Testimony of

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Thank you for giving me the opportunity to testify today. The Voting Rights Act of 1965 is rightly celebrated as the cornerstone of the Second Reconstruction that, a century after the Civil War and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, finally began the full integration of black Americans into the political life of this nation. But it is critical to remember that the Voting Rights Act was part of the Second Reconstruction: the First Reconstruction, which at one point saw levels of voter turnout among black men that would be the envy of any state today1 and numbers of black state legislators in the south that exceed the number elected in the decade after this Court last amended the Voting Rights Act,2 ultimately gave way to cynical political compromises within Congress, judicial indifference to minority voting rights and a complete disenfranchisement of black Americans in the south that ended only after the massive struggle of a Civil Rights Movement whose veterans, many of whom bear physical scars from their attempts to help fellow citizens register to vote, are among the current Members of Congress.

So the history that gave rise to the Voting Rights Act of 1965 is not ancient history. It is far closer to current events. I have not yet, I hope, reached the midpoint of my career as a voting rights attorney, and I have represented individuals, in cases since Congress last amended and extended the Act in 1982, involving claims of discriminatory registration practices, poll taxes, voter purges, registration requirements, majority-vote requirements, apportionments, criminal prosecutions for voting rights activism, and the like.

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I know that the record before Congress is replete with examples of the continuing denial of the ability to participate effectively and fully, not only to African Americans but also by Latinos, Native Americans (for whom political conditions in South Dakota, a jurisdiction partially covered by section 5, are disturbingly reminiscent of the pre-1965 Deep South), and citizens with limited English proficiency. I strongly support renewal of the expiring temporary provisions of the Voting Rights Act. In my testimony, rather than focusing primarily on the evidence of the continuing effectiveness of, and need for, section 5, I shall focus on a set of largely legal questions, regarding the constitutionality of the proposed extension of section 5's preclearance requirement and the proposed amendments to section 5 that respond to the Supreme Court's decisions in Reno v. Bossier Parish, 528 U.S. 320 (2000) (Bossier Parish II), and Georgia v. Ashcroft, 539 U.S. 461 (2003). In brief, my conclusions are:

1. Congressional power is at its constitutional maximum when Congress acts to protect the voting rights of minority citizens, particularly when legislation resolves otherwise difficult and contested questions about the best means for achieving political equality.

2. A congressional conclusion that the extension of section 5 serves an important deterrent function need not rest on what has been referred to as "trial-type" evidence of current

constitutional violations.
3. The amendment of section 5 to overturn the Supreme Court's interpretation in
Bossier II of which sorts of racially tainted "purpose" are impermissible causes no constitutional
difficulty whatsoever, since the amendment only forbids states from making changes that would
themselves violate the Fourteenth or Fifteenth Amendments.
4. It is well within Congress's power to decide, with respect to the question how section
For the benefit of the Committee, I have appended to this testimony t 3 wo articles that I have
published, the first addressing the question of congressional power regarding voting rights under the
Reconstruction Amendments' enforcement clauses (Pamela S. Karlan, Two Section Twos and Two Section
Fives: Voting Rights and Remedies After Flores, 39 Wm. & Mary L. Rev. 725 (1998)) and the second
analyzing the Supreme Court's decision in Georgia v. Ashcroft (Pamela S. Karlan, Georgia v. Ashcroft and
the Retrogression of Retrogression, 3 Election L.J. 21 (2004)).
4 In 1965, Congress relied expressly on its powers under section 5 of the Fourteenth
Amendment (as opposed to under section 2 of the Fifteenth Amendment) only with respect to the suspension
of literacy tests with respect to the voting eligibility of citizens educated in U.S.-flag schools where the
language of instruction was not English. In later years, however, Congress has made clear that it is relying
on its "14/5" enforcement powers with respect to the entire Act.
5 Michael McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores,
111 Harv. L. Rev. 153, 182 (1997) (quoting Cong. Globe, 42d Cong., 2d Sess. 525 (1872)).

5 ought to be construed that preclearance authorities should focus on the ability of minority
citizens actually to elect candidates of their choice rather than on more nebulous factors such as
their ability to influence the post-electoral governance process.3
I. Congressional Power Is At Its Constitutional Maximum When Dealing With the Issue of
Providing Minority Voters With Full, Equal, and Effective Access to the Political
Process, Broadly Understood
Each time that Congress has taken up the Voting Rights Act of 1965, it has relied on its
powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments.4 Those
amendments recognized a special role for Congress, as opposed to the courts, in protecting
individual rights. As then-Professor Michael McConnell has explained:
Section Five of the Fourteenth Amendment was born of the fear that the judiciary
would frustrate Reconstruction by a narrow interpretation of congressional power.
. . . As Republican Senator Oliver Morton explained: "the remedy for the
violation of the fourteenth and fifteenth amendments was expressly not left to the
courts. The remedy was legislative, because in each the amendment itself
provided that it shall be enforced by legislation on the part of Congress."5
The Supreme Court has continued to recognize that special role when it comes to the
There is a voluminous academic criti 6 cism regarding the Court's reliance on the eleventh
amendment to preclude suits based not on diversity of citizenship but rather on the presence of a federal
question, and at virtually every point over the last forty years, the Court has been divided on this question 5-4
despite a nearly complete turnover in its membership.

protection of fundamental rights and traditionally excluded groups. In City of Boerne v. Flores,
521 U.S. 507 (1997), the Court observed that a distinction exists between "measures that remedy
or prevent unconstitutional actions and measures that make a substantive change in the
governing law." Id. at 519. And it recognized that "Congress must have wide latitude" with
respect to measures that fall in the first - remedial or prophylactic - category.
In Boerne itself, the Court pointed to the Voting Rights Act of 1965 - and, in particular,
Congress's decision to suspend literacy tests (first, only in section 5-covered jurisdictions, and
then nationwide) - as appropriate legislation under the Fourteenth Amendment, even though the
provisions clearly "prohibit[ed] conduct which [was] not itself unconstitutional and intrude[d]
into 'legislative spheres of autonomy previously reserved to the States.'" Id. at 518 (quoting
Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).
The Term before Boerne, in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996),
the Supreme Court held that Congress lacks the power to use its Article I powers (such as the
commerce power) to abrogate the sovereign immunity states enjoy against lawsuits by private
citizens.6 In the decade since Seminole Tribe and Boerne, the Supreme Court has frequently

revisited the question of congressional power, and although it may be somewhat premature, even now, to say that the dust has settled completely, the following principles articulated in the decided cases may be helpful in understanding the scope of Congress's power to amend and extend the Voting Rights Act.

