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FEDERALISM, PRECLEARANCE, AND THE REHNQUIST COURT

ELLEN D. KATZ*

*LOPEZ v. Monterey County*¹ is an odd decision. Justice O'Connor's majority opinion easily upholds the constitutionality of a broad construction of section 5 of the Voting Rights Act (VRA) in language reminiscent of the Warren Court. Acknowledging the "substantial 'federalism costs'" resulting from the VRA's "federal intrusion into sensitive areas of state and local policymaking,"² *Lopez* recognizes that the Reconstruction Amendments "contemplate" this encroachment into realms "traditionally reserved to the States."³ Justice O'Connor affirms as constitutionally permissible the infringement that the section 5 preclearance process "by its nature" effects on state sovereignty,⁴ and applies section 5 broadly, holding the statute applicable to a county's nondiscretionary implementation of state law. This holding, Justice O'Connor insists, "adds nothing of constitutional moment to the burdens that the Act imposes."⁵

Decided in 1999, *Lopez* stands in tension not only with a series of Rehnquist Court decisions circumscribing congressional authority to enforce the Reconstruction Amendments,⁶ but also with two other opinions

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1. 525 U.S. 266 (1999).

2. *Lopez*, 525 U.S. at 282 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

3. *Id.* (citing *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

4. *Id.* at 284. *Lopez*, in fact, references not just section 5 but the Voting Rights Act in its entirety. *Id.* (noting "[i]n short, [that] the Voting Rights Act, by its nature, intrudes on state sovereignty").

5. *Id.* at 285.

6. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997); *see also* John Matthew Guard, Comment, "Impotent Figureheads"? *State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores*, 74 TUL. L. REV. 329, 357-58 (1999) (noting this tension); Charlotte Marx Harper, Note, *Lopez v. Monterey County: A Remedy Gone Too Far?*, 52 BAYLOR L. REV. 435, 452-54 (2000) (arguing that *Lopez* conflicts with *City of Boerne*); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 726 (1998) (discussing implications of *City of Boerne* for sections 2 and 5 of the Voting Rights Act).

interpreting section 5, *Reno v. Bossier Parish (Bossier Parish I)*,⁷ and *Reno v. Bossier Parish (Bossier Parish II)*.⁸ These decisions, handed down in 1997 and 2000 respectively, narrowly construe the VRA's preclearance provision and invoke federalism concerns as justification. *Bossier Parish I* holds that section 5 does not block implementation of voting changes that violate section 2 of the VRA,⁹ noting that the contrary construction would "increase further the serious federalism costs already implicated by § 5."¹⁰ *Bossier Parish II* reads section 5's purpose prong to proscribe retrogressive intent only, and not an intent to dilute or an invidious intent more generally, and strangely cites *Lopez* as support for its claim that the broader reading would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts."¹¹

Left unexplained is why the Court understood the federalism costs implicated in the *Bossier Parish* cases to be preclusively high, while it viewed the costs at issue in *Lopez* to be the necessary and justifiable result of implementing the VRA. As part of this Symposium on "The New Federalism," this Article will attempt an explanation. After providing a synopsis of the decisions in *Lopez* and the *Bossier Parish* cases, it evaluates several rationales for why the Court might have assessed the federalism costs so differently in each decision. The implementation of congressional intent fails as an explanation given that Congress appears to have intended the broad construction of section 5 in all three cases.¹² Nor can the decisions be reconciled based on the principle that enforcement of the Fourteenth and Fifteenth Amendments warrants intrusion into state sovereign processes. Insofar as the Court read section 5 broadly in *Lopez* because it understood the statute to be enforcing a constitutional right, it should have likewise adopted broad readings in the *Bossier Parish* cases. So too, an understanding of the Constitution to mandate colorblindness lacks explanatory power given that all three decisions promote racially-informed decision-making. Finally, the view that the majority-minority district gives rise to a distinct, constitutionally-cognizable harm fails to explain the difference in approach because this view should have led the Court to adopt narrow constructions of section 5 in all three cases.¹³

Instead, the Court's differing assessment of federalism costs in *Lopez* and the *Bossier Parish* cases may best be seen to reflect the Court's concern about institutional overreaching by the Department of Justice (DOJ). The

7. 520 U.S. 471 (1997) [hereinafter *Bossier Parish I*].

8. 528 U.S. 320 (2000) [hereinafter *Bossier Parish II*].

9. Section 2 of the VRA, as amended in 1982, prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a) (1994); see also *infra* note 58.

10. *Bossier Parish I*, 520 U.S. at 480.

11. See *Bossier Parish II*, 528 U.S. at 336 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)).

12. See *infra* Part II.A.

13. See *infra* Part II.B.

Rehnquist Court has long been convinced that DOJ has systematically abused its authority in the preclearance process and thereby exacerbated the federalism costs that inhere in the VRA.¹⁴ The *Bossier Parish* cases involved DOJ's refusal to preclear a districting plan that the agency deemed to contain an insufficient number of majority-minority districts.¹⁵ Thus, these cases presented the Court with the type of DOJ conduct that the justices have repeatedly found most objectionable. The *Bossier Parish* decisions rejected DOJ's position on preclearance and construed section 5 narrowly to curb opportunities for institutional overreaching by DOJ. *Lopez*, by contrast, did not directly implicate conduct by DOJ, and instead addressed a question over which the Department has no authority, namely whether the disputed changes were subject to preclearance at all. While the decision renders more conduct subject to preclearance and hence to review by DOJ,¹⁶ *Lopez* required the Court neither to review a specific decision made by DOJ nor to confront the prospect that DOJ would implement the construction of the statute adopted. The Court, consequently, was able to construe section 5 broadly without directly facing concerns about DOJ overreaching, and thereby to embrace the resulting federalism costs as a justified consequence of implementing congressional intent in the VRA.

I. THE DECISIONS

Perhaps more so than any other federal law to be upheld by the United States Supreme Court, section 5 of the VRA, as enacted in 1965 and extended since,¹⁷ dramatically shifts the balance of power between the federal government and the States and state subdivisions where it ap-

14. See *infra* notes 195-97 and accompanying text.

15. See *infra* notes 55-59 and accompanying text.

16. Claims that an electoral change is subject to preclearance may be brought before a state court or federal three-judge court within the jurisdiction, while the Attorney General or the federal district court in the District of Columbia evaluate preclearance submissions on their merits. See 42 U.S.C. § 1973c (1994); see also *Lopez v. Monterey County*, 519 U.S. 9, 23-24 (1996) (noting that three-judge district court "may determine only whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate"); SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 579-80 (2d ed., 2001) (describing division of authority regarding coverage questions and merits of preclearance submissions).

17. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2, 5, 84 Stat. 314, 314-15 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 204, 206, 405, 89 Stat. 402, 402-04 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 132-33 (1982).

plies.¹⁸ Applicable only in “covered” jurisdictions,¹⁹ section 5 eliminates the presumption of validity that typically attaches to governmental decisionmaking by blocking such jurisdictions from “enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,” unless the jurisdiction receives federal judicial or administrative preclearance.²⁰ Covered jurisdictions must demonstrate, either to the Attorney General or to the federal district court in D.C., that a proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,” or, after 1975, membership in a language minority group.²¹

A. *Lopez v. Monterey County*

Between 1972 and 1983, Monterey County, a jurisdiction covered under section 5,²² adopted and implemented a series of ordinances that consolidated the County’s various judicial courts and established a single countywide municipal court served by ten judges elected at-large.²³ Through various legislative acts, California, which is not covered under section 5, facilitated this consolidation process.²⁴

18. See *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999) (upholding constitutionality of 1982 extension of section 5 as applied in case); *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980) (upholding 1975 extension of section 5); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (stating that Act permissibly requires federal scrutiny of new voting regulations); see also I LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 932 (3d ed., 2000) (describing VRA of 1965 as “probably the most radical piece of civil rights legislation since Reconstruction”); Daniel Hays Lowenstein, *You Don’t Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 *STAN. L. REV.* 779, 790 (1998) (describing preclearance process as “an unprecedented federal intrusion into the governing processes of the states”).

19. See Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4-5, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. §§ 1973b(B), (C), 1973c (1994)). A jurisdiction was “covered” if, on the date the VRA became effective, it employed as a prerequisite to voting devices such as a literacy, understanding, subject matter or moral character test, and less than fifty percent of the voting age population was registered or actually voted in the presidential election of 1964. See *id.* (defining what jurisdictions were covered). As Congress extended section 5 in 1970, 1975 and 1982, dates subsequent to 1964 were selected for comparative measurements. See *supra* note 17.

20. 42 U.S.C. § 1973c (1994).

21. 42 U.S.C. §§ 1973c, 1973b(f)(2) (1994); Act of Aug. 6, 1975, Pub. L. No. 94-73, § 206, 89 Stat. 400, 401 (1975). Covered jurisdictions may seek preclearance either from the Attorney General or from the district court in D.C. See 42 U.S.C. § 1973c.

22. See *Lopez*, 525 U.S. at 271.

23. See *id.* at 271-74; *Lopez v. Monterey County*, 871 F. Supp. 1254, 1256 (N.D. Cal. 1995).

24. See 1983 Cal. Stat. 1249, §§ 3, 16 (increasing number of judges in County’s municipal court district); 1979 Cal. Stat. 694 (requiring merger, already effected by county ordinance, of municipal court districts in Monterey County); 1977 Cal.

In 1991, a group of Latino voters residing in the County filed suit, claiming that section 5 required that the County obtain preclearance before implementing the ordinances. Complex proceedings followed. A three-judge panel of the United States District Court for the Northern District of California agreed that preclearance was required,²⁵ and the County initiated an action in the federal district court in D.C. to obtain it.²⁶ The County, however, subsequently agreed to dismiss its suit, stipulating that the ordinances had a retrogressive effect on Latino voting strength and accordingly that it could not establish that they complied with section 5.²⁷ Thereafter, the parties returned to the federal three-judge panel in northern California with a new plan that retained a county-wide municipal court, but created districts from which judges would be elected.²⁸

California intervened in the proceedings and argued that the plan conflicted with the California Constitution, which requires correspondence between a judge's electoral base and his or her jurisdictional base.²⁹ The three-judge panel agreed and refused to approve the plan. When the parties could not agree on a new plan that complied with both state and federal law, the district court imposed a temporary plan under which judges would be elected from districts, but serve countywide. The court recognized that the plan conflicted with state law, but deemed the intrusion on state interests to be relatively minor.³⁰ The County submitted this interim plan for preclearance and readily obtained it.³¹

Elections proceeded under that plan in June 1995, but the Supreme Court's decision shortly thereafter in *Miller v. Johnson*³² led the three-judge panel to conclude that the interim plan was constitutionally suspect. The court rescinded the plan and ordered the County to hold the March 1996

Stat. 995 (transforming justice court in Monterey County into municipal court); see also CAL. CONST. art. VI, § 5(b) (eliminating justice courts).

25. See *Lopez*, 871 F. Supp. at 1256.

26. See *Lopez*, 525 U.S. at 274; see also *supra* note 16.

27. See *Lopez*, 871 F. Supp. at 1256 (quoting stipulation that "the Board of Supervisors is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County . . . did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County").

28. See *id.*

29. See *id.*; see also CAL. CONST. art. VI, § 16(b) (requiring linkage between judge's electoral and jurisdictional base).

30. See *Lopez*, 525 U.S. at 275.

31. The County sought preclearance of the court-ordered plan because that plan was based substantially on a proposal it submitted. See *Lopez*, 871 F. Supp. at 1261; see also *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981) (stating that preclearance is required "whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them").

32. 515 U.S. 900 (1995) (holding that districting plan in which race predominates over traditional districting principles violates Constitution unless plan satisfies strict scrutiny).

judicial elections under the original, unprecleared countywide regime. The panel decreed that this plan was to govern the 1996 election only and enjoined future elections pending preclearance of a permanent plan.³³

The Supreme Court responded with an emergency stay of the district court's order and a subsequent decision enjoining the County from using the unprecleared plan.³⁴ The Court acknowledged "the predicament" faced by the three-judge panel given the County's longstanding failure to obtain preclearance of a usable districting plan, the difficulty in constructing a plan that complied with both state and federal law, and the fact that simply enjoining elections "would leave the County without a judicial electoral system."³⁵ In the Court's view, however, these factors did not alter the fact that the County "has not discharged its obligation to submit its voting changes" for preclearance. "The requirement of federal scrutiny must be satisfied without delay."³⁶

On remand, the district court, perhaps seeking a way out of the morass, reversed its original holding that section 5 applied to the County's ordinances. Finding persuasive California's argument that state, not county, law mandated the judicial structure the County had implemented,³⁷ the court held that a jurisdiction is subject to the preclearance requirement only when it exercises some element of discretion over the implemented electoral change. The County, the court found, had no choice but to implement the countywide system and hence no duty to obtain preclearance.³⁸

33. *See Lopez v. Monterey County*, 519 U.S. 9, 18-19 (1996).

34. *See id.* at 19.

35. *See id.* at 22.

36. *Id.* at 25.

37. California had raised this argument in the district court and before the Supreme Court. The district court had deemed it unpersuasive, but offered the State the opportunity to develop it in subsequent proceedings. The Supreme Court refused to address this argument and instructed the district court to consider it on remand. *See id.* at 19-20.

38. *See Lopez v. Monterey County*, 525 U.S. 266, 276 (1999). More specifically, the court deemed relevant two laws consolidating the county courts. The first was a 1979 state statute that consolidated the County's three existing municipal courts and mandated a single municipal court district in the County. As an uncovered jurisdiction, California, the court noted, was not required to obtain preclearance of this statute. *See id.* at 276-77. The court identified the only other relevant change to the county's judicial electoral structure to be a 1983 county ordinance merging the County's remaining justice court districts into the municipal court district. California had sought and obtained the Attorney General's approval for a 1983 state law recognizing the county's 1983 court merger and authorizing new judgeships for it. The Attorney General did not oppose the submission, which included a copy of a 1983 county ordinance merging the courts, and accordingly the submission "may well have served to preclear the 1983 county ordinance." *See Lopez*, 519 U.S. at 15. Even if, however, the state law had not been precleared, the court held that a 1995 amendment to the California Constitution eliminating the justice courts would have resulted in the same merger effected by the 1983 county ordinance, and thus preclearance of those ordinances was not required. *See Lopez*, 525 U.S. at 276-77; CAL. CONST. art. VI, § 5(b).

