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Congressional Power to Extend Preclearance: A Response to Professor Karlan

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COMMENTARY

CONGRESSIONAL POWER TO EXTEND PRECLEARANCE: A RESPONSE TO PROFESSOR KARLAN

*Ellen D. Katz**

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I. INTRODUCTION

Is the core provision of the Voting Rights Act unconstitutional? Many people now think that the Act’s preclearance requirement is invalid, but Professor Karlan is not among them. In part, that is because she is not convinced the problems that originally motivated Congress to impose preclearance have been fully remedied. Professor Karlan points

* Professor of Law, University of Michigan Law School. Thanks to Emma Cheuse, Daniel Halberstam, Bill Miller, Rick Pildes, and Dan Tokaji for helpful comments and suggestions, and to Jim Driscoll-MacEachron for research assistance.

out the many ways section 5 of the Voting Rights Act (VRA) shapes behavior in the jurisdictions subject to the statute—not just by blocking discriminatory electoral changes, but also by influencing less transparent conduct by various political actors operating in these regions. Do not be so sure, she tells us, that opportunities for minority political participation would not deteriorate absent the constraints imposed by section 5.¹

I share that sentiment, although Professor Karlan and I differ on how it informs the legality of reauthorization. For Professor Karlan, what matters is that Congress thought that minority political participation in covered jurisdictions would suffer were the statute to expire.² When a legal challenge to reauthorization makes its way to the Supreme Court, as one inevitably will, Professor Karlan maintains that the Justices should simply defer to Congress's judgment that section 5 remains necessary. She writes, "Congress should have the authority . . . to conclude that the course of treatment is not yet fully complete and to prescribe another round of medicine."³

Professor Karlan, of course, knows that the Supreme Court accorded Congress no such deference in *City of Boerne v. Flores* and the five related decisions that followed. Decided between 1997 and 2001, *City of Boerne* and its progeny struck down portions of six federal statutes and flatly rejected Congress's judgment that particular statutory remedies were needed. In each case, the Court found that Congress failed to document constitutional violations pervasive enough to warrant the federal proscriptions and remedies it attempted to construct.⁴ As a result, it is widely assumed that the fate of section 5, as reauthorized, will hinge on whether the record Congress amassed to support reauthorization documents the continuance of pervasive, or at least significant, unconstitutional conduct for which preclearance offers a remedy.⁵

1. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 22 (2007).

2. See *id.* at 29.

3. *Id.* at 31.

4. *City of Boerne v. Flores*, 521 U.S. 507, 530–32 (1997); see also *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); *United States v. Morrison*, 529 U.S. 598, 614–19 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–91 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672–75 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640–47 (1999).

5. See Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in *DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT* (forthcoming 2007) (manuscript at 2 n.6, on file with the Houston Law Review), available at

Professor Karlan disputes that assumption. She argues that preclearance differs from the statutes invalidated in the *City of Boerne* decisions because it implicates five critical factors—a fundamental right, a suspect classification, the regulation of congressional elections, the need for “political value judgments,” and the exercise of “political responsibility.”⁶ Professor Karlan posits that these factors are all “in play with respect to the preclearance regime,” that their convergence places congressional power “at its apogee,” rendering the limits on Congress articulated in *City of Boerne* and its progeny inapplicable.⁷

That is a provocative and novel defense of reauthorization. The standard line insists that preclearance comports with the *City of Boerne* standard, either in its most rigorous form, or under the less exacting version applied in two more recent decisions which involved suspect classes and fundamental rights.⁸ Preclearance, of course, implicates both race, a suspect classification, and voting, the classic fundamental right. Professor Karlan relies on these aspects of section 5 as important to its survival. But her claim is not that these specific features of section 5 mean that preclearance should be subject to some sort of watered down *City of Boerne* review. Far more sweeping, her claim is that the statute need not be subject to the *City of Boerne* analysis at all. Congress need not document pervasive, significant, or even any unconstitutional conduct in covered jurisdictions because when it acts as it did in this realm, it exercises what I understand Professor Karlan to suggest is a plenary power—or at least pretty close to one.

Professor Karlan skillfully presents this robust vision of congressional power. She cogently reconciles existing precedent and adroitly extracts every morsel of support one can from the legal landscape to bolster her argument. And yet, I am not convinced. On both descriptive and normative grounds, I am not convinced that Congress enjoys, or should enjoy, as much power as she suggests, and, as a predictive matter, I would be surprised if a majority of the Roberts Court will think so either. Professor Karlan’s vision of congressional power supports not only section 5 as reauthorized, but also a far more expansive statute, one with neither temporal nor geographic limitations, one unsupported by

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955827.

6. Karlan, *supra* note 1, at 17–19.

7. *Id.* at 17.

8. See *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); see also 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, 71 (2003).

a record of any kind, and one stripped of the bailout provision, the escape hatch that presently releases covered jurisdictions from preclearance if they comply with specified statutory criteria. Given the skepticism many Justices have expressed about various aspects of the Voting Rights Act, I suspect that a majority of them will not embrace such a vision.

Still, as I have written elsewhere,⁹ I too think the legality of reauthorization should not hinge on the record of unconstitutional conduct the Court demanded in *City of Boerne* and its progeny. In my view, it is not the five factors that Professor Karlan cites that make section 5 different, but instead section 5's status as an operational statute, and not a wholly new one. The *City of Boerne* decisions required evidence of pervasive unconstitutional conduct in order to ensure that the problem Congress sought to address was significant enough to warrant a new congressional statute.¹⁰ Had Congress expanded the preclearance regime to apply to regions where section 5 presently does not operate, *City of Boerne's* quest for pervasive unconstitutional conduct might govern the validity of that expansion.

Reauthorization of an existing statute like section 5, however, requires a different showing. Section 5 was legitimately put in place more than forty years ago to address precisely the type of pervasive discrimination the *City of Boerne* cases require as justification for new legislation. For the validity of reauthorization to depend on evidence that such discrimination persists largely unchanged would mean that preclearance could be reauthorized only if the statute was wholly ineffective. In other words, section 5's very success in addressing racial discrimination in voting should not itself be mistaken for proof that preclearance has become obsolete.¹¹

Nor, however, should section 5's success be license for the statute to continue indefinitely. Instead, the validity of reauthorization should depend on whether section 5 has achieved its goals not only to suppress acts of racial discrimination in voting, but to bring about lasting changes in behavior and attitude as well. It should require that we try to predict whether unconstitutional conduct would resume were the constraints of section 5 lifted. Reauthorization should require that we determine whether section 5's success in controlling

9. See Katz, *supra* note 5 (manuscript at 20).

10. See *supra* note 4.

11. See Katz, *supra* note 5 (manuscript at 2).

manifestations of racial discrimination now amounts to a cure for the underlying disease.¹²

Critics of reauthorization insist that we have been cured. Observed improvements in minority political participation suggest that may be right, but these improvements are also, as Professor Karlan rightly notes, consistent with the view that section 5 is curbing misconduct that might otherwise find expression.¹³ Professor Karlan argues for plenary power in part because she believes the evidence on the ground supports both a “realist” account and the more “optimistic” story critics of reauthorization celebrate. Because Congress opted for realism, she argues, the Court should not displace it.¹⁴

I am nevertheless wary of an approach that renders reauthorization functionally unreviewable. *City of Boerne* and its progeny, while problematic in important respects, were nevertheless properly animated by the conviction that congressional power to enforce the Reconstruction Amendments—including Congress’s power to reauthorize section 5—is not wholly unfettered. The Roberts Court will undoubtedly assess reauthorization under the *City of Boerne* standard, requiring congruence and proportionality between the statutory provision and the injury addressed, and indeed it should. My view, however, is that when it does, it must adjust the *City of Boerne* standard to reflect section 5’s status as an operational statute.

More specifically, the validity of section 5 cannot hinge on the scope of contemporary unconstitutional conduct in covered jurisdictions, given that section 5 presently operates to block such conduct.¹⁵ Instead, reauthorization is best understood to target political processes that continue to be compromised by race, compromised in ways that reflect past unconstitutional conduct and portend future misconduct absent the strictures of section 5. As I will explain, such practices are a legitimate target for congressional enforcement legislation. The Court has specifically so held in the past and explicitly affirmed in *City of Boerne* itself.¹⁶

12. See Karlan, *supra* note 1, at 31; see also Katz, *supra* note 5 (manuscript at 21) (questioning “whether Section 5 has successfully achieved its larger ambition not simply to suppress discrimination in voting but to change the attitudes that, if left unchecked, give rise to the behavior”).

