SUPREME COURT OF THE UNITED STATES

No. 97–1396

VICKY M. LOPEZ, ET AL., APPELLANTS *v.*
MONTEREY COUNTY ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[January 20, 1999]

JUSTICE THOMAS, dissenting.

The majority today interprets the phrase "seek to administer" as used in §5 of the Voting Rights Act, 42 U. S. C. §1973c, to require that a covered political subdivision seek federal approval of any law enacted by a noncovered State that effects a change with respect to voting in the covered political subdivision, so long as the covered political subdivision somehow implements the State's law. I do not think the majority's is the best reading of the statute; moreover, I think the majority's interpretation is constitutionally doubtful. I would read §5 to require preclearance only of those voting changes that are the direct product of a covered jurisdiction's policy choices. Accordingly, I respectfully dissent.

I

As the majority notes, *ante*, at 1, Monterey County (County) is a covered jurisdiction under the Voting Rights Act, but the State of California is not. Section 5 of the Voting Rights Act provides that whenever a covered "State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that differs from those in effect on the date that the State or subdivision became a covered jurisdiction, it must

obtain federal approval of the new voting requirement.[1] Although the County elected its municipal judges from separate districts at the time it became subject to the Act's preclearance requirement, California law now requires that the County elect its judges from a single judicial district. This appeal, then, squarely puts before us for the first time the question whether §5 requires federal preclearance of a noncovered State's laws effecting a change with respect to voting in one of its covered political subdivisions.

The majority concludes that the County must preclear the State's laws because it "seek[s] to administer" the state districting scheme. *Ante,* at 11.[2] The Voting Rights Act does not define the phrase "seek to administer," and the majority's construction of the phrase is not plainly erroneous. "[A]dminister" can plausibly be read, in isolation, to encompass "nondiscretionary acts by covered jurisdictions endeavoring to comply with the superior law of the State." *Ibid.* But I do not think that the majority's reading of the statute is the best one. "[S]eek to administer" must be read in light of its surrounding terms. Section 5 requires that a covered political subdivision obtain federal preclearance whenever it "shall enact or seek to administer" voting changes. The term "administer" is best understood when read in contrast to "enact." In my view, Congress intended "administer" to reach those changes in

– – – – – –

[1] For convenience, I use the shorthand "voting change" or "change with respect to voting" throughout. But I adhere to my view that not all changes affecting voting are covered by §§2 and 5 of the Voting Rights Act, as those sections are properly understood. See *Holder* v. *Hall*, 512 U. S. 874, 891, 893–903 (1994) (opinion concurring in judgment).

[2] Even were I to agree with the majority's interpretation of the statute, I am not convinced that the County implements the State's districting laws simply by administering elections, as the majority apparently believes.

voting qualifications, prerequisites, standards, practices, or procedures that a covered jurisdiction imposes in a way other than formal enactment. In other words, the statute is designed to ensure that a covered jurisdiction cannot cleverly avoid preclearance requirements by the simple expedient of making voting changes by nonlegislative means.

The majority's interpretation appears to render superfluous the "enact" prong of the statute. A person could not be "denied the right to vote for failure to comply with" a covered jurisdiction's enactment affecting voting, as §5 prohibits absent federal preclearance, unless the jurisdiction was administering its enacted laws. And the majority's explanation that "seek" as it modifies "to administer" is a "temporal distinction," *ante*, at 12, is unsatisfactory because it ignores that "shall" as it modifies "enact" is also a temporal limitation. Both prongs of the statute, not surprisingly, are written in terms of simple futurity, given §5's prophylactic nature.

My interpretation of the statutory phrase also more accurately reflects the section's purpose. As we have previously recognized, §5 was enacted as

> "'a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided . . . "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," . . . .'" *Beer* v. *United States*, 425 U. S. 130, 140 (1976) (quoting H. R. Rep. No. 94–196, pp. 57–58 (1970).

See also *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 477 (1997) (quoting *Beer*); *Miller* v. *Johnson*, 515 U. S. 900, 926 (1995) (same). It follows that Congress intended to subject to federal preclearance only the policy decisions made by jurisdictions that it found to be the "perpetrators

of the evil" by means of the §4(b) coverage formula that the majority describes, *ante*, at 2. California has never been found to satisfy the coverage test and therefore is not one of the "perpetrators" that §5 is designed to thwart. I therefore see no reason to believe that Congress intended §5 to require federal approval of the State's policy choices.[3]

