

INTENT AND ITS ALTERNATIVES: DEFENDING THE NEW VOTING RIGHTS ACT

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INTRODUCTION

On July 27, 2006, President George W. Bush signed into law the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.¹ This Act extends two central provisions of the Voting Rights Act of 1965² (VRA) for twenty-five years. The first is Section 5, which requires covered jurisdictions to obtain pre-clearance of electoral changes before they may go into effect.³ The other is Section 203, which requires jurisdictions with substantial language minority populations to provide translated ballot materials and other language assistance.⁴

Though this enactment represents a major achievement for the civil rights groups that fought hard to extend the VRA's expiring provisions, their victory is not yet complete. The ink on the new law had not yet dried when the first of what are likely to be multiple lawsuits challenging its constitutionality was filed.⁵ In fact, even before the passage of the 2006 Reauthorization Act, the constitutionality of extending the VRA—especially its preclearance requirement—had already generated vigorous debate on the part of both commentators and members of Congress.⁶ The principal issue

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1. Pub. L. No. 109-246, 120 Stat. 577 (2006). This Essay refers to the enactment as the "Reauthorization Act" or simply the "New VRA."

2. 42 U.S.C. § 1973 *et seq.* (2000).

3. *Id.* § 1973c.

4. *Id.* § 1973aa-1a. The Reauthorization Act also extends section 4(f)(4) of the VRA, *id.* § 1973b(f)(4), designed to ensure access for language minorities, and other VRA provisions (not discussed in this Essay) that have to do with federal observers. *Id.* §§ 1973f & 1973k.

5. Complaint, Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales, No. 06-1384 (D.D.C. Aug. 4, 2006), available at <http://electionlawblog.org/archives/northwest%20austin.pdf>.

6. See, e.g., *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *The Continuing Need for Section 5 Pre-Clearance*] (statement of Pamela S. Karlan, Professor and Associate Dean, Stanford Law School), available at http://judiciary.senate.gov/testimony.cfm?id=1888&wit_id=5350; *id.* (statement of Richard H. Pildes, Professor, New York University School of Law), available at http://www.judiciary.senate.gov/testimony.cfm?id=1888&wit_id=5353; H.R. REP. NO. 109-478, at 54-68 (2006) [hereinafter House

in dispute is whether a reauthorized VRA constitutes a “congruent and proportional” remedy for constitutional violations in light of the Supreme Court’s new federalism cases starting with *City of Boerne v. Flores*.⁷

It is far from certain that the Supreme Court will uphold the reauthorized provisions of the VRA in their entirety. That is especially true of Section 5, which places unusual burdens on covered state and local electoral jurisdictions by requiring their electoral changes to be precleared by the U.S. Department of Justice or a federal court. To date, the constitutional debate has focused mostly on whether Section 5 remains an appropriate remedy for intentional race discrimination within the democratic process more than four decades after the original VRA became effective. The Supreme Court has upheld various provisions of the VRA against constitutional attack and has on a number of occasions compared the VRA favorably to other laws deemed to fall beyond Congress’s enforcement power.⁸ This is a good sign for supporters of the reauthorized Section 5, but it does not definitively resolve the issue. The obvious difficulty is that there is nowhere near the level of intentional race discrimination in voting in 2006 that there was in 1965.

While Section 203’s constitutionality has received much less attention, there are constitutional issues surrounding this provision as well. Section 203 does not impose the same type of federalism burdens as does Section 5. On the other hand, it is not clear that assistance for language minorities can be justified as a remedy for intentional discrimination based on race or ethnicity. There may be some other constitutional violation that Section 203 is designed to remedy, but to date, that theory has not been fully elaborated.

This Essay’s purpose is to challenge the assumption that these provisions of the New Voting Rights Act may be upheld only if it is deemed an appropriate remedy for intentional race discrimination under the Fourteenth or Fifteenth Amendment.⁹ I consider two alternative theories that might be

Report], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr478.109.pdf; S. REP. NO. 109-295, at 25-54 (2006) [hereinafter Senate Report], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:sr295.109.pdf (statements of Sens. Cornyn and Coburn suggesting that reauthorized VRA’s coverage formula may violate constitutional requirements); 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, 178 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 225-26 (2003); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 70 (2003).

7. 521 U.S. 507 (1997).

8. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-66 (2001).

9. In speaking of the “New Voting Rights Act,” I do not of course mean that this four-decade-old law is new, or that courts should require exactly the same evidentiary showing to uphold the reauthorized VRA as would be required for a newly enacted enforcement statute. See Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in DEMOCRACY, PARTICIPATION, AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT (Berkley Press forthcoming 2006) (manuscript at 21-22, <http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf>) (explaining that because the VRA has been in place for so long, it will be difficult to demonstrate a record of ongoing constitutional violations). Nevertheless, the VRA Reauthorization Act will be treated as a distinct piece of legislation that must be defended based on present-day needs. It is in this sense that I mean the Act is (or at least will be treated as) “new.”

employed to establish their constitutionality. One alternative is that the reauthorization may be upheld as an exercise of Congress's power over federal elections under the Elections Clause of the U.S. Constitution.¹⁰ The other alternative is that the reauthorized VRA may be upheld to enforce rights of equal *participation* under the Fourteenth Amendment.

In using the term "participation," I mean to draw a distinction with representation—between voting and having one's vote counted on the one hand and being fairly represented in federal, state, and local political bodies on the other. In voting rights cases, infringement of participation rights is sometimes referred to as "vote denial" and infringement of representation rights as "vote dilution."¹¹ Although some commentators have argued that the "fundamental" nature of the right to vote might alter the constitutional test applied to federal statutes protecting that right,¹² both supporters and opponents of VRA reauthorization generally have overlooked the distinction between vote denial and vote dilution.

The most important point I press here is that the Fourteenth Amendment provides greater protection in cases involving participation (or vote denial) than it does in cases involving only representation (or vote dilution). More specifically, the Equal Protection Clause has been interpreted to forbid electoral practices that deny citizens the ability to vote or have their votes counted, *even where intentional race discrimination is not found to exist*. Discriminatory intent is undoubtedly the constitutional standard when it comes to practices, such as gerrymandered districts or at-large elections, that qualitatively dilute minority representation,¹³ but it is decidedly not the constitutional standard for practices, such as poll taxes¹⁴ or vote-counting disparities,¹⁵ that have the effect of denying equal participation in the democratic process. VRA provisions that protect rights of participation therefore may be upheld even if they cannot be justified as congruent and proportional remedies for intentional discrimination.¹⁶

This alternative equal protection theory will not be sufficient to uphold the New Voting Rights Act in its entirety, but it does provide a strong basis for some of the law's most important applications. In particular, the right of participation provides an especially strong basis for upholding Section 203's

10. U.S. CONST. art. I, § 4.

11. See *Reno v. Bossier Parish Sch. Dist.*, 528 U.S. 320, 334 n.3 (2000) (distinguishing vote dilution from vote denial, and noting that the Court has never held that vote dilution violates the Fifteenth Amendment); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) (defining vote denial and vote dilution).

12. See Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 824 (2005).

13. See *Rogers v. Lodge*, 458 U.S. 613, 616 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980), *superseded by statute on other grounds*, Voting Rights Act Amendments of 1982, sec. 3, § 1973, Pub. L. No. 97-205, 96 Stat. 131, 134.

14. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

15. See *Bush v. Gore*, 531 U.S. 98, 125 (2000).

16. Professor Pildes expresses a similar idea, in suggesting that Congress has the power to legislate to protect the "right to vote as such." Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 759 (2006).

language assistance provisions, which are difficult to justify under an intentional discrimination theory. This theory also may be sufficient to justify the applicability of the VRA's preclearance requirement with respect to electoral practices that constitute the bulk of submissions—though not the bulk of objections—under Section 5. What it cannot do is to support Section 5's application to practices that dilute minority votes without denying them, such as state and local redistricting plans that reduce racial minorities' ability to elect representatives of their choice. The equal participation theory nevertheless provides a basis for upholding some critical aspects of the New Voting Rights Act, ones that have attracted considerable attention in recent years and that may become even more important in years to come.

I. CONGRESSIONAL POWER TO ENFORCE VOTING RIGHTS

The principal constitutional theory cited in support of the New Voting Rights Act is that it is needed to prevent and remedy intentional discrimination in the voting process. While this is a plausible justification for both Section 5 and Section 203, it is not an uncontroversial one. To understand why, it is first necessary to examine the doctrinal developments since the 1960s concerning congressional power to enforce constitutional rights. Because other scholars have examined these developments in some depth,¹⁷ I summarize them briefly here and then move to an assessment of the arguments for upholding the reauthorized VRA as a remedy for intentional race discrimination.

