Mr. Justice REHNQUIST, dissenting.

We have only this Term held that the city of Mobile does not violate the Constitution by maintaining an at-large system of electing city officials. *City of Mobile v. Bolden*, 446 U. S. 50 (1980). This result is reached even though the black residents of Mobile have demonstrated that racial "bloc" voting has prevented them from electing a black representative to the city government. The Court correctly concluded that a city has no obligation under the Constitution to structure its representative system in a manner that maximizes the black community's ability to elect a black representative. Yet in the instant case, the city of Rome is prevented from instituting precisely the type of structural changes which the Court says Mobile may maintain consistently with the Civil War Amendments because Congress has prohibited these changes under the Voting Rights Act as an exercise of its "enforcement" power conferred by those Amendments.

It is not necessary to hold that Congress is limited to merely providing a forum in which aggrieved plaintiffs may assert rights under the Civil War Amendments in order to disagree with the Court's decision permitting Congress to straight-jacket the city of Rome in this manner. Under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment, Congress is granted only the power to "enforce" by "appropriate" legislation the limitations on state action
embodied in those Amendments. While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities. Marbury v. Madison, 5 U. S. (1 Cranch) 137 (1803); United States v. Nixon, 418 U. S. 683 (1974). Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.

I

The facts of this case readily demonstrate the fallacy underlying the Court's determination that congressional prohibition of Rome's conduct can be characterized as enforcement of the Fourteenth or Fifteenth Amendments. The three-judge District Court entered extensive findings of fact—facts which are conspicuously absent from the Court's opinion. The lower court found that Rome has not employed any discriminatory barriers to black voter registration in the past 17 years. Nor has the city employed any other barriers to black voting or black candidacy. Indeed, the Court found that white elected officials have encouraged blacks to run for elective posts in Rome, and are "responsive to the needs and
interests of the black community." The city has not discriminated against blacks in the provision of services and has made efforts to upgrade black neighborhoods. It was also established that although a black has never been elected to political office in Rome, a black was appointed to fill a vacancy in an elective post. White candidates vigorously pursue the support of black voters. Several commissioners testified that they spent proportionately more time campaigning in the black community because they "needed that vote to win." The Court concluded that "blacks often hold the balance of power in Rome elections."

Despite this political climate, the Attorney General refused to approve a number of city annexations and various changes in the electoral process. The city sought to require majority vote for election to the City Commission and Board of Education; to create numbered posts and staggered terms for those elections; and to establish a ward residency requirement for Board of Education elections. In addition, during the years between 1964 and 1973, the city effected 60 annexations. Respondents concede that none of the annexations were sought for discriminatory purposes. All of the electoral changes and 13 of the annexations were opposed by the Attorney General on the grounds that their adoption would lessen the likelihood that blacks would be successful in electing a black city official, assuming racial bloc voting on the part of both whites and blacks. Each of the changes was considered to be an impermissible "vote-dilution" device.

Rome sought judicial relief and the District Court found that the city had met its burden of proving that these electoral changes and annexations were not enacted with the purpose of discriminating against blacks. The changes were nevertheless prohibited because of their perceived disparate effect. 2

"I share Justice Powell's observation that the factual conclusions respecting the discriminatory effect of the annexations are highly questionable. Supra, at 3. I rest my dissent, however, on somewhat broader grounds."
The Court holds today that the city of Rome can constitutionally be compelled to seek congressional approval for most of its governmental changes even though it has not engaged in any discrimination against blacks for at least 17 years. Moreover, the Court also holds that federal approval can be constitutionally denied even after the city has proven that the changes are not purposefully discriminatory. While I agree with Mr. Justice Powell's conclusion that requiring localities to submit to preclearance is a significant intrusion on local autonomy, it is an even greater intrusion on that autonomy to deny preclearance sought.

