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Cover Page Footnote

J.D. and Law and Public Policy Program Certificate Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.S., 2005, Longwood University. The author wishes to thank Susanna Fischer and David Baker for their persistent guidance and support; my father and brother, both, for always setting the bar so high; and Jocelyn Kendall for a lifetime of love and editorial review.

SHELBY COUNTY V. HOLDER AND THE VOTING RIGHTS ACT: GETTING THE RIGHT ANSWER WITH THE WRONG STANDARD

Michael James Burns⁺

In 1898, on the eve of Election Day, a white mayoral candidate from Wilmington, North Carolina, rallied his supporters: “Go to the polls tomorrow and if you find the negro out voting, tell him to leave the polls, and if he refuses[,] kill him; shoot him down in his tracks.”¹ The candidate made this statement 30 years after the passage of the Fifteenth Amendment, which prohibited voter disenfranchisement based on “race, color, or previous condition of servitude.”² Such Jim Crow-inspired violence, intimidation, and injustice went unchecked for nearly a century after the adoption of the Fifteenth Amendment, effectively disenfranchising millions of people of color.³ The Voting Rights Act of 1965 (VRA) signaled Congress’s first decisive action to preserve minorities’ right to vote in the United States.⁴

The VRA implemented a two-tier approach to combat voting rights discrimination. First, the VRA created remedial measures such as criminal and civil penalties for voting rights discrimination based on race by states or “other political subdivisions.”⁵ Second, the VRA implemented narrow prophylactic

⁺ J.D. and Law and Public Policy Program Certificate Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.S., 2005, Longwood University. The author wishes to thank Susanna Fischer and David Baker for their persistent guidance and support; my father and brother, both, for always setting the bar so high; and Jocelyn Kendall for a lifetime of love and editorial review.

1. STEWART E. TOLNAY & E. M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930*, at 67 (1995) (quoting HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 74 (1988)).

2. U.S. CONST. amend. XV, § 1. Congress ratified the Fifteenth Amendment in 1870. *See South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966).

3. *Katzenbach*, 383 U.S. at 310–14 (describing the on-going discrimination minority voters faced after the passage of the Fifteenth Amendment); *see also* Taunya Lovell Banks, *Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner*, 43 HARV. C.R.-C.L. L. REV. 127, 127–31 (2008) (discussing the continuing oppression of African Americans in the United States in the late eighteenth and early nineteenth centuries).

4. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)); *Katzenbach*, 383 U.S. at 315 (“The Voting Rights Act of 1965 reflects Congress’s firm intention to rid the country of racial discrimination in voting.”).

5. *See* Voting Rights Act of 1965 § 2 (“No voting qualification or prerequisite to voting, or . . . procedure shall be imposed . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”); § 3 (providing remedial measures for violation of the Fifteenth Amendment by “any State or political subdivision”); § 4(e)(1) (prohibiting “the State from conditioning the right to vote . . . on [the] ability to read, write, understand, or interpret any

provisions that applied stringent federal oversight to the electoral functions of primarily southern states with egregious histories of racial discrimination regarding voting.⁶ At the time the VRA was enacted, these oversight protections contained a five-year expiration period.⁷ However, persistent efforts to deny voting rights to minorities forced Congress to increase the original geographic coverage⁸ and the expiration period of the prophylactic provisions on several occasions.⁹ Even today, these targeted provisions are necessary to ensure that the right to vote of minority citizens is not infringed upon.¹⁰

matter in the English language”); § 6(a) (allowing the appointment of examiners where needed to enforce the provisions of the Fifteenth Amendment in “any political subdivision”); § 10(a)–(b) (prohibiting “states or political subdivisions” from instituting a poll tax); § 11 (making illegal the employment of threats, intimidation, or coercion against an eligible voter for the purpose of preventing them from exercising their voting rights); § 12(a)–(c) (establishing penalties for individuals who violate the Act).

6. See Voting Rights Act of 1965 § 4 (providing the test for determining whether a jurisdiction is subject to the targeted provisions of the VRA); § 5 (freezing electoral changes, by states or political subdivisions identified by § 4’s test, unless the changes are cleared by the U.S. Attorney General or the U.S. District Court for the District of Columbia); see also *infra* Parts I.A.1–2. This Note will refer to the prophylactic provisions of the VRA, namely section 5 preclearance, as the “targeted provisions.”

7. Voting Rights Act of 1965 § 4(a).

8. See *infra* Part I.A.4 (discussing the various jurisdictions covered).

9. The expiration period has been extended four times since 1965. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b (2006)) (extending the VRA for another five years); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973b (2006)) (extending the VRA for another seven years); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 131 (codified as amended at 42 U.S.C. § 1973b (2006)) (extending the VRA for another twenty-five years); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §4, 120 Stat. 577, 580 (codified as amended at 42 U.S.C. § 1973b (2006)) (extending the VRA for another twenty-five years).

10. See, e.g., WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, VOTING LAW CHANGES IN 2012, at 2 (2011), available at http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf (finding that in 2011 “at least nineteen laws and two executive actions making it more difficult to vote passed across the country, at least forty-two bills are still pending, and at least sixty-eight more were introduced but failed”); Stuart Rothenberg, *Is This the Ugliest Redistricting Cycle Ever?*, ROLL CALL (Nov. 10, 2011, 12:00 AM), http://www.rollcall.com/issues/57_57/is_this_ugliest_redistricting_cycle_ever-210186-1.html (noting certain redistricting attempts that could have an adverse impact on the voting strength of African-American and Hispanic communities). Another stark display of the continued need for section 5 preclearance were two rulings against the state of Texas, which occurred just two days apart, preventing the implementation of a redistricting plan and new voter I.D. requirements. See *Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012); *Texas v. United States*, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012).

Nonetheless, Congress's Fifteenth Amendment enforcement authority is challenged each time the VRA is extended.¹¹ Most recently, in *Shelby County v. Holder*, the 2006 extension of the VRA¹² survived a facial constitutional challenge in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit.¹³ Although the court held that the VRA was constitutional, the *Shelby County* decision marked a distinct departure from prior VRA cases by applying a more stringent standard of judicial review to Congress's Fifteenth Amendment enforcement authority than has been applied previously.¹⁴ This shift in standard of review from the deferential rational basis to the fact-focused balancing of congruent and proportional review could eventually leave the Department of Justice mired in a continuous onslaught of litigation defending that "current burdens justify[y] . . . current needs."¹⁵

Rational basis review is the most deferential standard of review that holds legislation to be constitutional as long as it is rationally related to achieving a

11. See, e.g., *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–87 (1999); *City of Rome v. United States*, 446 U.S. 156, 173 (1980), *superseded by statute*, Voting Rights Act of 1982 § 2(b), *as stated in* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 209 (2009); *Georgia v. United States*, 411 U.S. 526, 531, 535 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966); Attorney General's Consolidated Reply Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment at 5, *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 1:10-cv-00651-JDB) [hereinafter Attorney General's Consolidated Reply] (defining the question in *Shelby County* as "whether Congress had a rational basis for concluding that the preclearance requirements of section 5 remain an appropriate means of protecting minority voting rights"); Memorandum of P. & A. in Support of Plaintiff's Motion for Summary Judgment at n.6, *Shelby Cnty.*, 811 F. Supp. 2d 424 (No. 1:10-cv-00651-JDB) (addressing the constitutionality concerns of section 5 of the VRA).

12. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

13. 679 F.3d 848, 853 (D.C. Cir. 2012), *cert. granted in part*, 131 S. Ct. 594 (2012). This Note will focus primarily on the district court's opinion in *Shelby County* because it dedicated substantial treatment to the varying standards of review, while the appellate court directly reviewed the 2006 VRA Amendments under the more stringent congruent and proportional standard. Compare *Shelby Cnty.*, 679 F.3d at 859 (giving less than one paragraph of treatment to the standard of review, reasoning "if section 5 survives the arguably more rigorous congruent and proportionality standard, it would also survive . . . rationality review"), with *Shelby Cnty.*, 811 F. Supp. 2d at 447–63 (dedicating nearly seventeen pages to the standard of review analysis).

14. Compare *Katzenbach*, 383 U.S. at 324 (applying the rational means test in determining the constitutionality of section 5), and *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241 (D.D.C. 2008) (holding that the rational means test should be applied), *rev'd and remanded on statutory grounds sub nom. NAMUDNO*, 557 U.S. 193, with *Shelby Cnty.*, 811 F. Supp. at 449 ("[The] congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*, and hence provides the appropriate standard of review to assess *Shelby County's* facial constitutional challenge to section 5 and section 4(b).")