The Supreme Court again reversed. Justice O'Connor's opinion in *Lopez* holds that a covered jurisdiction "seek[s] to administer" a voting change within the meaning of section 5 "when, without exercising any independent discretion, . . . [it] implements a change required by the superior law of a noncovered State."³⁹ Justice O'Connor writes that neither the word "seek" nor the word "administer" lends itself to a definition precluding nondiscretionary acts, and that other decisions by the Court and lower federal courts assumed that voting changes enacted by partially covered States and affecting covered localities must be precleared. She notes further that the Attorney General construed section 5 to be applicable in these circumstances and that DOJ routinely received preclearance submissions from States in these circumstances.⁴⁰

Justice Thomas' sole dissent charged that requiring preclearance of a covered jurisdiction's implementation of a mandatory state law would thwart the State's implementation of a uniform statewide voting policy.⁴¹ Section 5, he writes, "is a unique requirement that exacts significant federalism costs" and that "[t]he Section's interference with state sovereignty is quite drastic."⁴² Application of section 5 must hinge on the jurisdiction's history of wrongdoing, he argues, and this requirement is ignored by a rule that requires preclearance of a covered jurisdiction's nondiscretionary implementation of an uncovered jurisdiction's mandates. The majority's construction thus "raise to new levels the federalism costs that the statute imposes."⁴³

Justice O'Connor readily dismisses this concern. The VRA, she writes, "authorizes federal intrusion into sensitive areas of state and local policymaking, [and thus] imposes substantial 'federalism costs.'"⁴⁴ The Reconstruction Amendments, under which Congress enacted the VRA, "by their nature contemplate some intrusion into areas traditionally reserved to the States."⁴⁵ The uniform implementation of state law may well be hindered by the application of the preclearance requirement to ordinances such as those enacted by the County, but "only to the extent that that law affects voting in jurisdictions properly designated for coverage."⁴⁶ Justice O'Connor concludes: "[T]he Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intru-

39. *Lopez*, 525 U.S. at 278.

40. *See id.* at 279-81.

41. Joined by the Chief Justice, Justice Kennedy concurred, arguing that some element of discretion was required to trigger the preclearance requirement, but deeming the County to have exercised such discretion in implementing the changes. *See id.* at 288 (Kennedy, J., concurring).

42. *Id.* at 293 (Thomas, J., dissenting).

43. *Id.* at 296 (Thomas, J., dissenting).

44. *Id.* at 282 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

45. *Id.* (citing *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

46. *Id.* at 284.

sion . . . and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."⁴⁷

B. *Reno v. Bossier Parish School Board I & II*

The Court understood the burdens imposed by section 5 quite differently when it assessed whether a districting plan adopted by the Bossier Parish School Board (the Board) deserved preclearance. Citing federalism concerns, *Bossier Parish I* and *Bossier Parish II* adopt narrow constructions of section 5 and thereby enable covered jurisdictions to obtain preclearance more easily.

The dispute in the *Bossier Parish* cases concerned the redistricting plan adopted by the Board following the 1990 Census. The Board, a covered jurisdiction under the VRA, consists of twelve members elected from single-member districts to serve four-year terms. At the time the Board set out to redraw its districts,⁴⁸ the Bossier Parish Police Jury, the principal governing body of the Parish, had already adopted and obtained preclearance of a twelve-district redistricting plan for its elections. The Board, however, initially declined to adopt the police jury plan, most likely because it transgressed some of the Board's traditional districting principles.⁴⁹

As the Board embarked on devising its own plan, the local NAACP chapter sought inclusion in the districting process and submitted a redistricting proposal that included two majority-black districts.⁵⁰ The population of the Parish at the time was approximately twenty percent African-American.⁵¹ The record indicates that at least some members of the Board were opposed to creating any majority-black districts⁵² and that the Board generally was not receptive to the NAACP's proposal.⁵³ As contro-

47. *Id.*

48. The Board initially had sought to develop a joint districting plan with the police jury, but the Jury was not interested in a cooperative effort. See *Bossier Parish II*, 528 U.S. 320, 344 (2000) (discussing stipulations).

49. See *id.* at 346-47 (Souter, J., concurring in part and dissenting in part) (noting that plan disregarded school attendance zones, included two districts without schools, pitted two pairs of Board incumbents against each other and created two districts in which no incumbent resided; that four districts failed Board cartographer's standard for compactness, and one contained noncontiguous elements; and that plan also exceeded total population variance typically used to satisfy one person, one vote requirement).

50. See *id.* at 323.

51. See *id.*

52. See *id.* at 348 (Souter, J., concurring in part and dissenting in part) (noting that Board member Henry Burns told one black leader that he personally favored black representation on Board, but that number of other Board members opposed idea, and that, according to NAACP representative George Price, Board member Barry Musgrove indicated that Board was hostile to creation of majority-black district).

53. See *id.*

versy in the Parish mounted, the Board adopted the police jury plan, which, like its predecessor, included no districts with a black majority.⁵⁴

Insofar as the Board expected that the police jury plan would be easily precleared, it was mistaken. While the Attorney General had once precleared that plan, she now objected to the Board's adoption of it. Invoking the language used by the Court in *Thornburg v. Gingles*,⁵⁵ she stated that new information—namely the NAACP's proposal—demonstrated that “black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts.”⁵⁶ Disavowing any attempt to compel the Board to adopt a particular plan, the Attorney General blocked preclearance on the ground that the Board was “not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice.”⁵⁷ In other words, the Attorney General concluded that the failure of the police jury plan to create two majority-black districts violated section 2 of the VRA⁵⁸ and that this violation was grounds to deny preclearance.⁵⁹

The Supreme Court disagreed.⁶⁰ *Bossier Parish I* holds that a violation of section 2 of the VRA is not alone grounds to deny preclearance because

54. *See id.* at 323-24.

55. 478 U.S. 30 (1986).

56. *Bossier Parish II*, 528 U.S. at 324.

57. *Id.*; *see also Bossier Parish I*, 520 U.S. 471, 475-76 (1997).

58. Section 2 prohibits any voting “standard, practice, or procedure” that “results in a denial or abridgement of the right . . . to vote on account of race or color.” 42 U.S.C. § 1973(a) (1994). A voting practice is dilutive and violates section 2:

if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to [members of the protected class] 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.

42 U.S.C. § 1973(b) (1994).

Proof of vote dilution under section 2 requires establishment of the so-called *Gingles* preconditions. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (setting forth preconditions that racial group “is sufficiently large and geographically compact to constitute a majority in a single-member district;” that the group is “politically cohesive,” and that the majority “votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate”). Section 2 also requires evidence that the totality of circumstances supports the dilutive quality of the practice. *See Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994).

59. *See also* 28 C.F.R. § 51.55(b)(2) (1996) (authorizing denial of preclearance to prevent “clear violation” of section 2).

60. The Board responded to the Attorney General’s ruling by seeking and obtaining preclearance in federal district court. There, the three-judge panel, over a dissent, rejected the Attorney General’s construction of section 5, holding that a section 2 violation is not grounds to deny preclearance. *See Bossier Parish v. Reno*, 907 F. Supp. 434, 440-41 (D.D.C. 1995). The court further held that evidence of a section 2 violation does not inform the inquiry into discriminatory purpose under section 5. *See id.* at 445. Finally, the court held that the Board had acted with legitimate, nondiscriminatory purposes in adopting the police jury plan,

retrogression provides the sole measure of a section 5 discriminatory “effect.”⁶¹ Justice O’Connor’s opinion for the Court states that the contrary holding would not only contravene precedent,⁶² but also would violate established norms of federalism. A finding of retrogression, that is, that a proposed change worsens the condition of a minority group, requires a comparison of a proposed change against the benchmark of an existing rule. Section 2’s proscription against vote dilution, by contrast, requires a comparison with the benchmark not of an existing practice, but of an imagined, undiluted practice. Justice O’Connor explains that to construe section 5 to bar preclearance of changes that violate section 2 would require covered jurisdictions to litigate whether a proposed change has a dilutive result under such a hypothetical standard. Section 5, however, “already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect.”⁶³ To add defending against claims of vote dilution “is to increase further the serious federalism costs already implicated by § 5.”⁶⁴ Two years later, Justice O’Connor would embrace these costs in *Lopez*, but in *Bossier Parish I*, she narrowly construes section 5 because of the “difficult burden” section 5 imposes and the “serious federalism costs” it generates.

Bossier Parish II similarly invokes federalism costs as justification for a narrow construction of section 5. *Bossier Parish I* holds that evidence of a section 2 violation, while alone not grounds to deny preclearance, informs the inquiry into impermissible purpose under section 5. The district court had not evaluated the section 2 claim in this regard and thus the Court remanded the case for such consideration.⁶⁵ *Bossier Parish I*, however, reserves the question “whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent.”⁶⁶ *Bossier Parish II* answers that question with a resounding no.

namely, the anticipation that preclearance would be readily granted, and the concern about implementation problems that inhered in the NAACP plan. *See id.* at 447. The Attorney General appealed and the Supreme Court responded with its decision in *Bossier Parish I*.

61. *See Bossier Parish I*, 520 U.S. at 485. The Attorney General’s denial of preclearance rested on the conclusion that the Board’s plan constituted a “clear violation” of section 2, *see* 28 C.F.R. § 51.55(b)(2) (1996), and not on the finding that the plan was retrogressive. *See* 520 U.S. at 475 (noting parties’ stipulation that plan was not retrogressive); *id.* at 499 (Stevens, J., dissenting in part and concurring in part) (noting that “[n]one of the 12 districts had ever had a black majority and a black person had never been elected to the Board”). Following *Bossier Parish I*, the Board acknowledged that its adopted plan diluted the minority vote in violation of section 2. *See Bossier Parish II*, 528 U.S. at 343-44, 349 (Souter, J., concurring in part and dissenting in part).

62. This precedent was less definitive than Justice O’Connor suggested. *See infra* note 97 and accompanying text.

63. *Bossier Parish I*, 520 U.S. at 480.

64. *Id.* That jurisdictions would not bear the burden of proof in such litigation was of no consequence. *See id.*

65. *See id.* at 486-87.

66. *See id.* at 486.

Justice Scalia's opinion for a divided Court holds that section 5's purpose prong proscribes only a retrogressive purpose, and not a discriminatory purpose more broadly understood.⁶⁷ He explains that the Court had already concluded that section 5's use of the phrase "abridging the right to vote on account of race or color" limited the term "effect" to retrogressive effect.⁶⁸ Established canons of statutory interpretation, Justice Scalia writes, require that retrogression also provide the measure of a section 5 purpose, otherwise, the Court "would attribute different meanings to the same phrase in the same sentence."⁶⁹ Precedent suggested the Court had previously recognized such a divergence, but *Bossier Parish II* deems it distinguishable.⁷⁰ Nor does limiting section 5's purpose prong to retrogressive purpose render it meaningless: while the natural linguistic consequence of the parallel construction meant that only the incompetent retrogressor would violate it and not also run afoul of its effects prong,⁷¹ the term retains "value and effect," *Bossier Parish II* asserts, given that the government may more easily refute a jurisdiction's claim of nonretrogressive purpose than its assertion of nonretrogressive effect.⁷²

Bossier Parish II recognizes that section 5 contains language "virtually identical" to language in section 2 of the VRA and the Fifteenth Amendment and that the Court had read the latter provisions to extend beyond retrogression. *Bossier Parish II*, however, insists that the "context" of the preclearance process, with its goal of preventing "backsliding," explains the difference in approach.⁷³ A broader construction of section 5, Justice Scalia explains, would conflate section 2 with section 5, something "we declined to do in *Bossier Parish I*."⁷⁴ Concerns for federalism, the Court insists, also counsel against this approach, particularly given the "ex-

67. Considerable evidence suggested that the Board acted with invidious, but not retrogressive, intent when it adopted the challenged districting plan. See *Bossier Parish II*, 528 U.S. 320, 343-355 (2000) (Souter, J., concurring in part and dissenting in part) (detailing Board's repeated efforts to block desegregation and other actions evincing discriminatory intent).

68. *Id.* at 329.

69. *Id.* (citing *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983)).

70. *Bossier Parish II* "acknowledge[s] that *Richmond v. United States*, 422 U.S. 358 (1975), created a discontinuity between the effect and purpose prongs of § 5," given that the decision both approved a voting change despite its seeming retrogressive effect and asserted that a retrogressive purpose warranted a denial of preclearance. *Bossier Parish II* dismisses this disjunction as "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation." See *id.* at 330; *cf. id.* at 369-71 (Souter, J., concurring in part and dissenting in part) (reading *Richmond* to extend beyond annexation context and to hold that discriminatory, albeit nonretrogressive intent, suffices to block preclearance).

71. See *id.* at 332 (noting that "[w]henver Congress enacts a statute that bars conduct having 'the purpose or effect of x,' the purpose prong has application entirely separate from that of the effect prong only with regard to unlikely conduct that has 'the purpose of x' but fails to have 'the effect of x'").

72. See *id.*

73. See *id.* at 334-35; see also *infra* note 130 and accompanying text.

74. *Id.* at 336.

traordinary burden-shifting procedures of § 5.”⁷⁵ While Justice Souter’s dissent charges that the broad construction of section 5 “would not raise the cost of federalism one penny above what Congress meant it to be,”⁷⁶ the majority responds by invoking *Lopez* and stating that to construe the preclearance provision to transcend retrogression would “exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts.”⁷⁷ Doing so might even “rais[e] concerns about § 5’s constitutionality,”⁷⁸ and thus the Court adopts the narrow construction.