13. Karlan, *supra* note 1, at 21–22.

14. *Id.* at 30.

15. See *id.* at 22.

16. See *infra* notes 31–33 and accompanying text.

To be sure, understanding reauthorization to target political processes of this sort presents a serious problem if congressional power is to remain at all circumscribed. Race will very likely always affect political processes in problematic ways and the prospect of future misconduct will never fully abate. How then should we gauge Congress's determination that preclearance remains necessary in covered jurisdictions at this moment without unavoidably upholding congressional power to deem it necessary in perpetuity, to expand its reach geographically or to heighten the burdens it imposes?

The best answer has been provided by Congress itself. In the reauthorized statute, Congress articulated a standard to gauge when preclearance is no longer necessary.¹⁷ That standard, set forth in the statute's bailout provision, does not require the elimination of every way race compromises political processes in covered jurisdictions. Nor does it demand the elimination of any threat of future misconduct. Instead, it articulates criteria compliance with which Congress has deemed proof the jurisdiction has made sufficient progress to be relieved of further obligations under section 5.¹⁸

While Congress designed the bailout criteria for application on a case-by-case basis, it implicitly applied the standard wholesale when it recently reauthorized section 5. Reauthorization reflects Congress's judgment that preclearance remains necessary and, by implication, that covered jurisdictions were not categorically qualified for bailout at the time of renewal. The record evidence Congress collected prior to reauthorization indeed suggests widespread noncompliance with the bailout factors.¹⁹

Congress nevertheless left room for the possibility that covered jurisdictions might demonstrate otherwise and show that they made sufficient progress to be released from coverage, now or in the coming years. In other words, the bailout provision enables covered jurisdictions to calibrate on an individual basis Congress's judgment that, overall, section 5 remains necessary. Bailout thereby clarifies the regime reauthorization imposes. Rather than an inexorable command, preclearance operates as a rebuttable presumption that covered jurisdictions may refute.

The question of whether to reauthorize preclearance forced Congress to confront a difficult counterfactual: what would

17. See 42 U.S.C. § 1973b(a)(1)(F) (2000).

18. *Id.*

19. See S. Res. 232, 109th Cong., 151 CONG. REC. S9541 (2005).

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happen if the strictures of section 5 were lifted? Sufficient evidence pointed to the conclusion that some ill would occur, but how much or how pervasive this occurrence would be was difficult to assess. Faced with this uncertainty, Congress renewed the statute but limited its reach by specifying evidentiary criteria that a jurisdiction must satisfy to demonstrate that it had sufficiently mended its ways, and it left the burden on the jurisdiction to so demonstrate. In the context of renewing an existing statute in the face of necessary uncertainty, this choice, as exercised by Congress, should receive deference under section 5 of the Fourteenth Amendment. And it is ultimately this choice that renders reauthorization constitutional.

* * *

Part I of this Essay parses the factors Professor Karlan identifies as characterizing the preclearance regime, which she claims give rise to distinct congressional power in this realm. This Part explains why the Roberts Court is likely to read each of these factors less expansively than does Professor Karlan. Part II offers an alternative approach through which to explore validity of reauthorization, one that requires adapting the *City of Boerne* framework to accommodate section 5's status as an operational statute. Part III concludes this commentary.

II. A PLENARY POWER?

Professor Karlan argues that the preclearance process is different from the statutes invalidated in the *City of Boerne* line of cases in several critical ways, which, when taken together, placed Congress's power at its "apogee" when it reauthorized section 5.²⁰ The Roberts Court may well disagree. Here is why.

A. *Fundamental Rights and Suspect Classifications*

Professor Karlan observes that Congress's power to enforce the Reconstruction Amendments "is at its strongest" when it "acts to remedy or prevent the kinds of practices that the Court has subjected to heightened judicial scrutiny."²¹ Congress can do more, she writes, when it acts to protect a fundamental right or suspect classification than when it seeks "to promote equality more generally."²²

20. Karlan, *supra* note 1, at 17.

21. *Id.* at 13.

22. *Id.*

This position has been widely advanced in the debates that preceded reauthorization, and the authority most often cited for it is the authority Professor Karlan invokes—namely, two recent decisions, *Nevada Department of Human Resources v. Hibbs*, and *Tennessee v. Lane*.²³ *Hibbs* sustained the Family and Medical Leave Act (FMLA) against a *Boerne*-based challenge, while *Lane* upheld a provision of the Americans with Disabilities Act (ADA) facing a similar attack. *Hibbs* emphasized that the FMLA implicated questions of gender discrimination, a subject that receives heightened judicial scrutiny,²⁴ while *Lane* pointed out that the application of the ADA under challenge had protected access to the courts, and thus implicated a fundamental right.²⁵

Supporters of reauthorization celebrate *Hibbs* and *Lane*, but whether the Roberts Court will embrace these decisions remains to be seen. *Hibbs* and *Lane* are not easily reconciled with the earlier *City of Boerne* decisions, some of which involved challenges to statutes that also implicated fundamental rights (such as the free exercise of religion in *City of Boerne* itself) or a suspect classification (such as gender discrimination in the *United States v. Morrison*²⁶ decision striking down the Violence Against Women Act (VAWA)). These earlier decisions elicited no deference from the Court of the sort the Justices employed in *Hibbs* and *Lane*. While the statutes in these earlier cases might be distinguished from the FMLA and ADA in terms of their relative breadth and the type of remedy imposed, the earlier decisions never suggested that suspect classes or fundamental rights might matter to the analysis.

Both *Hibbs* and *Lane*, moreover, involved fractured opinions, and the deciding votes were cast by Justices no longer on the Court (namely, William Rehnquist in *Hibbs* and Sandra Day O'Connor in *Lane*).²⁷ Justice Kennedy, who now holds the Court's center, dissented in both cases.²⁸ Thus, even if a majority of the Rehnquist Court believed that more deference to Congress should be accorded when legislation implicates fundamental rights and suspect classifications, a majority of the Roberts Court may not. Professor Karlan may yet find herself longing for the good old days of the Rehnquist Court.

23. *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728–29 (2003).

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

25. *Lane*, 541 U.S. at 521–22.

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

27. *Hibbs*, 538 U.S. at 723; *Lane*, 541 U.S. at 512.

28. *See Hibbs*, 538 U.S. at 723; *Lane*, 541 U.S. at 512.

Even if *Hibbs* and *Lane* remain good law, the decisions do not suggest a power plenary in scope. While they uphold congressional enactments based on thinner records than those deemed inadequate in the original *City of Boerne* decisions, they hardly repudiate the *City of Boerne* framework.²⁹ They continue to emphasize “the extent and specificity” of the unconstitutional state conduct needed as a predicate for congressional action.³⁰

Even absent this precedent, the Court’s careful preservation of the VRA’s preclearance regime in prior decisions does indeed suggest special receptivity to congressional power over suspect classifications and fundamental rights, and specifically to the very classification and fundamental right preclearance implicates.³¹ *City of Boerne* cites earlier versions of the VRA’s section 5 as the paradigm of permissible enforcement legislation, despite both “the burden those measures placed on the States” and their proscription of constitutional conduct.³² *City of Boerne*’s progeny likewise invoke the earlier VRA provisions as examples of permissible congressional action and cite the decisions upholding them as so establishing.³³

29. See Erwin Chemerinsky, *Real Discrimination?*, 16 WASH. U. J.L. & POL’Y 97, 118 (2004) (“Together *Lane* and *Hibbs* establish that Congress has more authority to act under Section 5 . . . when it is dealing with claims of discrimination or violations of rights which receive heightened scrutiny.”). But see Vikram David Amar, *The New “New Federalism”*: *The Supreme Court in Hibbs (and Guillen)*, 6 GREEN BAG 2d 349, 351–53 (2003) (arguing that the heightened scrutiny for gender classifications notwithstanding, *Hibbs* is irreconcilable with *City of Boerne* and *Morrison*).

