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TWO SECTION TWOS AND TWO SECTION FIVES: VOTING RIGHTS AND REMEDIES AFTER *FLORES*

PAMELA S. KARLAN*

My favorite book review of all time appeared in *Field and Stream* and concerned *Lady Chatterley's Lover*:

[T]his fictional account of the day-by-day life of an English gamekeeper is still of considerable interest to out-door-minded readers, as it contains many passages on pheasant raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper. Unfortunately, one is obliged to wade through many pages of extraneous material in order to discover and savor these side-lights on the management of a Midlands shooting estate . . .¹

I suppose I should feel apologetic, but my reaction to *City of Boerne v. Flores*² was rather similar. I know most constitutional scholars consider the Religious Freedom Restoration Act (RFRA)³ and the religion clauses the far sexier topic, but what gripped me was the Court's treatment of the Voting Rights Act of 1965 (the "Act").⁴

With respect to the Voting Rights Act, *Flores* was remarkable for its blend of enthusiasm and silence. Justice Kennedy's opinion relied heavily on the Act as an exemplary illustration of congressional enforcement power under Section 5 of the Fourteenth Amendment.⁵ Yet the quartet of "[r]ecent" Voting Rights

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1. The review, which originally appeared in 1959, is reprinted in *Best of the Best: Column Excerpts*, FIELD & STREAM, Oct. 1995, at 10, 148.

2. 117 S. Ct. 2157 (1997).

3. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

4. 42 U.S.C. §§ 1973 to 1973p (1994).

5. Actually, most of the cases Justice Kennedy cited relied on Congress's use of

Act cases on which he relied were all decided at least seventeen years ago.⁶ In more contemporary cases involving the key provision of the 1982 amendments to the Act, Justice Kennedy has explicitly left open the question of the Act's constitutionality.⁷

My goal in this Essay is to begin to answer that question and show that the Voting Rights Act, in its current form, remains a proper use of congressional enforcement power. Congress's choice of disparate impact tests in both section 2 and section 5 of the Voting Rights Act represents an appropriate congressional judgment despite the Supreme Court's decisions in *City of Mobile v. Bolden*⁸ and *Rogers v. Lodge*⁹ that only purposeful vote dilution violates the Equal Protection Clause of the Fourteenth Amendment.¹⁰ Sections 2 and 5 of the Voting Rights Act are designed to address prior unconstitutional discrimination, both within and outside the electoral process, as well as to prevent future invidious conduct. Moreover, each is carefully calibrated to insure "congruence and proportionality between the injur[ies] to be prevented or remedied and the means adopted to that end."¹¹

its enforcement power under Section 2 of the *Fifteenth Amendment*. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, J., concurring in part and dissenting in part); *id.* at 231-36 (Brennan, White, & Marshall, JJ., concurring in part and dissenting in part); *id.* at 282-84 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J. & Blackmun, J.); *South Carolina v. Katzenbach*, 383 U.S. 301, 324-27 (1966). But because the two amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the analysis surely carries over.

6. See *Flores*, 117 S. Ct. at 2166. In addition to the cases cited in the previous note, which were all decided by 1980, the Court also relied on *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

7. See *Johnson v. DeGrandy*, 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

8. 446 U.S. 55 (1980).

9. 458 U.S. 613 (1982).

10. See *Bolden*, 446 U.S. at 69-70; *Lodge*, 458 U.S. at 617.

11. *Flores*, 117 S. Ct. at 2164.

I. THE VOTING RIGHTS QUARTET: THE REACH OF
CONGRESSIONAL POWER UNDER SECTIONS 2 AND 5 OF THE
RECONSTRUCTION AMENDMENTS

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment grant Congress the "power to enforce" the amendments' substantive commands by "appropriate legislation."¹² The question at the heart of *Flores* was Congress's power to forbid state practices that have only a disparate impact in the service of enforcing constitutional provisions that would directly forbid only purposeful discrimination. In answering this question, the Court quite naturally turned to the quartet of Voting Rights Act precedents because they offer the most complete explanation of congressional enforcement power under the Reconstruction Amendments.