II. THE CASES COMPARED

Lopez and the *Bossier Parish* cases approach section 5 very differently. *Lopez* readily interprets the preclearance provision broadly, easily accepting the “intrusion” into “sensitive areas of state and local policymaking” effected by the statute and its consequent “substantial ‘federalism costs.’”⁷⁹ The Court in the *Bossier Parish* cases appears far more wary of the statute’s intrusiveness and more inclined to limit its scope to minimize the resulting “federalism costs.” Relying on conclusory statements about federal power, these decisions fail to explain the distinct value each attaches to the federalism costs at issue. This Part assesses several factors that might explain the difference in approach.

A. Congressional Intent

Congressional intent fails to explain the Court’s divergent assessment of federalism costs in these cases. To be sure, insofar as Congress intended the application of section 5 adopted in *Lopez*, the resulting federalism costs are warranted, or at least the Court could so conclude, assuming, of course, that Congress had constitutional power to enact such a provision.⁸⁰ Likewise, if the broader construction of section 5 rejected in the *Bossier Parish* cases contravened congressional intent, the Court rightly refused to countenance the federalism costs that would have resulted. But while Congress may have intended the construction of section 5 adopted in *Lopez*, it appears not to have intended the construction of section 5 approved in the *Bossier Parish* cases and, indeed, likely intended the rejected readings.⁸¹

75. *Id.* at 335.

76. *Id.* at 372 (Souter, J., concurring in part and dissenting in part).

77. *Id.* at 336 (citing *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)).

78. *Id.*

79. See *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999).

80. See *supra* note 6 and *infra* notes 151-56 and accompanying text.

81. See also *The Supreme Court, 1999 Term: Leading Cases*, 114 HARV. L. REV. 379, 380 (2000) (arguing that *Bossier Parish II* “imposed its own restrictive view of the statute over a constitutionally permissible interpretation that both Congress and the Justice Department had found to be politically accountable and just”). *But see The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 421, 426 (1997)

Lopez locates congressional support for its construction of section 5 primarily in the statute's language. "The face of the Act itself," Justice O'Connor writes, "provides the most compelling support" for this construction.⁸² She explains that in common parlance, "seek to administer" encompasses nondiscretionary acts, and provides "no indication" Congress intended to limit preclearance to the discretionary acts of a covered jurisdiction.⁸³ This understanding of congressional intent, O'Connor continues, is strengthened by precedent, which has assumed section 5's application when a noncovered State effects voting changes in covered counties,⁸⁴ by the practice of DOJ, which routinely reviews preclearance applications from uncovered jurisdictions;⁸⁵ and by the Attorney General's understanding of congressional intent, which parallels the Court's.⁸⁶

The central purpose of the preclearance process, however, arguably suggests a contrary reading. Congress enacted section 5 "to shift the advantage of time and inertia from the perpetrators of the evil to its victim."⁸⁷ Under section 5, electoral changes implemented by jurisdictions covered because of their history of wrongdoing are presumed to be invalid, and the jurisdictions themselves face the burden of proving otherwise. This regime suggests Congress anticipated that preclearance would be applicable only to the decisions of covered jurisdictions themselves, that is, to the choices made by covered entities as opposed to their nondiscretionary implementation of mandates issued by others.⁸⁸ Both the concurrence and dissent raise this point, but their opposition to the majority's understanding of congressional intent is noticeably tepid. Justice Kennedy's concurring opinion notes that it is "quite possible" that the statute requires a discretionary element and states that this reading "draws some support" from precedent.⁸⁹ Similarly measured, Justice Thomas' dissent acknowledges that "the majority's construction of the phrase [seek to administer] is not plainly erroneous."⁹⁰ He offers an alternative reading of the phrase to preclude nondiscretionary acts,⁹¹ but does so, as does Justice Kennedy, not so much because he deems Congress to have dictated this

(arguing that *Bossier Parish I* "reached the result most consistent with legislative intent and precedent").

82. *Lopez*, 525 U.S. at 278.

83. *See id.*

84. *See id.* at 279-80.

85. *See id.* at 280.

86. *See id.* at 281 (noting that "we find it especially relevant that the Attorney General also reads § 5 as we do" and that "we traditionally afford substantial deference" to Attorney General's interpretation) (citations omitted). This deference is markedly absent in both *Bossier Parish* cases. *See infra* notes 94, 118 and accompanying text.

87. H.R. REP. NO. 94-196, at 57-58 (1970).

88. *See Harper, supra* note 6, at 454-55 (arguing that precedent supports this reading).

89. *Lopez*, 525 U.S. at 288 (Kennedy, J., concurring in judgment).

90. *Id.* at 290 (Thomas, J., dissenting).

91. *See id.* at 290-92 (Thomas, J., dissenting).

result, but because of his concern that the majority's construction is "constitutionally doubtful."⁹² Indeed, it is this constitutional doubt, and not the clarity of congressional intent, that leads both justices to ignore the Attorney General's view of the matter.⁹³ To the extent Congress did not unambiguously mandate *Lopez's* rule, that view, which parallels the Court's holding, represents a reasonable construction of the statute. Neither the dissent nor the concurrence suggests otherwise.

By contrast, the *Bossier Parish* decisions sustain narrow and strained readings of section 5 that are difficult to square with Congress' likely intent. *Bossier Parish I* holds that Congress never intended that a prohibited section 5 effect encompass a violation of section 2, and finds this intent to be "sufficiently clear" to warrant invalidation of the Attorney General's contrary regulation.⁹⁴ Justice O'Connor's opinion locates this intent not in the language of the statute,⁹⁵ but in precedent and the congressional

92. *Id.* at 293 (Thomas, J., dissenting) (noting that "[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter") (quoting *United States v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). A corollary to the principle of avoiding unnecessary constitutional questions is that Congress intended the interpretation that in fact avoids them. *See generally* *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). Neither Justices Thomas nor Kennedy phrases his objection in these terms, however, and sustaining such a claim would have been difficult. Congress last addressed section 5 on its merits in 1982, *see* Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 131, fifteen years before the Court handed down *City of Boerne v. Flores*, 521 U.S. 507 (1997), based on which Justice Thomas raised the constitutional objection. *See generally* Akhil R. Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 118 (2000) (arguing that *Boerne* doctrine represents "new rule of doctrine . . . [that] contrasts sharply with the text, history, and overall architecture of the Fourteenth Amendment"); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1158-65 (2001) (arguing that "congruence and proportionality standard" articulated in *City of Boerne* cases departs from original intent and understanding); *see also infra* notes 151-56 and accompanying text.

93. *See* *Solid Waste Agency of N. Cook County v. United States Army Corps of Engr's*, 531 U.S. 159, 172 (2001) (noting that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect clear indication that Congress intended that result"); *DeBartolo Corp.*, 485 U.S. at 575; *cf.* Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 245-46 (1996) (urging judicial restraint against curbing agency discretion based on "mere fact that an agency is acting in an area with constitutional implications," and arguing that "the agency's interpretation must raise a concrete and avoidable constitutional question, in order to trump *Chevron* deference").

94. *See Bossier Parish I*, 520 U.S. 471, 483 (1997) (refusing to defer to Attorney General's regulation that preclearance be withheld "to prevent a clear violation of amended Section 2") (quoting 28 C.F.R. § 51.55(b)(2) (1996)).

95. *See id.* at 497, 503 (Stevens, J., dissenting in part and concurring in part) (noting that majority does not hold Attorney General's regulation to conflict with statutory text).

failure to alter that precedent by amending the language of section 5.⁹⁶ That precedent, however, is hardly unequivocal and indeed, like the legislative history to the VRA's 1982 amendments, supports the interpretation adopted by the Attorney General's regulation, namely that changes violating section 2 should not be precleared.⁹⁷

The longstanding precedent to which Justice O'Connor referred was the Court's 1976 decision, *Beer v. United States*,⁹⁸ in which the Court, for the first time,⁹⁹ stated that section 5 was meant to block voting changes that "would lead to a retrogression in the position of racial minorities."¹⁰⁰ *Beer* added, however, that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."¹⁰¹ Thus, *Beer* itself indicated that the Court did not understand retrogression to be the sole measure of section 5.¹⁰² The question is how far beyond retrogression the Court understood section 5 to extend. *Beer* referenced *White v. Regester*¹⁰³ for its assertion that unconstitutional voting practices should not be precleared. *White* held unconstitutional an apportionment plan under which, based on the totality of circumstances, members of a racial minority "had less opportunity than did other residents in the district to participate

96. *See id.* at 483 (noting that "[g]iven our longstanding interpretation of § 5, which Congress has declined to alter by amending the language of § 5, we believe Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5") (citations omitted).

97. *But cf. The Supreme Court, 1996 Term, supra* note 81, at 422 (arguing that *Bossier Parish I* "reached the result truest to congressional intent and judicial precedent").

98. 425 U.S. 130 (1976). *Bossier Parish I* also relies on *City of Lockhart v. United States*, which holds that preclearance is warranted where proposed changes "may have the effect of discriminating against minorities" in some circumstances, because the changes did "not increase the degree of discrimination" against a minority population. *See Lockhart*, 460 U.S. 125, 134, 135 (1983). *Lockhart*, however, relied exclusively on *Beer* for its conclusion that the absence of retrogression means preclearance is warranted and, like *Beer* itself, did not involve the allegation that a nonretrogressive change "was so discriminatory that it clearly violated some other federal law." *See id.* at 134-36; *see also Bossier Parish I*, 520 U.S. at 503 (Stevens, J., dissenting in part and concurring in part).

99. *See Bossier Parish II*, 528 U.S. 320, 364 n.13 (2000) (Souter, J., concurring in part and dissenting in part) (noting that term retrogression "appears for the first time in a federal case in *Beer*"); *Lockhart*, 460 U.S. at 134 (reading *Beer* as holding that preclearance should follow where "new plan does not increase the degree of discrimination against blacks"); *United Jewish Org. v. Carey*, 430 U.S. 144, 159 (1977) (noting that *Beer* "established" that section 5 bars implementation of retrogressive plan); Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1445-46 (1996) (same).

100. *Beer*, 425 U.S. at 141.

101. *Id.*

102. *See Bossier Parish I*, 520 U.S. at 504 (Stevens, J., dissenting in part and concurring in part) (rejecting Court's "assumption that § 5 is concerned only with retrogressive effects and purposes").

103. 412 U.S. 755 (1973).

in the political processes and to elect legislators of their choice."¹⁰⁴ At the time, this standard was the constitutional standard for vote dilution, and section 2 of the VRA was thought to add nothing to the constitutional proscription.¹⁰⁵ The Court in *Beer*, accordingly, had no reason to distinguish a constitutional violation from conduct transgressing the standard set forth in *White v. Regester* from conduct violating section 2 of the VRA. These violations were one and the same and all grounds for denying preclearance.

Subsequent to *Beer*, however, the Court held that invidious intent is an essential element of a Fourteenth and Fifteenth Amendment violation,¹⁰⁶ and Congress responded by codifying the *White v. Regester* standard in the 1982 amendments to section 2 of the VRA.¹⁰⁷ With the constitutional standard now diverging from the statutory one, the question arises whether changes that violate the latter are grounds to deny preclearance. *Beer* itself does not answer that question as the Court there had no occasion to confront it and the decision is inherently ambiguous on this point.

The legislative history to the 1982 amendments to the VRA suggests, however, that Congress meant for a violation of amended section 2 to be grounds to deny preclearance. The Senate Report squarely states that "in light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure so discriminates as to violate section 2."¹⁰⁸ Justice O'Connor's opinion in *Bossier Parish I* dismisses this seemingly unambiguous statement because Congress did not amend the language of section 5.¹⁰⁹ Congress would not, she writes, "depart from the settled interpretation of § 5 and impose a demonstrably greater burden . . . by dropping a footnote in a Senate Report instead of amending the statute itself."¹¹⁰ That interpretation of section 5, namely that retrogression defines the full scope of a section 5 effect, however, was hardly settled, and the "demonstrably greater burden" was that imposed by governing law before the Court's 1980 decision in *Mobile v. Bolden*¹¹¹ and ar-

104. *White*, 412 U.S. at 766.

105. See *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (noting that section 2 as originally enacted "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment"); *Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (stating that "it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and . . . that it was intended to have an effect no different from that of the Fifteenth Amendment itself."); see also ISSACHAROFF ET AL., *supra* note 16, at 739.

106. See generally *Mobile*, 446 U.S. 55; *Washington v. Davis*, 426 U.S. 229 (1976).

107. See 42 U.S.C. § 1973a (1994); S. REP. NO. 97-417, at 15-16 (1982).

108. S. REP. NO. 97-417, at 12 n.31.

109. See *Bossier Parish I*, 520 U.S. 471, 483-84 (1997) (noting "[t]hat there may be some suggestion" in the Senate Report that Congress intended violation of section 2 to be grounds for denying preclearance under section 5).

110. *Id.* at 484.

111. 446 U.S. 55 (1980).

guably thereafter as well.¹¹² Congress, accordingly, may have deemed an amendment to the language of section 5 unnecessary.¹¹³

To be sure, there is room for debate about congressional intent on this point.¹¹⁴ *Beer* itself is typically remembered as establishing the nonretrogression rule,¹¹⁵ and it specifically referenced constitutional and not statutory violations as additional grounds for denying preclearance.¹¹⁶ In 1982, Congress may have read *Beer* in this narrow sense, and, the Senate Report's language notwithstanding, retained the language in section 5 to preserve this understanding. But while the argument that Congress may have intended to exclude a section 2 violation from a section 5 effect may not be wholly implausible,¹¹⁷ congressional intent on this point is hardly unambiguous. *Bossier Parish I* suggests, however, that it is. The Court's rejection of the Attorney General's regulation necessarily implies that Congress spoke with sufficient clarity to override the agency's view, a view that was embodied in a formal regulation and to which deference is typically accorded.¹¹⁸

112. See *supra* note 103 and accompanying text.

113. See H.R. REP. NO. 97-227, at 28 (1981) ("Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under § 2] or preclearance [under § 5]."); *Bossier Parish I*, 520 U.S. at 506 (Stevens, J., dissenting in part and concurring in part) (arguing that House Report "conveys the same message" as the Senate Report on this point); cf. *Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Voting Rights Act: Proposed Section 5 Regulations*, 99th Cong. 5 (1986) (finding, after oversight hearing on proposed regulation, "that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations").

