v. Pitts*, 503 U.S. 567, 505 (1992) (Scalia, J., concurring) (describing terms of early desegregation decrees as being “extraordinary in law but not unreasonable in fact,” “granting the merits of this approach at the time,” while pointing out “it is now 25 years later”); Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, AMERICAN ENTERPRISE INSTITUTE ONLINE, Aug. 6, 2010, available at <http://www.aei.org/article/101881> (arguing that the remedial regime set forth in the VRA of 1965 “was an indispensable and beautifully designed response to a profound moral wrong” but that today it “has become a barrier to the political integration that was its original aim”).

repudiate particular remedial methods, though these calls have yet to garner majority support.

A commitment to colorblindness is the most common example of repudiation. Several Justices have invoked this commitment and urged the Court to repudiate race-conscious remedies. Most often, they equate a remedy's reliance on race-conscious criteria with the invidious discrimination that prompted the remedy (or ones like it) in the first place. Chief Justice Roberts adopted this stance three years ago when he led the Court to scrap race-based student assignment plans used voluntarily by two school districts as a means to promote racially balanced schools. Likening the challenged plans to de jure segregation of the sort outlawed by *Brown v. Board of Education*,⁸² the Chief Justice bluntly stated, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁸³

Other Justices have likewise equated the cure with the disease in making the case for colorblindness,⁸⁴ and have buttressed the argument by citing ill effects they see that follow from reliance on color-conscious criteria.⁸⁵ A majority of the Court, however, has yet to adopt this stance and repudiate entire remedies based on the colorblindness principle. To be sure, the Justices have disavowed portions of specific remedial efforts, but typically on far more narrow grounds than the colorblindness principle would require.

Chief Justice Roberts, for example, was able to toss out the race-conscious student assignment plans at issue in *Parents Involved*, but only with Justice Kennedy's equivocal concurrence that would have allowed at least some racially informed decisions to continue.⁸⁶ Similarly, Justice Kennedy led the Court to reverse New Haven's decision to scrap a firefighters exam in light of race-based factors, but the opinion in *Ricci v. DeStefano* fell short of embracing the race neutrality urged by Justice Scalia.⁸⁷

82. 347 U.S. 483 (1954).

83. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

84. See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (saying Title VII's disparate impact provisions "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes," and calling this type of "racial decisionmaking . . . discriminatory").

85. Such reliance is said to stigmatize a remedy's purported beneficiaries, see, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., dissenting); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), promote damaging stereotypes, see, e.g., *United Jewish Org. v. Carey*, 430 U.S. 144, 174 (1977) (Brennan, J., concurring), breed corruption, see, e.g., *Ricci*, 129 S. Ct. at 2688 (Alito, J., concurring); *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009) (finding black elected officials intentionally manipulated election procedures to dilute white voting strength), and disproportionately burden parties who fall outside the remedy's reach.

86. See *Parents Involved*, 551 U.S. at 787 (2007) (Kennedy, J. concurring); see also Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 988–89 (2008); Taunya Lovell Banks, *Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner*, 43 HARV. C.R.-C.L. L. REV. 127, 157 (2008); Lani Guinier, *The Supreme Court-2007 Term: Forward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 38 (2008).

87. *Ricci*, 129 S. Ct. at 2658; *id.* at 2681–82 (Scalia, J., concurring); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235–39 (1995); *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993).

Even the most vocal proponents of colorblindness have shown themselves to be less committed in practice to the principle than their rhetoric suggests. Neither Chief Justice Roberts nor Justice Alito was willing to sign on with Justices Scalia and Thomas to repudiate the primary application of the VRA's race-based disparate impact standard.⁸⁸ Indeed, in *LULAC v. Perry*, the Chief Justice adopted what arguably was the most expansive reading of the VRA on a core point in contention,⁸⁹ even as he lamented this "sordid business, this divvying us up by race."⁹⁰

Justices Scalia and Thomas most consistently voice their commitment to colorblindness, but they nevertheless accepted the proposition that compliance with the VRA's facially race-conscious preclearance regime constituted a compelling interest that justified overtly race-based district lines.⁹¹ They said so, to be sure, at a moment when that regime was set to expire. But just last spring, Justice Scalia (though not Justice Thomas) agreed to leave standing Congress's 2006 decision to extend this regime for an additional twenty-five years.⁹²

Like colorblindness, a commitment to local control has also animated calls to repudiate particular remedies. Justice Hugo Black, for instance, thought the VRA's preclearance requirement was invalid from the start because it treated regions subject to requirement as "little more than conquered provinces."⁹³ Much more recently, Justice Kennedy invoked a similar refrain when he suggested the preclearance obligation offended the "sovereign dignity" of subject states,⁹⁴ and said so seemingly as cause to repudiate the preclearance regime.

In fact, a majority of the Court recently seemed poised to repudiate the preclearance regime precisely because the statute selectively displaced local

88. *League of United Latin Am. Citizens v. Perry (LULAC v. Perry)*, 548 U.S. 399, 492 (2006) (Roberts, C.J., concurring in part and dissenting in part); *id.* at 511–12 (Scalia, J., dissenting in part) (adhering to position voiced by Justice Thomas in *Holder v. Hall*, 512 U.S. 874 (1994), that Section 2 of the VRA should not prohibit vote dilution).

89. *See LULAC*, 548 U.S. at 492, 505–07 (Roberts, C.J., concurring in part and dissenting in part); Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1172 (2007); Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006), <http://www.michiganlawreview.org/assets/fi/105/ortiz.pdf>.

90. *LULAC*, 548 U.S. at 511.

91. *Id.* at 519 (Scalia, J., concurring in part and dissenting in part).

92. *NAMUDNO*, 129 S. Ct. 2504 (2009); *id.* at 2519 (Thomas, J., dissenting).

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

94. Transcript of Oral Argument, *supra* note 67, at 34; *see also* 152 CONG. REC. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood); Charles Babington, *GOP Rebellion Stops Voting Rights Act: Complaints Include Bilingual Ballots and Scope of Justice Dept. Role in South*, WASHINGTON POST, June 22, 2006, at A07 ("Rep. Jack Kingston (R-Ga.) said . . . 'If you move a polling place from the Baptist church to the Methodist church, you've got to go through the Justice Department'").

control.⁹⁵ Ultimately, however, the Justices, save Justice Thomas, passed on the opportunity to disavow the remedy,⁹⁶ and instead issued an obscure statutory holding that left this regime fully operational, at least for the time being.⁹⁷

Repudiation based on local control arguably gained more traction among the Justices in the busing disputes of the 1970s, but here, too, the Court's rulings do not wholly disavow the remedial method.⁹⁸ The Court came closest to repudiation in *Milliken v. Bradley*, when it barred the busing of children across district lines as a means to integrate previously segregated schools.⁹⁹ *Milliken* held that local control took precedence,¹⁰⁰ even though so holding meant that meaningful desegregation would never occur in places like Detroit where the case arose.¹⁰¹ *Milliken* hobbled busing as a remedial technique and thwarted integration as a remedial goal. Still, the decision did not prohibit busing based on race within municipal boundaries (thus including cities and counties of substantial size), and the practice continued to be employed in various jurisdictions well after the decision in *Milliken* was reached.¹⁰²

In sum, the Court has not repudiated entire remedies based on their use of color-conscious criteria or their displacement of local control.¹⁰³ The Justices who advocate repudiation seek to scrap these core tools of the remedial project, convinced that the damage they cause outweighs the consequences that might follow from their elimination. To date, this conviction has failed

95. See, e.g., Adam Liptak, *Skepticism at the Court on Validity of Vote Law*, N.Y. TIMES, April 30, 2009, at A16; Rick Hasen, NAMUDNO: *The Answer to My Question Appears to be "Yes"*, ELECTION LAW BLOG (Apr. 29, 2009, 08:00 AM), http://electionlawblog.org/archives/2009_04.html.