15. *NAMUDNO*, 557 U.S. 193.

legitimate government interest.¹⁶ The congruence and proportionality standard of review, on the other hand, was developed to limit when Congress could invoke its section 5 enforcement powers under the Fourteenth Amendment.¹⁷ The congruence and proportionality standard was developed to distinguish Congress's enforcement authority from the judicial branch's role of interpreting the broad constitutional rights defined in the Fourteenth Amendment.¹⁸ Such concerns are not present in the narrower Fifteenth Amendment context, because the Fifteenth Amendment only addresses racial discrimination in voting.¹⁹

This Note focuses on the change in the standard of review in the *Shelby County* case. Part I outlines the history of the VRA, focusing on the major provisions relevant to the *Shelby County* decision. Part I also surveys prior cases that challenge the constitutionality of the VRA and highlights the development of rational basis and congruence and proportionality standards of review. Part II examines the district court's rationale in *Shelby County* for adopting the congruence and proportionality standard. Finally, Part III concludes that the rational basis standard is the appropriate standard of review for Congress's Fifteenth Amendment enforcement authority.

I. BRIEF HISTORY OF THE VRA AND THE CONSTITUTIONAL CONTROVERSIES SURROUNDING ITS PROPHYLACTIC PROVISIONS

After the passage of the Fifteenth Amendment, states employed a variety of schemes to continue to prevent minorities from voting, including poll taxes, literacy tests, property qualifications, grandfather clauses, "white primaries," and even outright violence.²⁰ Until the mid-twentieth century, these tactics

16. BLACK'S LAW DICTIONARY 1376 (9th ed. 2009); see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 429–40 (1985) (discussing the rational basis standard as applied to Fourteenth Amendment equal protection claims).

17. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (noting that Congress has overstepped its enforcement role under Section 5 of the Fourteenth Amendment by making substantive changes to constitutional protections, instead of merely enforcing them, if there is no "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

18. *Id.* ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 296–98 (3d ed. 2006).

19. U.S. CONST. amend. XV, § 1.

20. H.R. REP. NO. 89-439, at 8, 11–13 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2439–40, 2443–44; S. REP. NO. 89-162, at 4–5 (1965), reprinted in 1965 U.S.C.C.A.N. 2508, 2542–43; see *South Carolina v. Katzenbach*, 383 U.S. 301, 309–16 (1966) (describing the multitude of methods used to deprive minorities of the right to vote); TOLNAY & BECK, *supra* note 1, at 172 (noting that in Kentucky, lynchings increased after the passage of the Fifteenth Amendment as "whites turned to violence to discourage African-Americans from voting"); J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 678 (2008) (summarizing measures used in the South to reduce African

succeeded in preventing minorities from registering to vote and from “participating in the most fundamental aspects of the political process.”²¹

Section 2 of the Fifteenth Amendment granted Congress the power to implement legislation that enforces the Amendment’s preservation of the right to vote,²² and Congress attempted numerous legislative approaches to fulfill this mandate.²³ However, a number of jurisdictions located mainly in the South found ways to evade congressional enforcement by, among other things, “merely switch[ing] to discriminatory devices not covered by the federal decrees.”²⁴ This system left the burden of litigation on the victims and continued the barriers to registration and voting.²⁵ A different approach was required to break the cycle.

A. *The Voting Rights Act of 1965*

The passage of the VRA “reflect[ed] Congress’[s] firm intention to rid the country of racial discrimination in voting.”²⁶ The VRA contained two main types of provisions.²⁷ First, the VRA enumerated nationally applied remedial measures including: (1) prohibitions on the use of voting rules to abridge the right to vote based on race; (2) procedures for challenging poll taxes; and (3) civil and criminal causes of action and penalties for interfering with the rights

American voting, including modifying voting districts, literacy tests, violence, secret ballots, ballot box stuffing, and property requirements). Other means included allowing only whites to vote in primaries, as well as tailoring which criminal convictions disqualify someone from voting to those most likely to be committed only by African Americans. Kousser, *supra*, at 678.

21. H.R. REP. NO. 109-478, at 7 (2006), *reprinted in* 2006 U.S.S.C.A.N. 618, 621; *see* Kousser, *supra* note 20 at 678 (noting that none of the means employed to prevent African Americans from voting facially mentioned race and instead relied on surrogate traits that could be used to disenfranchise blacks without directly violating the Fifteenth Amendment).

22. U.S. CONST. amend. XV, § 2; *South Carolina v. Katzenbach*, 383 U.S. at 325–26 (stating that “the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1”).

23. *Katzenbach*, 383 U.S. at 309–16 (noting that the Civil Rights Acts of 1957, 1960, and 1964 gave the Attorney General authority to seek injunctive relief “against public and private interference with the right to vote on racial grounds,” “access to local voting records,” and expedited hearings for voting rights cases); H.R. REP. NO. 89-439, at 8–11, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439–42; S. REP. NO. 89-162, pt. 3, at 5–9, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2543–47.

24. *Katzenbach*, 383 U.S. at 314 (noting that local officials also evaded or defied the court orders); H.R. REP. NO. 89-439, at 10, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439–42; S. REP. NO. 89-162, at 5, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2542–43.

25. *Katzenbach*, 383 U.S. at 313–15; *see* H.R. REP. NO. 89-439, at 11, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2442 (“[T]he damage . . . is too great not to adopt more effective measures than exist today.”)

26. *Katzenbach*, 383 U.S. at 315.

27. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

guaranteed by the Act.²⁸ Second, the VRA contained several provisions that only applied to targeted areas of the country that had the worst records of voting discrimination.²⁹ These targeted provisions included: (1) a prohibition on the use of tests or devices as requisites to registering to vote or voting; (2) preclearance by the Attorney General or the United States District Court for the District of Columbia of any changes to voting laws or regulations; and (3) the ability to appoint federal examiners to oversee registration and election activities.³⁰

Congress intended for the targeted prophylactic provisions to be temporarily necessary to overcome the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the [Fifteenth Amendment].”³¹ Congress hoped that once the systemic discriminatory practices broke, participation by minorities in the voting process would eventually stabilize, and remedial measures, like the threat of civil or criminal penalties for violations, would suffice.³² However, due to continued and pervasive discrimination, Congress extended the temporary prophylactic provisions as recently as 2006 through the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization).³³

28. Voting Rights Act of 1965 §§ 2, 3, 4(e), 6(a), 10(a)–(c), 11, 12(a)–(d), 13(b); *see Katzenbach*, 383 U.S. at 315–17 (describing the remedial provisions of the VRA).

29. Voting Rights Act of 1965 §§ 4(a)–(d), 5, 6(b), 7, 9, 13(a).

30. Voting Rights Act of 1965 §§ 4(a)–(d), 5, 6(b), 7, 9, 13(a).

31. *Katzenbach*, 383 U.S. at 309.

32. *Id.* at 328.

33. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (codified as amended at 42 U.S.C. § 1973b (2006)) (extending the VRA for another twenty-five years); *see supra* note 9 (detailing the previous three extensions of the VRA). Congress conducted an extensive review of existing voting discrimination before passing the 2006 Reauthorization by a 390 to 33 vote in the House, and unanimously in the Senate. *See* Office of the Clerk-U.S. House of Representatives, *Roll Call Votes, 109th Congress*, <http://clerk.house.gov/evs/2006/roll374.xml> (last visited Sept. 16, 2012); U.S. Senate, *Senate Roll Call Votes, 109th Congress*, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212 (last visited Sept. 16, 2012). During the review, Congress found that the VRA had made significant progress in eliminating “first generation barriers” to minority voting rights, as evidenced by increased minority registration, turn-out, and representation in official positions. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 2(b)(1). Unfortunately, Congress also discovered that pervasive discrimination in minority voting still existed as evidenced by “second generation barriers.” *Id.* § 2(b)(2)-4(A); H.R. REP. NO. 109-478, at 2 (2006). These “second generation barriers” include schemes designed to dilute minority voting strength using techniques such as annexation, at-large voting, numbered post, and multi-member districts. H.R. REP. NO. 109-478, at 2 (2006). Combined with racially polarized voting, dilutive schemes are used to prevent minorities from electing their candidates of choice. *See Thornburg v. Gingles*, 478 U.S. 30, 68–69 (1986); *see also The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2209 (2003).

1. Section 4 Coverage Formula: Who Are the Most Egregious Discriminators?

Section 4 of the VRA sought to eradicate the most common tools used to prevent minority registration and voting.³⁴ Section 4(b) created a formula to identify the jurisdictions to be covered by the targeted provisions.³⁵ The original 1965 coverage formula contained two criteria: (1) a determination by the Attorney General that the jurisdiction was using a “test or device” as a precondition to voter registration or voting; and (2) a showing that either less than fifty percent of the voting-age population was registered, or that less than fifty percent of the voting-age population voted in the 1964 presidential election.³⁶

The first factor, use of a “test or device,” encompassed literacy tests, property qualifications, grandfather clauses, good-morals requirement, and similar practices.³⁷ The second factor, reviewing registration and turn-out rates, was designed to indicate whether the test or devices were, in effect, restricting access to registration and voting.³⁸ Congress intended for the combination of the two factors to create an efficient proxy for findings of intentional discrimination.³⁹ Tests and devices had long been used for discriminatory purposes, and those jurisdictions that used them the most egregiously to restrict access to registration and voting would logically have registration and turn-out rates far below the national average.⁴⁰

(describing how racially polarized voting occurs when white voters predominately support only white candidates, and do not cross over to support minority candidates and vice versa).

