

THE VOTING RIGHTS ACT'S FIGHT TO STAY RATIONAL: *SHELBY COUNTY V. HOLDER*

SUDEEP PAUL*

I. INTRODUCTION

In the early 1950s and 1960s, Congress attempted to battle voter discrimination through case-by-case litigation with the help of civil rights legislation from 1957, 1960, and 1964.¹ For example, “Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify [black citizens] from voting in federal elections.”² These attempts failed to create long-term change; barring certain types of discriminatory voting practices simply led to a modification of methods³—Southern voting officials would do everything from ignore court orders to freeze voting rolls by closing registration offices.⁴ To combat these invidious tactics and “to banish the blight of racial discrimination in voting,”⁵ Congress passed the Voting Rights Act of 1965.⁶

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1. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

2. *Id.* at 314. The Civil Rights Act of 1957 granted the Attorney General authority to seek injunctions against any interference with the right to vote based on race. The Civil Rights Act of 1960 allowed the Attorney General to access “local voting records, and authorized courts to register voters in areas with systemic discrimination.” *Id.*

3. H.R. REP. NO. 89-439, at 2441 (1965). *See Katzenbach*, 383 U.S. at 314 (noting that following the enactment of civil rights legislation, voting officials switched to “discriminatory devices not covered by the federal decrees”).

4. *Katzenbach*, 383 U.S. at 314. For example, the Fifth Circuit Court of Appeals ordered Forrest County, Mississippi to give black voting applicants the same assistance its registrars had given to white applicants, and to register black applicants who had errors on their applications that were not serious enough to disqualify white applicants. The Mississippi Legislature responded by “requiring applicants to complete their registration forms without assistance or error.” *United States v. Mississippi*, 229 F. Supp. 925, 996–97 (S.D. Miss. 1964).

5. *Id.* at 308.

6. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

The Fifteenth Amendment states that the right to vote cannot be denied on the basis of “race, color, or previous condition of servitude.”⁷ The Voting Rights Act was created to uphold the Fifteenth Amendment, by strengthening existing remedies to combat voter discrimination and by creating “stringent new remedies for voting discrimination.”⁸ Section 2 of the Act is a nationwide provision that prohibits voter discrimination⁹ and allows individuals to bring suit against any jurisdiction, including any State, “to challenge voting practices that have a discriminatory purpose or result.”¹⁰ Section 5 of the Act permits the Attorney General to review and approve any voting legislation proposed by specific jurisdictions; certain jurisdictions are identified by Section 4(b)’s coverage formula as being particularly likely to discriminate.¹¹

In *Shelby County v. Holder*,¹² the Supreme Court will be called on to decide whether Congress’s 2006 reauthorization of Section 5 and Section 4(b)’s coverage formula in the Voting Rights Act is a permissible use of Congress’s Fourteenth and Fifteenth Amendment powers. Additionally, the Court may decide the appropriate standard of review under which to consider the constitutionality of legislation passed under Congress’s Section 2 power of the Fifteenth Amendment. *Shelby County* contends that Section 5 of the Act oversteps the boundaries of federalism and is no longer needed.¹³ In light of the long-standing history and importance of the Act, the Court’s precedents, and the continued existence of voting discrimination in this country, the Court is unlikely to find Section 5 of the Act unconstitutional.¹⁴ The Court may, however, find Section 4(b)’s coverage formula unconstitutional on the grounds that the formula’s data is outdated and it does not properly represent today’s political conditions.

7. U.S. CONST. amend XV, § 1.

8. *Katzenbach*, 383 U.S. at 308.

9. 42 U.S.C.A. § 1973 (West 2013).

10. *Shelby Cnty. v. Holder*, 679 F.3d 848, 854 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2012) (No. 12-96).

11. 42 U.S.C.A. § 1973c.

12. *Shelby Cnty. v. Holder*, No. 12-96 (U.S. argued Feb. 23, 2013).

13. Brief for Petitioner at 18, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. Dec. 26, 2012) [hereinafter Brief for Petitioner].

14. See *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) (“Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

II. FACTUAL & PROCEDURAL BACKGROUND

Congress enacted the Voting Rights Act of 1965 as a far-reaching statute to combat voter discrimination both at a national level and at a jurisdiction-specific level. Congress passed the Act under Section 2 of the Fifteenth Amendment, which gives Congress the authority to enforce the Fifteenth Amendment through “appropriate legislation.”¹⁵ In addition, under Section 5 of the Fourteenth Amendment, Congress has authority to pass “appropriate legislation”¹⁶ to uphold the Equal Protection Clause of the Fourteenth Amendment.¹⁷

The Voting Rights Act contains permanent provisions and temporary provisions. The central permanent provision of the Act, Section 2, forbids any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”¹⁸ The temporary provisions, which include the “preclearance requirement of Section 5” and the coverage formula in Section 4(b), may be renewed periodically by Congress.¹⁹ The two provisions of the Act being challenged by Shelby County are Section 4(b) and Section 5.

Congress uses the coverage formula of Section 4(b) to determine which jurisdictions are abridging the voting rights of their citizens within the meaning of the Act and are thus subject to Section 5’s preclearance requirements.²⁰ The coverage formula covers jurisdictions that (1) used any voting test or device during 1964, 1968, or 1972, and (2) had less than 50% of its citizens either registered to vote or vote in the 1964, 1968, or 1972 presidential elections.²¹ The Act

15. See U.S. CONST. amend XV, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

16. *Id.* at amend XIV, § 5 (giving Congress authority to enact appropriate legislation to enforce the Fourteenth Amendment).

17. See *id.*, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

18. 42 U.S.C.A. § 1973 (West 2013). The abridgement of voting rights includes the use of intimidation and providing false information in registering or voting. *Id.* § 1973i(b)–(c).

19. See U.S. Department of Justice Civil Rights Division Voting Section—Frequently Asked Questions, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/vot/misc/faq.php> (last visited May 7, 2013) (“In 2006, Congress passed the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights and Reauthorization and Amendments Act of 2006 which renews nearly all of the temporary provisions of the Voting Rights Act.”).

20. 42 U.S.C.A. § 1973b(b). States can be covered jurisdictions within the meaning of the Act. See *Shelby Cnty. v. Holder*, 679 F.3d 848, 855 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2012) (No. 12-96) (describing the State of Alabama as a jurisdiction originally covered in its entirety).

21. *Id.*

defines a voting test or device to be:

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.²²

A jurisdiction identified by Section 4(b) must, under Section 5, submit for approval all proposed voting changes to either the Attorney General or the United States District Court for the District of Columbia.²³ The Attorney General and the D.C. District Court will grant preclearance if the proposed voting change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”²⁴ A voting change is considered to abridge the right to vote if it will have the effect of diminishing a citizen’s ability to elect his or her candidate of choice on account of race, color or speaking language.²⁵ If the Attorney General or the D.C. District Court does not pre-clear the proposed change then the jurisdiction is prohibited from enacting the law or procedure.²⁶

A jurisdiction not identified by Section 4(b) can subsequently be brought under Section 5’s requirements by being “bailed-in”; a court may “bail-in” a jurisdiction if it is found to be denying the voting guarantees of the Fourteenth or Fifteenth Amendments.²⁷ As a countermeasure, the Act also allows jurisdictions to apply to be “bailed-out” of Section 5’s preclearance requirements and regain complete autonomy in passing voting legislation.²⁸

22. *Id.* § 1973b(c).

23. *Id.* § 1973c.

24. *Id.* § 1973c(a).

25. *Id.* § 1973c(b).

26. *Id.* § 1973c(a).

27. *Id.* § 1973a(c).