30. *Hibbs*, 538 U.S. at 733–35 & n.11; see also *Lane*, 541 U.S. at 528–29 (noting the “sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination” evidenced through “judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services”).

31. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (contrasting abrogation of immunity in ADA with the VRA provisions upheld in *South Carolina v. Katzenbach*); *United States v. Morrison*, 529 U.S. 598, 626–27 (2000) (contrasting VAWA with statutory provisions upheld in *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–89 (2000) (discussing the importance of the legislative record); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638–39 & n.5 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (citing VRA quartet as examples of permissible enforcement legislation); see also *Hibbs*, 538 U.S. at 736 (likening congressional efforts to combat sex discrimination in the FMLA with the VRA’s attempt to combat racial discrimination in voting, as upheld in *South Carolina v. Katzenbach*). The notable exception is *City of Boerne*’s rejection of *Katzenbach v. Morgan*’s suggestion that Congress may expand the rights protected by the Equal Protection Clause. See *City of Boerne*, 521 U.S. at 527–28.

32. *City of Boerne*, 521 U.S. at 518.

33. See *Hibbs*, 538 U.S. at 736 (citing the VRA provisions upheld in *South Carolina v. Katzenbach* as examples of permissible congressional measures to address a serious problem); *Garrett*, 531 U.S. at 373 (stating that “[t]he ADA’s constitutional shortcomings are apparent” when compared with the VRA provisions upheld in *South Carolina v. Katzenbach*); *Morrison*, 529 U.S. at 626 (describing VAWA as “unlike” the remedies

The Court's post-*Boerne* decision, *Lopez v. Monterey County*, vigorously affirmed the constitutionality of a broad construction of section 5.³⁴ In *Lopez*, Justice O'Connor's majority opinion easily finds "that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions."³⁵ This process may be intrusive,³⁶ but it falls well within Congress's enforcement powers to mandate. "[T]he Voting Rights Act, by its nature, intrudes on state sovereignty," Justice O'Connor observed, while emphasizing that "[t]he Fifteenth Amendment permits this intrusion."³⁷ *Lopez* thereby affirms as constitutionally permissible the burden that the section 5 preclearance process "by its nature" places on state sovereignty.³⁸

While the Court had previously upheld congressional authority to enact section 5,³⁹ *Lopez* is important because it addressed the constitutionality of the statute after the 1982 extension and after the emergence of the *City of Boerne* framework.⁴⁰ *Lopez* certainly offers support for the claim that section 5 is entitled to a different form of review than that employed in the *City of Boerne* cases. In *Lopez*, Justice O'Connor cites *City of Boerne* only once, and then solely for the proposition that Congress's enforcement power includes the power to prohibit constitutional conduct and to intrude deeply into state sovereign

upheld in *Katzenbach v. Morgan* and *South Carolina v. Katzenbach*); *Kimel*, 528 U.S. at 89 (contrasting the congressional record supporting ADEA's abrogation of state immunity with that underlying the VRA provisions upheld in *South Carolina v. Katzenbach*); *Fla. Prepaid*, 527 U.S. at 638–39 & n.5 (invoking *City of Boerne*'s discussion of the VRA quartet to distinguish the statutory provision in dispute).

34. *Lopez v. Monterey County*, 525 U.S. 266, 282–85 (1999); see also John Matthew Guard, Comment, "Impotent Figureheads"? *State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores*, 74 TUL. L. REV. 329, 355–56 (1999).

35. *Lopez*, 525 U.S. at 283.

36. See Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 790 (1998) (describing preclearance process as "an unprecedented federal intrusion into the governing processes of the states").

37. *Lopez*, 525 U.S. at 284–85.

38. *Id.* at 284. *Lopez*, in fact, references not just section 5 but the Voting Rights Act in its entirety. *Id.*

39. See *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); see also Guard, *supra* note 34, at 357 (arguing that principles of stare decisis support the Court's holding in *Lopez*).

40. *Lopez* was decided during the same term as the *College Savings Bank* and *Florida Prepaid* decisions, both of which developed and extended the *City of Boerne* decision. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637–40 (1999).

processes.⁴¹ *Lopez*, moreover, makes no mention of the congressional findings underlying the 1982 extension of section 5. Instead, Justice O'Connor affirms the validity of section 5 based on *South Carolina v. Katzenbach* and *City of Rome v. United States*, both of which upheld earlier versions of the statute based on distinct legislative findings and historic circumstances.⁴²

The Justices in *Lopez* were remarkably united in thinking section 5 legitimate. Justice O'Connor's opinion was joined not only by Justices Stevens, Souter, Ginsburg, and Breyer, all of whom dissented in *City of Boerne's* progeny,⁴³ but also by Justice Scalia, who voted with the majority in all of the *City of Boerne* decisions and dissented in both *Hibbs* and *Lane*.⁴⁴ So too, while former Chief Justice Rehnquist and Justice Kennedy concurred in *Lopez*, they did so to dispute a factual issue and a specific application of section 5, and not to question the overall validity of the statute.⁴⁵ Even Justice Thomas, who dissented alone and argued that the Court's construction of section 5 contravened the *City of Boerne* standard,⁴⁶ did not suggest that section 5 itself, as amended in 1982, was suspect under the *City of Boerne* doctrine. *Lopez's* affirmation of section 5 was not, accordingly, the product of a divided Court.

The Roberts Court also appears to subscribe to the proposition that section 5 is legally permissible, at least insofar

41. *Lopez*, 525 U.S. at 282–83 (“As the Court recently observed with respect to Congress’s power to legislate under the Fourteenth Amendment, “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.” (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)) (alteration in original).

42. See *Lopez*, 525 U.S. at 282–84; see also *City of Rome*, 446 U.S. at 180–82 (discussing congressional findings supporting the 1975 extension of the Act and agreeing that the need for the extension was “unsurprising and unassailable” and that it was “plainly a constitutional method of enforcing the Fifteenth Amendment”); *South Carolina v. Katzenbach*, 383 U.S. at 308–09 (noting extensive congressional findings underlying the 1965 VRA).

43. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (Stevens, J., dissenting in part and concurring in part); *Coll. Sav. Bank*, 527 U.S. at 691 (Stevens, J., dissenting); *id.* at 693 (Breyer, J., dissenting); *Fla. Prepaid*, 527 U.S. at 648 (Stevens, J., dissenting).

44. Justice O'Connor likewise joined the majority in *City of Boerne's* progeny, but dissented in *City of Boerne* itself because of her disagreement with the Court's analysis in *Employment Division v. Smith*. *City of Boerne*, 521 U.S. at 544–45 (O'Connor, J., dissenting).

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

46. See *id.* at 295–96 (Thomas, J., dissenting) (arguing that nondiscretionary actions cannot be motivated by unconstitutional conduct and accordingly that Congress cannot reach them through enforcement legislation).

as it was reauthorized in 1982. In last year's *League of United Latin American Citizens (LULAC) v. Perry*, Justice Scalia characterized the state's interest in complying with section 5 as compelling. Justice Scalia stated that this compelling interest justified, under strict scrutiny, what he deemed to be an intentional racial gerrymander.⁴⁷ Joining Justice Scalia on this point were Justices Thomas and Alito, and Chief Justice Roberts.⁴⁸ Justices Stevens, Souter, Ginsburg and Breyer had all previously stated their belief that compliance with section 5, as amended in 1982, is a compelling state interest.⁴⁹ As a result, Justice Kennedy is now the only sitting Justice who has not expressly subscribed to that proposition.

All told, these decisions provide substantial support for the proposition that Congress has additional power when it regulates at least one suspect classification and at least one fundamental right. That is, these decisions suggest that congressional power to regulate the intersection of race and the right to vote is simply different. I have written elsewhere that such a rule makes sense, and in fact comports with a meaningful commitment to federalism and state power. In particular, I think that the Court has historically deferred to congressional power in the realm of race and the vote in order to reinforce representative governance at the state and local level. The animating conviction is that state and local governments best protect individual liberty, but this conviction is informed by the belief that to do their jobs such governments must be democratically accountable. Seen in this light, intrusive federal measures like section 5 are permissible because they are thought to foster effective state and local

47. See *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2666–67 (2006); see also Nathaniel Persily, *Strict in Theory, Loopy in Fact*, 105 MICH. L. REV. FIRST IMPRESSIONS 43 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/persily.pdf>.