114. See, e.g., *The Supreme Court, 1999 Term*, *supra* note 81, at 386 (noting that "[a] revision of *Beer's* calibration of effect would require a stronger statement of intent than exists in the record").

115. See, e.g., Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 750 (1995) (citing *Beer* for proposition that before 1982 VRA amendments, "a jurisdiction subject to the preclearance provisions of Section 5 needed to show only that a proposed voting change, otherwise free of discriminatory intent, did not have a retrogressive effect on a covered minority population"); see also *supra* note 99.

116. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (stating that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution").

117. Cf. *Bossier Parish I*, 520 U.S. at 497 (Stevens, J., dissenting in part and concurring in part) (stating that Congress never intended what majority's construction required, namely that "the Attorney General of the United States . . . place her stamp of approval on a state action that is in clear violation of federal law").

118. See *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172-73 (2001) (noting that deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), is accorded to agency interpretations found in formal agency regulations or produced by other procedures assuring "fairness and deliberation"); see also *id.* at 2184 (Scalia, J., dissenting) (arguing *Chevron* deference applies so long as agency position is evident "in a course of unstructured administrative actions" and reflects "the official position of the agency"). The Court, moreover, in *Lopez* and other

The Attorney General's construction of section 5 and the longstanding practice of DOJ implementing it proved no more persuasive to the Court in *Bossier Parish II*. In this case, the Court again adopts a construction of the statute that seems contrary to congressional intent, holding that section 5's purpose prong reaches retrogressive intent only and not discriminatory intent more broadly. *Bossier Parish II* states that established principles of statutory construction and the particular "context" of preclearance demonstrate that Congress intended this result. Neither factor, however, unequivocally establishes congressional intent on this point.

First, Justice Scalia states that section 5's purpose prong must be limited to retrogressive purpose because *Beer* held retrogression to define the full scope of a section 5 effect. This reading of *Beer*¹¹⁹ supports the Court's construction, but does not mandate it;¹²⁰ that is, even if Congress meant to limit section 5's prohibition on discriminatory effects to retrogressive effects,¹²¹ it need not have intended to restrict similarly the statute's prohibition on discriminatory purpose. A discriminatory purpose such as an intent to dilute is always invidious, while a policy yielding a dilutive or otherwise discriminatory effect may or may not reflect ill-will on the part of the policymaker.¹²² Limiting section 5's effect prong to retrogressive effect arguably restricts its reach to conduct for which invidious

decisions, has accorded deference to the Attorney General's construction of section 5. See, e.g., *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985) ("Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference"); *Dougherty County Bd. of Educ. v. White*, 429 U.S. 32, 39 (1978) (noting that deference to Attorney General stems from his "central role . . . in formulating and implementing" section 5); *Perkins v. Matthews*, 400 U.S. 379, 390-91 (1971) (holding that regarding coverage of section 5 "draws further support from the interpretation followed by the Attorney General in his administration of the statute"). Cf. *supra* note 86 and accompanying text.

119. *Beer* was more ambiguous on this point than Justice Scalia suggests. See *supra* notes 98-107 and accompanying text.

120. See also *The Supreme Court, 1999 Term, supra* note 81, at 385-86 (arguing that congressional intent on this point was ambiguous and that Court should have deferred to DOJ's view rejecting parallel construction).

121. For a discussion as to why Congress likely did not so intend, see *supra* notes 108-13 and *infra* notes 131-39 and accompanying text.

122. See generally *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, 270 (1977) (rejecting argument that racially disparate impact, standing alone, implies discriminatory purpose); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that Court has never "embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"); Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 1023-34 (discussing Court's standards for determining whether disparate impact is result of invalid discrimination); Cf. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 134 (2000) (arguing that "the dilutive effect of any districting plan does reflect 'discriminatory intent' on the part of the voters").

intent is the likely explanation.¹²³ Whether established by *Beer* or later by *Bossier Parish I*, this rule may well be sensible in light of recent case law circumscribing congressional authority to enforce the Fourteenth and Fifteenth Amendments.¹²⁴ Congress, however, need not have similarly limited section 5's purpose prong given that it prohibits conduct proscribed by the Constitution itself, namely intentional discrimination. *Beer* anachronistically suggested this result when it stated that preclearance should be denied when a change violates the Constitution.¹²⁵

Indeed, the particular "context" of preclearance, cited in *Bossier Parish II* in support of its holding,¹²⁶ suggests congressional intent for section 5 to transcend retrogression. Echoing Justice O'Connor's opinion in *Bossier Parish I*,¹²⁷ Justice Scalia explains that because the preclearance process "uniquely . . . and specifically" addresses only voting changes, it requires a comparison of the change against the status quo, a comparison that the concept of retrogression captures.¹²⁸ Under this view, section 5 does not guard against vote dilution more generally, be it intentional or not, given that dilution entails a comparison not with the status quo, but with the hypothetical alternative of an undiluted vote.¹²⁹ The different comparative focus, the Court maintains, justifies construing section 5 differently from the Fifteenth Amendment and other provisions of the VRA which contain "virtually identical language" to section 5, and have not been read to be limited to retrogression.¹³⁰

123. See generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 898 (1999) (arguing that *Washington v. Davis'* discriminatory intent rule "reflects practical concerns with the remedial consequences of an effects test").

124. See *supra* note 6 and *infra* notes 151-57 and accompanying text.

125. See *Beer v. United States*, 415 U.S. 130, 141 (1976). Anachronistically because the Court had not yet established intent to be a requisite element of a constitutional violation, nor had it articulated the standard of congruence and proportionality. See *supra* notes 92, 96. Language in *Bossier Parish I* supports this reading of *Beer*. See *Bossier Parish I*, 520 U.S. at 483 (noting that *Beer* cited *White v. Regester* "not for itself, but because it embodied the current constitutional standard for a violation of the Equal Protection Clause . . . [and w]hen *White* ceased to represent the current understanding of the Constitution, a violation of its standard . . . no longer constituted grounds for a denial of preclearance under *Beer*). But *Bossier Parish II* rejects this reading. See *Bossier Parish II*, 528 U.S. 320, 337-38 (2000) (stating that *Beer's* statement that section 5 blocks changes that violate Constitution was referring neither to intentional discrimination, which had yet to become essential element of constitutional violation, nor to effects-based discrimination, which would have negated retrogression standard, and instead was to unconstitutional action that denies, as opposed to abridges, right to vote, and thus does not encompass vote dilution, which falls under latter term).

126. See *Bossier Parish II*, 528 U.S. at 334.

127. See *Bossier Parish I*, 520 U.S. at 478; see also *supra* notes 60-63 and accompanying text.

128. *Bossier Parish II*, 528 U.S. at 334.

129. See *id.*

130. *Id.* at 333. Compare 42 U.S.C. § 1973c (preclearance should be denied if changes have purpose or effect of "denying or abridging the right to vote on ac-

As *Beer* itself indicates,¹³¹ however, section 5's focus on electoral changes does not necessarily establish that Congress meant for retrogression to define the full extent of the statutory standard. Section 5 does not mention retrogression at all, and the legislative history to the statute as originally enacted and extended since suggests congressional intent not simply to prevent covered jurisdictions from "undo[ing] or defeat[ing] the rights recently won,"¹³² but to block the implementation of new practices that perpetuate existing discrimination.¹³³ So understood, section 5 does not preserve the status quo, but actively promotes equal opportunity in the political process. Indeed, Congress' decision to use the same language in section 5 as appears in the Fifteenth Amendment suggests its intent for the statute to transcend retrogressive practices. Congressional reliance on terminology that tracks the language of the constitutional provision it seeks to enforce is generally read to signal congressional intent that the terms be given the same meaning.¹³⁴ The Fifteenth Amendment has never been limited to retrogression and, the assertion in *Bossier Parish*

count of race or color"), with U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"), and 42 U.S.C. § 1973(a) (1975) (providing that "[n]o voting [practice] 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").

131. See *supra* note 102 and accompanying text.

132. *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 91-397, at 8 (1969)); see also *Bossier Parish II*, 528 U.S. at 363 (Souter, J., concurring in part and dissenting in part) (criticizing *Beer's* "imposition of a nontextual limitation . . . [from] a single fragment of legislative history," and arguing that "the legislative history is replete with references to the need to block changes in voting practices that would perpetuate existing discrimination and stand in the way of truly nondiscriminatory alternatives").

133. See, e.g., S. REP. NO. 97-417, at 6 (preclearance procedure "was designed to insure that old devices for disenfranchisement would not simply be replaced by new ones"); S. REP. NO. 94-295, at 15-17 (1975) (noting importance of section 5 "as a means of promoting and preserving minority political gains in covered jurisdictions"); H.R. REP. NO. 89-439, at 10 (1965) (noting that "even after apparent defeat[s] resisters seek new ways and means of discriminating . . . [and that] [b]arring one contrivance too often has caused no change in result, only in methods."); S. REP. NO. 89-162, pt. 3, at 12 (1965) (noting that after losing voting rights cases, jurisdictions adopted new voting requirements "as a means for continuing the rejection of qualified Negro applicants" (quoting *United States v. Parker*, 236 F. Supp. 511, 517 (M.D. Ala. 1964))); see also *Bossier Parish II*, 528 U.S. at 366 (Souter, J., concurring in part and dissenting in part) (noting, *inter alia*, that the "statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles"); *Beer*, 425 U.S. at 152 n.9 (Marshall, J., dissenting).

134. See, e.g., *Bossier Parish II*, 528 U.S. at 358 (Souter, J., concurring in part and dissenting in part) (citing cases so holding). Congress enacted the VRA pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments. See *South Carolina v. Katzenbach*, 383 U.S. 301, 325-27 (1966); S. REP. NO. 97-417, at 40.

II notwithstanding,¹³⁵ has been thought to proscribe racial vote dilution.¹³⁶ To be sure, the term “dilution” was not used before 1969, but the practice predates the term,¹³⁷ and even if it did not, the very purpose of the preclearance process is to block “new ways and means of discriminating” implemented as old “contrivances” are struck down.¹³⁸ Each time Congress extended section 5 to provide for additional years of coverage, it noted its expectation that the preclearance standard would encompass racial vote dilution.¹³⁹

At bottom, *Bossier Parish II* espouses an implausible conclusion: namely, even though Congress created the preclearance procedure because covered jurisdictions engaged repeatedly in acts of unconstitutional discrimination, it did not intend to block implementation of voting changes enacted with precisely this purpose.¹⁴⁰ The Attorney General had long adopted the contrary interpretation, denying preclearance to changes DOJ determined had been enacted or implemented with a discriminatory purpose.¹⁴¹ Dispensing with the deference typically afforded

135. See *Bossier Parish II*, 528 U.S. at 334 n.3 (suggesting that vote dilution does not violate Fifteenth Amendment).

136. See *id.* at 360 n.11 (Souter J., dissenting) (stating that Court has suggested Fifteenth Amendment applies to dilution claims); see also Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 524 n.161 (2000).

137. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); see also *Bossier Parish II*, 528 U.S. at 364 & n.13 (Souter, J., concurring in part and dissenting in part); J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 25-31 (1999); HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890*, 126, 269-73 (1978).

138. H.R. REP. NO. 89-439, at 10.

139. See S. REP. NO. 97-417, at 6 (noting that following rise in registration resulting from VRA of 1965, “a broad array of dilution schemes were employed to cancel the impact of the new black vote”); S. REP. NO. 94-295, at 16-17 (identifying continuing need for preclearance procedure given adoption of dilutive measures including switching to at-large elections, annexations of predominately white areas or adoption of discriminatory redistricting plans); H.R. REP. NO. 91-397, at 6-7 (noting continued need for preclearance requirement given that, as voter registration rose, various jurisdictions “have undertaken new, unlawful ways to diminish the Negroes’ franchise and to defeat Negro and Negro-supported candidates” including use of numerous dilutive techniques); see also S. REP. NO. 97-417, at 7 n.8 (noting that in both 1970 and 1975, Congress renewed section 5 “with full awareness of its interpretation by the courts to include dilution and other evasive mechanisms, as well as outright denials of the opportunity to register or vote” and that “Congress has twice ratified this interpretation of the intended scope of Section 5”).

140. See also Rubin, *supra* note 122, at 92 (describing *Bossier Parish II*’s “remarkable holding that preclearance under the Voting Rights Act must be granted to laws that are adopted with discriminatory intent, so long as the intent behind them was to leave the members of the racial minority group against whom they are aimed in no worse a position than they were under the previous law”).

141. The applicable regulation stated that “the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution.” See 28 C.F.R. § 51.55(a) (1994). DOJ argued that it had consistently applied this regulation to block practices im-

to DOJ given its role in administering section 5,¹⁴² the decision, as Justice Souter's dissent notes, creates a regime under which "executive and judicial officers of the United States will be forced to preclear illegal and unconstitutional voting schemes patently intended to perpetuate discrimination."¹⁴³ The majority's claim that Congress meant to limit section 5's purpose prong to retrogressive purpose alone is unpersuasive.

B. *Vindicating a Constitutional Right*

The Rehnquist Court has intervened deeply in state electoral processes when it has understood the Constitution to require it.¹⁴⁴ While *Bush v. Gore*¹⁴⁵ generated charges of hypocrisy,¹⁴⁶ this Court has long been engaged in a dramatic restructuring of state governance even as it has elsewhere vigorously promoted state sovereignty at the expense of federal

plemented with a discriminatory, but nonretrogressive, purpose. See Brief for Federal Appellant at 32-33, *Bossier Parish II*, 528 U.S. 320 (2000) (No. 98-405) (discussing Department's position); see also *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (noting DOJ position that state's adoption of nonretrogressive districting plan may embody prohibited purpose under section 5 where it deemed rejected plan to better serve minority population). The Court has suggested that agency practice of this sort should be accorded deference as well. See *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001); *id.* at 2184-85 (Scalia, J., dissenting); *FDIC v. Phila. Gear*, 476 U.S. 426, 438-39 (1986) (accord *Chevron* deference to the FDIC's interpretation of statutory term "reflected in a course of unstructured administrative actions"); see also *The Supreme Court, 1999 Term, supra* note 81, at 387-88 (arguing that *Bossier Parish II* erred in refusing to accord *Chevron* deference to Attorney General's construction of section 5's purpose prong).