28. *Id.* § 1973b(a)(1). To qualify for bailout, the covered jurisdiction must show that the jurisdiction, as well as any of its sub-jurisdictions, has not in the preceding ten years: (1) used a test or device to determine voter eligibility; (2) received a judgment by any court holding that the jurisdiction has denied or abridged the right to vote on account of race or color; (3) had federal observers assigned to the jurisdiction; (4) been found to have passed a voting change without preclearance approval; or (5) had the Attorney General object to a proposed voting change under Section 5. Additionally, the jurisdiction has to ensure that it has eliminated voting procedures that “inhibit or dilute equal access to the electoral process,” and that it has “engaged in constructive efforts to eliminate intimidation and harassment” of voters. The jurisdiction must also have “engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of

Petitioner Shelby County, Alabama (Shelby County or the County) is a political subdivision of Alabama that has been subject to preclearance requirements since 1965.²⁹ The County became a covered subdivision when Respondent United States Attorney General determined that Alabama should be a covered state pursuant to Section 4(b) because it had used a prohibited test or device and had a voter turnout of less than 50% for the 1964 presidential election.³⁰ Since 1965, Shelby County and the jurisdictions within Shelby County have submitted at least 682 voting changes to the Attorney General for preclearance; the Attorney General objected to five of the proposed changes, including a proposed redistricting plan by a city located in Shelby County, which was submitted in 2008.³¹ The County has never applied for bailout, though it is likely ineligible as it has violated the Act by holding several special elections without seeking preclearance, and the Attorney General has objected to at least one proposed voting change within the last ten years.³²

Shelby County sought a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional, and sought a permanent injunction barring the Attorney General from enforcing these sections.³³ The District Court assessed Shelby County's claims by examining two categories of evidence: first, by examining the types of evidence the Supreme Court has looked to in previous cases involving the Act,³⁴ and second, by examining the types of evidence Congress cited to when it reauthorized the Act in 2006.³⁵

minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process." *Id.* § 1973b(a)(1)(A)–(F).

29. *Shelby Cnty. v. Holder*, 811 F.Supp.2d 424, 442 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2013) (No. 12–96) (citing Determination of the Attorney Gen. Pursuant to Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965)).

30. Determination of the Attorney Gen. Pursuant to Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

31. *Shelby Cnty.*, 822 F.Supp.2d at 442.

32. *Shelby Cnty. v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012), *cert. granted*, 133 S.Ct. 594 (U.S. Nov. 9, 2012) (No. 12–96). *See supra* note 28 and accompanying text.

33. *Shelby Cnty.*, 811 F.Supp.2d at 427.

34. *Id.* at 465 (assessing “evidence of (1) racial disparities in voter registration (and turnout); (2) the number of minority elected officials; and (3) the nature and number of Section 5 objections”). A Section 5 objection refers to the Attorney General or a District Court rejecting a proposed voting change from a jurisdiction covered by Section 4(b)'s coverage formula.

35. *Id.* at 465–66 (examining “evidence of [(1)] more information requests; [(2)] Section 5 preclearance suits; [(3)] Section 5 enforcement actions; [(4)] Section 2 litigation; [(5)] the dispatch of federal observers; [(6)] racially polarized voting; and [(7)] Section 5's deterrent effect”).

Looking to the legislative record, the District Court found that there was still a significant disparity between white voter registration and minority voter registration,³⁶ that the “percentage of minority elected officials . . . lag[ged] behind the minority percentage of the population” in 2006,³⁷ and that there was still evidence of vote dilution and racially polarized voting.³⁸ The court found that the existence of Section 5 objections³⁹ in the legislative record demonstrated the power of preclearance in deterring jurisdictions from trying to pass discriminatory voter legislation.⁴⁰ Further, the prevalence of Section 5 objections suggested that Congress had “good reason to conclude in 2006 that Section 5 was still fulfilling its intended function” of denying the passage of discriminatory voting laws.⁴¹

The District Court denied the County’s motion for summary judgment and granted the Attorney General’s motion for summary judgment.⁴² Shelby County appealed the grant of summary judgment to the D.C. Circuit Court.⁴³

III. LEGAL BACKGROUND

Since passing the Voting Rights Act in 1965, Section 5 has been reauthorized four times, most recently in 2006.⁴⁴ Numerous challenges have been made to the reauthorizations and the Act itself, though the Court has consistently held that the Act, as passed, is constitutional.⁴⁵

36. *Id.* at 468.

37. *Id.* at 469.

38. *Id.* at 490. Additionally, the District Court found that “between 1982 and 2003, at least 205 proposed voting changes were withdrawn by covered jurisdictions” after the Attorney General requested more information on the proposal. *Id.* at 476. Congress had found that these withdrawals were a strong indication of efforts to discriminate against voters. *Id.* at 477. Furthermore, the court used evidence of the Attorney General sending tens of thousands of federal observers to covered jurisdictions over the last twenty-five years to ensure fair elections as an indication of the continued need for federal oversight of local elections. *Id.* at 485.

39. *See* 42 U.S.C.A. § 1973c (West 2013).

40. *Shelby Cnty.*, 811 F.Supp.2d at 492. The District Court highlighted that in lawsuits brought under Section 2, jurisdictions were still being found to have been intentionally discriminating against minority voters. *Id.* at 481.

41. *Id.* at 476. Furthermore, the legislative record revealed forty-two unsuccessful declaratory judgment actions where a jurisdiction sought preclearance. *Id.* at 477.

42. *Id.* at 508.

43. *Shelby Cnty. v. Holder*, 679 F.3d 848, 858 (D.C. Cir. 2012), *cert. granted*, 133 S.Ct. 594 (U.S. Nov. 9, 2012) (No. 12-96).

44. *Id.* at 855. Congress reauthorized the temporary provisions of the Act, including Section 4(b) and Section 5, in 1970 for five years, in 1975 for seven years, in 1982 for twenty-five years, and finally in 2006 for another twenty-five years. *Id.*

45. *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 287 (1999) (adjudicating a challenge to the 1982 reauthorization); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (adjudicating a

The Court's holdings have relied on both the need to give judicial deference to Congress's legislative decisions and the evidence of voter discrimination Congress presented prior to each reauthorization vote. More recently, however, the Court has signaled, in dicta, that it would defer less and that it may use a higher standard of review to analyze Congress's decisions in the area of voting discrimination.⁴⁶

A. *The Court's Initial Willingness to Defer to Congress*

Within the realm of racial discrimination and voting, the Court has viewed congressional legislation deferentially. The basis for this deference is rooted in Section 2 of the Fifteenth Amendment, which authorizes Congress to pass any "appropriate legislation" to enforce a citizen's right to vote.⁴⁷ After the Act was passed in 1965, its constitutionality was challenged almost immediately in 1966, in *South Carolina v. Katzenbach*.⁴⁸ There, the Court held the Act's provisions to be "valid means for carrying out the commands of the Fifteenth Amendment."⁴⁹ Even though the Court claimed that Section 5 preclearance was an "uncommon exercise of congressional power,"⁵⁰ the Court found Section 5 to be within Congress's mandate "to effectuate the constitutional prohibition against racial discrimination in voting" under Section 2 of the Fifteenth Amendment.⁵¹

Similarly, the Court approved Section 4(b)'s coverage formula even though Congress had reverse-engineered the formula—it had identified specific jurisdictions and then created a formula to capture those areas.⁵² The Court openly acknowledged that the formula did not cover every locality that had voting discrimination, yet it held that "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical

challenge to the 1975 reauthorization); *Georgia v. United States*, 411 U.S. 526, 541 (1973) (adjudicating a challenge to the 1970 reauthorization); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (adjudicating a challenge to the 1965 passage of the Voting Rights Act).

46. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAUMDNO)*, 557 U.S. 193, 203 (2009) ("For example, the racial gap in voter registration and turnout is lower in the States originally covered by [Section] 5 than it is nationwide.").

47. U.S. CONST. amend XV, § 2.

48. 383 U.S. 301 (1966).

49. *Id.* at 337.

50. *See id.* at 334 ("[T]he Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate.").

51. *See id.* at 326.

52. *See id.* at 329 (noting that "Congress began work with reliable evidence of actual voting discrimination" in particular jurisdictions and that the "formula eventually evolved to describe these areas").

experience.”⁵³ Thus, the Court found the reverse-engineered formula constitutional and within Congress’s power to enforce the Fifteenth Amendment.

In subsequent cases, the Court has exhibited a similar willingness to defer to Congress’s legislative decisions in this realm. For example, in *City of Rome v. United States*,⁵⁴ the Court held that Congress’s 1975 reauthorization of the Act was constitutional; it rejected a federalism argument against the Act on the ground that the principles of federalism “are necessarily overridden by the power to enforce the Civil War Amendments by appropriate legislation.”⁵⁵ The Court emphasized that the Civil War Amendments were designed to expand federal power and limit state sovereignty.⁵⁶ Moreover, the Court reiterated that “legislation enacted under authority of [Section] 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment is plainly adapted to [the] end of enforcing the Equal Protection Clause.”⁵⁷

B. Applying the Rational Basis Test to Voting Rights Act Legislation

The Court has assessed the constitutionality of legislation passed by Congress under the Fifteenth Amendment using the rational basis test. Pursuant to this test, the Court has held 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.”⁵⁸ Under the rational basis test, Congress is afforded considerable deference.

To determine whether Congress’s legislation combating voter discrimination is rational, the Court has looked to the evidence collected by Congress during the debates on passing and reauthorizing the Act. In *Katzenbach*, the Court relied on the “voluminous legislative history of the Act contained in the committee hearings and floor debates”⁵⁹ to conclude that Congress used

53. *Id.* at 331.

54. 446 U.S. 156 (1980).

55. *Id.* at 179 (citation omitted) (internal quotation marks omitted).

56. *Id.* at 179.

57. *Id.* at 176 (citation omitted) (internal quotation marks omitted).

58. *Katzenbach*, 383 U.S. at 324. *See also City of Rome*, 446 U.S. at 177 (“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.”).

59. *See Katzenbach*, 383 U.S. at 309 (“We pause here to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for

appropriate means to combat racial discrimination in voting.⁶⁰ Similarly, in *City of Rome*, the Court held that Congress's reauthorization of the Act was rational because Congress had found that political progress by minorities had thus far been "modest and spotty."⁶¹ The Court further noted that Congress had given "careful consideration to the propriety of readopting [Section] 5's preclearance requirement."⁶²

C. First-Generation Barriers to Voting Versus Second-Generation Barriers

The Voting Rights Act was created to root out various types of devices and tactics used to deny minorities the right to vote.⁶³ Some of the barriers identified by the Court, and reflected in the Act, include poll taxes and literacy tests.⁶⁴ These types of barriers are commonly referred to as "first-generation barriers" to voting.⁶⁵ Section 4(b)'s coverage formula was designed to identify jurisdictions that had implemented "first-generation barriers" to deny access to the voting polls.⁶⁶

Recently, Congress has emphasized eradicating "second-generation barriers," such as racially polarized voting⁶⁷ and vote dilution. Vote dilution occurs when a majority group votes as a bloc to effectively nullify a minority group's vote. The Court has never held that the Fifteenth Amendment prohibits vote dilution,⁶⁸ however it has held that vote dilution can violate the Fourteenth Amendment.⁶⁹

these reactions by Congress.").

60. *Id.* at 308 ("Congress explored with great care the problem of racial discrimination in voting.").

61. *City of Rome*, 446 U.S. at 181 (citation omitted) (internal quotation marks omitted).

62. *Id.*

63. *Katzenbach*, 383 U.S. at 308.

64. *Id.* at 315–16.

65. *Shelby Cnty. v. Holder*, 679 F.3d 848, 878 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2012) (No. 12-96).

66. 42 U.S.C.A. § 1973b(b) (West 2013).

67. Racially polarized voting in this context refers to a pattern of voting where voters of one race support the same candidate while voters of another race all support a different candidate.

68. *Reno v. Bossier Parish School Board (Bossier II)*, 528 U.S. 320, 334 n.3 (2000).

69. *See City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) ("[Multimember legislative districts] could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

D. Gradual Erosion of the Level of Deference

As Congress shifted its focus from first-generation barriers to voting to second-generation barriers, the Supreme Court distanced itself from *Katzenbach* and *City of Rome* and became less willing to defer to Congress's legislative decisions. When Congress began addressing second-generation barriers to voting, it interpreted Section 5 very broadly as it related to vote dilution. Section 5 provides that a voting change can only be precleared if the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."⁷⁰ Congress interpreted this to mean that the Act barred voting changes that were non-retrogressive but had a discriminatory purpose, as well as voting changes that had discriminatory, retrogressive effects regardless of purpose.⁷¹

The Court disrupted Congress's understanding of this provision in *Reno v. Bossier Parish School Board (Bossier II)*⁷² when it held that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."⁷³ Thus, the Court nullified the part of the Act relating to voting changes that only had a discriminatory purpose.⁷⁴ Because the Court has never held that the Fifteenth Amendment prohibits vote dilution,⁷⁵ after *Bossier II* the most Section 5 could do in vote dilution cases was ensure that no backsliding occurred with new redistricting plans.⁷⁶ In response to this decision, with the 2006 reauthorization of the Act, Congress imposed a "purpose" standard⁷⁷ in Section 5 and included a provision that defined "purpose" to mean "any discriminatory purpose."⁷⁸

70. 42 U.S.C.A § 1973c(a).

71. *Shelby Cnty. v. Holder*, 811 F.Supp.2d 424, 436 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2012) (No. 12–96).

72. 528 U.S. 320 (2000).

73. *Bossier II*, 528 U.S. at 341.

74. *See Voting Rights Act: Section 5-Preclearance Standards, Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12 (2005) (prepared statement of Mark A. Posner, Adjunct Professor, American University, Washington College of Law) ("Section 5 'purpose' now has been given a highly specialized and esoteric meaning, the intent to cause retrogression. As a result, . . . the purpose standard now can almost never make a difference in whether or not a change is precleared.").

75. *Bossier II*, 528 U.S. at 334 n.3.

76. *Id.* at 335.

77. By imposing a purpose standard, Congress effectively reversed the Court's holding in *Bossier II*.

78. 42 U.S.C.A. § 1973c(c) (West 2013).

In addition, Congress used the 2006 reauthorization to bypass the Court's holding regarding a different aspect of Section 5. When Congress extended the Voting Rights Act in 1975, it specified that a voting change could not satisfy preclearance if the change augmented or diminished the ability of minority groups to elect candidates of their choice.⁷⁹ The Supreme Court altered this interpretation in *Georgia v. Ashcroft*⁸⁰ by holding that “the comparative ability of a minority group to elect a candidate of its choice . . . cannot be dispositive or exclusive” in a Section 5 retrogression inquiry.⁸¹ Following this decision, Congress amended Section 5 of the Act to include a new provision stating that any voting change that has the purpose or effect of diminishing the ability of minority citizens to elect their preferred candidates is a change that denies minority citizens the right to vote.⁸²

E. The Court Indicates a Potential Change in Course

When Congress reauthorized the Act in 2006, it maintained the long-standing purpose of the Act by not altering the coverage formula or the preclearance requirements. By 2006, the coverage formula was using data that was nearly forty years old and was still identifying jurisdictions that had used first-generation barriers to voting. Yet in 2009, the Court gave its strongest indication that the deference Congress had enjoyed in earlier Voting Rights Act cases may no longer be appropriate.⁸³

Other than *Shelby County, Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*⁸⁴ is the only case the Court has heard on the constitutionality of the 2006 reauthorization of the Act. The petitioner in *NAMUDNO* was a utility district created in 1987 to deliver city services to Travis County, Texas.⁸⁵ A board of five

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

80. 539 U.S. 461 (2003).