48. *LULAC*, 126 S. Ct. at 2663.

49. *Shaw v. Hunt*, 517 U.S. 899, 915 (1996). (“We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest”); see also *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) (“[W]e assume without deciding that compliance with the [section 2] results test . . . can be a compelling state interest”); *id.* at 990–92 (O’Connor, J., concurring) (stating that “compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest”); *id.* at 1004 (Stevens, J., dissenting) (stating that “[e]ven if strict scrutiny applies, I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State’s responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements”); *id.* at 1046 (Souter, J., dissenting) (describing as significant Justice O’Connor’s concurring position “that compliance with § 2 of the Voting Rights Act is a compelling state interest”).

governance and thereby to render unnecessary even more intrusive and extensive federal regulation.⁵⁰

This suggests that the Court might well think that section 5, as reauthorized in 2006, is no different from the earlier versions of the statute. The Court might review it with the same deferential stance the Justices employed previously. Still, the Court may think the most recent reauthorization presents a distinct issue. In the *City of Boerne* decisions the Court had little difficulty affirming the validity of section 5, a historically resonant statute that was not subject to direct challenge.⁵¹ So too, *Lopez* involved a relatively narrow question of statutory interpretation, not a facial challenge to the constitutionality of the statute.⁵² *Lopez* was decided just two years after the *City of Boerne* decision, at a time when the Court might not yet have appreciated the breadth of the *City of Boerne* doctrine, notwithstanding Justice Thomas's prescient warning in dissent.⁵³ Likewise, *LULAC* prompted Justice Scalia's embrace of section 5, but did not involve a direct challenge to the statute, something Justice Scalia was careful to note along with the fact that he was assuming and not deciding the statute's constitutionality.⁵⁴

Most importantly, all the decisions from *City of Boerne* to *Lopez* to *LULAC* addressed section 5 when expiration of the statute loomed on the horizon. Indeed, Justice Scalia's decision in *LULAC* deemed compliance with section 5 a compelling state interest at a moment when the Court was likely never again to confront a challenge under this version of the statute. The inclination to affirm the validity of a statute that is about to expire may say little about one's willingness to uphold section 5, as recently reauthorized, for another quarter century, particularly when the conditions that first prompted enactment of this "temporary" statute occurred four decades ago.

50. See Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2388 (2003).

51. Pamela S. Karlan, Lecture, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1594 (2002) (describing the VRA as the "crown jewel of the Second Reconstruction" and suggesting that "the Court has been unwilling to use strict scrutiny to dismantle [it]").

52. See, e.g., Brief for Appellant at *8, *Lopez v. Monterey County*, 525 U.S. 266 (1999) (No. 97-1396); Brief for Appellee Monterey County at *2-3, *Lopez v. Monterey County*, 525 U.S. 266 (1999) (No. 97-1396); Brief for State Appellee at *10-11, *Lopez v. Monterey County*, 525 U.S. 266 (1999) (No. 97-1396).

53. See Katz, *supra* note 50, at 2373.

54. *LULAC v. Perry*, 126 S. Ct. 2594, 2668 n.2 (2006) (Scalia, J., dissenting).

B. The Regulation of Congressional Elections

Article I, Section 4 of the U.S. Constitution authorizes state legislatures to regulate congressional elections, while specifying that “Congress may at any time by Law make or alter such Regulations.”⁵⁵ For Professor Karlan, this grant of authority “reinforc[es]” the validity of section 5.⁵⁶ While the preclearance regime is typically understood as an exercise of congressional power under the Fourteenth and Fifteenth Amendments,⁵⁷ Professor Karlan argues that Congress also exercised its power under the Elections Clause when it reauthorized section 5, at least insofar as the preclearance process regulates elections in which members of Congress are selected.⁵⁸

This is both correct and important because, as Professor Karlan notes, precedent suggests that congressional power under the Elections Clause is quite broad. Professor Karlan reads this precedent as establishing that Article I grants Congress “essentially plenary authority”⁵⁹ when it regulates congressional elections, and that may well be right. If so, the grant of authority provides sufficient congressional power to support many applications of section 5. It allows for the continued application of the preclearance process to voting changes that pertain to congressional elections, including changes related to so-called “mixed elections,” namely elections involving multiple offices so long as candidates for Congress are among them.⁶⁰

And yet, it does not reach purely local elections,⁶¹ the very elections where section 5 appears to be most important. Discriminatory practices remain more persistent at the local level where party affiliation less effectively operates as a mitigating factor.⁶² Indeed, the Department of Justice has

55. U.S. CONST. art. I, § 4.

56. See Karlan, *supra* note 1, at 4.

57. *Id.* at 10–11.

58. *Id.* at 17; see also Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. (forthcoming 2007) (manuscript at 4, on file with the Houston Law Review) (arguing that the Elections Clause provides an alternative theory on which the reauthorization might be upheld).

59. Karlan, *supra* note 1, at 16.

60. *Id.* at 17 (citing *In re Coy*, 127 U.S. 731, 752 (1888)).

61. Tokaji, *supra* note 58 (manuscript at 26).

62. See Katz, *supra* note 5 (manuscript at 4) (noting that with regard to section 2 of the Voting Rights Act, successful challenges to local practices exceed the number of such challenges to statewide ones); see also Samuel Issacharoff, Essay, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1724 (2004) (arguing that preclearance is no longer warranted for statewide districting plans).

objected more often to changes proposed at the local level than to statewide changes such as congressional redistricting plans.⁶³

The Elections Clause consequently provides significant, but ultimately only partial, support for the validity of reauthorization.

C. “Political Value Judgments”

Reasonable people disagree about how to achieve what Professor Karlan labels “political fairness” in the electoral process.⁶⁴ Elections might be structured in a number of legitimate ways, and the Constitution provides little guidance on how to select among them. Regulating the political process necessarily requires that choices be made among what Professor Karlan calls “hotly contested principles of political philosophy,” choices that she maintains are ill-suited for judicial resolution.⁶⁵ Because Professor Karlan thinks these choices “are particularly within the expertise of politicians,”⁶⁶ she argues that courts should defer to legislatures and, specifically, that “Congress should . . . have more leeway to make initial choices.”⁶⁷

Professor Karlan posits that reauthorization represents such a choice. Section 5, she argues, involves the regulation of the political process and embodies numerous “political value judgments” that the Court lacks the ability to make. Congress made the judgments, and Professor Karlan posits that the Court should not displace them.⁶⁸

Professor Karlan highlights one specific value judgment, namely what is known as the *Georgia v. Ashcroft* “fix.” *Georgia v. Ashcroft* held that Georgia could permissibly replace some majority-minority districts with so-called “coalition” and “influence” districts,⁶⁹ and that covered jurisdictions have the

63. See Michael J. Pitts, *Let's Not Call the Whole Thing off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612 (2005) (arguing that the greatest impact of section 5 and the VRA has been to police voting discrimination at the local level).

64. Karlan, *supra* note 1, at 18–19.

65. *Id.* at 18.

66. *Id.*

67. *Id.* at 19.

68. *Id.* at 17.

69. See generally Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539 & n.60 (2002) (defining and discussing coalition districts). In coalition districts, black voters need not comprise the majority of a district's population to be able to elect representatives of choice, while influence districts permit minority voters to exert some sway in the electoral process but not necessarily elect representatives of choice. *Id.* at 1539–40.

discretion to select among these districting devices.⁷⁰ As the Court wrote, “Section 5 gives States the flexibility to choose one theory of effective representation over the other.”⁷¹

Congress “fixed” *Georgia v. Ashcroft* when it reauthorized section 5 by expressing its preference for one specific theory of representation. The reauthorized statute provides that a change that “will have the effect of diminishing the ability of” minority voters “to elect their preferred candidates of choice denies or abridges the right to vote” for purposes of section 5 review.⁷² In other words, the amendment prevents Georgia from doing what the Court said Georgia could do in *Georgia v. Ashcroft*, namely, replace majority-minority districts, where minority voters elect representatives of choice, with influence districts, where, by definition, they do not.