First, the Court has drawn a sharp distinction between the scope of Congress's regulatory

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power, to which it continues to give broad effect, and Congress's remedial arsenal, which Seminole Tribe and its progeny have narrowed. In cases such as Board of Trustees v. Garrett, 531 U.S. 356 (2001), Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), and Alden v. Maine, 527 U.S. 706 (1999), the Court expressly noted that Congress could bind the state officials and agencies involved and require them to follow federal law. What it could not do was enforce those constraints by authorizing private damages actions. The Alden Court explicitly compared private damages lawsuits, which it held foreclosed by the Eleventh Amendment, to lawsuits brought by the United States to enforce individuals' rights, noting that "[s]uits brought by the United States itself require the exercise of political responsibility," 527 U.S. at 756, which brings them within the "plan of the [Constitutional] Convention" and "subsequent constitutional amendments" regarding the relationship between the federal and state governments.

Second, with respect to Congress's power under the Fourteenth and Fifteenth Amendments, the Court has not only continued to recognize the vitality of Fitzpatrick v. Bitzer, but has further held that congressional remedial and prophylactic power is at its strongest when Congress acts to remedy or prevent the kinds of practices that the Court has subjected to heightened judicial scrutiny. Put in simple terms, when Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are broader than when it acts to promote equality more generally. Thus, in Tennessee v. Lane Tennessee v. Lane, 541 U.S. 509 (2004), the Court upheld Congress's abrogation of states' sovereign immunity under Title II of the Americans with Disabilities Act with respect to the fundamental right of access to the courts, and in Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003), it upheld Congress's abrogation of states' sovereign immunity under the Family and Medical Leave Act

Article I, § 4 provides that "[t]he Times, Places an 7 d Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

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because the act was intended to prevent sex discrimination.

Third, in a case whose bearing on the constitutionality of the Voting Rights Act has so far received little attention, Vieth v. Jubelirer, 541 U.S. 267 (2004), Justice Scalia suggested that even when judges find equal protection clause-based challenges to political gerrymanders nonjusticiable - because they cannot discern a manageable judicial standard for analyzing such claims - Article I, § 4 (the "elections clause")7 empowers Congress to deal with such issues. 541 U.S. at 275-76 (plurality opinion). Part of the reason the Supreme Court has grappled with the justiciability of political gerrymandering claims for nearly forty years is precisely because the issue calls on courts to decide among hotly contested principles of political philosophy. To give just one example that bears on the proposed amendment to section 5 responding to Georgia v. Ashcroft, people active in and knowledgeable about politics differ vociferously about whether, in crafting electoral districts, political fairness is better ensured by drawing each district to be as competitive as possible (which increases both the chances that any individual voter will cast a decisive ballot and the risk that small changes in electoral preferences can produce grossly disproportionate legislative bodies) or by drawing districts that are predictably controlled by identifiable blocs of voters (which can produce proportional representation of the blocs within the legislative body but which results in larger numbers of voters casting essentially meaningless, or "wasted," votes).

Taken together, these decisions suggest that congressional power is at its apogee when Congress acts to protect fundamental rights, to protect suspect or quasi-suspect classes, to deal

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with issues relating to politics and political value judgments that are relatively unamenable to judicial resolution under the Constitution alone, and does so through mechanisms that "require the exercise of political responsibility" by the federal government.

All four of these factors apply to the bill now before Congress. First, the Supreme Court

has recognized, for over a century, that the right to vote is a "fundamental political right, because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); see also, e.g., Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Harper v. State Board of Elections, 383 U.S. 663, 667 (1966). Second, discrimination against the groups protected by the Voting Rights Act is subject to strict scrutiny. Third, the Act involves an area - regulation of the political process - that both raises important issues of political fairness that are not fully determined by the sweeping commands of sections 1 of the Fourteenth and Fifteenth Amendment and that are particularly within the expertise of politicians.

Finally, the preclearance regime of section 5 represents a quintessential exercise of political responsibility. In replacing case-by-case adjudication directly under the Constitution with an administrative regime designed to deter as well as to remedy denials of the right to vote, Congress (and ultimately the executive branch in the course of administrative preclearance) finally exercised the power it had been given by section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment to enforce the voting rights of racial minorities.

Nor does the preclearance regime run afoul of general federalism concerns. First, the Supreme Court has repeatedly turned aside constitutional challenges based on the structure of the preclearance regime itself. See, e.g., Lopez v. Monterey County, 525 U.S. 266 (1999); City of

Rome v. United States, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966). In Lopez, the Court stated that while "the Voting Rights Act, by its nature, intrudes on state sovereignty[, t]he Fifteenth Amendment permits this intrusion." 525 U.S. at 284-85. And the permissible intrusion involves not only the requirement of preclearance, but also the imposition of the burden of proof on the covered jurisdiction and the further substantive requirement that the jurisdiction prove not only the absence of a discriminatory purpose, but also that it prove that the proposed change will have no discriminatory effect. See id. at 283.