96. For more on this decision, see *infra* notes 128–132 and accompanying text (as an example of adaptation).

97. See Ellen D. Katz, *Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 1 FLA. L. REV. 991, 997 (2009) (explaining what the decision accomplishes).

98. Most are better seen as examples of attrition. See *infra* notes 104–107 and accompanying text.

99. 418 U.S. 717 (1974).

100. *Milliken*, 418 U.S. at 752.

101. See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 296–97 (2002) (“Official, legal segregation indeed was dead [after *Milliken*]; but what replaced it was a deeper, more profound segregation . . . Tens of thousands of black children attend schools that are all black, schools where they never see a white face; and they live massed in ghettos which are also entirely black.”).

102. See, e.g., K. FORBIS JORDAN & CHARLES V. DALE, CONG. RESEARCH SERV., *METROPOLITAN SCHOOL DESEGREGATION* 9–10 (1980), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8148:1>.

103. Voters have been more apt to do so. See, e.g., CAL. CONST. ART. I, § 31, *amended* by Cal. Proposition 209 (1996); MICH. CONST. ART. I, § 26(1), *amended* by Mich. Proposal 06-2 in (2006); NEB. CONST. ART. I, § 30, *amended* by Neb. Initiative 424 (2008); WASH. REV. CODE. § 49.60.400 (2010), *amended* by Washington Initiative 200 (1998); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (overturning, as a violation of equal protection, a voter initiative that stripped local school districts of the power to mandate busing). But cf. Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995) (explaining difficulties in discerning voter intent from election returns).

to garner majority support, perhaps because the consequences of repudiation are feared to be grave or simply because they are unknown. As a result, remedies terminate, but they generally are not repudiated.

E. Attrition

A fifth response to change, attrition, views areas of both improvement and deficiency as cause to end the remedial project. Attrition operates as an “off switch,” albeit one executed by a steady dimmer. The Supreme Court frequently uses attrition to slash remedies the Justices dislike, that they believe to be ineffectual, or that they think no longer serve pressing needs. Attrition scales back existing remedies, leaving them nominally operational but ultimately diminished to a degree that is indistinguishable from outright termination.

The Court has repeatedly sheared off core elements of remedial programs.¹⁰⁴ For example, in the school desegregation context, the Court originally adopted an expansive vision of what desegregation should entail,¹⁰⁵ but beginning in 1974, dramatically cut back the range of methods that might permissibly be employed. *Milliken v. Bradley* outlawed interdistrict busing absent evidence pointing to a “significant violation” by all districts involved, and rejected the notion that desegregation required “any particular racial balance in each ‘school, grade or classroom.’”¹⁰⁶ Having effectively eliminated the prospect of meaningful integration in many urban areas, the Court soon found itself again attempting to make separate schools more equal.¹⁰⁷

The Justices have similarly hacked away at remedies in the voting rights context. After a series of decisions pledged to give the VRA’s preclearance regime “the broadest possible scope,”¹⁰⁸ the modern Court has steadily (albeit not without exception¹⁰⁹) whittled back the regime’s reach. It has systematically lowered the hurdle covered jurisdictions must meet to obtain

104. Voters occasionally do so as well. See, e.g., *Crawford v. Bd. of Educ.*, 458 U.S. 527, 540–42 (1982) (upholding Proposition I, which barred state courts from enacting busing remedies when federal courts would not be permitted to do so under the federal Constitution).

105. See, e.g., *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding interdistrict busing is a permissible means to integrate schools where multiple school districts engaged in de jure segregation); *id.* at 15 (stating that the goal of desegregation efforts is to eliminate racially identifiable schools); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968).

106. *Milliken v. Bradley*, 418 U.S. 717, 740–45 (1974).

107. See *Milliken v. Bradley*, 433 U.S. 267 (1977); see also James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 261–62 (1999); Paul R. Dimond, *Panel II: Concluding Remarks*, 61 FORDHAM L. REV. 63, 63 (1992) (“In its own way, *Milliken* can best be understood as a ‘separate but equal’ result for our times.”).

108. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566–67 (1969).

109. See, e.g., *Young v. Fordice*, 520 U.S. 273 (1997); *Lopez v. Monterey Cnty.*, 519 U.S. 9 (1996).

preclearance,¹¹⁰ a practice that has ensured that most electoral changes will pass review.¹¹¹ The Court has also reduced the types of electoral changes that must be precleared.¹¹² Along the way, the Justices have lamented the regime's reliance on race-conscious criteria,¹¹³ its selective displacement of local control,¹¹⁴ its seeming absence of limiting principles,¹¹⁵ and its insensitivity to improved conditions.¹¹⁶

So, too, the Court has cut back the reach of Section 2 of the VRA, a remedial provision barring electoral practices that produce racially disparate results. A divided Court initially construed Section 2 expansively,¹¹⁷ but subsequent decisions have steadily narrowed the remedy. These decisions do so primarily by exempting certain types of electoral structures from Section 2's proscription, even when the structures facially place distinct burdens on minority voters.¹¹⁸

A recent example is *Bartlett v. Strickland*,¹¹⁹ in which the Court held that Section 2 offers no protection to minority voters who are too few in number to comprise the majority of a single-member district. On the facts of *Bartlett*, drawing district boundaries in some locations but not others would have

110. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (holding that covered jurisdictions may select electoral structures that reduce or eliminate the power of minority voters to elect candidates of choice so long as efforts were made to provide such voters diffuse influence in the electoral process); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (holding that preclearance of electoral changes is permissible even if enacted with invidious intent, so long as the intent does not make conditions far worse than they had been); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (holding that violations of Section 2 of the VRA are not cause to deny preclearance); *Beer v. United States*, 425 U.S. 130 (1976) (holding that preclearance is to be denied only when proposed electoral changes worsen, or cause "retrogression" to, opportunities for minority political participation).

111. See *Pitts*, *supra* note 49, at 523; *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 478 (2003).

112. See *Riley v. Kennedy*, 128 S. Ct. 1970 (2008); *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491 (1992). But see *Lopez v. Monterey Cnty., Cal.*, 519 U.S. 9 (1996).

113. See, e.g., *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244–45 (2009).

114. See, e.g., Transcript of Oral Argument, *supra* note 67, at 34 (voicing skepticism about the VRA's regional burdens and Congress's "finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama . . . is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments [of] the other").

115. See, e.g., *Presley*, 502 U.S. at 505–06.

116. See *Riley*, 128 S. Ct. at 1987 (Stevens, J., dissenting) ("Voting practices in Alabama today are vastly different from those that prevailed prior to the enactment of the Voting Rights Act of 1965").

117. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

118. See *Bartlett*, 129 S. Ct. at 1248 (holding that Section 2 does not mandate the preservation of "crossover districts," wherein minority voters can elect preferred candidates with the help of non-minority voters who "cross over" and vote for the minorities' preferred candidate); *LULAC v. Perry*, 548 U.S. 399, 445–46 (2006) (holding that Rep. Martin Frost, a white candidate whom black voters had supported regularly for twenty years, did not qualify as a minority "candidate of choice" under Section 2); *Johnson v. De Grandy*, 512 U.S. 997, 1011, 1022 (1994) (finding that satisfaction of "Gingles factors" is necessary but not sufficient to show a violation of Section 2, and that Section 2 does not require maximizing the number of majority-minority districts); *Holder v. Hall*, 512 U.S. 874, 885 (1994) (holding the size of a governing body is not subject to Section 2 challenge).