Professor Karlan has argued that minority voters are better served when they elect representatives of choice than when they are only able to “influence” outcomes.⁷³ That is, she prefers the theory of representation Congress adopted in the reauthorized statute better than the one Georgia implemented, but her argument doesn’t depend on this preference. Instead, her claim is that Congress made a choice among differing theories, and that it has the constitutional power to do so.

I wonder. The Court in *Georgia v. Ashcroft* certainly claimed it was agnostic about the theories of representation at issue in the case and that it read section 5 as allowing states to choose among them.⁷⁴ Still, I can’t help but think that the Justices sided with Georgia because they preferred the substantive choice Georgia made. That is, the Justices upheld Georgia’s discretion to replace majority-minority districts with influence districts because the Justices think that latter form of representation is better policy. Several Justices have expressly said so,⁷⁵ and some

70. See *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (noting that, as between majority-minority and coalition districts, “[s]ection 5 does not dictate that a State must pick one of these methods of redistricting over another”); *id.* at 483 (finding that “[s]ection 5 leaves room for States to use these types of influence and coalitional districts . . . [and that] the State’s choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable”).

71. *Id.* at 482.

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

73. See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31–32 (2004).

74. *Georgia v. Ashcroft*, 539 U.S. at 480–82.

75. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (“[E]qual opportunity to gain public office regardless of race . . . is neither assured nor well served . . . by carving

have suggested that majority-minority districts themselves may be unlawful.⁷⁶ Indeed, language in *Georgia v. Ashcroft* itself reflects the Court's continuing discomfort with the majority-minority district as a form of representation.⁷⁷

If that's right, the Court's willingness to uphold Georgia's decision to replace majority-minority districts with influence districts doesn't necessarily mean that the Justices would have sustained a decision to move in the opposite direction. It does not mean that the Court will necessarily agree that Congress has the discretion to select the specific theory of representation that it did when it attempted the *Georgia v. Ashcroft* "fix."

But even if the Court finds that congressional power to make "political value judgments" is sufficient to sustain this statutory amendment, will it think such power supports the preclearance regime more generally? Reauthorization does not simply block covered jurisdictions from reducing the number of majority-minority districts in the manner that Georgia did. Instead, it retains the entire preclearance apparatus and continues section 5's burden-shifting process under which the presumption of validity that typically attaches to state and local decisionmaking is reversed.

In one sense, of course, Congress's decision to continue this regime reflects a "political value judgment"—the judgment that

electorates into racial blocs."); *id.* at 911–12 ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993))); *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (recognizing that majority-minority districts may "sometimes" be necessary "to ensure equal political and electoral opportunity," but emphasizing that such districts embody the "politics of second best," and should be avoided whenever diverse ethnic and racial coalitions are possible); *Holder v. Hall*, 512 U.S. 874, 892, 892–907 (1994) (Thomas, J., concurring) (arguing that majority-minority districts represent "racial 'balkanization' of the Nation," that they "segregat[e] the races into political homelands that amount[, in truth, to nothing short of a system of 'political apartheid,']" that they give "credence to the view that race defines political interest," and that "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act" (quoting *Shaw*, 509 U.S. at 647, 657)); see also Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POLY 119, 121 (2000) (describing the position that self-conscious creation of majority-minority districts "expresses a view of political identity inconsistent with democratic ideals . . . [and] might have the consequentialist effect of encouraging citizens and representatives increasingly to come to experience and define their political identities and interests in partial terms").

76. See, e.g., Lowenstein, *supra* note 36, at 801 (stating that "a majority of the majority [in the *Shaw* cases] regards the intentional creation of [a majority-minority district] as presumptively unconstitutional" but that a majority of the full Court does not).

77. *Georgia v. Ashcroft*, 539 U.S. at 487. But see *LULAC v. Perry*, 126 S. Ct. 2594, 2616, 2622 (2006).

the procedures the regime mandates remain necessary. Still, it strikes me as a value judgment of a different order than the specific substantive choice Congress made in response to *Georgia v. Ashcroft*. If preclearance in its entirety constitutes a political value judgment to which the Court should defer, the expansiveness of the category strips it of analytic power. No longer a reason to defer to congressional power, the need for a political value judgment constitutes nothing more than the conclusion that deference is required. In this light, the factor simply restates the general claim that power here should be plenary without advancing the case for why it might be.

D. Exercising “Political Responsibility”

The final component of Professor Karlan’s argument rests on her characterization of the preclearance regime as “a quintessential exercise of political responsibility.”⁷⁸ This matters, Professor Karlan suggests, because she maintains that the animating force within much of the *City of Boerne* doctrine and the Court’s federalism jurisprudence generally is the belief that the federal government should own up to measures that erode state sovereignty and not a broader concern for protecting state sovereignty itself.⁷⁹ Because Professor Karlan believes that preclearance manifests the requisite federal assumption of political responsibility, she argues the federalism decisions do not affect the validity of reauthorization.

That’s a provocative and interesting claim, but again, I’m not convinced that the Court will agree nor that it should. To be sure, the Court has made clear that the concerns propelling its Eleventh Amendment jurisprudence are not implicated when Congress authorizes the federal government (as opposed to a private party) to initiate litigation against a state defendant.⁸⁰ It has also suggested (albeit less explicitly) that these concerns were at issue in many of the *City of Boerne* decisions, which involved congressional efforts to abrogate state immunity from suit under the Fourteenth Amendment.⁸¹ Finally, the Court has indeed flatly rejected federal measures that blur lines of political

78. Karlan, *supra* note 1, at 19.

79. *Id.* at 11.

80. *See Alden v. Maine*, 527 U.S. 706, 755–56 (1999).

81. In decisions like *Kimel*, *Florida Prepaid*, and *Garrett*, the Court refused to allow Congress to circumvent decisions like *Seminole Tribe of Florida* through an expansive use of its power to enforce the Fourteenth Amendment. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

responsibility and emphasized the need for the federal government to assume responsibility for the measures it initiates.⁸²

Far less clear is whether any of this informs the validity of the section 5 preclearance regime. The assumption of political responsibility as described by Professor Karlan is hardly a necessary condition for a statute's survival.⁸³ That it might be sufficient (or at least sufficient when combined with independent factors of the sort Professor Karlan lists) is, I suppose, possible. It's also possible that the Court believes that the need to assume political responsibility is but one value that inheres in its vast federalism jurisprudence. Congress may well circumvent the rules applying the Eleventh Amendment by assuming political responsibility for the measures it promotes. But that power does not necessarily mean it can get around all the strictures embodied in federalism case law simply by assuming such responsibility. In other words, additional values limit congressional power in this realm.

Nor is it clear to me that preclearance reflects an assumption of responsibility of the sort or scope Professor Karlan suggests. She is, of course, correct that judicial preclearance (that is, when states seek preclearance in federal district court) "raises none of the specific concerns that the abrogation cases involve, since it does not implicate the Eleventh Amendment."⁸⁴ The State is by definition the plaintiff, and thus is not being subjected to suit. As important, the Attorney General's response as a defendant in such suits necessarily manifests an exercise of responsibility, either by rebutting the claims made by the covered jurisdiction or by acquiescing to them.⁸⁵

So too, political responsibility is plausibly exercised within the administrative preclearance process where the vast majority of preclearance requests are submitted.⁸⁶ The Attorney General assumes such responsibility when he interposes an objection to a

82. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997).

83. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 533 (2004) (upholding the FMLA's authorization of private suits against state agencies); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) (upholding ADA's authorization of private suits against state agencies).

