

SECTION 5 OF THE VOTING RIGHTS ACT: A ONCE AND FUTURE REMEDY?

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For almost four decades, Section 5 of the Voting Rights Act has required certain states and localities to garner federal pre-approval prior to implementing any changes in laws that affect voting.¹ Initially designed to remedy the persistent recalcitrance of southern states in providing African-Americans equal access to the electoral process, Section 5 represents one of the greatest and lengthiest federal encroachments on the power of state and local governments in United States history and has been characterized as “unique and stringent,”² “reminiscent of old Reconstruction days,”³ and “an unprecedented federal intrusion into the governing processes of the states.”⁴

Section 5 seemingly raises serious constitutional concerns, as it most certainly burdens and usurps the power of state and local governments. But the United States Supreme Court has consistently upheld Section 5’s constitutionality⁵ as a valid exercise of congressional enforcement power.⁶ Likewise, the federalist majority on the Rehnquist Court⁷

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)). Section 5 is at 42 U.S.C. § 1973c.

2. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1250 (1989).

3. *Allen v. State Bd. of Elections*, 393 U.S. 544, 595 (1969) (Black, J., dissenting).

4. Daniel Hays Lowenstein, *You Don’t Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 790 (1998); see also *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 260 (D.D.C. 2002) (calling Section 5 “a severe process”); Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1181 (2001) (describing Section 5 as “dramatically shift[ing] the balance of power between the federal government and the States”); Charlotte Marx Harper, *Lopez v. Monterey County: A Remedy Gone Too Far?*, 52 BAYLOR L. REV. 435, 449 (2000) (describing Section 5 as a “severe intrusion by the federal government into state electoral autonomy”).

5. *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Georgia v. United States*, 411 U.S. 526, 540-41 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

6. The congressional enforcement power, as it relates to voting, resides in Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Section 5 of the Fourteenth Amendment states “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. Section 2 of the Fifteenth Amendment states “[t]he Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV, § 2. This Article will refer to both of these constitutional provisions more generally as Congress’s “enforcement power,” except in Part IV when it becomes necessary to make a distinction between the two. A general reference to Congress’s “enforcement power” also avoids confusion by eliminating the need to constantly clarify between the two Section 5s—the one in the Voting Rights Act and the one in the Fourteenth Amendment.

appears unwilling, at least for now, to nullify this broad Voting Rights Act remedy.⁸

Opponents of this tremendous power wielded by the federal government can take solace in the fact that it might end soon. Section 5 expires in 2007.⁹ Yet, the clock has expired on Section 5 three times previously and each time Congress has extended it.¹⁰ At this point, with a conservative Republican president and Congress, Section 5's chances for extension may appear dicey. However, the last extension of Section 5 occurred with a conservative Republican president and Republican Senate majority.¹¹ Indeed, Republican politicians often support the remedies the Voting Rights Act provides to minority voters.¹²

Politics aside, if Congress chooses to extend Section 5, it will almost certainly be subjected to another challenge as an inappropriate exercise of congressional enforcement power—a challenge it may not survive. Why? Because the limits of Congress's enforcement power have recently changed. In the landmark case of *City of Boerne v. Flores*,¹³ and in several subsequent cases,¹⁴ the Court has delivered a “significant and

7. The federalist judges on the current Supreme Court are Chief Justice William H. Rehnquist, and Justices Antonin Scalia, Clarence Thomas, Sandra Day O'Connor, and Anthony M. Kennedy. See generally, Amy Bach, *Movin' on Up with the Federalist Society: How the Right Rearrains Its Young Lawyers*, NATION, Oct. 1, 2001, at 11 (describing the modern Federalist Society and its members).

8. See *Lopez v. Monterey County*, 525 U.S. 266, 287 (1999) (*Lopez II*).

9. 42 U.S.C. § 1973b(a)(8).

10. Section 5 was extended in 1970, 1975, and 1982. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2, 5, 84 Stat. 314, 314-15 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 204, 206, 405, 89 Stat. 402, 402-05 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 (1982).

11. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 75 (2000) (remarking on how the 1982 extension and revision of the Voting Rights Act was approved by a Republican-controlled Senate and signed by President Ronald Reagan).

12. See Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING* 177, 191-92 (Bernard Grofman & Chandler Davidson eds., 1992) (noting that “Republican presidential administrations . . . have warmed to the prospect of redistricting arrangements that concentrate black and Hispanic Democrats in urban jurisdictions”); ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?* 9 (1987) (describing how Voting Rights Act enforcement under the Reagan Administration differed little from previous administrations); see also Adam Cohen, *Why Republicans Are Shamelessly in Love with the Voting Rights Act*, N.Y. TIMES, Mar. 24, 2002, § 4, at 14 (describing the Republican Party's support of “max black” redistricting after the 1990 census). This Article uses the term “minority” to encompass those groups that generally benefit from application of the Voting Rights Act—namely African-Americans, Asians, Latinos, and Native Americans.

13. 521 U.S. 507 (1997).

14. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that Congress could not subject states to suits under Title I of the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress could not subject private individuals to suits under the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that Congress could not subject states to suits under the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that Congress could not subject states to suits for patent infringement). *But see Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1984 (2003) (allowing Congress to subject states to suits under the Family and Medical Leave Act); *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (allowing Congress to subject states to suits under Title II of the Americans with Disabilities Act).

lasting cutback”¹⁵ on Congress’s ability to exercise its enforcement power, circumscribing its use through application of the congruence and proportionality test.¹⁶

As a result, this Article focuses on the basic question of whether another extension of Section 5 will pass muster under the Court’s more recent decisions. In doing so, it is the intent of this Article to establish the framework for the coming, likely passionate,¹⁷ debate over the constitutionality of Section 5 beyond 2007.

To answer the question posed, this Article provides a review of the history and structure of Section 5 (Part I) before examining the limits of Congress’s enforcement power, both when Section 5 was initially upheld as a constitutional exercise of that power and after the Rehnquist Court more recently limited Congress’s ability to exercise it (Part II). This Article then moves from the hardpan of the descriptive to the swamp of the predictive,¹⁸ by trying to realistically analyze how a moderately conservative, federalist-leaning Court¹⁹ might view an extension of Section 5—ultimately concluding that the statute would not pass the congruence and proportionality test applied by such a Court (Part III).²⁰ But, despite the likelihood that Section 5 will not survive the congruence and proportion-

15. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 947 (3d ed. 2000).

16. See *Boerne*, 521 U.S. at 519-20 (establishing the doctrine of congruence and proportionality); Kimberly E. Dean, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After Garrett?*, 43 B.C. L. REV. 697, 725 (2002) (noting that applications of the congruence and proportionality test represent “the Court’s clear attempt to diminish Congress’s [enforcement] power”).

17. The 1982 extension and amendment of the Act was marked by discordant debate, especially in the Senate; although the focus of much of this debate was Section 2 of the Act. See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1393-95 (1983) (describing the fractious tenor of the Senate hearings).

18. Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 82 (2001) (describing how “[m]oving to a discussion of likely effects of a legal development is a bit like moving from the hardpan to the swamp”).

19. Thus, all predictions are made with the caveat that the situation could change if a shift in membership occurs that causes the Court to be less inclined to diminishing federal power over the states or if the Court substantially changes the contours of the congruence and proportionality doctrine. However, these scenarios appear unlikely.

20. Professor Pamela Karlan has argued that, despite *Boerne*, Section 5 remains a proper exercise of congressional enforcement power. Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 726 (1998). This Article concurs with her assessment with regard to the constitutionality of the current extension of Section 5. See also *Giles*, 193 F. Supp. 2d at 265 (describing a challenge to the current extension of Section 5 as “entirely frivolous in light of overwhelming Supreme Court precedent”). However, Professor Karlan’s article was written prior to the Court’s six subsequent applications of the congruence and proportionality test and did not speculate on whether another extension of Section 5 would continue to remain an appropriate exercise of Congress’s enforcement power. Karlan, *supra*, at 740-41.

Two more recent pieces have also concluded that Section 5 remains constitutional under the congruence and proportionality standard. See Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 71 (2003); Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 776, 798 (2003).

ality test, this Article sets forth two means by which Section 5 can still be saved. First, this Article explores in some detail whether the Court will carve out an exception to the congruence and proportionality test for voting rights remedies (Part IV). Second, even if Section 5 is subjected to the test, this Article sets forth three ways in which Congress could revise the statute to conform to the test while still providing adequate protection for the gains made by minority voters since passage of the Voting Rights Act (Part V).

I. THE RATIONALE FOR ENACTING SECTION 5 AND HOW IT WORKS

A. Section 5: Why It Was Enacted

The Voting Rights Act was passed in 1965 after almost a century of overt, rampant, and purposeful discrimination against minority voters, most notably against African-Americans in the Deep South.²¹ The initial goal of the Act was to provide African-American voters with access to the ballot because, at the time, numerous state and local governments used the discriminatory application of literacy tests or other devices, such as tests of good moral character, to prevent African-Americans from registering to vote.²² The discriminatory application of these tests was generally performed by voter registrars who often excused white appli-

21. In 1870, the Fifteenth Amendment was ratified, guaranteeing that the right to vote could not be "denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1. Following ratification of the Amendment, Congress passed several laws designed to eradicate voting discrimination against African-Americans. *See, e.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140, 140 (1870) (guaranteeing the right to vote "without distinction of race, color, or previous condition of servitude" and providing for penalties for interfering with the right to vote); Enforcement Act of 1871, ch. 99, 16 Stat. 433, 433-34 (1871) (providing for the appointment of federal officials to oversee and monitor elections). However, these Acts did little to end discrimination. *See Voting Rights: Hearings on H.R. 6400 Before Subcomm. No.5 of the House Comm. on the Judiciary*, 89th Cong. 3-4 (1965) [hereinafter *House Hearings*] (statement of United States Attorney General Nicholas deB. Katzenbach) (describing post-Civil War attempts to guarantee the right to vote as "neither adequately enforced, nor of long duration" and later repealed).

In the late nineteenth century, as Reconstruction ebbed, southern states began to implement numerous devices, such as literacy tests, to massively disenfranchise African-American voters. *See Emma Coleman Jordan, Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 397 (1985) (listing "gerrymandering, poll taxes, literacy tests, 'grandfather clauses,' white primaries, malapportionment, residency requirements, . . . fraud, and violence" as methods used to disenfranchise African-American voters). During the twentieth century, the Supreme Court gradually found some, but not all, of these practices to be unconstitutional. *See Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (refusing to declare all literacy tests unconstitutional); *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (upholding a challenge to Texas's white primary); *Myers v. Anderson*, 238 U.S. 368, 382-83 (1915) (invalidating Annapolis, Maryland's grandfather clause); *Guinn v. United States*, 238 U.S. 347, 367-68 (1915) (invalidating Oklahoma's grandfather clause); *Giles v. Harris*, 189 U.S. 475, 485-86 (1903) (dismissing, for lack of jurisdiction, challenges to Alabama's grandfather clause, literacy test, and property ownership requirements for voter registration).