34. Voting Rights Act of 1965 § 4(a); *Katzenbach*, 383 U.S. at 311–14.

35. Voting Rights Act of 1965 § 4(b).

36. *Id.* “Tests or devices” is defined as:

Any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Id. § 4(c).

37. H.R. REP. NO. 89-439, at 3, 8–9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439–40, 2443–44; S. REP. NO. 89-162, at 4–5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, pt. 3, 2542–43.

38. *See Katzenbach*, 383 U.S. at 330 (describing the relevance of registration and voting rates in determining the existence of discriminatory practices); *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 438 (D.D.C. 2011) (noting that election data has been used, in conjunction with other evidence, to identify jurisdictions that infringe minority voting rights), *aff’d*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 131 S. Ct. 594 (2012).

39. *See Katzenbach*, 383 U.S. at 329–31 (concluding that “the coverage formula is rational in both practice and theory”). *But see Shelby Cnty.*, 811 F. Supp. 2d at 438 (noting the scholarly debate over the value of updating the coverage formula with more current election data).

40. *See The Continuing Need for Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 99 (2006) (response of Pamela S. Karlan to question submitted by Sen. Cornyn) (arguing that although the use of voter registration as a trigger “has always been both slightly over- and under-inclusive . . . the . . . formula overall fit the problem closely

In 1970, Congress extended the temporary provisions for five years without substantive changes to the section 4 formula.⁴¹ However, in addition to extending the expiration of sections 4 and 5, Congress added a second benchmark to review for the use of test or device and turn-out and registration data from the 1968 presidential election below the fifty percent threshold for inclusion in coverage.⁴² The 1975 amendments added a third benchmark, identical to the first two, but with a review date of the 1972 presidential election.⁴³ The 1975 amendments also added a new mechanism to trigger coverage by creating subsection 4(f) to protect language minorities.⁴⁴ The subsection triggered coverage of jurisdictions that provided registration and election materials exclusively in English even though certain percentages of the voting-age population in the jurisdiction were of a single-language minority.⁴⁵ Since the 1975 amendments, Congress has not made any additional changes to the coverage formula.⁴⁶

enough”). Section 4 also banned the use of any tests and devices in the covered jurisdictions. Voting Rights Act of 1965 § 4(a).

41. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 4, 5, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. §§ 1973b–c (2006)); *Georgia v. United States*, 411 U.S. 526, 533 (1973) (“[The Voting Rights] Act was extended for five years, without any substantive modification of [section] 5”). The general ban on “test or device” in section 4 was also extended for another five years and expanded to non-covered jurisdictions as well. Voting Rights Act Amendments of 1970 § 6.

42. Voting Rights Act Amendments of 1970 §§ 4, 5.

43. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, Tit. II, 89 Stat. 400, 400 (1975) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2006)).

44. Voting Rights Act Amendments of 1975 § 203. Among the changes in the 1975 amendments was an extension of the targeted provisions for another seven years. *Id.* § 101. In addition, Congress placed a permanent nationwide ban on “tests or devices.” *Id.* § 203. The need for continued measures was well-documented. Although, the registration rates of African Americans had drastically increased in some covered jurisdictions by 1975, and African American candidates were being elected in increasing numbers, many jurisdictions still had double-digit percentage gaps in registration and turn-out rates between whites and African Americans in many covered jurisdictions. S. REP. NO. 94-295, at 13–14 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 779–82 (noting that “a bleaker side of the picture yet exists”). In some instances, the differential was greater than twenty percent. *See id.* Further, the few elected positions held by African Americans were considered “relatively minor,” located in jurisdictions with large African-American populations, and none had state-wide authority. *See id.*; *City of Rome v. United States*, 446 U.S. 156, 180 (1980), *superseded by statute*, Voting Rights Act of 1982 § 2(b), *as stated in* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 209 (2009).

45. Voting Rights Act Amendments of 1975 § 203. This was accomplished by expanding the definition of test or device. *See* 42 U.S.C. § 1973b(f)(3) (2006).

46. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization Act and Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

2. Section 5 Preclearance – Federal Oversight of States and Localities

Jurisdictions included in the section 4 coverage formula are subject to section 5 preclearance.⁴⁷ Section 5 preclearance essentially freezes election laws and regulations of covered jurisdictions.⁴⁸ Covered jurisdictions interested in changing their election laws are required either to inform the Attorney General, who has 60 days to object, or to file an action for declaratory judgment in the U.S. District Court for the District of Columbia.⁴⁹ If the Attorney General objects to the changes and the jurisdiction fails to obtain declaratory judgment from the D.C. district court, “no person [within the jurisdiction] shall be denied the right to vote for failure to comply with [the new law or regulation].”⁵⁰ Section 5 finally put federal institutions one step ahead of local perpetrators by preventing covered jurisdictions from switching to new discriminatory methods before review.⁵¹

3. Section 4(a) Bailout – Correcting for the Overinclusive Formula

In order to abate concerns that the coverage formula was overinclusive and an inadequate method for targeting intentional discrimination,⁵² Congress included a so-called “bailout” procedure.⁵³ Under section 4(a) of the VRA, a covered jurisdiction could become exempt from the requirement of section 5 preclearance by bringing an action for declaratory judgment in the U.S. District Court for the District of Columbia.⁵⁴ To qualify for bailout, the covered

47. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (2006)).

48. *See About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Sept. 16, 2012) (“Under Section 5, any change with respect to voting in a covered jurisdiction—or any political subunit within it—cannot legally be enforced unless and until the jurisdiction first obtains the requisite determination by the U.S. District Court for the District of Columbia or makes a submission to the Attorney General.”). Although the original preclearance requirement of the Voting Rights Act of 1965 only applied to jurisdictions covered in 1964, jurisdictions that fell within coverage as a result of the 1970 and 1975 amendments also became subject to preclearance requirements. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 5, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973c) (freezing voting law in covered jurisdictions to those in effect on November 1, 1968); Voting Rights Act Amendments of 1975 § 204 (freezing voting law in covered jurisdictions to those in effect on November 1, 1972).

49. Voting Rights Act of 1965 § 5.

50. *Id.*; *see also About Section 5 of the Voting Rights Act*, *supra* note 48.

51. Voting Rights Act of 1965 §5; *see supra* note 24 and accompanying text.

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

53. *See* Voting Rights Act of 1965 § 4(a); *see also Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_lis (last visited Sept. 16, 2012).

54. Voting Rights Act of 1965 § 4(a). Originally, for purposes of bringing a bailout action, the bailout language of section 4(a) only recognized a “State” or a “political subdivision” about which a coverage determination had been made as “a separate unit.” Voting Rights Act of 1965 § 4(a). Interpreting this language, the Supreme Court limited bailout actions to whole jurisdictions covered under the VRA and prohibited any subdivisions within a covered

jurisdiction must show that it has not used a test or device for the purpose or effect of restricting voting rights for ten years preceding the filing of the action, and has complied with several additional statutory requirements, primarily focused on whether a jurisdiction had violated any other parts of the VRA.⁵⁵

4. VRA Coverage

Currently, the VRA coverage formula qualifies nine states for inclusion on a state-wide basis: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.⁵⁶ Additionally, individual counties in California, Florida, New York, North Carolina, and South Dakota qualify for inclusion.⁵⁷ Michigan and New Hampshire have several districts below the county level that are also covered.⁵⁸

jurisdiction from independently seeking bailout. *City of Rome v. United States*, 446 U.S. 156, 167 (1980), *superseded by statute*, Voting Rights Act of 1982 § 2(b), *as stated in* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 209 (2009). The 1982 amendments gave political subdivisions within a covered jurisdiction the right to independently seek bailout. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131, 131 (codified as amended at 42 U.S.C. § 1973b); *see also Section 4 of the Voting Rights Act, supra* note 53.

55. 42 U.S.C. § 1973b(a)(1)(A)–(F) (2006). The 1965 version of the VRA only required that a jurisdiction show that it had not discriminatorily used a test or device for the last five years. Voting Rights Act of 1965 § 4(a). When the targeted provisions of the VRA were extended by the 1970 and 1975 Amendments, the length of time that a jurisdiction had to show that it had abstained from the use of a “test or device” for discriminatory purpose or to a discriminatory effect increased to ten years and seventeen years, respectively. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973b). The 1982 amendment, however, permanently set a ten-year review period before granting bailouts. Voting Rights Act Amendments of 1982, §§ 2(b)(4)(D), 2(b)(5).

56. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *Section 5 Covered Jurisdictions*, http://www.justice.gov/crt/about/vot/sec_5/covered.php#note1 (last visited Sept. 16, 2012). Even though these nine states are fully covered, political subdivisions within those states have sought and received bailouts. *Section 4 of the Voting Rights Act, supra* note 53. Most notably, twenty-nine counties or cities in Virginia have independently received bailout declaratory judgments. *Id.* Virginia is an outlier, however, because there have only been four other political subdivisions in a covered state that have received bailouts—two in Texas, one in Georgia, and one in Alabama. *See id.* The statutory interpretation issues discussed in *NAMUDNO* might account for the previous lack of bailouts granted to political subdivisions within covered states. *See infra* Part I.C. Six of the thirty-three bailouts of subdivisions within covered states occurred in the two years following *NAMUDNO*. *See Section 4 of the Voting Rights Act, supra* note 53. Covered jurisdictions not part of a fully covered state have been more successful in receiving bailouts. *See id.* (listing the forty-two counties and towns with individual coverage determinations that have received bailout declaratory judgments).

57. *See Section 5 Covered Jurisdictions, supra* note 56.

58. *Id.*

B. Previous Constitutional Challenges to the VRA Establish Rational Means as the Standard of Review

Historically, through application of the rational means standard,⁵⁹ the Supreme Court has broadly interpreted Congress's authority to enforce the guarantees of the Fifteenth Amendment by appropriate legislation and, as such, has upheld the VRA and the targeted provisions on multiple occasions.⁶⁰

1. The First Application of the Rational Means Standard: South Carolina v. Katzenbach

In *South Carolina v. Katzenbach*, South Carolina challenged the constitutionality of the VRA, seeking to enjoin the Attorney General from enforcing the targeted provisions against the state.⁶¹ The Court framed South Carolina's challenge as a question of whether Congress acted within the bounds of its enforcement authority when creating the targeted provisions.⁶² The Court concluded that "[a]s against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting."⁶³ Although acknowledging existing precedent that established the authority of states to administer voting,⁶⁴ the Court noted that the Fifteenth Amendment's protection of minority voting rights "supersedes contrary exertions of state power."⁶⁵ The Court rejected South Carolina's argument that only courts, through judicial review, could override the states' authority.⁶⁶ The Court reasoned that Section 2 of the Fifteenth Amendment clearly gives enforcement authority to Congress because Congress is "chiefly responsible for implementing the rights created in [Section] 1 [of the Fifteenth Amendment]."⁶⁷ Therefore, the Court upheld the constitutionality of Congress's actions.⁶⁸

59. Rational means standard of review is a truly deferential standard that will uphold Congressional action that uses any means rationally related to achieving a legitimate government interest. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

60. *See infra* Parts I.B.1–2.

61. 383 U.S. 301, 307 (1966).

62. *Id.* at 323–24 (framing the question as whether the Act "encroach[es] on an area reserved to the States by the Constitution").

63. *Id.* at 324 (emphasis added).

64. *Id.* at 325 (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)) (explaining that when a state exercises the power within its constitutional boundary, federal judicial review is inappropriate); *see also* U.S. CONST. art. 1 § 4, cl. 1 (authorizing the states to establish "[t]he Times, Places and Manner of holding Elections" even in the case of federal elections for Senators and Representatives).

65. *Katzenbach*, 383 U.S. at 325–26.

66. *Id.* at 325 (rejecting South Carolina's argument that allowing Congress to invalidate state statutes is the same as robbing the courts' role to exercise this authority).

67. *Id.* at 326.

68. *Id.* at 328.

Next, the Court addressed whether the section 4 coverage formula was a rational means for preventing states from denying the right to vote based on race or color.⁶⁹ The Court held that the coverage formula was “rational in both practice and theory.”⁷⁰ The Court noted that the coverage formula was tailored to encompass only those jurisdictions that evidenced intentional discrimination by focusing on jurisdictions that used test and devices and had drastically lower registration and turn-out numbers.⁷¹ Similarly, the Court was persuaded that historical evidence that certain jurisdictions were continuously adopting new maneuvers to avoid enforcement gave Congress a rational basis to enact section 5’s preclearance mechanisms.⁷² In addition, the Court also regarded section 4(a)’s bailout provision favorably as a limiting feature, noting that it adequately corrected for any overinclusive features of the coverage formula.⁷³

2. Continued Deference to Congress

After the VRA’s targeted provisions were first extended in 1970, the Supreme Court re-addressed the constitutionality of the provisions in *Georgia v. United States*.⁷⁴ In *Georgia*, the Attorney General objected to Georgia’s reapportionment plan⁷⁵ for the State House of Representatives and, eventually, succeeded in obtaining a court-ordered injunction prohibiting Georgia from implementing the plan.⁷⁶ Georgia appealed, arguing that section 5 preclearance did not apply to the reapportionment changes and, in the

69. *Id.* at 329–30 (introducing South Carolina’s contention that the formula itself is inappropriately designed and that it ignores many local situations of states).

70. *Id.* at 330 (determining that the formula’s two characteristics, “the use of tests and devices” and a low voting rate, demonstrate evidence of voting discrimination).

71. *Id.* at 329–30.

72. *Id.* at 335 (noting that prior violations by covered jurisdictions made it rational for Congress to respond “in a permissibly decisive manner”). The combined remedies of sections 4 and 5 made it so that “[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress . . . shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims.” *Id.* at 328.

73. *Id.* at 331.

74. 411 U.S. 526, 535 (1973).

75. Reapportionment is defined as a “[r]ealignment of a legislative district’s boundaries to reflect changes in population.” BLACK’S LAW DICTIONARY 1379 (9th ed. 2009). An example of reapportionment is when the U.S. House of Representatives reallocates seats among the states every ten years following the census. U.S. CONST. art. 1, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2. By contrast, redistricting means “re-drawing the lines of each legislative district.” JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, A CITIZEN’S GUIDE TO REDISTRICTING, 6–7 (2010), available at http://brennan.3cdn.net/7182a7e7624ed5265d_6im622teh.pdf. *Black’s Law Dictionary*, however, uses “reapportionment” and “redistricting” interchangeably. See BLACK’S LAW DICTIONARY 1379 (9th ed. 2009) (listing redistricting as a synonym of reapportionment). This confusion is understandable because a change in the number of districts during reapportionment generally necessitates redistricting. See, e.g., *Georgia*, 411 U.S. at 528–29. In *Georgia*, the court correctly characterized the state’s action as reapportionment because the state’s plan changed the number of state legislative districts. *Id.*

76. *Georgia*, 411 U.S. at 527–28.

alternative, that application of the preclearance requirement was unconstitutional.⁷⁷ After deciding that preclearance did apply,⁷⁸ Justice Potter Stewart dismissed Georgia's constitutional challenge by simple reference to *Katzenbach* as controlling precedent.⁷⁹

After the 1975 Amendments, the Supreme Court again, in *City of Rome v. United States*, upheld the constitutionality of section 5 preclearance under a rational means standard.⁸⁰ Reiterating its analysis in *Katzenbach*, the Court ruled that Congress could act to prohibit voting practices that have a discriminatory purpose *or* effect.⁸¹ The Court expounded on this principle stating, "Congress may, under the authority of [section] 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of [section] 1, perpetuates the effects of past discrimination."⁸² To the Court, Congress's expansive authority under Section 2 was analogous to broad congressional authority under the Necessary and Proper Clause.⁸³

This pattern of deference to Congress's broad enforcement authority to implement section 5 preclearance continued in *Lopez v. Monterey County*.⁸⁴ In *Lopez*, the Court held that Monterey County in California was required to seek section 5 preclearance before implementing any changes to the election process for judges within the county.⁸⁵ This preclearance was required even though the changes were mandated by California state law.⁸⁶ Similar to

77. *Id.* at 531.

78. *Id.* at 531–32. Arguing that multi-member districts, numbered posts, and majority run-offs were all electoral systems used in Georgia prior to the 1964 and 1968 VRA benchmark dates, and that Georgia did not consider the reapportionment a "change" requiring preclearance. *Id.* Taking a broad approach to what constituted a "change," the Court held the reapportionment plan required preclearance because it would apply the systems in different districts and would alter the make-up of those districts. *Id.* The 1970 amendment's legislative history and prior Supreme Court VRA jurisprudence supported such a broad interpretation of what constitutes a change. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (determining that the congressional legislative history is indicative of the intent that any alteration to a covered state's election law constitutes a change for section 5 purposes); see also *Georgia*, 411 U.S. at 531 (noting that Congress in its 1970 amendments did not narrow the broad definition of change described in *Allen*).