84. Karlan, *supra* note 1, at 19.

85. See *id.* at 20.

86. See Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING* 52, 53 n.2 (Bernard Grofman & Chandler Davidson eds., 1992) (citing Justice Department statistics); Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 191 (1983) (citing the "expense and delay involved in a declaratory judgment action" as primary reasons most jurisdictions seek preclearance from the Attorney General).

proposed change, and other agency actors at least arguably do so as well when they take actions that slow state decision-making or indeed functionally block choices a State would otherwise make.⁸⁷

And yet, section 5 imposes its biggest burden by requiring covered jurisdictions to submit changes for preclearance (regardless of how the Department of Justice responds to submissions). It is this obligation that is far more difficult to characterize as an exercise of political responsibility of the sort Professor Karlan references. To be sure, through the original coverage formulas set forth in the VRA and the reauthorizations that followed, Congress decided that covered jurisdictions should bear the burden to submit electoral changes, regardless of their individual merits, and defend their legitimacy. But if Congress's determination that preclearance was needed and remains necessary represents an exercise of political responsibility, then any legislative act would presumably qualify as well.

That hardly renders reauthorization suspect. It simply means that the exercise of responsibility the statute reflects does not ensure its survival.

III. A THIRD APPROACH

Most proponents of preclearance parse the congressional record for documented evidence of misconduct in covered jurisdictions and defend section 5 as a congruent and proportional remedy under the *City of Boerne* standard, understood either in its most rigorous form or under the less exacting approach set forth in *Hibbs* and *Lane*.⁸⁸ Professor Karlan, by contrast, posits a vision of congressional power that allows Congress to renew preclearance regardless of whether the new statute comports with the cramped standards set forth in *City of Boerne* and its progeny.

In this part, I suggest a third approach to assess the validity of reauthorization. I do not believe the scope of unconstitutional conduct in covered jurisdictions can help us gauge the need for renewal, given that section 5 presently operates to block such conduct.⁸⁹ And yet, I don't think Congress enjoys so much power that its decision to renew preclearance becomes functionally

87. See, e.g., Luis Ricardo Fraga & Maria Lizet Ocampo, *The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests*, in DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT (forthcoming 2007) (manuscript at 8, on file with the Houston Law Review), available at http://www.ucdc.edu/faculty/Voting_Rights/Papers/5%20-%20Fraga%20&%20Ocampo.pdf.

88. See *supra* notes 8, 23–25 and accompanying text.

89. See *supra* text accompanying note 5.

unreviewable. The *City of Boerne* cases have been widely criticized,⁹⁰ but they nevertheless rest on the important intuition that congressional power to enforce the Reconstruction Amendments is not wholly unbounded. My view is that this intuition applies to reauthorization as well, both as a normative matter and as a predictive judgment of what the Court will do.

A. Reauthorizing Existing Statutes Under City of Boerne

The *City of Boerne* decisions articulate ways to limit Congress's enforcement powers, with the need for a supporting record of unconstitutional conduct being the most prominent. The need for such a record, however, makes little sense when evaluating an operational statute such as section 5. After all, such a requirement would allow Congress to reauthorize the preclearance regime only if it were an utterly unsuccessful means to combat discrimination.

But if the scope of unconstitutional conduct cannot help us evaluate Congress's determination that preclearance remains necessary, how can we assess Congress's judgment that the world has yet to change so much that section 5 might be eliminated without serious adverse consequence?

My view is that the *City of Boerne* standard of review remains applicable to reauthorization—that is, the reauthorized statute must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”⁹¹—but that application of this standard must be adjusted to reflect the status of section 5 as an operational statute. Reauthorization should not be seen to address contemporary unconstitutional conduct of debatable scope. Instead, reauthorization should be understood to target political processes that continue to be compromised by race, compromised in ways that reflect past misconduct and that portend future misconduct absent the statute's renewal. In my view, Congress may legitimately target political processes compromised in this manner, and may do so through the means it selected when it renewed section 5, namely, with a remedial regime that is intrusive but also circumscribed in critical respects.

90. See, e.g., Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 602–04 (1998); Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 791–93 (2002); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 455 (2000).

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

More specifically, racial considerations may compromise a political process in ways that do not rise to a constitutional violation. Voting may be polarized along racial lines and campaigns marked by racial appeals. Historic discrimination both in voting and other realms may hinder contemporary political participation, quantitatively in terms of voter registration and turnout, and more qualitatively, by, for instance, hindering cross-racial alliances and fundraising efforts, particularly in environments that are racially segregated.⁹² Elected officials may be nonresponsive to minority residents, and minority candidates may have little hope of mounting a successful campaign.⁹³

None of this, of course, necessarily matters under conventional *City of Boerne* analysis, which cares little about behavior that does not rise to the level of unconstitutional conduct. In my view, however, such evidence critically informs the validity of reauthorization. It reveals an environment in which race remains salient in problematic ways, ways that compromise rather than foster the emergence of a truly healthy and vibrant political community. It signals that the vestiges of past discrimination have not been adequately remedied and it portends future discrimination stemming from contemporary limits on full participation. In short, it describes an environment in which federal measures protecting voting rights remain justified.

The Supreme Court has so recognized, or, more precisely, affirmed Congress's power to make this determination in a series of decisions dating back to Reconstruction.⁹⁴ The modern articulation of the principle is found in *Katzenbach v. Morgan*, which upheld the ban on literacy tests set forth in section 4(e) of the Voting Rights Act of 1965, because such tests excluded members of New York City's Puerto Rican community from casting a ballot.⁹⁵ The concern was both that the tests themselves were the product of prohibited discrimination and that the use of such tests fostered "discrimination in governmental services."⁹⁶ *Morgan* recognizes congressional power to ban this literacy test both as a remedy for past discrimination and also to protect the

92. See Katz, *supra* note 5 (manuscript at 23).

93. See *id.*

94. See, e.g., *Ex parte Yarbrough*, 110 U.S. 651, 661–62 (1884) (recognizing Congress's power to protect voting interests in the famous Ku Klux cases); see also Katz, *supra* note 50, at 2343.

95. *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966).

96. *Id.* at 653.

people the test excluded from future governmental discrimination.⁹⁷ *Morgan* posits that people denied access to the franchise are more likely to confront such discrimination, and accordingly upholds congressional power to enact section 4(e) because doing so “enhanced political power [that] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.”⁹⁸

City of Boerne, of course, rejected the most famous proposition associated with *Morgan*, specifically, the suggestion that Congress may enact legislation that “expands” rights protected by the Fourteenth Amendment.⁹⁹ *City of Boerne*, however, assiduously affirmed the two core rationales for *Morgan*’s holding, namely, congressional power to ban New York’s English literacy test as a remedial measure for official discrimination in establishing voter qualification,¹⁰⁰ and congressional power to ban the test as a mechanism to address future discrimination in public services.¹⁰¹

That’s all well and good as far as it goes. But a problem remains if the Court wants to use this framework to uphold reauthorization as both a remedial measure and a measure to block future discrimination. Congressional power, as described in *Morgan* and affirmed in *City of Boerne*, is functionally unbounded. A truly healthy political community, one where race unites us only in positive ways, is something we are unlikely to witness in our lifetimes. Vestiges of discrimination persist, and will very likely always persist. We will continually be able to collect evidence showing the ways race affects the political process in problematic ways, and we can be sure that the threat of future misconduct will never fully abate.

If that admittedly gloomy prediction is right, how does it inform the validity of reauthorization? To what extent can Congress address the vestiges of past discrimination and block future misconduct and still exercise a power of circumscribed dimension? Put differently, how will we know when enough is enough?

97. *Id.* at 653–56.

98. *Id.* at 652.

99. *See City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997) (noting language in *Morgan* that “could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in [Section] 1 of the Fourteenth Amendment,” and finding that “[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law”).

100. *See id.* at 528; *Morgan*, 384 U.S. at 654.

101. *See City of Boerne*, 521 U.S. at 528; *see also Katz*, *supra* note 50, at 2395–96.

That is a tough question, but one about which we need not speculate in a vacuum. The statute as reauthorized includes within its criteria, set by Congress itself, a mechanism to predict the likelihood of future misconduct absent section 5. That is, it contains criteria to measure the very question reauthorization presents.