Flores discussed provisions of the Voting Rights Act that banned the use of literacy tests as a prerequisite to voting and that imposed a "preclearance" requirement on certain jurisdictions with a history of depressed political participation, requiring them to obtain federal approval before implementing changes in any laws affecting voting.¹³ *Flores* reaffirmed the propriety of these provisions as responses to "the widespread and persisting deprivation of constitutional rights resulting from this

12. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

13. *South Carolina v. Katzenbach*, 383 U.S. 301 (1965), involved, for present purposes, a challenge to the Voting Rights Act's five-year suspension of literacy tests in a targeted set of states and counties with a history of depressed political participation, section 4(b), and its concomitant requirement that these "covered jurisdictions" seek preclearance, section 5. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved a challenge to section 4(e) of the 1965 Act, which essentially relieved Puerto Ricans who had received their education in Spanish-speaking schools from having to pass any still surviving literacy tests. The other two decisions discussed in *Flores*—*Oregon v. Mitchell*, 400 U.S. 112 (1970), and *City of Rome v. United States*, 446 U.S. 156 (1980)—challenged aspects of the Act as it was subsequently amended. Part of the complaint in *Mitchell* challenged Congress's then-temporary decision to ban literacy tests nationwide (a ban that was made permanent in 1975, see 42 U.S.C. § 1973aa (1994)), and *City of Rome* concerned Congress's 1975 decision to extend the preclearance requirement of section 5 for another seven years. In 1982, Congress extended the preclearance requirement until 2007. See 42 U.S.C. § 1973b(a)(8) (1994).

country's history of racial discrimination."¹⁴

The cases on which the Court relied offer three models of congressionally corrigible invidious discrimination: the internal, the external, and the prospective. The operation of these models, and the types of congressional responses they might permit, are illustrated by the literacy test cases.

First, under the internal model, literacy tests themselves might be the source of invidious discrimination; that is, the unconstitutional discrimination might occur within the electoral system. Congress and the Court had substantial evidence that literacy tests were administered in deliberately discriminatory ways for the purpose of excluding black citizens who possessed the same abilities as white individuals who were permitted to register.¹⁵ Under this view, Congress could ban literacy tests because the available evidence gave it "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."¹⁶ The congressional ban might—and in fact did¹⁷—reach some literacy tests that could not be proven to be purposefully discriminatory. But as long as there was "congruence and proportionality between the [unconstitutional] injury to be prevented or remedied and the means adopted to that end,"¹⁸ the Constitution does not require a perfect fit.

Second, in the external model, purposeful governmental discrimination outside the electoral system might play out within the electoral system, where it would be observed in the disparate impact of otherwise acceptable policies. For example, the inability of minority voters to pass even a fairly administered

14. *Flores*, 117 S. Ct. at 2167.

15. The Court provides a catalog of examples in *South Carolina v. Katzenbach*, 383 U.S. at 312.

16. *Flores*, 117 S. Ct. at 2170.

17. One of the literacy tests that was suspended by section 4(a), 42 U.S.C. § 1973b(a) (1994), was employed by Northampton County, North Carolina, see 28 C.F.R. pt. 51 app. (1994) (listing Northampton County as a covered jurisdiction as of Nov. 1, 1964). In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 53 (1959), the Supreme Court had upheld Northampton County's use of a literacy test, noting that there were no allegations that the test was discriminatory on its face or as applied.

18. *Flores*, 117 S. Ct. at 2164.

literacy test might be "the direct consequence of previous governmental discrimination in education."¹⁹ Under this view, Congress could ban literacy tests to reach and remedy the effects of that impermissible prior discrimination. Again, even though some of the beneficiaries of the ban on literacy tests might not be actual victims of the government's unconstitutional provision of an inferior and inadequate education, there was a sufficient connection to justify some level of overbreadth.