119. 129 S. Ct. 1231.

allowed minority voters to form cross-racial coalitions and elect representatives of their choice. *Bartlett* made clear that the VRA did not require that such lines be drawn—even though it would require specified boundaries had the minority voters been able to claim majority status in a single district.¹²⁰

Bartlett highlights how scaling back a remedy may produce perverse effects. *Bartlett* rejected an expansive statutory construction that would have unquestionably enlarged the statute's reach by making more conduct subject to challenge under Section 2. The discomfort and distaste with which many of the Justices viewed the race consciousness that inheres in Section 2's disparate impact test all but ensured a majority of the Court would vote against expansion.¹²¹ By so doing, however, the Justices cut off an application of the statute that promised to encourage the type of political participation the Court has long claimed it wants to promote—namely, the type that yields cross-racial coalitions.¹²² At the same time, the Justices restricted the statute's reach to protect the type of participation they most dislike—namely, that secured by the majority-minority district.¹²³ The result is a circumscribed remedy, but not one crafted to further the goals the Court has deemed most worth pursuing.

Finally, in the employment context, the Court has cut back Title VII's remedial reach. *Ricci v. DeStefano* famously involved a decision by the City of New Haven to scrap test results after no African American firefighters scored high enough to secure promotions under applicable rules. The City argued that Title VII compelled this result given the test's racially disparate impact and the city's belief that high scores on the test were not a necessary job requirement.¹²⁴ Five Justices, however, held that federal law did not require the city to throw out the test.

Ricci held that Title VII's proscription against disparate impact was inapplicable to a context in which many informed observers viewed such

120. *Id.* at 1246–47.

121. *See id.* at 1249 (“It would be an irony, however, if § 2 were interpreted to entrench racial differences by expanding a ‘statute meant to hasten the waning of racism in American politics.’” (quoting *De Grandy*, 512 U.S. at 1020)). For a discussion of the race consciousness that inheres in the VRA's disparate impact test, see Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 75–79 (2000).

122. *See, e.g., De Grandy*, 512 U.S. at 1020 (“[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.”); *see also Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (allowing state to disperse rather than concentrate minority voters).

123. *Bartlett*, 129 S. Ct. at 1246–47; *see also* Rick Hasen, *Cross-over Districts and the Shaw Claims*, ELECTION LAW BLOG (Mar. 13, 2009 11:47 AM), <http://electionlawblog.org/archives/013187.html> (suggesting that the requirement of majority-minority districts might lead to invalidation of Section 2); Rick Hasen, *Initial Thoughts on Bartland v. Strickland: Narrowing the Voting Rights Act to Save it?*, ELECTION LAW BLOG (Mar. 9, 2009 09:03 AM), <http://electionlawblog.org/archives/013149.html> (arguing that the decision's limitations on the Act might spare it from a facial overturn).

124. *Ricci v. DeStefano*, 129 S. Ct. 2659, 2674–75 (2009).

application unexceptional, albeit hardly unproblematic.¹²⁵ As such, *Ricci* highlights a more general problem regarding remedial enforcement in a changed landscape. As conditions change, standard applications of remedial regimes may indeed become problematic, because longstanding remedies have become either ill-suited to contemporary concerns or simply too costly to maintain in light of the altered landscape. Whether *Ricci* was such a case, the dispute was poorly served by the on/off framework with which the Justices confront remedial regimes. Just how far *Ricci* narrowed Title VII will depend on later cases, but the decision is plausibly read to have scrapped one of its core applications. Insofar as the prohibition on disparate impact no longer provides an operational constraint in the employment arena,¹²⁶ *Ricci* will have terminated the remedy without explicitly saying so. The decision accordingly shows how the Court uses attrition as an opaque method of termination.

II. AN ALTERNATIVE: ADAPTATION

We need to respond more effectively to changed conditions. We should adapt remedies as conditions change and vigorously resist both termination and indefinite extension as the preferred course of action. This Part offers some modest steps that might foster adaptation, and points out some of the institutional concerns raised by its pursuit. It then offers one substantive proposal for how remedies might be adapted productively.

A. Promoting Change

Remedies are typically evaluated in complex circumstances. Improved conditions may be simultaneously dramatic and fragile; and serious, if perhaps less overt, problems are likely to persist. These conditions are ill-served when the available options are limited to termination, on the one hand, and continuation of an existing remedy originally designed for different conditions, on the other. Most often, adaptation is the better response.¹²⁷

125. See, e.g., Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 256–57 (2009) (noting that the Supreme Court announced a new interpretation of Title VII in *Ricci*, and it was unusual for the Court to not remand the case to the lower court for reconsideration under the new rule); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343 (2010); see also *Ricci v. DeStefano*, 530 F.3d 88, 93–94 (2d Cir. 2008) (Carbanes, J., dissenting) (arguing that the case might present an issue of first impression, and expressing concern at applying Title VII in a manner that would require the fire department to discard the results of a test designed to be race-neutral); *New Supreme Court ruling rocks your Title VII world*, MICH. EMP. L. LETTER, Aug. 2009 (stating that *Ricci* creates a new Title VII standard).

126. See Primus, *supra* note 125.

127. But, of course, not always. A demand to terminate a remedy immediately after it issues is almost certainly premature and standing alone insufficient cause to restructure the remedy's terms. Cf. *Lemon v. Bossier Parish School Board*, 444 F.2d 1440, 1401 (5th Cir. 1971) (disputing school district's claim it was "unitary" after operating one semester under an approved decree, noting "[o]ne swallow does not make spring"). So, too, changes separate from the mere passage of time may establish that a remedy has accomplished its mission and thus should terminate.

Proposals to adapt specific remedies nevertheless rarely gain traction. Key decision makers like Congress and the Court repeatedly define their options too narrowly and thus fail to pursue adaptation seriously. This failing is a systematic problem. It propels the termination of remedial decrees in the school desegregation context, the steady erosion of disparate impact in the voting and employment realms, and the stolid maintenance of the VRA's preclearance regime in the voting arena. A single binary framework drives these divergent responses to changed conditions.

In an ever-changing environment, decisions to stay the course or terminate a remedy should be met with deep skepticism. In internal deliberations and public discussions alike, such decisions should trigger something functionally akin to the heightened scrutiny courts apply when decisions implicate suspect traits or infringe on fundamental rights. Such scrutiny would help ensure that these decisions are supported by good cause rather than conclusory judgments or simply path dependence.

Good cause, moreover, should be proved and not simply asserted. More specifically, the subsidiary claims typically used to bolster decisions either to terminate remedies or retain them unchanged should be scrutinized more rigorously than they have been and, where possible, tested empirically. Claims that existing remedies are burdensome to administer, stigmatizing to their beneficiaries, and a source of polarization in the affected communities might accurately describe current conditions or they might simply be empty assertions. Similarly ambiguous are the recurring claims that existing remedies deter misconduct and that improved conditions are dependent on their continued operation. All these claims should be substantiated, and rigorous; empirical study should be demanded.

Decision makers should demand data of this sort when they evaluate existing remedies in light of changed conditions. Demanding information, of course, does not alone ensure that the data produced will be reliable or that it will be carefully scrutinized. Nor does it mean that decision makers will no longer opt to terminate or continue remedies in their existing forms. A presumption in favor of adaptation nevertheless begins to shift the debate by demanding more substantiation for and scrutiny of decisions to terminate or to stay the course.

Decision makers will vary in their institutional capacity to adapt remedies in response to such information. Recently, for instance, the Supreme Court adapted the VRA's preclearance regime in a manner Congress might have enacted without question or legal controversy, and, indeed, to potentially productive effect. For the Court to make this change, however, was simply lawless.