22. For example, as a condition of registration in the State of Alabama, an applicant had to be able to "read and write any article of the United States Constitution . . . be of good character and embrace the duties and obligations of citizenship." *United States v. Alabama*, 192 F. Supp. 677, 678 (M.D. Ala. 1961). In the State of Louisiana, an applicant had to "'understand and give a reasonable interpretation of any section'" of either the Constitutions of the United States or of Louisiana. *United States v. Louisiana*, 225 F. Supp. 353, 357 n.6 (E.D. La. 1963).

cants from taking the tests, gave them easier versions of the test, provided assistance in taking the test, or gave passing scores despite serious errors in their answers, while African-American applicants took difficult versions of the tests, were prevented from receiving outside assistance, were given failing scores for even the most marginal error, and were not informed if their application was rejected.²³ Moreover, even if an African-American applicant passed the test, the registrant might not be issued a registration certificate.²⁴ And when all of these other tactics failed, jurisdictions would just resort to old-fashioned intimidation.²⁵

The United States Department of Justice tried to halt these disgraceful tactics through litigation brought under the Civil Rights Acts passed by Congress in 1957, 1960, and 1964.²⁶ But Department of Justice enforcement failed to provide African-Americans with access to the ballot.²⁷ African-American voters continued to feel the burden of racial discrimination as evidenced by continued low registration rates.²⁸ Litigation proved onerous and slow.²⁹ More significantly, even victory in federal court would fail to end discrimination in registration. Often, when a court enjoined a state or local government from engaging in a particular discriminatory practice, the jurisdiction would simply switch to a new discriminatory device not covered by the injunction.³⁰

23. See, e.g., *Alabama*, 192 F. Supp. at 679-81 (describing the discriminatory application of literacy tests in Macon County); see also *Louisiana*, 225 F. Supp. at 383 (describing how the state's test requiring interpretation of the constitution was discriminatorily applied by giving African-Americans difficult sections to interpret while whites were given easy sections).

24. *Alabama*, 192 F. Supp. at 680.

25. See, e.g., *United States v. Mississippi*, 339 F.2d 679, 683 (5th Cir. 1964) (describing how the registrar of Walthall County brandished a pistol when African-Americans attempted to register).

26. The Civil Rights Act of 1957 authorized the Attorney General to seek an injunction against any person who interfered with the right to vote in a racially discriminatory manner. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (1957). The Civil Rights Act of 1960 gave the Attorney General access to local voting records, authorized courts to conduct voter registration, and allowed suits against state parties. Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 303, 601, 74 Stat. 86, 88, 90-92 (1960). The Civil Rights Act of 1964 required literacy tests to be administered wholly in writing, created a presumption of literacy for certain persons, provided for expedited hearings of certain voting cases before three-judge panels, and required the collection of registration and voting statistics in certain jurisdictions. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101(a)(2)(C), 101(c), 101(h), 801, 78 Stat. 241, 241-42, 266 (1964).

27. *House Hearings, supra* note 21, at 5. For an excellent, concise discussion of the Department of Justice's enforcement efforts between passage of the Civil Rights Act of 1957 and the Voting Rights Act of 1965, see Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 15-25 (1983).

28. *House Hearings, supra* note 21, at 4.

29. *Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong. 9-14 (1965) (statement of United States Attorney General Nicholas deB. Katzenbach) (discussing the length of time necessary to obtain judicial relief in voting cases).

30. Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed., 1984) (noting that new discriminatory tools were sometimes implemented within twenty-four hours of the eradication of the previous discriminatory tools).

In addition, to evade a court order, some local officials established rules to make registration extremely difficult, if not impossible. Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1210 n.7 (1999)

To combat these tactics, Congress passed the Voting Rights Act of 1965,³¹ providing a number of remedies designed to bring an end to voting discrimination, the most important of which were found in Sections 4, 6, and 5.³² Section 4, the “original heart”³³ of the Act, suspended certain jurisdictions’ use of literacy tests and other devices that served as the predominant means for disenfranchising minority voters.³⁴ Section 6 provided for the appointment of federal examiners to conduct voter registration in certain places.³⁵ Lastly, Section 5 froze into place the voting laws in certain states and localities, requiring federal approval of any changes to these laws, so that once a discriminatory law was suspended under the Act or successfully challenged through litigation, a new discriminatory law could not be enacted as a replacement for the old discriminatory law.³⁶ Of these three core remedies, Section 5 was, and remains, the most novel and drastic.³⁷

(describing “dilatory tactics” of registration officials such as “extending breaks when no registration applications were accepted, having irregular office hours, and refusing to allow more than one applicant at a time to apply”).

31. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

32. Sections 4, 6, and 5 are currently at 42 U.S.C. §§ 1973b, 1973d, and 1973c. In addition to these remedies, Section 10 of the Act directed the Attorney General to institute litigation against poll taxes. 42 U.S.C. § 1973h(b). The need for such litigation, however, was soon largely obviated by a Court decision finding all poll taxes to be in violation of the Fourteenth Amendment. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

33. Derfner, *supra* note 30, at 149.

34. 42 U.S.C. § 1973b(a)(1). Section 4 banned the use of a “test or device” which was defined as:

[A]ny 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. § 1973b(c).

When Congress extended Section 5 in 1975, it broadened the coverage to include discrimination against members of language minority groups. *Id.* § 1973b(f). At the same time, Congress expanded the definition of the term “test or device” to include:

[A]ny practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.

Id. § 1973b(f)(3).

35. *Id.* § 1973d.

36. *Id.* § 1973c. The Senate Judiciary Committee’s 1982 Report on the Voting Rights Act Extension explained how Congress properly anticipated the implementation of new, discriminatory devices after passage of the Act:

Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoff elections were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act. Congress an-

B. Section 5: How It Works

The drastic nature of the Section 5 remedy comes from its abrogation of the autonomy of some state and local governments in all matters related to voting. A detailed description of how it works follows, but this is the basic framework: Section 5 prevents certain state and local governments (usually those with a history of discrimination in voting) from implementing any change in voting laws, no matter how minor, until a federal authority determines that the change does not discriminate against minority voters in either purpose or effect.

About the only limitation of Section 5 is its geographic scope—it does not apply nationwide. Rather, a coverage formula determines the areas subject to its strictures.³⁸ The coverage formula represents an effort to target those places where discrimination seemed most rampant because: (1) a literacy test, or other similar device, had been employed; and (2) there was reduced participation in the election process, as evidenced by low registration or turnout rates.³⁹ Generally, two types of jurisdic-

anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts.

S. REP. NO. 97-417, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 183.

37. Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. PA. J. CONST. L. 665, 686 (2003) (describing Section 5's preclearance requirement as the "most novel feature of the Act—and, to those concerned with the operation of our federal system, the most intrusive"). As the Supreme Court noted, the reason for this drastic scheme was to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

38. When the Act initially passed, the entire States of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered, along with forty counties in North Carolina, and a few other counties in Arizona, Hawaii, and Idaho. S. REP. NO. 94-295, at 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 778. Currently, Section 5 covers all or parts of sixteen states. The States of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered in their entireties. 28 C.F.R. app. pt. 51 (2003). Parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota are also covered. *Id.*

39. *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 156-57 (1977) (plurality opinion) (describing how jurisdictions were covered by Section 5 "whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area"); *see also* Timothy G. O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 772-73 (1983) (noting that the coverage formula "rests on the rationale that the conjunction of low voter registration or turnout and the use of a literacy test . . . establishes a presumption that discrimination exists in the voting process").

When initially passed, the coverage formula applied to those places with lower participation rates and that used a test or device as of November 1964. When extended in 1970, the coverage formula applied to those places with lower participation rates and that used a test or device in November 1968. When extended in 1975, the coverage formula applied to those places with lower participation rates and that used a test or device in November 1972. *See* U.S. Dep't of Justice, Civil Rights Division, Voting Section, *About Section 5 of the Voting Rights Act*, at http://www.usdoj.gov/crt/voting/sec_5/types.htm (last visited Jan. 25, 2004) (discussing history of coverage formula) [hereinafter U.S. Dep't of Justice, *About Section 5*]. The current coverage formula reads as follows:

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in

tions are covered: states and counties.⁴⁰ And, if a state or county is subjected to Section 5, so are all of its political subdivisions. In a covered state such as Texas, for example, not only do actions of the legislature need federal approval, so do voting-related actions of counties, cities, school districts, and water districts.⁴¹ Federal approval is also required for certain changes made by political parties in these covered jurisdictions.⁴²

In these covered areas, Section 5 freezes into place the laws and procedures related to voting as of the date of coverage and requires a jurisdiction to obtain federal approval, commonly referred to as “pre-

the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

42 U.S.C. § 1973b(b).

40. The two types of entities to which the coverage formula applies are states and “political subdivisions.” The term “political subdivision” is defined as “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.” 42 U.S.C. § 1973(c)(2). In the vast majority of states, voter registration is conducted on the county or parish level. However, Section 5 coverage currently extends to several towns in Michigan and New Hampshire. 28 C.F.R. app. pt. 51.

41. 42 U.S.C. §§ 1973b(a)(1), 1973c (providing for coverage of states and “any political subdivision of such State[s]”); *see also* 28 C.F.R. § 51.6 (2003) (“All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of section 5.”).

42. *Morse v. Republican Party of Va.*, 517 U.S. 186, 205 (1996) (holding that a fee charged to delegates at the state nominating convention was a voting change subject to the preclearance requirement).

The Department of Justice has issued the following guideline to determine which changes made by political parties need federal approval:

A change affecting voting effected by a political party is subject to the preclearance requirement:

- (a) If the change relates to a public electoral function of the party and
- (b) If the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5.

For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5.

28 C.F.R. § 51.7 (2003). The guidelines promulgated by the Attorney General have traditionally earned substantial deference from the courts in light of the Department of Justice’s prominent role in implementing the statute. *Lopez v. Monterey County*, 525 U.S. 266, 281 (1999) (*Lopez II*).

clearance,” to implement a change in voting laws or practices.⁴³ One avenue to preclearance is through a declaratory judgment—from a three-judge panel of the United States District Court for the District of Columbia—that the voting change does not have the purpose or effect of denying or abridging the right to vote on account of race, color, or language minority status.⁴⁴ A second route is through submission of the voting change to the Attorney General of the United States.⁴⁵ The Attorney General then has sixty days to review the change to determine whether the jurisdiction has proven that the change is not discriminatory in purpose or effect.⁴⁶ If the Attorney General either does not object to the voting change or affirmatively indicates no objection will be made, then the covered jurisdiction can enforce the change.⁴⁷ Since the onset of Section 5, the vast majority of jurisdictions have opted to submit changes to the

43. 42 U.S.C. § 1973c (requiring federal pre-approval whenever a covered jurisdiction “shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on” the applicable date of coverage).