Third, under the prospective model, literacy tests might be seen as enabling future invidious action. For example, if literacy tests eliminate a disproportionate number of minority citizens from the electorate, then their diminished voting power might leave minorities vulnerable to discrimination in a wide range of government programs by officials who would be relieved of any practical need to be responsive to the minority's concerns. Under this expansive view, Congress might ban literacy tests "as a remedial measure to deal with . . . discrimination in the provision of public services."²⁰ In short, there are a variety of ways in which "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."²¹

Flores's discussion of the Voting Rights Act quartet also sheds light on the requisite "congruence and proportionality" between means and ends under the enforcement powers.²² The provisions at issue in the quartet were simultaneously quite broad and quite narrowly targeted. But the Court saw both the Act's breadth and its narrowness as reflecting appropriate congressional judgment. Preclearance, for example, is an "uncommon"²³ and "extraordi-

19. *Id.* at 2167 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 235 (1970) (Brennan, White, & Marshall, JJ., concurring in part and dissenting in part); *see also* *Gaston County v. United States*, 395 U.S. 285, 291 (1969) (rejecting Gaston County's request for an exemption from suspension and coverage on the grounds that, regardless of whether the county had administered its literacy test impartially, its maintenance of a de jure segregated school system that provided black citizens with an inferior education "in turn deprived them of an equal chance to pass the literacy test").

20. *Flores*, 117 S. Ct. at 2168.

21. *Id.* at 2163.

22. *Id.* at 2164.

23. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

nary departure" from the usual relationship between the federal government and the states,²⁴ but it reaches only a limited number of jurisdictions where Congress had reason to believe past discrimination was pervasive and future discrimination was likely.²⁵ And its coverage has always been only temporary: the version upheld in *South Carolina v. Katzenbach* was scheduled to terminate within five years;²⁶ the 1975 amendment approved in *City of Rome* "lapsed in seven years."²⁷ Similarly, although by the time of *Oregon v. Mitchell*²⁸ Congress had banned literacy tests nationwide, it addressed only a specific practice "with a long history as a 'notorious means to deny and abridge voting rights on racial grounds.'"²⁹

Beneath the surface, the Court's analysis of the requirement of means-ends tailoring poses a tantalizing question: Must the prospect of purposeful discrimination be a continuing threat? That is, can an "enforcement" statute *become* unconstitutional if circumstances change? Justice Kennedy seemed to disclaim any requirement that Congress ensure that the legislation survives only as long as the danger of unconstitutional state action persists.³⁰ Still, his discussion of RFRA's legislative record at least raises the possibility of some kind of durational constraint. Justice Kennedy observed that the record "lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearing mentions no episodes occurring in the past forty years."³¹ The contrast between present circumstances and a history of discrimination suggests that there *might* have been a moment when Congress *might* have identified a level of persecution sufficient to justify *some* form of a Religious Freedom Act—perhaps one more closely targeted at particular jurisdic-

24. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500 (1992).

25. *See South Carolina v. Katzenbach*, 383 U.S. at 335.

26. *See Flores*, 117 S. Ct. at 2170.

27. *Id.*

28. 400 U.S. 112 (1970).

29. *Flores*, 117 S. Ct. at 2170 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 355 (Black, J., concurring in part and dissenting in part)).

30. *See id.* ("This is not to say, of course, that § 5 legislation requires termination dates. . . .").

31. *Id.* at 2169.

tions or practices—even if that moment has now passed. But if the record today is inadequate to justify the exercise of congressional enforcement power, why does a previous exercise remain appropriate?³² There is something at least disquieting about the idea of continuing federal intervention if the grounds on which congressional action rest “have vanished long since, and the rule simply persists from blind imitation of the past.”³³

At the same time, it may be quite difficult to judge whether a threat has receded because state actors no longer wish to engage in purposeful discrimination (if, for example, attitudes about the protected class or behavior have changed) or only because the congressional prohibition remains in place. Congressional decisions about whether to impose an express durational limit in the first place or whether to revisit prior enforcement statutes should therefore be accorded a fair degree of deference.

