Response of Drew S. Days III, Alfred M. Rankin Professor of Law, Yale Law School to Written Questions of Senator Patrick Leahy
June 16, 2006

1. *Some have argued that Section 5 imposes too high of a cost on the states for the Supreme Court to uphold it in light of its recent federalism cases. However, in City of Boerne, the Supreme Court held up the VRA as an example of Congress properly exercising its powers. Does that decision address the scope of Congress' powers to enforce the 14th and 15th Amendment?*

As I and several others have testified, while *City of Boerne v. Flores,* and the cases that followed, contemplate certain limitations on Congressional enforcement powers under the 14th, and 15th Amendments, this decision does not drastically inhibit Congress's ability to enact remedial and prophylactic legislation to protect the fundamental rights of traditionally excluded groups in the face of widespread discrimination.[1] As you have recognized, in *Boerne* itself the Court points to the Voting Rights Act of 1965 ("Act") as model legislation under the enforcement provisions of the Civil War Amendments, despite the fact that some VRA provisions clearly "prohibit conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[2] One aspect of the Court's decision in *Boerne* that grew out of the Supreme Court's seminal Section 5 precedent in *South Carolina v. Katzenbach,* and bears emphasis is its acknowledgment that "[t]he appropriateness of remedial measures must be considered in light of the evil presented."[3] Abridgements of the right to vote through vote denial and dilutions alike, seriously threaten the fundamental right that the Supreme Court has called "preservative of all

[1] *See City of Boerne v. Flores*, 521 U.S. 507, 519-520 (1997) (striking Religious Freedom Restoration Act but noting Congress's right to enforce measures that remedy or prevent unconstitutional actions and stating that Congress must have "wide latitude" in determining whether an action is remedial in scope citing Voting Rights Act as exemplar.)
[2] *Id.* at 518 (1997) (quoting *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976)).
[3] *Id.* at 519 (citing *South Carolina v. Katzenbach,* 338 U.S. 301, 308 (1966).

other rights".[4] Accordingly, infringements of voting rights threaten the very foundation of our democracy.

The *Boerne* line of cases appear to require that Congress act only after careful assessment and documentation of a problem of constitutional dimension, and that its legislative response be "congruent and proportional" to the constitutional violation at issue.[5] While this developing framework calls for Congress to be deliberate in the exercise of its enforcement powers under the Civil War Amendments,[6] it does not establish clearly discernible limits on Congressional authority in the context of prophylactic legislation regarding race or other areas traditionally subjected to higher levels of judicial scrutiny. For example, in *Nevada Dept. of Human Resources v. Hibbs,* the Court upheld Congress's abrogation of states' sovereign immunity under the Family Medical Leave Act (FMLA) because the act was intended to prevent sex discrimination.[7] Likewise, in *Tennessee v. Lane,* the Court upheld Congress's abrogation of state's sovereign immunity under Title II of the Americans with Disabilities Act because it protected citizens' fundamental right of access to the courts as applied.[8] In reaching these decisions, the Court has given effect to its early acknowledgment in *Boerne* that "Congress must have wide latitude" in determining "when congruence and proportionality between the injury to be prevented or remedied and the means to be adopted to that end" have been achieved.[9]

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[4] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[5] *Id.* at 520.
[6] *See, e.g., Bd. of Trustees of University of Alabama v. Garrett,* 531 U.S. 356 (2001) (where Court very carefully reviewed the Congressional record relied upon to justify passage of Title I of the Americans with Disabilities Act and found it wanting).
[7] *Nevada Dep't of Human Resources v. Hibbs,* 538 U.S. 721 (2003).
[8] *Tennessee v. Lane,* 541 U.S. 509 (2004).
[9] *Boerne,* 521 U.S. at 520.

In sum, *Boerne* and its progeny, when read collectively, stand for the proposition that Congress continues to possess significant enforcement powers to remedy problems traditionally subjected to heightened scrutiny. In fact, these cases suggest that Congressional power is at its apex when Congress acts to protect fundamental rights and traditionally excluded groups. Consequently, when renewing the VRA, Congress acts at the height of its enforcement powers because it is enacting a remedial and prophylactic measure for discrimination against racial and language minorities that protects their fundamental right to equal voting access.