Second, and more generally, the Fourteenth and Fifteenth Amendments, by their very nature, intrude on state sovereignty. Indeed, that is precisely what they were intended to do, as the late Chief Justice explained in his opinion for the Court in Fitzpatrick v. Bitzer, the amendments marked a profound "shift in the federal-state balance." While decisions such as South Carolina v. Katzenbach have "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States," that "expansion of Congress' powers - with the corresponding diminution of state sovereignty - [was] intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments." 427 U.S. at 455-56.

Third, with respect to the application of the Voting Rights Act's procedural and substantive commands to the states' conduct of elections to federal office, Congress' power under Article I is plenary, and states have no countervailing constitutional sovereignty interest at all. As the Supreme Court explained in U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), the states' power here derives entirely from power delegated to them by Article I of the Constitution. The elections clause has long been interpreted to give Congress wide-ranging power over

congressional elections. In its most recent decision discussing the elections clause, Cook v. Gralike, 531 U.S. 510 (2001), the Supreme Court stated, "in our commonsense view [the] term ["manner of holding elections"] encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" Id. at 523-24 (emphasis added) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)). The list of practices that the Supreme Court and the lower federal courts have found within the scope of Congress' election clause power is broad indeed. See, e.g., Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972) (authority to regulate recount of elections); United States v. Gradwell, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); In re Coy, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with a federal contest); Ex parte Clarke, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections).

The elections clause assumes, in the first instance, that states will enact these regulations themselves. But as the Court explained in Foster v. Love, 522 U.S. 67 (1997):

The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices. Thus it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States. The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.

Id. at 69 (internal quotation marks and citations omitted). As the Foster Court went on to say, the clause gives Congress "'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which

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experience shows are necessary in order to enforce the fundamental right involved.'" Id. at 72 n.2 (emphasis added) (quoting Smiley v. Holm, 285 U.S. at 366)). See also Cook, 531 U.S. at 522 ("The federal offices at stake aris[e] from the Constitution itself. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States. . . . No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.") (internal quotations and citations omitted).

This congressional primacy is reflected in recent decisions uniformly rejecting tenth amendmentbased challenges to congressional action that asserted that the expansive voter registration practices of the Motor Voter law unconstitutionally commandeered state resources. See, e.g., ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997); ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996).

A long series of cases, mostly involving statutes that criminalize various forms of election-related misconduct, state that Congress' power under the elections clause extends to regulation of all aspects of an election conducted even in part to select members of Congress. In the most recent reported case to address this issue, United States v. McCranie, 169 F.3d 723 (11th Cir. 1999), the Court of Appeals upheld the convictions of two men charged with vote buying in primary elections for county commission and sheriff that appeared on the same ballot as uncontested primaries for United States Senate and House of Representatives. The Court of

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Appeals' language in rejecting the defendants' claim that there was no federal jurisdiction is fairly typical of the genre:

[T]he federal election fraud statutes were implemented to protect two aspects of a federal election: the actual results of the election and the integrity of the process of electing federal officials. In the present case, we agree with the government that McCranie's and Jones' fraudulent conduct corrupted the election process, if not the election results.

Moreover, the government maintains, and we agree, that the Constitution's Necessary and Proper Clause, (Art. I, § 8, cl.18), along with Art. I, § 4, empowers Congress to regulate mixed elections even if the federal candidate is unopposed.

Id. at 727. This ability to regulate "mixed" elections gives congressional regulation some extra leverage in protecting voting rights in elections for state and local office as well. Thus, for example, the federal anti-intimidation statute, 42 U.S.C. § 1971, that was part of the pre-1965 Voting Rights Act, protects voters even if the real motive or effect of intimidating them has to do with elections to non-federal offices.

II. Extension of Section 5 Constitutes Appropriate Legislation Under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments

Under City of Boerne, legislation constitutes appropriate enforcement of the provisions of the Reconstruction era amendments if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. As far as I am aware, the questions that have been raised with respect to whether extension and amendment of the Act is within Congress's power fall largely into two categories. First, section

Under section 5 as construed by the Court in Bossier Parish 8 II, the Act prohibits only those changes undertaken for a racially retrogressive purpose, but does not reach other racially discriminatory purposes, such as a racially driven desire to perpetuate the existing level of minority exclusion. The proposed amendment would make section 5 reach all purposeful racial discrimination. Since, as I explain below, all purposeful discrimination violates either the Fourteenth or Fifteenth Amendment, the proposed Bossier Parish II "fix" raises no serious constitutional questions.

9 I explore this point at greater length in the attached article.

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5 goes beyond prohibiting changes made for discriminatory purposes8 to reach changes that will have a retrogressive effect. Some individuals have questioned whether the prohibition of conduct that is not itself unconstitutional is congruent and proportional. As I have already shown in the prior section, however, the Court has squarely upheld the use of "effects tests," both under the Voting Rights Act itself in Lopez and City of Rome and in post-Boerne cases such as Tennessee v. Lane and Nevada v. Hibbs where Congress is trying to prevent infringement of fundamental rights or discrimination against protected classes. Thus, nothing about the continued imposition of an effects test raises any new constitutional questions.9 Particularly because the Supreme Court has held, expressly in the context of constitutional voting rights cases, that the effects of a challenged practice are powerful evidence of the intent with which it was adopted or maintained, see Rogers v. Lodge, 458 U.S. 613 (1982), evidence of the continued use of voting practices and procedures that have the effect of denying minority citizens equal access to the political process is relevant to assessing the continued risk of constitutional violations in the absence of strong prophylactic measures such as section 5. And this conclusion is reinforced by a point of which Congress was well aware when it amended section 2 of the Voting Rights Act in 1982 to embrace an effects test: requiring findings of purposeful race discrimination in order to remedy the continued political exclusion of minority citizens can actually exacerbate racial tensions. Thus, one reason for the enactment of section 2 was to avoid

The year before the Voting Rights Act was passed, the 10 Twenty Fourth Amendment forbid conditioning the right to vote in elections for federal office on payment of "any poll tax or other tax," and the next year, in striking down Virginia's attempt to circumvent the amendment by imposing a certificate of residency requirement on citizens who sought to register without paying the commonwealth's poll tax, the Supreme Court stated that "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro." Harman v. Forssenius, 380 U.S. 528, 543 (1965). In Harper, the Supreme Court struck down imposition of a poll tax in any election as a violation of the fundamental right to vote.

