Notes

THE CASE FOR REAUTHORIZING SECTION FIVE OF THE VOTING RIGHTS ACT

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INTRODUCTION

The key provision[1] of the most effective civil rights law ever enacted[2]—Section 5 of the Voting Rights Act (VRA or the Act)—will expire in 2007 if it is not reauthorized.[3] Section 5, also known as preclearance, requires that jurisdictions fitting a statutorily-defined profile submit all changes "with respect to voting" to the Attorney General or to the United States District Court for the District of Columbia.[4] To satisfy preclearance, these jurisdictions must establish that the prospective voting procedure "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." Moreover, the proposed change cannot have a deleterious impact on the voting rights of minority language

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1. *Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. of the Judiciary*, 94th Cong. 1 (1975) (statement of Arthur Flemming) ("Section 5 of the Voting Rights Act, the provision requiring preclearance of changes in electoral laws . . . has become the *centerpiece of the act*.") (emphasis added).

2. *See* Hugh Davis Graham, *Voting Rights and the American Regulatory State*, *in* CONTROVERSIES IN MINORITY VOTING 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (characterizing the Voting Rights Act as "one of the most effective instruments of social legislation in the modern era of American reform"); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. (forthcoming 2006) (manuscript at 1–2, on file with the *Duke Law Journal* (describing Section 5 as "the most powerful weapon in the civil rights arsenal")).

3. Section 5 of the Voting Rights Act of 1965 will expire in 2007 if it is not reauthorized by Congress. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1974e (2000)).

4. 42 U.S.C. § 1973c (2000).

groups.[5] Preclearance can be secured by requesting either a declaratory judgment in the United States District Court for the District of Columbia or administrative preclearance from the Department of Justice (DOJ).[6] As of 2006, the majority of jurisdictions covered by Section 5 are in the Deep South.[7]

The primary objective of preclearance is to prevent voting abuses in jurisdictions that had a history of discrimination when the VRA was enacted. Section 5 was originally enacted for a five-year term. It was then reauthorized in 1970 for five additional years,[8] in 1975 for a term of seven years,[9] and again in 1982 for a twenty-five-year term.[10] Though Section 5 was originally intended as a temporary measure, successive Congresses perceived reauthorization to be necessary to prevent recalcitrant jurisdictions from interfering with the minority franchise.

Yet previous unanimity among voting rights scholars[11] has given way to heated disagreement over whether Section 5 should be reauthorized. Some scholars believe that preclearance may no longer be necessary to protect the minority franchise. Professor Issacharoff, for instance, contends that Section 5 may no longer be a reasonable remedy[12] because minority groups are no longer excluded from meaningful participation in covered jurisdictions.[13] Moreover, the

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5. *Id.*

6. *Id.*

7. Sixteen states or parts thereof are currently covered by Section 5. 28 C.F.R. pt. 51 app. at 98–99 (2005).

8. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 3, §4(a), 84 Stat. 314, 315.

9. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, sec. 101, §4(a), 89 Stat. 400, 400.

10. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2(b)(6)), §4(a), 96 Stat. 131, 133.

11. *See* Gerken, *supra* note 2 (manuscript at 2) ("After a long period of relative unanimity, the academics who study the Act and the lawyers who enforce it are at an impasse, and they are split for reasons that have little to do with whose ox is gored.").

12. *See generally* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

13. *See generally id.* Professor Issacharoff is not alone in thinking that the political influence of African Americans in covered jurisdictions has changed dramatically since the Voting Rights Act was initially passed. *See* Richard H. Pildes, *Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1529 (2002) (arguing that "while voting continues to show some degree of racial polarization, the degree of polarization nonetheless permits a meaningful level of white–black coalitional politics, and that crossover voting enables black candidates in many jurisdictions to be elected even in nonmajority–minority districts").

argument for reauthorization is subject to challenge on federalist principles: without a close fit between Section 5 and the obstacles that minority groups face in exercising their right to the franchise, preclearance violates the principle that state and local enactments are presumed lawful "unless and until a federal court rules otherwise."[14] As Issacharoff colorfully puts it, "Section 5 placed political life in [covered] jurisdictions under a form of *administrative receivership* and treated political activity within those areas as subject to a rebuttable presumption that the continued exclusion of blacks from meaningful political opportunity [is] the dominant feature of all political decision-making in those jurisdictions."[15] In Issacharoff's view, preclearance unjustifiably relieves covered jurisdictions of political control they would otherwise enjoy and also unfairly attributes to those jurisdictions a disposition to disenfranchise minority voters.

Some scholars concede that preclearance in its current guise is imperfect. Professor Heather Gerken argues that despite the intrusive character of the preclearance process, Section 5 should be reauthorized. In her view, preclearance should be reauthorized on an opt-in basis.[16] The jurisdictions that are currently covered under Section 5 would remain "covered," but in a very specific sense: a change to a voting procedure or practice would only require preclearance in a covered jurisdiction in cases where local public interest and civil rights groups *deliberately invoke* Section 5 in response to a perceived violation of minority voting rights. Preclearance, in other words, would be invoked whenever these groups felt a particular procedure or practice unlawfully diluted minority voting strength or otherwise interfered with the minority

14. Mark A. Posner, The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do? 3 (Jan. 2006), http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf (last visited July 9, 2006). It is important to note that Professor Issacharoff never characterizes his own view in precisely this way. However, it is clear that in his view special solicitude should only be granted when specific rights are genuinely imperiled. *See* Issacharoff, *supra* note 12, at 1730 (arguing that the *Carolene Products* footnote clearly implies that "special solicitude [to minority groups] is not simply the product of discreteness, but of the inability to seek redress through the normal operations of the political system").

15. Issacharoff, *supra* note 12, at 1710 (emphasis added).

16. *See* Heather Gerken, *Race (Optional)*, THE NEW REPUBLIC, Sept. 26, 2005, at 11, 12 (arguing that instead of reauthorizing Section 5, an opt-in strategy should be adopted that "allows community and legislative leaders to negotiate the best deal for racial minorities" but which also gives minorities the right "to demand that the Act's traditional constraints" be applied when traditional forms of political bargaining break down), *available at* http://www.law.harvard.edu/news/2005/09/19_gerken.php.

franchise. Under this opt-in variant of Section 5, minority voters would retain the substantive protections of the traditional preclearance mechanism; and covered jurisdictions would enjoy greater autonomy over local voting practices and procedures. Indulging in a bit of playful rhetoric to drive home this point, Gerken insists that an opt-in variant of preclearance would ensure that "[p]olitical deals struck by racial minorities would be enforced" because "the VRA would hang like the sword of Damocles over every negotiation."[17]

There are three easily identifiable positions one might endorse in the debate over reauthorization. First, on the basis of political gains made since the VRA was originally passed, and in light of the significant degree of political interference wrought on covered jurisdictions, one could conclude that reauthorization would be a mistake. This is the position that Issacharoff advocates. Second, one might find an opt-in variant of Section 5 preferable, because in theory an opt-in regime would provide minority groups with similar or identical levels of protection from voting abuses without subjecting "well-behaved" jurisdictions to nettlesome and unnecessary administrative review. Essentially, this is Professor Gerken's solution of choice. Finally, it is possible that, notwithstanding the gains in political influence that minority groups have made since the Act was passed, and despite the undeniable costs of mandatory preclearance, Section 5 still provides the most reliable legislative method for protecting the integrity of minority voting rights. Call this the traditionalist position.[18]

The key question this Note addresses is whether Section 5 should be reauthorized, and, if so, what form a reauthorized Section 5 should take. This Note does not address the numerous constitutional concerns posed by a reauthorized Section 5.[19] Rather, this Note argues

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17. *Id.*

18. Professor Karlan of the Stanford Law School is a traditionalist, for she believes that Section 5 has afforded "minority voters and their representatives an invaluable bargaining chip" in the struggle to obtain a robust, effective political voice. Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 36 (2004).

19. Recent Supreme Court jurisprudence suggests that if the current (mandatory) version of Section 5 were reauthorized, it could be vulnerable to constitutional challenge. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that Congress has the authority to pass only remedial statutes when attempting to provide remedies for intentional state action. *Id.* at 532. Soon after *City of Boerne*, the Court held that the constitutionality of such remedial statutes turns in large part on whether adequate evidence of intentional state conduct exists to justify congressional intervention. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374

that despite the fact that minorities face fewer and less severe obstacles to exercising the franchise than they did when Section 5 was originally enacted, there is not enough information about voting dynamics in covered jurisdictions to adopt an opt-in variant of preclearance.

Part I of this Note explores Professor Issacharoff's position. Unlike other recent attempts[20] to disarm Issacharoff's carefully crafted attack on renewal, this Note argues that when the considerations that most affect the desirability of Section 5's renewal are disaggregated and addressed independently, the notion that preclearance is undesirable or unnecessary to protect the minority franchise becomes significantly less plausible. Part II sketches and evaluates Professor Gerken's argument for adopting an opt-in variant of Section 5. The theoretical argument for adopting a modified variant of Section 5 is appealing in a number of ways, not the least of which is its promise to reduce unnecessary preclearance filings while at the same time shifting political bargaining power to civil rights groups. Yet the long-term success of an opt-in preclearance mechanism would critically depend upon the dedication and competence of local public interest and civil rights groups serving minority voters. Part III argues that although the opt-in approach is appealing in a number of ways, Congress should reauthorize Section 5 for a period of time that would allow careful study and consideration of the probable success of enacting an opt-in approach to preclearance.