81. *Id.* at 480. Thus, under the Court's holding in *Ashcroft*, a State could redraw district lines so that minorities were likely able to elect candidates of their choice even if that probability was reduced as compared to the previous districting plan. *Id.* This would only be permissible if the State created more districts in this manner than the existing number of “safe” districts where it was “highly likely that minority voters w[ould] be able to elect the candidate of their choice.” *Id.*

82. 42 U.S.C.A. § 1973c(b), (d).

83. *See NAMUDNO*, 557 U.S. 193, 203 (2009) (noting that the Voting Rights Act may not account for “current political conditions”).

84. 557 U.S. 193 (2009).

85. *Id.* at 200.

members governed the district; Travis County oversaw elections for the board and the registration of voters for the board.⁸⁶ Because the district was a political subdivision of Texas,⁸⁷ and Texas became a covered state in 1975,⁸⁸ the district's election standards were subject to the preclearance requirements of Section 5.⁸⁹ The district filed suit seeking to be bailed out of the obligations of Section 5, and in the alternative, claiming that Section 5 was unconstitutional.⁹⁰ The Supreme Court only decided the first issue and held that all political subdivisions can file for bailout, even if they do not fall under the narrower definition of political subdivision in Section 14(c)(2)⁹¹ of the Voting Rights Act.⁹²

In addition to expanding the spectrum of jurisdictions that may be eligible for bailout in the future, the Court may have also offered a glimpse into its current stance on the Voting Rights Act. With regard to the appropriate standard of review, the district argued for a "congruence and proportionality" standard,⁹³ and the government argued for a rational basis standard.⁹⁴ Although the Court did not decide the appropriate standard of review, it did state that the Act "imposes current burdens and must be justified by current needs."⁹⁵ Moreover, the Court noted that past success in eliminating many "first-generation" barriers alone was insufficient to justify retaining the requirements of Section 5.⁹⁶ Next, the Court suggested that the issues Section 5 was created to address may no longer be unique to

86. *Id.*

87. *Id.* at 206.

88. Voting Rights Act Amendments of 1975—Partial List of Determinations, 40 Fed. Reg. 43746 (Sept. 23, 1975).

89. *NAMUDNO*, 557 U.S. at 206.

90. *Id.* at 200–01.

91. Compare BLACK'S LAW DICTIONARY 1003 (abridged 9th ed. 2010) (defining "political subdivision" as "[a] division of a state that exists primarily to discharge some function of local government"), with 42 U.S.C.A. 1973l(c)(2) (West 2013) ("The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.").

92. *NAMUDNO*, 557 U.S. at 211.

93. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). It should be noted that *City of Boerne* was a Fourteenth Amendment case regarding the extent of Congress's ability to use its Section 5 enforcement power.

94. *NAMUDNO*, 557 U.S. at 204.

95. *Id.* at 203.

96. See *id.* at 202 ("Past success alone, however, is not adequate justification to retain the preclearance requirements.").

the jurisdictions singled out by Section 4(b)'s coverage formula.⁹⁷ Finally, the Court acknowledged that there was "considerable evidence that [the coverage formula] fails to account for current political conditions."⁹⁸

IV. D.C. CIRCUIT COURT'S HOLDING

With *NAMUDNO* in its periphery, the D.C. Circuit Court analyzed whether Section 5's burdens on state sovereignty were justified by "current needs," and whether Section 4(b)'s "disparate geographic coverage [was] sufficiently related to the problem that it target[ed]."⁹⁹ The court found that Congress "drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments" to reauthorize Sections 5 and 4(b) of the Voting Rights Act in 2006.¹⁰⁰ The Circuit Court thus affirmed the District Court's decision.¹⁰¹

A. Section 5 Preclearance

The D.C. Circuit Court acknowledged that the standard of review for legislation enacted by Congress under Section 2 of the Fifteen Amendment is an unresolved issue.¹⁰² Yet, relying on dicta in *NAMUDNO*, the circuit court applied the congruent and proportional test to determine the constitutionality of the reauthorization of Section 5.¹⁰³ The court noted that for the reauthorization to be congruent and proportional, Congress must have "documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions" such that case-by-case litigation under Section 2 of the Act, by itself, would prove inadequate.¹⁰⁴

97. *Id.* at 203.

98. *Id.*

99. *Shelby Cnty. v. Holder*, 679 F.3d 848, 859 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2012) (No. 12-96) (quoting *NAMUDNO*, 557 U.S. 193, 203 (2009)).

100. *Id.* at 884.

101. *Id.*

102. *Id.* at 859.

103. *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

104. *Id.* at 864.

Over Shelby County's objection, the court took into account evidence of vote dilution that Congress itself had considered when reauthorizing the statute.¹⁰⁵ The court noted that though the Supreme Court has never held that the Fifteenth Amendment prohibits intentional vote dilution,¹⁰⁶ the Court has held that invidious vote dilution violates the Fourteenth Amendment.¹⁰⁷ Thus, the circuit court believed it was entitled to consider "numerous examples of modern instances of racial discrimination in voting"¹⁰⁸—second generation barriers.

Similar to the District Court, the D.C. Circuit reviewed the legislative record and found several categories of evidence that supported reauthorizing Section 5 for another twenty-five years.¹⁰⁹ The court found the Attorney General's claim "that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes"¹¹⁰ to be very persuasive. The legislative record of the reauthorization demonstrated that, in comparison to Section 5's straightforward preclearance power, Section 2 claims often involved costly and time-consuming litigation, which dissuaded potential litigants from pursuing valid claims.¹¹¹ The court emphasized that while a Section 2 action was pending, a proponent of the challenged law could win election and enjoy the advantage of incumbency before the law was overturned.¹¹² Further, a plaintiff with few resources could not easily seek a preliminary injunction in such an instance because of the heavy burden of proof required for preliminary injunctive relief.¹¹³

105. *Id.*

106. *Id.*

107. *Id.* (citing *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980)). *City of Mobile*, 446 U.S. at 66 ("We have recognized, however, that [multimember legislative districts] could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

108. *Shelby Cnty.*, 679 F.3d at 865.

109. *Id.* at 864–66.

110. *Id.* at 871 (quoting H.R. REP. NO. 109-478, at 24 (2006)). Additionally, the legislative record revealed that minorities had obtained over 650 favorable outcomes in Section 2 lawsuits within covered jurisdictions from 1982 to 2005. *Id.* at 868. Furthermore, the Attorney General, pursuant to Section 5 preclearance rules, had objected to hundreds of proposed voting changes by covered jurisdictions based on the determination that the voting changes "would have a discriminatory purpose or effect." *Id.* at 866.

111. *Id.*

112. *Id.*

113. *Id.* at 873.