A. *The Katzenbach Quartet*

In a line of cases beginning with *South Carolina v. Katzenbach*,¹⁸ the Supreme Court upheld various portions of the Voting Rights Act, as originally enacted and as subsequently reauthorized, as a proper exercise of Congress's enforcement authority. *South Carolina v. Katzenbach* upheld Section 5's preclearance requirement and other provisions of the original VRA.¹⁹ It relied on Section 2 of the Fifteenth Amendment as well as the congressional finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" due to the systemic obstruction that such lawsuits inevitably provoked.²⁰

Later that term, in *Katzenbach v. Morgan*,²¹ the Court upheld another provision of the original VRA against a challenge by New York officials.²² That decision is worth noting because it involves a provision of the original

17. See, e.g., Hasen, *supra* note 6, at 177; Waterstone, *supra* note 12, at 793; Winke, *supra* note 6, at 69.

18. 383 U.S. 301 (1966).

19. *Id.* at 335-36.

20. *Id.* at 328.

21. 384 U.S. 641 (1966).

22. *Id.* at 646-47.

VRA comparable to the present language assistance provisions. At issue in *Morgan* was Section 4(e), which prohibited enforcement of state literacy requirements as to those who had successfully completed the sixth grade in non-English schools in Puerto Rico.²³ This time, the Court relied on Congress's power under Section 5 of the Fourteenth Amendment, holding that the requirement was an appropriate exercise of authority to enforce the Equal Protection Clause.²⁴

The *Morgan* Court articulated two distinct equal protection rationales. The first was that Section 4(e) protected those who had been "denied the right to vote because of their inability to read and write English" and, more specifically, that it ensured that Puerto Ricans migrating to states would be afforded "nondiscriminatory treatment" with respect to voting and other public services "such as public schools, public housing and law enforcement."²⁵ On this point, the Court assumed a deferential position: "It was for Congress . . . to assess and weigh the various conflicting considerations It is not for us to review the congressional resolution of these factors."²⁶ The other equal protection rationale was intentional discrimination internal to the electoral process, the Court viewing Section 4(e)'s requirement as an appropriate means to eliminate "invidious discrimination in establishing voter qualifications."²⁷

Two subsequent cases upheld provisions of the VRA after their reauthorization and amendment in the 1970s. In *Oregon v. Mitchell*,²⁸ a fractured Court upheld a 1970 amendment to the VRA that imposed a five-year nationwide ban on literacy tests and prohibited states from disqualifying voters in presidential elections due to state residency requirements.²⁹ The Court struck down an amendment purporting to lower the minimum voting age to eighteen in *state* elections but upheld it for federal elections.³⁰ No rationale commanded a majority on this point: Justice Black relied on the Elections Clause and the Necessary and Proper Clause,³¹ while four other justices relied on the Necessary and Proper Clause and the Fourteenth Amendment.³² Finally, in *City of Rome v. United States*,³³ the Court upheld the applicability of Section 5 to a local jurisdiction that was precluded from

23. *Id.* at 643.

24. *Id.* at 658.

25. *Id.* at 652. As Pam Karlan has observed, this rationale is "prospective" or forward-looking, insofar as it views Section 4(e) as providing a means by which to prevent future discrimination in public services that might occur if Puerto Ricans were denied access to the vote. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 740 (1998).

26. *Id.* at 653.

27. *Id.* at 654.

28. 400 U.S. 112 (1970), *superseded by* U.S. CONST. amend. XXVI.

29. *Id.* at 118.

30. *Id.*

31. *Id.* at 119-20 (Black, J.).

32. *Id.* at 135 (Douglas, J.); *id.* at 239-81 (Brennan, J.). These four justices would have upheld the lowering of the minimum voting age under the Fourteenth Amendment.

33. 446 U.S. 156 (1980).

bailing out of preclearance because it was within a covered state.³⁴ As in *South Carolina v. Katzenbach*, the Court found Section 5 to be a proper exercise of Congress's power to enforce the Fifteenth Amendment's prohibition on intentional race discrimination in voting, even though it targeted some practices that were only discriminatory in effect.³⁵

B. *Boerne and Its Progeny*

Since the *Katzenbach* quartet, the Supreme Court has adopted a considerably less deferential view of congressional power to enforce constitutional rights. This line of cases, a cornerstone of the so-called "new federalism,"³⁶ requires that laws enacted under Section 5 of the Fourteenth Amendment be congruent and proportional to the constitutional rights they purport to protect.

The pivotal case was *City of Boerne v. Flores*,³⁷ which held that Congress had exceeded its Fourteenth Amendment enforcement powers by enacting the Religious Freedom Restoration Act (RFRA), a statute that imposed religious accommodation requirements on the states that went well beyond those required by the First Amendment, under prior Supreme Court precedent.³⁸ Specifically, *Boerne* concluded that Congress lacked the power to "alter[] the Fourteenth Amendment's meaning" by adopting an interpretation of constitutional rights contrary to that articulated by the Court.³⁹ Congress's power under the Fourteenth Amendment was limited to enforcement of constitutional rights, the Court reasoned, and did not include the modification of rights: "The power to interpret the Constitution in a case or controversy remains in the Judiciary."⁴⁰ The Court further reasoned that there must be "congruence between the means used and the ends to be achieved."⁴¹ It found RFRA "so out of proportion" to its supposed objective of remedying intentional religious discrimination that it could not be sustained as a valid exercise of Congress's enforcement power.⁴² In reaching this conclusion, the Court contrasted the *Katzenbach* line of cases, reasoning that Congress had enacted the VRA in the face of strong evidence of intentional race discrimination in the voting process, thus justifying its imposition of requirements on the states going beyond what the Fourteenth Amendment itself imposed.⁴³ In contrast to RFRA, the VRA's strong en-

34. *Id.* at 167.

35. *Id.* at 177.

36. Hasen, *supra* note 6, at 183.

37. 521 U.S. 507 (1997).

38. *Id.* at 533-34 (contrasting RFRA's standard with the constitutional standard articulated in *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

39. *Id.* at 529.

40. *Id.* at 524.

41. *Id.* at 530.

42. *Id.* at 532.

43. *Id.* at 532-33.

forcement provisions were needed to prevent and remedy constitutional violations.⁴⁴

Boerne was followed by a series of cases in which the Court struck down federal statutes on the ground that they exceeded Congress's power to enforce constitutional rights. Among the laws held to lie beyond Congress's enforcement powers under Section 5 of the Fourteenth Amendment were portions of the Violence Against Women Act (VAWA),⁴⁵ Age Discrimination in Employment Act (ADEA),⁴⁶ and Americans with Disabilities Act (ADA).⁴⁷ These cases established "congruence and proportionality" as the new test for evaluating the means/end fit of laws enacted pursuant to the Fourteenth Amendment. Yet in all of these cases, as in *Boerne*, the Court was careful to distinguish its holdings in the *Katzenbach* quartet.

Most notable in this regard is *Board of Trustees of the University of Alabama v. Garrett*, which as of this date represents the nadir of deference to Congress. *Garrett* held that Title I of the ADA exceeded Congress's enforcement power in purporting to create a damages remedy against state government for failing to accommodate disabled employees.⁴⁸ The first step in the constitutional analysis, according to *Garrett*, was "to identify with some precision the scope of the constitutional right at issue."⁴⁹ Next, the court should determine whether Congress "identified a history and pattern" of violations of that right—in that case, irrational discrimination against disabled people in state employment.⁵⁰ Even if such a pattern of constitutional violations is demonstrated, "congruence and proportionality" between the remedy created and the constitutional violation must still be shown for the statute to be upheld.⁵¹

The *Garrett* Court found Title I defective on the ground that Congress failed to identify and document a sufficient pattern of constitutional violations.⁵² As in *Boerne*, the Court compared the VRA favorably to the law it struck down.⁵³ With the VRA, *Garrett* observed, "Congress documented a marked pattern of unconstitutional action by the States."⁵⁴ Specifically, Congress found a pattern of racial discrimination in voting, as to which conventional litigation had proved ineffective.⁵⁵ By contrast, Congress had

44. *Id.* at 533; *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (rejecting constitutional challenge to an application of Section 5, despite statute's "federalism costs").

45. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

46. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000).

47. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

48. *Id.*

49. *Id.* at 365.

50. *Id.* at 368.