(2000). It is unclear that *City of Boerne* and *Garrett* would be applicable were a constitutional challenge mounted to a renewed Section 5. The reason the evidentiary requirements for remedial legislation might not apply is that under *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), broad discretion has once again been granted to congressional efforts to craft remedial statutes. The *Hibbs* Court may have made it easier to make the case for preclearance by (1) suggesting that Congress has a reduced evidentiary burden when the legitimacy of remedial schemes for gender and racial discrimination is called into question and by (2) emphasizing that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." 538 U.S. at 727–28. In addition to considering the evidence of state actors, as is required under *Garrett*, the *Lane* Court considered constitutional violations by city and county officials. 541 U.S. at 527 n.16.

20. *See* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 605–11 (2005) (arguing that in light of Section 5's role in ensuring that *local* voting practices do not erode minority voting rights, Professor Issacharoff's complaint that Section 5 is no longer needed to ensure the fairness of *congressional* and *statewide* redistricting efforts does not provide a reason to discard Section 5).

I. THE CASE AGAINST RENEWAL

The theory of preclearance is in one sense simple: the franchise is a critically important right that must be granted to all individuals without regard to racial or ethnic extraction. Prior to the Voting Rights Act, minority voters in many Southern jurisdictions were not able to exercise this right.[21] Authorities in many parts of the South had even resorted to physical violence and intimidation tactics to prevent African Americans from effectively exercising the right to vote.[22] The franchise—a right explicitly granted to African Americans in the Fifteenth Amendment to the Constitution[23]—was systematically ignored by Southern jurisdictions. To combat the attempts of these jurisdictions to nullify a right explicitly granted in the Constitution, Congress decided to pass a statute that would prevent abuses before they occurred. As the Court observed in *South Carolina v. Katzenbach*,[24] preclearance was thought necessary to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."[25]

The simplicity of the theory of preclearance stands in great contrast to the difficulties inherent in deciding whether Section 5 is still necessary. Section A contrasts the preclearance process with Section 2 of the VRA. Section B examines three considerations that Issacharoff offers as compelling evidence for the claim that Section 5 has rendered itself obsolete.

A. Understanding Preclearance

To fully appreciate Professor Issacharoff's argument against reauthorization, it is crucial to understand the preclearance process. To promote descriptive representation, Section 5 requires

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21. *See generally* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7 (Bernard Groffman & Chandler Davidson eds., 1992).

22. The Attorney General at the time pointed out that in enacting the VRA the federal government intended to destroy the obstacles in the way of those African Americans "who [wanted] to take the revolutionary step of registering to vote." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States).

23. *See* 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.").

24. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

25. *Id.* at 328.

jurisdictions to submit a wide range of proposed changes to the Department of Justice for pre-implementation approval.[26] The statutory language is exceedingly broad: covered jurisdictions must preclear any new "standard, practice or procedure with respect to voting."[27] The Supreme Court significantly revised the general standard for preclearance with its 2003 decision in *Georgia v. Ashcroft*.[28] Frustrated by having its State Senate plan rejected three times by the DOJ during the 1990s redistricting cycle, after the 2000 census Georgia's legislature decided to file for judicial preclearance for its statewide legislative redistricting plan.[29] Under this plan, the number of majority–minority districts would remain constant, but this would be accomplished by "unpacking" the Senate's majority-black districts and distributing the black voters across a wider range of districts.[30] This plan increased the number of districts with majority black populations by one and created four additional districts in which blacks comprised between 20 and 50 percent of the voting age population.[31] Although this redistricting plan passed with the votes of ten of eleven black senators, the Voting Section argued that unpacking super-majority districts violated black voters' right to elect a candidate of their choice.[32] The Court rejected the Voting Section's contention, holding that the creation of coalition districts under these circumstances might very well enhance—not undermine—minorities' ability to elect their preferred candidates.[33] Under the pre-*Ashcroft* standard, changes in voting practices and procedures could only be precleared if it is clear that they could not "lead to a retrogression in

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26. Descriptive representation applies when the party representing a group or interest has a number of formal or identifiable characteristics (such as gender or race) in common with that group or interest. Thus, the degree to which descriptive representation obtains to a given jurisdiction or county is something that rudimentary arithmetic can reveal. Substantive representation is more elusive, for it pertains just in case the substantive police preferences of party representing a group or interest coincide with the preferences of the represented group or interest. *See generally* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–91, 112–43 (1972) (arguing that although race can in some instances track the policy preferences and political orientation of a social or racial group, race is not always, or even usually, an accurate proxy and therefore substantive representation is not necessarily ensured by descriptive representation).

27. 42 U.S.C. § 1973c (2000).

28. Georgia v. Ashcroft, 539 U.S. 461 (2003).

29. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 31 (D.D.C. 2002).

30. *Ashcroft*, 539 U.S. at 470–71.

31. *Id.*

32. *Id.* at 472.

33. *Id.* at 489–91.

the position of racial minorities with respect to their effective exercise of the electoral franchise."[34] But *Ashcroft* effectively supplanted this rule with an entirely new standard, one requiring Section 5 reviews to include an inquiry into "all the relevant circumstances"[35] that might impact minority groups' ability to exercise the right to vote. Thus, *Ashcroft* represents a stunning reversal of Section 5 jurisprudence.

Unlike Section 2 of the VRA, Section 5 is an administrative mechanism that places the burden upon covered jurisdictions to prove, before it is implemented, that a particular change is not inimical to minority voting interests. Section 2 is a nationwide prohibition on the implementation of any practice or procedure that diminishes the ability of citizens to elect their chosen representatives on the basis of race, color, or membership in a minority language group.[36] Section 2 suits are difficult for two reasons. First, plaintiffs must meet three prerequisites commonly referred to as the "*Gingles* preconditions."[37] These conditions, established in *Thornburg v. Gingles*,[38] define vote dilution primarily in terms of the current degree of racially polarized voting.[39] Second, after the *Gingles* preconditions have been met, Section 2 plaintiffs must further establish that, given the particularities of a jurisdiction's politics,[40] the avenues of political

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

35. *Ashcroft*, 539 U.S. at 479.

36. *See* 42 U.S.C. § 1973(b) (2000) (indicating that a violation of this standard has occurred when the totality of circumstances demonstrate that "political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)" because "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

37. Megann E. Donahue, Note, *"The Reports of My Death Are Greatly Exaggerated": Administering Section 5 of the Voting Rights Act After* Georgia v. Ashcroft, 104 COLUM. L. REV. 1651, 1654 n.17 (2004). These conditions are as follows: (1) the minority voting-age population must be large enough to compose a majority in at least one district; (2) the minority voting-age population is politically cohesive; and (3) the white majority in that same district votes with a degree of cohesion that allows it to defeat the minority group's preferred candidate in most circumstances. *Id.*

38. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

39. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1834–35 (1992) (noting that in *Thornberg*, "the Court adopted a simplified test to determine whether white voters as a group had frustrated the electoral aspirations of a cohesive set of minority voters and, if so, whether an alteration of electoral practices could relieve the diminution of minority electoral opportunity").

40. *See* Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994) (noting that "if *Gingles* so clearly identified the three [factors] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination" because "the ultimate conclusions about

participation are "not equally open to . . . a class of citizens . . . in that its members have less opportunity than other members of the electorate . . . to elect representatives of their choice."[41] There is an additional feature of Section 2 that is worth noting: it does not require plaintiffs "to show that the state either enacted or maintained the challenged practice because of its discriminatory impact on minority voting strength."[42] Notwithstanding the fact that Section 2 plaintiffs do not need to establish state action, the practical implication of the *Gingles* preconditions, as well as the totality of the circumstances standard, is that Section 2 places a substantial burden on plaintiffs. Section 5 review is much different. Rather than shifting the burdens of litigation to a complaining party, preclearance requires that covered jurisdictions demonstrate *ex ante* that they are in compliance with the VRA.[43]

B. Two Arguments Against Renewal

Professor Issacharoff develops two arguments against reauthorizing Section 5. The first focuses on four historical and legal "preconditions" that coalesced to make preclearance a reasonable remedy for voting rights abuses. These preconditions include: (1) the urgency and extent of the harm; (2) the administrative simplicity of preclearance; (3) the lack of an effective form of political redress for violations of the franchise in the Jim Crow South; and (4) the absence of substantial partisan political impact from the preclearance process.[44] Accordingly, these four preconditions make possible Section 5's effectiveness and attribute to preclearance the legitimacy it would otherwise lack.[45]

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equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts").

41. 42 U.S.C. § 1973(b) (2000).

42. Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 732 (1998).