II. THE VOTING RIGHTS TWO-STEP: THE EXERCISE OF CONGRESSIONAL POWER UNDER SECTIONS 2 AND 5 OF THE VOTING RIGHTS ACT

The discussion of the Voting Rights Act precedents in *Flores* thus sets out a roadmap for assessing the constitutionality of the Act in its current incarnation. The two key provisions of the modern Voting Rights Act are section 2's “results” test and section 5's “retrogression” standard.³⁴ Section 2 was amended in

32. Consider, for example, the policies upheld in *Korematsu v. United States*, 323 U.S. 214 (1944) (involving the internment of persons of Japanese descent who lived on the West Coast), and *Hirabayashi v. United States*, 320 U.S. 81 (1943) (involving a West Coast curfew against persons of Japanese ancestry). Although the Court found these measures acceptable in light of military imperatives, it seems inconceivable that the federal government could have continued the internment and curfew once World War II ended and the (at best) perceived threat of sabotage had disappeared. Similarly, although a state might be entitled temporarily to segregate prison inmates on the basis of race to quell a prison riot, see *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring), it certainly could not continue that segregation after the emergency had passed.

33. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

34. Both sections 2 and 5 also reach purposeful discrimination, but here the only significant departure from the constitutional standards under the Fourteenth and Fifteenth Amendments seems to be that section 5 places the burden of disproving the presence of a discriminatory purpose on the covered jurisdiction, rather than

1982 as a response to the Supreme Court's decision in *City of Mobile v. Bolden*³⁵ that both the prior version of section 2 and the Fourteenth Amendment forbade only purposeful vote dilution.³⁶ Section 2 provides that no voting practice or procedure "shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a specified language minority group]."³⁷ The forbidden result occurs when,

[b]ased on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.³⁸

Plaintiffs in a section 2 lawsuit therefore are not required to show that the state either enacted or maintained the challenged practice because of its discriminatory impact on minority voting strength.

The current version of section 5 continues the preclearance regime upheld in *South Carolina v. Katzenbach*³⁹ and *City of Rome v. United States*.⁴⁰ It provides that before a covered jurisdiction "shall enact or seek to administer any . . . procedure with respect to voting different from that in force or effect" on the date it became a covered jurisdiction, it must show that the procedure "does not have the purpose and will not have the effect of denying

placing the burden of proving an invidious motive on the plaintiff challenging a proposed change. Nothing in the Court's equal protection or enforcement jurisprudence casts any doubt on congressional power to structure the allocation of proof within lawsuits.

35. 446 U.S. 55 (1980).

36. See *id.* at 60-61, 69-70.

37. 42 U.S.C. § 1973(a) (1994).

38. *Id.* § 1973(b).

39. 383 U.S. 301 (1966).

40. 446 U.S. 156 (1980).

or abridging the right to vote on account of race or color, or in contravention of the guarantees [protecting language minorities]."⁴¹ The Court has interpreted the "effects" prong of section 5 to embody a "retrogression" test: changes that either enhance or leave unchanged a minority group's political position do not violate section 5 "unless the new [policy] itself so discriminates on the basis of race or color as to violate the Constitution."⁴²

Both sections 2 and 5 can be seen as appropriate enforcement measures under the internal, external, and prospective approaches. Moreover, each contains a kind of durational calibration that makes the enforcement congruent with the injury.