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requiring the kind of judicial findings that would undermine political progress. Thus, Congress has made the eminently sensible judgment that the best way of combating the lingering effects of past, unconstitutional racism in the political process is not to require name-calling and condemnation in the litigation process but to simply bring about the effective integration of minority citizens into the political process.

Second, some individuals have suggested that extension of section 5 raises questions of congruence and proportionality because it leaves in place for another significant period of time a preclearance regime that applies to only a selected group of covered jurisdictions that are defined in terms of a triggering formula developed in the 1960's and 1970's.

The contours of section 5's coverage are a product of principle mixed with pragmatic politics. To be sure, not every jurisdiction with a history of pervasive racial discrimination in voting was originally covered. For example, the trigger rested on use of a literacy test, and not a poll tax, even though there was substantial evidence of the discriminatory purpose and effect of poll taxes.10 Thus, section 5 provided protection to blacks on the Mississippi side of the Delta but not on the opposing shore in Arkansas. And Texas became a covered jurisdiction only in 1975, as a result of its discrimination against language minorities. Still, the trigger did a reasonably good job of picking up most, if not all, the places with a history of pervasive violations of the Fourteenth and Fifteenth Amendments. See South Carolina v. Katzenbach, 383

Indeed, I understand that extensive evidence about 11 the scope, operation, and effectiveness of section 4 bailout has been presented during hearings before the House Judiciary Subcommittee on the Constitution, and incorporated into this Committee's record.

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U.S. at 331 ("Legislation need not deal with all phases of a problem in the same way, so long as

the distinctions drawn have some basis in practical experience.").
"Bailout" under section 4 of the Act has been available to jurisdictions brought within the triggering formula that can show their compliance with both the Act and with the underlying constitutional commands for fair and inclusive political processes. I know you will hear testimony on this legislative incentive for compliance from many individuals with far more expertise on this question than I.11 But it is important to note that under section 3(c) of the Act, "bail-in" - that is, judicial orders bringing jurisdictions that were not covered by the trigger within the special provisions of section 5 - has also been available. I was involved in one such case in the late 1980's. In Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990), aff'd, 498 U.S. 1019 (1991), a three-judge federal district court ordered that the state of Arkansas seek preclearance of any new majority-vote (or runoff) requirements before putting them into place, because it found that the state had "committed a number of constitutional violations of the voting rights of black citizens" related to such requirements. Id. at 586; see id. at 601-02. See also Sanchez v. Anaya, Civ. No. 82-0067M (D.N.M. Dec. 17, 1984) (three-judge court) (requiring preclearance of any new redistricting plan for a period of ten years); McMillan v. Escambia County,559 F. Supp.720, 727 (N.D. Fla. 1983) (referring to the Fifth Circuit's imposition of a preclearance requirement on the country under section 3(c)). Thus, beyond periodic renewal, the Act provides two routes for tailoring which jurisdictions ought to be covered that give jurisdictions and courts the opportunity to consider the Act's coverage more surgically.
Nothing about Boerne 12 and its progeny address directly the question whether appropriate remedial and prophylactic measures - adopted on the basis of a record of a century's worth of unconstitutional conduct and ineffectual judicial and legislative attempts to resolve the problems by other means - must be abandoned at some particular moment. As I have already suggested, the record before Congress is sufficient for you to conclude that that moment has not yet arrived. But there is no general doctrine of constitutional desuetude that requires abandonment of section 5.
13 This is especially true at the local level, where communities can be relatively small and where discriminatory changes are likely to escape scrutiny from either national civil rights organizations or - particularly when the changes involve nonpartisan elections - the organized political parties that often litigate issues involving state-level or congressional redistricting. Thus, to conclude that section 5 is unnecessary because minority voters are electing candidates of their choice at the state or national level would be a serious mistake. And it is worth noting in any event that the record before Congress contains evidence of statewide redistricting examples of section 5 violations post-2000 Census. See LCCR: Voting Rights in Louisiana 1982-2006 describing Louisiana House of Representatives. et al. v. Ashcroft.
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The question whether Congress can continue coverage of the already covered jurisdictions as part of an extension of the Act does not require that Congress conclude that if it were writing on a completely clean slate today, it would choose the original triggering formulas.12 Rather, it depends on whether continuing to subject the covered jurisdictions to the preclearance regime is congruent and proportional to preventing future constitutional injury.
It is critical to understand that section 5 operates in two distinct ways. First, as a formal matter, section 5 empowers the Department of Justice or a federal district court in the District of Columbia to block a covered jurisdiction from implementing discriminatory changes it proposes to make in its voting-related laws. Second, and ultimately more important, section 5 deters jurisdictions even from seeking to implement such laws by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims." South Carolina v. Katzenbach, 383 U.S. at 328. Congress has recognized that individual minority voters, and even minority communities, may not have the expertise or financial resources to effectively challenge discrimination in the political process.13 But when a jurisdiction must justify its changes, and bear the burden of justifying those changes, it is likely to think hard about whether its changes
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are nonretrogressive. My own experience, helping to ensure that California's state legislative redistricting after the 2000 census complied with section 5, reinforces my sense, garnered from discussions with state and local officials and their lawyers in other jurisdictions, that section 5 has a salutary effect in making the political participation of minority voters a central consideration, rather than an issue relegated to an afterthought.
If section 5 worked perfectly, there would therefore be no section 5 objections, because covered jurisdictions would simply be deterred. This creates an apparent difficulty because