142. See *supra* notes 86, 118.

143. *Bossier Parish II*, 528 U.S. 320, 372 (2000) (Souter, J., concurring in part and dissenting in part).

144. The Rehnquist Court, of course, is not the first Court to do so. See, e.g., Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1837 (1992) (noting "the Court first set foot in the 'political thicket' in the 1960's"); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1325 (1987).

145. 513 U.S. 98 (2000) (per curiam).

146. *Bush v. Gore*, 513 U.S. 98 (2000), is said to be an unwarranted and unprecedented intrusion into state sovereignty led by the very justices who have most celebrated state power in the decisions implementing the Rehnquist Court's federalism revolution. See, e.g., Vincent Bugliosi, *None Dare Call It Treason*, THE NATION, Feb. 5, 2001, at 11; Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. OF BOOKS, Jan. 11, 2001, at 53; Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 19, 2000, at A1; Tony Mauro, *Court's Election Brawl May Leave Lasting Scars*, LEGAL TIMES, Jan. 18, 2000, at 13 (asserting Court majority usually defers to state sovereignty); Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18.

power.¹⁴⁷ A prime example is *Shaw v. Reno*¹⁴⁸ and its progeny,¹⁴⁹ which recognize a distinct injury under the Equal Protection Clause resulting from the predominance of race in districting decisions. These decisions circumscribe state power to draw electoral boundaries, and express little concern for the resulting loss in state autonomy.¹⁵⁰

147. See, e.g., Jeffrey L. Fisher, *The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies*, 95 MICH. L. REV. 1404, 1428-29 (1997) (arguing that lower federal courts crafting remedies under *Shaw* and its progeny “subordinate states’ political concerns to other, more sterile, redistricting criteria”); Issacharoff, *supra* note 144, at 1835-36 (noting that “[d]espite the increased prominence of federalist concerns” in various opinions, Court’s decisions in *City of Pleasant Grove* and *Chisom v. Romer* “dramatically enhanced federal power to regulate electoral processes”); Lowenstein, *supra* note 18, at 785, 786 (noting paradox in *Shaw v. Reno* and its progeny that “conservative judges extend the Equal Protection Clause . . . beyond the reach of precedent to significantly displace state control over legislative districting” and that decisions “offend conservative conceptions of federalism”).

148. 509 U.S. 630 (1993) [hereinafter *Shaw I*].

149. See generally *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001); *Shaw v. Hunt*, 517 U.S. 899 (1996) [hereinafter *Shaw II*]; *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1996); *Shaw I*, 509 U.S. 630 (1993).

Rice v. Cayetano, 528 U.S. 495 (2000), is similarly illustrative. *Rice* struck down as a violation of the Fifteenth Amendment a state law that provided that only “Hawaiians” could vote for trustees of the state’s Office of Hawaiian Affairs (“OHA”), a public agency that oversees programs designed to benefit the State’s native people. The Court held that the restriction limiting the OHA electorate to descendants of the 1778 inhabitants of the Hawaiian Islands embodied a racial classification that denied non-Hawaiians the right to vote within the meaning of the Fifteenth Amendment. While hardly self-evident, *Rice*’s conclusion—that the OHA regime involved both a racial classification and the constitutionally protected right to vote—led the Court inexorably to its holding invalidating the voting restriction. See *Katz*, *supra* note 136, at 493-94. Along the way, *Rice* barely notices the federalism costs that result from its displacement of a regime constructed by the people of Hawaii via constitutional amendment to address and remedy historic discrimination unique to the Hawaiian Islands. Indeed, it is noteworthy how easily the Court displaced this local regime, which, unlike the districts at issue in cases like *Shaw* and its progeny, did not bear the direct imprimatur of federal law or DOJ involvement. See *infra* notes 195-97 and accompanying text. Thus, absent from *Rice* was the concern for separation of powers that informs much of the Rehnquist Court’s federalism jurisprudence. See, e.g., Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 23 (2000) (arguing that *City of Boerne* cases are “as much about separation of powers as about federalism”); Caminker, *supra* note 92, at 1168-85; Linda Greenhouse, *The High Court’s Target: Congress*, N.Y. TIMES, Feb. 25, 2001, at 3. The federalism costs implicated by *Rice* were thus peculiar and significant, but of only minor concern to the Court.

150. See, e.g., *Shaw II*, 517 U.S. at 949 (Stevens, J., dissenting) (stating that narrow tailoring requirement in *Shaw* cases drastically restricts state discretion in this realm); *Bush*, 517 U.S. at 1068-69 (Souter, J., dissenting); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 310 (1996); KOUSSER, *supra* note 137, at 422; Lowenstein, *supra* note 18, at 819; Rubin, *supra* note 122, at 112; see also Lowenstein, *supra* note 18, at 811 (suggesting that *Shaw* cases damage federalism values because political parties can no longer shape districting decisions to same degree as they once did or fully derive benefits that participation previously yielded).

The Court's willingness to override state sovereignty to vindicate a constitutional right cannot, however, explain its divergent assessment of the federalism costs in *Lopez* and the *Bossier Parish* cases. Neither section 5's status as congressional enforcement legislation nor an understanding of the Constitution to proscribe either race-conscious decisionmaking or majority-minority districts more narrowly explains the Court's approach to federalism in the respective decisions.

1. *Congressional Enforcement Legislation*

Lopez suggests that its broad construction of section 5 vindicates rights protected by the Fifteenth Amendment. The decision affirms that section 5's targeting of discriminatory effects through the burden shifting procedures of the preclearance process is a legitimate means for Congress to enforce the Fifteenth Amendment,¹⁵¹ with the statutory proscription being understood to "deter[] or remed[y] a constitutional violation," even though the prohibited conduct does not itself violate the Constitution.¹⁵² As valid congressional enforcement legislation, section 5 limits state sovereignty, but these federalism costs are deemed justified.

Lopez's embrace of section 5 as valid enforcement legislation is puzzling given the increasingly stringent parameters the Court has identified as limiting congressional discretion in this realm.¹⁵³ The Court had, of course, upheld congressional authority to enact section 5 before,¹⁵⁴ but it had not yet addressed the constitutionality of the statute either as extended in 1982 or under *City of Boerne v. Flores*.¹⁵⁵ Decided the same Term as the *College Savings Bank* decisions, which developed and extended the *Boerne* principles,¹⁵⁶ *Lopez* pays little attention to the factors that have become increasingly important to establishing congruence and proportionality under the developing *Boerne* doctrine. For example, Justice O'Connor's opinion for the Court does not even mention the legislative findings made by Congress when it amended the statute in 1982, and thus does not assess their adequacy, despite the centrality of such determinations in the *Boerne* cases.¹⁵⁷ *Lopez* instead relies on precedent that upheld

151. See *Lopez v. Monterey County*, 525 U.S. 266, 283-84 (1999) (finding "no merit" to claim that Congress lacks constitutional authority "to require federal approval before the implementation of a state law" that may have discriminatory effect in covered jurisdiction).

152. *Id.* at 282-83 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)).

153. See also *supra* note 6.

154. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *City of Rome v. United States*, 446 U.S. 156, 183 (1980); see also *Guard*, *supra* note 6, at 357 (arguing that principles of *stare decisis* support the Court's holding in *Lopez*).

155. 521 U.S. 507 (1997).

156. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999). See generally *Caminker*, *supra* note 92, at 1147-49 (discussing application of *City of Boerne* in *College Savings Bank* cases).

157. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 964-66 (2001) (finding inadequate legislative findings underlying abrogation of state sov-

earlier versions of section 5 based on distinct legislative findings and historic circumstances.¹⁵⁸

The Court in *Lopez* is nevertheless confident that section 5, as broadly construed in the case, constitutes valid enforcement legislation vindicating rights protected by the Constitution. To the extent, however, that this understanding of section 5 explains *Lopez's* dismissal of the resulting federalism costs, it should have dictated contrary holdings in the *Bossier Parish* cases, both of which likewise construe section 5. The Court in *Bossier Parish I* remains nevertheless unmoved not only by section 5's status as valid enforcement legislation, but also by section 2's,¹⁵⁹ and instead invokes federalism as a reason to order preclearance of a change that violates section 2.¹⁶⁰ Even more puzzling in this regard, *Bossier Parish II* rejects a construction of section 5 that would have blocked implementation of a patently unconstitutional change, all the while asserting that the rejected construction was constitutionally suspect.¹⁶¹

2. Colorblindness and the Majority-Minority District

The Rehnquist Court, at times, has suggested the Reconstruction Amendments promote colorblind decisionmaking,¹⁶² and individual jus-

foreign immunity in Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (invalidating § 13,981 of Violence Against Women Act and noting that "Congress' findings indicate that the problem of gender-motivated crimes does not exist in all States, or even in most States"); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89-91 (2000) (finding inadequate legislative findings underlying abrogation of state immunity in Age Discrimination in Employment Act); *Fla. Prepaid*, 527 U.S. at 641, 645-46 (noting that record documented few instances of patent infringements by States); *City of Boerne*, 521 U.S. at 530-31 (invalidating Religious Freedom Restoration Act and noting that documented instances of state-sponsored bigotry dated back more than forty years).

158. See *Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999); see also *Rome*, 446 U.S. at 180-82 (discussing findings underlying 1975 extension of VRA); *Katzenbach*, 383 U.S. at 308-09 (noting voluminous congressional findings).

159. *City of Boerne*, 521 U.S. 507 (1997), and its progeny cast doubt on whether section 2 constitutes valid congressional enforcement legislation. See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1737 (2001); Guard, *supra* note 6, at 359-63; Karlan, *supra* note 6, at 728-40; ISACHAROFF ET AL., *supra* note 16, at 859-66; David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 45; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-50 (1998); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2544 (1998).

Bossier Parish I, however, predates *City of Boerne*, makes no reference to the question of section 2's constitutional validity, and contains nothing to suggest that concern about the adequacy of congressional authority to enact section 2 informed the Court's construction of section 5.

160. See *Bossier Parish I*, 520 U.S. 471, 480 (1997).

161. See *Bossier Parish II*, 528 U.S. 320, 336 (2000).

162. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (discussing Fifteenth Amendment's "mandate of neutrality"); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (noting that "central mandate" of Equal Protection Clause "is racial neutrality in governmental decisionmaking").

tices have read the amendments to require it.¹⁶³ An understanding of the Fourteenth and Fifteenth Amendments to mandate colorblindness, while debatable on its merits,¹⁶⁴ offers a coherent basis to invalidate racially-

163. The most ardent devotees of the concept are Justice Scalia, *see, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (Scalia, J., concurring in part and concurring in judgment) (stating that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment) (same); Justice Thomas, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952, 999 (1996) (Thomas, J., concurring in judgment) (disagreeing "that strict scrutiny is not invoked by the intentional creation of majority-minority districts"); *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring); *see also* Thomas L. Jipping, *Judge Thomas Is the First Choice: The Case for Clarence Thomas*, 12 REGENT U. L. REV. 397, 447 (1999-2000) (noting statement by then judge-Thomas that "I firmly insist that the Constitution be interpreted in a colorblind fashion"); and Justice Kennedy. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997, 1027 (Kennedy, J. concurring); *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (discussing "the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group"); *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in judgment) (noting that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause").

More receptive to claims that incorporate some consideration of race are Justice O'Connor, *see, e.g.*, *Hunt v. Cromartie*, 121 S. Ct. 1452, 1459 (2001) (discussing how racial identification is linked with political affiliation); *Bush*, 517 U.S. at 958-59, 962; *id.* at 993 (O'Connor, J., concurring); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) (stressing plaintiffs must show state "relied on race in substantial disregard of customary and traditional districting practices"); *see also* Samuel Issacharoff, *Constitutional Contours of Race*, 1995 SUP. CT. REV. 45, 63 (1995); Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1614 (2000); and Chief Justice Rehnquist. *See* *Lawyer v. Dept. of Justice*, 521 U.S. 567, 581-82 (1997) (a 5-4 decision with Chief Justice Rehnquist voting in the majority to uphold districting plan that was racially informed but found not to subordinate traditional districting principles to race); *Bush v. Vera*, 517 U.S. at 958 (stating, in plurality opinion joined by Chief Justice, that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race[,] . . . [n]or does it apply to all cases of intentional creation of majority-minority districts"); *Johnson v. DeGrandy*, 512 U.S. 997, 999 (1994) (Chief Justice joining majority to reject section 2 challenge to racially-informed districting plan containing numerous majority-minority districts); KOUSSER, *supra* note 137, at 436; Saunders, *supra*, at 1613 n.50. *But cf.* Jeffrey Rosen, *The Color-Blind Court*, NEW REPUBLIC, July 31, 1995, at 19 (placing Chief Justice with Justices Kennedy, Scalia and Thomas, and arguing that all believe that government "can almost never classify citizens based on race").

164. Compare ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 53-66 (1992); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 1-5 (1991); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985), with STEPHAN T. THERNSTROM & ABIGAIL M. THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 492 (1997); James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517, 519 (1995); Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 599-600 (1995); Charles J. Cooper, *The Coercive Remedies Paradox*, 9 HARV. J.L. & PUB. POL'Y 77, 77 (1986).

informed state action and thereby circumscribe state power.¹⁶⁵ This understanding cannot, however, explain the Court's assessment of federalism costs in *Lopez* and the *Bossier Parish* cases, as all three decisions promote race-conscious decisionmaking by covered jurisdictions.