51. *Id.* at 372; *see also* *Miller v. King*, 384 F.3d 1248, 1269 (11th Cir. 2004) (interpreting *Garrett* as establishing a three-part test for ascertaining whether Congress has acted within its power under Section 5 of the Fourteenth Amendment), *vacated on other grounds*, *Miller v. King*, 449 F.3d 1149 (11th Cir. 2006).

52. 531 U.S. at 374.

53. *Id.* at 373.

54. *Id.*

55. *Id.*; *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999) (reaffirming the constitu-

failed to demonstrate either a pattern of unconstitutional state discrimination or congruence and proportionality between the violation and the remedy when it enacted Title I of the ADA.⁵⁶

Subsequent to *Garrett*, the Court issued two opinions that suggest a broader scope for congressional power, at least where a suspect class or fundamental rights are at issue. In *Nevada Department of Human Resources v. Hibbs*,⁵⁷ the Court upheld the application of the Family Medical Leave Act of 1993 (FMLA) to a state entity as a permissible exercise of congressional authority to remedy sex discrimination.⁵⁸ In contrast to distinctions based on age or disability, the Court reasoned, sex discrimination is subject to heightened constitutional scrutiny.⁵⁹ This made it “easier for Congress to show a pattern of state constitutional violations” than in cases like *Garrett*.⁶⁰ The Court also appeared to engage in a more relaxed review of the FMLA’s means/end fit, finding it to be a “congruent and proportional” remedy despite the fact that the statute—like the VRA—imposed requirements on the state that went well beyond what the Constitution requires.⁶¹

Also germane to the reauthorized VRA’s constitutionality is the decision in *Tennessee v. Lane*,⁶² which upheld the application of Title II of the ADA to the cases of disabled people who were denied access to county courthouses.⁶³ The Court identified the right at issue as “the right of access to the courts,” protected by the Due Process Clause of the Fourteenth Amendment.⁶⁴ It further noted that Congress enacted Title II “against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.”⁶⁵ Just as *Hibbs* notes that constitutional violations are easy to show when sex discrimination is at issue,⁶⁶ *Lane* suggests that such violations also may be easier to show when fundamental rights are at stake.⁶⁷ It specifically identified voting as among those fundamental rights.⁶⁸ As the Court puts it: “Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications.”⁶⁹ It further con-

tionality of Section 5 of the VRA against a constitutional challenge, despite its “federalism costs” on covered state and local entities).

56. 531 U.S. at 374.

57. 538 U.S. 721 (2003).

58. *Id.* at 734-35.

59. *Id.* at 735-36.

60. *Id.* at 736.

61. *Id.* at 737.

62. 541 U.S. 509 (2004).

63. *Id.* at 533-34.

64. *Id.* at 523.

65. *Id.* at 524 (emphasis added).

66. 538 U.S. at 736.

67. 541 U.S. at 529.

68. *Id.* at 524-25.

69. *Id.* at 529.

cludes that the “prophylactic” remedy that Congress adopted through Title II—imposing requirements that go substantially beyond what the Fourteenth Amendment requires—was still “congruent and proportional” to the constitutional wrongs sought to be addressed.⁷⁰

Taken together, *Hibbs* and *Lane* suggest a more deferential standard of review where Congress acts to address practices that are subject to heightened scrutiny, including discrimination based on race or sex as well as infringements of fundamental rights such as voting. In both cases, the Court appeared more willing to find that Congress had met its burden of establishing the requisite pattern of constitutional violations. It was also more willing to find the necessary means/end fit, despite the fact that both statutes swept in constitutionally permissible conduct.⁷¹

II. IN SEARCH OF DISCRIMINATORY INTENT

The post-*Boerne* cases, particularly *Hibbs* and *Lane*, provide some reason for optimism for those hoping that the Supreme Court will uphold the New Voting Rights Act. But the matter is not free from doubt, at least insofar as supporters will be required to show that its provisions are appropriately tailored to prevent or remedy *intentional discrimination*. In this section, I anticipate arguments regarding the constitutionality of Section 5’s preclearance requirement and Section 203’s language assistance requirement. My purpose here is not to engage in a thorough analysis of the evidentiary record, in which I expect the courts will engage, but rather to sketch out the basic lines of argument that supporters and opponents of the reauthorized VRA might be expected to pursue on whether these provisions are “congruent and proportional” to the objective of enforcing the prohibition against intentional race discrimination.

A. Preclearance

If we assume that the sole right protected by Section 5 is the right to be free from intentional race discrimination, VRA proponents will face some significant challenges. As an initial matter, they will have to demonstrate a pattern of constitutional violations.⁷² This was relatively easy to do in 1965 but is much more difficult now. Even if this burden is satisfied, proponents still will need to establish that the remedy imposed by Section 5—requiring

70. *Id.* at 531.

71. The Court upheld another application of Title II of the ADA in *United States v. Georgia*, 126 S. Ct. 877, 882 (2006). This case, however, sheds little light on Congress’s authority to enact “prophylactic” remedies that go beyond constitutional requirements. Instead, the Court relies on Congress’s undisputed authority to enforce the Fourteenth Amendment’s requirements “by creating private remedies against the States for *actual* violations of those provisions.” *Id.* at 881. Because the lower court had not addressed the question of whether the Constitution actually prohibited the conduct alleged, the Court remanded. *Id.* at 882.

72. *Cf. Lane*, 541 U.S. at 521 (noting that *Garrett* failed to demonstrate such a pattern).

covered jurisdictions to go through the extraordinary step of obtaining federal preclearance before their electoral changes may go into effect—is congruent and proportional to redress unconstitutional action.⁷³ Discriminatory intent is required to prevail on a race discrimination claim under either the Fourteenth or Fifteenth Amendment.⁷⁴ While the Court arguably has applied a more relaxed standard for proving discriminatory intent in voting than in other areas,⁷⁵ this remains the constitutional standard for race discrimination claims.

Following Professor Karlan,⁷⁶ I find it helpful to consider two categories of intentional discrimination for which Section 5 arguably serves as a remedy. One is discrimination *internal* to the voting process, in the sense that the practice is instituted within the electoral system.⁷⁷ The other is discrimination *external* to the voting process, such as intentional discrimination in public education or by private entities, which interacts with the challenged voting practice.⁷⁸

Classical examples of internal voting discrimination would be legislative districts gerrymandered with the intent to weaken black political strength or obstacles to participation (such as a literacy test) designed to make it difficult for blacks to vote. The problem in using this as a justification for the New VRA is that instances of intentional discrimination are far less common now than they were when the original VRA was enacted in 1965, or when it was reauthorized in 1970, 1975, and 1982. Rick Hasen refers to this as the “Bull Connor is Dead problem.”⁷⁹ Of course, there is some evidence of ongoing intentional discrimination in the years since the VRA was last reauthorized.⁸⁰ It scarcely can be doubted, however, that intentional discrimination is less prevalent today than it was four decades ago, when Congress enacted Section 5 and the Supreme Court upheld it in *South Carolina v. Katzenbach*.⁸¹

As Ellen Katz notes, the fact that there are relatively few instances of intentional race discrimination in voting today may be seen as a tribute to the efficacy of the VRA in general and Section 5 in particular.⁸² She there-

73. See, e.g., *id.* at 520.

74. *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980), *superseded by statute on other grounds*, Voting Rights Act Amendments of 1982, sec. 3, § 1973, Pub. L. No. 97-205, 96 Stat. 131, 134; *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). In this Essay, I use the terms “intent” and “purpose” interchangeably.

75. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126-31 (1989) (citing *Rogers v. Lodge*, 458 U.S. 613 (1982), and other cases where the Court has appeared to relax the intent requirement).

76. Karlan, *supra* note 25, at 728-29.

77. See *id.* at 728.

78. See *id.* at 728-29.

79. Hasen, *supra* note 6, at 188. Bull Connor was the desegregation-era police commissioner of Birmingham, Alabama, notorious for using fire hoses and dogs on civil rights demonstrators. Juan Williams, *The Faithful's Wayward Path*, N.Y. TIMES, Jan. 20, 2003, at A19.

80. See House Report, *supra* note 6, at 25-35.

81. 383 U.S. 301 (1966).