opponents of section 5, or parties that challenge its constitutionality, will argue that the decline in the number objections shows that the statute has outlived its usefulness. But the difficulty is only an apparent, and not an actual, one. It is entirely within Congress's expertise, as a body composed entirely of elected officials with a sense of how politics actually operates on the ground, to conclude that section 5 is still necessary to deter future violations, particularly given a voluminous record of problems that minority voters have continued to face in covered jurisdictions. The fact that: many of the problems were resolved prior to litigation, that not all of the e problems are themselves constitutional violations, or that there are other, perhaps equivalently troubling issues in some non-covered jurisdictions, does not undermine the continued usefulness of section 5 as one quiver in Congress's arsenal for ensuring equal political opportunities for minority citizens.

As to when section 5 may become unnecessary, I cannot now give an answer. At least given current political realities, there would be substantial risks, particularly with respect to changes within local jurisdictions where racial tensions are often far sharper than at the statewide or national level, that unconstitutional or illegal discrimination could recur.

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The effective political integration of minority citizens remains, in many jurisdictions, a relatively newfound phenomenon. It was really not until after the 1982 amendments to the Act that minority voters began to elect significant numbers of representatives to many public bodies. When faced with a claim in 1971, by the Bossier Parish School Board, that it should be released from various aspects of a desegregation decree because the schools in the ironically named locality of Plain Dealing had been unitary for a semester, the Fifth Circuit observed that "One swallow does not make a spring." Lemon v. Bossier Parish School Bd., 444 F.2d 1400, 1401 (5th Cir. 1971). The fact that Bossier Parish still had not managed political integration a quarter century later is stark evidence that it may take more time for the advances the Voting Rights Act has so far produced really to take root. As Georgia v. Ashcroft recognized, one key purpose of the Voting Rights Act is "to encourage the transition to a society where race no longer matters." 539 U.S. at 490. But we are not yet there. And it is critical to remember that the gains minority voters have achieved over the last forty years by "pull[ing], haul[ing], and trad[ing] to find common political ground," Johnson v. De Grandy, 512 U.S. 997, 1020 (1994), have all occurred in the shadow of section 5, which has given minority voters and their representatives an invaluable bargaining chip. Our long, bitter, and all-too-recent history of covered jurisdictions' pervasive indifference and hostility to minority citizens' political aspirations demands something more than the triumph of hope over experience.

III. The Bossier Parish II and Georgia v. Ashcroft "Fixes" Represent an Entirely Appropriate Exercise of Congress's Enforcement Power

In Bossier Parish II, the Supreme Court construed section 5's prohibition on the implementation of changes unless a jurisdiction can show that the change does not have a

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"discriminatory purpose" to forbid only changes that have a retrogressive purpose. That is, changes that are purposefully discriminatory, but that do not leave minority citizens worse off, do not violate section 5.

Such changes do, of course, violate the Constitution. So, for example, a jurisdiction which currently uses electoral districts from which black voters are unable to elect candidates of their choice that chooses, after the census, to redraw its districts with the purpose of ensuring a continued lack of minority electoral success would violate the equal protection clause. A jurisdiction that prevented minority citizens from voting by locating polling places in inaccessible locations that then introduced a voter identification procedure designed to keep any minority voters who managed to find the polling place from actually casting a ballot would violate the Fifteenth Amendment as well.

Amending section 5 to prohibit all unconstitutional discrimination with respect to the right to vote, rather than only the subset of unconstitutional discrimination that is also retrogressive poses no constitutional difficulties under any conceivable theory of congressional power.

The Georgia v. Ashcroft "fix" responds to a different sort of problem. In that case, the Supreme Court held that section 5's current language "gives States the flexibility to choose one theory of effective representation over the other." 539 U.S. at 482. Thus, the Court recognized

that the decision about how best to protect minority voters' right to fair, equal, and effective representation involves a choice among very different theories.

It is not my aim here to explain why Congress should embrace the theory that minority voters are most effectively represented when they can actually elect candidates of their choice - 19

a theory that groups with control over the redistricting process almost always adopt for themselves - rather than simply having some "influence" over the election of candidates sponsored by, and beholden to, other communities. To some extent, Congress has already embraced that theory in section 2 of the Voting Rights Act, which protects the right both to "participate" and to "elect." Other witnesses before this Committee will lay out in far greater detail this issue, and the House Judiciary Subcommittee on the Constitution has heard substantial evidence on this question. I want simply to highlight one point to which I have already adverted. Once we recognize that this is a choice among theories, Congress has the constitutional power to make that choice. Congress, and not the courts, decided in 1842 that congressional elections should be conducted from single-member districts - and has since then neither retreated to permitting elections at large nor adopted any of the systems of proportional representation used by most other Western democracies - thereby embracing a particular "theory of representation" from among the constitutionally available ones. So too, Congress can choose, particularly in the context of ensuring equal political opportunity for historically excluded groups, to impose a standard that looks at changes in the groups' ability to elect candidates of their choice rather than a more nebulous and speculative standard that poses a threat of once again relegating minority voters' political aspirations to an afterthought. Particularly in light of Vieth's invitation to Congress to address difficult questions of fair representation, the Georgia v. Ashcroft "fix" lies well within your constitutional competence.