79. *Georgia*, 411 U.S. at 531–32, 535 (1973) (holding that "for the reasons stated at length in *South Carolina v. Katzenbach* . . . we reaffirm that the Act is a permissible exercise of congressional power under [Section] 2 of the Fifteenth Amendment").

80. 446 U.S. 156, 176–77 (1980), *superseded by statute*, Voting Rights Act of 1982 § 2(b), as stated in *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 209 (2009).

81. *Id.* at 175.

82. *Id.* at 176.

83. *Id.* at 175.

84. 525 U.S. 266, 283–84 (1999).

85. *Id.* at 269, 282.

86. *Id.* The state of California was not a covered jurisdiction under the VRA; however, Monterey County was a covered jurisdiction. *Id.* at 268–69. Monterey County tried to use this distinction to argue that because the electoral changes were passed by a non-covered jurisdiction

Georgia, the *Lopez* decision dismissed Monterey County's constitutional challenge by referencing the holdings of *Katzenbach* and *City of Rome* without further elaboration.⁸⁷

3. *Challenges to the 2006 Reauthorization Prior to Shelby County v. Holder*

In *Northwest Austin Municipal Utility District Number One v. Mukasey* (*NAMUDNO*), a Texas utility district with an elected board brought an action seeking a declaratory judgment that it was entitled to a bailout or, in the alternative, a constitutional challenge to section 5 after the 2006 Reauthorization.⁸⁸ Because the utility district was in a state covered under the VRA, the utility district was subject to section 5 preclearance, requiring it to receive preclearance on any changes to "standard[s], practice[s], or procedure[s] with respect to voting."⁸⁹ The district court interpreted the VRA to obligate a "political subdivision" to register voters in order to be eligible to independently seek a bailout and, therefore, held that the utility district was ineligible to seek a bailout.⁹⁰

Rejecting the utility district's primary argument, the court next considered the constitutional challenge.⁹¹ After spending a substantial amount of time considering whether to continue to apply the rational means standard or adopt the Fourteenth Amendment congruence and proportionality test,⁹² the court concluded that the rational means standard, as applied in *Katzenbach*, was still appropriate.⁹³ First, the court noted that the congruence and proportionality test was developed in response to concerns that Congress was infringing on the judiciary's role as the interpreter of the Constitution, by going beyond Congress's enforcement authority and defining the substance of constitutional rights.⁹⁴ The court noted that this concern is legitimate when dealing with ambiguous Fourteenth Amendment protections like "equal rights" or "due

(the state), the changes should not require section 5 preclearance when implemented at the county level. *Id.* at 277–79.

87. *Id.* at 283–84 (citing *City of Rome*, 446 U.S. at 175–78; *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966)).

88. 573 F. Supp. 2d 221, 233 (D.D.C. 2008), *rev'd and remanded sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 557 U.S. 193 (2009).

89. 42 U.S.C. 1973c(a); *Nw. Austin Mun.*, 573 F. Supp. 2d at 230–31; *Section 5 Covered Jurisdictions*, *supra* note 56.

90. *Nw. Austin Mun.*, 573 F. Supp. 2d at 230–33 (concluding that section 14(c)(2) of the VRA expressly defines subdivisions as those who "conduct registration for voting" and disagreeing with the utility district's argument that Congress intended a broad definition of "subdivision").

91. *Id.* at 232–33, 235.

92. *Id.* at 236–46.

93. *Id.* at 245–46.

94. *Id.* at 242 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997), *superseded by statute*, 42 U.S.C. § 1973cc-1 (2006)).

process,” but not necessary in the narrow Fifteenth Amendment context of prohibition on racial discrimination in voting rights.⁹⁵ Second, the district court found that the congruence and proportionality cases do not in any way overrule, or even cast doubt on, the *Katzenbach* and *City of Rome* application of rational means in the Fifteenth Amendment context.⁹⁶ Based on the extensive evidence of continuing voting rights discrimination in covered jurisdictions collected by Congress before the passage of the 2006 Reauthorization, the district court upheld the constitutionality of section 5.⁹⁷

The Supreme Court granted certiorari to review the case.⁹⁸ The Supreme Court reversed the district court on legislative interpretation, holding that the utility district qualified as a “political subdivision” and, thus, was eligible to petition for a bailout.⁹⁹ Because the Supreme Court settled the case on statutory grounds, it did not reach the constitutional challenge.¹⁰⁰

II. *SHELBY COUNTY V. HOLDER*: A FACIAL CHALLENGE

Shelby County is subject to section 5 preclearance because it is located within Alabama, a state fully covered under section 4(b).¹⁰¹ Because even

95. *Id.* at 242–43.

96. *Id.* at 243–46.

97. *Id.* at 246–68; *see also supra* note 33 and accompanying text (describing voting rights discrimination prior to the 2006 Reauthorization). Interestingly, the court also analyzed the 2006 Reauthorization under the congruence and proportionality standard and still found the amendments to be constitutional. *Nw. Austin Mun.*, 573 F. Supp. 2d at 268–80.

98. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009). Under the VRA, actions for declaratory judgment are directly appealed from the district court to the Supreme Court, passing by circuit court review. 42 U.S.C. § 1973c(a) (2006).

99. *NAMUDNO*, 557 U.S. at 208–211; *see also* Jon Izak Monger, Note, *Thirsting for Equal Protection: The Legal Implications of Municipal Water Access in Kennedy v. City of Zanesville and the Need for Federal Oversight of Governments Practicing Unlawful Race Discrimination*, 59 CATH. U. L. REV. 587, 601 (2010) (noting that the Court “avoided a complete constitutional analysis of § 5 of the Voting Rights Act, but nevertheless upheld the law’s preclearance provision.”).

100. *NAMUDNO*, 557 U.S. at 197, 204–06. Section II of the opinion consists of dicta discussing the constitutional issue, including the dispute between the parties about the appropriate standard of review. *Id.* at 201–06. Justice Clarence Thomas, however, concurred in part and dissented in part, finding that section 5 was unconstitutional. *Id.* at 216 (Thomas, J., concurring in part and dissenting in part) (basing his opinion on his belief that “[t]he extensive pattern of discrimination that led the Court to previously uphold [section] 5 as enforcing the Fifteenth Amendment no longer exists”).

Section 5 preclearance was challenged again in *Georgia v. Holder*. 748 F. Supp. 2d 16 (D.D.C. 2010). In this case, Georgia brought an action seeking preclearance for a change in the process the state uses to verify voter registrations, and arguing in the alternative that the preclearance requirement was unconstitutional. *Id.* at 17. The case was dismissed as moot, however, when Georgia submitted a revised proposal of changes, and the Attorney General withdrew his objection to the revised changes. *Id.* at 18–19.

101. *See Section 5 Covered Jurisdictions, supra* note 56 (listing Alabama as a covered jurisdiction).

small voting changes require preclearance, Shelby County asserted that it “will have to regularly seek preclearance in the near future[.]” which it contends, “expend[s] significant taxpayer dollars, time, and energy.”¹⁰² Further, due to recent problems with some preclearance submissions by Shelby County and political jurisdictions located within the county, the county also asserted that it did not meet the requirements to receive bailout.¹⁰³ Believing that it had no other avenue to obtain relief, Shelby County filed a lawsuit, facially challenging¹⁰⁴ the constitutionality of sections 4 and 5 of the VRA.¹⁰⁵

A. *Selecting a Standard of Review*

After establishing that Shelby County had standing to pursue a facial challenge to sections 4(b) and 5, the district court focused its inquiry on determining the appropriate standard of review.¹⁰⁶ Shelby County contended that the congruence and proportionality standard was appropriate,¹⁰⁷ while the defendant, the Attorney General, argued for the continued use of the rational means standard.¹⁰⁸

1. *Following Forty-Five Years of Precedent: Rational Means Standard*

In deciding on a standard of review, the court first considered the rational means standard used in previous section 5 cases such as *Katzenbach* and *City of Rome*.¹⁰⁹ Instead of drafting a full analysis of the previous “rationality” cases, the court limited its opinion to a review of the two main points relied upon by the district court in *NAMUDNO* to retain the rationality standard.¹¹⁰ First, the court noted that *NAMUDNO*’s holding, that the rationality standard

102. Complaint for Declaratory and Injunctive Relief at 32–33, *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 1:10-cv-00651-JDB).