B. The Centrality of Bailout

Reauthorization rests on the view that the world has not changed enough, and that the problems that originally propelled Congress to enact section 5 have not been adequately remedied. But the statute as framed allows for the possibility that this judgment is mistaken or might become so with time. Covered jurisdictions may escape from the obligation to obtain preclearance if they demonstrate their eligibility for what is commonly known as bailout.¹⁰² Covered jurisdictions can lose the “covered” designation and thereby free themselves of the preclearance requirement if they demonstrate their compliance with specific statutory criteria.¹⁰³

As originally formulated, bailout was only available to jurisdictions that had not employed a discriminatory test or device for a designated period that Congress kept calibrated to the enactment of the section 5 regime in 1965. This requirement meant most covered jurisdictions were wholly ineligible for bailout, and that consequence was intended.¹⁰⁴ Bailout was meant to exempt from preclearance those regions that found themselves covered under the original “trigger” or coverage formula but, due to the imprecision with that trigger, should not have been subjected to the preclearance requirement.¹⁰⁵ Jurisdictions able to bailout during this period may have employed a test or device in a nondiscriminatory fashion, or, after 1975, used English-only ballot materials in a region where members of the resident qualifying foreign language minority population were fluent in English.¹⁰⁶

102. See 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).

103. *Id.* at 409–11.

104. *Id.* at 381 (“Thus, prior to the 1982 amendments, jurisdictions that had historically discriminated in the electoral process could not realistically expect to bail out until a fixed calendar date arrived.”).

105. *Id.* at 391–92 & n.62 (citing text of House Report which acknowledges that some jurisdictions might be covered yet have no record of discrimination in “registering voters or conducting elections”).

106. See J. Gerald Hebert, *An Assessment of the Bailout Provisions of The Voting Rights Act*, in DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON

Congress amended the bailout standard in 1982 to excuse jurisdictions from preclearance even if they were properly covered in the first instance. The change reflected the view that section 5, overall, remained necessary due to “continuing problems of discrimination and widespread failure to comply with the Voting Rights Act in the covered jurisdictions.”¹⁰⁷ It also reflected Congress’s judgment that some jurisdictions might have made sufficient progress to justify excusing them from further obligations under section 5.¹⁰⁸ Rather than attempting to identify these jurisdictions one by one, Congress opted instead to create a mechanism under which jurisdictions come forward with evidence to adjust on a case-by-case basis Congress’s presumptive judgment that section 5 remains necessary.¹⁰⁹ Congress retained this version of bailout when it reauthorized preclearance in 2006.

As presently formulated, the bailout provision informs the validity of reauthorization in several respects. First, it sets forth substantive criteria designed to gauge whether section 5 obligations may be lifted without adverse consequence. The bailout criteria do not focus exclusively, or even primarily, on constitutional violations, although intentionally discriminatory conduct related to voting renders a covered jurisdiction ineligible for bailout.¹¹⁰ Instead, the bailout provision seeks to measure the health of minority political participation in the jurisdiction, the implication being that where such participation is sufficiently vibrant, minority voters can ably protect themselves absent the strictures of section 5.¹¹¹

REAUTHORIZATION OF THE VOTING RIGHTS ACT (forthcoming 2007) (manuscript at 4–6, on file with Author), available at http://www.ucdc.edu/faculty/Voting_Rights/Papers/9%20-%20Hebert.pdf (tracing the history of the bailout provision from original enactment).

107. S. REP. NO. 97-417, at 44 (1982).

108. See Winke, *supra* note 8, at 111 (recognizing that the 1982 bailout provision opened the door for covered jurisdictions that have sufficiently remedied voting discrimination to be exempted).

109. S. REP. NO. 97-417, at 45–46 (1982) (discussing the proposed—and subsequently passed—committee bill that allowed individual jurisdictions to come forward with evidence of progress with regards to voting discrimination).

110. See 42 U.S.C. § 1973b(a)(3) (2000) (“No declaratory judgment shall issue under this subsection . . . if such plaintiff . . . during the period beginning ten years before the date the judgment is issued, engaged in violations . . . unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.”).

111. See Timothy G. O’Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 782 (1983) (stating broadly that the bailout provisions require “a jurisdiction [to] demonstrate a record of compliance with the Act over the previous ten years, and [to] show that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence”).

More specifically, the bailout standard inquires whether the jurisdiction has complied with section 5, both in terms of the timely submission of proposed changes and actual objections interposed by the Attorney General; whether it required the presence of federal officials to monitor registration or to observe elections; whether the jurisdiction violated section 2 of the Voting Rights Act or related statutory proscriptions, or entered a consent decree in litigation that might have so established; and whether the jurisdiction eliminated obstacles to equal political participation and made affirmative efforts to expand minority participation, by for instance, working to end voter harassment, to expand voter registration, and to appoint minority election officials.¹¹²

Because very few jurisdictions have bailed out since 1982,¹¹³ some say that the bailout criteria are too difficult.¹¹⁴ And yet, jurisdictions that have attempted to do so typically succeed,¹¹⁵ suggesting that more might free themselves from coverage were they simply to try to navigate the process.¹¹⁶ Indeed, the criteria may well be too lenient given that the factors fail to capture a host of problems that might hinder minority political participation and thus arguably make exemption from section 5 premature. For example, judicial findings made in litigation under section 2 of the VRA provide important details about

112. See 42 U.S.C. § 1973b(a)(1) (2000). In summary, the statute holds that a jurisdiction can escape coverage if it can establish that, in the last ten years, it:

(1) has not used a discriminatory test or device in the electoral process that has the purpose or effect of denying or abridging the right to vote based on race or membership in designated language minorities;

(2) has not been found by a federal court to have denied or abridged the right to vote based on race or other protected statute, and has not been party to a consent decree or settlement ending such litigation;

(3) has not required the presence of federal officials to register voters or observe elections;

(4) has fully complied with section 5, including submitting all changes; and

(5) has eliminated voting procedures which inhibit or dilute equal access; engaged in constructive efforts to eliminate intimidation and harassment of voters; and engaged in other constructive efforts, such as expanding opportunities for convenient registration and the appointment of minorities as election officials. *Id.*

113. See Hebert, *supra* note 106 (manuscript at 20).

114. See 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) (arguing that while “bailout rules have been liberalized in theory . . . the conditions for termination of coverage have been made so restrictive that bailout will continue to be impossible for most jurisdictions”); *cf.* Winke, *supra* note 8, at 72 (describing the bailout standard as “strict” but appropriate).

115. See Hebert, *supra* note 106 (manuscript at 2) (claiming the standards for bailout “have proven to be both workable and practical”).

116. *But cf.* O’Rourke, *supra* note 111, at 98 (discussing costs of attempting bailout and failing).

political participation in defendant jurisdictions.¹¹⁷ Cases in which statutory violations are found or consent decrees are entered signal problems with minority political participation in the jurisdiction. But using litigation of this sort as a lens through which to observe such problems necessarily means that a good deal of problematic conduct will escape detection, either because lawsuits were not filed or litigation was not pursued to finality.¹¹⁸

Bailout might have been made contingent on a greater showing, and different criteria might also do the job.¹¹⁹ Still, the provision as crafted is important—and indeed so important that it should provide the measure under which reauthorization is reviewed—because it sets forth Congress’s definition of when enough is enough. It strikes the balance Congress thought appropriate and sensible when it acted in an environment of necessary uncertainty, and it confronted the obligation to make a judgment about that uncertainty. Under this balance, neither the absence of pervasive unconstitutional conduct is sufficient for bailout, nor is the elimination of all vestiges of past discrimination required.

In this sense, the bailout criteria parallel the standard the Court has developed to gauge whether a school district should be released from a desegregation decree.¹²⁰ Districts achieve “unitary” status, the Court has held, through a combination of good faith compliance with the decree and the elimination of “vestiges of past discrimination” to the extent practicable.¹²¹ The bailout provision similarly looks at good faith by checking whether the jurisdiction has made timely submissions for preclearance, and, through the mix of other factors, requires not the complete elimination of all vestiges of discrimination, but instead a reasonable effort in this regard.¹²²

117. See Katz, *supra* note 5 (manuscript at 3); see also Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 654–62 (2006).

118. See generally Katz, *supra* note 5 (manuscript at 25).

119. Congress allows counties within covered jurisdictions to bailout independently, but a host of governmental entities within counties cannot, unless the county or the state as a whole seeks bailout. A pending challenge to reauthorization insists that Congress’s failure to allow subcounty units to bailout renders the statute constitutionally suspect. See generally Complaint, *Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales*, No. 1:06-cv-01384 (D.C.C. filed Aug. 4, 2006), available at <http://www.citizen.org/documents/mudgonzalescomplaint.pdf>.