2. *You have litigated Voting Rights Act cases in the Supreme Court, including Miller v. Johnson (1995). In 1999, the Supreme Court decided Lopez v. Monterey County, which came after City of Boerne. In Lopez, the Court again upheld, as it has many times, Congress' authority under the Fifteenth Amendment to require a jurisdiction to pre-clear voting changes. It did so even where that voting change was required to implement a state law in a non-covered state and the jurisdiction in question had no discretion in making the voting change. The Court recognized "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...." Does Lopez provide strong evidence that the Supreme Court will continue to give deference to Congress in reauthorizing the remedies in the VRA, even after City of Boerne?*

While no single precedent can necessarily dictate the outcome of future challenges to Congress's renewal of the Voting Rights Act, it is fair to say that *Lopez* presents the clearest indication of how the Supreme Court would evaluate a constitutional challenge to Section 5 of the VRA in the post-*Boerne* world. In *Lopez,* the court stated plainly but unmistakably that even though "the Voting Rights Act, by its nature, intrudes on state sovereignty, [t]he Fifteenth Amendment permits this intrusion."[10] Additionally, it is important to note that *Lopez* was decided before *Hibbs* and *Lane,* discussed above. There, the Court arguably gave even *greater* deference to Congress than it had in earlier

[10] *Id.* at 284-285.

cases with respect to remedial legislation preventing discrimination against protected groups. Taken together, these cases provide strong evidence that the Supreme Court will continue to give deference to Congress in reauthorizing elements of the VRA. Though the Court's assessment of the record is of paramount importance, the precedent cases suggest that even its review of the record itself should be more deferential in the context of the VRA.

3. *The Supreme Court requires a strong record of discrimination to uphold laws that impinge on the states. In enacting the VRA and reauthorizing it 4 times, Congress has relied on extensive fact-finding showing the recurring use of discriminatory tactics in covered jurisdictions. We are now in the process of trying to extend this existing remedy. Do you believe that the Court views evidence of state discrimination as perishable – with some kind of constitutional expiration date – even after Tennessee v. Lane, in which the Supreme Court upheld key portions of the Americans with Disabilities Act on the basis of older evidence of discrimination?*

No, I do not believe that the Court views evidence of state discrimination as perishable. Even *Boerne,* which sets forth high evidentiary requirements to justify federal legislation, looks for a history and pattern of discrimination. In *Boerne,* the legislation at issue was deemed problematic because the legislative record lacked any modern proof of discrimination and all of the discrimination considered was more than 40 years ago.[11] As I read *Boerne*, it does not bar all older evidence but rather requires more recent evidence as well. The Court's decisions in *Lane* and *Hibbs* further support the proposition that while historical evidence, standing alone, may be insufficient to warrant Congressional enactments under the Fourteenth and Fifteenth Amendments, it remains relevant, nevertheless.[12]

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[11] *Boerne,* 521 U.S. 507 (1997).

[12] *See Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 730-735 (2003) (reviewing both "the long and extensive history of sex discrimination . . . [and] the persistence of such unconstitutional discrimination by

As I view the portions of the record that I have had the opportunity to examine, while not identical to that of 1982, it shares many critical features: there is progress side-by-side with continuing discrimination; there are many egregious examples of violations of voting rights; last minute, drastic polling place changes, and familiar dilutive tactics through methods of "cracking" and "packing"; and racial campaign appeals[13] but also a more carefully considered record on Section 5's deterrent effects,[14] and the operation of Section 203. Overall I believe that the record is consistent with that assembled in 1982. Both the quantity and quality of the evidence is strong.

4. *In 1982, I helped amend the VRA to include a new bailout provision to give covered jurisdictions without recent violations the opportunity to get out of Section 5 coverage. Even though no jurisdiction that has tried to bail out has failed, fewer than a dozen jurisdictions have sought to remove themselves from Section 5 coverage. What is the constitutional significance to the fact that jurisdictions have been choosing not to exercise the option to bailout from Section 5 coverage?*

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the States" in concluding that this record "is weighty enough to justify the enactment of prophylactic § 5 legislation" by Congress); *Tenn. v. Lane*, 541 U.S. 509, 528 (2004) (upholding Title II of the ADA as a congruent and proportional response to a "long history" of discrimination, and citing the "sheer volume of evidence" of both that "long history" and the fact that discrimination "has persisted despite several legislative efforts to remedy the problem.").