43. *See supra* notes 4–10 and accompanying text. Section 5 is also advantageous in that it has been interpreted by the Supreme Court to proscribe changes not only in access to voting influence per se, but also to other forms of state regulation that have an impact on the effectiveness of the franchise: "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations" because the Act recognizes "that voting includes 'all action necessary to make a vote effective.'" Allen v. State Bd. of Elections, 393 U.S. 544, 565–66 (quoting 42 U.S.C. § 1973*l*(c)(1)).

44. Issacharoff, *supra* note 12, at 1710.

45. *See id.* at 1712 ("[These] four preconditions allowed this extraordinary intervention to work effectively and to retain the clear sense of purpose that permitted it to overcome the

Each of these four preconditions can be challenged. With respect to the first precondition, the urgency and extent of the harm, one could object that it is the responsibility of Congress to decide whether the political leverage that minorities derive from Section 5 is important enough to justify reauthorization. This is true despite the fact that minorities are in a much better position to effect political change today than they were when the VRA was initially passed.

The second precondition, the administrative simplicity of the preclearance mechanism, can also be challenged. Drawing on *Morris v. Gressette*[46] and *Beer v. United States*,[47] Professor Issacharoff contends that in its golden years, Section 5 was applied to "questions that could be addressed through relatively mechanical assessments of voting practices."[48] Eager to entertain the reader while laying bare an important aspect of voting rights history, Issacharoff argues that preclearance used to require little more than "sixth-grade arithmetic."[49] There is a large measure of truth in this idealization of the ease with which pre-*Ashcroft* preclearance was administered. *Ashcroft* does indeed abandon the ability-to-elect standard *Beer* inaugurated.[50] And in so doing, *Ashcroft* invites courts (1) to determine minority groups' voting power by considering the combined strength of minority votes and "like-minded white 'crossover' votes"[51] and (2) to consider the "'extent of the opportunities minority voters enjoy to participate in the political processes'"[52] in evaluating redistricting plans under Section 5. But though *Ashcroft* does extend this invitation to the courts, there is less cause for concern than one might initially assume. Although the notion of "effective participation in the political process" is somewhat vague, perhaps leading to more partisan wrangling,[53] there is evidence that the DOJ is actually already equipped to handle the nuanced,

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normal presumptions of state autonomy and respect for federalism.").

46. Morris v. Gressette, 432 U.S. 491 (1977).

47. Beer v. United States, 425 U.S. 130 (1976).

48. Issacharoff, *supra* note 12, at 1713.

49. *Id.*

50. Donahue, *supra* note 37, at 1662. The ability-to-elect standard was based on the notion that a minority group has the right to elect a candidate of choice that will represent its interests effectively throughout the political process.

51. *Id.*

52. Georgia v. Ashcroft, 539 U.S. 461, 485 (2003) (quoting Johnson v. De Grandy, 512 U.S. 997 (1994)).

53. *See* Donahue, *supra* note 37, at 1653 (conceding that "*Ashcroft*'s call to examine substantive representation may cause section 5 review to become increasingly partisan").

fact-specific analyses required under the new, post-*Ashcroft* Section 5.[54] Insofar as the DOJ is able to conduct meaningful inquiries into the circumstances that affect minority voting strength, Professor Issacharoff's argument in this connection is not convincing. After all, if the DOJ is capable of administering Section 5 in a way that is consistent with *Ashcroft*, then unless one demonstrates that administrative simplicity is so critically important,[55] ceteris paribus *Ashcroft's* nuanced standard appears preferable to its blunter predecessor.

The third precondition is the narrowness of the pre-*Ashcroft* scope of preclearance. On this view, cases like *Presley v. Etowah County Commission*[56] "limited the sweep of [S]ection 5 to narrowly cover voting practices and to remove questions about the efficacy of governance from the ambit of preclearance."[57] As with the second precondition, there is nothing in the VRA, or in constitutional jurisprudence more generally, that provides a principled reason for thinking that Section 5 must apply to a narrow range of electoral phenomena. In fairness, it should be noted that Professor Issacharoff's appeal to this principle does not sound in formal constitutional jurisprudence, but rather in federalism. But even so, a

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54. *See id.* at 1676 ("For purposes of evaluating the capacity of the Department [of Justice] to conduct the review required by Ashcroft, however, the DOJ's past practices show a particularized, case-by-case, and jurisdiction-specific review is not only possible but also already routinely conducted."). Not only is the DOJ well equipped to conduct fact-specific, contextual evaluations of minority voting strength, it should be noted that nowhere in the VRA is there an indication that the aims of preclearance can only be achieved through the deployment of mechanical, easily-administrable tests, helpful as such metrics may be to analysts at the Voting Section.

55. Professor Issacharoff has simply not demonstrated that this is true. It could be argued that clear, mechanical guidelines are particularly important in the context of voting rights because they make it more difficult to dilute minority voting strength.

Professor Issacharoff does not directly make this argument or even hint at it. Professor Karlan, however, offers an argument very similar to this. Karlan contends that *Ashcroft's* plastic standard not only fails to provide a reliable way to appropriately weigh the actual effects of diluted minority voting power, it also fails to provide courts with a framework for evaluating the real empirical effects of a redistricting plan on minority voting strength. As Professor Karlan colorfully puts this point, *Ashcroft* supplants serious inquiry about the effects of redistricting on minority political influence with a "free floating inquiry into legislative intent." Karlan, *supra* note 18, at 35.

56. 502 U.S. 491, 506 (1992) (holding that Section 5 review only applies to voting practices and does not apply to difficult questions concerning the efficacy of local governance; as the Court explained, "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting").

57. Issacharoff, *supra* note 12, at 1713.

careful reading of *Is Section 5 a Victim of Its Own Success?*[58] reveals that the federalist intuitions that drive the argument are never explored in a way that effectively demonstrates why federalism requires that Section 5 be easily administered and narrow in scope.[59]

The fourth and final precondition concerns the specific character of political competition in the covered jurisdictions when the VRA was originally enacted. Though not alone in recognizing the substantial impact of voting rights law on partisan politics,[60] Professor Issacharoff observes that Section 5 produces more readily justifiable outcomes when there is a dearth of healthy political competition in covered jurisdictions: "In paradoxical fashion, the more Southern politics continued to be organized around the retrograde isolation and suppression of black political interests, the more enlightened and noble would be the intervention from Washington."[61] Intervention from the DOJ in Washington would forcibly erode the "encrusted white establishment of the Democratic Party,"[62] thus undermining racial homogeneity in Southern politics but doing nothing to entrench partisan interests in covered jurisdictions. The bugbear, then, is that "the use of preclearance for districting configurations . . . dramatically increases the ability to use preclearance to affect the projected outcomes in terms of partisan representation."[63]

It is difficult to muster sympathy for this argument. It begins with the assumption that African Americans and other minority groups find it more beneficial to vote for Democratic candidates. In a post-*Ashcroft* world, the DOJ will preclear redistricting plans that unpack minority voters, thus allowing for the creation of coalition districts in

58. *See supra* note 12.

59. There is a rich literature in anti-discrimination theory that could have been consulted to articulate the federalist pedigree of the second and third preconditions. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 444 (2000) ("Supreme Court decisions . . . have brought Congress's power to enact antidiscrimination legislation under Section 5 to the top of the judicial agenda, while simultaneously rendering doubtful the nature and extent of Congress's authority to enforce the Equal Protection Clause.").

60. Scholars have long recognized that the enactment of the Voting Rights Act has had considerable effects on partisan politics. *See, e.g.*, NELSON W. POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE 80 (2004) ("The registration of black voters [following the Voting Rights Act of 1965] strengthened the liberal factions of the Democratic parties in the several states and encouraged conservative voters and leaders to desert the Democrats and become Republicans.").

61. Issacharoff, *supra* note 12, at 1713–14.

62. *Id.* at 1713.

63. *Id.* at 1730–31.

covered jurisdictions. Coalition districts are widely thought to increase the probability of widespread gains for the Democratic Party. In this way, a reauthorized Section 5 would become one of the most powerful strategic weapons in the Democratic Party's arsenal. It is important to note that this argument is probably meant to apply to post-*Ashcroft* preclearance. Pre-*Ashcroft* preclearance was not solicitous of the creation of coalition districts, and thus it was common to create majority–minority districts, which allowed racial minorities to constitute the majority during elections. Under these circumstances, many Democrats felt that where African American and Latino populations were relatively small in absolute terms, too many seats would be lost to Republicans. As Professor Gerken explains, "[s]ome even blame the Democrats' loss of the House on the aggressive creation of majority–minority districts during the 1990s, a trend spurred in part by section 5."[64]

In any event, in a post-*Ashcroft* world the claim that Section 5 would become an instrument of partisan politics only makes sense if one assumes that the voting preferences of minority groups should be equitably distributed across the existing dominant political parties. But what could possibly justify such an assumption? The conditions that affect and condition competition between political parties—the parties' relative sensitivity to constituents' needs, appeal to a wide voting base, and willingness to represent a diversity of interests—are to a large extent within the control of the parties themselves. Failing to win the support of a particular constituency is just that—a *failure* of a particular political party. Though Section 5 may indeed bring into sharp relief a political party's systematic failure to capture the imaginations and trust of certain minority groups, preclearance does not *cause* that systematic failure.