A. *The Internal Perspective*

The record before Congress in 1982 revealed numerous "modern instances of generally applicable [election] laws passed because of [racial] bigotry."⁴³ As the Senate Report accompanying the 1982 amendments explained, the very passage of the 1965 Act seems to have prompted a new wave of purposeful discrimination within the electoral system: "a broad array of dilution schemes were employed to cancel the impact of the new black vote."⁴⁴ Of particular salience to the question whether the Act's treatment of racial vote dilution represents appropriate congressional action, "election boundaries were gerrymandered" and "at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote."⁴⁵ Extensive hearings and the record of preclearance objections during the period from 1975 to 1980 showed repeated problems with apparently purposeful racial

41. 42 U.S.C. § 1973c. Section 5 of the Voting Rights Act offers two routes for satisfying this standard. First, a covered jurisdiction may obtain a declaratory judgment from the United States District Court for the District of Columbia. Second, the jurisdiction may "submit" the change to the Attorney General and receive administrative preclearance. In the latter case, the jurisdiction may implement the change unless the Attorney General has "interposed an objection within sixty days." *Id.*

42. *Beer v. United States*, 425 U.S. 130, 141 (1976).

43. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997) (explaining that although such modern instances were present in the records on racial issues, they were lacking in the record on religion issues).

44. S. REP. NO. 97-417, at 6 (1982).

45. *Id.*

vote dilution.⁴⁶

The round of reapportionment that was underway while Congress was amending and extending sections 2 and 5 confirms that Congress was right to discern a substantial likelihood of continuing internal discrimination. In *Busbee v. Smith*,⁴⁷ for example, the District of Columbia District Court refused to preclear Georgia's 1981 congressional apportionment, which failed to draw a majority-black district in the heavily black Atlanta metropolitan region. The court's analysis relied in part on a statement by the Chairman of the Georgia House Reapportionment Committee, Joe Mack Wilson, that "I don't want to draw nigger districts"⁴⁸ and a finding that Georgia House Speaker Thomas Murphy had "racial attitudes" that led him to "purposefully discriminat[e]" throughout the 1981 redistricting process.⁴⁹ Similarly, in *Major v. Treen*,⁵⁰ a district court concluded that Louisiana's 1981 congressional reapportionment violated section 2. In addition to pointing out the highly irregular manner in which the plan split a large, geographically compact and politically cohesive black community in the New Orleans area, the court noted discrimination in the redistricting process: during the last round of legislative negotiations, black state legislators were "deliberately excluded from the final decision-making process";⁵¹ in fact, they literally were kept out of the room where the deal was made. The Attorney General denied preclearance to North Carolina's 1981 congressional redistricting and Petersburg, Virginia's 1981 councilmanic redistricting on the grounds that each appeared to have a discriminatory purpose.⁵² This modern discrimination was not solely a regional problem. In *Garza v. Los Angeles Board of Supervisors*,⁵³ the district court found a deliberate "intent to maintain fragmentation of the

46. See *id.* at 10-12.

47. 549 F. Supp. 494 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983).

48. *Id.* at 501.

49. *Id.* at 510.

50. 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

51. *Id.* at 352.

52. See S. REP. NO. 97-417, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 188.

53. 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990).

Hispanic vote"⁵⁴ in the way Los Angeles drew its 1981 supervisory districts. Also, in *Rybicki v. State Board of Elections*,⁵⁵ the court found that the post-1980 Illinois state legislative reapportionment unconstitutionally diluted black voting strength in the Chicago area.

Such experiences also suggest pragmatic reasons for not requiring judicial findings of discriminatory purpose. As the Senate Report explained, requiring courts to label "individual officials or entire communities" as racist in order to grant judicial relief was tremendously "divisive, threatening to destroy any existing racial progress in a community."⁵⁶ Requiring proof of purpose, therefore, might exacerbate purposeful discrimination. And the district court's decision in *Major v. Treen*⁵⁷ suggests an additional danger: after providing page after page of examples of overt and covert discrimination in the Louisiana reapportionment process, the court was unwilling to "draw the ultimate inference of purposeful discrimination."⁵⁸ Judges, after all, often live in the same milieu as other public officials and far away from the plaintiffs who bring racial vote dilution lawsuits. If they are compelled to call their acquaintances evil in order to do justice, then they may find themselves tempted to shade their judgment in even remotely close cases. Congress realistically might have concluded that forcing a specific finding of racist intent would immunize intentionally discriminatory systems.