Both *Lopez* and *Bossier Parish I* promote race-conscious decisionmaking of the sort that necessarily results from compliance with the VRA and any law barring racially discriminatory effects. Such prohibitions require those governed by them to consider race expressly or risk violating the proscription.¹⁶⁶ The coverage designation established in *Lopez* means that the County must prove that its new electoral regime does not have an impermissible purpose or effect. The only way to demonstrate the latter is for the County to assess expressly how the switch from a district-based system to an at-large one affects the interests of racial minorities. A covered jurisdiction cannot prove this effect is absent without taking race into account.¹⁶⁷ *Bossier Parish I* similarly discourages colorblindness. To be sure, the decision postpones, and at times will eliminate,¹⁶⁸ the racially-informed evaluation of an electoral rule under section 2's results test. But by relying on retrogression as the measure of a section 5 effect, the decision also accepts and indeed requires functionally analogous race-conscious decisionmaking by covered jurisdictions.

The explanatory failure of colorblindness is most evident, however, in *Bossier Parish II*, where the Court expressly rejected a construction of section 5 that would have blocked racially informed decisionmaking in favor of one that permits it. Unlike section 5's effect prong, its purpose prong

165. See, e.g., Caminker, *supra* note 92, at 1194 (stating that "[t]he Reconstruction Amendments in general, and the Fourteenth Amendment in particular, worked a significant shift in the federal-state balance of power, as part of which the states waived various features of their erstwhile sovereign status"); Victor W. Rotnem, *Enforcement of Civil Rights*, 3 NAT'L B.J. 1, 4 (1945) (noting that Reconstruction Era amendments "drastically altered the earlier balance of power between the states and the Federal government").

166. See, e.g., Lowenstein, *supra* note 18, at 825 (noting that under both section 2 and section 5 of VRA "race is a privileged criterion" and that "[t]he legislature and everyone who participates in the process must begin with race"); Lisa Erickson, Comment, *The Impact of the Supreme Court's Criticism of the Justice Department in Miller v. Johnson*, 65 Miss. L.J. 409, 421 (1995) (noting that section 5 requires covered jurisdictions to "consider race in implementing new voting practices in order to achieve equal opportunity in voting rights"); cf. *Ragin v. N.Y. Times*, 923 F.2d 995, 1000, 1001 (2d Cir. 1991) (discussing how Fair Housing Act's effect-based ban on racial preference in advertisements permissibly leads to race-conscious decisionmaking).

The Rehnquist Court generally has been unpersuaded by the contention that seemingly benignly-motivated, racially-informed decisionmaking is different in kind from that motivated by racial animus. See, e.g., *Miller*, 515 U.S. 900, 920-21 (1995); *Adarand*, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. 469, 493-94 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986).

167. See, e.g., Rubin, *supra* note 122, at 107 (describing Court's "implicit recognition that race-based districting to avoid retrogression may well be required to satisfy the effect prong of section 5 preclearance scrutiny").

168. See *infra* note 189.

does not inherently require that jurisdictions engage in race-conscious decisionmaking. Justice Scalia nevertheless reads section 5 to permit covered jurisdictions not only to consider race, but also to discriminate invidiously based on race, so long as they do not hold a retrogressive intent.¹⁶⁹

A commitment to colorblindness accordingly cannot explain the Court's assessment of federalism costs in *Lopez* and the *Bossier Parish* cases. Similarly, the sentiment that the Constitution bars the majority-minority district, as a distinct subset of racially informed decisionmaking, also fails as an explanation. The Rehnquist Court repeatedly has held that, at the behest of DOJ,¹⁷⁰ or by the apparent command of the Court's own precedent,¹⁷¹ jurisdictions have employed the majority-minority district far more broadly than Congress ever intended when it amended the VRA in 1982 and indeed beyond what the Constitution permits.¹⁷² Many of the justices appear convinced that the majority-minority district represents bad policy,¹⁷³ and some suspect, or indeed believe, that the intentional creation of a majority-minority district, under any circumstances, violates

169. See *Bossier Parish II*, 528 U.S. 320, 341 (2000).

170. See *infra* notes 195-97 and accompanying text.

171. See *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (noting that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity"); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (assuming, without deciding, that compliance with section 2 can be a compelling interest); *Shaw II*, 517 U.S. 899, 915 (1996) (same); *Miller*, 515 U.S. at 920-21; *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986); see also *Bush v. Vera*, 517 U.S. at 990-92 (O'Connor, J. concurring) (stating that compliance with § 2 is compelling interest).

172. See *Shaw II*, 517 U.S. at 915-18; *Bush v. Vera*, 517 U.S. at 977-83; *Miller*, 515 U.S. 900; *Shaw I*, 509 U.S. 630.

173. See, e.g., *Miller*, 515 U.S. at 927 ("[E]qual opportunity to gain public office regardless of race . . . is neither assured nor well served . . . by carving electorates into racial blocs."); *id.* at 911-12 ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" (quoting *Shaw I*, 509 U.S. at 647)); *Johnson*, 512 U.S. at 1020 (recognizing that majority-minority districts may "sometimes" be necessary "to ensure equal political and electoral opportunity," but emphasizing that such districts embody "the politics of second best," and should be avoided whenever diverse ethnic and racial coalitions are possible"); *Holder v. Hall*, 512 U.S. 874, 892, 903, 907 (1994) (Thomas, J., concurring) (arguing that majority-minority districts represent "racial 'balkanization' of the Nation," that they "segregat[e] the races into political homelands that amount[], in truth, to nothing short of a system of 'political apartheid,'" that they give "credence to the view that race defines political interest," and that "few devices could be better designed to exacerbate racial tensions that the consciously segregated districting system currently being constructed in the name of the Voting Rights Act" (quoting *Shaw I*, 509 U.S. at 647, 658)); see also Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 112, 121 (2000) (describing position that self-conscious creation of majority-minority districts "expresses a view of political identity inconsistent with democratic ideals . . . [and] might have the consequentialist effect of encouraging citizens and representatives increasingly to come to experience and define their political identities and interests in partial terms").

the Fourteenth and Fifteenth Amendments.¹⁷⁴ While the contours of any such constitutional injury have not been developed, the justices' evident preference for the influence district over the majority-minority district suggests they understand the latter to produce a harm distinct from that they associate with the race-consciousness that informs the creation of both types of districts.¹⁷⁵ That this harm may be of constitutional dimension finds circumstantial support in the fact that the only two Court decisions to uphold after argument a racially informed district against a *Shaw* challenge both involved districts that were not majority-minority.¹⁷⁶

But even if the Court were convinced that the majority-minority district gives rise to a distinct harm cognizable under the Reconstruction Amendments and thus that the need to curb the creation of such districts warrants encroachments into state sovereignty, such a conviction cannot explain its divergent assessment of federalism costs in *Lopez* and the *Bossier Parish* cases. To be sure, had the Court construed section 5 to block the Bossier Parish School Board from implementing its districting plan, either because the plan violated section 2 or because the Board acted with a discriminatory, albeit not retrogressive, purpose, the decision would have caused the Board to adopt either the NAACP's plan or some other plan containing one, and likely two, majority-minority districts.¹⁷⁷ And yet, the Court's construction of the statute in *Lopez*, while not directly requiring the County to create majority-minority districts, opened the door to such a mandate. Holding section 5 applicable to the county ordinances meant that the County needed to submit the changes for preclearance before it could implement them. Given that those ordinances replaced a district-

174. See, e.g., Lowenstein, *supra* note 18, at 801 (stating that "majority of the majority [in the *Shaw* cases] regards the intentional creation of [a majority-minority district] as presumptively unconstitutional" but that majority of Court does not).

175. See, e.g., *Johnson*, 512 U.S. at 1020 (expressing this preference); see also *Bossier Parish I*, 520 U.S. 471, 491 (1997) (Thomas, J., concurring) (arguing that increasing number of majority-minority districts "necessarily decreases the level of minority influence in surrounding districts, and to that extent 'dilutes' the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole"); *Holder*, 512 U.S. at 900-01 (Thomas, J., concurring) (discussing influence districts); *Voinovich v. Quilter*, 507 U.S. 146, 154-155 (1993) (noting potential differences between majority-minority and influence districts).

The harm, accordingly, stems not from race-consciousness itself, but from the perception that too much reliance on race in districting decisions thwarts the meaningful exercise of the vote. Cf. *Katz*, *supra* note 136, at 525-26 (suggesting that justices joining majority opinion in *Rice v. Cayetano*, 528 U.S. 495 (2000), disagree with those concurring about when reliance on race in districting becomes excessive).

176. See *Hunt v. Cromartie*, 121 S. Ct. 1452, 1457 (2001) (noting district's "heavily African-American (47%) voting population"); *Lawyer v. Dept. of Justice*, 521 U.S. 567, 571-73 (1997) (noting that district's population declined from 45% African-American in first plan to 36.2% in revised plan). But cf. *DeWitt v. Wilson*, 515 U.S. 1170 (1995) (summarily affirming constitutionality of majority-minority district challenged under *Shaw*).

177. See *Bossier Parish II*, 528 U.S. 320, 323 (2000).

based electoral regime with an at-large system, a denial of preclearance could easily have led to a district-based system containing at least some majority-minority districts.¹⁷⁸ Notwithstanding this possibility, *Lopez* adopts the broad construction of section 5 and accepts the federalism costs that result.

C. Institutional Overreaching at the Preclearance Hurdle

Lopez and the *Bossier Parish* cases construe different components of the preclearance statute. *Lopez* concerns a question of coverage, namely whether preclearance was required at all, while the *Bossier Parish* cases address the substantive standard for obtaining preclearance. The VRA vests a federal three-judge panel with jurisdiction to assess coverage questions, while it provides DOJ, along with the federal district for the District of Columbia, with authority to review the substance of preclearance submissions.¹⁷⁹

This division of authority may best explain the Court's differing assessment of federalism costs in the respective decisions. The Rehnquist Court has long been convinced that DOJ has abused its authority in administering the preclearance process and has intruded unjustifiably in state sovereign processes.¹⁸⁰ The *Bossier Parish* cases rely on retrogression with the unstated hope that the concept will curb the opportunities for what the Court sees as institutional overreaching by DOJ and the unjustified federalism costs it produces. *Lopez*, by contrast, did not directly implicate conduct by DOJ, addressing instead the coverage question. DOJ has no say on this question, and thus while the consequence of the decision is to render more conduct subject to preclearance and thus to DOJ review,¹⁸¹ the Court in *Lopez* had no opportunity to confront directly DOJ conduct and thus readily accepted the federalism costs that followed from its broad construction of section 5.

At issue in *Lopez* was whether the County was "seek[ing] to administer" a voting change within the meaning of the Act.¹⁸² The Rehnquist Court, with one major exception,¹⁸³ has construed section 5 broadly when

178. See *Lopez v. Monterey County*, 525 U.S. 266, 272-74 (1999).

179. See *supra* note 16.

180. See *infra* notes 195-97 and accompanying text.

181. See *infra* text following note 221.

182. *Lopez*, 525 U.S. at 278.

183. The major exception is *Presley v. Etowah County Commission*, which held section 5 inapplicable to laws altering the powers exercised by elected county commissioners, where the laws had been adopted after voting rights litigation resulted in structural changes to the respective commissions and the election of African-American commissioners. 502 U.S. 491, 496, 498 (1992); see *id.* at 522 n.23 (Stevens, J., dissenting); see also LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 179-80 (1994); Rubin, *supra* note 122, at 64 n.181. *Presley* holds that applying section 5 to such changes would work "an unconstrained expansion of its coverage," given that "innumerable" local enactments affect the power of elected officials. See *Presley*, 502 U.S. at 504. Distinguishing precedent, see *id.* at 506-07 (stating that *Allen v.*

confronted with coverage questions of this sort. These cases expand the types of decisions subject to preclearance and stiffen the penalties for a jurisdiction's failure to obtain it,¹⁸⁴ all the while paying scant attention to the federalism costs that result.¹⁸⁵ At the same time, however, the Court

State Board of Elections, 393 U.S. 544, 569-70 (1969), which held, *inter alia*, that decision to make previously elected position appointive must be precleared, was not controlling because voters in *Presley* retained ability to elect official, albeit one with lesser and different powers), and disregarding the Attorney General's contrary construction, *see id.* at 508-09, *Presley* states that localities must be able to allocate power among officials without federal interference; otherwise efficient and responsible governance would be sacrificed. *See id.* at 510.

City of Monroe v. United States likewise represents an exception to the Court's general tendency to construe section 5 broadly in coverage cases. *Monroe* held that a covered city may enforce a majority vote requirement despite the unprecleared status of the law instituting it, because the Attorney General had precleared a subsequent state law creating the majority vote requirement as a default rule. *See* 522 U.S. 34, 39 (1997) (per curiam). *City of Rome v. United States* reached the opposite conclusion where the municipality's charter originally called for a plurality vote and an unprecleared 1966 change sought to establish a majority vote requirement. *See* 446 U.S. 156, 169 n.6 (1980). *Monroe's* facts paralleled *Rome's* but for the fact that *Monroe's* charter was silent regarding the majority-plurality question, with the city adhering in practice to a plurality vote rule. The Court in *Monroe* held that the absence of an express charter provision meant the already-precleared state default rule governed, and thus that *Monroe* could enforce the majority vote rule without obtaining preclearance of its 1966 charter amendment. *See Monroe*, 522 U.S. at 39.

184. The Court has, for example, unanimously held that judicial elections held pursuant to unprecleared statutes should have been enjoined, *see Clark v. Roemer*, 500 U.S. 646, 652 (1991), and, prospectively, that elections may not be held under an unprecleared system, even when the result may be to leave the jurisdiction without an electoral system. *See Lopez v. Monterey County*, 519 U.S. 9, 22-23 (1996). The Court has unanimously held that a State's failure to obtain preclearance is not cured by the preclearance of later or related changes, *see Clark*, 500 U.S. at 655, or changes not enumerated in the submission. *See Foreman v. Dallas County*, 521 U.S. 979, 980 (1997) (per curiam). *But see Monroe*, 522 U.S. 34; *supra* note 183. The Rehnquist Court was unanimous in requiring preclearance for discretionary decisions made pursuant to a precleared statute, *see id.* at 980; as well as for a State's implementation of separate registration systems for federal and state elections after the enactment of the National Voter Registration Act. *See Young v. Fordice*, 520 U.S. 273, 290 (1997).