To be sure, there is an obvious riposte to this criticism. Professor Issacharoff points out that the *Ashcroft* Court was more than willing to "consider that black electoral prospects in Georgia could not be divorced from . . . partisan battles for legislative hegemony."[65] This is an interesting development in voting rights jurisprudence, as it suggests that there are a number of "front-burner" political decisions—such as redistricting—for which Section 5 produces partisan results by proxy. In remaining too solicitous of minority

64. *See* Gerken, *supra* note 2 (manuscript at 7 n.20) ("Neither Pildes nor Issacharoff has firmly committed to the view that section 5 ought to expire in 2007.").

65. Issacharoff, *supra* note 12, at 1730.

political interests, preclearance lends the color of law to what is essentially partisan spoils. But again, this is exactly the same non sequitur sketched above: it erroneously insists that Section 5 is the cause of the preferences that minority groups have for particular political parties.

The second argument against preclearance is that it may no longer be necessary to protect the minority franchise.[66] In fact, Section 5 may stand in the way of the political compromises that appear to be available to minority voters in the twenty-first century. To be sure, there are a number of reasons to find this argument compelling. There are no longer "the poll taxes, the literacy tests, and the other overt barriers to voter registration";[67] "[b]latant and despicable discrimination no longer occurs on the widespread level at which it occurred four decades ago";[68] and higher numbers of minority representatives appear in substantial numbers in Congress, state legislatures, and in local political positions.[69]

But it is unclear what these changes in the relative political power and influence of minority voters mean for the reauthorization debate. Are minorities strong enough to stand on their own, to negotiate political deals without the aid of preclearance? It is possible that Section 5 no longer plays a crucial role in national politics, but still provides critical protection for minority candidates at the local level.[70] It is also possible that Section 5 is necessary both to protect

66. *See id.* at 1728 (observing that Section 5, in its current guise, "appears to hamper the very type of coalitional politics that traditional defenders of minority voting rights" have historically endorsed).

67. Issacharoff, *supra* note 39, at 1833–34 (footnotes omitted).

68. Pitts, *supra* note 20, at 606–07.

69. *See* DAVID A. BOSITIS, JOINT CTR. FOR POL. AND ECON. STUD., BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000, at 5 (2002), *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/BEO-00.pdf (observing that political officials of African American descent numbered 9,040 in 2000, whereas a study published in 1968 found there were only 1,469 black representatives); Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 49 (2002) (chronicling a similarly modest increase in the number of Asian-American elected officials from 1978 (120) to 2000 (309)); National Association of Latino Elected and Appointed Officials Educational Fund, http://www.naleo.org/membership.htm (last visited Apr. 6, 2006) (chronicling a more modest increase in the number of Latino elected officials from 1984 (3,128) to 2004 (4,853)).

70. *See* Pitts, *supra* note 20, at 630 ("While minority voters may now be powerful enough on a statewide level to protect their own interests without having the watchful eye of federal officials in Washington in their corner, it is not nearly as clear that minority voters have this same power on the local level.").

national and local politics.[71] Given Professor Issacharoff's concession that the empirical evidence available on the level of political power minorities would possess independent of Section 5 is equivocal,[72] some degree of risk aversion seems justifiable.[73] Put another way, if there is little reason to *confidently believe* that minorities can stand on their own feet,[74] unaided by the crutches provided by Section 5, does this necessarily mean that Section 5 should be reauthorized in its mandatory form? This question is addressed in Part II.

II. AN ALTERNATIVE SOLUTION: DYNAMIC COMPLIANCE

A number of scholars agree that preclearance has "achieved spectacular results."[75] But many are concerned that if Section 5 is renewed in its mandatory guise, it will not only fail to adequately protect minority interests,[76] it will also in some circumstances actively frustrate those interests.[77] Professor Gerken has provided the most comprehensive and promising alternative solution: an opt-in

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71. *See* Karlan, *supra* note 18, at 36 (suggesting that because minority gains have been achieved through bargaining "in the shadow of" preclearance, it is possible that preserving minority voting influence in the future requires retaining Section 5).

72. *See* Issacharoff, *supra* note 12, at 1729 ("Much in this debate turns on a difficult empirical assessment of when minorities become full players in the political process.").

73. However, Professor Issacharoff is not opposed to taking seriously the possibility that minorities might lose political influence in a Section 5-free world. But he does insist that the decision to reauthorize cannot be predicated exclusively upon an unreasonable policy against taking risks. *Cf. id.* at 1731 ("If the burden for change is certainty of outcome, then the status quo always prevails. . . .[T]he combination of section 2 of the Voting Rights Act, the protections of the Fourteenth Amendment, and the fact of being in the process and at the table would afford much protection.").

74. As Professor Gerken explains, "[i]t is extraordinarily difficult to decide whether entrenched racial politics persist or whether we have reached 'normal politics' because we cannot assess the extent to which the threat of a VRA lawsuit has affected political bargaining in this country." Gerken, *supra* note 2 (manuscript at 8); *see also* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 533 (arguing that it is virtually impossible to measure the political power of minority groups independently of the bargaining leverage preclearance provides).

75. Gerken, *supra* note 2 (manuscript at 3).

76. *See generally* CAROL SWAIN, BLACK FACES, BLACK INTERESTS (1995) (arguing that white-black racial coalitions are not only necessary to serve the political, economic and social needs of the black community, these coalitions can actually be effective in promoting the interests of African Americans); Charles Cameron et al., *Do Majority–Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996); Gerken, *supra* note 2.

77. *See* Issacharoff, *supra* note 12, at 1729 (arguing that mandatory preclearance "could compromise the range of political accords available to minority voters and thereby, under conditions of mature political engagement, actually thwart minority political gains").

approach whereby "community representatives, public interest groups, and other parts of civil society"[78] can actuate the requirements of Section 5 in the event that political bargaining breaks down. The primary objective of this approach is to encourage *dynamic compliance* with voting rights laws: because public interest and civil rights groups are charged with informing the DOJ of voting rights abuses, local political bargaining can achieve an equilibrium without mandatory interference from Washington. This is what makes compliance under an opt-in scheme dynamic.

The general appeal of Professor Gerken's opt-in solution is that it appears to promote efficient political bargaining while simultaneously providing a robust form of protection for minorities who find themselves unable to exercise the franchise in a meaningful way.[79] Section A describes the role of civil rights groups in encouraging fair and efficient bargaining and Section B describes the potential for enhanced political participation under an opt-in scheme. The purpose of this Part is primarily descriptive.

A. Encouraging Efficient and Fair Political Bargaining

The principal objective of an opt-in version of Section 5 is to encourage efficient and fair political bargaining without imposing unreasonable administrative burdens on jurisdictions that are not actually interfering with minority groups' effective enjoyment of the franchise. According to Professor Gerken, an opt-in scheme "would give community members a chance to bargain with localities over voting rights enforcement while providing them with a meaningful alternative should bargaining fail."[80] The opportunity to bargain would be secured by the ability of public interest groups and civil rights organizations to call upon the DOJ to impose Section 5's requirements. Essentially, the opt-in approach vests the authority to trigger a Section 5 analysis in the people closest to the action—namely, the public interest and civil rights groups most concerned with the local political dynamics that color minority groups' ability to strike political bargains responsive to their interests.

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78. Gerken, *supra* note 2 (manuscript at 9).

79. As Professor Gerken aptly puts this second point, an opt-in scheme would "avoid the dangers associated with full-scale regulatory retreat by providing a safety net for racial minorities who find themselves negotiating a hostile political environment." *Id.* (manuscript at 9).

80. *Id.* (manuscript at 2).

Professor Gerken's opt-in approach is predicated upon "responsive regulation," an approach that has proved successful across a range of regulatory areas, including environmental law, welfare regulation, employment law, and consumer safety.[81] Responsive regulation involves three elements. First, there is the element of *sunshine*: the law must provide equal access to the information that is necessary to make political choices or formulate policy preferences.[82] Second, there is the element of *escalation*: the law must vest authority in the relevant agency or agencies to impose a system of incentives that involves both rewards and punishments; so as to "tailor the level of government intervention to whether the regulated party functions as a good actor or bad actor within the system."[83] And third, there is the element of *tripartism*: the legal system must enlist the assistance of third-parties—public interest groups, civil rights activists, and other whistleblowers—to determine when regulatory or disciplinary action must be taken against a bad actor.[84] In short, responsive regulation works best when local community members communicate effectively with the appropriate government agency so as to reduce the agency's monitoring costs and at the same time increase the degree to which it can sanction unlawful conduct.[85]

The theory behind responsive regulation is that if access to relevant information is guaranteed, and if agencies deploy a mix of rewards and punishment in a way commensurate with the complying or offending party's conduct, then "collaborative negotiation may produce better regulatory outcomes than top-down regulation."[86] It should be noted that this theory assumes that the entities that are granted access to relevant information—local public interest groups and civil rights organizations, for example—have sufficiently stable incentives to utilize the information to engage in meaningful monitoring of potential bad actors. Though the assumption that civil

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81. Professor Gerken's work is influenced by Ian Ayres and John Braithwaite's early work on responsive regulation. *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

82. Gerken, *supra* note 2 (manuscript at 4).

83. *Id.* (manuscript at 12).