44. *Id.* (allowing states and political subdivisions to “institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such [voting] qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2)”).

When Section 5 was initially enacted, the United States District Court for the District of Columbia received jurisdiction over declaratory judgment actions involving preclearance because southern district judges often expressed hostility to minority voting rights. *See* Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH* 378, 379 (Chandler Davidson & Bernard Grofman eds., 1994) (describing how southern federal district court judges would “hamstring” claims brought by private plaintiffs or the Department of Justice under the Civil Rights Acts of 1957, 1960, and 1964). *But see* 111 CONG. REC. 10354-55 (1965) (statement of Sen. Hart) (describing the need for uniformity of interpretation of the preclearance provisions as the reason for placing jurisdiction in the D.C. District Court).

45. 42 U.S.C. § 1973c (allowing voting changes to be enforced without a declaratory judgment from the United States District Court for the District of Columbia if the change is “submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection” to the change). The Attorney General has delegated responsibility for making Section 5 determinations to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 51.3 (2003).

46. 42 U.S.C. § 1973c.

47. Section 5 provides that a change becomes precleared if the Attorney General fails to interpose an objection to the change within sixty days of its submission. *Id.* Thus, a change can be precleared without any formal action by the Attorney General. However, if the Attorney General determines that a change merits preclearance prior to the sixty-day deadline, the Attorney General may affirmatively preclear the change prior to the sixtieth day. *Id.* When the Attorney General provides preclearance prior to the sixtieth day, “the Attorney General . . . reserve[s] the right to re-examine the submission if additional information comes to [light] . . . which would otherwise require [an] objection.” *Id.*; *see also* 28 C.F.R. § 51.43 (2003).

If the Attorney General deems a submission to be incomplete, a written request for additional information can be sent to the jurisdiction within the initial sixty-day period. 28 C.F.R. § 51.37(a) (2003). This request stops the clock until the Attorney General receives a complete response and another sixty-day period commences. 28 C.F.R. §§ 51.37(c), (d); *see also* *Branch v. Smith*, 123 S. Ct. 1429, 1436 (2003) (allowing for an extension of time if the Attorney General makes a request for additional information that is “neither frivolous nor unwarranted”); *Georgia v. United States*, 411 U.S. 526, 539-41 (1973) (allowing the Attorney General to suspend the sixty-day clock until the complete submission is received).

Attorney General rather than undergo the time and expense involved in federal district court litigation.⁴⁸

Section 5 applies broadly to all standards, practices, and procedures that affect voting, no matter how minor.⁴⁹ Changes affecting voting include: changes in methods of election, districting plans, annexations, rules for candidate qualifying, procedures for casting write-in votes, and locations of polling places.⁵⁰ Thus, the federal government must scruti-

48. See U.S. Dep't of Justice, *About Section 5*, *supra* note 39 (noting that ninety-nine percent of preclearance requests go through the Attorney General); see also Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING* 52, 53 n.2 (Bernard Grofman & Chandler Davidson eds., 1992) (noting that an overwhelming number of jurisdictions choose to seek approval for voting changes from the Attorney General).

When the Attorney General objects to a change, a jurisdiction still has the option to seek a declaratory judgment in the United States District Court for the District of Columbia. 28 C.F.R. § 51.11 (2003) ("Submission to the Attorney General does not affect the right . . . to bring an action in the U.S. District Court for the District of Columbia . . ."). A decision by the Attorney General to preclear a change is not reviewable in any court, but such a decision does not prevent a voting change from being attacked as violative of other provisions of federal or state law. See *Morris v. Gressette*, 432 U.S. 491, 501-02 (1977) (explaining that the Attorney General's decision to preclear is not subject to judicial review); see also *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-78 (1997) (*Bossier I*) (illustrating that a precleared change may be challenged under any applicable provision of federal or state law); 28 C.F.R. § 51.49 (2003) (same).

49. *Allen v. State Bd. of Elections*, 393 U.S. 544, 564-72 (1969). In *Allen*, the Court rejected a narrow construction of Section 5, noting that the Voting Rights Act was "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," and that Congress's intent in passing Section 5 was to "reach any state enactment which altered the election law of a covered State in even a minor way." *Allen*, 393 U.S. at 565-66; see also *Dougherty County v. White*, 439 U.S. 32, 43 (1978) ("§ 5 must be given the broadest possible scope") (internal quotes omitted).

Since *Allen*, the Court has placed some, but very little, limit on the scope of Section 5. In *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992), the Court decided that changes in the powers and duties of elected officials do not constitute voting changes subject to Section 5 preclearance. *Presley* involved changes made to the authority of county commissioners in Etowah and Russell Counties, Alabama. *Presley*, 502 U.S. at 495, 499. Prior to the changes, individual commissioners had broad authority to fix roads in their individual districts whereas after the changes, individual commissioners had far less authority. *Id.* at 495-99. In the case of Etowah County, this change occurred after voting rights litigation led to the election of an African-American commissioner. *Id.* at 496-97.

The *Presley* Court held that these shifts of power were not voting changes subject to Section 5, acknowledging that while Section 5 was "expansive within its sphere of operation," a change had to have some nexus to voting in order to be subject to the preclearance requirement. *Id.* at 501-03. The Court also provided guidance on the types of changes subject to Section 5 review, delimiting four broad categories: (1) "changes involve[ing] the manner of voting;" (2) changes "involve[ing] candidacy requirements and qualifications;" (3) "changes in the composition of the electorate that may vote for candidates for a given office;" and (4) changes "affecting the creation or abolition of an elective office." *Id.* at 502-03.

50. The Department of Justice has provided the following list as examples of changes which affect voting:

- (a) Any change in qualifications or eligibility for voting.
- (b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.
- (c) Any change with respect to the use of a language other than English in any aspect of the electoral process.
- (d) Any change in the boundaries of voting precincts or in the location of polling places.
- (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

nize and approve everything from a city's annexation of vacant land to a state's adoption of new congressional districts.⁵¹ So, by way of hypothetical, if Tombstone, Arizona, moves its polling place from the local elementary school to city hall, it must obtain preclearance.⁵²

To secure preclearance, a jurisdiction has the burden of proving⁵³ the voting change does not have a discriminatory effect or purpose.⁵⁴ A change discriminatory in effect is one that leads to a retrogression of the ability of minority voters to effectively exercise the electoral franchise.⁵⁵ A change discriminatory in purpose is one adopted with the intent to cause a retrogression of the ability of minority voters to effectively exercise the electoral franchise.⁵⁶ Retrogression is measured by reference to the existing, or "benchmark," practice.⁵⁷

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

28 C.F.R. § 51.13 (2003).

51. *City of Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987) (annexation of vacant land); *Shaw v. Reno*, 509 U.S. 630, 634 (1993) (congressional redistricting).

52. *See Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (requiring preclearance if a covered jurisdiction changes the location of a polling place). Tombstone is covered because the entire State of Arizona is subject to Section 5. *See supra* note 38.

53. 28 C.F.R. § 51.52(a) (2003) (providing that "[t]he burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance"); *Wilkes County v. United States*, 450 F. Supp. 1171, 1177 (D.D.C. 1978) ("In an action for a declaratory judgment under Section 5, the burden of proof is on the plaintiff.").

54. 42 U.S.C. § 1973c (allowing preclearance of a change so long as it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2)").

55. *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2503 (2003); *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) (holding that voting changes were entitled to preclearance because changes "did not increase the degree of discrimination against blacks"); *Beer v. United States*, 425 U.S. 130, 141 (1976) (holding that "the purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Texas v. United States*, 866 F. Supp. 20, 27 (D.D.C. 1994) (explaining that "preclearance [must] be denied under the 'effects' prong of Section 5 if a new system places minority voters in a weaker position than the existing system").

56. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 340 (2000) (*Bossier II*). The standards for evaluating annexations are slightly different than for evaluating other voting changes. An annexation can be precleared if it retrogresses minority voting strength, so long as the method of election of the jurisdiction fairly reflects the minority voting strength remaining after the annexation occurs. *City of Richmond v. United States*, 422 U.S. 358, 371-72 (1975). In *Richmond*, the Court held there was no discriminatory effect in an annexation that reduced the City's African-American population by ten percentage points—from 52 to 42 percent. *Richmond*, 422 U.S. at 363. The Court concluded that no such effect existed because the city had four (out of nine) single-member districts with a majority of African-American population. *Id.* at 371-72.

An unprecleared voting change cannot be enforced. A voting change in a covered jurisdiction “will not be effective as law[] until and unless [pre]cleared,”⁵⁸ and failure to obtain preclearance “renders the change unenforceable.”⁵⁹ If a voting change has not been precleared, the Attorney General or a private plaintiff may challenge any attempted enforcement of the change in a local federal district court.⁶⁰ These cases are commonly known as “Section 5 enforcement actions” and such an action will almost always lead to an injunction prohibiting any implementation of the unprecleared change.⁶¹

Jurisdictions can remove themselves from Section 5’s preclearance requirement by obtaining a declaratory judgment from the United States District Court for the District of Columbia, a so-called “bailout.”⁶² To obtain a bailout, the jurisdiction must prove that during the last ten years: (a) no discriminatory test or device (e.g., a literacy test) has been used; (b) no court has judged the jurisdiction or any of its political subdivisions to have denied or abridged the right to vote; (c) no federal examiners have been assigned to register voters; (d) the subjurisdiction and all political units within it have complied with Section 5; (e) no Section 5 objection by the Attorney General or unfavorable declaratory judgment has been issued by the United States District Court for the District of Columbia; (f) the subjurisdiction and all its political units have eliminated vot-

An annexation can be found to have a discriminatory purpose if the jurisdiction engages in a racially selective annexation policy. *Pleasant Grove*, 479 U.S. at 467. *Pleasant Grove* upheld a lower court denial of preclearance to an annexation of white residents when the city refused, for racial reasons, to annex an area where African-Americans resided. *Id.* at 465-72. The Court has described such racially motivated annexation procedures as objectionable because it indicates a purposeful attempt to retrogress minority voting strength in the future. *Bossier II*, 528 U.S. at 340.

57. 28 C.F.R. § 51.54(b)(1) (2003) provides:

In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction’s applicable date for coverage . . . and is not otherwise legally enforceable under Section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

Id. Thus, the benchmark practice is almost always either the practice in place as of the date of coverage or any practice that has received preclearance since the applicable coverage date.