A different set of pragmatic concerns arises with respect to long-standing practices. Here, too congressional enforcement may properly sweep more broadly than simply restating the Constitution's "self-executing"⁵⁹ ban on intentional discrimination. This point was driven home by the ultimate decision in *Bolden v. City of Mobile*.⁶⁰ After the case was remanded to the

54. *Id.* at 1305; see *id.* at 1312, 1317-18 (discussing evidence of a discriminatory purpose).

55. 574 F. Supp. 1082, 1106-10 (N.D. Ill. 1982) (three-judge court).

56. S. REP. NO. 97-417, at 36, reprinted in 1982 U.S.C.C.A.N. 177, 214 (quoting the testimony of Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights).

57. 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

58. *Id.* at 355 n.45.

59. *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966).

60. 542 F. Supp. 1050 (S.D. Ala. 1982).

district court, the plaintiffs hired three historians to trace the history of Mobile's election system. Based on the evidence they uncovered after months of archival work, the district court ultimately issued a lengthy opinion tracing the tortuous history of Mobile's electoral practices from 1867 until 1911, when the existing election system was adopted.⁶¹ The district court found that discriminatory motivations permeated the system at virtually every turn.⁶² The court also found that, in the 1960s, the city decided to retain the existing system because a switch to district-based elections, like any other change that might "increase black representation[,] just would not fly. . . . There was certainly an intent to maintain the at-large election system for racial motives."⁶³ The cost of proving what turned out to be a blatant series of constitutional violations was staggering: The black plaintiffs' lawyers logged 5,525 hours and spent \$96,000 in out-of-pocket expenses, "which were exclusive of expenses incurred by Justice Department lawyers after the department intervened [in support of the plaintiffs] and the costs of expert witnesses and paralegals."⁶⁴ Given the minuscule size of the voting rights bar, requiring plaintiffs to prove intentional discrimination in cases involving complex election practices with lengthy and distant pedigrees would quite plausibly leave literally thousands of unconstitutional systems in place. The burdens of proving discriminatory purpose in a vote dilution case were thus on par with the burdens to which the Supreme Court pointed in *South Carolina v. Katzenbach*⁶⁵ in explaining the need for vigorous congressional enforcement.

More generally, there is a problem in the determination of discriminatory purpose unique to the sphere of voting rights. As my colleague Dan Ortiz has explained, the "intent doctrine" in

61. *See id.*

62. *See id.* at 1056-68, 1074-77.

63. *Id.* at 1068.

64. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 21, 29 (Chandler Davidson & Bernard Grofman eds., 1994).

65. 383 U.S. 301, 313-14 (1966) (noting, among other things, that a voting suit might take 6,000 hours of attorney time to successfully challenge literacy tests in a single county).

voting cases bears only a scant relationship to the actual motivation of any particular government actor.⁶⁶ In *Rogers v. Lodge*,⁶⁷ for example, the Court found that "the at-large system in Burke County [Georgia] was being maintained for the invidious purpose of diluting the voting strength of the black population."⁶⁸ In reaching this conclusion, the Court pointed to a sprawling array of facts. Some involved the history of prior purposeful discrimination in Burke County. Some involved the present-day unresponsiveness of public officials. Others involved the county's demography and geography and various features of its electoral system.⁶⁹ The Court left unstated the link between these facts on the one hand, and a deliberate decision by state actors to maintain at-large elections in order to perpetuate black political powerlessness on the other hand. Even more significantly, as Justice Stevens pointed out, the Court "never identified or mentioned" precisely *who* had "harbored an improper intent."⁷⁰

In fact, the most likely culprits were the present-day white voters of Burke County: they were a majority of the electorate, and their refusal to support candidates who represented the political interests of the black community shut out black-sponsored candidates. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions,"⁷¹ such as racial bloc voting,⁷² "to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."⁷³ But the white voters whose discriminatory sentiments are the operative engine by which black voters are politically excluded, are not, of course, state actors.⁷⁴ In any event, their choices were constitutionally protected even if they were based on outright racism.⁷⁵ Still,

66. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126 (1989).