84. *Id.*

85. I have deliberately avoided framing responsive regulation in game theoretic terms. *But see* AYRES & BRAITHWAITE, *supra* note 81, at 60–71 (setting out a game-theoretic model of regulation).

86. Gerken, *supra* note 2 (manuscript at 12).

rights organizations do possess such incentives to some degree is eminently reasonable, scant evidence exists for the more salient—and less reasonable—assumption that most civil rights groups and other interested parties have sufficient incentives to meet this charge.

Does this theory hold in the context of voting rights? Perhaps. Professor Gerken frankly admits that it may not be possible to replicate the success of responsive regulation in the context of voting rights;[87] however, she notes that the kind of negotiation that responsive regulation encourages is in fact already occurring in the world of election law. Two aspects of the current regulatory approach support this claim. First, the DOJ already culls and analyzes information from representatives of minority groups in administering Section 5. In fact, the DOJ has developed a diverse and complex set of customary procedures for initially vetting preclearance requests from covered jurisdictions. For example, there is a minimal or "quick" review, primarily utilized in jurisdictions with a small minority population or in places where racial minorities already "dominate politics."[88] The existence of this pre-existing practice strongly suggests that if civil rights groups were to take a more proactive role in collecting and sharing information, the DOJ would readily be able to sort through and weigh such information. In Gerken's view, since the DOJ is already employing a wide variety of screening mechanisms for different kinds of jurisdictions, an opt-in Section 5 would reflect and reinforce practices that have already taken root in the Voting Section. Second, *Ashcroft's* "totality of the circumstances" test requires the DOJ to continue collecting and sifting through such information.

Despite this palpable symmetry between existing preclearance review procedures and the theory of responsive regulation, there is a very general reason one might remain skeptical of the claim that an opt-in variant of Section 5 would result in increased efficiency in political bargaining. An opt-in scheme can only encourage political bargaining *beyond what the mandatory preclearance regime incents* if community members are afforded additional reasons to share relevant information with the DOJ. Yet if Professor Gerken is right

87. *See id.* (manuscript at 13) ("There is, of course, a danger that the successes of other models cannot be reproduced in the election law context without a good deal more mimicry than proposed here.").

88. Professor Gerken learned of these practices through interviewing a number of officials at the Voting Section of the DOJ. *See id.* (manuscript at 16–17 n.52).

that the most significant difference between opt-in and mandatory preclearance is that "members of the relevant community [get to] decide for themselves what is worth investigating and what is not,"[89] then there would seem to be no *additional* reasons to proactively share information with the DOJ. After all, by hypothesis an opt-in scheme would allow public interest groups and civil rights organizations to do officially what they have been doing informally.[90] What additional incentive could there be?

It is possible that under an opt-in system civil rights groups would be more likely to share particularly salient information about potential abuses. Although this outcome is within the bounds of reason, it is problematic. The claim that bargaining would be enhanced is problematic if one grants Professor Gerken's (implicit) prediction that under an opt-in regime minority representatives would much more frequently enter the fray in order to protect and advocate minority groups' respective interests. In other words, if one assumes that civil rights groups will prove ardent advocates, then it is difficult to see how political bargaining would necessarily be enhanced. It is reasonable to assume that the *quantity* of bargaining would increase at the margins. But if the substantive standards applied to changes in voting practices and procedures were carried over from mandatory preclearance,[91] then in the aggregate one would expect very similar outcomes—not necessarily a substantive change in the nature, quality or efficiency of political bargaining.

Nevertheless, Professor Gerken's view has two important features that partially quell these concerns. First, though an opt-in approach may not result in more efficient political bargaining, an opt-in system would distribute the responsibility for ensuring that minority voices are heard across civil rights groups, public interest groups, and the states. As Gerken observes, the opt-in approach

89. *Id.* (manuscript at 18).

90. *Id.* (manuscript at 17) ("One might worry that civil rights groups lack the resources to play such an important role in enforcing the right to vote. But they are already doing the type of legwork needed for an opt-in approach to work.").

91. On the one hand, it appears that Professor Gerken has not settled on a specific set of remedies, implying that the opt-in approach she recommends is compatible with a wide range of remedies—even remedies that local minority representatives could finesse to fit the empirical real-world circumstances at issue. On the other hand, Gerken clearly believes that a defensible opt-in approach should utilize the totality of the circumstances approach endorsed by the *Ashcroft* Court. *See id.* (manuscript at 32) (arguing that a "flexible regulatory strategy" allowing Section 2 and Section 5's remedies to be applied as circumstances require would "help us exit the current morass we now face in choosing which districting strategy is the better one").

"would require states and minority voters to share the risk of mistake, placing a formal obligation on racial minorities to participate in the enforcement process while still guaranteeing them the basic safety net section 5 currently provides."[92] Second, minority representatives would be able to influence electoral policy at two different stages of the preclearance process. Not only would such representatives be charged with sharing salient information and requesting preclearance investigations, they would also have a chance to challenge the DOJ's preclearance decisions. Gerken is probably right that the increasingly politicized nature of preclearance makes it imperative to adopt procedures for policing the DOJ.[93] To be sure, one might worry that providing civil rights groups with the right to challenge preclearance decisions is a bad idea. In a post-*Ashcroft* world, a world in which courts and the DOJ must examine a preclearance request in light of the totality of the circumstances, there is an exceedingly large margin for error (depending of course on one's perspective). Without the benefit of a readily administrable retrogression standard—a standard condemning redistricting plans resulting in quantifiable retrogression—post-preclearance litigation could very well rise to unacceptable levels.

B. Providing Incentives for Political Engagement

Perhaps the most promising aspect of Professor Gerken's opt-in proposal is its emphasis on encouraging political participation. As previously noted, the opt-in system that Gerken envisions would more equitably distribute the responsibility for regulating the political process between minority group agents and the states.

The opt-in approach would accomplish this objective in two ways. First, in allocating to local public interest groups and civil rights organizations the formal obligation to police the political process, the opt-in approach thereby privileges "local knowledge and community participation in protecting the right to vote."[94] Armed with information about a proposed change to a voting practice or procedure, civil rights groups would be able to make decisions about which investigations to initiate on the basis of the "local motives and

92. *Id*. (manuscript at 9).

93. *See* Gerken, *supra* note 2 (manuscript at 10) ("It is thus time to take another lesson from the administrative law playbook and treat DOJ decisions as one would the decisions of any other federal agency by allowing third parties to challenge them in court.").

94. *Id.* (manuscript at 15).

electoral consequences that DOJ officials cannot possibly hope to possess."[95]

Second, the opt-in approach creates a very dynamic set of incentives that would benefit minority groups and the larger political process. Minority group agents would be responsible for asking the DOJ to initiate an investigation in the event that a minority group lacked the political leverage necessary to secure a fair and equitable political compromise. Localities would have a palpable incentive to cooperate with civil rights groups, because under an opt-in scheme, the DOJ would very likely ramp-up its current practice of looking more carefully at "potentially troubling requests coming from localities against whom a large number of information requests or objections were made."[96] Even localities with a significant history of responsiveness to the special needs of minority voters would have an incentive to negotiate thoughtfully with minority agents; as Professor Gerken explains, "because a civil rights complaint accusing the locality of malfeasance has a different normative significance than the run-of-the-mill preclearance request that [under the mandatory variant of Section 5] every covered jurisdiction files for each change it makes."[97]

III. THE WISDOM OF REAUTHORIZING SECTION 5

Part I addressed two stiff challenges to mandatory preclearance. Part II evaluated the opt-in approach to preclearance, concluding that this new form of preclearance would be desirable if it lived up to its theoretical promise. This third and final Part examines in a more direct fashion the potential problems with the opt-in approach. Section A addresses these potential problems. In addition, Section B considers what steps Congress should take to gather the information necessary to fully evaluate an opt-in approach. I conclude that unless Congress is prepared to gamble with the minority franchise by allowing preclearance to expire, Section 5 (in its mandatory form) should be extended for a period of time necessary to allow Congress

95. *Id.* (manuscript at 18). According to Professor Gerken, something very much like this is already happening. *See id.* (manuscript at 19) ("At least as a formal matter, the current regulatory scheme treats racial minorities as passive wards of the DOJ. That formal allocation is, of course, belied by the active role that community group members *already* play behind the scenes in helping the DOJ.").

96. *Id.* (manuscript at 20 n.66).

97. *Id.* (manuscript at 20).

to evaluate the potential virtues and limitations of the opt-in approach.

A. Adopting an Opt-in Approach Is Premature

The general aim of opt-in preclearance is to "create a set of institutional incentives and decisionmaking proxies that would induce cooperation between localities and community leaders and focus enforcement resources on bad actors."[98] It is difficult to foresee whether this lofty goal would be realized under an opt-in regime for a number of interlocking reasons.