82. See Katz, *supra* note 9, at 1.

fore contends that Section 5's validity should not turn on whether there is still evidence of "widespread unconstitutional conduct."⁸³ To the extent that evidence of continuing discrimination is scarce, that may well be a function of the statute having been so effective in stopping it; it does not necessarily follow that the statutory remedy is no longer necessary to deter or remedy future discrimination.⁸⁴ For this reason, Professor Katz persuasively argues that a reauthorized statute like Section 5 should be viewed differently from one that imposes a new legal requirement.⁸⁵ With the latter class of laws, it is reasonable to expect a record of unconstitutional state action, but with the former, such evidence will exist only if the statute has been ineffective.⁸⁶ Accordingly, the relatively small number of objections in recent years⁸⁷ does not demonstrate that Section 5 is no longer needed to curb intentional discrimination. These low numbers may well be a tribute to Section 5's success in discouraging states from attempting to implement retrogressive changes.

Professor Katz's argument is compelling, but it does not remove all doubt as to the renewed Section 5's constitutionality, at least before the current Supreme Court. Even if the Court is willing to accept less evidence of a "pattern" of ongoing unconstitutional conduct than it ordinarily would, proponents of the renewed Section 5 still will have to demonstrate that the renewed Section 5 is "congruent and proportional" to its object. Here, too, the Court may apply a more relaxed standard than in other areas. *Hibbs* and *Lane* are especially encouraging in this regard because *Hibbs* suggests greater deference to Congress when it comes to suspect classifications, while *Lane* suggests greater deference when it comes to fundamental rights.⁸⁸ Because Section 5 applies to the quintessential suspect classification (race) and to the quintessential fundamental right (voting), there is as strong an argument for deferring to Congress's remedial choices here as in any context.⁸⁹

On the other hand, the remedy imposed by Section 5 is an extraordinary one. Congress decided to extend Section 5 for a full quarter-century, while retaining the pre-existing coverage formula, bailout requirements, and procedure for preclearance.⁹⁰ During the reauthorization debate, Rick Pildes observed that the Court would be more likely to accept a reauthorized VRA

83. *Id.* at 20.

84. *Id.*

85. *Id.*

86. *Id.*

87. Hasen, *supra* note 6, at 191-92.

88. *See also* *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) (suggesting more permissive test for federal statutes redressing race discrimination than for other statutes enacted pursuant to Section 5 of the Fourteenth Amendment); *cf. supra* notes 57-71 and accompanying text.

89. *See The Continuing Need for Section 5 Pre-Clearance*, *supra* note 6, at 5 (statement of Pamela S. Karlan) (arguing that congressional power is at its apogee when Congress acts to protect fundamental rights or suspect classes).

90. Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization & Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

if changes were made to the coverage formula, bailout provisions, or term of reauthorization.⁹¹ In the end, Congress made none of these suggested modifications. Instead, it reversed the Court's interpretation of Section 5 in *Georgia v. Ashcroft*.⁹² If anything, this change will make it *more* difficult to argue that the statute is congruent and proportional to the objective of redressing intentional race discrimination, since it limits the flexibility of states. This does not mean Section 5 will be struck down, but it does make the case for upholding it on an intentional discrimination theory more difficult than would have been the case if Congress had softened the preclearance requirements.

The other type of intentional discrimination that might be used to support the renewed Section 5 is discrimination *external* to the challenged voting practice.⁹³ Where a challenged voting practice interacts with intentional discrimination or its vestiges to result in the diminution of minority voting strength, there is a plausible argument for the exercise of Congress's remedial powers—even if the voting practices themselves were not intended to discriminate. This argument might also have a prospective dimension, as *Katzenbach v. Morgan* suggests,⁹⁴ to the extent that voting rights protection is necessary to prevent discrimination in public services.⁹⁵

This line of argument could be applied to electoral practices that have a disproportionate effect on minority participation or representation. It might, for example, be possible to justify the application of Section 5 to stop a voter identification requirement on this ground, to the extent that such a requirement interacts with the vestiges of past discrimination to limit black participation.⁹⁶ With the proper evidence, one could argue that such a law requiring state-issued photo ID, like that recently enacted by Georgia,⁹⁷ would have a greater negative impact on blacks than on whites due to historic racial discrimination by the state. The argument would go something like this: (1) *de jure* discrimination in public education, along with discrimination by public employers, led to unequal access to job opportunities; (2) those unequal job opportunities in turn led to lower rates of automobile ownership among blacks, which persist to this day; (3) because black citizens are less likely to drive, they are less likely to possess a driver's license than white citizens; and (4) given that blacks are less likely to have a

91. *The Continuing Need for Section 5 Pre-Clearance*, *supra* note 6, at 1-2 (statement of Richard H. Pildes).

92. 539 U.S. 461 (2003) (holding that a redistricting plan may be precleared, despite reduction in racial minorities' ability to elect a representative of their choice, where the plan includes "influence districts" in which minorities may play a substantial role in the electoral process).

93. *Cf. supra* note 78 and accompanying text.

94. 384 U.S. 641, 652-53 (1966).

95. *See* Karlan, *supra* note 25, at 729.

96. *See* Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 59 HOW. L.J. 785, 812-19 (2006); Spencer Overton, *Voter Identification*, 104 MICH. L. REV. (forthcoming Dec. 2006), available at <http://www.stealingdemocracy.com/OvertonVoterID6-7-06.pdf> (describing debates over voter identification in various states and at the federal level).

97. GA. CODE ANN. § 21-2-417 (2003 & Supp. 2006).

driver's license, the most common form of government-issued photo ID, they will be affected more severely by laws that condition voting on possession of such identification. It might further be argued that ID laws would prospectively injure blacks, by limiting their representation in government and thus opening the door to discrimination in the provision of public services. Of course, citizens who lack a photo ID may go to the state driver's license bureau to obtain one. But how many people will be willing to go through the burden of waiting in line to get such an ID, only to face the prospect of waiting in another line to vote? Some people undoubtedly will, but others will not.

The problem with relying on external discrimination in this fashion is that it requires one to draw a series of causal connections that some jurists might find too attenuated. Such a theory would require some evidence to demonstrate either (1) that the disparate impact of a challenged practice (like voter ID) is really traceable to intentional discrimination, or (2) that the disparate impact on blacks will ultimately limit their representation in government, resulting in intentional discrimination in public services. While plausible, the theory may be difficult to support with evidence. Much will likely hinge on the degree of deference that the Court gives to congressional factfinding.

A different type of external discrimination might be used to justify the application of Section 5 to redistricting, one of the most common reasons for preclearance objections.⁹⁸ Even where there is no evidence of intentional discrimination by those drawing district lines, a redistricting plan's negative impact on minority voters might be traceable to intentional discrimination on the part of white voters. To the extent that majority-group members are unwilling to vote for black candidates, the argument goes, it will be difficult for black candidates to win election unless majority-minority districts are drawn. On this theory, continuing evidence of racial bloc voting in covered jurisdictions provides evidence of intentional discrimination that could be used to support Section 5's application to redistricting plans, as well as to election methods (such as at-large elections) that have a disparate impact on minority-group members.⁹⁹

The problem with this argument is establishing that the racist voting of private citizens may be attributed to the state and, therefore, may furnish the necessary evidence of constitutional violations needed to uphold the reauthorized VRA.¹⁰⁰ Ever since the *Civil Rights Cases*,¹⁰¹ the Supreme Court has held that the Fourteenth Amendment may be violated only by *state ac-*

98. Luis Ricardo Fraga & Maria Lizet Ocampo, *The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests* 28 tbl.8 (Feb. 9, 2006) (unpublished manuscript, http://www.ucdc.edu/faculty/Voting_Rights/Papers/5%20-%20Fraga%20&%20Ocampo.pdf) (showing 236 objections to redistricting changes from 1990-2005, the second most common reason for objections).

99. Cf. Karlan, *supra* note 25, at 739-40; Winke, *supra* note 6, at 104.

100. See Hasen, *supra* note 6, at 193-94.

101. 109 U.S. 3, 11 (1883).

tion, not by private action.¹⁰² It would seem difficult, at first blush, to attribute private racist voting choices to the state, particularly given that the Constitution is generally thought to protect such choices.¹⁰³ On the other hand, the boundaries of the state action doctrine are anything but clear. As Professor Chemerinsky noted more than two decades ago, there is considerable academic commentary “demonstrating the incoherence of the state action doctrine,”¹⁰⁴ and subsequent case law has done little to clarify the doctrine. In some respects, the boundaries of state action have broadened by cases extending the state action requirement to civil litigants in selecting juries and generally requiring that jury trials be free from any taint of racial bias.¹⁰⁵ The jury system bears comparison to the voting system, as both provide opportunities for private citizens to participate in a form of democratic deliberation.¹⁰⁶ To the extent that this comparison holds, it is no great stretch to find “state action” in a situation where the state’s electoral map interacts with private racist choices to result in the diminution of black voting strength.¹⁰⁷

In sum, there are plausible arguments for upholding Section 5 based on intentional discrimination external to the electoral system. But like the arguments based on race discrimination internal to the electoral system, these arguments are not airtight. It is therefore necessary to consider alternative bases, aside from intentional discrimination, upon which Section 5 might be upheld. Before doing so, however, I turn to the other major component of the reauthorized VRA, considering whether its provisions may be upheld based on a theory of intentional discrimination.