67. 458 U.S. 613 (1982).

68. *Id.* at 622.

69. See *id.* at 625-27.

70. *Id.* at 647 (Stevens, J., dissenting); see *id.* at 629 (Powell, J., dissenting) (making the same point).

71. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

72. An issue to which I return in the next section. See discussion *infra* Part II. B.

73. *Gingles*, 478 U.S. at 47.

74. See *Lodge*, 458 U.S. at 647 n.30 (Stevens, J., dissenting).

75. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL.

the state was operating a forum that enabled white voters to engage in racial discrimination.

In light of the apparent convergence of effects and intent standards and the "distinctive blend of state action and private choice involved in the electoral process,"⁷⁶ even if the state's "purpose"—to the extent it can be said really to have one—does not rise to the level of an outright desire to injure minorities, it is certainly morally culpable.⁷⁷ In assessing the constitutionality of Congress's determination to enforce the Fourteenth and Fifteenth Amendments using an impact standard, the Court should conclude that the risk that constitutionally innocuous conduct will be banned is outweighed by the difficulty of detecting and stopping serious constitutional injuries.

B. The External and Prospective Perspectives

To understand why sections 2 and 5 are also appropriate responses under the external and prospective models requires a brief detour into one of the key concepts of contemporary voting rights law: racial bloc voting. Racial bloc voting, also called racially polarized voting, "exists where there is a consistent relationship between the race of the voter and the way in which [a] voter votes, or to put it differently, where black voters and white voters vote differently."⁷⁸ When voting is racially polarized, "the black minority usually votes for one candidate, and the white majority votes for and elects a different candidate."⁷⁹ But the effects of racial bloc voting extend beyond the mere defeat of the black community's candidates of choice. "Not only does voting along racial lines deprive minority voters of their preferred representatives in these circumstances, it also allows those elected to ignore minority interests without fear of political consequences, leaving the minority effectively unrepresented."⁸⁰

L. REV. 1201, 1228 (1996) (explaining that voting decisions are protected under the First Amendment).

76. *Id.* at 1227.

77. See Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 124-25 (1983).

78. *Gingles*, 478 U.S. at 53 n.21 (internal quotation marks and brackets omitted).

79. *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill. 1987), *aff'd*, 851 F.2d 937 (7th Cir. 1988).

80. *Gingles*, 478 U.S. at 48 n.14 (internal quotation marks and citations

Racial bloc voting that results in the defeat of minority-preferred candidates and the disregard of minority interests surely is caused in part by external government discrimination. "To the extent that racially correlated differences in political preferences are the product of socioeconomic disparities produced by inferior access to schools, government services, and the like, state action has *caused* polarized voting."⁸¹ The district court in *Thornburg v. Gingles* recognized this in concluding that "historic discrimination" resulted in blacks in North Carolina having a lower socioeconomic status than whites: this disparity in status "gives rise to special group interests and hinders blacks' ability to participate effectively in the political process."⁸² Even beyond the material reasons why past discrimination might cause differences in voting behavior, there may be an attitudinal effect too. The broad range of purposeful past governmental discrimination "is likely to have affected white voters' attitudes by communicating the idea that black voters' attempts to gain political power should be resisted."⁸³

Voting rights remedies that dismantle multimember districts or at-large election systems and that create some majority-black constituencies dampen the present effects of this past external discrimination. Smaller constituencies, for example, may enable candidates with less funding to compete more effectively; to the extent that the depressed socioeconomic status of minority communities is a product of prior unconstitutional discrimination—as it surely is—single-member districts offer a partial remedy. Differences in white and black voter's attitudes can be attributed at least in part to past invidious state action. This action may play out either in different material interests or in a

omitted); see *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (making the same point in the course of striking down a Georgia county's use of at-large elections as purposefully discriminatory). For an excellent discussion of the interaction between racial bloc voting and process failure generally, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1865-71 (1992).