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Georgia v. Ashcroft and the Retrogression of Retrogression

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SECTION 5 OF THE VOTING RIGHTS ACT OF 19651 has served as a major legal engine for transforming American democracy over the last forty years. Its power stems from two modifications of the conventional legal process for safeguarding minority voting rights. First, section 5 forbids covered jurisdictions2 from making any changes in their election laws unless

and until the laws first receive federal approval,[3] and places the burden of proving that the new law will have neither a discriminatory purpose nor a discriminatory effect on the covered jurisdiction. The preclearance requirement "shifts the advantage of time and inertia from the perpetrators of the evil to its victims."[4] Second, section 5 contains a natural benchmark that preserves the political gains minority voters have achieved through political or legal action. The preclearance process measures a proposed voting practice or procedure against the existing scheme to determine whether the change will "lead to a retrogression with respect to [minority voters'] exercise of the electoral franchise."[5] Thus, "the baseline is the status quo that is proposed to be changed."[6] The presence of an "objective and workable standard for choosing a reasonable benchmark"[7] reassured the Court that section 5 judgments would not embroil the courts or the executive branch in unguided interference with the political process.

This essay discusses last term's decision in Georgia v. Ashcroft.[8] The Court's opinion fundamentally alters the preclearance process in disturbing ways. For several years, the Supreme Court has been expressing concern

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1 42 U.S.C. § 1973c (1994).

2 Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b) (1994) designates states and political subdivisions for section 5 coverage if they used a literacy test, broadly defined (to include, for example, the use of English language-only election materials in a significantly non English-speaking community), and voter registration or turnout in the 1964, 1968, or 1972 presidential elections dipped below 50 percent of voting age population. Currently, nine states and parts of seven others are "covered jurisdictions." See 28 C.F.R. Part 51 App. (2003).

3 Section 5 also limits the fora in which preclearance can be obtained--administratively through the Department of Justice or judicially through three-judge federal district courts convened in the District of Columbia. The unstated rationale for this specification was to avoid the problem of underenforcement of voting rights by unsympathetic southern judges. See, e.g., Samuel Issacharoff, Pamela S.

Karlan & Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 546-47 (rev. 2d ed. 2002) (describing the problem); William Colbert Keady & George Colvin Cochran, Section 5 of the Voting Rights Act: A Time for Revision, 69 Ky. L.J. 741, 750-51 (1981) (describing discussions of this issue in the legislative history).
4 South Carolina v. Katzenbach, 383 U.S. 301, 328 (1965). See also Beer v. United States, 425 U.S. 130, 140 (1976) (noting that prior to section 5 "each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory").
5 Beer, 425 U.S. at 141.
6 Reno v. Bossier Parish School Board (Bossier II), 528 U.S. 320, 333 (2000).
7 Holder v. Hall, 512 U.S. 874, 881 (1994).
8 123 S.Ct. 2498 (2003).
about the ways in which section 5 works a substantial departure "from the traditional course of relations between the States and the Federal Government."9 Not surprisingly, the Rehnquist Court, whose primary legacy is a "federalism revival" characterized by skepticism about federal enforcement power under the Reconstruction Amendments,10 has sought to cabin section 5. In Presley v. Etowah County Commission, 11 the Court restricted the category of changes that require preclearance, excluding changes in "governance." In Presley itself, this meant that section 5 did not reach a local government resolution that undercut the settlement of a section 2 vote-dilution lawsuit. (After the county had agreed to abandon at-large elections, the county commission enacted a resolution stripping the commissioner representing the newly created majority-black district of the traditional powers of his office, arguably leaving the district's residents "even worse off than they were before entry of the consent decree." 12) And in Reno v. Bossier Parish School Board (Bossier II),13 the Court held that section 5's prohibition of changes that have a "discriminatory purpose" bars only changes manifesting a purpose to retrogress: thus, changes that merely aim to perpetuate existing levels of unconstitutional or illegal discrimination cannot justify denying preclearance. In Bossier II, this meant that section 5 did not prohibit a twenty percent black parish with a decadeslong history of resistance to school desegregation orders from adopting new district lines for school board elections that failed once again to draw any majority-black districts; the prior plan had not included any majority-black districts either.
Georgia v. Ashcroft takes a significantly different tack. It reintroduces the considerations

of governance that Presley seemed to exclude, transforming them into justifications for approving plans that decrease minority voters' ability to elect the representatives of their choice. And it engages in the kind of noncomparative purpose analysis that Bossier II seemed to reject, in a fashion that dramatically undercuts the statutory burden of proof, a burden born of long, bitter, and all-too-recent experience with covered jurisdictions' indifference and hostility toward the political aspirations of minority voters.

A BRIEF HISTORY OF REDISTRICTING IN GEORGIA

Particularly because a key aspect of the Supreme Court's decision in Georgia v. Ashcroft is its reliance on the good faith of Georgia's redistricting officials, it's at least worth remembering why Georgia is a covered jurisdiction in the first place.14 When the Voting Rights Act of 1965 was passed, Georgia's population was roughly one quarter black, but there were only three black elected officials in the entire state.15 Only 27.4 percent of eligible black adults were registered to vote,16 and the state had engaged in a variety of tactics to assure black political powerlessness. By the summer of 1968, the percentage of the black population that was registered to vote had more than doubled, almost entirely as a result of the Act's suspension of the discriminatorily administered literacy test, the activities of federal registrars, and the work of several civil rights organizations.17

The state's response to the surge of black voter registration was to adopt new laws to perpetuate white control over the political process. Prominent among these were its redistricting practices. Following the 1970 census,

9 Presley v. Etowah County Commission, 502 U.S. 491, 501 (1992). See also, e.g., Reno v. Bossier Parish School Board (Bossier I), 520 U.S. 471, 480 (1997) (discussing the "serious federalism costs" imposed by section 5).

10 See Bradley W. Joondeph, Bush v. Gore, Federalism, and the Distrust of Politics, 62 Ohio St L J 1781, 1784 (2001) (suggesting that "while the Rehnquist Court's 'federalism revolution' has imposed new limits on Congress, and thereby modestly enhanced some aspects of state autonomy, it has not championed states' political independence more generally").