The facts of this case signal the necessity for this Court to carefully scrutinize the alleged source of congressional power to intrude so deeply in the governmental structure of the municipal corporations created by some of the 50 States. Section 2 of the Fifteenth Amendment and § 5 of the Fourteenth provide that Congress shall have the power to "enforce" § 1 "by appropriate legislation." Congressional power to prohibit the electoral changes proposed by Rome is dependent upon the scope and nature of that power. It is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation. It has never been seriously maintained, however, that Congress can do no more than the judiciary to enforce the Amendments' commands. Thus, if the electoral changes in issue do not violate the Constitution, as judicially interpreted, it must be determined whether Congress could nevertheless appropriately prohibit these changes to enforce the substantive prohibition of the Amendments. If not properly remedial, the exercise of this power could be sustained only if Congress has the authority under its enforcement powers to determine without more that electoral changes with a disparate impact on race violate the Constitution, in which case...
Congress by a legislative Act could effectively amend the Constitution.

I think it is apparent that neither of the first two theories for sustaining the exercise of congressional power support this application of the Voting Rights Act. After our decision in City of Mobile there can be no dispute that Rome has not engaged in constitutionally prohibited conduct. I also do not believe that prohibition of these changes can genuinely be characterized as a remedial exercise of congressional enforcement powers. Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution. This result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government. See United States v. Nixon, 418 U.S. 683 (1974); Marbury v. Madison, (1 Cranch) 137 (1803).

A

If the enforcement power is construed as a "remedial" grant of authority, it is this Court's duty to ensure that a challenged congressional act does no more than "enforce" the limitations on state power established in the Fourteenth and Fifteenth Amendments. Marbury v. Madison. The Court has not resolved the question of whether it is an appropriate exercise of remedial power for Congress to prohibit local governments from instituting structural changes in their government, which although not racially motivated, will have the effect of decreasing the ability of a black voting bloc to elect a black candidate.

This Court has found, as a matter of statutory interpretation, that Congress intended to prohibit governmental changes on the basis of no more than disparate impact under the Voting Rights Act. These cases, however, have never directly presented the constitutional questions implicated by the lower court finding in this case that the city has engaged...
in no purposeful discrimination in enacting these changes, or otherwise, for almost two decades. See Beer v. United States, 425 U. S. 190 (1976); City of Richmond v. United States, 422 U. S. 318 (1975); Perkins v. Matthews, 400 U. S. 372 (1971); Farley v. Patterson, 393 U. S. 544 (1969). In none of these cases was the Court squarely presented with a constitutional challenge to congressional power to prohibit state electoral practices after the locality has disproved the existence of any purposeful discrimination. 4

The cases in which this Court has actually examined the constitutional questions relating to congressional exercise of its powers to enforce the Fourteenth and Fifteenth Amendments also did not purport to resolve this issue. 4 But the

4 In City of Petersburg v. United States, 334 F. Supp. 1021 (DC), aff'd mem., 410 U. S. 902 (1973), the District Court did find that an annexation scheme could be prohibited solely on the basis of its disparate impact, without a finding of purposeful discrimination on the part of the local government. Petersburg cannot be considered dispositive of the question presented in this case, however. The court did not address any possible constitutional difficulties with its conclusion, and thus it is not clear that those arguments were raised by the parties. An unexplained per curiam affirmance by this Court affirms only the judgment, not the reasoning, of the District Court. See Hicks v. Miranda, 422 U. S. 332 (1975).

4 This issue was also not squarely presented or resolved in United Jewish Organization v. Carey, 430 U. S. 144 (1977). In UJO, the issue was whether the State could constitutionally take racial criteria into account in drawing its district lines where such redistricting was not strictly necessary to eliminate the effects of past discriminatory districting or apportionment. The Court found that use of this criteria was proper, for differing reasons. In an opinion by Mr. Justice White, joined by three other Members of the Court, it was suggested in part that the Voting Rights Act could constitutionally require this. The only question, however, was the constitutionality of state use of racial criteria, vis-à-vis other citizens, and not the constitutionality of congressional acts which required state governments to use racial criteria against their will. In another part of the opinion, Mr. Justice White reasoned that “the state is not powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls.” 430 U. S., at 167. While States may be empowered to voluntarily use racial criteria in order to-
principles which can be distilled from those precedents require the conclusion that the limitations on state power at issue cannot be sustained as a remedial exercise of power. While the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination, the decisions of this Court have recognized that in some circumstances, congressional prohibition of state or local action which is not purposefully discriminatory may nevertheless be appropriate remedial legislation under the Civil War Amendments. See Oregon v. Mitchell, 400 U.S. 112 (1970); Gaston County v. United States, 395 U.S. 286 (1969).