First, the question one should ask in evaluating the promise of opt-in preclearance is whether it leads to acceptable levels of protection for minority voting rights. In the wake of *Ashcroft*, the notion of acceptable levels of protection is exceedingly difficult to define. For those who believe that *Ashcroft* was rightly decided, there is no rule of thumb: as long as minorities are able to meaningfully participate in the political process, a locality has not illegally interfered with the minority franchise. Insofar as an opt-in variant of Section 5 would produce the same or similar substantive results that this standard would under the existing mandatory scheme, opt-in by definition produces "acceptable" levels of protection. For those who think *Ashcroft* was a mistake,[99] the promise of opt-in preclearance is hard to divine. On the one hand, it is possible that the civil rights groups in some jurisdictions would wield the threat of opt-in preclearance adroitly, forcing localities otherwise hostile to their claims to make concessions hitherto regarded impossible to attain. On the other, it is equally possible that civil rights groups will in many instances fail to protect minority interests, leading to a situation in which *Ashcroft's* already dubious standard is further watered down. This would be, as it were, a triple retrogression: If Professor Karlan is right to characterize *Ashcroft* as a retrogression (i.e., an erosion) of the original retrogression standards developed in *Beer*, then an opt-in

98. *Id.* (manuscript at 9).

99. *See* Karlan, *supra* note 18, at 36 ("It is as true with respect to political institutions as it was with respect to public schools, that '[o]ne swallow does not make a spring.' Our long, bitter, and all-too-recent history of covered jurisdictions' pervasive indifference and hostility to minority citizens' political aspirations demands something more than the triumph of hope over experience. Gutting section 5, as the Supreme Court seemed poised to do in *Georgia v. Ashcroft*, is itself a retrogression in minority voters' effective exercise of the electoral franchise." (footnote omitted)).

system implemented by sporadically-competent and incompetent civil rights groups would certainly fit this description.

The second problem in evaluating the promise of opt-in preclearance is intimately related to the first: there are difficult empirical questions about whether civil rights groups across a range of jurisdictions will be capable of and committed to monitoring localities for voting rights abuses. Professor Gerken is well aware that there are doubts about the ability of these groups to monitor reliably such abuses, but points out that local chapters of the NAACP, the Mexican American Legal Defense and Education Fund (MALDEF), and the League of United Latin American Citizens (LULAC) are already playing a very active role in policing local voting abuses.[100] In making this connection, Gerken argues that if these groups are given wide access to information (reflecting the sunshine aspect of the responsive regulation model), the resource limitations constraining some of these groups would be greatly alleviated.[101]

Still, little empirical inquiry has been undertaken to ascertain the general level of competence of local civil rights groups in identifying voting rights abuses. This suggests that even though the "distant bureaucrats" may not be perfectly able to administer preclearance, the Voting Section will be more than marginally effective in protecting the voting franchise in the near future. Given the dearth of data available, at this point the same cannot be said about a system that is driven exclusively by the earnest commitment of civil rights organizations.[102] When comparing mandatory and opt-in preclearance, great care should be taken before transitioning to a new scheme where the costs and benefits are a matter of well-informed guesswork. It may very well be that a number of civil rights organizations are up to the task. But it may also be true that in a number of jurisdictions,

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100. Gerken, *supra* note 2 (manuscript at 17–18).

101. *See id.* (manuscript at 18) (explaining that "the sunshine provisions of this proposal might even ease the burden already shouldered by these groups by providing them a readily accessible means for identifying violations and pooling information" and observing that such a proposal "would provide a more transparent process for public interest groups and minority officials taking part in enforcement, one that makes public the role that community leaders now play privately in the enforcement process").

102. *See* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 44–45 (2003) ("By the post-1990 round of redistricting, blacks and Hispanics had progressed from being literally locked out of the room in which political deals were cut to being key members of state legislative redistricting committees." (footnote omitted)).

the organizations that exist are poorly equipped for the significant responsibility an opt-in system would foist upon them.

Third, there are opportunities for fraud in an opt-in system. For instance, shell agencies could be constructed to fraudulently "represent" the interests of minority voters. Professor Gerken acknowledges that fraud may play a larger role in an opt-in system than in a mandatory regime. In her view, one should even expect "political parties to try to capture existing community groups and to fake the appearance of a healthy decisionmaking process."[103] Notwithstanding the opportunities for fraud that an opt-in system would create, Gerken insists that on balance it would be preferable to allow (legitimate) community leaders to play a formal role in leading their constituencies. On this view, it would be better to "channel our political and litigation energies into discerning what members of the minority community actually think about the question" rather than allow "scholars or politicians [to] play the role of philosopher king, opining about what is best for the minority community."[104]

In light of these potential problems with an opt-in preclearance regime, Congress should avoid adopting this variant of Section 5 until more is known about its effectiveness in protecting the minority franchise over the long term. The next section addresses four inquiries that need to be undertaken before an opt-in regime should be implemented.

B. Building a Case for Dynamic Compliance

1. *The Expected Utility of Opt-in Preclearance*. In evaluating the effectiveness of the opt-in approach, Congress should undertake four related inquiries. First, Congress should consider carefully whether opt-in preclearance is likely to be effective in the voting rights context. One way of doing this is to consider the relevance of theories of responsive regulation[105] (or dynamic compliance) to voting rights as carefully as possible.[106] This is necessary for a simple reason:

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103. Gerken, *supra* note 2 (manuscript at 30).

104. *Id.* (manuscript at 30–31).

105. *See supra* notes 81–92 and accompanying text.

106. There is a substantial literature on the impact of "responsive regulation" in the workplace and in governing the behavior of public officials in a variety of regulatory contexts. *See generally* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Jody Freeman, *The Private Role in Public*

opt-in regulatory strategies may be very effective in some regulatory domains, but unhelpful in others. In some regulatory domains, individuals have strong incentives to engage in monitoring with an eye to increasing compliance with a set of legal principles or norms; in others, these incentives are not very strong. For instance, in the context of tort law, private firms bear the costs associated with damage awards.[107] In a sense, individuals play a "monitoring" role in the tort context because they bring suits against private firms who violate legal norms. Because firms directly shoulder the costs of tort regulation, individuals have relatively strong incentives to press for enforcement.[108] The government plays a regulatory role by providing a set of substantive laws under which individuals can recover, but individuals play a critical monitoring role because they decide when a violation of those laws is serious enough to pursue enforcement.

As Professor Gerken herself recognizes, the same cannot be said of individuals in the context of voting rights.[109] For in this context, elected officials do not "bear the costs of regulation in the same way that private firms do."[110] Elected officials may be forced to revise a redistricting plan or abandon a particular voting practice, but they are not forced to internalize the costs associated with penalties for noncompliance. Moreover, individuals are not wronged in the tort context in precisely the way they are wronged in the context of voting rights. If a tort has been committed, an individual citizen is directly harmed by the activity of a particular firm (or individual). Yet to be deprived of the ability to select a candidate of one's choice is a *collective* harm. This is not to deny that individual minority voters are in an important sense harmed by these violations. But minority voters are harmed as a class because it is the interests of similarly situated citizens that are compromised when Section 5 is violated.

From this observation it need not follow that individual minority voters have particularly weak incentives to press for enforcement of voting rights regulations. But given that elected officials—the

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Governance, 75 N.Y.U. L. REV. 543 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

107. *See generally* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

108. *Id.*

109. *See* Gerken, *supra* note 2 (manuscript at 13–14 n.43) ("In voting rights enforcement, there may be a broader range of players who can play that monitoring role . . . .").

110. *Id.* (manuscript at 13 n.43).

"regulated entities" in election law[111]—do not "directly bear the costs" of noncompliance with voting rights law,[112] placing the responsibility to monitor compliance in community representatives may not be a good idea. Even if individuals and the groups that represent them theoretically have incentives to actively monitor undesirable conduct, Congress should have a better idea of how similar, or dissimilar, enforcement patterns would be before adopting opt-in preclearance.[113] The problem, of course, is that a number of what can loosely be called "cooperative" enforcement schemes—i.e., schemes like tort law which involve private monitoring by individuals and public enforcement by courts—provide optimistic estimates of the success of opt-in enforcement that may prove false in the context of election law. Thus, a number of factors affect the effectiveness of "private" monitoring: the ability of individuals or groups to effectively gather relevant information, the ease and effectiveness of using that information in bargaining, and the strength of the incentives that institutions have for complying with either informal demands, or, as the case may be, with demands issued by legal institutions when bargaining has failed. The impact of each of these factors is not necessarily illuminated by the theory and practice of responsive regulation.

Congress should try to determine whether the flexibility an opt-in approach promises is really in the interests of minority groups. A good place to begin is the movement toward self-regulatory regimes in the workplace.[114] Modern employers, dismayed by the average costs associated with employment litigation, have decided to adopt diversity programs, internal dispute resolution processes, and mandatory arbitration.[115] For example, in an effort to preempt sexual harassment litigation, some employers have adopted antiharassment policies that proscribe a wide range of offensive communication in the

111. *Id.*

112. *Id.* The enforcement of voting rights only rarely results in fines or imprisonment. *See* 42 U.S.C. § 1973j (2000).