B. Language Assistance

In the debates over reauthorization of the VRA, the constitutionality of the language assistance requirements has received much less attention than the constitutionality of the preclearance requirements. This is probably attributable to the unusual procedural burdens entailed in Section 5 preclearance—namely, getting advance approval from a federal agency or court before a change may go into effect.

The language assistance requirements impose a more conventional burden on state and local government. Section 203 requires covered state and local entities to provide language assistance, including both written materi-

102. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *cf. Georgia v. McCollum*, 505 U.S. 42, 45 (1992).

103. See Hasen, *supra* note 6, at 193.

104. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985).

105. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616-28 (1991).

106. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 217-54 (1995); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2519-22 (2003).

107. See Winke, *supra* note 6, at 103-04 (citing Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1227 (1996)) (noting that voting involves a combination of state and private action).

als and oral assistance, in jurisdictions with a sufficient number or percentage of non-English speaking people.¹⁰⁸ First enacted in 1975, this provision applies to states or political subdivisions (typically counties) where: (1) more than 10,000 citizens or more than 5% of the population are members of a single language minority group, and (2) the illiteracy rate of language minorities is above the national illiteracy rate.¹⁰⁹ The other significant language assistance provision is Section 4(f)(4), which covers jurisdictions where a language minority group constituted more than 5% of the voting-age population, materials were provided only in English, and less than half of the population was registered to vote in 1972.¹¹⁰ Covered jurisdictions must “provide[] any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, . . . in the language of the applicable minority group as well as in the English language.”¹¹¹ Both written materials and oral assistance should be provided to covered groups, which include Asian American, Hispanic American, Native American, and Alaskan Native citizens.¹¹² Almost 300 jurisdictions are covered by Section 203’s language assistance requirements.¹¹³

The arguments for reauthorizing the language assistance provisions were compelling, given the relatively low rates of participation in elections on the part of many language minority subgroups. For example, a 2004 exit poll of approximately 11,000 Asian American voters found that almost one-third of them needed some assistance.¹¹⁴ The percentage needing assistance was even higher for new voters.¹¹⁵ Significantly lower rates of participation also exist among language minority groups, including those whose primary language is Spanish, an Asian language, or a Native American language.¹¹⁶ Covered jurisdictions face costs to comply with Section 203, but those costs are justified by the need to ensure that citizens who are not proficient in English are able to participate and make informed choices.

Somewhat more difficult is determining the constitutional theory under which Congress has the power to require state and local governments to

108. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i) (2000). A listing of covered jurisdictions may be found at Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,871-77 (July 26, 2002).

109. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i).

110. *Id.* § 1973b. Jurisdictions covered by Section 4(f)(4) also must meet the preclearance requirement of Section 5. *Id.* The issues surrounding this requirement mirror those in the larger debate over preclearance, so I focus here on Section 203.

111. *Id.* § 1973aa-1a(c).

112. Voting Rights Act Amendments of 1992, 67 Fed. Reg. at 48,871-77.

113. This material appears in substantially similar form in Dan Tokaji, *What About Section 203?* (May 19, 2006), <http://electionlawblog.org/archives/005671.html>.

114. ASIAN AM. LEGAL DEF. & EDUC. FUND, *THE ASIAN AMERICAN VOTE: A REPORT ON THE AALDEF MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION 2* (2005), http://www.aaldef.org/articles/2005-04-20_67_TheAsianAmeric.pdf.

115. *Id.*

116. See Pei-Te Lien, *The Voting Rights Act and Its Implications for Three Nonblack Minorities*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT* 129, 138 tbl.8-2 (Richard M. Valelly ed., 2006).

provide language assistance. The most obvious answer is that such measures are needed to redress intentional discrimination against minority voters. Here again, it is helpful to rely on Professor Karlan's distinction between internal and external discrimination.¹¹⁷

There undoubtedly has been—and continues to be—significant intentional discrimination against language minorities within the voting process. The record that Congress had before it includes evidence of ongoing discrimination against language minorities.¹¹⁸ The question remains, however, whether it is a congruent and proportional remedy to require all jurisdictions with substantial non-English proficient citizen populations and low literacy to provide affirmative language assistance. More specifically, can it be argued that such a requirement can be justified by the need to root out intentional discrimination that otherwise would result in state and local officials intentionally discriminating against language minorities? To prevent unconstitutional discrimination, Congress undoubtedly is entitled to impose requirements beyond what the Constitution requires, as it has done with Section 2¹¹⁹ and Section 5. Those provisions both incorporate effects-based tests that go beyond what the Constitution requires, but they can be defended on the ground that they are needed as a prophylactic against intentional discrimination. The prophylaxis argument is bit more difficult with respect to Section 203, insofar as it purports to remedy intentional discrimination internal to the election process. While there is some evidence of intentional discrimination on the part of state and local entities in failing to provide language assistance, establishing that Section 203's broader mandate is "congruent and proportional" to this discrimination may be a challenge.

An alternative justification is that Section 203 is needed to remedy intentional discrimination *outside* the voting process. Disparities in the educational opportunities offered to language minority groups, this argument goes, make it necessary to accommodate citizens who are not proficient in English at the polls. So too, Congress noted the failure to offer literacy centers to provide adults with English-as-a-Second-Language instruction.¹²⁰ The evidence of unequal educational opportunities is undoubtedly strong. The problem in using this sort of evidence as a basis for upholding Section 203 is twofold: (1) it may be difficult to prove these inequalities stem from *intentional* discrimination against minorities; and (2) even if this can be shown, the causal link between educational disparities and lower rates of

117. See *supra* notes 76-78 and accompanying text.

118. House Report, *supra* note 6, at 58-61; LAUGHLIN McDONALD & DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT (2006), http://www.aclu.org/votingrights/2005_report.pdf; NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005, at 32 (2006), <http://www.votingrightsact.org/report/finalreport.pdf>.

119. For discussion of the constitutional issues surrounding Section 2, see Tokaji, *supra* note 11, at 726-32.

120. House Report, *supra* note 6, at 60.

minority participation may be difficult to show. Though my purpose here is not to engage in a thorough assessment of the legislative record, it is questionable whether Congress had sufficient evidence of *intentional* discrimination in the educational opportunities available to language minorities. Absent such evidence, it will be difficult to justify Section 203 as a congruent and proportional remedy for intentional discrimination external to the election system.

There is also a prospective argument that language minorities will be exposed to discrimination in public services unless language assistance is provided in the voting process. This argument tracks one that the Court found persuasive in *Katzenbach v. Morgan*, where it accepted the government's contention that Section 4(e) was justified as a means by which to prevent future discrimination against Puerto Rican immigrants in public services.¹²¹ It is unclear, however, whether the present Court will be so deferential to congressional predictions, absent evidence of intentional discrimination in public services against citizens who are not proficient in English.

None of this is meant to deny that there are plausible arguments for upholding the language assistance provisions on the basis of intentional discrimination. Such arguments do exist, based on discriminatory practices both within and without the voting process. As with Section 5, however, it is not clear that the arguments based on intentional discrimination will be sufficient to carry the day—and, more specifically, to uphold all applications of the New VRA. I therefore turn to two alternative theories under which these provisions might be upheld.

III. THE ELECTIONS CLAUSE ALTERNATIVE

One alternative theory on which the New Voting Rights Act might be upheld is that it is an exercise of Congress's power under the Elections Clause.¹²² At the time of the original VRA, Congress expressly cited the Elections Clause as one source of authority.¹²³ This follows a long line of Supreme Court precedent, including *Smiley v. Holm*,¹²⁴ holding that the Elections Clause gives Congress broad power to regulate congressional elections.¹²⁵ That power includes setting elections' time and place as well as voter registration, fraud prevention measures, vote-counting practices, and

121. 384 U.S. 641, 652-53 (1966).

122. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . ." U.S. CONST. art. I, § 4.

123. Richard R. Hesp, *Electoral Data in Racial-Bloc Analysis: A Solution for Staleness and Special Circumstances Problems*, 1995 U. CHI. LEGAL F. 409, 411; R. Paul Margie, *Protecting the Right to Vote in State and Local Elections Under the Conspiracy Against Rights Act*, 1995 U. CHI. LEGAL F. 483, 500.