In *NAMUDNO*, the Court ruled that the plaintiff was eligible to seek bailout even though the VRA facially excluded entities like it from petitioning for the exemption. The statute allowed "political subdivision[s]" to petition for bailout but defined such subdivisions as either a county or a state subdivision "which conducts registration for voting" when the county does not.¹²⁸

128. 42 U.S.C. § 1973f(c)(2) (2006).

The *NAMUDNO* plaintiff was neither. As a result, the Court's unanimous conclusion that the plaintiff was nevertheless eligible for the exemption required a statutory construction that Rick Hasen pointed out "virtually no lawyer thought was plausible."¹²⁹

Interestingly, Chief Justice Roberts seemed well aware of this. He acknowledged that the holding required the Court to take an "unusual" step and ignore an explicit statutory definition, and that circumstances existed in which the district court's contrary holding of ineligibility "might well be correct."¹³⁰ The Chief Justice did not bother to address either the legislative history or a Justice Department regulation that directly contradicted what the Court read the 1982 VRA amendments to have accomplished.¹³¹ Instead, Chief Justice Roberts anemically posited that "[i]t is unlikely" Congress intended for the bailout provision to have an effect that was, in fact, well-documented and universally understood when Congress reauthorized the statute in 2006.¹³²

Animating the ruling was the Court's belief that Congress had been insufficiently responsive to improved conditions in covered jurisdictions when it opted to extend the existing remedial regime for another quarter century.¹³³ The opinion avoids striking down the remedy, but makes clear how the Justices viewed the constitutional question presented. The decision all but guarantees the Court will scrap the remedy in the next case unless something significant about the statutory regime changes by then.¹³⁴

The decision was widely praised because it kept the preclearance regime operational, at least for now. But the manner in which the Court accomplished this is nevertheless a deeply problematic instance of judicial overreaching. The Court took it upon itself to initiate some of the change it

129. Rick Hasen, *Initial Thoughts on NAMUDNO: Chief Justice Roberts Blinked*, ELECTION LAW BLOG (June 22, 2009, 08:00 AM), <http://electionlawblog.org/archives/013903.html>.

130. 129 S. Ct. at 2514.

131. See, e.g., S. REP. NO. 97-417, at 57 n.192 (1982) ("Towns and cities within counties may not bailout separately."); Judicial Administration, 28 C.F.R. §§ 51.2, 51.5 (2008); H.R. REP. NO. 97-227, at 2 (1981) ("The standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c) (2), in covered states to seek to bail out although the state itself may remain covered."); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. §§ 51.2, 51.5 (2009) (DOJ regulations); Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987) (providing commentary for changes to C.F.R.).

132. *NAMUDNO*, 129 S. Ct. at 2516; see also *supra* notes 128–131 and accompanying text.

133. *NAMUDNO*, 129 S. Ct. at 2511–12 (citations omitted) (noting the "substantial 'federalism costs'" Section 5 exacts, its broad application to all electoral changes "however innocuous," the fact that "[t]hings have changed in the South," that the racial gap in voter registration and turnout rates is diminished and in places nonexistent, that minority candidates hold elected office "at unprecedented levels," that "[b]latantly discriminatory evasions of federal decrees are rare," the dated character of the coverage formula's weak relation to current conditions, and the fact that the distinct burdens imposed on covered jurisdictions "may no longer" be warranted).

134. See Katz, *supra* note 97, at 998; see also Ellen D. Katz, Opinion, *Voting Rights Act § 5: Leave it up to Congress*, NAT'L L.J. Apr. 13, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429774549&slreturn=1&hblogin=1> (arguing that the Court should find a way to force congressional reconsideration).

believed was needed. The change it made may, in substance, prove to be productive,¹³⁵ but the ruling is not a credible act of statutory construction. The alternative, moreover, need not have been to toss out the remedy entirely. Given the statutory language, the Court would have done better to explore ways to encourage congressional reconsideration of the remedy than to make the change to the statute itself.

But while *NAMUDNO* stands as a blatant example of judicial overreaching, the Court is hardly without power to adapt remedies through the reasonable exercise of judicial review. As discussed below, the terms governing remedial regimes typically allow the Court itself ample leeway to adapt remedies productively. The VRA's preclearance regime, in fact, is not an exception. Instead, the specific dispute in *NAMUDNO* made it a poor candidate for judicial adaptation, at least in the manner selected by the Court.

B. Adapting Institutions

Adaptation requires more than simply the inclination to pursue change. It requires substantive commitments to direct the nature of the change to be implemented. This Section proposes one such commitment: that decision makers like Congress and the Court shift the remedial focus away from the effects of past discrimination to the institutions that must deal most closely with them. The goal should be the development of robust local institutions capable of productively handling the vestiges of discrimination that persists.

For example, the racial test-score gap among elementary and secondary school students has long been understood as a vestige of past discrimination in schools,¹³⁶ and for years, school desegregation decrees have directed resources towards eliminating it.¹³⁷ Standing alone, however, the test-score gap is not the best gauge of a school that best serves minority students. Recent

135. The ruling vastly increases the number of jurisdictions eligible to apply for bailout, and makes successful bailout applications more likely, given that the newly eligible jurisdictions have no political subunits for which they must account. *See supra* note 58 and accompanying text. It remains to be seen whether the change will meaningfully alter the way preclearance operates. *See supra* notes 48–53 and accompanying text. *But see supra* notes 58–61 and accompanying text (discussing reluctance of covered jurisdictions to petition for bailout even when eligible). Still, encouraging more bailout applications is a good idea. It holds promise as a means to channel resources to those places that most need them, while reducing the administrative burdens in places that no longer require oversight.

136. *See* Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat From Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1477, 1482 n.9 (2003); *see also* Larry V. Hedges & Amy Nowell, *Changes in the Black-White Gap in Achievement Test Scores*, 72 SOC. EDUC. 111, 111 (1999); *cf.* David Armor et al., *The Outlook for School Desegregation*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY* 323 (Christine Rossell et al. eds., 2002).

137. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 277–78 (1977) (directing resources to address racial achievement gaps); *Jenkins v. Missouri*, 639 F. Supp. 19, 24–26 (W.D. Mo. 1985), *decree terminated*, 515 U.S. 70 (1995) (mandating various programs designed to improve student achievement); *Tasby v. Wright*, 520 F. Supp. 683, 741–43 (N.D. Tex. 1981), *rev'd in part*, 713 F.2d 90 (5th Cir. 1983) (ordering increased resources to lower teacher–student ratio and thereby improve minority student achievement).

experience with the No Child Left Behind Act ("NCLB")¹³⁸ suggests that some schools reporting gaps, and what NCLB deems insufficient "adequate yearly progress," are in fact well-functioning, sound institutions that are tackling complex educational issues with expertise and sophistication.¹³⁹ Other schools that report better test scores and seemingly better yearly progress often operate less-rigorous and exacting programs that remain deficient in important respects.¹⁴⁰

This disconnect between good schools on the one hand and the racial test-score gap on the other suggests that termination of a remedial desegregation decree need not be contingent on eliminating the gap. The problem with a ruling like the Supreme Court's 1995 decision *Missouri v. Jenkins* is not that it allowed dissolution despite the gap's persistence.¹⁴¹ The problem instead is that the Court never inquired whether the school district had been adequately equipped to address the gap on an ongoing basis.¹⁴² The Justices never explored what resources the district might need to perform this task in the absence of federal supervision, and thus never demanded that the district have these resources. Instead, *Jenkins* simply demanded an end to federal supervision.