58. *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam).

59. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).

60. 42 U.S.C. § 1973j(d) (Attorney General); *Allen*, 393 U.S. at 555 (private party).

61. *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) (“If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.”). *Clark* does, however, leave some wiggle room for jurisdictions to avoid an injunction preventing enforcement of a change. For example, if an injunction against enforcement of a change was sought on the eve of an election and equitable principles existed that justified allowing the change to be enforced. *Clark*, 500 U.S. at 654-55.

Implementing a voting change without preclearance could lead to a court ordering a new election to be held without use of the unprecleared change. *See NAACP v. Hampton County Election Comm’n.*, 470 U.S. 166, 182-83 (1985) (instructing the district court to order a new election if the implemented, unprecleared change fails to receive post-election preclearance); John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107, 124-27 (1979) (describing the potential for retrospective relief under Section 5).

62. 42 U.S.C. § 1973b(a)(1).

ing procedures and methods of election which inhibit or dilute equal access to the electoral process, have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising the right to vote, and have engaged in constructive efforts to provide convenient opportunities for registration and participation by minority citizens; and (g) the jurisdiction is not engaged in any statutory or constitutional violation of the right to vote on account of race, color, or membership in a language minority group.⁶³ The jurisdiction must also provide public notice of its intent to bail out and present evidence of minority participation in voting, including data on trends in registration and voting and disparities between minority and non-minority electoral participation.⁶⁴

As is evident from the above description, Section 5 provides a tremendous prophylactic tool in preventing voting-related discrimination and perhaps serves as the principal reason the Voting Rights Act “has been hailed by many to be the most effective [piece of] civil rights legislation ever passed in this country.”⁶⁵ Yet it simultaneously imposes a substantial burden on state and local governments because they must seek approval from federal officials before implementing even the most minor of voting changes. In addition, the price for failure to get preclearance is steep—basically, an automatic injunction against enforcement of the change, and a great deal of proof and expense is necessary to bail out of this scheme.⁶⁶ Section 5 places such a great burden on state and local governments that it would seemingly be unconstitutional. But, so far, the Supreme Court has soundly rejected every such challenge to the statute.

63. *Id.* §§ 1973b(a)(1)(A)–(F), 1973b(f).

64. *Id.* §§ 1973b(a)(2), 1973b(a)(4).

65. *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. of the Judiciary, 94th Cong. 1 (1975)* (statement of Rep. Edwards); *see also* Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 340 (1996) (describing Section 5 as “the single most important provision of the Voting Rights Act and the key to preventing electoral discrimination”); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1419 (1991) (calling Section 5 the “heart of the Voting Rights Act”).

66. A few other aspects of Section 5 underscore the stringent nature of the remedy. First, in making submissions to the Attorney General, a jurisdiction must submit the change in “some unambiguous and recordable manner . . .” *McCain v. Lybrand*, 465 U.S. 236, 249 (1984); 28 C.F.R. § 51.27(c) (2003) (requiring a “clear statement of the change explaining the difference between the submitted change and the prior law or practice”) (emphasis added). This requirement has resulted in ambiguities in submissions being resolved against the jurisdictions. *See, e.g.,* *Boxx v. Bennett*, 50 F. Supp. 2d 1219, 1227 (M.D. Ala. 1999) (noting the “presumption that any ambiguity in the scope of the preclearance request must be construed against the submitting jurisdiction”) (internal quotes omitted). Second, Section 5 is so broad that even a change approved by any federal court other than the United States District Court for the District of Columbia is subject to preclearance to the extent the changes reflect the underlying policy choices of the jurisdiction. 28 C.F.R. § 51.18 (2003) (“Changes affecting voting that are ordered by a Federal court are subject to the preclearance requirement of Section 5 to the extent that they reflect the policy choices of the submitting authority.”); *McDaniel v. Sanchez*, 452 U.S. 130, 150–51 (1981). Third, decisions of state courts that result in voting changes also must be precleared. *See Hathorn*, 457 U.S. at 265 n.16 (noting that “the presence of a [state] court decree does not exempt the contested change from § 5”); *see also* *LULAC of Tex. v. Texas*, 995 F. Supp. 719, 726 (W.D. Tex. 1998) (subjecting a decision of the state supreme court to preclearance review).

II. FROM *KATZENBACH* TO *BOERNE* TO *HIBBS*: CHANGES IN THE SCOPE OF CONGRESS'S ENFORCEMENT POWER AND THE DEVELOPMENT OF THE CONGRUENCE AND PROPORTIONALITY TEST

The Supreme Court, on two occasions, has extensively considered whether Section 5 represents a proper exercise of Congress's enforcement power. In *South Carolina v. Katzenbach*⁶⁷ and *City of Rome v. United States*,⁶⁸ the Court ceded broad enforcement power to Congress and easily upheld the statute's constitutionality.⁶⁹ More recently, however, in *City of Boerne v. Flores*,⁷⁰ the Court has evinced a willingness to put much more severe limitations on Congress's enforcement power. This Section briefly explains the changes wrought by the Court in creating the congruence and proportionality test first set forth in *Boerne* and then provides a detailed description of how the Court has applied the test.

A. *The Shift from a Broad to a Narrow Enforcement Power*

South Carolina v. Katzenbach represented the Court's first foray into the constitutionality of Section 5. In *Katzenbach*, the Court upheld Section 5, employing a highly deferential standard that gave Congress "full remedial powers" to use "all means which are appropriate,"⁷¹ to eliminate unconstitutional voting discrimination.⁷² This power allowed Congress to pass any "appropriate" legislation to carry out the "letter and spirit of the constitution"⁷³

After setting forth this deferential framework, the Court encountered little difficulty in finding Section 5 a rational remedy for Congress

67. 383 U.S. 301, 327 (1966).

68. 446 U.S. 156, 174-75 (1980).

69. In *Georgia v. United States*, 411 U.S. 526 (1973), the Court reaffirmed the constitutionality of Section 5 in a single sentence: "And for the reasons stated at length in *South Carolina v. Katzenbach*, we reaffirm that the Act is a permissible exercise of congressional power under [§] 2 of the Fifteenth Amendment." *Georgia*, 411 U.S. at 535 (internal citations omitted).

The Court's decision in *Lopez v. Monterey County*, 525 U.S. 266 (1999) (*Lopez II*), also discussed Section 5's relationship with Congress's enforcement power. But *Lopez II* provided a much less comprehensive discussion of the issue than in *Katzenbach* and *City of Rome*, and appeared to principally rely on these precedents. See *Lopez II*, 525 U.S. at 283-84. This Article gives in-depth treatment to *Lopez II* in Part IV.

70. 521 U.S. 507 (1997).

71. *Katzenbach*, 383 U.S. at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

72. This deferential standard led the Court to reject the state's argument that Congress could only "forbid violations of the Fifteenth Amendment in general terms" while "the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts." *Id.* at 327.

73. *Id.* at 326. The Court also noted:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 327 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

to employ in the eradication of voting-related discrimination.⁷⁴ While recognizing that Section 5 represented an “uncommon exercise of congressional power,” the Court held that “exceptional conditions [could] justify legislative measures not otherwise appropriate.”⁷⁵ These exceptional conditions included the lengthy and despicable history of voting-related discrimination in many of the jurisdictions covered by Section 5,⁷⁶ including these jurisdictions’ resort to the “extraordinary stratagem” of creating new rules to perpetuate discrimination even in the face of federal court decrees to the contrary.⁷⁷ Thus, with the Court ceding broad enforcement authority to Congress, Section 5 had survived its first constitutional challenge.⁷⁸

Following Congress’s extension of Section 5 in 1970 and 1975,⁷⁹ the Court, in *City of Rome v. United States*,⁸⁰ considered whether *Katzenbach* had been correctly decided and whether Section 5 continued to represent a proper exercise of Congress’s enforcement power.⁸¹ Once again the Court ceded broad enforcement power to Congress, finding that Congress could provide a broad remedy to protect voting rights so long as the legislation was “appropriate.”

While once again giving Congress wide latitude in the exercise of its enforcement power, the Court provided three principal rationales for upholding Section 5.⁸² First, it was appropriate for Congress to ban vot-

74. In *Katzenbach*, the Court also separately upheld the coverage formula used to determine which localities would be required to preclear voting changes—a formula also used to require these same jurisdictions to suspend literacy tests and to allow federal examiners to register voters. *Id.* at 329-33. The Court held that in the places covered by the formula “actual voting discrimination” had occurred and that the bailout procedures provided enough of a safeguard to eliminate any potential “overbreadth” of coverage. *Id.* at 330-31.

75. *Id.* at 334.

76. *Id.* at 329-31. The Court opened its opinion with an extended discussion of the history of voting-related discrimination, relying heavily on the legislative history from passage of the Act. *Id.* at 308-15.

77. *Id.* at 335.

78. Justice Black dissented in *Katzenbach*, as he was unconvinced that federalism allowed such great congressional intrusion into state lawmaking. *See id.* at 355-62 (Black, J., concurring and dissenting). In his view, Section 5 marked a complete distortion of the American constitutional structure of government because requiring a state to “beg” federal authorities for approval of its laws rendered meaningless any distinction between federal and state power. *Id.* at 358 (Black, J., concurring and dissenting). He continued: “It is inconceivable to me that such a radical degradation of state power was intended in any provisions of our Constitution or its Amendments.” *Id.* at 360 (Black, J., concurring and dissenting). To support his view, Justice Black cited the original intent of the framers who chose to deny Congress the power to veto state laws, a power that Congress, in Justice Black’s view, was now asserting through passage of Section 5. *Id.* at 360-62 (Black, J., concurring and dissenting).

79. *See supra* note 10.

80. *City of Rome* involved the denial of a declaratory judgment for preclearance in the United States District Court for the District of Columbia. *City of Rome*, 446 U.S. at 172-73. The city had unsuccessfully sought approval of changes to its boundaries and the method of electing its council. *Id.* at 159-62.

81. *Id.* at 174 (characterizing the city’s argument as one that asked the Court “to do nothing less than overrule our decision in *South Carolina v. Katzenbach*”).