124. 285 U.S. 355 (1932).

125. *Id.* at 366; *see also* *Roudebush v. Hartke*, 405 U.S. 15, 24-26 (1972); *United States v. Gradwell*, 243 U.S. 476, 481-82 (1917).

publication of election returns.¹²⁶ Broad congressional power over federal electoral practices also finds support in Justice Black's opinion in *Oregon v. Mitchell*,¹²⁷ which upheld Congress's authority not just to alter district lines but also to require that eighteen-year-olds be allowed to vote in federal elections.¹²⁸

Consistent with this authority, appellate courts broadly interpreted Congress's power under the Elections Clause in upholding the National Voter Registration Act of 1993 (NVRA).¹²⁹ More recently, Congress relied on its Elections Clause authority in enacting the Help America Vote Act of 2002,¹³⁰ and there seems to be little question that this statute is also within Congress's authority to regulate congressional elections under the conventional understanding of that clause's scope.¹³¹ But while Congress's power over federal elections is broad, the Elections Clause can furnish only a partial basis for upholding the reauthorized VRA. In particular, this clause can support the application of Section 5 and Section 203 to federal elections and mixed federal-state elections but not to practices that bear exclusively on local elections.

Here again, it is useful to separate different applications of Section 5 and Section 203 in assessing the viability of this legal theory. There can be little question that the Elections Clause could be used to justify preclearance decisions pertaining to congressional districting. On the other hand, it cannot justify the exercise of preclearance power with respect to redistricting decisions at the state or local level, given that Article I, Section 4, by its terms extends only to congressional elections.

With respect to election administration practices, the picture is somewhat less clear, but it is likely that the Elections Clause could sustain many important applications of Section 5. An example is a state law requiring that citizens prove their citizenship before they can register to vote, similar to the law Arizona recently imposed through Proposition 200.¹³² Though the Department of Justice precleared this change in law, if an objection to this or a similar registration law was made, Congress's Elections Clause power

126. *Smiley*, 285 U.S. at 366.

127. 400 U.S. 112 (1970) (Black, J.), *superseded by* U.S. CONST. amend. XXVI.

128. *Id.* at 122.

129. *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 792 (7th Cir. 1995); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995).

130. Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified as amended at 42 U.S.C. § 15301 (Supp. 2003)).

131. Martin J. Siegel, *Congressional Power Over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VT. L. REV. 373, 417 (2004) ("There is no doubt that Congress can impose whatever changes it chooses on the manner in which states conduct elections to the House and Senate using its power under Article I, Section 4."); *see also* Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1022-30 (2005) (discussing meaning and history of the Elections Clause).

132. ARIZ. REV. STAT. ANN. § 16-166(F) (2005); *see also* *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (vacating injunction against Proposition 200's voter identification requirements). These registration requirements and the litigation surrounding them are described in Dan Tokaji, *The Arizona NVRA Decision*, <http://moritzlaw.osu.edu/blogs/tokaji/2006/06/arizona-nvra-decision.html>.

might well be sufficient to sustain this application of Section 5. A state still could try to impose its registration requirement in state elections by maintaining a dual registration list. In fact, after the NVRA's enactment, some states attempted to do just that by implementing dual registration systems—one NVRA-compliant list for federal elections and another list for state elections—but this ultimately proved to be overly burdensome, and states abandoned those efforts.¹³³

In the event that Section 5 was upheld only on Elections Clause grounds, it still could have considerable impact in the realm of election administration. A dual system might be feasible for some election administration practices but difficult, if not impossible, to administer in others. For the same reasons that dual registration systems proved impracticable after the NVRA's enactment, a state's attempt to impose different requirements for federal and state elections would be difficult to sustain. But for other practices, a dual system for federal elections versus state/local elections might be feasible. Take, for example, a state's attempt to impose a photo identification requirement—one that is deemed to violate Section 5. The Elections Clause would serve as an adequate constitutional basis to uphold Section 5's application to *federal* elections in which such an ID requirement is imposed. In even-year elections where federal races are on the ballot, it is hard to see how a state could, in a practicable manner, impose one ID requirement for federal races and another for state races. On the other hand, if the state were to amend its law to require that photo ID be shown in odd-year elections, in which no federal races are on the ballot, the Elections Clause alone would not sustain the Justice Department's authority to make a Section 5 objection.

The scope and utility of Congress's Elections Clause power is also somewhat uncertain when it comes to language assistance. For the same reasons that Congress enjoys broad power to regulate registration for federal elections under the NVRA and Section 5, it also would enjoy considerable power to require language assistance in the registration process. The Elections Clause also furnishes a strong basis for requiring oral language assistance (such as poll workers who are able to communicate with voters in polling places with large numbers of non-English speaking voters) in federal elections. On the other hand, if a state refused to provide such assistance in exclusively state and local elections, the Elections Clause would provide no authority for an attempt to compel the provision of such assistance under Section 203. Nor could it be used to require the state to provide

133. Jeffrey A. Bloomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015, 1033 n.135 (1995) (reporting that Illinois and Mississippi chose to employ "expensive and cumbersome dual registration" systems after NVRA); Brenda Wright, *Young v. Fordice: Challenging Dual Registration Under Section 5 of the Voting Rights Act*, 18 *MISS. C. L. REV.* 67, 68 (1997) (noting that Mississippi did not permit NVRA registrants to vote in state elections). *But see* Robert E. Sanders, *Motor-Voter and the Voting Rights Act in Mississippi*, 18 *MISS. C. L. REV.* 47, 66 (1997) (noting that, after *Young v. Fordice*, preclearance was not as a practical matter available to Mississippi until merger of its registration systems).

translated ballot materials in state elections, including not only those involving candidates but also those involving initiatives and referenda. This is particularly troubling given the length and complexity of many contemporary state and local ballot measures, which are difficult enough to understand in one's first language, let alone a second language.

In sum, the Elections Clause could sustain many important applications of Sections 5 and 203 but not all of them. It appears to provide an airtight basis for sustaining Section 5's application to vote dilution in congressional races but not to dilution in state and local races. As to election administration practices, the Elections Clause provides strong authority for the application of Section 5 to federal and mixed elections. This may be good enough for some election administration practices, like those governing registration. It is of limited use for other practices, such as photo ID requirements, where states would remain free to impose special requirements for non-federal elections. Similarly, the Elections Clause will provide a basis for some applications of the language assistance requirements but not all of them. Foremost among the examples of Section 203 applications that could not be sustained under the Elections Clause is the requirement of providing translated ballot materials for state initiatives and other ballot measures.

IV. THE PARTICIPATION ALTERNATIVE

Given the limits of the Intentional Discrimination and Elections Clause theories for upholding the New Voting Rights Act, it is important to consider one other potential theory: Section 5 and Section 203 may be upheld based on Congress's authority to enforce the constitutional right to participate in elections. As I will explain, the Supreme Court has found the Equal Protection Clause to be violated in cases where equal participation is denied, even where intentional race discrimination has not been proven. Though the Court has been vague in defining the boundaries of the equal participation principle, it is clear that the Equal Protection Clause extends to some practices that do not arise from purposeful discrimination but nevertheless result in the unequal denial of votes.

To understand this theory, it is vital to recognize the distinction, mentioned at the start of this Essay,¹³⁴ between practices that impede *participation* (voting and having one's vote counted) and those that diminish the *representation* of a group of voters, notwithstanding that everyone is allowed to vote. As I have discussed elsewhere, practices that fall into the former category are sometimes referred to as "vote denial" and those in the latter category as "vote dilution."¹³⁵ First-generation VRA enforcement tended to focus on vote denial, including such practices as poll taxes and literacy

134. See *supra* notes 11-15 and accompanying text.

135. See Tokaji, *supra* note 11, at 691.

tests.¹³⁶ Second-generation enforcement, on the other hand, focused on practices, such as at-large elections and redistricting, that diluted minorities' voting strength in places where they were permitted to vote.¹³⁷ Most recently, with the parties' increasing attention to the "nuts and bolts" of elections, attention has turned back to vote denial, including such issues as voting technology, felony disfranchisement, and voter identification requirements.¹³⁸ This phenomenon is exemplified by Georgia's photo ID requirement, the Justice Department's preclearance of which generated substantial controversy.¹³⁹

When it comes to allegations of qualitative vote dilution,¹⁴⁰ Supreme Court precedent requires plaintiffs to demonstrate intentional discrimination to make out an equal protection claim. The leading case on this point is *City of Mobile v. Bolden*,¹⁴¹ where the Court held that plaintiffs challenging an at-large election scheme were required to prove purposeful discrimination to establish an equal protection violation, even where the challenged practice had a negative impact on black voting strength.¹⁴² In a later case, *Rogers v. Lodge*, the Supreme Court upheld lower court findings that an at-large election scheme had been maintained for invidious purposes.¹⁴³ The enactment of the 1982 amendments to the VRA, specifically the new "results" test of Section 2, effectively preempted further refinement of the constitutional test for racial vote dilution.¹⁴⁴ It is nevertheless clear that a claim of racial vote dilution requires the plaintiff to demonstrate intentional discrimination.