Jenkins was not alone in lacking this institutional focus. Congress and the Court have consistently failed to place significant value on the development of robust local institutions when they evaluate longstanding remedies. The VRA's bailout criteria come closest to valuing such development, but even these criteria do so only minimally.¹⁴³

138. See Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified in scattered sections of U.S.C.).

139. See, e.g., Charles A. McCullough, II, *What Matters Even More: Codifying the Public Purpose of Education to Meet the Education Reform Challenges of the New Millennium*, 27 B.C. THIRD WORLD L.J. 45, 50 n.19 (2007); see also Press Release, Hoover Institution, NCLB Does a Poor Job of Distinguishing Good Schools From Ineffective Ones (Sept. 28, 2006), available at <http://www.hoover.org/pubaffairs/releases/4269286.html> (showing that NCLB lacks a growth metric to account for improving schools that still are not meeting AYP levels).

140. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944–48 (2004); Chester E. Finn, *Dumbing Education Down*, WALL ST. J., Oct. 5, 2007, at A16 (showing states lowering their standards to comply with NCLB); see also Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 BYU EDUC. & L.J. 157, 173 (2006); cf. Sam Dillon, *Obama Calls for Major Changes in Education Law*, N.Y. TIMES, Mar. 14, 2010, at A1.

141. 515 U.S. 70, 98–103 (1995).

142. For a discussion of other problems with the decision, see *id.* at 153–54 (Souter, J., dissenting) (suggesting that test scores, while below the national average, showed improvement, and that further improvement approaching the national average could reasonably be expected with limited continuation of the desegregation remedies); *id.* at 176 (Ginsburg, J., dissenting) (identifying the goal of attracting more nonminority students to the Kansas City, Missouri school district); Tushnet, *supra* note 45.

143. Bailout glances at institution-building by placing the burden on local entities to make the case for their release from preclearance, see *supra* notes 48–54 and accompanying text, and by requiring that jurisdictions make "constructive efforts" to encourage minority participation, see 42 U.S.C. § 1973b(a)(1)(F) (2006). Still, this latter requirement functions more as a marker of good faith than as a means to develop healthy institutional structures. See generally Hebert, *supra* note 49. The bailout criteria, moreover, disqualify jurisdictions from bailout if they have been party to a voting rights consent decree in the last decade, even though participation in such a decree might foster the very type of institutional growth upon which a successful bailout petition should ideally

The lack of focus on institution building is cause for concern. Existing remedies were first imposed because local institutions had malfunctioned so severely that simply prohibiting discriminatory conduct was seen as a necessary but insufficient response.¹⁴⁴ Remedies accordingly imposed affirmative measures for local institutions to implement under supervision.¹⁴⁵ The expectation was that supervision would ultimately resolve the institutional incapacity that gave rise to the remedies in the first instance. Years later, however, decision makers evaluate and either terminate or extend remedies without adequately investigating whether the institutional issues that prompted their creation had been or are being adequately addressed.

Compounding this problem is the fact that local institutions operating under a remedial regime often become accustomed to outside oversight, and, at times, prefer the oversight to governing without it. Supporters of the VRA's 2006 reauthorization, for example, included several jurisdictions who were themselves subject to the preclearance obligation.¹⁴⁶ Similarly, a select number of school districts have opposed efforts to dissolve governing desegregation decrees¹⁴⁷ and local governments have pressed expansive views of

depend. For examples of consent decrees, see Consent Decree, *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (No. 4:05CV 33TSL-AGN), available at http://www.justice.gov/crt/voting/sec_2/noxubee_cd.pdf; Consent Decree, *United States v. Crockett County, Tenn.*, No. 1-01-1129 (W.D. Tenn. Apr. 17, 2001), available at http://www.justice.gov/crt/voting/litigation/crockett_cd.pdf; see also U.S. Dep't of Justice, *Cases Raising Claims Under Section Two of the Voting Rights Act*, CIVIL RIGHTS DIVISION, available at http://www.justice.gov/crt/voting/sec_2/recent.php (last visited Sept. 12, 2010).

144. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part) ("The [VRA] contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles."); *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting . . . [and] after enduring nearly a century of systematic resistance to the Fifteenth Amendment, [it] might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.").

145. See, e.g., H.R. REP. 91-397, at 1 (1969).

146. See, e.g., Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al. at 2, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322) ("The preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions."); *id.* at 1 ("The Amici States recognize that Section 5 of the Voting Rights Act has allowed our Nation to make substantial progress toward eliminating voting discrimination. More, however, remains to be done."); see also *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Practices and Views from the Field: Hearing Before the Subcomm. On the Constitution, Civil Rights, and Prop. Rights of the S. Comm. on the Judiciary*, 109th Cong. 11 (2006) (statement of Donald Wright, Gen. Counsel, North Carolina State Board of Elections) ("It has been my experience from the beginning that, I have never had any difficulty getting expedited pre-clearance or any reasonable cooperation from the U.S. Department of Justice."). But see Brief of Amicus Curiae Georgia Governor Sonny Perdue in Support of Appellant, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322); Brief of the Honorable Bob Riley, Governor of the State of Alabama, as Amicus Curiae in Support of Neither Party, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322).

147. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 74 (1995) (noting that the school district served as nominal defendant and cross-claimant); *id.* at 77-80 (noting that the decree the school district was defending provided additional funding for renovations and salary expenses); *Belk v. Charlotte-Mecklenburg Bd. of Educ.* 269 F.3d 305 (4th Cir. 2001) (school district arguing against unitary status in reverse-discrimination case brought by nonblack student); *United States v. Georgia*, 702 F. Supp. 1577 (M.D. Ga. 1989) (school district arguing for dismissal without a finding on unitary status, thus effectively retaining the permanent injunction mandating desegregation); *Parker*,

federal remedial programs that would have reduced local autonomy had the Supreme Court not ultimately rejected them.¹⁴⁸

Local officials embrace remedial oversight for varied reasons. Some do so because they lack the political clout to prevent discrimination absent the outside backing that undergirds longstanding remedial regimes. Anecdotal evidence collected by Congress prior to the 2006 VRA reauthorization showed local officials blocking ostensibly discriminatory moves by invoking the federal remedy.¹⁴⁹ Similarly, predominantly minority school districts have found themselves unable to secure an equitable share of state aid unless they are subject to a federal decree requiring such division.¹⁵⁰

Elsewhere, local officials have embraced remedial measures for partisan gain, blatant self-dealing,¹⁵¹ and outright illegality.¹⁵² In *Ricci v. DeStefano*, the “unusual” posture of a city arguing against its own autonomy prompted Justice Alito to conclude that a mixture of self-dealing, corruption, and pandering led local officials to scrap the disputed employment test.¹⁵³ Justice

supra note 45, at 1206–07 (2000) (arguing that school districts rarely request dismissal in school desegregation cases); *Walker critic fight his bid*, *supra* note 54 (school board voted to settle with a party seeking partial continuation of desegregation decree, even though city attorney advised that board would likely be granted unitary status).

148. See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674–75 (2009) (rejecting claim pressed by city officials in New Haven that Title VII required them to scrap an employment exam in which no African American firefighters had scored high enough to qualify for promotion); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1237–38 (2009) (rejecting claim pressed by state officials that Section 2 of the VRA required them to draw district lines that violated state law).

149. See, e.g., *Mukasey*, 573 F. Supp. 2d 221, 265 (D.D.C. 2008) (citing city attorney blocking local effort to dismantle majority-black district who argued it violated Section 5); *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 104, 362 (2006) (Statement of Kent Willis in appendix of statement of Joe Rogers), available at <http://permanent.access.gpo.gov/lps73399/26411V1.pdf>; see also *Mukasey*, 573 F. Supp. 2d at 264 (quoting *An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 98 (2005) (statement of Armand Derfner) (“[P]roposals . . . never even get off the ground because it’s understood that they will not get precleared . . . [H]alf the time, we never see what might happen and what would happen if we didn’t have section 5.”).