Over dissenting votes, moreover, the Court has held the section 5 preclearance requirement applicable to a decision to annex uninhabited land, *see City of Pleasant Grove v. United States*, 479 U.S. 462, 471 (1987); *cf. Bossier Parish II*, 528 U.S. 320, 339-40 (2000) (reading *Pleasant Grove* to understand discriminatory purpose under section 5 to be retrogressive purpose), to a party-initiated filing fee for participation in the state party's nominating convention, *see Morse v. Republican Party of Va.*, 517 U.S. 186, 201 (1995), and to voting-related measures mandated by a noncovered State, even when the jurisdiction exercises no discretion in giving effect to the change. *See Lopez*, 525 U.S. at 280.

185. *See, e.g., Lopez*, 519 U.S. at 24 (acknowledging that its construction of section 5 might well leave jurisdiction without electoral system, but stating simply that "[t]he County has not discharged its obligation" under statute, and that "the requirement of federal scrutiny should be satisfied without further delay"); *Clark*, 500 U.S. at 660 (instructing district court to fashion remedy that "implemented the mandate of § 5 in the most equitable and practicable way with least offense to its provisions," and expressing no explicit concern for any resulting disruption in state processes); *Pleasant Grove*, 479 U.S. at 468 (responding to dissent's charge that

has construed section 5 narrowly when assessing the substantive standard the statute requires covered jurisdictions to meet before implementing an electoral change. These decisions significantly lower the hurdle to obtaining preclearance,¹⁸⁶ and emphasize the federalism costs that a higher hurdle would generate.¹⁸⁷

underlying facts did not warrant application of section 5's "unusual intrusion . . . on state sovereignty" by affirming the Court's commitment to give the statute "the broadest possible scope'" (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

186. See *supra* notes 60-78 and accompanying text. On this point, *Miller v. Johnson*, 515 U.S. 900 (1995), is a precursor of sorts to *Bossier Parish II*. In *Miller*, DOJ maintained that Georgia's initial failure to create a plan with three majority-minority districts reflected a discriminatory purpose under section 5 and was therefore a ground for a denial of preclearance. See *Miller*, 515 U.S. at 923-24. The Court disagreed, holding that Georgia's ultimate adoption of a districting plan with three majority-black districts reflected not the dictates of section 5, but the DOJ's so-called "black-maximization" policy. See *id.* at 925; see also Lowenstein, *supra* note 18, at 813 (agreeing with Court that original state plan submitted to DOJ should have been precleared). And yet, as Professor Rubin has explained, Georgia's plan did not maximize the number of majority-minority districts and instead created a number roughly proportional to the state's African-American population. See Rubin, *supra* note 122, at 106 (noting that State could have created as many as five black-minority districts). While *Johnson v. DeGrandy*, 512 U.S. 997, 1014 (1994), rejected a section 2 challenge because the plan in dispute achieved rough proportionality—that is, it afforded minority voters the opportunity to exercise electoral control in a number of districts roughly proportional to their share of the population—and *Bossier Parish I* suggests that evidence of a section 2 violation is relevant to discriminatory purpose under section 5, see *Bossier Parish I*, 520 U.S. 471, 486-91 (1997), *Miller*, laying the groundwork for *Bossier Parish II*, accordingly suggests that a failure to achieve rough proportionality does not inform the inquiry into section 5's prohibited purpose. *Miller*, 515 U.S. at 924. Like both *Bossier Parish* decisions, *Miller* invoked "the federalism costs exacted by section 5 preclearance" as justification. See *id.* at 926-27.

Abrams v. Johnson, 521 U.S. 74 (1997), likewise construes section 5 narrowly. *Abrams* was not technically a section 5 case at all, given that it involved a court-devised redistricting plan which need not be precleared. See *Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam). Nevertheless, the Court has held that the preclearance standards should inform the judicial redistricting process. See *Abrams*, 521 U.S. at 95; *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). Hence the plaintiffs in *Abrams* charged that the district court's plan was retrogressive within the meaning of section 5. See *Abrams*, 521 U.S. at 95. The Court, however, found no violation of section 5 where a redistricting plan, like its predecessor, contained a single black-majority district. See *id.* at 97-98; see also *id.* at 96-97 (noting dispute about whether appropriate benchmark was last precleared plan that included single black-majority district or subsequent, unprecleared plan containing two such districts). The Court deemed this result nonretrogressive even though the increased size of the State's congressional delegation after the 1990 census meant that the black-majority district went from representing one-tenth of the State's delegation in the original plan to one-eleventh of the delegation under the new plan. See *id.* at 97; see also Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 749 (1998) (arguing that district court's plan left state's African-American population "quantitatively worse off").

187. See *Bossier Parish II*, 528 U.S. at 336 (noting federalism costs of broader construction); *Bossier Parish I*, 520 U.S. 471, 480 (1997) (same); *Abrams*, 521 U.S. at 96-97 (adopting narrow understanding of retrogression to preserve state discretion

This approach to section 5 suggests that the Court thinks the statute's federalism costs are incurred disproportionately at the preclearance hurdle. The reason, however, is not that the Court deems the burden imposed by the coverage designation to be inconsequential.¹⁸⁸ *Lopez* itself illustrates how intrusive a coverage designation can be. The decision delayed the uniform implementation of statewide policy and left California, a jurisdiction not subject to the preclearance requirement, confronting the prospect that such implementation would be permanently blocked.¹⁸⁹ Recognizing the intrusiveness of its holding, *Lopez* does not dispute Justice Thomas' statement in his dissent that "section [] [5's] interference with state sovereignty is quite drastic—covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government's approval."¹⁹⁰ Indeed, *Lopez* expressly acknowledges the "substantial 'federalism costs'" resulting from the VRA's "federal intrusion into sensitive areas of state and local

over districting and refusing to construe section 5 to require that "each time a State with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority"); *Miller*, 515 U.S. at 926-27 (noting "federalism costs exacted by section 5 preclearance").

188. See, e.g., *Bossier Parish II*, 528 U.S. at 335 (noting "extraordinary burden-shifting procedures of § 5"); *Blanding v. Dubose*, 454 U.S. 393, 402 (1982) (Rehnquist, J., concurring) (describing preclearance process as "effort to please a distant authority with veto power over the decisions of local officials," and stating that localities are "at the mercy of attorneys in the Justice Department"); *City of Rome v. United States*, 446 U.S. 156, 201 (1980) (Powell, J., dissenting) (stating that statute's encroachment on state sovereignty is "especially troubling because it destroys local control of the means of self-government, one of the central values of our polity"); *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (describing encroachment on state sovereignty as "significant and undeniable"); *South Carolina v. Katzenbach*, 383 U.S. 301, 358-60 (1966) (Black, J., concurring and dissenting) (arguing that section 5 "distorts our constitutional structure of government"); see also *supra* note 18.

189. In terms of intrusiveness, *Lopez* appears at least commensurate to the *Bossier Parish* cases, where the respective holdings offer covered jurisdictions a reprieve, but not necessarily an escape from liability under section 2 and the Constitution itself. See also *Abrams*, 521 U.S. at 96-98 (upholding narrow construction of section 5 that left State potentially subject to liability under section 2). To be sure, the burden of proof in these latter actions and the time and cost of litigation allow covered jurisdictions to implement and potentially retain measures that a broader construction of section 5's preclearance hurdle would immediately block. See, e.g., Alaina C. Beverly, *Lowering the Preclearance Hurdle*, *Reno v. Bossier Parish Sch. Bd.*, 5 MICH. J. RACE & L. 695 (2000) (making this point); cf. Charlotte Marx Harper, *A Promise for Litigation: Reno v. Bossier Parish School Board*, 52 BAYLOR L. REV. 647, 660 (2000) (arguing that after *Bossier Parish* cases, preclearance no longer establishes nondiscriminatory character of districting plan and thus that precleared plans are now "more vulnerable to challenge under section 2"). That flexibility is significant, but it remains flexible to violate federal law, be it section 2 of the VRA or the Fourteenth and Fifteenth Amendments. The Court's insistence on preserving state autonomy to do so is puzzling given its acceptance of the encroachments upheld by the coverage designation in *Lopez*.

190. *Lopez v. Monterey County*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting).

policymaking.”¹⁹¹ And while *Lopez* holds this intrusion to be warranted, the Court in *Presley v. Etowah County Commission*¹⁹² deemed coverage to be too invasive if applied to resolutions that altered the powers exercised by elected county officials.¹⁹³ “If federalism is to operate as a practical system of governance and not a mere poetic ideal,” Justice Kennedy wrote for the Court, “States must be allowed both predictability and efficiency in structuring their governments.”¹⁹⁴

But while the Court deems the federalism costs of coverage to be significant, it thinks that those costs are more likely to be justified than those incurred at the preclearance hurdle. The reason is the Rehnquist Court’s dissatisfaction with the conduct of DOJ in assessing preclearance submissions.¹⁹⁵ In the Court’s view, DOJ has spent more than a decade implementing a “black maximization” policy, under which it has required covered jurisdictions to draw the maximum number of black-majority districts possible, regardless of their contours or the communities of interest they encompass. In pursuit of this “policy,” DOJ is said to have denied preclearance based on unreasonable constructions of section 5,¹⁹⁶ im-

191. *Id.* at 282 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

192. 502 U.S. 491 (1992).

193. Etowah County’s “Common Fund Resolution” ended the County’s prior practice of allowing each county commissioner full authority over funds allocated to the commissioner’s road district. A second resolution, passed the same day, allowed the holdover members of the newly restructured Commission to retain control over district road shops and control jointly all repair and construction work. The two new commissioners were given separate responsibilities. See *Presley*, 502 U.S. at 496-97. Russell County’s “Unit System” abolished individual road districts and transferred authority over them to an appointed official, giving the elected officials different responsibilities. See *id.* at 499.

194. *Id.* at 510.

195. Criticism of this sort is not a new phenomenon. See, e.g., *Blanding v. Dubose*, 454 U.S. 393, 401-03 (1982) (Rehnquist, J., concurring) (noting “the unreasonably burdensome and unrealistic control which the Federal Government routinely exercises over state and local governments under the Voting Rights Act;” that “the record” portrays a particularly frustrating effort to please a distant authority with veto power over the decisions of local officials; “that localities are “at the mercy of attorneys in the Justice Department;” and that “[t]here seems to be something inherently unsatisfactory about a system which places such discretionary authority in the hands of a few unelected federal officials who are wholly detached from the realities of the locality and the preferences of the local electorate.”).

196. See, e.g., *Shaw II*, 517 U.S. 899, 913 (1996) (stating that “[i]t appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia”); *id.* (noting that Court “again reject[s] the Department’s expansive interpretation of § 5”); *Miller v. Johnson*, 515 U.S. 900, 921 (1995) (noting that “compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws”); *id.* at 924 (noting that “[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts”); *id.* at 925 (stating that “[i]n utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority beyond what Congress intended and we have upheld”).

properly skewed state districting processes, and forced localities to adopt unconstitutional majority-minority districts.¹⁹⁷

The *Bossier Parish* cases are informed by these views. To be sure, the opinions do not contain the biting criticism of DOJ that is prevalent in other decisions; no allegation was raised suggesting that the Board could not constitutionally draw the majority-minority districts sought by the NAACP,¹⁹⁸ and the Board itself subsequently acknowledged that the plan it adopted diluted the voting strength of the Parish's black population.¹⁹⁹ Even so, the *Bossier Parish* decisions reflect the skepticism with which the Court views DOJ conduct in this realm. Both decisions emphasize the fact that the Attorney General refused to preclear the Board's plan, even though she had already precleared the identical police jury plan, and that this refusal was based on "new information" indicating that majority-minority districts could be drawn.²⁰⁰ Both decisions pointedly refuse to defer to the Attorney General's construction of the statute, despite the

197. See, e.g., *Abrams v. Johnson*, 521 U.S. 74, 85-86 (1997) (noting that Georgia legislature had "yielded to the Justice Department's threats, [and] it also adopted the Justice Department's entirely race-focused approach to redistricting—the max-black policy"); *id.* at 86 (noting that "the State was subjected to steady Justice Department pressure to create the maximum number of majority-black districts"); *id.* at 87 (finding "strong support . . . for finding the second majority-black district . . . resulted in substantial part from the Justice Department's policy of creating the maximum number of majority-black districts"); *Miller*, 515 U.S. at 917 (noting evidence of State's "predominant, overriding desire" to create three black majority districts to satisfy Department of Justice); see also *Johnson v. Miller*, 922 F. Supp. 1556, 1560 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 ("Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by unconstitutional DOJ interference"); *id.* at 1563 (noting Department of Justice's "subversion of the redistricting process" since the 1990 census); Lowenstein, *supra* note 18, at 780, 804-05, 813 (noting that Department of Justice "forced" covered jurisdictions to create specific number of majority-minority districts and withheld preclearance unless they complied); O'Rourke, *supra* note 115, at 750 (arguing that "the legal foundation for the Justice Department's demand that North Carolina and Louisiana craft two majority black districts or that Georgia draw three black districts is, at best, dubious"); Abigail Thernstrom, *More Notes From a Political Thicket*, 44 EMORY L.J. 911, 930 (1995) (noting concern "over the Justice Department's coercive role in bending local jurisdiction to its will" and that Voting Rights Section "has long assumed freewheeling power to object to districting plans that did not seem 'right'—that is, racially 'fair'"). But see Rubin, *supra* note 122, at 105-06 (disputing Court's characterization of DOJ's conduct); Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 30-31 (1998) (suggesting that the DOJ conduct disputed in *Abrams v. Johnson* was appropriate); Thalia L. Downing Carroll, Casenote, *One Step Forward or Two Steps Back? Abrams v. Johnson and the Voting Rights Act of 1965*, 31 CREIGHTON L. REV. 917, 944-45 (1998) (same).