When it comes to practices that impede participation, on the other hand, the Court has not required plaintiffs to prove intentional discrimination. An example is *Harper v. Virginia State Board of Elections*,¹⁴⁵ where the Court struck down a state's \$1.50 poll tax as a violation of the Equal Protection Clause.¹⁴⁶ Though we now commonly associate poll taxes with race discrimination, the Court declined to rest its holding on that ground.¹⁴⁷ In a footnote, the Court noted a prior case finding that literacy tests had been

136. *Id.*

137. *Id.* at 691-92.

138. *See id.* at 709-18.

139. *See Tokaji, supra* note 96, at 812-19.

140. In speaking of "qualitative" vote dilution, I refer to claims that a minority's voting strength has been diminished, even though there has been compliance with the "one person, one vote" rule articulated in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), and its progeny. By contrast, "quantitative" vote dilution refers to violation of the requirement of equipopulous districts articulated in the "one person, one vote" cases. *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

141. 446 U.S. 55 (1980), *superseded by statute on other grounds*, Voting Rights Act Amendments of 1982, sec. 3, § 1973, Pub. L. No. 97-205, 96 Stat. 131, 134.

142. *See id.* at 66-74.

143. 458 U.S. 613 (1982).

144. 42 U.S.C. § 1973 (2000); *see also* Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 n.1, 1673-74 (2001); Luke McLoughlin, *Section 2 of the Voting Rights Act After City of Boerne: The Role of Converging Constitutional and Statutory Vote Dilution Standards* 3 (manuscript Sept. 2006).

145. 383 U.S. 663 (1966).

146. *Id.* at 668.

147. *See id.* at 666.

used to discourage blacks from voting¹⁴⁸ but then said, “[W]e do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.”¹⁴⁹ Rather than resting on intentional race discrimination, the Court found Virginia’s poll tax unconstitutional because of its effects; specifically, the Court found the poll tax’s impact was to impose disproportionate barriers on less wealthy voters.¹⁵⁰ By making payment of the poll tax a “condition to the exercise of the franchise,”¹⁵¹ the state had violated the principle of equal participation.¹⁵² While *Harper* predates development of the three levels of scrutiny that we know today, the Court uses language that we now associate with strict scrutiny, saying that classifications that infringe on fundamental rights “must be closely scrutinized and carefully confined.”¹⁵³

Katzenbach v. Morgan provides further support for the idea that Congress may have greater latitude under the Fourteenth Amendment in protecting rights of participation, as compared with rights of representation. Recall that the Court in *Morgan* articulated two distinct rationales for upholding Section 4(e)’s protection of voters educated in Puerto Rico. While the Court found that this section could be justified as a remedy for invidious discrimination, its first justification was that Section 4(e) was needed to ensure access to voting and other governmental services.¹⁵⁴ Although *Morgan* did not define the protected right with the precision that *Garrett* and some other post-*Boerne* cases appear to demand, it did cite the Court’s longstanding recognition that the right to vote is fundamental because “preservative of all other rights.”¹⁵⁵ Without access to the franchise, members of the Puerto Rican community would be susceptible to discrimination in other areas of public life. As in *Harper*, decided three months earlier, the Court affirmed that equal participation is a norm protected by the Fourteenth Amendment, while leaving the contours of that norm somewhat vaguely specified.

More recently, the Court found an electoral practice to violate the Equal Protection Clause, despite the absence of intentional discrimination, in *Bush v. Gore*.¹⁵⁶ The practice at issue in *Bush v. Gore* was Florida’s recount process, which was being conducted under a highly discretionary “intent of the

148. *Id.* at 666 n.3 (citing *Louisiana v. United States*, 380 U.S. 145, 151 (1965)).

149. *Id.*

150. *See id.* at 668.

151. *Id.* at 669.

152. *Id.* at 668; *see also* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citing *Harper* and other cases for the proposition that “a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,” and striking down durational residency requirement for voting based on this principle); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (relying on *Harper* to strike down law that conditioned participation in school district elections on either the owning or leasing of property ownership or having children in the public schools).

153. 383 U.S. at 670.

154. 384 U.S. 641, 652-53 (1966); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 528 (1997) (citing this rationale with approval).

155. 384 U.S. at 652 (quoting *Yick Wo v. Hopkins*, 384 U.S. 652 (1886)).

156. *See* 531 U.S. 98, 109-10 (2000).

voter” standard.¹⁵⁷ The broad discretion vested in election officials to determine which votes should count led to different standards being applied from county to county and sometimes within a single county.¹⁵⁸ The Court concluded that this discretionary recount process denied equal protection, even though it did not find intentional discrimination (much less intentional *race* discrimination) in Florida’s recount process.¹⁵⁹ In explaining why this recount violated equal protection, the Court relied on *Harper* as well as its “one-person, one-vote” cases, concluding, “This is not a process with sufficient guarantees of equal treatment.”¹⁶⁰

As I have argued elsewhere, *Bush v. Gore* is best understood as concerned with the impact of official discretion on rights of political participation.¹⁶¹ The absence of sufficiently clear procedures designed to ensure uniform treatment of ballots created a risk that local election officials and state judges might exercise their discretion in a manner that disadvantaged some voters compared to others. There is considerable room for debate as to the contours of the equal protection principle underlying *Bush v. Gore*, especially given how few constitutional vote denial cases have reached the Supreme Court since *Harper*.¹⁶² In fact, the open-endedness of its equal protection principle is something that *Bush v. Gore* expressly acknowledged. The Court pointedly declined to specify precisely how the requirement of “equal treatment” would apply to future cases: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”¹⁶³ Among the questions the Court specifically declined to prejudge was the constitutionality of local entities using “different systems for implementing elections.”¹⁶⁴ What can-

157. *Id.* at 102 (quoting *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000), *rev'd* 531 U.S. 98 (2000)) (internal citations omitted).

158. *Id.* at 106-07.

159. *See id.* at 109-10.

160. *Id.* at 107.

161. Tokaji, *supra* note 106, at 2487-95; *see also* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 48-50 (2004) (addressing the relationship between equality and structural concerns in *Bush v. Gore*).

162. Some of the lower courts to consider vote denial claims under the Equal Protection Clause have relied on the test articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See* *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006); *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003). These cases articulate a sort of balancing test, under which practices are subject to strict scrutiny if they impose a “severe” restriction on the vote, while practices imposing “reasonable, nondiscriminatory restrictions” may be upheld if justified by “the State’s important regulatory interests.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). The types of practices challenged in *Anderson* and *Burdick*, however, are analytically distinct from vote denial claims. Both cases instead involved limitations on voters’ ability to select their candidate of choice. In *Anderson*, the Court struck down an early filing deadline for presidential candidates, while in *Burdick*, the Court upheld a prohibition on write-in voting. The key point is that these cases implicate voters’ choice of candidates, rather than their ability to vote and have their votes counted—in other words, *Anderson* and *Burdick* are not vote denial cases. Accordingly, they provide little guidance on the equal protection standard that should apply in vote denial claims. To put it another way, one that comports with the terminology of *Burdick* and *Anderson*, practices that impede participation (as opposed to simply limiting a voter’s choices) are by definition “severe.”

163. *Bush*, 531 U.S. at 109.