Thus, the D.C. Circuit agreed with Congress's assessment that "case-by-case enforcement" of voting rights, by itself, would inadequately protect minority citizens from the constitutional violations documented in the legislative record.¹¹⁴ After acknowledging that Congress is given deference when making legislative judgments,¹¹⁵ the D.C. Circuit ruled that Congress had reasonably concluded that Section 5 remained a critical component of the Voting Rights Act.¹¹⁶

B. Section 4(b)'s Coverage Formula

Next, the D.C. Circuit considered whether the statute's geographic coverage was sufficiently related to the targeted problem. The D.C. Circuit used a study by Ellen Katz¹¹⁷ from the legislative record to compare the occurrence of discriminatory voting laws in covered and non-covered jurisdictions.¹¹⁸ By adjusting the data in the Katz study to account for population differences between states, the court found that the rate of successful Section 2 cases in covered jurisdictions was nearly four times higher than in non-covered jurisdictions.¹¹⁹ The D.C. Circuit also looked at unpublished Section 2 cases, which were primarily court-approved settlements, in both covered and non-covered jurisdictions over the objections of Shelby County.¹²⁰ The court found that eleven of the top fourteen states with the highest combined number of successful Section 2 cases from 1982 to 2004 were covered states.¹²¹ The court concluded that "if discrimination were evenly distributed throughout the nation, [there would be] fewer successful [S]ection 2 cases in covered jurisdictions than in non-

114. *See id.* at 872 (quoting H.R. REP. NO. 109-478, at 57 (2006)) (emphasizing that the County has "offered no basis" for the court to call into question Congress's judgment based on its supporting evidence).

115. *See id.* at 861 ("Congress 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'" (quoting *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 196 (1997))).

116. *Id.* at 873 ("[W]e, like the district court, are satisfied that Congress's judgment [regarding Section 5] deserves judicial deference.").

117. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006) [hereinafter Katz Study].

118. *Shelby Cnty.*, 679 F.3d at 874 (referring to the Katz study as the "Impact and Effectiveness" study.).

119. *Id.*

120. *Id.* at 875–77.

121. *Id.* at 876. These eleven states included the seven states that were originally covered by the Act in 1965: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. *Id.*

covered jurisdictions,” yet there were “substantially more.”¹²²

In determining the constitutionality of Section 4(b), the D.C. Circuit also considered the statute’s bailout and bail-in features.¹²³ The court noted that the bailout mechanism “reduce[d] the possibility of overbreadth,” which “ensure[d] Congress’[s] means [were] proportionate to [its] ends.”¹²⁴ Although Section 4(b)’s coverage formula uses old voting data, when supplemented with the legislative record and the bail-in and bailout provisions of the statute, the court concluded that the statute’s geographic coverage area sufficiently related to the problem of voter discrimination.¹²⁵

Shelby County appealed the Circuit Court’s decision to the Supreme Court under the Fifteenth Amendment.¹²⁶ The Supreme Court granted certiorari to determine whether Congress exceeded “its authority under the Fourteenth and Fifteenth Amendments” by reauthorizing Section 5 of the Act under the “pre-existing coverage formula of Section 4(b).”¹²⁷

V. ARGUMENTS

A. *Petitioner’s Argument*

Shelby County’s main contention is that Congress’s 2006 reauthorization of Section 5’s preclearance requirement and Section 4(b)’s coverage formula was unconstitutional given present voting conditions in the United States.¹²⁸ First, Shelby County alleges that Section 5 “imposes current burdens” that are not “justified by current needs.”¹²⁹ Second, Shelby County claims that even if Section 5 is constitutional,¹³⁰ Section 4(b)’s “disparate geographic coverage”¹³¹ does not adequately relate to the problem the Voting Rights Act is trying to fix.¹³²

122. *Id.* at 878 (emphasis in original).

123. *Id.* at 881.

124. *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 533, (1997)).

125. *Id.* at 883.

126. Petition for a Writ of Certiorari at i, *Shelby Cnty. v. Holder*, 2012 WL 3017723 (U.S. Jul. 20, 2012) (No. 12-96).

127. *Shelby Cnty. v. Holder*, No. 12-96 (U.S. argued Feb. 23, 2013).

128. Brief for Petitioner, *supra* note 13, at 18–23.

129. *Id.* at 23 (quoting *NAMUDNO*, 557 U.S. 193, 203 (2009)).

130. *Id.* at 40.

131. *Id.* (quoting *NAMUDNO*, 557 U.S. at 203).

132. *Id.* at 21.

1. Shelby County's Section 5 Argument

Shelby County alleges that the type of voting discrimination that once made Section 5 preclearance appropriate legislation no longer exists today. Shelby County references a political climate in 1965 in which there was an “invidious practice of subtly and continuously altering discriminatory voting laws to circumvent” any gains minorities won through litigation.¹³³ Today, preclearance is unnecessary; between 1982 and 2004 only about 0.74% of all preclearance submissions were objected to by the federal government.¹³⁴ Congress itself said that “significant progress has been made in eliminating first[-]generation barriers . . . including increased numbers of registered minority voters, minority voter turnout, and minority representation” in political offices.¹³⁵

Shelby County notes that the focus now is on second-generation barriers to voting, such as racially polarized voting¹³⁶ and vote dilution.¹³⁷ However, the County does not consider polarized voting to be “governmental discrimination,” which it contends is the “only type of conduct Congress may remedy.”¹³⁸ Moreover, Section 5 was passed in 1965 to combat “vote-denial schemes interfering with ballot access,” not claims of the diminishing “effect of ballots once cast.”¹³⁹ These claims of vote dilution should be handled through Section 2 litigation and therefore “cannot justify preclearance.”¹⁴⁰

Furthermore, Shelby County argues Section 5 preclearance is unduly burdensome for covered jurisdictions.¹⁴¹ Preclearance greatly supersedes a State's sovereign authority because a covered state is unable to create its own voting laws without first getting approval from the federal government.¹⁴² Additionally, the County proffers that “preclearance compliance has over the past decade required the commitment of state and local resources easily valued at over a

133. *Id.* at 27–28.

134. *Id.* at 29.

135. *Id.* (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006)).

136. *Id.* at 31.

137. *Id.* at 19–20.

138. *Id.* at 31.

139. *Id.* at 32.

140. *Id.* at 32–33.

141. *Id.* at 24.

142. *Id.*

billion dollars.”¹⁴³

Shelby County contends that the 2006 reauthorization of Section 5 made it even more difficult to attain preclearance by requiring covered jurisdictions to prove that their proposed voting changes did not have “any discriminatory purpose.”¹⁴⁴ In addition, Congress has changed Section 5’s “mission from preventing ‘backsliding’ . . . to ensuring a certain number of minority-preferred elected officials.”¹⁴⁵ Without evidence that the same type of “racial animus” that existed in 1965 still exists today, Section 5 should not have been reauthorized.¹⁴⁶

2. Shelby County’s Section 4(b) Argument

If Section 5 is found to be constitutional, then Shelby County contends that Section 4(b)’s coverage formula is unconstitutional. The formula in Section 4(b) was originally considered reliable because it was tied to the use of voting tests and devices, as well as low voter registration, which were prevalent in 1965.¹⁴⁷ The formula’s reliance on data points from 1964, 1968, and 1972 cannot rationally identify the “jurisdictions likely to discriminate between 2007 and 2031.”¹⁴⁸ For this reason alone, the formula should be found unconstitutional.¹⁴⁹ In addition, Shelby County claims that the formula would not be rational even if it were updated to use voting data from the 1996, 2000, and 2004 presidential elections—relying on those data points, Hawaii would be the only state identified as having current first-generation barriers to voting, which demonstrates that the triggers the formula uses are no longer relevant today.¹⁵⁰

143. *Id.* at 25 (quoting *Modern Enforcement of the Voting Rights Act, Hearing before the Comm. on the Judiciary U.S. S.*, 109th Cong. 110 (2006) (statement of Gregory S. Coleman, Weil Gotshall and Manges)).