11 502 U.S. 491, 510 (1992).

12 Presley v. Etowah County Commission, 869 F. Supp. 1555, 1573 (M.D. Ala. 1994). In this decision, on remand from the Supreme Court, the district court held that the challenged resolution violated the terms of the consent judgment implementing the settlement of the section 2 lawsuit.

13 528 U.S. 320 (2000).
14 For extensive discussion of Georgia's resistance to black political participation see Laughlin McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia 130-32, 135-38, 141-50, 159-60, 164-72 (2003).
15 See Laughlin McDonald, Michael B. Binford & Ken Johnson, Georgia, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990, at 67 (Chandler Davidson & Bernard Grofman eds. 1994).
16 See id. at 75.
17 See McDonald, supra note 14, at 129.
Georgia redrew its congressional and state legislative district lines. When it submitted the new plans for administrative preclearance, the attorney general interposed objections to all three. The state legislative plans contained a catalogue of dilutive devices--multimember districts, numbered posts, majority runoff elections, and boundary irregularities in areas with concentrations of black voters.18 The congressional plan deliberately fragmented the Atlanta area's large black population among three districts, and manipulated boundary lines to exclude the most plausible black candidates from the district where they stood the best chance of winning.19 The legislator who proposed the creation of a 38 percent black district (rather than a majority-black one) explained his intention as ensuring the election of "a white, moderate Democratic Congressman."20 Only after the attorney general interposed an objection did the state increase the black percentage in the Fifth Congressional District to 44 percent and include the residences of strong black candidates within the district. While Andrew Young, a black candidate, was elected to the seat in 1972 and 1974 (receiving roughly onequarter of the white vote), a white candidate was elected in a racially polarized election after his retirement and held the seat until after the next redistricting.
The post-1980 round of redistricting was equally flawed. Once again, the attorney general objected to both the state legislative and the congressional district lines. With respect to the state legislative district boundaries, he concluded that they fragmented concentrations of black voters in several areas across the state, threatening "a significant detrimental impact on black voting strength."21 That objection created crucial leverage for drawing a plan that increased the number of majority-black house districts from 24 to 30 (of 180) and the number of majority-black senate districts from 2 to 8 (of 56).22 As for the state's congressional redistricting, after the attorney general objected to the state's decision once again to fragment Atlanta's

geographically and politically cohesive black community, the state sought a declaratory judgment from a three-judge district court in the District of Columbia. At trial, the legislative leaders who had shepherded the plan to passage--Chairman of the Georgia House Reapportionment Committee Joe Mack Wilson and House Speaker Thomas Murphy--"raised the spectre that a Republican would be elected from the Fourth District under the Senate plan," which had created a majority-black adjacent district.23 But the district court rejected the defense of "politics, not race." In concluding that the plan was tainted by intentional racial discrimination, the court pointed, among other things to Wilson's announcement, after meeting with the Department of Justice, that "I don't want to draw nigger districts,"24 and Murphy's "racial attitudes" that led him to "purposefully discriminat[e]" throughout the process.25

Perhaps by the post-1990 round of redistricting, Georgia had learned its lesson: the first state legislative plans it submitted for preclearance created one additional majority-black senate district and six additional majority-black state house seats.26 The Department of Justice nonetheless refused preclearance until Georgia created an additional majority-black senate district and four additional majority-black house districts. The state complied, and the plan was precleared. The resolution of a Shaw challenge to the state's congressional map, however, in-

18 See id. at 148. The state responded by redrawing the state senate districts, thereby creating two majority-black districts, but failed to cure the problems with the house plan, so the attorney general interposed a second objection. Georgia responded to the ensuing lawsuit by the United States seeking to enjoin use of the unprecleared plan, by arguing that section 5 should not even cover redistricting. The Supreme Court unanimously rejected that claim. See Georgia v. United States, 411 U.S. 526 (1973).

19 See McDonald, supra note 14, at 149.

20 Id. at 150 (quoting Rep. G.D. Adams).

21 Id. at 167 (quoting the objection letter).

22 Since the population of Georgia was 27.4 percent black, see Georgia Dept. of Human Resources, Vital Statistics Data Book 1980, tbl. 1 (1982), even the new plan meant that blacks were underrepresented in the legislature relative to their presence in the population.

23 Busbee v. Smith, 549 F. Supp. 494, 507 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

24 Id. at 501.

25 Id. at 510. Judge Harry Edwards--one of the three judges to sit on the Georgia v. Ashcroft three-judge court--was also one of the three judges on the three-judge

court in Busbee.
26 See Johnson v. Miller, 929 F. Supp. 1529, 1537 n. 23 (S.D. Ga. 1996). Georgia's demographic profile in both 1990 and 2000 is discussed by the district court. See Georgia v. Ashcroft, 195 F. Supp.2d at 38-39. In 1990, 29.96 percent of Georgia's population was black. See id. at 38.
dicated that the Department should have precleared the initial state legislative reapportionments,
27 so when plaintiffs brought a Shaw challenge against the state legislative districts, Georgia and the Department of Justice returned to the drawing board. In 1997, the state adopted, and the attorney general precleared, new plans that served as the basis for the 1998 and 2000 elections and as the benchmark for the post-2000 round of redistricting.