113. Professor Gerken suggests that "asking community leaders to take part in the enforcement process may give members of these communities a greater sense of efficacy and ownership over the enforcement process." Gerken, *supra* note 2 (manuscript at 18).

114. *See generally* Estlund, *supra* note 106 (analyzing the impact of "responsive regulation" in the workplace and in governing the behavior of public officials in a variety of regulatory contexts).

115. *Id.* at 333.

workplace.[116] To enforce such policies, employers might provide employees with an accessible, simple procedure for reporting violations. In this way, some forms of workplace regulation involve cooperation among employers and employees where once federal administrative agencies were primarily responsible for securing workers' rights.[117]

This form of cooperation in the workplace is sometimes criticized on the ground that the "compliance" it ultimately produces is illusory or cosmetic.[118] The core complaint of self-regulatory schemes in the workplace is not that internal compliance mechanisms inevitably fail to protect the interests of the workers they are designed to shepherd. Rather, the claim is that little empirical evidence exists to support the claim that self-regulation schemes actually do deter unlawful conduct within the modern workplace.[119] Structurally speaking, these monitoring schemes are very much like what would be deployed in an opt-in variant of preclearance. And so, it is natural to consider the possibility that the opt-in approach to Section 5 might be a dubious mode of deterring wrongful conduct.[120] However, the analogy between self-regulation in the workplace and opt-in preclearance need not be perfect to be apropos: before adopting an entirely new version of preclearance, Congress should have reasonable grounds for

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116. *Id.* at 334.

117. *See id.* at 324 ("The coordination of internal or self-regulatory compliance structures with the external law of the workplace has the potential to create new mechanisms for the enforcement of employee rights and labor standards—mechanisms that engage employees and revive the prospects for employer voice in the wake of declining unionization.").

118. *See generally* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003). *But cf.* Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639 (1998) (suggesting that self-regulatory strategies can work in tandem with external legal restrictions to thwart discrimination in the workplace).

119. *See* Krawiec, *supra* note 118 at 491 (stating that "a growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms, and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability").

120. Professor Gerken argues that deterrence would actually be enhanced in an opt-in scheme. She assumes that courts evaluating preclearance requests under an opt-in regime would look for indicia that a political bargain was struck fairly as a procedural matter. On the basis of this assumption Gerken infers that because participation of minority representatives in a political bargain would be viewed as a proxy for fairness by any reviewing court, political elites would "finally have a reason to engage with the communities affected by the decisions they make." Gerken, *supra* note 2 (manuscript at 24).

believing that voting rights abuses will not be under-deterred relative to mandatory preclearance.[121]

2. *Measuring the Monitoring Capacity of Civil Rights Organizations*. Second, Congress should collect as much data as possible on the capacity of local public interest and civil rights groups to monitor voting abuses. As noted previously,[122] Professor Gerken argues that local chapters of the NAACP, MALDEF, and LULAC will be well-equipped to play an active role in monitoring voting rights abuses. Apparently, analysts at the Voting Section are so intimately connected to civil rights groups and local political insiders that one analyst remarked that the "DOJ has a 'whole slew of contacts' in 'almost every covered county.'"[123] There is even some reason to believe that an opt-in approach could enhance monitoring by the civil rights groups that often provide the DOJ with information about local political conditions.[124] Given the prevalence of a rich culture of communication between the Voting Section and local civil rights groups, and in light of the realistic hope that an opt-in approach would enhance the DOJ's ability to monitor local conditions, collecting data on the capacity of representative organizations will be a manageable task. Nevertheless, Congress should confirm that all minority citizens in all covered jurisdictions really are protected by a local public interest group or civil rights organization. In the event that members of minority groups in some jurisdictions temporarily (or permanently) lose the benefit of representation by a private organization, Congress should provide a mechanism for streamlining the complaint filing process. Such a mechanism would ensure that the Voting Section would carefully examine complaints filed by private citizens, thereby "filling in" for the civil rights organizations that would be responsible for continuous monitoring of local political

121. After *Ashcroft*, it is difficult to define "under-deterrence" because the contextual standard announced by the Court appears to constitute a very liberal preclearance standard. If Congress decides that the totality of circumstances test that *Ashcroft* announced is reasonable, then from the perspective of deterrence it might not matter whether preclearance was mandatory or opt-in: because the same standard would apply in the case of mandatory or opt-in preclearance, the deterrence effect would be the same. Of course, the costs would be different: with opt-in preclearance, one would expect that the Voting Section of the DOJ would be less burdened with preclearance requests.

122. *See supra* notes 100–01 and accompanying text.

123. Gerken, *supra* note 2 (manuscript at 18 n.56) (citing an anonymous telephone interview).

124. *See supra* note 101 and accompanying text.

conditions. In this way, ordinary citizens would be able to enjoy the protection of (opt-in) Section 5 during periodic lapses in representation.[125]

3. *Minimizing the Opportunities for Fraud*. Third, Congress should consider ways of designing an opt-in system to minimize fraud.[126] The incentives for manipulating the opt-in process would be considerable.[127] Drawing on modern labor regulation, a restrictive registration process could be implemented to confirm the legitimacy of civil rights organizations that claim to represent minority groups. This process would be modeled after the union certification process under the National Labor Relations Act (NLRA).[128] Mirroring the National Labor Relations Board's (NLRB) involvement in the union certification process,[129] the Voting Section would be responsible for

125. Attaching this provision to an opt-in Section 5 could cause problems. For instance, if community members felt dissatisfied with the local political organization representing them, they could file these pro se complaints with the Voting Section out of irritation and impatience. Mindful of the fact that credibility with the Voting Section is threatened by pro se complaints, civil rights organizations with inadequate resources (but a genuine desire to help) might periodically file preclearance petitions without regard for whether minority voting influence was truly being diminished by local political bargaining.

126. Professor Gerken argues that the community economic development movement provides a model for thinking about how fraud might be minimized under an opt-in regime. *See id.* (manuscript at 31) ("[W]e would expect that litigation over who genuinely represents racial minorities will, in the long run, generate more accountability and representation for those communities than the current regime."). Because funding for community economic development corporations (CDCs) depends upon ensuring that CDCs actually do represent the interests of their constituents, there is competition among CDCs for the right to represent local communities. That competition benefits community members, because only the most vigorous advocates for local community interests are likely to receive funding on a continuous basis.

There is one important difference between CDCs and civil rights organizations that makes it difficult, if not impossible, to conclude that similar kinds of competition among civil rights organizations will spring up to the benefit of minority communities: the funding for civil rights organizations does not directly depend upon their success in aiding the Voting Section in its enforcement efforts.

127. *See id.* (manuscript at 30) ("The moment that elites learn that community support matters, they will presumably try to create 'shell' organizations that claim community support but are little more than political shills. We should also expect political parties to try to capture existing community groups and to fake the appearance of a healthy decisionmaking process.").

128. For a skeptical overview of the union certification process, see Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 14 BERKELEY J. EMP. & LAB. L. 50, 53–55, 55 (1994) ("A simple look at the tools available to each side in a union campaign election suggests that management has an advantage.").

129. It is beyond the scope of this Note to consider all of the differences between the employment and voting rights contexts. However, one difference is important for designing an effective registration process to certify civil rights organizations: although employers have an

overseeing the certification process for civil rights groups and public interest organizations. Only certified organizations would be permitted to petition the Voting Section in the event that political bargaining breaks down. Assuming that the registration process was designed to closely reflect the NLRB certification process, this system would allow minority members to file petitions to certify and decertify civil rights organizations. This representation system would not necessarily have to adopt the equivalent of labor law's principle of one union, one group of employees; rather, this system could allow minority communities to be represented by multiple public interest groups and civil rights organizations simultaneously.

Drawing on contemporary labor law has the advantage of providing some hints about what problems would emerge if an official certification process were adopted to minimize fraud in an opt-in system. The main disadvantage of this system is that it would impose greater restrictions on analysts in the Voting Section of the DOJ. Currently, analysts are permitted to speak freely with a wide range of local civil rights organizations and private individuals who may have helpful insights into local political conditions and practices.[130] If a certification regime were implemented to mitigate fraud, analysts might not be able to take advantage of the wide range of contacts they have cultivated in covered jurisdictions. Another disadvantage of this solution is that the DOJ would have to dedicate valuable resources to the certification process. Yet this is just one potential solution to the problem of legitimate representation.

Congress could alternatively determine that a formal antifraud procedure or policy is unnecessary. The argument for this approach is that community leaders and civil rights organizations are not only unlikely to engage in turf wars,[131] analysts in the Voting Section could be vested with plenary authority to disregard evidence put forth by phony civil rights organizations that a bargaining process was fair and

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interest in blocking union certification bids in the employment context, there is no equivalent group or institution that has an interest in interfering with or preventing the registration process for civil rights and public interest organizations in this context. To be sure, it could be that civil rights organizations would compete with one another for the privilege of representing minority groups. But this would be a welcome development, if indeed it emerged.