The Government, as *amicus curiae* supporting appellants, suggests that the State enacted its district consolidation legislation at the County's suggestion, implying that the state judicial district consolidation statutes are the product of the County's policy choices. Brief for United States as *Amicus Curiae* 22–25. I recognize that in *McDaniel* v. *Sanchez*, 452 U. S. 130 (1981), we required preclearance of a court-ordered voting change in a covered jurisdiction because the plan that the court had ordered was submitted by, and reflected the policy choices of, that covered jurisdiction, even though we had decided, in *Connor* v. *Johnson*, 402 U. S. 690 (1971) (*per curiam*), that federal court-ordered voting changes need not be pre-

[3] I recognize that we have interpreted §5 to reach entities that did not obviously fall within the definition of covered "State or political subdivision" in prior cases. For example, in *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110 (1978), we held that although the city of Sheffield, Alabama, was not a "political subdivision" under the Act, it was nevertheless subject to §5's preclearance requirements because it was a "political unit" of the covered State. *Id.*, at 127–128. Whether *Sheffield* was correct as an original matter, the "top-down" approach to coverage that it announced is simply not implicated in this case; appellants argue for a "bottom-up" approach to coverage questions that I do not believe the reasoning of *Sheffield* supports. And in *Morse* v. *Republican Party of Va.*, 517 U. S. 186 (1996), the judgment of the Court was that §5 could be extended to reach the activities of political parties in covered States. I adhere to the views that I expressed in dissent, but at most, that case stands for the proposition that for purposes of §5 preclearance, "State" in some (but not all) instances is "coextensive with the constitutional doctrine of state action." *Id.*, at 265 (THOMAS, J., dissenting). Of course, this case requires us to interpret the phrase "seek to administer," not §5's "State or political subdivision" language.

cleared. 452 U. S., at 147, 153. We stated that "[a]s we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people . . . the preclearance requirement of the Voting Rights Act is applicable." *Id.*, at 153. Although our holding in *McDaniel* is not obviously consistent with the text of §5 as I would interpret it, it at least appears to be consistent with the policy that we have said underlies §5. See *Beer, supra,* at 140. Regardless of whether the legislative product of a noncovered jurisdiction would ever be subject to the preclearance requirement if it could be demonstrated that a state law is a product of collusion between state and local governments, the record in this case does not support such a claim. And appellants did not make this argument, either in their complaint filed in the District Court[4] or in their briefs before this Court.

II

Moreover, my reading of §5 avoids the majority's constitutionally doubtful interpretation. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); see also *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 355, 356–359 (1998) (SCALIA, J., concurring in judgment).

Section 5 is a unique requirement that exacts significant

---

[4] For somewhat similar reasons, even if I agreed with the majority's interpretation of the statute, I would still affirm the District Court's dismissal of appellants' First Amended Complaint, which did not ask that the County be ordered to preclear the State's laws. The only coverage question the complaint raised was whether the County's antecedent consolidation ordinances needed to be precleared. App. to Juris. Statement 83–104.

federalism costs, as we have recognized on more than one occasion. See *Bossier Parish*, 520 U. S., at 480; *Miller* v. *Johnson*, 515 U. S., at 926; see also *City of Rome* v. *United States*, 446 U. S. 156, 200 (1980) (Powell, J., dissenting); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 141 (1978) (STEVENS, J., dissenting); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 358–360 (1966) (Black, J., concurring and dissenting). The section's interference with state sovereignty is quite drastic– covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government's approval. As Justice Powell wrote in *City of Rome*, the section's "encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity." 446 U. S., at 201.

Despite these serious and undeniable costs, we have twice upheld the preclearance requirement as a constitutional exercise of Congress' Fifteenth Amendment enforcement power,[5] first in *Katzenbach* and again in *City of Rome*. In those cases, we compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause. See *City of Rome*, *supra*, at 175; *Katzenbach*, *supra*, at 326. But we have taken great care to emphasize that Congress' enforcement power is remedial in nature. See *City of Boerne* v. *Flores*, 521 U. S. 507, 516–529 (1997); *Katzenbach*, *supra*, at 327–328.[6]

– – – – – –

[5] The Fifteenth Amendment provides:

"Section 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.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

[6] Although *City of Boerne* involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement

There can be no remedy without a wrong. Essential to our holdings in *Katzenbach* and *City of Rome* was our conclusion that Congress was remedying the effects of prior *intentional* racial discrimination. In both cases, we required Congress to have some evidence that the jurisdiction burdened with preclearance obligations had actually engaged in such intentional discrimination. In *Katzenbach*, we recognized that Congress had "evidence of actual voting discrimination" in some jurisdictions. 383 U. S., at 330. In each of those jurisdictions, two characteristics were present– depressed voter turnout and the use of a test or device. We concluded that it was permissible for Congress to impose §5 preclearance requirements on the States and political subdivisions for which Congress had "more fragmentary evidence" of voting discrimination, *id.*, at 329–330, where those two conditions (incorporated into the Act's coverage formula) could be found to exist, "at least in the absence of proof that [such jurisdictions] have been free of substantial voting discrimination in recent years," *id.*, at 330. We also thought it quite important that "the Act provide[d] for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination ha[d] not materialized during the preceding five years." *Id.*, at 331. In *City of Rome*, we rejected the city's argument that, because it had not employed any discriminatory practices over the relevant period, §5 was unconstitutional as applied. We thought that "because electoral changes by jurisdictions *with a demonstrable history of racial discrimination in voting* create the risk of purposeful discrimination, it was proper [for Congress] to prohibit

– – – – – –

powers conferred by the Fourteenth and Fifteenth Amendments as coextensive. See, *e.g.*, *City of Boerne*, 521 U. S., at 518–528; *James* v. *Bowman*, 190 U. S. 127 (1903).

changes that have a discriminatory impact." 416 U. S., at 177 (emphasis added; footnote omitted).

The majority "find[s] no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law that may have [a discriminatory] effect in a covered county." *Ante*, at 16–17. In my view, it overlooks our warning in *City of Boerne* that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 521 U. S., at 530; see also *City of Rome*, *supra*, at 211–219 (REHNQUIST, J., dissenting). There has been no legislative finding that the State of California has ever intentionally discriminated on the basis of race, color, or ethnicity with respect to voting. Nor has the State been found to run afoul of the Act's overbroad coverage formula. We recognized in *City of Boerne* that "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." 521 U. S., at 532. But I do not see any reason to think that California's laws discriminate in any way against voting or that the State's laws will be anything but constitutional. I therefore doubt that §5 can be extended to require preclearance of the State's enactments and remain consistent with the Constitution.

Moreover, it is plain that the majority's reading of §5 raises to new levels the federalism costs that the statute imposes. If preclearance of a State's voting law is denied when sought by a covered political subdivision, the State will be unable to develop a consistent statewide voting policy; its laws will be enforceable in noncovered subdivisions, but not in the covered subdivision. And under the majority's reading of §5, noncovered States are forced to rely upon their covered political subdivisions to defend their interests before the Federal Government. The sub-

division may not know the State's interest, or may simply disagree with the State and therefore choose not to defend vigorously the State's policy choices before the Federal Government. Indeed, in this case, the County represented that it "concurs with the essential arguments of the Appellants that state law affecting voting insofar as such law may affect elections within a covered jurisdiction, must be precleared . . . ." Brief for Appellee Monterey County 1.

The majority attempts to bolster its argument by suggesting that requiring the County to submit the State's laws for preclearance is no more unusual than the Act's suspension of literacy tests in covered jurisdictions. It points out that in some instances, literacy tests were required by the laws of noncovered jurisdictions, including California. *Ante*, at 17. I do not think, however, that the suspension of tests and the preclearance remedy can be compared. The literacy test had a history as a "notorious means to deny and abridge voting rights on racial grounds." *Katzenbach*, 383 U. S., at 355 (BLACK, J., concurring and dissenting). Literacy tests were unfairly administered; whites were given easy questions, blacks were given more difficult questions, such as "the number of bubbles in a soap bar, the news contained in a copy of the *Peking Daily*, the meaning of obscure passages in state constitutions, and the definition of terms such as *habeas corpus*." A. Thernstrom, Whose Votes Count?, Affirmative Action and Minority Voting Rights 15 (1987). When we upheld the constitutionality of the suspension provision of the Voting Rights Act in *Katzenbach*, we indicated that the tests had actually been employed to disenfranchise black voters. 383 U. S., at 333–334. Later in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), we upheld the national ban on the use of such tests– even though we recognized that they were not facially unconstitutional– as a proper means of preventing purposeful discrimination in the application of the tests and remedying prior constitutional

violations by state and local governments in the education of minorities. Congress' suspension of tests, then, was a focused remedy directed at one particular prerequisite to voting. In contrast, the preclearance requirement presumes that a voting change— no matter how innocuous— is invalid, and prevents its enforcement until the Federal Government gives its approval.

* * *

I would interpret §5 only to require preclearance of a covered jurisdiction's changes affecting voting qualifications, prerequisites, standards, practices, or procedures, whether made by formal enactment or otherwise. In my view, this is the best interpretation of the statute and it avoids the grave constitutional concerns that the majority's contrary interpretation raises. I respectfully dissent.