150. James E. Ryan, *The Influence of Race on School Finance Reform*, 98 MICH. L. REV. 432, 445–46 n.52 (1999) (finding that schools operating under desegregation decrees get a more equitable share of state revenue than do predominantly minority districts operating independently, and “[t]hat [a] majority black district received additional funding only because of court [desegregation] order cannot be gainsaid”); Cynthia Howell, *McDaniel seeks school-suit hearing*, ARK. DEMOCRAT-GAZETTE, May 20, 2009 (discussing funding consequences for school seeking unitary status).

151. See, e.g., *Missoui v. Jenkins*, 515 U.S. 70, 98–99 (1995) (suggesting lower court opinion would enable the school district to continue to receive disproportionately high funding indefinitely); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (“[T]here is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics . . . [and that this tendency could] ‘support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate ‘a piece of the action’ for its members.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting))).

152. See, e.g., *United States v. Brown*, 494 F. Supp. 2d 440, 450 (2007) (finding that the Democratic party chairman in Noxubee County had engaged in racially motivated manipulation of the voting process in violation of Section 2 of the VRA, including racial appeals such as “You’ve got to put blacks in office, our candidates, because we don’t want white people over us anymore.”).

153. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2688 (2009) (Alito, J., concurring) (“[A] reasonable jury could easily find that the City’s real reason for scrapping the test results was not a concern

Alito's opinion posits that local officials manufactured a statutory construction as political cover for their actions.¹⁵⁴ In other words, the remedy itself was facilitating dysfunction rather than helping to cure it.¹⁵⁵

Whether or not this best explains what happened in New Haven,¹⁵⁶ Justice Alito is surely right that remedies give rise to varied incentives and affect the exercise of local power in ways that are not always intended or even productive. Operational remedies necessarily shape the decision-making universe in which local officials work.

As a result, key decision makers like Congress and the Court should focus on the ways in which longstanding remedies shape local decision making and specifically on building robust structures of local governance. Doing so promotes the devolution of power as the assumption of responsibility it should be.

C. Nascent Adaptation

Congress, the Court, and other key decision makers have repeatedly evaluated longstanding remedies as if they must choose between all-or-nothing. On occasion, however, they deviate from the dominant approach. This Section identifies two such examples.¹⁵⁷ The first is *LULAC v. Perry*, in which the Court identified a violation of the VRA's Section 2 in unexpected circumstances. The second is the growing inclination by federal trial courts to pass on the traditional remedy for racial vote dilution in favor of experiments with proportional systems. These examples are discussed below.

1. Protecting Engagement in *LULAC v. Perry*

LULAC v. Perry surprised many observers when it held that a congressional redistricting plan adopted by Texas in 2003 violated Section 2 of the

about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.”).

154. *Id.*

155. The willingness of state and local officials to lobby for outcomes that diminish their autonomy is a recurring stance, but not one that has received systematic attention. *See, e.g.,* Bartlett v. Strickland, 129 S. Ct. 1231, 1239–40 (2009) (noting that state's willingness to do so presented the statutory question in an “unusual” posture); *see also* Parker, *supra* note 45, at 1211–13 (arguing that school districts sometimes support continuation of desegregation decrees because of inertia, uncertainty about the future, financial considerations, or because they provide political cover).

156. *See, e.g.,* Michael Zimmer, Ricci: *Color-Blind Standards in a Race-Conscious Society?*, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/2009/11/ricci-color-blind-standards-in-a-race-conscious-society.html> (Nov. 20, 2009 08:49 AM) (criticizing Justice Alito's concurrence). *But see* *The Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 492 (2009) (testimony of Peter Kirsanow) (suggesting Justice Alito rightly identified racial politics as the root of the case).

157. *See supra* note 134 (discussing *NAMUDNO* as an example of suboptimal adaptation). For additional, less recent examples, *see* Friedman, *supra* note 4, at 755 n.98.

VRA.¹⁵⁸ The Court held that Texas caused racial vote dilution within the meaning of Section 2 when it removed 100,000 Latino voters from a congressional district in Laredo in order to protect the Republican incumbent these voters did not support.¹⁵⁹

LULAC was the first time the Court held specific conduct violated Section 2, a provision Congress had adopted in its present form back in 1982.¹⁶⁰ Before *LULAC*, the Court's stance towards Section 2 had been one of almost relentless attrition,¹⁶¹ interspersed with repeated calls from Justices Thomas and Scalia to repudiate entirely the statute's application to racial vote dilution.¹⁶²

LULAC was an odd case in which to change course. At issue was Texas's notorious foray into "re-redistricting," a patently partisan affair that challenged the Court's hands-off approach to the problem of partisan gerrymandering. *LULAC* presented the Justices with numerous claims, the most prominent of which was the charge that Texas violated the Equal Protection Clause when it tossed out a viable districting plan adopted after the 2000 census in favor of a new plan that better served Republican interests. The racial vote-dilution claims raised in Laredo and Forth Worth seemed to some observers as both a distraction and a misguided attempt to "racialize" what was fundamentally a partisan dispute.¹⁶³

Adding to the surprise, the race-based injury *LULAC* identified in Laredo was far from self-evident. The holding required the Justices to analyze the factors comprising the Section 2 inquiry in a decidedly pro-plaintiff manner and to resist the tendency of various lower courts to read these factors narrowly.¹⁶⁴ For example, the "marked and continuous rise in Spanish-surnamed voter registration"¹⁶⁵ that the Court found to exist in Laredo was the sort of thing lower courts had repeatedly held to weigh against liability under Section 2.¹⁶⁶ Such signs of healthy participation had been seen as evidence that a challenged electoral rule caused no harm to protected voters.¹⁶⁷

158. See *League of United Latin Am. Citizens v. Perry (LULAC v. Perry)*, 548 U.S. 399 (2006); see also Edward B. Foley, *Election Law and the Roberts Court: An Introduction*, 68 OHIO ST. L.J. 733, 739 (2007) (describing identification of a Section 2 violation in *LULAC* as a "surprise").

159. *LULAC*, 548 U.S. at 436–42.

160. See Katz, *supra* note 89, at 1164.

161. See *supra* notes 117–120 and accompanying text.

162. See *supra* notes 83–92 and accompanying text.

163. Katz, *supra* note 89, at 1163 (discussing and disputing this stance and arguing that Texas pursued its partisan agenda through race-based districting moves that relied on the close connection between race and party in the state, and that the resulting claims of race-based injury were predictable consequence rather than an irrelevant distraction).

164. *Id.* at 1168.

165. *LULAC*, 548 U.S. at 439.

166. Katz, *supra* note 89, at 1169.

167. *E.g.*, *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) ("Obviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage

The *LULAC* majority, by contrast, suggested that rising voter registration rates only strengthened the plaintiffs' case.¹⁶⁸

In fact, the belief that nascent political engagement requires cultivation and hence protection best explains why the *LULAC* majority thought Texas had injured Latino voters when it split the city in 2003.¹⁶⁹ Evidence showed that Laredo's Latino voters were becoming increasingly politically active and engaged, and that fueling this engagement was the prospect they might soon elect a representative of choice. The new district line eliminated that prospect, damaging the engagement it had engendered and thus giving rise to what *LULAC* deemed to be a legally cognizable injury under Section 2.¹⁷⁰

Liability under Section 2 had long hinged on many things,¹⁷¹ but until *LULAC*, a "politically active" minority community had not been one of them. Evidence of engagement weighed against liability until *LULAC* adapted the reach of Section 2 and made this engagement something warranting cultivation through statutory protection.¹⁷² *LULAC* posits that the statute protects "the progress of a racial group,"¹⁷³ and finds such progress manifest in that group's increasing political activity. *LULAC* accordingly opted to adapt the remedy so that it would help cultivate the community itself as an institution of local governance. Reaching out to do so led a Court long wary of Section 2 to acknowledge that race is not exclusively a problem to overcome but a trait that unites people in positive ways and gives rise to communities that deserve protection.¹⁷⁴

Not everyone, to be sure, reads *LULAC* in this way. Markedly absent, however, from the extensive debate the decision engendered is the critique that emerged immediately upon *NAMUDNO*'s issuance—namely, that the Court construed the statute in a way that was implausible and inconsistent with the judicial role. Section 2's substantive standard—protecting the ability of minority voters to participate and elect representatives of choice—was itself originally a judicial creation rather than a legislative one. More important, the statutory language, legislative history, and the Court's own

than whites to vote. Further, the high incidence of Hispanic *registration* in the District is persuasive evidence that Hispanic voters are not deterred from participation in the political process . . .").