103. *Id.* at 34; see also *Shelby Cnty.*, 811 F. Supp. 2d at 443, *aff’d*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 131 S. Ct. 594 (2012). In 2008, the City of Calera, which is located within Shelby County, was denied preclearance for a redistricting plan. Letter from Grace Chung Becker, Acting Assistant Attorney General, to Dan Head (August 25, 2008), available at http://www.justice.gov/crt/about/vot/sec_5/ltr/l_082508.php (objecting to the City of Calera’s 2008 annexation and redistricting submission for preclearance). Nonetheless, the City of Calera proceeded with elections under the plan, resulting in the Department of Justice bringing a section 5 enforcement action against it. See *Shelby Cnty.*, 811 F. Supp. 2d at 443.

104. A facial challenge is a direct attack on the constitutionality of a statute where the “challenger must establish that no set of circumstances exists under which the [statute] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987), *rev’d and remanded*, 505 U.S. 317 (1992).

105. *Shelby Cnty.*, 811 F. Supp. 2d at 447.

106. *Id.* at 445–47.

107. *Id.* at 448; Memorandum of P & A in Support of Plaintiff’s Motion for Summary Judgment, *supra* note 11, at 19.

108. *Shelby Cnty.*, 811 F. Supp. 2d at 447–48; Attorney General’s Consolidated Reply, *supra* note 11, at 6–7.

109. *Shelby Cnty.*, 811 F. Supp. 2d at 448–49.

110. *Id.*

was controlling,¹¹¹ was based, in part, on the fact that neither *City of Boerne*, which established the congruence and proportionality test, nor any cases following *City of Boerne*, have overruled *Katzenbach* or *City of Rome*.¹¹² Second, the court noted that *NAMUDNO* distinguished the congruence and proportionality cases as those involving Fourteenth Amendment enforcement authority, not Fifteenth Amendment enforcement authority.¹¹³

The court rejected both of these propositions, reasoning that the Fourteenth and Fifteenth Amendment's enforcement authority is subject to the same standard of review, and that *City of Boerne*'s congruence and proportionality test illustrates a refinement of the previous rationality standard.¹¹⁴ In order to illustrate its point, the court compared the language of the Fourteenth and Fifteenth Amendments. As the court noted, the Fourteenth Amendment's enforcement authority defined in Section 5 of the Fourteenth Amendment states, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."¹¹⁵ Similarly, the language of the Fifteenth Amendment's Section 2 enforcement authority states, "Congress shall have power to enforce this article by appropriate legislation."¹¹⁶ The court noted that these provisions are "virtually identical," and thus should have the same standard of review.¹¹⁷ The court also cited a number of cases before and after *City of Boerne* that reference similar enforcement authority under the Fourteenth and Fifteenth Amendments.¹¹⁸

111. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241 (D.D.C. 2008), *rev'd and remanded sub nom. Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 209 (2009).

112. *Shelby Cnty.*, 811 F. Supp. 2d at 440 (citing *Nw. Austin Mun.*, 573 F. Supp. 2d at 241).

113. *Nw. Austin Mun. Util.*, 573 F. Supp. 2d at 243 (citing *Eldred v. Ashcroft*, 537 U.S. 186 (2003)).

114. *Shelby Cnty.*, 811 F. Supp. 2d at 459.

115. U.S. CONST. amend. XIV, § 5.

116. U.S. CONST. amend. XV, § 2.

117. *Shelby Cnty.*, 811 F. Supp. 2d at 450 (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001)).

118. *Id.* Although the court cites a number of cases for its proposition, it is notable that the court only cites one case published after *City of Boerne* that is not a dissenting opinion. *Id.* (noting that "section 2 of the Fifteenth Amendment is practically identical to section 5 of the Fourteenth Amendment") (citing *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 742 n.1 (2003)); see *Garrett*, 531 U.S. at 378 n.8; *Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) (explaining that "[a]lthough *City of Boerne* involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement power conferred by the Fourteenth and Fifteenth Amendments as coextensive"); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (comparing Congress's Fourteenth Amendment enforcement authority to its "parallel power to enforce the provisions of the Fifteenth Amendment"); *City of Rome v. United States*, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting) (stating that "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive"); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (explaining that "section 2 of the Fifteenth Amendment grants Congress a similar power to that of

2. *The Court Replaces the Congress: Congruence and Proportionality Standard*

The court defined the congruence and proportionality standard as having three steps.¹¹⁹ First, a court must “identify the constitutional right or rights that Congress sought to enforce.”¹²⁰ Next, a court “examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States that justified the enactment of the remedial measure.”¹²¹ In the final step, the court reviews to see if the challenged legislation is “congruent and proportional to the targeted violation.”¹²²

Building off of its conclusion that the enforcement authorities of the Fourteenth and Fifteenth Amendments are coextensive,¹²³ the court categorized the congruence and proportionality standard as “a mere elaboration of [the] ‘broad terms’” of the original rationality standard.¹²⁴ Under the view that congruence and proportionality is merely an evolution of the rationality standard, the court was left with only one standard of review to apply—the congruence and proportionality standard.¹²⁵

B. *Upholding the Constitutionality of the 2006 Reauthorization Under Congruence and Proportionality*

Settling on the congruence and proportionality standard, the district court conducted a three-step review of the voluminous legislative history of the 2006 Reauthorization to determine if Congress acted within its constitutional authority.¹²⁶

the section 5 of the Fourteenth Amendment” as both sections permit Congress to “enforce by ‘appropriate legislation’ the provisions of that amendment”).

119. *Shelby Cty.*, 811 F. Supp. 2d at 457.

120. *Id.* (citing *Tennessee v. Lane*, 541 U.S. 509, 522 (2004)).

121. *Id.* (quoting *Garrett*, 531 U.S. at 368) (internal quotation marks omitted).

122. *Id.* (quoting *Garrett*, 531 U.S. at 374) (internal quotation marks omitted); *see also Hibbs*, 538 U.S. at 737.

123. *Shelby Cty.*, 811 F. Supp. 2d at 457.

124. *Id.* at 459 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997)). The court noted that the *Katzenbach* and *City of Rome* opinions engaged in “*Boerne*-like analysis” when they compared the prophylactic remedies of section 5 to the history of voting discrimination it was intended to address. *Id.* at 459–60. The court dismissed the more deferential treatment of Congress’s findings in cases like *Katzenbach* and *City of Rome* as “a reflection of the fact that where a remedial statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, it is ‘easier for Congress to show a pattern of state constitutional violations,’ as required at the second step of *Boerne*.” *Id.* at 460 (citing *Hibbs*, 538 U.S. at 736; *Lane*, 541 U.S. at 529).

125. *Id.* at 461–62. *But see* Evan H. Caminker, “*Appropriate*” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1186–91 (2001) (arguing for a return to the rational means standard of review for both Fourteenth and Fifteenth Amendment enforcement authority).

126. *Shelby Cty.*, 811 F. Supp. 2d at 435, 464 (noting that the expansive record is over 15,000 pages total).

1. Step One: Identifying the Constitutional Rights

Applying the first step of the congruence and proportionality standard—identifying the constitutional rights at issue—the court found that section 5 was designed to protect the fundamental right to vote and prevent racial discrimination, a suspect classification.¹²⁷ Both suspect classes and fundamental rights receive heightened scrutiny.¹²⁸

2. Step Two: History and Pattern of Abuse

In step two of the analysis, the court evaluated the history and pattern of abuse. The court distinguished the evidence of voting discrimination in the 2006 Reauthorization legislative record in two overlapping ways.¹²⁹ First, the court separated the evidence into incidents of intentional discrimination, which show a discriminatory purpose,¹³⁰ and circumstantial evidence, which primarily illustrates discriminatory effect.¹³¹ Second, the court evaluated the specific types of evidence, including evidence relied upon in *City of Rome* to uphold the 1975 extension and evidence reviewed by Congress in the 2006 Reauthorization legislative history.¹³²

127. *Shelby Cnty.*, 811 F. Supp. 2d at 462 (“Significantly, Section 5 not only seeks to protect the right to vote—a ‘fundamental political right, because [it is] preservative of all rights’—but also seeks to protect against discrimination based on race, ‘the classification of which has been the most suspect.’” (internal citations omitted)).

128. *See id.* (noting that “it is ‘easier for Congress’” to justify statutes designed to protect fundamental rights or prevent race discrimination); *see also* CHEMERINSKY, *supra* note 18, at 694–96, 871–72 (discussing race classifications as a suspect class and voting rights as a fundamental right that both receive strict scrutiny). It is easier for Congress to establish a pattern of violations when “racial classifications and restrictions on the right to vote” are involved, because restrictions on fundamental rights or targeting suspect classes are “‘presumptively invalid.’” *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 270 (D.D.C. 2008), *rev’d and remanded sub nom.* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009) (quoting *Hibbs*, 538 U.S. at 736).

129. *Shelby Cnty.*, 811 F. Supp. 2d at 465–66.