120. See *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995) (setting forth the standards to gauge whether a school district should be released from a desegregation decree).

121. *Id.* at 89 (quoting *Freeman v. Pitts*, 503 U.S. 467, 492 (1992)).

122. See 42 U.S.C. § 1973b(a)(1) (2000).

Of course, the analogy between the preclearance regime and school desegregation decree is far from complete and important differences exist.¹²³ Still, section 5's remedial regime resembles a desegregation decree in that it was imposed to address specified, unconstitutional conduct, it was not intended to operate in perpetuity, and it functions in a context in which local control is highly valued. While I think the standards for relief from both are too lenient,¹²⁴ the similarities between the two suggest that the balance Congress reached in framing the bailout standard is neither unprecedented nor irresponsible.

The bailout provision, moreover, does not simply define circumstances that justify releasing individual jurisdictions from the preclearance requirement. It also offers a lens through which to gauge how Congress viewed the record before it when it reauthorized preclearance. Had Congress declined to reauthorize preclearance entirely or, more narrowly, chosen to exempt particular covered jurisdictions from the preclearance obligation, it would, for all practical purposes, have "bailed out" the jurisdictions involved. Congress opted to reauthorize the statute and retain the bailout provision, and thereby suggested its belief that covered jurisdictions were not yet in sufficient compliance with the bailout criteria to be freed from the section 5 obligations.

The record underlying reauthorization supports this judgment and suggests widespread noncompliance with the bailout criteria.¹²⁵ Congress collected evidence documenting hundreds of examples of apparently unconstitutional conduct by public officials in covered jurisdictions,¹²⁶ dozens of instances in which federal officials have been sent to covered jurisdictions to monitor elections;¹²⁷ a

123. Compare *Jenkins*, 515 U.S. at 88–89 (setting forth the standards to gauge whether a school district should be released from a desegregation decree), with 42 U.S.C. § 1973b(a)(1) (2000) (setting forth the standards for the bailout provision).

124. See David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1115 (2004) (arguing that relief from desegregation decrees may be too easy to achieve).

125. See generally Katz, *supra* note 5; Katz et al., *supra* note 117, at 654–61.

126. Katz et al., *supra* note 117, at 678–85; see also Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292–99 (2006) (finding that the preclearance process has repeatedly blocked proposed electoral changes based on evidence of bad intent).

127. *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 47 (2005) (statement of Barry H. Weinberg, former Deputy Chief of the Voting Rights Division, Department of Justice); *id.* at 63 (statement of Rep. John Conyers, Jr.); *id.* at 195 (statement of Bradley J. Schlozman, Principal Deputy Assistant Att'y Gen., Civil Rights Division, Department of Justice); *id.* at 264 (Letter from William

widespread failure of covered jurisdictions to make timely submission of their proposed changes, and 627 objections interposed since 1982,¹²⁸ albeit at a declining rate in recent years;¹²⁹ constructive efforts by covered jurisdictions to increase minority registration and turnout,¹³⁰ but also evidence indicating that minority participation continues to lag in many areas, that covered jurisdictions continue to employ dilutive electoral devices, and that, in many places, minority voters continue to face harassment in seeking to register and vote.¹³¹ The record documented that, since 1982, federal courts reached outcomes favorable to plaintiffs in sixty-eight published decisions involving a section 2 claim brought against a covered jurisdiction.¹³²

Congress's decision to reauthorize section 5 based on this record embodies the judgment that minority political participation in covered jurisdictions was not yet so secure as to render preclearance obsolete. To the extent that any specific covered jurisdiction might demonstrate otherwise now or in the coming years, the bailout provision carves out the path for doing so.

As such, bailout informs the validity of reauthorization in an additional respect. It clarifies the nature of the regime reauthorization imposes.¹³³ When Congress voted to extend preclearance last summer, it did not conclusively bind covered jurisdictions to the strictures of section 5 for the next quarter century. Instead, it renewed what has been since 1982 a rebuttable presumption that preclearance remains a necessary remedy. And it placed on covered jurisdictions the burden to show otherwise by demonstrating their compliance with the statutory criteria set forth in the bailout provision.¹³⁴ The obligation to seek preclearance should accordingly be understood not as an inexorable command but instead as a temporally and

Jenkins, Director, Homeland Security and Justice Issues, Government Accountability Office, to Sen. Joseph Lieberman, Rep. Henry Waxman, and Rep. John Conyers, Jr.).

128. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 104–224 (2005) (appendix to statement of Bradley J. Schlozman, Acting Assistant Att’y Gen., Civil Rights Division, Department of Justice).

129. *Id.* at 10 (statement of Bradley J. Schlozman, Acting Assistant Att’y Gen., Civil Rights Division, Department of Justice).

130. *Id.* at 12.

131. *See id.* at 80–82 (statement of Anita S. Earls, Director of Advocacy, UNC Center for Civil Rights).

132. Katz, *supra* note 5 (manuscript at Figure 1).

133. *See* Winke, *supra* note 8, at 111 (arguing that bailout was “required to cut the potentially overbroad preclearance remedy down to a size congruent with the problem of persistent racial discrimination in voting”).

134. *See* 42 U.S.C. § 1973b(a)(1) (2000).

geographically limited default regime applicable to those jurisdictions, already held to have been properly covered in the first instance,¹³⁵ that are unable or unwilling to make their case for bailout.

IV. CONCLUSION

Professor Karlan fully appreciates the complex ways race continues to infect political processes in covered jurisdictions, and her vigorous defense of reauthorization is propelled by her firm conviction that gains in minority political participation are too recent and too fragile to render preclearance obsolete.¹³⁶ Professor Karlan also values the ways in which section 5 remains a targeted and circumscribed statute. She views bailout as an important component of the preclearance regime,¹³⁷ and sees the record underlying the statute as confirmation that the statute remains needed.¹³⁸

Professor Karlan nevertheless posits a vision of congressional power so broad that reauthorization would stand even if Congress acted on no record whatsoever and dispensed with bailout entirely. Indeed, her vision would allow Congress to make preclearance much more difficult to obtain,¹³⁹ or vastly to expand the types of decisions subject to preclearance.¹⁴⁰ Under Professor Karlan's vision, Congress could make section 5 permanent, or subject the entire country to its strictures.

Congress, of course, never seriously considered enacting any of these changes, and its refusal to do so provides support for Professor Karlan's claim that deference is appropriate. The political process itself might just ensure that preclearance remains within circumscribed bounds, or at least might police those bounds as effectively as the Court might hope to do. But if I'm right that Professor Karlan's vision of congressional power would allow Congress to expand vastly the reach of section 5, the Roberts Court may well be uneasy with Professor Karlan's vision.

135. See *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (upholding section 5 as extended in 1975); *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970) (upholding section 5 as extended in 1970); *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (upholding section 5 as enacted in 1965).

136. See generally Karlan, *supra* note 1, at 21–22.

137. *Id.* at 26–27.

138. *Id.* at 2–3.

139. *Cf. Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477–78 (1997) (holding that a violation of section 2 of the VRA is not grounds to deny preclearance under section 5).

140. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992) (holding that changes in the allocation of power among elected officials are not changes “with respect to voting” subject to preclearance under section 5 (quoting 42 U.S.C. § 1973b (2000))).

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RESPONSE TO KARLAN

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If the Justices aren't wholly convinced that Congress enjoys as much power as Professor Karlan thinks, we should remind them that Professor Karlan has offered us more than is needed to sustain the statute that was authorized. Reauthorization targets political processes that remain compromised by race, compromised in ways that reflect past discrimination and portend future misconduct. As such, it targets electoral practices of the sort that the Court has held fall within congressional power to regulate. It does so through a remedial regime that is circumscribed—geographically, temporally, through the rebuttable presumption the bailout provision embodies, and the detailed record that underlies it.

Indeed, the ways in which the preclearance regime remains circumscribed may well prove critical to its survival precisely because the Roberts Court may be more comfortable with the amount of power reauthorization of this statute requires. Sometimes just enough is plenty.