Those circumstances, however, are not without judicial limits. These decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is "appropriate" legislation "to enforce" the Civil War Amendments if that prohibition is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit. In both circumstances, Congress would still be legislating in response to the incidence of state action violative of the Civil War Amendments. These precedents are carefully formulated around a historic tenet of the law that, in order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation. Only when the wrong is identified can the appropriateness of the remedy be measured.

The Court today identifies the constitutional wrong which was the object of this congressional exercise of power as purposeful discrimination by local governments in structuring their political processes in an effort to reduce black voting to minimize the effects of racial bloc voting, that conclusion does not determine the constitutional authority of Congress to require States to use racial criteria in structuring their governments.
strength. The Court goes on to hold that the prohibitions imposed in this case represent an "appropriate" means of preventing such constitutional violations. The Court does not rest this conclusion on any finding that this prohibition is necessary to remedy any prior discrimination by the locality. Rather, the Court reasons that prohibition of changes discriminatory in effect prevent the incidence of changes which are discriminatory in purpose:

"Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."

Supra, at 19.

What the Court explicitly ignores is that in this case the city has proven that these changes are not discriminatory in purpose. Neither reason nor precedent support the conclusion that here it is "appropriate" for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is not purposeful discrimination.

Congress had before it evidence that various governments were enacting electoral changes and annexing territory to prevent the participation of blacks in local government by measures other than outright denial of the franchise. Congress could of course remedy and prevent such purposeful discrimination on the part of local governments. See Gomillion v. Lightfoot, 364 U. S. 339, 347 (1960). And given the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. See

\[^{1}\text{See the reference to the legislative history in United Jewish Organizations v. Carey, 430 U. S. 144, 158 (1977).}\]
78-1540—DISSENT (A)

CITY OF ROME v. UNITED STATES

South Carolina v. Katzenbach, 383 U. S. 301 (1966). But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption. Absent other circumstances, it would be a topsy-turvy judicial system which held that electoral changes which have been affirmatively proven to be permissible under the Constitution nonetheless violate the Constitution.

The precedent on which the Court relies simply does not support its remedial characterization. Neither Oregon v. Mitchell, 400 U. S. 112 (1970), nor South Carolina v. Katzenbach, supra, legitimize the use of an irrebuttable presumption that vote dilution changes are motivated by a discriminatory animus. The principal electoral practice in issue in those cases was the use of literacy tests. Yet, the Court simply fails to make any inquiry as to whether the particular electoral practices in issue here are encompassed by the “preventive” remedial rationale invoked in South Carolina and Oregon. The rationale does support congressional prohibition of some electoral practices, but simply has no logical application to the “vote-dilution” devices in issue.

In Oregon, the Court sustained a nationwide prohibition of literacy tests, thereby extending the more limited suspension approved in South Carolina. By upholding this congressional measure, the Court established that under some circumstances, a congressional remedy may be constitutionally overinclusive by prohibiting some state action which might not be purposefully discriminatory. That possibility does not justify the overinclusiveness countenanced by the Court in this case, however. Oregon by no means held that Congress could simply use discriminatory effect as a proxy for discriminatory purpose, as the Court seems to imply. Instead, the Court opinions identified the factors which rendered this prohibition properly remedial. The Court found the nationwide ban to be an appropriate means of effectively
preventing purposeful discrimination in the application of the
literacy tests as well as an appropriate means of remedying
prior constitutional violations by state and local governments
in the administration of education to minorities.

The presumption that the literacy tests were either being
used to purposefully discriminate, or that the disparate effects
of these tests were attributable to discrimination in state­
administered education was not very wide of the mark. Var­
ious opinions of the Court noted that at the time that Con­
gress enacted the ban, few States were utilizing literacy tests,
400 U. S., at 147 (opinion of Douglas, J.), and the voter
registration statistics available within those States suggested
that a disparate effect was prevalent. Id., at 132-133 (opin­
ion of Black, J.). Even if not adopted with a discriminat­
ory purpose, the tests could readily be applied in a discrimina­
tory fashion. Thus a demonstration by the State that it sought
to reinstate the tests for legitimate purposes did not eliminate
the substantial risk of discrimination in application. Only a
ban could effectively prevent the occurrence of purposeful
discrimination.