144. *Id.* at 26 (quoting 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)).

145. *Id.* (quoting *Bossier II*, 528 U.S. 320, 335 (2000)).

146. *Id.* at 39.

147. *See id.* at 40 (“In *Katzenbach*, the Court found Section 4(b)’s formula sound in theory because its inputs . . . reliably indicated a ‘widespread and persistent’ use of intentionally discriminatory tactics to keep minorities from voting.” (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966))).

148. *Id.* at 41.

149. *Id.*

150. *Id.* at 43–44.

Moreover, if the coverage formula is being used to target second-generation barriers then it is under inclusive.¹⁵¹ The Katz Study highlights that the highest number of Section 2 lawsuits filed since 1982 are found in both covered and non-covered jurisdictions.¹⁵² The County alleges that the bailout provision in the Act cannot save the coverage formula from its disparate coverage¹⁵³ and that the bail-in provision “further undermines the formula’s constitutionality.”¹⁵⁴ Therefore, Section 4(b)’s coverage formula should be considered unconstitutional as it is no longer rational.¹⁵⁵

B. Respondent’s Argument

The United States Attorney General argues that while progress has been made since the passage of the Voting Rights Act, voting discrimination is still a serious problem in covered jurisdictions.¹⁵⁶ Consequently, the work of Section 5 is not complete and it should not be deemed unconstitutional.¹⁵⁷

1. The Government’s Section 5 Argument

The Attorney General argues that Congress demonstrated the efficacy of and continued need for Section 5’s preclearance requirement. The legislative record shows that Section 5, which allows States to work with the Attorney General to create permissible laws, deters States from attempting to pass new discriminatory voting laws.¹⁵⁸ Furthermore, the Attorney General contends that preclearance has helped to increase black voter registration.¹⁵⁹ This success suggests Section 5 will help remedy the disparities between

151. *See id.* at 46 (“A state-by-state comparison of Section 2 litigation data and racially polarized voting statistics confirms the irrationality of using Section 4(b)’s formula to address ‘second generation’ barriers.”).

152. *See id.* at 47 (“[N]on-covered Illinois had more Section 2 lawsuits filed since 1982 than all but three fully-covered States. The same is true of New York, and Florida, even disregarding the suits filed against their scattered covered jurisdictions.” (citation omitted)).

153. *Id.* at 54.

154. *Id.* at 57.

155. *See id.* at 40 (“An appropriate coverage formula must be ‘rational in both practice and theory.’ . . . [T]he archaic coverage formula reauthorized in 2006 is neither.” (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966))).

156. Brief for the Federal Respondent at 25, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. Jan. 25, 2013) [hereinafter Brief for Respondent].

157. *Id.* at 12.

158. *See id.* at 29 (noting that in 2012 the Attorney General worked with South Carolina to create a new photo-identification law that a court could preclear even though the Attorney General had objected to the initial law presented by South Carolina).

159. *Id.* at 32–33.

Hispanic and non-Hispanic voter registration.¹⁶⁰

The Attorney General also argues that preclearance is still necessary to combat new and existing types of voting discrimination. First, the Attorney General continues to send federal observers to covered jurisdictions to monitor polling sites because minority voters recently faced voting discrimination in these areas.¹⁶¹ Second, the legislative record identified “ongoing problems of vote suppression, voter intimidation, and vote dilution.”¹⁶² Although the Court has not decided whether the Fifteenth Amendment prohibits vote dilution, Congress has “unquestioned authority” to bar intentional vote dilution under the Fourteenth Amendment.¹⁶³ Congress has repeatedly reauthorized Section 5 to prevent covered jurisdictions from attempting to minimize the effectiveness of votes cast by minority citizens, including by vote dilution.¹⁶⁴

Finally, the Attorney General rejects the County’s argument that voter discrimination can be effectively combated by Section 2 lawsuits.¹⁶⁵ First, in order to gather sufficient evidence to prove the discriminatory effect of an illegal voting practice, the voting law must remain in effect for several voting cycles.¹⁶⁶ Thus, covered jurisdictions are able to enjoy the benefits of the discriminatory voting scheme until sufficient evidence has been accumulated.¹⁶⁷ Second, Section 2 lawsuits place the burden on minority plaintiffs to prove the discriminatory aspects of a voting law, whereas Section 5 preclearance places the burden on covered jurisdictions.¹⁶⁸ Covered jurisdictions are much better equipped to gather information about possible voter discrimination.¹⁶⁹ Third, the Attorney General argues that “Section 2

160. *Id.* at 33.

161. *Id.* at 31. The Act also allows the Attorney General to send federal observers to polling sites in jurisdictions covered by Section 4(b) when necessary to protect the voting rights of citizens under the Fourteenth and Fifteenth Amendments. 42 U.S.C.A. § 1973f (West 2013). Unlike the Attorney General, courts can send federal observers to any jurisdiction that has a Section 2 lawsuit pending even if the jurisdiction is not covered by Section 4(b)’s coverage formula. *Id.* § 1973a(a).

162. Brief for Respondent, *supra* note 156, at 33.

163. *Id.* at 36.

164. *Id.* at 37.

165. *See id.* at 39–40 (“Petitioner asserts that Section 2 affords a sufficient remedy. But that is a judgment for Congress to make, and after months of hearings, Congress concluded otherwise.” (citation omitted)).

166. *Id.*

167. *Id.*

168. *Id.* at 40.

169. *Id.*

places a heavy financial burden on minority voters who challenge illegal election practices” compared to the modest financial burden placed on the covered jurisdictions seeking preclearance.¹⁷⁰

2. The Government’s Section 4(b) Argument

The Attorney General argues that Section 4(b)’s coverage formula continues to target the jurisdictions with the most frequent instances of voting discrimination.¹⁷¹ The Government dismisses the importance of the data used in the formula because Congress “‘reverse-engineer[ed]’ the coverage criteria in Section 4(b) to describe in objective terms those jurisdictions Congress already knew it wanted to cover.”¹⁷² The important question in 2006 was not about the need to update the coverage criteria, but whether Section 5 was still needed in the covered jurisdictions, which Congress answered in the affirmative.¹⁷³ The Attorney General notes that if Section 5 preclearance was unnecessary then covered jurisdictions should have fewer successful Section 2 lawsuits than non-covered jurisdictions, yet this is not what Congress found.¹⁷⁴

Finally the Attorney General argues that the geographic coverage area of Section 5 is not solely reflected in Section 4(b)’s coverage formula.¹⁷⁵ The bailout and bail-in provisions of the Voting Rights Act ensure that the coverage area is neither over-inclusive nor under-inclusive.¹⁷⁶ The Attorney General contends that it is “‘neither unduly difficult nor expensive for eligible jurisdictions to bail out of Section 5 coverage.’”¹⁷⁷ The Voting Rights Act properly identifies the jurisdictions with the most concentrated racial discrimination in voting, which allows Section 5 to “‘sufficiently relate[] to the problem that it targets.’”¹⁷⁸

170. *Id.* at 40–41.

171. *Id.* at 49–50.

172. *Id.* at 49.

173. *Id.* at 49–50.

174. *Id.* at 53.

175. *Id.*

176. *See id.* at 53–54 (“[T]he geographic scope of Section 5 is not reflected in the coverage criteria in Section 4(b) alone.”).

177. *Id.* at 54.

178. *Id.* at 57 (quoting *NAMUDNO*, 557 U.S. 193, 203 (2009)).