130. *See* Gerken, supra note 2 (manuscript at 17) (explaining that when preclearance requests are filed, informal calls are often made by the DOJ to local civil rights groups or to an elected minority official to determine if "there is a problem").

131. *Id.* (manuscript at 31) ("Community group leaders . . . have every incentive to work out a consensus or compromise; their power, after all, comes from standing together.").

equitable. Without special reason to anticipate poor judgment on the part of analysts in the Voting Section, this solution appears quite appealing. Regardless of which particular solution is adopted, it is imperative that Congress be prepared to deal with the political manipulation and maneuvering that inevitably would accompany the transition to an opt-in preclearance regime.

4. *The Purpose of Section 5.* Fourth, and perhaps most importantly, Congress must articulate the main purpose of Section 5 of the VRA in a post-*Ashcroft* world. If Congress decides that *Ashcroft* was rightly decided, then the answer is simple: Section 5's purpose is to provide minority groups with a very flexible—perhaps too flexible—preclearance standard. But many believe that *Ashcroft* provides inadequate protection for minorities; others have suggested that *Ashcroft* gives a right of redress for minorities where none is genuinely needed.[132] *Ashcroft* thus raises a critical question about Section 5: if covered jurisdictions no longer employ poll taxes, literacy tests, and a host of other formal impediments to the minority franchise,[133] precisely what is Section 5 designed to prevent? This fourth and final inquiry should, and certainly will, be a matter of heated dispute as Congress conducts hearings in connection with reauthorization. As such, this inquiry is not one specific to the opt-in approach; it is highly germane to any reauthorization debate.

Section 5 is not a relic, a tool that was once useful in combating voting rights abuses but which should be relegated to the dustbin of history. But to remain relevant, Congress must clarify what its purpose is today. It may be that Section 5 is primarily helpful to minority voters by virtue of the political leverage that it gives to their chosen representatives in the context of political bargaining. If that is the role that Congress conceives for Section 5, then it is worth asking whether that leverage is best preserved with a flexible standard (as in

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132. Issacharoff, *supra* note 12, at 1730 ("One way of reading Ashcroft is to see the Court suggesting that black voters in Georgia have moved from a world of discrete status meriting protections external to the political system to a situation more closely approximating the normal give and take of politics.").

133. *See* Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 345 (1996) (noting that "the 1965 Voting Rights Act was originally and primarily aimed at eliminating obstacles to Black registration, such as literacy tests, good character tests, the practice of purging Blacks from the voting rolls once they were registered, and poll taxes" (footnotes omitted)).

Ashcroft) or with a firm rule (as in *Beer*).[134] Because preclearance, if reauthorized, will certainly be the subject of constitutional challenge, it is important to provide an answer to this query so that Congress can assemble an evidentiary record with an eye to defending preclearance if and when it is challenged before the Supreme Court.[135] More importantly, even though an opt-in regime might be less costly to implement and administer for the Voting Section, unless the *specific protections* afforded by Section 5 are tailored to a meaningful regulatory end, it is doubtful that an opt-in system would produce better outcomes for minority groups than the current regime. This is perhaps the central flaw in Professor Gerken's opt-in proposal: it takes for granted the legitimacy of existing Section 5 standards and then proposes a way of implementing those standards in a new way. This new implementation method certainly could reduce the cost of Section 5 enforcement for the Voting Section and promote local community involvement in political decision making. These features of Gerken's opt-in proposal make it a very appealing one. But if the standards embedded in Section 5 are not actually capable of protecting minority voting influence, or if those standards could be substantially improved by modifying Section 5 or the preclearance process in a more general fashion, at best the opt-in proposal would only produce marginal benefits for the Voting Section and for local political engagement.

It is uncertain how long it would take Congress to complete these four inquiries. It is also likely that some of these inquiries—particularly the final inquiry concerning the proper purpose and

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134. For a concise and powerful statement of the myriad problems with *Ashcroft*, see Karlan, *supra* note 18, at 22 ("*Georgia v. Ashcroft* takes a significantly different tack. It reintroduces the considerations of governance that *Presley* seemed to exclude, transforming them into justifications for approving plans that decrease minority voters' ability to elect the representatives of their choice. And it engages in the kind of noncomparative purpose analysis that *Bossier II* seemed to reject, in a fashion that dramatically undercuts the statutory burden of proof, a burden born of long, bitter, and all-too-recent experience with covered jurisdictions' indifference and hostility toward the political aspirations of minority voters.").

135. *See* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 180 (2005) (arguing that "Congress would be well advised to craft the best evidentiary record possible to support a renewed preclearance provision"). *But cf.* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 91 (2001) (observing that the tendency to conduct legislative record review is a relatively new phenomenon, and that its core purpose is primarily to "smoke out" illegitimate congressional motives; this suggests that legislative record review is only appropriate where Congress has legislated in order to enforce a "general police power").

scope of Section 5—could open the door to a number of legislative possibilities that may or may not arise in connection with the debate that is already afoot about reauthorizing the existing version of Section 5.[136] It is also unclear precisely how this task should be undertaken. The details should largely be left up to the discretion of Congress. But because it seems unlikely that all four inquiries could be successfully completed before Section 5's sunset date in 2007, Congress should reauthorize the extant version of Section 5 in the interim while they inquire into the effectiveness of an opt-in approach.

CONCLUSION

This Note has argued that the most pressing question is not whether to reauthorize Section 5, but which version of Section 5 should be reauthorized in 2007. On the assumption that the opt-in system raises complicated empirical questions that will be difficult to answer in the coming year, this Note contends that preclearance should be reauthorized on a temporary basis to allow Congress sufficient time to consider the likely benefits and drawbacks of an opt-in approach. The viability of opt-in preclearance depends on the resources and commitment of civil rights organizations across all covered jurisdictions. Despite the success that the Voting Section has had in the past through reliance on information provided by these organizations, Congress should consider with care whether the proxy-representation scheme at the heart of opt-in preclearance would serve the interests of minority communities in every covered jurisdiction.

To be sure, temporary reauthorization is not a panacea. Many obstacles that minority voters face—from coping with felon disenfranchisement[137] to unfair election practices[138] to intimidation tactics at the polls[139]—will not be cured by reauthorizing Section 5.

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136. For a helpful general overview of the particular issues that Congress has considered in connection with evaluating Section 5 during previous floor debates and hearings, see generally Gluck, *supra* note 133.

137. According to one source, 1.4 million African American men are prohibited from voting due to felon disenfranchisement laws. JAMIE FELLNER & MARC MALLER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998), *available at* http://www.hrw.org/reports98/vote/usvot98o.htm.

138. *See generally* SHELDON RAMPTON & JOHN STAUBER, BANANA REPUBLICANS: HOW THE RIGHT WING IS TURNING AMERICA INTO A ONE-PARTY STATE (2004) (chronicling the impact of unfair election practices on the ability of minorities to elect candidates of choice).

139. *See* Pamela S. Karlan, *Elections and Change under* Voting With Dollars, 91 CAL. L.

Reauthorization of Section 5 in its current form would not address serious concerns about the appropriate scope of Section 5 review. For "front-burner political decisions"[140] like redistricting, reauthorizing (mandatory) preclearance is not an optimal solution. The reason is simple: redistricting decisions are unique in that they have historically been occasioned by heightened levels of partisan wrangling because the political stakes are so high. As Issacharoff intimates, applying the current version of preclearance to redistricting decisions in jurisdictions with "active partisan competition" blurs the line between protecting minority voting power and illegitimately entrenching the Democratic Party.[141] Moreover, in a post-*Ashcroft* world, there is a significant danger that courts will be unable to identify redistricting plans that fail to protect minority voting influence.[142] Nevertheless, in light of the nation's collective ignorance about how precarious politics could become in the covered jurisdictions without some form of preclearance, renewal is the wisest course.[143]

REV. 705, 710 (2003) (describing voter intimidation as a "serious problem").

140. Issacharoff, *supra* note 12, at 1730.

141. Issacharoff's argument in this respect is a bit strange. On the one hand, he is not enthusiastic about *Ashcroft* because he believes that the totality of the circumstances test is difficult to administer. On the other hand, Issacharoff appears to laud the Court for recognizing that political bargaining has become a prominent part of politics in parts of the Deep South. *See id.* ("In contemplating that partisan competition may erode the traditional forms of section 5 review, the Court invites further inquiry into whether the administrative model of preclearance captures the protections necessary in jurisdictions with active partisan competition.").

142. It is worth noting that if Congress explicitly adopted the *Beer* standard for retrogression—a test that unlike *Ashcroft* does not authorize courts to examine the totality of the circumstances to determine whether a redistricting plan runs afoul of Section 5—some believe that the constitutionality of Section 5 would be imperiled. *See generally* Hasen, *supra* note 135.

143. *Impact and Effectiveness of the Voting Rights Act: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (October 25, 2005) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).