The nationwide ban was also found necessary to effectively
remedy past constitutional violations. Without the nation­
wide ban, a voter who was illiterate due to state discrimina­
tion in education could be denied the right to vote on the
basis of his illiteracy when he moved into a jurisdiction re­
taining a literacy test for nondiscriminatory purposes. Id.,
at 383-384. Finally, Mr. Jus­
tice STEWART found that a
uniform prohibition had definite advantages for enforcement
and federal relations: it reduced tensions with particular
regions, and it relieved the Federal Government from
the administrative burden implicated by selective state
enforcement.

Presumptive prohibition of vote diluting procedures is not
similarly an "appropriate" means of exacting state com­
pliance with the Civil War Amendments. First, these prohi­
bitions are quite unlike the literacy ban, where the disparate effects were traceable to the discrimination of governmental bodies in education even if their present desire to use the tests was legitimate. See Gaston County, supra. Any disparate impact associated with the nondiscriminatory electoral changes in issue here results from bloc voting—private rather than governmental discrimination. It is clear therefore that these prohibitions do not implicate congressional power to devise an effective remedy for prior constitutional violations by local governments. Nor does the Court invoke this aspect of congressional remedial powers.

It is also clear that while most States still utilizing literacy tests may have been doing so to discriminate, a similar generalization could not be made about all governmental structures which have some disparate impact on black voting strength. At the time Congress passed the Act, one study demonstrated that 60% of all cities nationwide had at-large elections for city officials, for example. This form of government was adopted by many cities throughout this century as a reform measure designed to overcome wide-scale corruption in the ward system of government. See Jewel, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 759, 760 (1967). Obviously, annexations similarly cannot be presumed to be devoid of legitimate uses. Yet both of these practices are regularly prohibited by the Act in most covered cities.

Nor does the prohibition of all vote dilution practices with a disparate impact enhance congressional prevention of purposeful discrimination. The changes in issues are not, like literacy tests, though fair on their face, subject to discriminatory application by local authorities. See Yick Wo v. Hopkins, 118 U. S. 356 (1886). They are either discriminatory from the outset or not.

Finally, the advantages supporting the imposition of a nationwide ban are simply not implicated in this case. N
added administrative burdens are in issue since Congress has provided the mechanism for preclearance suits in any event, and the burden of proof for this issue is on the locality. And it is certain that the only constitutional wrong implicated—purposeful dilution—can be effectively remedied by prohibiting it where it occurs. For all these reasons, I do not think that the present case is controlled by the result in Oregon. By prohibiting all electoral changes with a disparate impact, Congress has attempted to prevent disparate impacts—not purposeful discrimination.

Congress unquestionably has the power to prohibit and remedy state action which intentionally deprives citizens of Fourteenth and Fifteenth Amendment rights. But unless these powers are to be wholly uncanalized, it cannot be appropriate remedial legislation for Congress to prohibit Rome from structuring its government in the manner as its population sees fit absent a finding or unrebutted presumption that Rome has, or is, intentionally discriminating against its black citizens. Rome has simply committed no constitutional violations, as this Court has defined them.

More is at stake than sophistry at its worst in the Court's conclusion that requiring the local government to structure its political system in a manner that most effectively enhances black political strength serves to remedy or prevent constitutional wrongs on the part of the local government. The need to prevent this disparate impact is premised on the assumption that white candidates will not represent black interests, and that States should devise a system encouraging blacks to vote in a block for black candidates. The findings in this case alone demonstrate the tenuous nature of these assumptions. The court below expressly found that white officials have ably represented the interests of the black community. Even blacks who testified admitted no dissatisfaction, but expressed only a preference to be represented by officials of their own race. The enforcement provisions of the Civil War Amendments were not premised on the notion that
Congress could empower a later generation of blacks to "get even" for wrongs inflicted on their forebears. What is new at stake in the city of Rome is the preference of the black community to be represented by a black. This Court has never elevated a notion, by no means confined to blacks, to the status of a constitutional right. See Whitcomb v. Chavis, 403 U. S. 124 (1971). This Court concluded in Whitcomb that

"[t]he mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative assent of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." Id., at 154-155.

The Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate. Nor do I believe that Congress can do so, absent a finding that this obligation would be necessary to remedy constitutional violations on the part of the local government.

It is appropriate to add that even if this Court could find a remedial relationship between the prohibition of all state action with a disparate impact on black voting strength and the incidence of purposeful discrimination, this Court should exercise caution in approving the remedy in issue here absent purposeful dilution. Political theorists can readily differ on the advantages inherent in different governmental structures. As Justice Harlan noted in his dissent in Farley v. Patterson, 393 U. S. 544 (1969): "It is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers." Id., at 586.
The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group's ability to elect a candidate of their race violate the Fourteenth or Fifteenth Amendments. This construction of the Fourteenth Amendment was rejected in the Civil Rights Cases, 109 U. S. 3 (1883). The Court emphasized that the power conferred was "remedial" only. The Court reasoned that the structure of the Amendment made it clear that it did not "authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers . . . , when these are subversive of the fundamental rights specified in the Amendment." This interpretation is consonant with the legislative history surrounding the enactment of the Amendment. This construction has never been refuted by a majority of the Members of this Court. Support for this construction in current years has emerged in South Carolina v. Katzenbach, and Oregon v. Mitchell. See also opinion of Powell, J., Burt, "Miranda and Title II: a Morganatic Marriage," 1969 S. Ct. Rev. 81. Explicit support can also be derived from Mr. Justice Harlan's dissenting opinion, joined by Mr. Justice Stewart, in Katzenbach v. Morgan, 384 U. S. 641 (1966). Mr. Justice Harlan clarified the need for the remedial construction of congressional powers. It is also unnecessary, however, to read the majority opinion as establishing the Court's rejection of the "remedial" construction of the enforcement powers, the opinion also advanced a remedial rationale which supports the determination reached by the Court. Compare the rationales forwarded at 384 U. S., at 654 with the statements, at 656. It would be particularly inappropriate to construe Katzenbach v. Morgan as a rejection of the remedial interpretation of congressional powers in view of this Court's subsequent decision in Oregon v. Mitchell, 400 U. S. 112 (1970).
CITY OF ROME v. UNITED STATES

Supra, at —. In South Carolina v. Katzenbach, the Court observed that Congress could not attack evils not comprehended by the Fifteenth Amendment, 383 U.S. at 326. In Oregon v. Mitchell, 400 U.S. 112 (1970), five Members of the Court were unwilling to conclude that Congress had the power to determine that establishing the age limitation for voting at 21 denied equal protection to those between the ages of 18 and 20.

The opinion of Justice Stewart in that case, joined by Chief Justice Burger and Justice Blackmun, reaffirmed that Congress only has the power under the Fourteenth Amendment to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause" but not to "determine as a matter of substantive constitutional law that situations fall within the ambit of the clause." Id., at 206. Justice Harlan, in a separate opinion, reiterated his belief that it is the duty of the Court, and not the Congress, to determine when States have exceeded constitutional limitations imposed upon their powers. Id., at 204-207. Cf. Oregon v. Hass, 420 U.S. 714 (1975); Cooper v. Aaron, 358 U.S. 1, 18 (1958). Justice Black also was unwilling to accept the broad construction of enforcement powers formulated in the opinion of Justice Brennan, joined by Justices White and Marshall.8

The Court today fails to heed this prior precedent. To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it

8 Since Mr. Justice Black found that congressional powers were more circumscribed when seeking to counter racial discrimination under the Fourteenth Amendment, he did not have to determine the precise nature of congressional powers when they were exercised in the field of racial relations. His analysis of the nationwide ban on literacy tests, also presented in Oregon v. Mitchell, however, is consistent with a remedial interpretation of those powers.
requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.