[13] *See e.g.* Laughlin McDonald, Janine Pease and Richard Guest, *Voting Rights in South Dakota 1982-2006,* 15-21 LEADERSHIP CONFERENCE ON CIVIL RIGHTS (March 2006); *Asian-Americans and the Voting Rights Act: The Case for Reauthorization,* 21-22 ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND (May 2006) (documenting numerous examples of racist behavior by poll workers in elections between 1988 and 2006); Robert McDuff, *Voting Rights in Mississippi, 1982-2006,* LEADERSHIP CONFERENCE ON CIVIL RIGHTS (May 2006) (discussing recent examples of the use of racial campaign appeals); *Kilmichael Mississippi,* Protect Voting Rights: Renew the VRA, http://renewthevra.civilrights.org/resources/detail.cfm?id=190 (last visited June 13, 2006) (discussing an incident in 2001 when three weeks before election day in Kilmichael, Mississippi, the all-White town council decided to cancel the municipal election); Debo P. Adegbile, *Voting Rights in Louisiana 1982-2006,* 27-29 LEADERSHIP CONFERENCE ON CIVIL RIGHTS (March 2006) (noting that at least 11 Parishes in Louisiana were "repeat offenders," and that on 13 instances the DOJ caught jurisdictions resubmitting objected-to proposals with cosmetic or no changes).

[14] *See generally* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act* (June 7, 2006) (unpublished essay, submitted to Senate Judiciary Committee on June 9, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of more information requests (MIRs) from the Justice Department).

According to Gerald Hebert, who has served as legal counsel to all of the jurisdictions that have bailed out since the 1982 amendments, the jurisdictions that have bailed out have expressed several advantages that they derive from the current bailout formula, including being "afforded a public opportunity to prove it has fair, non-discriminatory practices[,] . . . [and] once bailout is achieved . . . [being] afforded more flexibility and efficiency in making routine changes, such as moving a polling place.[15] Hebert also opined that the problem is not that the bailout provisions are difficult or that jurisdictions are applying and being denied, but simply that "jurisdictions are just not applying."[16] This is consistent with some of my testimony before this Committee, and suggests that claims that Section 5's is terribly onerous may be overstated.

Moreover, I am not aware of any affirmative evidence in the record showing that the bailout provisions are particularly onerous, as compared to 1982 when there was a more fully developed record on this question. While we obviously cannot predict the future with any great certainty, it seems reasonable to suggest that the bailout provisions – particularly if the Department makes increased efforts to share information about the process -- will continue to provide an important incentive for covered jurisdictions to comply with Section 5 as intended in 1982. Because there is no evidence that the existing bailout provisions are placing an undue burden on covered jurisdictions, in my view, it presents no constitutional problem.

5. *Professor Gaddie testified that in his view Section 5 should not be extended as presently constituted because his report found evidence of discriminatory tactics in both covered and non-covered jurisdictions. In order to establish the kind of*

[15] *See The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 20, 2005) (statement of Gerald Hebert, Esq.) [hereinafter Hebert testimony].
[16] *Id.*

record Congress needs to extend Section 5, is Congress required to find that there is more discrimination in covered jurisdictions than in non-covered jurisdictions? Because of the history of discrimination in covered jurisdictions, which Congress has established in previous reauthorizations and the Supreme Court has upheld as a constitutional basis for Section 5, is it enough for Congress to find that there are recurring instances of discrimination in covered jurisdictions?

My understanding is that the *Boerne* line of cases and its progeny do not change the fact that a demonstrated pattern of widespread, historical and recurring instances of discrimination in covered jurisdictions is sufficient to warrant the extension of Section 5. As I have described above, in 1999, the Court in *Lopez v. Monterey County* reaffirmed the constitutionality of Section 5 and the preclearance regime.[17] The court cited *Boerne,* and then cited both *Katzenbach* and *City of Rome* favorably, upholding preclearance for "jurisdictions properly designated for coverage."[18] From my reading of that case, there is nothing in the *Lopez* decision that suggests that after *Boerne,* the constitutionality of Section 5 must rest on a state-by-state comparative analysis, nor am I aware that any comprehensive study of that kind has been performed.

It also bears emphasis that Section 5 coverage is not fixed under the statutory framework. As you are aware, the bailout provision of Section 4(a) provides a means through which covered jurisdictions with clean records of compliance for ten years can cease their preclearance obligations. Moreover, under Section 3(c) non-covered jurisdictions that intentionally discriminate may be ordered to submit future voting changes for preclearance at a court's discretion. Finally, the State by State reports submitted to the record by LCCR, among other things, clearly illustrate continued patterns and practices of discrimination in all of the currently covered States, and make a strong case for the need to extend Section 5 as currently enacted.