130. *Id.* at 463. Although direct evidence of discrimination may show both a discriminatory purpose and effect, it is mainly relied upon for demonstrating continued purposeful discrimination in voting rights. *Id.*

131. *Id.* at 464–65. Over Shelby County’s objections, the court found both direct and circumstantial evidence of racial voting discrimination to be relevant in justifying the 2006 Reauthorization. *Id.* at 463–64. A discriminatory purpose is a necessary element of a Fourteenth or Fifteenth Amendment violation. *See* *Washington v. Davis*, 426 U.S. 229, 240–41 (1976). In support of its decision to use circumstantial evidence, the court cited a number of cases providing the corollary that discriminatory purpose can be inferred from a discriminatory effect and the surrounding facts. *Shelby Cnty.*, 811 F. Supp. 2d at 463 (citing *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Davis*, 426 U.S. at 242).

132. *Shelby Cnty.*, 811 F. Supp. 2d at 465–66.

a. *Evidence Used in City of Rome*

In *City of Rome*, the Court used three types of evidence to uphold the constitutionality of section 5: (1) percentage differences in race for voter registration and turn-out; (2) number of minorities elected to office; and (3) nature and quantity of section 5 objections.¹³³ Upon review, the court in *Shelby County* found the first two types of evidence, minority registration and turn-out and the number of minority elected officials, showed some signs of improvement.¹³⁴ However, the court held that these improvements were not enough to overcome the continuing drastic disparities in a number of the covered jurisdictions.¹³⁵ Evaluating the last type of evidence, the quantity of section 5 objections, the court found that even though there had been an overall decline in number of objections, such evidence was still relevant because objections due to intentional discrimination still existed.¹³⁶ Combined, all of these factors necessitated the court to weigh the three *City of Rome* types of evidence in favor of upholding constitutionality.¹³⁷

b. *Other Forms of Evidence in the 2006 Reauthorization Record*

In establishing the history and pattern of abuse, the *Shelby County* court evaluated seven other types of evidence considered by Congress during the 2006 Reauthorization.¹³⁸ These included, “more information requests; Section 5 preclearance suits; [s]ection 5 enforcement actions; [s]ection 2 litigation; the dispatch of federal observers; racially polarized voting; and [s]ection 5’s deterrent effect.”¹³⁹ The legislative history pertaining to these seven types of evidence was vast and contained thousands of instances of direct and circumstantial evidence exemplifying both discriminatory purpose and effect.¹⁴⁰

3. *Third Step: Is the Legislation Congruent and Proportional?*

Evaluating all the evidence, the court found that the history and pattern of abuse considered by Congress in reauthorizing the targeted provisions of the VRA in 2006 was even greater than the record relied upon by the Court in *City of Rome*.¹⁴¹ Thus, the court concluded that the 2006 Reauthorization was

133. *Id.* at 465.

134. *Id.* at 466–69; *see also* H.R. REP. No. 109-478, at 12–13 (2006).

135. *Shelby Cnty.*, 811 F. Supp. 2d at 467–68; *see infra* note 160; *see also* S. REP. No. 109-295, at 11–12 (2006).

136. *Shelby Cnty.*, 811 F. Supp. 2d at 470–73.

137. *Id.* at 465, 502–03.

138. *Id.* at 464–65.

139. *Id.* at 446.

140. *Id.* at 495–96; *cf.*, H.R. REP. No. 109-478 (2006); S. REP. NO. 109-295 (2006).

141. *Shelby Cnty.*, 811 F. Supp. 2d at 498–99, 502–03.

constitutional, even against the higher bar set by the congruence and proportionality standard.¹⁴²

C. Appellate Review

The *Shelby County* case received expedited review and was heard by the U.S. Court of Appeals for the District of Columbia Circuit on January 19, 2012.¹⁴³ The circuit court affirmed the district court's holding that the VRA was constitutional.¹⁴⁴ The circuit court reasoned that "if section 5 survives the arguably more rigorous congruent and proportionality standard, it would also survive . . . rationality review."¹⁴⁵ This terse consideration of the appropriate standard of review makes the circuit court case unhelpful for an analysis of the appropriate standard of review.¹⁴⁶

III. *SHELBY COUNTY V. HOLDER*: RIGHT CONCLUSION, WRONG STANDARD

A review of the Court's holding in *Lopez v. Monterey County* and the underlying reasons behind the development of the congruence and proportionality standard indicate that the district court in *Shelby County* mistakenly altered course by applying the congruence and proportionality standard to Fifteenth Amendment enforcement authority review.¹⁴⁷ Further, even though the *Shelby County* court appropriately held that the 2006 Reauthorization was constitutional,¹⁴⁸ the court's application of the stringent congruence and proportionality standard will, over time, weaken and eventually undermine the enforcement authority of the Fifteenth Amendment.¹⁴⁹

A. *Lopez v. Monterey County: Continuing Use of the Rational Means Standard for the Fifteenth Amendment After the Development of the Congruence and Proportionality Standard*

In *Lopez v. Monterey County*, decided two years after *City of Boerne*, the Court cited to *Katzenbach* and *City of Rome* to support the contention that

142. *Id.* at 492.

143. *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 131 S. Ct. 594 (2012).

144. *Id.* at 852–83.

145. *Id.* at 859.

146. *See supra* note 145.

147. *See infra* Part III.A.

148. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 443 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 131 S. Ct. 564 (2012).

149. *See* Mark Posner, *Federal Judge Upholds the Constitutionality of a Core Provision of the Voting Rights Act*, ACS BLOG (Sept. 28, 2011), <http://www.acslaw.org/acsblog/federal-judge-upholds-the-constitutionality-of-a-core-provision-of-the-voting-rights-act> (noting that the congruence and proportionality standard promoted by *Shelby County* "would effectively preclude Congress from renewing effective antidiscrimination laws").

Congress can override the powers reserved to the states when enforcing the guarantees of the Fifteenth Amendment.¹⁵⁰ The *Lopez* decision further noted that *Katzenbach* and *City of Rome* had already addressed the issue of the constitutionality of section 5.¹⁵¹ Although *Lopez* does not explicitly address standard of review, the way in which the court cites to these seminal cases is instructive, shedding light on the fact that the *Lopez* court implicitly upheld the *Katzenbach* and *City of Rome* standard of review.¹⁵² Additionally instructive is that, despite the the *Lopez* court's cognizance of *City of Boerne*'s new narrowing congruence and proportionality test, it only cited to *City of Boerne* for the broad proposition that Congress's enforcement actions may also prohibit some constitutional conduct in their effort to reach unconstitutional conduct.¹⁵³ None of these cases cite *City of Boerne* for its standard of review.

The district court in *Shelby County* rejected *Lopez*, stating that it did not explicitly articulate a standard of review.¹⁵⁴ The court also noted that, "to the extent that *Lopez* cuts in either direction," the *Lopez* citations to *Katzenbach* and *City of Rome* indicate that the *Lopez* court agreed that the congruence and proportionality standard is simply an evolution, or elaboration, of rational means.¹⁵⁵ However, this is not an accurate reading of the case law; that the *Lopez* decision cited to *Katzenbach* and *City of Rome* for their analysis of the constitutionality of section 5 indicates that the court agreed with the standard of review used by these cases. If the *Lopez* court intended to adopt the congruence and proportionality standard—whether an evolution or not—it would have mentioned the difference from the *Katzenbach* and *City of Rome* standard of review or, at a minimum, used the terms "congruence and proportional" at least once in the decision.¹⁵⁶ It is more likely that the *Lopez* court did not feel the need to elaborate on the standard of review because they were continuing to apply the well-established rational means standard.¹⁵⁷ Given that *Lopez* was decided after *City of Boerne*, and the *Lopez* opinion—with no fanfare—cited to *Katzenbach* and *City of Rome* to uphold the

150. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283 (1999).

151. *Id.* at 282–83.

152. See Attorney General's Consolidated Reply, *supra* note 11, at 2, 5–6.

153. *Lopez*, 525 U.S. at 282–83 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997))).

154. *Shelby Cnty.*, 811 F. Supp. 2d at 460–61 (noting that "[n]owhere in *Lopez* did the Supreme Court mention either 'congruence and proportionality' or 'rational basis' review, or purport to apply either standard to Section 5").

155. *Id.* (concluding that the *Lopez* court considered *Katzenbach*, *City of Rome*, and *City of Boerne* to be consistent with one another).

156. *Id.* at 460 (noting that "congruence and porportionality" are not even mentioned once in the *Lopez* decision).