VI. ANALYSIS AND LIKELY DISPOSITION

The Supreme Court will have to determine whether the Voting Rights Act is constitutional given the political conditions of 2013, and it should do so under the rational basis test. The Court may avoid addressing the constitutionality of Section 5 by first determining that Section 4(b) is unconstitutional, but this is inadvisable.¹⁷⁹ Instead, the Court should first determine that Section 5 is constitutional because voting discrimination is still prevalent in the United States. The Court should hold that Section 4(b), however, is unconstitutional because the coverage formula's criteria and focus is outdated.

A. *The Court Should Continue to Use the Rational Basis Test*

Since *Katzenbach*, the Supreme Court has repeatedly used the rational basis test to determine the constitutionality of the Act.¹⁸⁰ The rational basis test is an appropriate standard of review because Congress has authority under the Fifteenth Amendment to pass "appropriate legislation" to combat voter discrimination.¹⁸¹ Although Shelby County argues for using the "congruence and proportionality" standard,¹⁸² this standard is inappropriate here because it has only been used in cases involving Congress's Section 5 power under the Fourteenth Amendment.¹⁸³

179. Another avenue the Court can take to decide *Shelby County* is through the Elections Clause, found in Article I of the Constitution. U.S. CONST. art. I, § 4, cl. 1. The clause permits "Congress to make or alter those districts [for federal elections] if it wished." *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (citation omitted) (internal quotation marks omitted). The Court can avoid deciding the case on Fourteenth Amendment and Fifteenth Amendment grounds if it decides that the Elections Clause grants "clear authority for Congress to enact Section 5 [pre]clearance procedures for state laws concerning federal elections." Brief of Gabriel Chin et al. as Amici Curiae in Support of Respondents at 4, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. Feb. 1, 2013). However, given the reservations expressed by the Court during oral arguments for *NAMUDNO*, it is unlikely the Court will approve of a legal argument that could potentially allow preclearance to continue in perpetuity. See Transcript of Oral Argument at 32, *NAMUDNO*, 557 U.S. 193 (2009) (U.S. Apr. 29, 2009) ("[A]t some point it begins to look like the idea is that [the Act] is going to go on forever.").

180. See *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."); Brief for Senate Majority Leader Harry M. Reid as Amicus Curiae in Support of Respondents at 7, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. Feb. 1, 2013) ("[I]n evaluating prior extensions of Section 5 . . . this Court has applied rational basis review.").

181. See U.S. CONST. amend. XV, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

182. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

183. See *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("[P]etitioners ask us to apply the 'congruence and proportionality' standard described in cases evaluating exercises of

Admittedly, in *NAMUDNO*, some of the language used in dicta suggests the Court might adopt a more demanding standard of review.¹⁸⁴ Nonetheless, the Court has consistently held that Congress should be given deference when it legislates under the Fifteenth Amendment.¹⁸⁵ Moreover, Congress has presented considerable evidence identifying continued voter discrimination each time the Act has been up for reauthorization. Thus, there is nothing that justifies a departure from applying the rational basis standard to reviewing legislation Congress passed to combat voter discrimination.

B. Section 4(b)'s Coverage Formula Most Likely Will Not Survive

The most difficult decision before the Supreme Court is how much weight to give precedent. After *Katzenbach* held that Section 4(b)'s reverse-engineered formula was constitutional—more than fifty years ago¹⁸⁶—the Court has not reconsidered the constitutionality of the formula. Moreover, the last time the coverage formula was substantially amended was in 1975, when Congress added data from the 1972 presidential election to the formula's calculus.¹⁸⁷ However, because 2013 does not reflect 1972 and because this is the first solely facial challenge to the 2006 reauthorization of the Act,¹⁸⁸ it is questionable how much value the Court will give this underlying precedent.

Congress[s] power under § 5 of the Fourteenth Amendment. But we have never applied that standard outside the § 5 context.” (citation omitted)).

184. *NAMUDNO*, 557 U.S. 193, 203 (2009) (“[The Act’s] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”).

185. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (“[The Civil War] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (“Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”).

186. *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966). The original basis for the reverse-engineered formula was to somehow capture most of the jurisdictions that had a long history of bypassing federal laws and discriminating against voters. Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 17 (2010).

187. Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400, 401 (1975).

188. In *NAMUDNO* the petitioner conditionally challenged the constitutionality of Sections 4(b) and 5, which allowed the Supreme Court to avoid determining the constitutionality of the 2006 reauthorization of the Act by Congress. *NAMUDNO*, 557 U.S. at 205.

With the 2006 reauthorization, Congress had the opportunity to amend the coverage formula to better represent current political conditions, but it actively chose not to do so.¹⁸⁹ Thus, under the Act as passed, come 2031, jurisdictions that committed voting violations in the 1960s and 1970s and that have not achieved bailout will still need preclearance from the federal government to pass new voting legislation. Yet, according to Representative Norwood, if the formula's underlying data had been changed to only include voter registration data and turnout rates from the 1996, 2000, and 2004 presidential elections, Hawaii would be the only fully covered state.¹⁹⁰

The covered jurisdictions under the updated data formula are not ones that have had a long history of voter discrimination.¹⁹¹ During oral arguments for *NAMUDNO*, Chief Justice Roberts pointedly asked if the position of the appellant was that “southerners are more likely to discriminate than northerners” since the current coverage formula's use of data from over forty years ago causes it to disproportionately cover southern jurisdictions.¹⁹² The difference between the jurisdictions that are identified by the “updated” formula compared to the current formula is too wide for the Court to reasonably conclude that the formula reflects current political conditions.

Furthermore, the criteria used to determine covered and non-covered jurisdictions is outdated. The coverage formula was created at a time when Congress was trying to fight against first-generation barriers to voting, such as poll taxes, literacy tests, and outward intimidation at voting sites.¹⁹³ These barriers are different from the voter polarization and vote dilution problems that Congress is trying to combat today. Yet, Congress's shift in focus has not led it to change the criteria used to identify jurisdictions.¹⁹⁴ The current coverage

189. See Seaman, *supra* note 186, at 38–39 (2010) (indicating that Representative Charlie Norwood introduced an amendment that “would ‘update’ the Section 5 coverage formula using voter registration and turnout rates from a ‘rolling test’ based off of the last three presidential elections.” (quoting H.R. REP. NO. 109-554, at 2 (2006))).

190. *Id.* at 39. This type of an update would also cover 1010 jurisdictions in thirty-nine states. *Id.*

191. *Id.*

192. Transcript of Oral Argument at 48, *NAMUDNO*, 557 U.S. 193 (2009) (U.S. Apr. 29, 2009).

193. See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (“Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”).

194. For example, because Congress has been using factors that pertain to first-generation barriers, the formula does not cover counties in Ohio and Florida, which have some of the most

formula is unable to identify jurisdictions that are currently covered for first-generation offenses that have not had second-generation offenses. Therefore, the coverage formula is unconstitutionally superseding the sovereignty of States that do not have second-generation offenses.

Despite the bailout and bail-in corrective provisions of the Act, the Court is still unlikely to uphold the current formula. Since 1984, thirty-eight bailouts have been granted for 196 jurisdictions, with twenty of those bailouts occurring after the Court's *NAMUDNO* decision expanded the availability of bailout to many more jurisdictions.¹⁹⁵ The *NAMUDNO* Court seemed less than enthused by the number of bailouts from 1982 to 2008.¹⁹⁶ Moreover, the requirements to maintain bailout status¹⁹⁷ may still prove too onerous. Thus, the Court should strike the coverage formula because the data and criteria used are outdated, and because it is considerably difficult for a jurisdiction to achieve bailout. This will signal to Congress that a formula must rationally relate to current conditions to justify its use for an extended period of time.