168. *LULAC*, 548 U.S. at 438–40.

169. Not everyone agrees. See Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1142–44. But see Katz, *supra* note 89, at 1166–67 (arguing discriminatory intent cannot adequately explain the Court's holding in *LULAC*).

170. Katz, *supra* note 89, at 1173.

171. Thirteen related but distinct factors have informed its application, with no single factor carrying dispositive weight and several requiring subsidiary findings. See *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (articulating the concept of proportionality as part of the Section 2 inquiry); *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (setting forth three preconditions to a Section 2 inquiry); S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.A.N. 177, 206–07 (listing seven factors plus two additional concerns that bear on the inquiry).

172. Katz, *supra* note 89, at 1173.

173. *LULAC*, 548 U.S. at 403.

174. Katz, *supra* note 89, at 1164–65.

construction of it over the years allowed ample room for adaptations of the regime of the sort *LULAC* may be read to promote.

A productive example of adaptation, *LULAC* embraced change in construing Section 2. That embrace, however, proved to be short-lived. Last year, in *Bartlett v. Strickland*,¹⁷⁵ the Court returned to its long-preferred approach to construing Section 2. It once again slashed the remedy. As in *LULAC*, the Court again confronted evidence of improved participatory conditions, but this time showed no interest in adapting the remedy to cultivate the improvements. Instead, *Bartlett* viewed the improvement at issue, namely, the emergence of meaningful cross-racial political coalitions, not as a condition to cultivate but instead as proof that the statute's remedial provisions were not needed.¹⁷⁶ The tenets of attrition rather than adaptation once again guided the way.¹⁷⁷

2. Looking Beyond the Majority-Minority District

For several decades, federal law has required remedial action when minority voters find themselves unable to elect candidates of choice and certain other conditions exist.¹⁷⁸ The most common remedy federal courts have ordered is the creation of districts in which minority voters comprise the majority of the voting population.¹⁷⁹ In recent years, however, a number of federal trial courts have rejected this remedy and allowed instead experiments with proportional systems.¹⁸⁰ While not without

175. 129 S. Ct. 1231 (2009).

176. See *supra* notes 119–123 and accompanying text.

177. See also Rick Hasen, *Initial Thoughts on Bartlett v. Strickland: Narrowing the Voting Rights Act to Save It?*, ELECTION LAW BLOG (Mar. 9, 2009 09:03 AM), <http://electionlawblog.org/archives/013149.html> (arguing that the court's opinion represented a "stingier" interpretation of the VRA, that the application of the law was mechanical, and that the 50 percent criterion ignores more meaningful voting demographic statistics).

178. The 1982 amendments to the VRA and the accompanying Senate report listed a host of such conditions, making clear that no single one was required to establish that existing electoral structures result in racial vote dilution. See Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (amended 2006); S. REP. NO. 97-417, at 28–29 (1982).

179. See, e.g., Gary M. Segura & Nathan D. Woods, *Majority-Minority Districts, Co-Ethnic Candidates, and Mobilization Effects*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, *supra* note 49, at 133, 133 ("[C]reating majority-minority districts has become the standard method for securing minority representation in legislative institutions.").

180. Several dozen small jurisdictions now employ some form of proportional system as a means to address racial vote dilution. See CTR. FOR VOTING AND DEMOCRACY, CUMULATIVE VOTING AT WORK IN TEXAS, <http://archive.fairvote.org/?page=167> (last visited Sept. 12, 2010); CENTER CTR. FOR VOTING AND DEMOCRACY, FULL AND FAIR REPRESENTATION IN ALABAMA, <http://archive.fairvote.org/?page=167> (last visited Sept. 12, 2010); CTR. FOR VOTING AND DEMOCRACY, THE ONE VOTE SYSTEM: NORTH CAROLINA'S MODEL FOR COMMUNITIES, <http://archive.fairvote.org/?page=167> (last visited Sept. 12, 2010); see also Consent Decree, *United States v. Town of Lake Park, Fla.*, No. 9:09-80507-MARRA (S.D. Fla. Oct. 26, 2009), available at <http://www.wpbfc.com/download/2009/1027/21436503.pdf> (consent decree adopting form of proportional voting in which voters cast one vote and the top four candidates are elected to the town commission); *Lake Park To Change Voting Method In 2010*, W. PALM BEACH NEWS, Oct. 27, 2009, available at <http://www.wpbfc.com/news/21436468/detail.html>.

risk,¹⁸¹ these systems hold promise as a more sustainable means to foster minority influence and a better way to engage voters. The willingness of federal courts to allow these experiments reveals an inclination to adapt rather than terminate or simply continue the existing remedial regime.

The embrace of proportional systems reflects, in part, persistent skepticism about both the virtues and long-term viability of the majority-minority district. While celebrated by some,¹⁸² these invariably safe Democratic districts have been widely criticized as suboptimal vehicles for productive minority political participation.¹⁸³ The move to proportional alternatives recognizes that such districts were never meant to be the exclusive remedy for racial vote dilution under the VRA.¹⁸⁴

Proportional systems generally rely on voters rather than district lines as a means to achieve minority representation. An example is cumulative voting, a practice recently implemented in Port Chester, New York.¹⁸⁵ Under this system, voters are allotted six votes each and may choose how to distribute those votes among the candidates running for the village's six-member governing board of trustees. Voters may cast all six votes for a single candidate, they may cast one vote for six different candidates, or they might distribute their

181. See, e.g., Patrick O'Donnell, *Euclid schools have first election since court settlement, but board remains all white*, CLEVELAND PLAIN DEALER, Nov. 4, 2009, available at http://www.cleveland.com/politics/index.ssf/2009/11/post_4.html (documenting how a limited vote system adopted as part of Section 2 remedial settlement and meant to increase minority representation nevertheless failed to secure the election of a black candidate to the school board).

182. For discussions about the benefits offered and secured by majority-minority districts, see DAVID T. CANON, *RACE, REDISTRICTING AND REPRESENTATION* 204–05, 261 (1999) (suggesting that majority-minority districts provide a venue for political participation that itself erodes racial polarization among voters); Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION IN THE SOUTH* 335 (Chandler Davidson & Bernard Grofman eds., 1994); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1415–17 (1991); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 740 (1998).

183. Majority-minority districts have been condemned for the racial consciousness that informs their creation, the salient racial identity said to characterize operational districts, and the lack of competition that generally prevails in these invariably safe Democratic districts. See, e.g., SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 649–52 (3d ed. 2007). One longstanding critique attributes Democratic losses and the resulting implementation of policies generally thought to be unfavorable to minority communities on the majority-minority district, and the so-called “bleaching” effect such districts are said to have on surrounding communities. See Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1609 (2004); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 314–20 (1997) (showing how majority-minority districts have assisted the Republican “Southern Strategy”).