GOVERNANCE AS A GOVERNING CONCERN: THE 2001 GEORGIA STATE SENATE REDISTRICTING

The post-2000 redistricting was the first one in which black elected officials--virtually all of whom were elected from majority-black districts created as a result of the Voting Rights Act--played a meaningful role. In the state senate--the body whose redistricting reached the Supreme Court in Georgia v. Ashcroft--the 1997 benchmark plan had created eleven state senate districts with populations that were over 50 percent black, ten of which had black votingage majorities. By 2000, population shifts meant that thirteen districts were at least 50 percent black in total population. Twelve of the thirteen had majority-black voting-age populations,
28 and eleven had elected black senators.29 Democrats controlled the redistricting process from start to finish.30 According to the Supreme Court, "the goal of the Democratic leadership--black and white--was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats."31 Preservation of the existing majorityminority districts was important to the Democratic leadership for several reasons.32 First, the Democrats could not pass a plan at all without black senators' support: in the 56-member senate, there were only 21 white Democrats, along with 11 black Democrats, and 24 white Republicans.
33 Only a plan that maintained significant concentrations of black voters in black incumbents' districts could garner support from black senators, since they were aware that their prospects for reelection depended on their being placed in such districts.34 Second, of course, the leadership was well aware that the plan would have to undergo preclearance, and the conventional understanding of the retrogression standard made decreasing the number of

majority-black districts risky. If preclearance were denied and a court-drawn plan were im-

27 See Miller v. Johnson, 515 U.S. 900, 923 (1996) (noting that Georgia's first and second proposed congressional plans "increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%)" and that the plans were therefore " 'ameliorative' and could not have violated § 5's non-retrogression principle"); Abrams v. Johnson, 521 U.S. 74, 97-98 (1997) (holding that a courtordered plan under which only 1 of the 11 districts (9%) was majority-black was non-retrogressive).

28 See Georgia v. Ashcroft, 123 S. Ct. at 2505.

29 The 2000 census also showed that the proportion of Georgia's population that was black had increased--from 26.96 percent to at least 28.7 percent. Georgia v. Ashcroft, 195 F. Supp. 2d at 39. The reason I say "at least" is that the 2000 census allowed individuals, for the first time, to identify themselves as members of more than one racial group. The complications of this change, which are discussed at length by both the district court and the Supreme Court, are not particularly relevant to this article.

30 Not a single Republican in either the house or the senate voted for any of the plans ultimately adopted. See Georgia v. Ashcroft, 123 S.Ct. at 2506.

31 Id. at 2505.

32 The notion that enabling black citizens to choose representatives of their choice was an attractive goal in its own right seems belied by the tone of the state's description of the benchmark districts in its brief before the Supreme Court:

> Georgia was left with much of the redistricting residue of the DOJ's maximization strategy from 1991-92 as it approached redistricting in 2001. The redrawn House and Senate plans were very similar to those originally passed by the General Assembly, under DOJ direction; only the flagrantly unconstitutional parts were modified.

Brief for Appellants at 9, Georgia v. Ashcroft, 123 S.Ct. 2498 (2003).

33 See Jim Galloway & David Pedered, Lack of Democratic Support Delays Redistricting Vote, Atlanta J. & Const., Aug. 9, 2001, at 4E.

34 See Brief Amicus Curiae of Georgia Coalition for the Peoples' Agenda in Support of Appellees at 8, Georgia v. Ashcroft, 123 S.Ct. 2498 (2003) (reporting that of 40 blacks elected to the Georgia legislature under the 1992 plan, only one was elected from a majority-white district and that district, which was 42% black, contained the University of Georgia). Even in the 2002 election, all ten blacks elected to the state senate were from majority-black districts as were 34 of 37 black members of the house. And of the three black representatives from majority-white districts, one had been elected originally from a majorityblack district and another was elected from a newly created multimember district. See id.

posed, the Democrats might have been unable

to attain their partisan interests.35
From the perspective of individual Democratic senators, there were at least two interests in play.36 First, each senator had an aggregation-level interest in how his own district was constructed: he wanted a seat he could win. Second, each senator had a governance-level interest: his post-election power depended significantly on the overall composition of the senate, since his ability to obtain a committee chairmanship or to pass legislation with a partisan valence depended on there being a Democratic majority.37
But how to create a majority-Democratic senate? For the Democrats to preserve, let alone increase, their representation, they needed to allocate Democratic voters efficiently among districts. This posed a problem because of a dramatic difference in the partisan voting patterns of black and white voters. While black voters overwhelmingly preferred Democratic candidates, white voters strongly supported Republicans.38 Thus, it would be hard to maintain Democratic control by creating significant numbers of overwhelmingly white but majority-Democratic districts. Most Democratic candidates would need a significant number of black voters in their district to stand a reasonable chance of winning.39
But precisely because a sizeable minority of white voters were Democrats, the proportion of a district's electorate that was Democratic was likely to exceed the proportion that was black. Consequently, a district with a majorityblack voting age population was likely to be overwhelmingly Democratic.40 From the perspective of maximizing Democratic power, such a district would "waste" votes. The most "efficient" use of black voters from the Democratic perspective might involve creating districts that were about one-fourth black, since those districts would have a slim Democratic majority on election day.41
Democrats were foreclosed from the most efficient use of black votes by both political and

35 For a discussion of the ways in which the prospect of judicial intervention, with its potential disregard of incumbency and partisan factors, spurs legislators to compromise, see Daniel R. Ortiz, Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself, 4 J.L. & Pol. 653 (1988).
36 In earlier work, I identified a nested constellation of interests implicated in voting rights cases: (1) participation--the entitlement to cast a ballot and have that ballot counted; (2) aggregation--the choice among rules for tallying votes to determine election winners; and (3) governance--

the ability to have one's policy preferences enacted into law within the process of representative decisionmaking. See Pamela S. Karlan, The Rights To Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1708 (1993). The latter two interests affect representatives as well as citizens.

37 See Georgia v. Ashcroft, 123 S.Ct. at 2506. See also Karlan, supra note 36; Jean-Pierre Benoit & Lewis A. Kornhauser, Assembly-Based Preferences, Candidate-Based Procedures, and the Voting Rights Act, 68 So .Cal. L. Rev. 1503 (1995); Jean-Pierre Benoit & Lewis A. Kornhauser, Social Choice in a Represent