81. Karlan & Levinson, *supra* note 75, at 1229.

82. *Gingles*, 478 U.S. at 39 (describing the district court's analysis). This finding picked up on the analysis in S. REP. NO. 97-417, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

83. Karlan & Levinson, *supra* note 75, at 1229.

refusal to support candidates sponsored by voters of the other race simply because of racial tribalism. Majority-black constituencies, however, allow black voters to circumvent the obstacle posed by racial bloc voting: as the electoral majority in some districts, they can elect some of the candidates of their choice.

As for the prospective model, the process failure caused by racial bloc voting plays out in post-election nonresponsiveness to the needs of the black community.⁸⁴ As one court explained, "[i]n a very real sense, . . . racially polarized voting perpetuates the effects of past discrimination."⁸⁵ If the right to vote is "preservative of all rights,"⁸⁶ then the right to an undiluted, equally effective vote is surely preservative of equal access to other rights and governmental services. Sections 2 and 5 are designed, therefore, to accomplish nationwide what section 4(e) was intended to accomplish for Puerto Ricans in New York: "nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement."⁸⁷ Given our long history of inequality in these areas, and the connection between minority political powerlessness and this inequality, Congress might reasonably conclude that such inequality is better combatted on the wholesale level, by providing all citizens with an equal opportunity "to participate in the political process and to elect representatives of their choice,"⁸⁸ than on only the retail level, by laws that impose equal treatment obligations in discrete areas of state government activity such as schools, public employment, or housing.

C. The Durational Modesty of the Voting Rights Act

Section 5 of the Voting Rights Act's preclearance regime remains temporary, scheduled to lapse in the year 2007 unless Congress concludes that it is still necessary. Assuming that Congress does

84. See Issacharoff, *supra* note 80, at 1865-71.

85. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1463 (M.D. Ala. 1988); see *Gingles*, 478 U.S. at 48 n.14.

86. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

87. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

88. 42 U.S.C. § 1973(b) (1994).

extend section 5's lifespan once again, the analysis I set out above would enable the courts to determine whether it remains—as it did at the time of *South Carolina v. Katzenbach* and *City of Rome*—an appropriate use of congressional enforcement power given the nature of the threat of future invidious discrimination.

Section 2, by contrast, contains no sunset provision. Nor does it cover only specific jurisdictions with a well-documented history of unconstitutional conduct. Nonetheless, the genius of the requirement that plaintiffs in section 2 vote dilution suits prove racial bloc voting is that that requirement provides precisely such a durational limit on section 2's operation. Election practices are vulnerable to section 2 only if a jurisdiction's politics is characterized by racial polarization. As the lingering effects of racial discrimination abate, and thus as excluded minorities become physically and politically integrated into the dominant society, their ability and need to bring claims under section 2 will subside as well. When the history of racial discrimination in our political process "mentions no episodes occurring in the past 40 years,"⁸⁹ there will not be any more section 2 cases or any need for section 2. But just as *Field and Stream* thought that *Lady Chatterley's Lover* "cannot take the place of J.R. Miller's *Practical Gamekeeping*,"⁹⁰ I think that the romantic "dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity"⁹¹ is not yet enough of a reality to take the place of the Voting Rights Act's "searching practical evaluation"⁹² of the games politicians play.

89. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2169 (1997).

90. *Best of the Best: Column Excerpts*, *supra* note 1.

91. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

92. S. REP. NO. 97-417, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 207-08.