184. See Katz, *supra* note 89, at 1165 (“*Thornburg v. Gingles*, the authority often cited for the contrary position, held only that the failure to create such a district in specified circumstances informs the question of liability under Section 2 [of the VRA] *Gingles* said nothing about how violations of Section 2 might be remedied.”).

185. *United States v. Vill. of Port Chester*, No. 06-CV-15173(SCR), 2010 WL 1326267 (S.D.N.Y. Apr. 1, 2010) (combining the court's previous rulings from the liability and remedial phases of the case, where the village was found to have diluted the voting strength of its growing Hispanic community by using at-large elections and staggered terms to select the village's six-member board of trustees).

six votes among two or more candidates running for the board. The system is meant to enable minority voters acting cohesively to concentrate or “plump” their votes on a single candidate and thereby secure the election of a candidate a majority of voters do not support.¹⁸⁶

As a means to foster minority representation, cumulative voting resembles the majority-minority district in that both are structured to allow minority voters to coalesce behind a candidate who can win elective office despite racial bloc voting and other barriers to minority participation in the jurisdiction. If certain conditions exist, however, cumulative voting promises to foster more competitive elections and more diverse cross-racial coalitions. In principle, at least, cumulative voting provides all candidates reason to court minority votes. The practice, moreover, is facially race-neutral and accordingly less vulnerable to criticism and legal attack than is the majority-minority district.¹⁸⁷

Cumulative voting nevertheless provides minority voters a less secure “seat at the table” when policy is made.¹⁸⁸ It requires that voters both understand how to navigate the system and turn out to cast their ballots in sufficient number to elect a candidate preferred by the minority but not the majority of voters.¹⁸⁹ Recent experience shows that voters do not always do this. Majority-minority districts, by contrast, require much less from voters because the act of voting is less complex and both turnout and cohesiveness are less important on election day.¹⁹⁰ This difference may be why, in the Port Chester litigation, the DOJ urged the trial court to replace the village’s at-large system with single-member districts in which Hispanic voters would comprise the majority of voters in one district.¹⁹¹

The village resisted this conventional remedy and pressed instead for cumulative voting, arguing, among other things, that its small size made

186. *Id.* at *31–37. For a discussion of cumulative voting, see *Cumulative Voting*, FAIR VOTE, <http://archive.fairvote.org/?page=563> (last visited Sept. 12, 2010).

187. See, e.g., Lani Guinier, *Groups, Representation, and Race-Conscious Redistricting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1595 (1993); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2451 (1994). Still, less susceptible is not the same as immune. See, e.g., Abigail Thernstrom, *Lani's Heir: The new, old racial ideology of the Holder Justice Department*, NAT'L REV., Dec. 21, 2009, at 34, 34 (arguing that cumulative voting risks “heightening the importance of racial identity in American elections and encouraging raw racial appeals—especially by black candidates trying to mobilize black voters”).

188. See, e.g., Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1231 (1996); Handley & Grofman, *supra* note 182, at 335; Karlan, *supra* note 182, at 740.

189. *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 756 (N.D. Ohio 2009) (suggesting that cumulative voting is less likely to remedy electoral underrepresentation of minorities than other practices, in part because it is a “more difficult concept for voters to understand,” and hence “more likely that voters [would] commit errors while voting, which could lead to good faith votes being disallowed”).

190. See Paul L. McKaskie, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 Hous. L. REV. 1119, 1154 (1998) (explaining that cumulative voting requires very sophisticated vote targeting to be effective in elections for public office).

191. *United States v. Vill. of Port Chester*, No. 06-CV-15173(SCR), 2010 WL 1326267, at *31 (S.D.N.Y. Apr. 1, 2010).

districted elections an awkward practice.¹⁹² The district court was willing to allow the experiment, calling it a “legally acceptable” alternative.¹⁹³ In so doing, it recognized that conditions change, both in terms of the overarching constitutional framework and with regard to the possibilities available to minority voters to secure the representation they seek.

CONCLUSION

The election of Barack Obama as president in 2008 was met with repeated calls to terminate existing remedies for past racial discrimination. Ward Connerly announced “that affirmative action is an idea whose time has passed.”¹⁹⁴ Ken Blackwell said that we have now conquered “endemic racism and overt hostility” such that “draconian laws” like the VRA are no longer needed.¹⁹⁵ Abigail and Stephan Thernstrom saw Obama’s election as grounds to terminate “aggressive federal interference in state and local districting decisions” mandated by the VRA because “American voters have turned a racial corner [and the] law should follow in their footsteps.”¹⁹⁶

Those more favorably disposed to the remedial project countered that nothing of importance had changed.¹⁹⁷ Gary Orfield pointed out that Obama’s success is not proof “that the racial problems of this country have been solved,” and Wade Henderson insisted that “exceptions don’t make the rule.”¹⁹⁸ Others emphasized the fact that John Kerry had done better than Obama among white voters in certain parts of the South and that racially polarized voting had persisted in both the primary and general elections.¹⁹⁹

This largely rhetorical debate on the significance of the Obama presidency mirrored the way Congress and the Court have long evaluated existing remedies for past discrimination. Confronted with a starkly altered landscape, advocates on both sides defined the possible options as all-or-nothing, even though neither response was appropriate for the moment.

192. *Id.* at *31–36.

193. *Id.*

194. Joseph Williams & Matt Negrin, *Affirmative Action Foes Point to Obama*, BOSTON GLOBE, Mar. 18, 2008, at 1A (adding, “How can you say there is institutional racism when people in Nebraska vote for a guy who is a self-identified black man?”).

195. Ken Blackwell, Op-Ed., *Obama Justice*, WASH. TIMES, Dec. 31, 2008, at A17.

196. Abigail Thernstrom & Stephan Thernstrom, *Racial Gerrymandering is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15, available at <http://online.wsj.com/article/SB122637373937516543.html>.

197. See, e.g., Ari Melber, *Obama, Race and the Presidency*, NATION, Jan. 3, 2008, <http://www.thenation.com/article/obama-race-and-presidency>; Leutisha Stills, *Obama’s Election = The End of Affirmative Action?*, JACK AND JILL POLITICS (Nov. 19, 2008), <http://www.jackandjillpolitics.com/2008/11/obamas-election-the-end-of-affirmative-action/>.

198. Charles Babington, *Might Obama’s Success Undercut Affirmative Action?*, USA TODAY, June 28, 2008, http://www.usatoday.com/news/politics/2008-06-28-3426171631_x.htm?loc=interstitialskip (internal quotation marks omitted).

199. E.g., Jeffrey Toobin, *Voter, Beware*, NEW YORKER, Mar. 2, 2009, at 19.

Obama's election itself did not resolve many persistent problems that still require attention and yet, it trivializes the accomplishment his election represents to the nation to dismiss it as a mere exception. Obama was, to be sure, a talented candidate running a well-financed campaign at a moment where the stars arguably aligned for the Democratic nominee. But his election would have been impossible even in the very recent past. And, notably, it would never have occurred but for the very remedial structures under contest.

When Representative John Lewis said that "Barack Obama is what comes at the end of that bridge in Selma,"²⁰⁰ he was not calling for the dismantling of the VRA, notwithstanding the fact that it was the disruption of a civil rights march on that Selma bridge that first propelled Congress to enact that remedial regime nearly a half century ago. Instead, Representative Lewis was signaling the existence of a political culture almost unimaginable when many existing civil rights remedies were first instituted. Obama's election confirmed that the landscape has changed. Those changes demand a more nuanced response than the all-or-nothing options that for too long have defined the debate. Work remains to be done and the remedial project should be adapted to do it.

200. David Remnick, *The President's Hero*, NEW YORKER, Feb. 2, 2009, at 21.