164. *Id.*

not seriously be denied is that the Court held the Equal Protection Clause to have been violated without finding intentional discrimination against any group. The equal protection standard that emerges from *Bush v. Gore* is vaguely defined,¹⁶⁵ but it is clearly *not* the intentional discrimination standard articulated in *City of Mobile v. Bolden*.¹⁶⁶

These cases furnish an alternative argument for upholding the reauthorized VRA's applicability to practices that result in vote denial. As I already have explained, the *Boerne* line of cases forbade Congress from modifying the definition of constitutional rights that the Supreme Court has articulated.¹⁶⁷ In *Boerne* itself, this prohibition meant Congress was not free to "enforce" a constitutional right to religious accommodation that the Court specifically had rejected in prior cases.¹⁶⁸ In *Garrett*, it meant Congress was not free to define a constitutional right to disability accommodation that substantially exceeded the right that the Court had articulated in prior cases.¹⁶⁹ Both cases involved rights that the Court previously had articulated with some precision.¹⁷⁰ These precedents are less applicable when it comes to rights that the Supreme Court has not yet defined with precision. It would be more than a little unfair to make Congress toe a line that the Court has not yet drawn. Put another way, the *Boerne* cases should not be read to demand rigid adherence to the judiciary's articulation of a right, where the Court itself has not defined that right with precision. Accordingly, the vague terms in which the Court has defined the right to participation—most notably in *Bush v. Gore*—constitutes a strong argument for giving Congress more latitude when it comes to the enforcement of that right.

With this in mind, I turn back to the question of whether the New Voting Rights Act can be sustained as a "congruent and proportional" remedy for denial of the right to equal participation in the electoral process. As I already have suggested, the equal participation theory provides no help in supporting the application of Section 5 in qualitative vote dilution.¹⁷¹ That is

165. The Court's cursory discussion of the voter ID requirements in *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006), does little to clarify the standard. It does reiterate that voting is a fundamental right, but the contours of that right are not precisely defined.

166. A distinct question, one that is beyond the scope of this essay, is *why* the Supreme Court appears to believe that vote denial warrants a more stringent constitutional test than vote dilution. One reason might be that there are different interests or values implicated by these two categories of voting rights claims. Representation claims implicate the ability to elect one's representative of choice, but not to vote or have one's vote counted.

167. See *supra* notes 37-61 and accompanying text.

168. See *supra* note 39 and accompanying text.

169. See *supra* notes 48-51 and accompanying text.

170. Cf. *supra* notes 37-44, 48-56, and accompanying text.

171. In speaking of Section 5's applicability to vote dilution claims, I do not mean to suggest that the test for preclearance has been the same as the test for establishing vote dilution under either the Constitution or Section 2 of the VRA. Before the 2006 amendments, the test under Section 5 is whether the practice in question was *retrogressive* in purpose or effect. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (*Bossier II*). The new VRA amends Section 5 to "include any discriminatory purpose." Pub. L. No. 109-246, Sec. 5. This "purpose" standard matches that applicable under the Constitution, but Section 5 also prohibits practices with a retrogressive effect that would pass constitutional muster. The Section 5 standard is also different from the results test applicable to Section 2 vote dilution claims, which focuses on compactness and racial polarization but does not require a "retrogressive" purpose or

because the Supreme Court *has* defined the scope of that right: to be free from intentional discrimination.¹⁷² On the other hand, the equal participation theory does provide a basis for applying Section 5 to cases where the state adopts an election practice that results in vote denial—and in particular, the disproportionate denial of minority votes. Examples include the denial of preclearance to stringent voter ID laws or registration requirements, which tend to bear more heavily on racial minorities.¹⁷³ To borrow from *Bush v. Gore*, such practices are arguably “inconsistent with the minimum procedures necessary to protect the fundamental right of each voter.”¹⁷⁴

The equal participation argument carries at least as much force when it comes to Section 203’s language assistance mandate. There is considerable evidence of lower registration and participation rates among minorities. In the 2000 election, for example, only 43% of voting-age Asian American citizens and 45% of voting-age Hispanic citizens voted, compared to roughly 72% of non-Hispanic whites.¹⁷⁵ There is considerable evidence to support the conclusions that language barriers play a major role in such participation disparities and that these groups are impeded from registering by language difficulties.¹⁷⁶ In fact, the National Commission on the Voting Rights Act, in a report prepared prior to reauthorization, found language barriers negatively affected the participation of Latinos, Asian Americans, and American Indians.¹⁷⁷ To the extent that language barriers are associated with lower participation rates among certain groups, these disparities furnish a compelling basis for Section 203’s language assistance requirements.

My argument does not depend on there being a constitutional right to language assistance at the polls. It is, instead, that rights of participation ought to be treated differently from rights of representation—or, put another way, that vote denial is different from vote dilution—for purposes of applying the congruence and proportionality test. While the Court has not precisely defined the limits of the equal participation principle, it has made clear that intentional discrimination is not required to find a violation.¹⁷⁸

effect.

172. See *City of Mobile v. Bolden*, 446 U.S. 55, 69 (1980), *superseded by statute on other grounds*, Voting Rights Act Amendments of 1982, sec. 3, § 1973, Pub. L. No. 97-205, 96 Stat. 131, 134.

173. See Tokaji, *supra* note 96, at 814-15.

174. 531 U.S. 98, 109 (2000); see Pildes, *supra* note 16, at 759 (viewing *Bush v. Gore* as limiting states’ ability to impose “arbitrary, manipulable, or unjustifiable obstacles to a fair voting system,” thereby suggesting that Congress has “concomitant power ... to legislate to protect the right to vote as such”).

175. Lien, *supra* note 116, at 139-40; cf. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, at 4 (2004), <http://www.census.gov/prod/2006pubs/p20-556.pdf> (reporting 44% turnout among Asian voting-age citizens and 47.2% among Latino voting-age citizens, compared to 67.2% for non-Hispanic white citizens).

176. VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, *supra* note 175, at 13 tbl.E; see also PHILLIP A. OLAYA ET AL., ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICANS AND THE VOTING RIGHTS ACT: THE CASE FOR REAUTHORIZATION 7-11 (2006), <http://www.aaldef.org/docs/AALDEF-VRARReauthorization-2006.pdf> (noting that 2004 election data reveal a need for language assistance provisions).

177. See NAT’L COMM’N ON THE VOTING RIGHTS ACT, *supra* note 118, at 40-49.

178. See *supra* text accompanying notes 163-166.

Vote denial claims are, in this respect, distinguishable from qualitative vote dilution claims as to which proof of intentional discrimination is required.¹⁷⁹ The Court has not defined the scope of the constitutional right to equal participation very clearly. In these circumstances, it would be unreasonable to apply the congruence and proportionality test with the stringency that the Court has adopted in other areas. To the extent that Congress had before it evidence of electoral practices that impeded access to the electoral process—whether or not by design—the equal participation theory provides a strong justification for upholding the New Voting Rights Act’s application to such practices.

CONCLUSION

My point in this Essay is not to dispute that the New Voting Rights Act may be justified as a remedy for intentional discrimination. It is instead to consider alternative justifications for these provisions. The language assistance provisions of the reauthorized VRA warrant particular attention because they have been almost entirely overlooked in the constitutional debate and because they are difficult to uphold on an intentional discrimination rationale.

The following table summarizes the constitutional justifications available for the major applications of the reauthorized VRA that I have discussed. The column on the left shows the major applications of the VRA provision, while the middle and right columns identify the theories upon which these applications can be defended.

VRA Section/ Application	Theories for Upholding Application	
	State and Local Elections	Federal and Mixed Elections
§ 5/Vote Dilution	14A: Discriminatory Intent	14A: Discriminatory Intent Art I, § 4: Elections Clause
§ 5/Vote Denial	14A/15A: Discriminatory Intent 14A: Participation	14A/15A: Discriminatory Intent Art I, § 4: Elections Clause 14A: Participation
§ 203/Language Assistance	14A/15A: Discriminatory Intent 14A: Participation	14A/15A: Discriminatory Intent Art I, § 4: Elections Clause 14A: Participation

As this table shows, the Fourteenth and Fifteenth Amendment intentional discrimination theory can be used to defend all of the applications of the New Voting Rights Act. However, this theory will be more viable to

179. See *supra* notes 140-142 and accompanying text.

some practices than to others. The Elections Clause theory can be used to justify the reauthorized VRA's application to federal elections and mixed federal-state elections but not to exclusively state and local elections. Finally, the participation theory can be used to justify Section 5's application to vote denial and Section 203's application to all language assistance claims.

Though it is difficult to predict exactly what the Court will do, its most recent cases concerning the scope of congressional power suggest it is less likely to evaluate the statute as a whole than to consider its applicability in different contexts separately.¹⁸⁰ This makes it all the more important that VRA supporters consider backup constitutional arguments, including both the Elections Clause and the right of equal participation under the Equal Protection Clause. The continuing vitality of Section 5 and Section 203 may well depend upon the Court sustaining arguments based on one or both of these alternative theories.

180. See *United States v. Georgia*, 126 S. Ct 877 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); see also *supra* notes 62-71 and accompanying text (discussing these cases).