[17] *Lopez v. Monterey County,* 525 U.S. 266 (1999).
[18] *Id.*

6. *The bill introduced in the House and Senate includes a correction to the Supreme Court's decision in Reno v. Bossier Parrish Sch. Bd. ("Bossier II") by making clear that a voting rule change motivated by any discriminatory purpose violates Section 5. Without this fix, is it possible for jurisdictions covered by Section 5 to pass changes to voting rules with the clear intent to discriminate against minorities? Is such a result consistent with the purposes of the Voting Rights Act?*

One problem with *Bossier II*, as the question suggests, is that its holding is contrary to the purposes of the Voting Rights Act. *Bossier II* created a preclearance standard under which intentionally discriminatory voting changes (e.g. those motivated by racial animus) that do not clearly worsen the position of minority voters must be precleared.[19] Of course, such changes violate the Constitution, and Section 5 should not be construed to allow one of the very types of discrimination that it was enacted to remedy.

Consider, for example, an analogy to "at will" employment. It is well recognized that in an "at will" employment state employees can be fired for any reason at all except a discriminatory reason. In the context of Section 5 preclearance, why should a covered jurisdiction – subject to the preclearance requirements as a result of a history of discrimination in voting – be free to make voting changes tainted by intentional racial discrimination? Following the analogy – under the logic of *Bossier II*, an employer could be barred from enacting a policy with the purpose or effect of purging a company of African-American employees under the prophylactic statute, but could continue to bar African-Americans for racially discriminatory reasons, even if written evidence of a no-blacks policy were uncovered. The standard thus permits absurd results. As I have testified previously, it strikes me that the decision is basically at war with the spirit of Section 5 in that it places a burden on those that the Act was designed to protect. It

[19] *See Reno v. Bossier Parrish Sch. Bd. II,* 528 U.S. 320 (2000).

subjects them to additional discriminatory practices that can be remedied only by way of individual lawsuits. The plain language of the VRA, not to mention common sense, both counsel strongly against such an interpretation of Section 5. Amending section 5 to prohibit *all* unconstitutional discrimination with respect to the right to vote, not just discrimination that is also retrogressive, poses no constitutional difficulties with respect to theories of Congressional power, and is consistent with and essential to the VRA's core purpose of eradicating historic and long-maintained voting discrimination.

7. *The bill we have introduced also corrects the Supreme Court's holding in Georgia v. Ashcroft by restoring the VRA's intent to ensure that minority communities can elect preferred candidates of choice. Can you explain why the Supreme Court's ruling in Georgia v. Ashcroft is inconsistent with this purpose?*

I share the broadly held view that the new standard set forth by *Georgia v. Ashcroft* has substituted an amorphous, easily manipulable standard for determining Section 5 violations for the previously well-established and well-understood non-retrogression test as outlined by *Beer.*[20] In *Georgia v. Ashcroft,* the Court identified an "influence district" as one "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[21] The problem with the *Georgia v. Ashcroft* "influence" test is not that there could never be a situation where minority influence is discernible and important, but as a former DOJ official responsible for administering the Voting Rights Act it seems clear to me that ferreting out such instances consistently is simply unrealistic. Furthermore, I believe that such a standard in many ways constitutes an open invitation to mischief. For instance, the pursuit of an influence trade-off theory could be used to cloak purposefully

[20] *See Beer v. U.S.,* 425 U.S. 130 (1976).
[21] *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

retrogressive or discriminatory acts from effective Section 5 review. Additionally, under the *Georgia v. Ashcroft* regime it is difficult if not impossible to identify how to weigh when the number of "influence districts" would suffice as a substitute for viable opportunity districts. Given these difficulties and potential dangers, I strongly support the proposed legislation that properly restores the tangible "ability to elect" standard and does not allow jurisdictions to cloak intentional discrimination under the intangible framework set forth by *Georgia v. Ashcroft*.[22]

8. *I have heard from practitioners and professors that the test set forth in Georgia v. Ashcroft is difficult to administer and provides little guidance to lower courts. Can you describe how the bill would fix these problems?*

The *Georgia v. Ashcroft* influence standard not only provides little guidance to lower courts but as I mentioned above is essentially unworkable for DOJ officials to administer. The central problem with *Georgia v. Ashcroft* is that the tradeoffs made in pursuit of political advantage for minority voters may or may not pan out, and could ultimately result in dilution of their electoral power. This, in turn, could do long-term damage to the rights of minorities to elect candidates of their choosing. The proposed bill would fix these problems by re-establishing the "ability to elect" standard that courts and DOJ administrators are familiar with, and that the original VRA statutory language envisioned. This standard has a long track-record of protecting against elimination of minority voting strength and advancing the aims of Section 5 of the VRA.

[22] *Id.*