82. These three reasons corresponded with the city’s three principal contentions in this case which were: (1) Congress did not own enforcement power broader than the substantive rights en-

ing changes with a discriminatory effect because Congress could have “rationally” concluded that it was necessary to prevent implementation of changes having a discriminatory effect in jurisdictions with a “demonstrable history of intentional racial discrimination in voting”⁸³ Second, Section 5 was consistent with principles of federalism because the Fifteenth Amendment specifically allowed for an expansion of federal power at the expense of state sovereignty. Therefore, the Court saw “no reason” to depart from its view in *Katzenbach* that Section 5 represented an appropriate means for Congress to carry out its Fifteenth Amendment responsibilities.⁸⁴ Third, the Court rejected the idea that Section 5 had outlived its usefulness, despite the increase in minority participation in voting and office-holding, by deferring to congressional findings indicating the need for the Section 5 remedy to prevent a backsliding of these gains.⁸⁵ The Court also noted that an additional seven years for Section 5 seemed appropriate in view of the ninety-five year history of voting discrimination between the end of the Civil War and passage of the Voting Rights Act.⁸⁶ In short, the Court found extension of the Act to be “plainly a constitutional method of enforcing the Fifteenth Amendment.”⁸⁷

compassed in the Constitution; (2) the remedy violated principles of federalism; and (3) the remedy had outlived its usefulness because of the decline in incidences of voting-related discrimination. *Id.* at 173, 178, 180.

The city also brought claims under the First, Fifth, Ninth, and Tenth Amendments, all of which the Court rejected in a single paragraph. *Id.* at 182-83. The Court did not reach the merits of a claim brought under the Guarantee Clause of Article IV, Section 4 of the Constitution. *Id.* at 183 n.17.

83. *Id.* at 177; *see also id.* at 173-76 (discussing the *Katzenbach* standard and holding that “prior decisions of this Court foreclose any argument that Congress may not . . . outlaw voting practices that are discriminatory in effect”).

84. *Id.* at 178-81.

85. *Id.* at 180-82.

86. *Id.* at 182.

87. *Id.* The Court then proceeded to uphold the district court’s findings that the voting changes at issue were not entitled to preclearance. *See id.* at 183-87.

In *City of Rome*, Justices Blackmun, *id.* at 187, and Stevens, *id.* at 190, wrote concurrences and Justices Powell, *id.* at 193, and Rehnquist (joined by Justice Stewart), *id.* at 206, penned dissents. Of these separate opinions, Justice Rehnquist’s dissent deserves some discussion because it presages some of the issues raised in the recent cases in which the Court has been more restrictive of Congress’s enforcement power.

Justice Rehnquist began his dissent by recognizing that the City itself had been found not to have engaged in discriminatory practices for the previous seventeen years and that the changes involved in the case were found only to have a discriminatory effect. *Id.* at 209 (Rehnquist, J., dissenting). He then explained the three theories of congressional enforcement power relevant to the case:

First, it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation. It has never been seriously maintained, however, that Congress can do no more than the judiciary to enforce the Amendments’ commands. Thus, if the electoral changes in issue do not violate the Constitution, as judicially interpreted, it must be determined whether Congress could nevertheless appropriately prohibit these changes under the other two theories of congressional power. Under the second theory, Congress can act remedially to enforce the judicially established substantive prohibitions of the Amendments. If not properly remedial, the exercise of this power could be sustained only if this Court accepts the premise of the third theory that Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution, in which case Congress by legislative Act could effectively amend the Constitution.

With the decisions in *Katzenbach* and *City of Rome*, it appeared that the Court would apply the relatively relaxed rational basis test to any exercise of congressional enforcement power so long as the federal statute did not restrict, abrogate, or dilute the guarantees found in the Fourteenth and Fifteenth Amendments.⁸⁸ But that has changed in recent years. With William Rehnquist's ascension to Chief Justice, the Supreme Court has consistently reduced federal power over state governments.⁸⁹ In *City of Boerne v. Flores*, the Rehnquist Court continued on this course by redefining Congress's ability to pass legislation under its enforcement power, applying much stricter limits to congressional authority than were extant when Section 5 was previously upheld.

Boerne created a new test for reviewing the constitutionality of Congress's exercise of its enforcement power: the congruence and proportionality test. In creating this test, the Court conceded that Congress has some enforcement power broader than the scope of the Constitution itself, allowing Congress to deter constitutional violations by prohibiting "conduct which is not itself unconstitutional"⁹⁰ and allowing Congress to intrude into "legislative spheres of autonomy previously reserved to the States."⁹¹ However, the Court's concessions to congressional power

Id. at 210 (Rehnquist, J., dissenting).

Justice Rehnquist thought it one thing for Congress to exercise its enforcement power to force a locality to submit its changes for review and bear the burden of proving a lack of discrimination, but that it was quite another for Congress to deny a locality the opportunity to implement changes that had been proven to lack a discriminatory purpose. *Id.* at 209-14 (Rehnquist, J., dissenting). He characterized the majority's decision as a blanket ban on particular dilutive practices even if such practices were adopted without a discriminatory purpose. *Id.* at 215 (Rehnquist, J., dissenting). Justice Rehnquist said no basis existed in the Court's precedents to have a blanket ban on dilutive practices that have a discriminatory effect because, unlike a literacy test, there was no extensive history of jurisdictions using dilutive practices for a discriminatory purpose. *Id.* at 215-18 (Rehnquist, J., dissenting). Thus, in his opinion, Congress had not exercised its powers in a remedial manner, but had instead changed the nature of the substantive constitutional right to vote. *Id.* at 219-20 (Rehnquist, J., dissenting).

88. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); see also David S. Day, *New Dimensions of the Section 5 Enforcement Power*, 47 S.D. L. REV. 366, 368-70 (2002) (discussing *Morgan* and its holding that Congress's exercise of its enforcement power would be reviewed under the rational basis standard); Stephen L. Carter, *The Morgan 'Power' and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 827-28 (1986) (discussing the limits of congressional enforcement power under *Morgan*).

89. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (finding a portion of the Brady Act to be an unconstitutional exercise of federal power over state officials); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (finding a portion of the Indian Gaming Act to be an unconstitutional attempt by Congress to abrogate states' sovereign immunity); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (finding the Gun-Free School Zones Act to be an unconstitutional exercise of Congress's Commerce Clause power); *New York v. United States*, 505 U.S. 144, 177 (1992) (finding a portion of the Low-Level Radioactive Waste Policy Amendments Act to be an unconstitutional exercise of federal power over the states).

90. *Boerne*, 521 U.S. at 518.

91. *Id.* (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). As examples of Congress's power to deter constitutional violations, the Court cited to several provisions of the Voting Rights Act, including Section 5. *Id.* at 517-20. The Court also noted its upholding of the Voting Rights Act's ban on literacy tests despite the facial constitutionality of such tests. *Id.* at 518. Compare *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (upholding a nationwide ban on literacy tests), with *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (finding literacy tests to

stopped there, and the Court then expounded on the limits of the enforcement power.⁹² The Court held that Congress lacks power to “decree the substance” or “alter[] the meaning” of a constitutional right, and that legislation altering the meaning of a constitutional right could not be considered merely as legislation that enforced the right.⁹³ The Court then set forth the test for determining whether Congress has exceeded its enforcement powers:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. *There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.* Lacking such a connection, legislation may become substantive in operation and effect.⁹⁴

be facially constitutional). The significance of *Boerne*'s references to the Voting Rights Act is discussed in Part IV of this Article.

92. *Boerne*, 521 U.S. at 518 (noting that “[a]s broad as the congressional enforcement power is, it is not unlimited” (quoting *Mitchell*, 400 U.S. at 128)).

93. *Id.* at 519 (“[Congress] has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).

94. *Id.* at 519-20 (emphasis added).

To justify this new test, the Court provided an extended discussion of the history surrounding the adoption of Congress's enforcement power and the Court's previous decisions interpreting that power. *Id.* at 520 (citing “history” for confirmation that Congress's enforcement power is “remedial, rather than substantive”). Historical support for the Court's position came from Congress's rejection of the initial draft of the Fourteenth Amendment because it “gave Congress too much legislative power at the expense of the existing constitutional structure.” *Id.* According to the Court, the revised and adopted amendment changed Congress's enforcement power from a “plenary” power to one which was “remedial.” *Id.* at 522. *But see* Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 174-81 (1997) (criticizing the *Boerne* Court's use of history to support its interpretation of Congress's enforcement power); Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 784 (2002) (arguing that the Court misread the historical record in giving a narrow scope to Congress's enforcement powers). As for precedent, the Court noted that its earliest cases deciding the limits of the enforcement power served to confirm Congress's power as remedial, and its more recent decisions, all of which dealt with voting rights, served as additional support for finding Congress's power to be remedial in nature. *Boerne*, 521 U.S. at 524-27.

The opinion acknowledged, however, that the Court's decision in *Katzenbach v. Morgan*, “could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in” the Constitution. *Id.* at 527-28; *see also supra* note 88 (discussing this interpretation of Congress's enforcement power as outlined in *Morgan*). *Morgan* involved a challenge to Section 4(e) of the Voting Rights Act which was passed with the purpose of eliminating New York's literacy test as it applied to Spanish-speaking citizens educated in Puerto Rico. *Morgan*, 384 U.S. at 645 n.3. In upholding Section 4(e), the Court implied that Congress had unlimited authority to expand constitutional rights using the enforcement power. *Id.* at 651 n.10.

However, in *Boerne*, the Court determined that *Morgan* could be interpreted as upholding Congress's attempt to “remedy” unconstitutional discrimination, not expand substantive constitutional rights. *Boerne*, 521 U.S. at 528-29. Moreover, reading *Morgan* more broadly would be incorrect because it would render the Constitution on par with “ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Professor Laurence Tribe described this explanation, authored by Justice Anthony Kennedy, of *Morgan* as “rather brief and a bit cryptic.” TRIBE, *supra* note 15, at 952. Professor Tribe posits that

After establishing this new standard,⁹⁵ the Court placed the Religious Freedom Restoration Act, a statute intended to prevent religious discrimination, under the congruence and proportionality microscope, and concluded that the statute could not meet that test. The Court allowed that preventive rules could sometimes be appropriate remedial measures, but that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”⁹⁶ The Court found that the congressional record lacked sufficient evidence of religious discrimination.⁹⁷ Moreover, even apart from the legislative record’s paucity of evidence, the Court found the statute to be clearly disproportionate to the supposed problem of unconstitutional religious discrimination.⁹⁸ The Court thought the sweeping scope of the statute would likely nullify a significant number of constitutional state laws.⁹⁹ The statute also exacted a “heavy litigation burden,” resulted in a “curtailing [of states’] traditional general regulatory power,”¹⁰⁰ failed to include any limits such as a termination date or a geographic restriction, and was not passed because of an egregious history of constitutional violations.¹⁰¹ Thus, the first statute subjected to the Court’s new test failed to survive that test.