157. See Attorney General's Reply Memorandum, *supra* note 11, at 5–6.

constitutionality of section 5,¹⁵⁸ it is apparent that the Supreme Court did not alter the standard of review for Fifteenth Amendment enforcement cases from rational means.¹⁵⁹

B. Congruence and Proportionality Not Intended to Apply to Civil War Amendments' Core Function: Preventing Racial Discrimination

Further, the district court's analysis in *NAMUDNO* of the two standards of review provides additional support for the continual application of the rational means standard.¹⁶⁰ In *NAMUDNO*, the district court distinguished between the motivation for the development of the congruence and proportionality standard and the static concerns of Fifteenth Amendment enforcement.¹⁶¹ The catalyst for the development of the congruence and proportionality standard was the significant apprehension that, under ambiguous Fourteenth Amendment clauses, words like "equal protection" and "due process" are open to interpretation of the rights they guarantee.¹⁶² Thus, there is a valid concern that Congress will attempt to define the substance of the rights protected, above and beyond simply enforcing those rights.¹⁶³ Here, on the other hand, as the *NAMUDNO* court noted, "[n]o such risk exists . . . because the Voting Rights Act focuses exclusively on racial discrimination—the precise evil addressed by the Civil War Amendments—in the narrow context of voting, as the Fifteenth Amendment expressly authorizes."¹⁶⁴ By focusing mechanically

158. *Lopez*, 525 U.S. at 283 (citing *City of Rome v. United States*, 446 U.S. 156, 178–83 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966)).

159. Even if the court's theory that *Lopez* implicitly accepted the *City of Boerne* standard of review as an elaboration of the rational means standard is given merit, the Court would have, at minimum, addressed the transition to the new standard of review.

160. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241–46 (D.D.C. 2008), *rev'd and remanded sub nom. Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 557 U.S. 193 (2009).

161. *Id.* at 239, 242–43.

162. *Id.* at 242.

163. *Id.* ("In *City of Boerne*, itself, the Court worried that Congress, by relying on its authority to enforce the Fourteenth Amendment's broad guarantees, could 'decree the substance' of that amendment's restrictions on the states, thereby transforming the Constitution from a 'superior paramount law' into something 'on a level with ordinary legislative acts.'").

164. *Id.* at 243. The district court in *NAMUDNO* held that,

[w]ith its greater degree of deference to Congress, [rational means] test is proper here because, put simply, this case implicates Congress' express constitutional authority to remedy racial discrimination in voting. None of the *City of Boerne* cases involved two such essential rights, much less any rights so close to the core objectives of the Civil War Amendments. We thus have no basis for reading those cases as overturning the Court's longstanding rule, set forth in *Katzenbach* and followed in *Morgan*, *Mitchell*, *Georgia*, and *City of Rome*, that "against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."

Id. at 245–56 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)); *see also Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) ("Above all else, the framers of the Civil War Amendments

on the similar language of the Fourteenth and Fifteenth Amendment's enforcement provisions, the *Shelby County* district court neglected to consider the reason behind the development of the congruence and proportionality standard.

C. The Congruence and Proportionality Standard Increases Congress's Burden to Collect Evidence of Discrimination

Under either the rational means or the congruence and proportionality standard, it is clear that the 2006 Reauthorization is constitutional.¹⁶⁵ However, this conclusion is easy to reach since, before the 2006 Reauthorization, Congress amassed a substantial record of continuing discrimination in voting rights in covered jurisdictions.¹⁶⁶ In addition to quantifiable evidence, Congress also heard testimony that indicated positive deterrent effects in covered jurisdictions as a result of the targeted sections.¹⁶⁷

intended to deny to the States the power to discriminate against persons on account of their race.”)

165. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 507–08 (D.D.C. 2011), *aff'd*, 679 F. 3d 848 (D.C. Cir. 2012), *cert. granted in part*, 131 S. Ct. 594 (2012); *Nw. Austin Mun.*, 573 F. Supp. 2d at 278.

166. See *supra* note 33. Congress also had evidence that since the 1982 amendments, the Attorney General had interposed preclearance objections to over 700 discriminatory voting changes. *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 17 (2006) (testimony of the Hon. Bill Lann Lee, Chair, National Commission on the Voting Rights Act). Additionally, 1,100 changes have been denied judicial preclearance. *Id.* The Attorney General responded to preclearance requests over 205 times with more information requests that resulted in the preclearance submission being withdrawn. H. R. REP. NO. 109-478, at 41 (2006). Further, a study showed that between 1990 and 2005, requests for more information “affected more than 800 additional voting changes that were submitted for preclearance, compelling covered jurisdictions to either alter the proposal or withdraw it from consideration altogether.” *Id.* at 40–41. Since 1982, more than one hundred injunctive actions have been brought by the Attorney General or private citizens to compel covered jurisdictions to submit changes for preclearance. *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 17 (2006) (testimony of the Hon. Bill Lann Lee, Chair, National Commission on the Voting Rights Act). Another study of the eight fully covered southern states and North Carolina identified 653 reported and unreported court cases of section 2 litigation with outcomes favorable to minorities. *Id.* at 14. Regarding registration and turn-out rates, congressional reports showed that there was an eleven-point gap between white and black registration and a fourteen-point gap in turn-out in Virginia, while Texas had a twenty-point registration gap between whites and Hispanics, and Florida had a thirty-one point registration gap between whites and Hispanics. *Nw. Austin Mun. Util.*, 573 F. Supp. 2d at 248 (citing H. R. REP. No. 109-478, at 35 (2006)). The gap is even more distinct than the reports indicate because the numbers used in the reports incorrectly compared black registration rates against white registration rates instead of “white non-Hispanic”. *Id.* In fact, when this error is corrected, there is only one fully covered state that has black registration rates higher than white registration rates. *Id.* (citing *Current Population Survey Table 4a (2004)*, U.S. Census Bureau, available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>).

167. *Nw. Austin Mun.*, 573 F. Supp. 2d at 262. The court commented on the number of incidents of congressional testimony that recounted the “unseen” cases of section 5’s deterrent

However, compiling such a massive record is extraordinarily expensive. The congruence and proportionality standard will shift the burden away from the perpetrators of discrimination and instead place a heavy burden on the legislative and executive branches by requiring Congress to routinely collect expansive and detailed records of voting discrimination, as well as requiring the Department of Justice to rigorously defend that the record establishes “current burdens justified by current needs.”¹⁶⁸ This shift in burden will defeat one of Congress’s primary purposes in enacting the targeted provisions—shifting the burden to the perpetrators of racial discrimination.¹⁶⁹

IV. CONCLUSION

The evidence shows that the prophylactic remedies of the targeted provisions of the VRA are still necessary to ensure the effective enfranchisement of millions of citizens.¹⁷⁰ Further, the district court in *Shelby County* did not establish a sound justification for the abandonment of nearly a half-century of rationality deference to Congress’s enforcement authority under Section 2 of the Fifteenth Amendment.¹⁷¹ The need to confine Congress to an enforcement role, instead of an interpretive role, which motivated the development of the stringent congruence and proportionality review in *City of Boerne*, is not present in the narrow context of the Fifteenth Amendment, which simply protects a suspect class’s fundamental right to vote.¹⁷² Further, a shift from rational basis review to congruence and proportionality will undermine Congress’s primary purpose in enacting the prophylactic provisions, and thus shift the burden of proving discrimination from individuals and the federal government to the perpetrators to disprove discriminatory intent or effect.¹⁷³ As such, the district court in *Shelby County* should have continued to apply the rational means standard employed by the

effect by preventing covered jurisdictions from even attempting to enact changes they thought were unlikely to receive preclearance. *Id.* at 264–65, *see also* H. R. REP. NO. 109-478, at 21–24 (2006). The evidence of continuing voting rights discrimination and disparities in registration, turn-out numbers, and minority elected officials is the same type of evidence previously relied on by the Court in *City of Rome* to uphold the 1975 Amendments and sustain the constitutionality of section 5 in the 2006 Reauthorization under the same rational means standard. *See City of Rome v. United States*, 446 U.S. 156, 173–83 (1980).

168. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009); *see also* Kimberly E. Dean, Note, *In Light of the Evil Presented: What Kind of Prophylactic Anti-Discrimination Legislation Can Congress Enact After Garrett?*, 43 B.C. L. REV. 697, 716 (2002) (discussing Justice Breyer’s dissent in *Board of Trustees of University of Alabama v. Garrett*, in which he took issue with the congruence and proportionality standard because it not only subjected Congress to a judicial level of evidentiary standards, but also undermined the fact that under rational means review constitutionality is inherently presumed).

169. *See South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

170. *See supra* notes 3, 34, and 163.

171. *See supra* Part III.A.

172. *See supra* Part III.B.

173. *See supra* Part III.C.

Supreme Court in *Katzenbach* in the context of the Fifteenth Amendment since the passage of the VRA in 1965. Although *NAMUNDO* was correct that review of the reauthorization of the VRA must not be based on a stagnant history of discrimination, once Congress performs its delegated function to collect and evaluate the current evidence of continued racial discrimination in access to voting rights, the court should afford those conclusions the appropriate level of deference they deserve.