198. The dispute concerning the NAACP's plan concerned not whether it ran afoul of *Shaw v. Reno* and its progeny, but whether the Board's claim that the plan impermissibly split precincts and thus could not be implemented was pretextual. See *Bossier Parish II*, 528 U.S. 320, 355 (2000) (Souter, J., concurring in part and dissenting in part).

199. See *id.* at 343.

200. See *id.* at 324; *Bossier Parish I*, 520 U.S. 471, 475 (1997).

traditional deference accorded to that view.²⁰¹ *Bossier Parish I* additionally holds that a section 2 violation is not reason to deny preclearance based, in part, on the suggestion that DOJ would exploit the authority that would inhere in this “new reason for denying preclearance.”²⁰²

This skepticism shaped the Court’s holding that retrogression defines the full scope of a section 5 injury. *Bossier Parish I* refuses to construe section 5 to include a section 2 violation because doing so would “change the § 5 benchmark from a jurisdiction’s existing plan to a hypothetical, undiluted plan.”²⁰³ *Bossier Parish II*, likewise, holds that retrogression fully defines a section 5 violation because construing the statute more broadly to include intentional dilution or other sorts of nonretrogressive purposive discrimination would require a comparison not with the status quo, but with the hypothetical alternative “of an undiluted vote.”²⁰⁴ Both decisions suggest that measuring discrimination against such a hypothetical benchmark would intrude too deeply into state sovereignty,²⁰⁵ and both do so, at least in part, because the Court doubts the ability of DOJ to con-

201. See *supra* notes 94, 118 and 141 and accompanying text.

202. *Bossier Parish I*, 520 U.S. at 477 (noting that “we entertain little doubt that the Department of Justice or other litigants would ‘routinely’ attempt to avail themselves of this new reason for denying preclearance, so that recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2”); cf. *id.* at 502 (Stevens, J., dissenting in part and concurring in part) (stating that “[t]here is no basis for the Court’s speculation that litigants would so ‘routinely’ . . . employ a 10-year-old regulation” in this manner).

203. *Id.* at 480.

204. *Bossier Parish II*, 528 U.S. at 324.

205. See *id.* at 336; *Bossier Parish I*, 520 U.S. at 480. In this regard, the *Bossier Parish* cases may be distinguished from *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), and Justice Kennedy’s plurality opinion in *Holder v. Hall*, 512 U.S. 874 (1994), both of which turn on the Court’s conclusion that no benchmark, hypothetical or otherwise, could be discerned, as opposed to its concern that the entity charged with discerning the benchmark lacks the competence to do so. *Presley* repeatedly notes the absence of a workable standard for designating covered changes were the Court to hold section 5 applicable to changes in the substantive authority of elected officials. See *Presley*, 502 U.S. at 504 (noting that “[s]ome standard is necessary” and that “[a] faithful effort to implement the design of the statute must begin by drawing lines”); *id.* at 505 (stating that “appellants fail to give any workable standard to determine when preclearance is required”). So too, Justice Kennedy’s plurality opinion in *Holder v. Hall* holds section 2 inapplicable to a challenge brought by black voters against county governance by a single county commissioner. While the suit alleged that, if the County replaced the single member executive with a multi-person commission, the county’s black voters could constitute a majority in one of five single-member districts, and that other counties had adopted such five-member commissions, the plurality holds the absence of a meaningful benchmark against which to assess dilution to be dispositive. See *Holder*, 512 U.S. at 881 (noting that “[t]here is no principled reason why one size should be picked over another as the benchmark for comparison”). Justice Thomas’ concurrence, joined by Justice Scalia, would have held section 2 inapplicable to vote dilution altogether, based on the view that an objective measure for designating undiluted voting strength is absent. See *id.* at 892 (Thomas, J., concurring).

duct these measurements. While not unbounded,²⁰⁶ claims of racial vote dilution are notoriously complex for both plaintiffs and defendants litigating them and for the courts adjudicating them.²⁰⁷ The *Bossier Parish* cases suggest the Court's conviction that DOJ lacks the competence to judge when the totality of circumstances establish racial vote dilution. More precisely, the Court fears that if section 5 transcends retrogression to encompass vote dilution and other forms of nonretrogressive discrimination, DOJ will use this "new reason" to deny preclearance to "maximize" the creation of black-majority districts, and thereby to impose unwarranted federalism costs on covered jurisdictions.²⁰⁸

This fear was not allayed by the fact that the federal district court in the District of Columbia, an entity whose competence the Court has not questioned in this context, is also authorized to review preclearance submissions.²⁰⁹ DOJ processes the vast majority of preclearance requests submitted,²¹⁰ and covered jurisdictions often lack the time and resources to seek review in the district court.²¹¹ The *Bossier Parish* decisions seek to restrict the discretion exercised by DOJ in this process, but the holdings necessarily limit the discretion exercised by the federal district court as well. The VRA requires that DOJ and the district court administer the same standard, such that the Court could not curb the discretion of one without restricting that of the other as well.

206. See *supra* note 58; see also S. REP. NO. 97-417, at 28-29 (listing factors informing totality of circumstances inquiry under section 2); Gerken, *supra* note 159, at 1171-76.

207. See, e.g., *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979) ("Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts."), *vacated and remanded* in light of amended section 2, 460 U.S. 1065 (1983); James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 971 (1997) (noting that resolving claims "about the actual ability of individuals and groups to use the political process to protect themselves and their interests . . . [can] be extremely complex and factually messy"); Samuel Issacharoff & Richard H. Pildes, *Not By "Election" Alone*, 32 LOY. L.A. L. REV. 1173, 1182 (1999) (noting that minority vote dilution cases "led the courts into complex fields of effective representation, fair distribution of governmental services, and finally, equitable allocation of governmental power").

208. But see *The Supreme Court, 1996 Term, supra* note 81, at 428 (arguing that *Bossier Parish I* "rested almost entirely on grounds other than federalism").

209. See *supra* note 16.

210. See Drew S. Days III, *Section 5 and the Role of the Justice Department, in CON- TROVERSIES IN MINORITY VOTING* 52, 53 n.2 (Bernard Grofman & Chandler Davidson eds., 1992) (citing Justice Department statistics); Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 191 (1983).

211. See Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 79-81 (1995) (discussing incentives for covered jurisdictions to seek preclearance from Attorney General instead of district court); Lowenstein, *supra* note 18, at 814 (stating that covered jurisdictions prefer to seek preclearance from Attorney General than from district court because DOJ generally acts more quickly and will negotiate with jurisdictions).

The Court accordingly hoped that by relying on retrogression to define the preclearance standard in the *Bossier Parish* cases it would reduce what it sees as unwarranted federalism costs produced by DOJ overreaching.²¹² The statute's intrusion into state sovereignty can, after all, only be justified when the various federal actors that oversee the Act operate lawfully within their designated roles.

Lopez might likewise be understood to curb the authority of a federal actor implementing the preclearance process. By holding nondiscretionary changes to be covered by section 5, *Lopez* narrows the inquiry pursued by the three-judge panel charged with assessing coverage questions. Had the Court held otherwise, coverage panels would thereafter confront questions whether a particular change involved a discretionary judgment, a complex question, as *Lopez* itself demonstrates, given the intricate intersections between local and state authority.²¹³ The holding in *Lopez*, consequently, left to coverage panels the relatively circumscribed task of assessing whether a particular change was one with respect to voting, regardless of whether it involved discretionary judgments.

The previous failure, moreover, of the three-judge panel to adhere to its designated task had already provoked criticism by the Court in its first decision in *Lopez*. Recall that after the County was unable to establish that its at-large system satisfied section 5 in proceedings before the federal district court in the District of Columbia, it returned to the three-judge panel in the Northern District of California, which oversaw efforts by the parties to develop a new districting plan, and subsequently ordered that elections be held under the original, unprecleared plan.²¹⁴ Reversing that ruling, the Court's first *Lopez* decision recognized that its holding threatened to leave the County without a judicial election system.²¹⁵ The Court placed blame for this occurrence not only on the County, for failing to seek and

212. The Court's affinity for retrogression reflects its view that the measure is objective, clear and easy to administer. See, e.g., *Bush v. Vera*, 517 U.S. 952, 983 (1996) (noting that "[n]onretrogression . . . merely mandates that a minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions"); *Holder v. Hall*, 512 U.S. 874, 883-84 (1994) (noting that "[t]here is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur"); *Shaw I*, 509 U.S. 630, 655 (1993) (stating that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). The standard, however, is more malleable than the Court has acknowledged. See, e.g., *Abrams v. Johnson*, 521 U.S. 74, 97 (1997) (holding nonretrogressive plan that reduces black-majority district from representing one-tenth of the State's congressional delegation to representing one-eleventh); Karlan, *supra* note 186, at 745-47 (arguing that *Abrams'* treatment of retrogression makes no sense); see also *supra* note 186.

213. See *Lopez v. Monterey County*, 525 U.S. 266, 271-74 (1999). See *supra* notes 22-24 and accompanying text.

214. See *supra* note 28 and accompanying text.

215. See *supra* note 35 and accompanying text.

obtain preclearance of a viable plan, but also on the three-judge panel.²¹⁶ The Court explained that the panel, concerned that the election plans proposed by the County and the resident voters conflicted “unnecessarily” with state law, repeatedly instructed the parties to submit to it an election plan that satisfied both section 5 and state law, and required them to do so before the County submitted any plan to federal officials. “In so doing,” the Court explained, “[the panel] interposed itself into the § 5 approval process in a way that the statute does not contemplate.”²¹⁷ The Court emphasized the “constrain[ed] . . . role”²¹⁸ of the three-judge coverage panel within the preclearance process, and that its goal is “to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible.”²¹⁹

The Court’s embrace of the consequent federalism costs in *Lopez* might accordingly be reconciled with its rejection of them in the *Bossier Parish* cases, given that all three decisions seek to restrict the discretion exercised by a federal actor implementing the preclearance process, and all three do so based on the perception that these actors have been operating in excess of their authority. Even so, the Court’s displeasure with the three-judge panel in *Lopez* pales in comparison to the profound disapproval it has expressed regarding what it sees as chronic and even intentional misconduct by DOJ.²²⁰ The Court’s mistrust of DOJ could not help but inform its analysis in the *Bossier Parish* cases, while the perceived misconduct by the three-judge panel in *Lopez* seems a tangential concern and thus an implausible explanation for the breadth of the holding.

Instead, *Lopez* may rest at bottom on what was missing as much as on what was present. More specifically, the case, in contrast to the *Bossier Parish* decisions, did not directly implicate any conduct by DOJ, addressing instead the coverage question over which DOJ has no authority.²²¹ *Lopez* required the Court neither to review a specific decision made by DOJ nor to confront the prospect that DOJ would implement the construction of the statute adopted. To be sure, the consequence of the decision is to render more conduct subject to preclearance and accordingly more conduct subject to review by DOJ, an odd result given the Court’s mistrust of DOJ. Still, *Lopez* postdates *Bossier Parish I*, and thus *Lopez*’s coverage designation meant that the County would face a preclearance hurdle already adjusted to mitigate overreaching by DOJ.²²² In *Lopez*, consequently, the Court was able to construe section 5 broadly without directly confronting

216. *Lopez v. Monterey County*, 519 U.S. 9, 24 (1996) (noting County’s failure to obtain preclearance and that “[t]he District Court itself holds some responsibility for protracting this litigation”).

217. *Id.*

218. *Id.* at 23.

219. *Id.* at 24.

220. See *supra* notes 195-97 and accompanying text.

221. See *supra* note 16.

222. See *supra* note 202 and accompanying text.

concerns about DOJ abuse, and thereby to embrace the resulting federalism costs as a justified consequence of implementing congressional intent in the VRA.

III. CONCLUSION

Read separately, *Lopez* and the *Bossier Parish* cases set forth starkly different portraits of the VRA's preclearance process. *Lopez* broadly affirms federal power to intrude deeply into sovereign state processes to vindicate the voting rights of racial minorities. Congress is given wide latitude to do so and deference is accorded both to its understanding of how best to vindicate those rights and to the Attorney General, to whom Congress delegated enforcement authority. The *Bossier Parish* cases present a distinct understanding of the preclearance process. The statute's intrusion into state sovereignty is viewed with skepticism and broad constructions of the statute are deemed to be of suspect constitutionality. The decisions suggest latent hostility to the creation of majority-minority districts and the conception of minority rights they embody, and more overt distrust of DOJ conduct in reviewing preclearance submissions.

Read together, the three decisions set forth a more complex portrait of the Court's understanding of the preclearance process. While seemingly irreconcilable, the decisions may be read to establish the Court's underlying commitment to preclearance as a legitimate federal structure enforcing the Fourteenth and Fifteenth Amendments, regardless of the constraints the Court has recognized on Congress' ability to enforce those amendments in other contexts.²²³ The legitimacy of the federal structure, however, does not diminish the Court's concern that those exercising power within that structure have abused their authority and consequently intruded unjustifiably into state sovereignty. The Court accordingly has sought to curb federal power at the points where it has identified institutional overreaching.

To the extent that DOJ or any federal agency acts in excess of its delegated authority, the Court indeed should restrain the abuse. The *Bossier Parish* cases, however, do far more. By imposing narrow and strained constructions on the statute, the decisions do not simply rein in agency excesses but prohibit the agency from exercising the discretion Congress delegated to it. Just as courts tend to accord too little deference to agency judgments touching on constitutional questions,²²⁴ the Court's desire here to curb not only DOJ overreaching, but also opportunities for future abuse undermines the federal regime and contravenes congressional design. Accordingly, the Court's effort to curb Executive Branch overreaching has produced a different type of institutional overreaching, this time by the Court itself.

223. See *supra* note 6.

224. See, e.g., Wald, *supra* note 93, at 245-46.