B. The Court’s Post-Boerne Rejections of Federal Remedies Using the Congruence and Proportionality Test

Boerne altered and limited the scope of Congress’s enforcement power. Instead of Congress having broad leeway, legislation enacted under the auspices of the enforcement power must sail through the narrower passage of the congruence and proportionality test.¹⁰² After decid-

this discussion interprets Congress’s action in *Morgan* as remedial because Congress had made a correct factual determination that New York’s literacy test was perhaps enacted with a discriminatory purpose. *Id.* Professor Tribe’s theory seems to be the correct one. In dissent in a subsequent congruence and proportionality case, Justice Kennedy explained how *Morgan* was criticized as an incorrect factual determination that New York’s literacy test involved unconstitutional behavior by the state. *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1993-94 (2003) (Kennedy, J., dissenting) (discussing Justice Harlan’s *Morgan* dissent).

95. Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 117 (2000) (arguing that *Boerne* represented a “new rule of doctrine”).

96. *Boerne*, 521 U.S. at 530.

97. *Id.* at 530-31 (describing the congressional record as containing “anecdotal evidence” about “laws of general applicability which place incidental burdens on religion”).

98. *Id.* at 532 (“Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning.”).

99. *Id.*

100. *Id.* at 534.

101. *Id.* at 532-33.

102. See Day, *supra* note 88, at 367 (describing how the Rehnquist Court’s decisions have set “high and rigorous standards” for the exercise of congressional enforcement power); Geoffrey Landward, Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust, 2002 BYU EDUC. & L.J. 313, 318 (noting how prior to the 1990s, it appeared Congress had “seemingly limitless” enforcement power); Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1134-58 (2001) (describing the Court’s shift from rational basis scrutiny of legislation passed under the enforcement power to “rigorous scrutiny”); Katz, *supra* note 4, at 1202 (noting that *Boerne* and

ing *Boerne*, the Court proceeded to reject four additional federal statutes subjected to the congruence and proportionality test while honing the parameters of the analysis by expounding on the three-part framework for evaluating laws passed under Congress's enforcement power.¹⁰³

In the initial step of the analysis, the Court precisely defines the scope of the constitutional right being violated by states and being remedied by the federal statute.¹⁰⁴ To understand how this step works, take for example the application of the congruence and proportionality test to the Age Discrimination in Employment Act. In that instance, the Court first decided what sort of state acts would be considered unconstitutional age discrimination.¹⁰⁵ The Court did so by undertaking a canvass of its precedent and ended up determining that, in the context of age discrimination, a state can discriminate on the basis of age if the discrimination rationally relates to a legitimate state interest.¹⁰⁶

After finding the contours of the right at issue, the Court turns to the second step of congruence and proportionality—undertaking a review of the scope of the problem of unconstitutional activity that the statute was intended to remedy.¹⁰⁷ To determine the scope of the problem, the Court primarily looks to the congressional record¹⁰⁸ and, to a lesser extent, to

subsequent cases represent “increasingly stringent parameters” on congressional enforcement power); Dean, *supra* note 16, at 728 (describing how *Boerne* and its progeny moved the Court's review of legislation passed pursuant to the enforcement power from “the traditional rational relationship test . . . to a stricter congruence and proportionality test”); Jack M. Beer mann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1030 (2002) (describing the Court's recent narrowing of the congressional enforcement power). *But see* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 473 (1999) (arguing that “the proportionality requirement has been a staple” of the Court's review of Congress's enforcement power while acknowledging that the Court had previously “applied it with varying degrees of vigor”).

103. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that Congress could not subject states to suits under Title I of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that Congress could not subject private individuals to suits under the Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that Congress could not subject states to suits under the Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (holding that Congress could not subject states to suits for patent infringement).

104. *Garrett*, 531 U.S. at 365 (requiring courts, as the first step, to “identify with some precision the scope of the constitutional right at issue”); *see also* *Florida Prepaid*, 527 U.S. at 640 (identifying the constitutional right at issue).

105. *Kimel*, 528 U.S. at 83-86.

106. *Id.* at 83 (“States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.”).

107. *Garrett*, 531 U.S. at 368 (“Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States . . .”).

108. *Kimel*, 528 U.S. at 88 (declaring that examination of the legislative record is necessary to determine if a prophylactic measure is required); *see also* *Florida Prepaid*, 527 U.S. at 639 (noting that for Congress to exercise its enforcement power it must “identify conduct transgressing” a substantive provision of the Constitution); *Boerne*, 521 U.S. at 525, 530-32 (noting that “[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects” (quoting *Katzenbach*, 383 U.S. at 308)).

judicial decisions.¹⁰⁹ The Court focuses on the number of constitutional violations by the states that Congress has identified,¹¹⁰ whether the violations were identified in all or only a few of the fifty states,¹¹¹ and whether the violations identified occurred contemporaneous with the passage of the statute.¹¹² Basically, the Court uses this review of the record to determine if a “widespread and persisting deprivation of constitutional rights”¹¹³ has occurred to support the enactment of the federal remedy.¹¹⁴

Finally, after reviewing the evidence of the problem’s scope, the Court undertakes step three by considering whether the breadth of the remedy adopted by Congress is congruent and proportional to the problem.¹¹⁵ At this step of the analysis, some of the factors considered by the Court are: (1) whether the legislation is geographically targeted to those areas that have the greatest number of problems;¹¹⁶ (2) whether the legislation impacts a broad number of state laws or only a discrete class of state laws;¹¹⁷ (3) whether the legislation includes opportunities for states

109. *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring) (remarking on the lack of “confirming judicial documentation” to show a history of widespread unconstitutional activity by the states).

110. *Id.* at 369 (remarking on the number of incidents of discrimination by states included in the congressional record); *Florida Prepaid*, 527 U.S. at 640 (faulting Congress for only finding two examples of unconstitutional action by the states).

111. *Morrison*, 529 U.S. at 626-27 (noting that the scope of the federal remedy was disproportionate to the problem of discrimination against victims of gender-related crimes because little evidence appeared in the congressional record to show the problem “exist[s] in all States, or even most States”); *Kimel*, 528 U.S. at 90 (noting that the congressional record did not contain evidence that unconstitutional age discrimination was “a problem of national import”).

112. *Garrett*, 531 U.S. at 369 n.6 (acknowledging that evidence existed of discrimination by states against individuals with disabilities, notably through forced sterilization of those with hereditary mental disease in the early part of the twentieth century, but that there was “no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted”); see also Hartley, *supra* note 18, at 51-52 (noting that the congruence and proportionality test requires Congress to be aware of a “contemporaneous pattern of unconstitutional conduct” at the time it passes the remedial statute); John Alan Doran & Christopher Michael Mason, *Disproportionate Incongruity: State Sovereign Immunity and the Future of Federal Employment Discrimination Law*, 2003 DETROIT COLL. L. MICH. ST. U. L. REV. 1, 44-45 (noting that the congressional record “must demonstrate that unlawful discrimination by the States, or the effect of such discrimination, existed at the time the legislative enactments are extended to the states”).

113. *Florida Prepaid*, 527 U.S. at 645 (quoting *Boerne*, 521 U.S. at 526).

114. In *Boerne*, the Court implied that the state of the congressional record would not be the be all and end all in its review of the scope of the problem. *Boerne*, 521 U.S. at 531 (noting that “[j]udicial deference, in most cases, is based not on the state of the legislative record”); see also *Florida Prepaid*, 527 U.S. at 646 (allowing that “lack of support in the legislative record is not determinative” in proving that a problem requiring a remedy does not exist). As a practical matter, in subsequent cases, the Court has looked primarily to the congressional record.

115. *Garrett*, 531 U.S. at 372-73 (discussing the scope of the remedies the ADA provided to plaintiffs against states); *Florida Prepaid*, 527 U.S. at 639 (holding that for Congress to exercise its enforcement power it “must tailor its legislative scheme to remedying or preventing [unconstitutional] conduct”).

116. *Boerne*, 521 U.S. at 532-33 (noting provisions of the Voting Rights Act previously upheld as proper use of enforcement power were “confined to those regions of the country where voting discrimination had been most flagrant”); see also *Florida Prepaid*, 527 U.S. at 647 (noting that when Congress passed the Patent Act it failed to limit its application to only those “States with questionable remedies or a high incidence of infringement”).

117. *Boerne*, 521 U.S. at 532-33 (noting provisions of the Voting Rights Act previously upheld as proper use of enforcement power only impacted “a discrete class of state laws, *i.e.*, state voting

to earn their way out of any remedy;¹¹⁸ (4) whether the legislation has a termination date;¹¹⁹ (5) whether the remedy covers a broad amount of constitutional behavior¹²⁰ or whether it is reasonable to believe many of the laws affected by the remedy have a significant likelihood of being unconstitutional;¹²¹ (6) whether the power to enforce the remedy is held in the hands of many or few persons;¹²² (7) whether the legislation carries a heavy litigation burden for the state and whether any judicial remedy is easily applied;¹²³ and (8) the number of levels of local government the remedy implicates.¹²⁴

After *Boerne* and the first four subsequent applications of the congruence and proportionality test, it appeared that meeting the test would be difficult, if not impossible. Justice Stevens, dissenting in one case, expressed the view that the test threatened any ability of Congress to pass prophylactic legislation using its enforcement power.¹²⁵ In fact, some commentators thought the congruence and proportionality test akin to strict scrutiny in that, once invoked, it appeared to be fatal¹²⁶ to the constitutionality of the statute.¹²⁷ However, in a more recent application

laws"); see also *Florida Prepaid*, 527 U.S. at 646-47 (noting that when Congress passed the Patent Act it failed to limit "the remedy to certain types of infringement").

118. *Boerne*, 521 U.S. at 533 (noting provisions of the Voting Rights Act previously upheld as proper use of enforcement power "permitted a covered jurisdiction to avoid preclearance requirements under certain conditions").

119. *Id.* at 533 (noting provisions of the Voting Rights Act previously upheld as proper use of enforcement power "lapsed in seven years").

120. *Kimel*, 528 U.S. at 86 (finding the Age Discrimination in Employment Act unconstitutional because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable" constitutional standard); *Florida Prepaid*, 527 U.S. at 646 (noting that when Congress passed the Patent Act it "did nothing to limit the coverage . . . to cases involving arguable constitutional violations").

121. *Boerne*, 521 U.S. at 534 (faulting the RFRA for not being "designed to identify and counteract state laws likely to be unconstitutional" (emphasis added)).

122. *Id.* at 532 (noting that "[a]ny law is subject to challenge at any time by any individual" (emphasis added)).

123. *Id.* at 534.

124. *Id.* at 532.

125. *Florida Prepaid*, 527 U.S. at 660 (Stevens, J., dissenting). This position was also the view of Justice Stephen Breyer who wrote that the Court's actions in striking down legislation passed under the auspices of the enforcement power seemed to have rendered as a hollow promise the principal that Congress could prevent some constitutional activity through use of a prophylactic remedy. *Garrett*, 531 U.S. at 387 (Breyer, J., dissenting) (arguing that the Court's declarations that Congress may legislate to provide broader protections than those available in the Constitution "sounds the word of promise to the ear but breaks it to the hope" (citations omitted)); see also Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 131 (2001) (speculating that the effect of the congruence and proportionality test was to limit Congress to "banning conduct that the courts would otherwise declare unconstitutional").

126. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (describing strict scrutiny as "strict in theory, but fatal in fact").

127. See *TRIBE*, *supra* note 15, at 959 (noting that the *Boerne* line of cases subjects Congress's exercise of its enforcement power to "something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality"); Robert C. Post & Reva B. Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 477 (2000) (comparing the congruence and proportionality test to "the narrow tailoring required by strict scrutiny").

of the test, the Court proved it possible for a federal remedy to survive congruence and proportionality.

C. Nevada Dep't of Human Res. v. Hibbs: *A Wholesale Retreat or a Brief Respite from Using the Congruence and Proportionality Test to Nullify Congressional Remedies?*

*Nevada Department of Human Resources v. Hibbs*¹²⁸ marked the first occasion in which a federal statute survived application of the congruence and proportionality test. The case involved a provision of the Family and Medical Leave Act (FMLA) that allows a state employee to sue for money damages if the state interferes with the employee's right to take up to twelve weeks of unpaid leave to care for a spouse, parent, or child with a serious health condition.¹²⁹ In *Hibbs*, the Court continued to apply its tripartite congruence and proportionality analysis, but put some new gloss on it.

The most important contribution *Hibbs* made to the congruence and proportionality body of jurisprudence is that the Court somewhat lessened Congress's burden to prove a widespread pattern of recent constitutional violations to justify a prophylactic remedy. Three things are evident in this regard. First, the greater the constitutional scrutiny provided by the Court to the right the federal remedy intends to secure, the more deferential the Court will be to Congress.¹³⁰ Second, the Court will be more deferential to Congress when the right being secured involves discrimination that is difficult to ferret out on a case-by-case basis.¹³¹ Third, the Court will relax its requirement of recent discrimination contemporaneous with passage of the statute when a long history of discrimination exists.¹³²

128. 123 S. Ct. 1972 (2003).

129. *Hibbs*, 123 S. Ct. at 1976.

130. The Court viewed the FMLA as an attempt to remedy "gender-based discrimination in the workplace." *Id.* at 1978. Thus, the Court recited its standard for protection from gender discrimination, noting its extension of heightened scrutiny to gender distinctions and its requirement that such distinctions "serv[e] important governmental objectives" and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* (internal citations omitted). The Court then used this higher level of scrutiny to lessen Congress's burden of identifying a pattern of constitutional violations. *Id.* at 1982 ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.").

131. *Id.* at 1982 (asserting that it was reasonable for Congress to think that gender stereotyping could "lead to subtle discrimination that may be difficult to detect on a case-by-case basis").

132. In *Hibbs*, the Court provided a brief canvass of the history of both its and Congress's attempts to protect citizens from gender discrimination. The Court chastised itself for sanctioning gender-based discrimination for many years and for failing to reverse this course until 1971. *Id.* at 1978 ("Until our decision in *Reed v. Reed*, 404 U.S. 71 (1971) . . . it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any basis in reason . . . could be conceived for the discrimination." (internal quotes omitted)). The Court also remarked on how Congress attempted to remedy gender discrimination through passage of Title VII. *Id.* However, despite these efforts by both federal branches, the Court found that "state gender discrimination did not cease." *Id.*

The second lesson of *Hibbs* is that just because a prophylactic remedy is justified, Congress cannot enact any remedy it desires.¹³³ The Court's first consideration now seems to be whether *any* prophylactic remedy can be enacted and the second consideration has become the burden the enacted remedy places on the states.¹³⁴ In previous cases, these two considerations seemed to work in concert. To put it another way, the lack of evidence in the congressional record and the lack of proportionality of the remedy previously seemed to merge and blur. Now the Court has more distinctly parsed these two steps of the analysis.

So where does this surprising¹³⁵ recent case leave congruence and proportionality and the Court's federalist bent? Does the upholding of the FMLA represent a wholesale retreat or merely a brief respite from the Court's recent, nearly wholesale disregard for congressional power over the states?¹³⁶ *Hibbs* most likely represents a small retreat from federalist principles, one that should not be over-read by those who pine for a return to the days of *Katzenbach* with a seemingly unfettered congressional power, but one that provides hope for core civil rights remedies like the Voting Rights Act.¹³⁷

Finally, the schizophrenia of the congruence and proportionality test leaves a large amount of uncertainty. *Hibbs* fails to mention a host of factors, such as sunset provisions and geographical restrictions, that seemed to be important to previous congruence and proportionality out-

After examining this backdrop, the Court turned to a review of the evidence before Congress when it passed the FMLA, finding this evidence demonstrated the "persistence of such unconstitutional discrimination by the States" that passage of prophylactic legislation by Congress was justified. *Id.* at 1979. In this discussion, the Court cited evidence from: (1) Bureau of Labor Statistics studies that found disparities between the provision of maternity and paternity leave in the private sector; (2) studies showing that states provided inequitable policies for maternity and paternity leave; and (3) testimony arguing that, even where equitable policies were in place, these policies were applied in discriminatory ways. *Id.* at 1979-80.

133. *Hibbs* held that an "across-the-board, routine employment benefit for all eligible employees" was allowable to solve the "'difficult and intractable proble[m]" of gender discrimination since previous federal remedies, such as Title VII, had failed. *Id.* at 1982 (quoting *Kimel*, 528 U.S. at 88). The Court described the remedy as "narrowly targeted at the fault line between work and family" unlike other federal statutes that had been found to fail the congruence and proportionality test because they "applied broadly to every aspect of [the] state employers' operations." *Id.* at 1983. The Court also stressed other limitations in the remedy, including its requirement that only unpaid leave be provided; its exceptions for recently hired, part-time, and high-level employees; its burden upon employees to request leave in advance and provide certification from a health-care provider; and its limitations on recovery in federal court litigation. *Id.* at 1983-84.

134. The Court found: "In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify enactment of prophylactic . . . legislation." *Id.* at 1981.

135. See Michael Kinsley, *Rehnquist's Surprise*, WASH. POST, May 30, 2002, at A23 (describing how the Court's decision to uphold the FMLA "surprised everybody").

136. See Anne Gearan, *States Must Grant Family-Leave Rights*, DESERET NEWS, May 28, 2003, at A2 (describing *Hibbs* as "a surprising departure from the conservative-leaning court's usual stance on states' rights cases").

137. See Linda Greenhouse, *Justices, 6-3, Rule Workers Can Sue States Over Leave*, N.Y. TIMES, May 28, 2003, at A1 (describing how *Hibbs* "was widely seen as a potential watershed because it moved the debate about congressional authority close to the core of traditional civil rights concerns").

comes (though it seems likely these factors have not been rendered irrelevant but will lie dormant until erupting at a later date). Thus, *Hibbs* leaves a “muddle” that “underlines the absence of recognizable principles in the court’s [sic] decisions governing the balance of power between states and the federal government.”¹³⁸ In reality, congruence and proportionality may represent little more than “the Court’s view of whether the statute was necessary.”¹³⁹

III. AN UNAMENDED EXTENSION OF SECTION 5 WILL LIKELY FAIL THE CONGRUENCE AND PROPORTIONALITY TEST

It is this muddled mess of a congruence and proportionality test that Congress will need to evaluate while considering the extension of Section 5. So how might Section 5 fare under the test? If extended in its entirety and without revision, Section 5 seems likely to fail. Congress will be passing the statute under constitutional provisions that protect the right of citizens to vote without purposeful discrimination on the part of government officials. This right, which the Court protects with strict scrutiny, combined with the long history of purposeful discrimination in voting and with more recent voting-related problems, will provide enough evidence for Congress to demonstrate a pattern of discrimination that justifies a prophylactic remedy. However, because the level of purposeful discrimination in voting has by all accounts diminished, the Court, especially one with a generally conservative federalist bent, seems unlikely to find the same unique and stringent Section 5 remedy initially passed in 1965 to be congruent and proportional to the modern-day dilemma of voting discrimination.

138. *State’s Rights Muddle*, WASH. POST, May 28, 2003, at A18.

139. Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 770 (1998) (describing his view of how the Court uses the congruence and proportionality test); see also Day, *supra* note 88, at 373 (describing the congruence and proportionality test as requiring Congress to produce “some undefined quantum” of evidence of unconstitutional conduct on the part of states).

As this Article went to press, the Rehnquist Court released yet another decision involving its congruence and proportionality doctrine—a decision that upheld Congress’s passage of Title II of the Americans with Disabilities Act. *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). This decision appears to further anchor the idea that first took shape in *Hibbs*, in that the Court seems to be placing a lower requirement on Congress to provide a well-documented record of proof of constitutional violations by state governments when Congress acts to protect constitutional rights to which the Court itself would grant greater protection and when a longstanding history of discrimination exists. *Lane*, 124 S. Ct. at 1988-92 (discussing historical evidence of disability discrimination in light of the fact that Title II seeks to protect basic constitutional rights “which are subject to more searching judicial review”). Thus, *Lane*, like *Hibbs*, provides great hope for core civil rights remedies.

This hope, however, should not be overstated. *Lane* has its limits. First, the *Lane* Court only endorsed Title II in one particular context—as applied to access to the courts. *Id.* at 1993 (holding that “Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ . . . authority to enforce the guarantees of the Fourteenth Amendment”). Second, even in the limited context of access to the courts, *Lane*, like *Hibbs*, highlights the discrete nature of the remedy provided by Congress. *Id.* (“The remedy Congress chose is nevertheless a limited one.”); *supra* note 133 (describing how *Hibbs* stressed the limitations of the FMLA).

A. Applying Step One of the Congruence and Proportionality Test to Section 5: Protecting the Right to Vote Found in the Fourteenth and Fifteenth Amendments

The starting point for analyzing whether an extension of Section 5 will meet the congruence and proportionality test is determining the scope of the constitutional right at issue. The Court has held that the Constitution guarantees protection from purposeful discrimination in voting. The Fifteenth Amendment prohibits “purposefully discriminatory denial or abridgment by government of the freedom to vote”¹⁴⁰ In other words, the Fifteenth Amendment protects against rules that deny access to the ballot through, for example, discrimination in registration procedures or in the location of polling places.¹⁴¹ The Fourteenth Amendment prohibits voting systems “‘conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.’”¹⁴² Thus, as it relates to voting, the Fourteenth Amendment protects against vote dilution—the practice of limiting the ability of minority groups to “convert their voting strength into control of, or at least influence with, elected public officials”¹⁴³ that most commonly occurs when a cohesive bloc of minority voters are submerged into a similarly cohesive but larger bloc of non-minority voters.¹⁴⁴ These standards will then serve as the launching pad for the Court’s congruence and proportionality analysis.¹⁴⁵

140. *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion); *see also* *Myers v. Anderson*, 238 U.S. 368, 379 (1915) (holding that invidious motivation is necessary to a Fifteenth Amendment claim); *Guinn v. United States*, 238 U.S. 347, 363-65 (1915) (same).