C. Section 5 Preclearance is Still Constitutional

If the Court first finds Section 4(b) unconstitutional, then it may not rule on the constitutionality of Section 5 due to the severability doctrine.¹⁹⁸ The first prong of the severability test requires that the statute, in this case Section 5, continue to operate fully as law without the invalidated portion of the statute.¹⁹⁹ The second prong requires courts to leave the remaining parts of the statute intact unless the legislature would not have enacted these parts independently of the

recent examples of voting rights violations. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 208 (2007).

195. Brief for Respondent, *supra* note 156, at 54.

196. See Transcript of Oral Argument at 37, *NAMUDNO*, 557 U.S. 193 (2009) (U.S. Apr. 29, 2009) (having being told that eighteen bailouts had been granted since 1982, Justice Scalia responded that “[i]t’s obviously quite impracticable . . . for anybody to bail out.”).

197. 42 U.S.C.A. § 1973b(a)(1)(A)–(F) (West 2013).

198. See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (“Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,” severing any “problematic portions while leaving the remainder intact. Because [t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course.” (citation omitted) (internal quotation marks omitted)).

199. Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 *TEX. REV. L. & POL.* 1, 54 (2011).

invalidated portion of the statute.²⁰⁰ Here, Section 5 preclearance is predicated on the existence of some formula identifying the jurisdictions that will be subject to Section 5's provisions. Therefore, without Section 4(b)'s coverage formula, Section 5 cannot work and cannot pass the first prong of the severability doctrine.

However, given the historical significance of this piece of legislation, as well as the focus on Section 5 in the certiorari order, the Court may first determine the constitutionality of preclearance before focusing on the coverage formula.²⁰¹ To rule on the permissibility of Section 5, the Court will have to answer three questions: (1) Are the current burdens imposed by preclearance justified by current needs; (2) in the absence of preclearance, can Section 2 litigation adequately handle future problems of racial voter discrimination; and (3) are the factors needed for preclearance constitutionally permissible.

The first question was set up by the *NAMUDNO* Court.²⁰² Congress's 2006 findings of racial voting discrimination must be weighed against the substantial federalism costs imposed by preclearance. In addition to the anecdotes of voter discrimination collected for the congressional hearings, the results from the Katz Study offer further evidence of continued voter discrimination. Although there are minor imperfections in the testing methods,²⁰³ the Katz Study did note a higher number of successful Section 2 lawsuits in covered jurisdictions than in non-covered jurisdictions.²⁰⁴ Preclearance ought to act as a deterrent for voter discrimination, which would suggest that covered jurisdictions should have fewer Section 2 cases than non-covered jurisdictions.²⁰⁵ The difference

200. *Id.* at 56.

201. The question presented in the certiorari order was phrased in terms of the constitutionality of Section 5 of the Act, as opposed to Section 4(b). *Shelby Cnty. v. Holder*, 133 S. Ct. 594, 594 (2012) (phrasing the question presented as whether the 2006 reauthorization of Section 5 was constitutional under the preexisting coverage formula of Section 4(b)). It would be unusual for the Court to avoid deciding the constitutionality of Section 5 a second time, because it did so only four years ago in *NAMUDNO*. *See*, 557 U.S. at 205 (disposing of the case on other grounds).

202. *See NAMUDNO*, 557 U.S. at 203 ("It may be that these improvements [because of the Act] are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs." (citations omitted)).

203. The study was only able to identify 331 lawsuits that addressed Section 2 claims since 1982, but believed that this "conservatively suggest[ed] that there ha[d] been more than 1,600 Section 2 filings nationwide." Katz Study, *supra* note 117, at 655.

204. *See id.* at 655–56 ("Of the 123 successful plaintiff outcomes documented, 68 originated in covered jurisdictions, and 55 elsewhere.").

205. Brief for Respondent, *supra* note 156, at 29; *Shelby Cnty. v. Holder*, 679 F.3d 848, 871 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (U.S. Nov. 9, 2012) (No. 12-96).

between expectation and reality indicates that there is a continued need for preclearance.²⁰⁶

Next, the Court will have to determine if Section 2 case-by-case litigation can adequately replace the protection of preclearance. Several covered states have noted that “Section 2 litigation is so costly and burdensome,”²⁰⁷ compared to applying for preclearance.²⁰⁸ Furthermore, in Section 2 lawsuits the impetus of bringing forth an action rests entirely on individual litigants who do not typically have the resources to shepherd an entire case, whereas in preclearance the onus is on States who are far better equipped. Individual litigants must themselves pursue temporary injunctions if they want the discriminatory voting practice suspended for the duration of the lawsuits. The difficulty in obtaining temporary injunctions coupled with the incumbency pitfalls of Section 2 litigation²⁰⁹ demonstrates that Section 2 lawsuits cannot, on their own, adequately ensure the rights of the Fifteenth Amendment.

Potential difficulties for upholding preclearance may surface when the Court tries to answer question three. With the 2006 reauthorization of the Act, Congress included provisions in Section 5²¹⁰ that overturned the Supreme Court’s holdings in *Georgia*²¹¹ and *Bossier II*.²¹² If the holdings in these two cases turned on statutory interpretation then Congress’s redefinition of the statute must be permissible. However, one of Congress’s 2006 amendments to Section 5 requires the creation of districts where minorities have the ability to elect the candidates of their choice.²¹³ This seemingly violates the Equal Protection Clause of the Fourteenth Amendment because it

206. A potential issue that may come up with the first question is whether second-generation barriers to voting represent a current need that Section 5 was designed to combat. The Court has not yet addressed the constitutionality of vote dilution under the Fifteenth Amendment. However, the Court is unlikely to make a determination in this case because Shelby County has not raised that issue.

207. Brief for the States of New York et al. as Amici Curiae in Support of Respondents at 9, *Shelby Cnty v. Holder*, No. 12-96 (U.S. Feb. 1, 2013).

208. *Id.* at 4.

209. Brief for Respondent, *supra* note 156, at 39–40.

210. 42 U.S.C.A. § 1973c(b)–(d) (West 2013).

211. See *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (“A court must examine whether a new plan adds or subtracts ‘influence districts’ where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”).

212. See *Bossier II*, 528 U.S. 320, 328 (2000) (“[T]he language of § 5 leads to the conclusion that the ‘purpose’ prong of § 5 covers only retrogressive dilution.”).

213. 42 U.S.C.A. § 1973c(b).

requires race to become a predominant factor in redistricting.²¹⁴ In order to preserve Section 5, the Court should simply invalidate the offensive provision—42 U.S.C. § 1973c(b). Ultimately, Section 5 preclearance should be held rationally permissible given the record of voter discrimination amassed by Congress, as well as the burdens created by solely relying on Section 2 lawsuits.

VII. CONCLUSION

In *Shelby County*, the Supreme Court is likely to find the Voting Rights Act's Section 4(b) coverage formula unconstitutional. Given the magnitude of this ruling, the Court is likely to first find Section 5's preclearance requirement to be constitutional, which should allow Congress to create new criteria that can better identify the jurisdictions that should currently be under the purview of Section 5. This will not be a popular decision and it will fly in the face of substantial precedent. However, the conditions in 1982 that justified reauthorization of the coverage formula were not the same conditions in 2006 nor today. Just as barriers to voting have evolved from "first-generation" to "second-generation," so too should Congress's legislation to fight these barriers.

214. See *Georgia*, 539 U.S. at 491 (Kennedy J., concurring) ("Race cannot be the predominant factor in redistricting Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.").