141. *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring) (describing types of voting laws that implicate ballot access, including registration requirements, polling place locations, and methods of casting ballots).

142. *Mobile*, 446 U.S. at 66 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

143. Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court, in THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 13, 14 (Lorn S. Foster ed., 1985).

144. *See* Derfner, *supra* note 30, at 4 (defining vote dilution).

Examples of voting changes that could result in vote dilution are: adoptions of at-large methods of election, staggered terms, majority-vote requirements, numbered posts, redistrictings, annexations, and switches from elected to appointed governing bodies. *See City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) (noting the dilutive impact of staggered terms); *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982) (majority vote); *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (numbered posts); *City of Richmond v. United States*, 422 U.S. 358, 370 (1975) (annexations); *Whitcomb*, 403 U.S. at 142-44 (at-large elections); *Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982) (fragmented districts).

145. It bears mentioning that this determination of the substantive nature of the constitutional right to vote could aptly be criticized as overly simplistic. After all, especially in the context of vote dilution, there are subtleties and intricacies to proving purposeful discrimination. For example, unconstitutional vote dilution seemingly can be proved without evidence of a racial motivation on the part of government officials. *See Rogers*, 458 U.S. at 647 (Stevens, J., dissenting) (criticizing the majority opinion for finding purposeful discrimination in maintenance of dilutive method of election when “the persons who allegedly harbored an improper intent are never identified or mentioned”). Yet the Court appears generally unwilling to examine such subtleties of the contours of constitutional rights in the application of the congruence and proportionality test. Rather, the Court’s practice has been to summarily dictate the constitutional right at issue without providing much gloss on the standard. *See Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1978 (2003) (using only one paragraph to describe the nature of the constitutional right at issue); *see also* Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming A Coordinate Branch*, 4 GREEN BAG 2d 351, 353 (2001)

B. Applying Step Two of the Congruence and Proportionality Test to Section 5: Assessing the Scope of the Problem of Unconstitutional Voting Discrimination

After delimiting the scope of the right, the Court will review the record Congress compiles to determine the extent to which states and local governments have engaged in purposeful voting discrimination.¹⁴⁶ The Court will decide whether Congress has compiled enough evidence of arguably¹⁴⁷ unconstitutional behavior by the states to identify a “widespread and persisting” pattern of unconstitutional activity in the voting arena.¹⁴⁸ Obviously, Congress has yet to compile that record. However, it is reasonable to assume that, while Congress will certainly be able to gather evidence of a great many instances of arguably unconstitutional voting discrimination, it will be unable to marshal the same amount of stark, widespread, and indisputable evidence of recent purposeful voting discrimination that it compiled when it first imposed the stringent Section 5 scheme.

The congressional record will likely contain a broad mix of evidence related to arguably unconstitutional behavior that can be placed into three general categories: (1) instances of unconstitutional denial of access to the ballot; (2) instances of unconstitutional vote dilution; and (3) evidence of racially polarized voting. The next three subsections explain how the Court will likely assess this evidence in determining the scope of the problem of unconstitutional voting discrimination. Yet before moving on, it is important to stress that this canvass of the potential congressional record does not purport to capture every possible example or instance of arguably unconstitutional racial discrimination in voting that has ever occurred. The point and purpose of this discussion is to delimit the contours of the arguments and evidence Congress likely will proffer to support the extension of Section 5 and the Court’s likely response to this evidence.

(criticizing the Court’s application of the congruence and proportionality test for failing to “make sense of the complexity and entirety” of the constitutional right involved).

146. It is not entirely clear whether the Court will only accept evidence of state violations or whether evidence of local government violations can also lend support to Congress’s determination of the scope of the problem of unconstitutional voting discrimination. In one congruence and proportionality case, the Court refused to extend its inquiry as to unconstitutional activity beyond the states themselves. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69 (2001).

In a later congruence and proportionality test, the Court seemed to reverse itself. *See Lane*, 124 S. Ct. at 1991 n.16 (noting that evidence of constitutional violations of non-state governmental actions is relevant to a congruence and proportionality inquiry). This Article assumes that in considering Congress’s evidence of unconstitutional voting discrimination, the Court likely will accept evidence of problems at the local level as well as the state level.

147. The term “arguably” is used because the Court’s congruence and proportionality test appears to give this sort of deference to Congress’s judgment. *See Garrett*, 531 U.S. at 370 (considering evidence of disability discrimination even though the unconstitutionality of such discrimination was “debatable”).

148. *See supra* notes 107-14 and accompanying text.

This discussion proceeds along two different tracks in its assessment of how the Court will handle the congressional record. First, it undertakes a “strict, skeptical review”¹⁴⁹ of the potential evidence—the same type of stringent review the Court took in its first five applications of the congruence and proportionality test.¹⁵⁰ Second, it briefly undertakes a more relaxed review of the potential evidence—similar to the review applied in *Hibbs*. Either way, the point of this discussion is that a long history of voting discrimination combined with evidence of recent problems will serve as an adequate justification for Congress to pass some sort of prophylactic remedy. However, the more recent history of discrimination is of a different and less widespread quality than the recent history demonstrated when Section 5 was initially enacted and was subsequently extended.

1. A Strict, Skeptical Review of the Congressional Record

a. Evidence of unconstitutional vote denial

Congress will likely encounter the most difficulty in creating a substantial record of continuing widespread, purposeful, and unconstitutional discrimination in the area of minority voters’ access to the ballot. Gone are the days when state voter registration laws and local registrars frequently and severely limited and denied minority voters’ access to the ballot. As Professor Samuel Issacharoff observed in the early 1990s, “A quarter century of federal policing of the electoral processes has markedly transformed the political landscape. Gone are the poll taxes, the literacy tests, and the other overt barriers to voter registration.”¹⁵¹

In fact, with the advent of laws such as the National Voter Registration Act (NVRA),¹⁵² which allows for voter registration by mail and makes voter registration widely available at places such as state department of motor vehicles agencies and public assistance agencies,¹⁵³ minority voters seemingly enjoy widespread registration opportunities, and, once on the voting rolls, minority voters can no longer be easily

149. Landward, *supra* note 102, at 327; *see also* Colker & Brudney, *supra* note 125, at 123 (describing how the Rehnquist Court has subjected congressional fact-finding and support for anti-discrimination law to “searching, skeptical review”).

150. For example, in *Garrett*, a broad array of evidence of disability discrimination was presented to the Court. *See Garrett*, 531 U.S. at 366-74 (analyzing the respondent’s evidence of disability discrimination as well as discussing the Court’s decisions on prior cases involving evidence of disability discrimination). Yet the Court picked apart this evidence in such a way as to render most of it irrelevant. *Id.*; *see also* Pamela Brandwein, *Constitutional Doctrine as Paring Tool: The Struggle for “Relevant” Evidence in University of Alabama v. Garrett*, 35 U. MICH. J.L. REFORM 37, 43-65 (2002) (discussing how the Court used constitutional doctrine as a “paring tool” to limit evidence of unconstitutional activity).

151. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1833-34 (1992).

152. National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-10 (2000).

153. *Id.* §§ 1973gg-2 to 1973gg-5.

purged.¹⁵⁴ Also mostly, but not entirely, gone are the days when polling places were intentionally placed in environments known to be unwelcome to minority voters, such as all-white social clubs.¹⁵⁵ And many states, including a number subject to Section 5, have continued to open up additional avenues to access, through the adoption of pre-election day voting,¹⁵⁶ easier absentee voting,¹⁵⁷ and even elections conducted by mail.¹⁵⁸

The Department of Justice's recent enforcement of Section 5 confirms that minority voters' problems have largely not been related to ballot access. For the six-year period from January 1, 1997, to December 31, 2002, the Department of Justice received submissions of about 29,500 changes that could potentially be dilutive of minority voting strength and about 48,100 changes that could potentially restrict minority voters' access to the ballot.¹⁵⁹ During the same time period, the Department prevented implementation of forty-two changes, thirty-six of which dealt with changes that would have a dilutive impact on minority votes while only six dealt with changes that would have negatively impacted minority voters' ballot access.¹⁶⁰ What these statistics show is that only fifteen percent of the Department's recent objections have been to changes that have the potential for vote denial, even though about two-thirds of the recent changes reviewed by the Department have been to vote denial-type changes.¹⁶¹

154. See *id.* § 1973gg-6.

155. See U.S. Comm'n on Civil Rights, Report on the Voting Rights Act: Ten Years After, 104-07 (1975) (discussing the placement of polling places in environments hostile to minority voters); see also U.S. Comm'n on Civil Rights, Report on The Voting Rights Act: Unfulfilled Goals, 29-31 (1981) (same).

156. E.g., TEX. ELEC. CODE ANN. § 85.001 (Vernon 2003) (allowing so-called "early voting" that lets voters cast ballots up to seventeen days before an election).

157. E.g., N.C. GEN. STAT. § 163-226 (2002) (allowing no-excuse absentee voting).

158. E.g., ARIZ. REV. STAT. ANN. § 16-409 (West 2003) (allowing for the conduct of "mail ballot" elections by certain jurisdictions).

159. See U.S. Dep't of Justice, Civil Rights Division, Voting Section, *Section 5 Changes by Type and Year*, at http://www.usdoj.gov/crt/voting/sec_5/changes_00s.htm (last visited Jan. 31, 2004) [hereinafter *Section 5 Changes 2000s*]; see also U.S. Dep't of Justice, Civil Rights Division, Voting Section, *Section 5 Changes by Type and Year*, at http://www.usdoj.gov/crt/voting/sec_5/changes_90s.htm (last revised Jan. 31, 2004) [hereinafter *Section 5 Changes 1990s*]. For the purposes of this tally, the following change types were considered as having the potential for vote dilution: redistricting, annexation, incorporation, method of election, form of government, and consolidation or division of political units. *Id.* The following change types were considered as having the potential for vote denial: polling places, precincts, registration or voter purge, bilingual procedures, special elections, voting methods, and candidate qualifications. *Id.*

160. See generally See U.S. Dep't of Justice, Civil Rights Division, Voting Section, *About Section 5 of the Voting Rights Act*, at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last revised Jan. 31, 2004) (listing documents that identify the Attorney General's changes relating to voting).

161. In addition to the above listed changes that clearly fall into one category or another, the Department of Justice has also precleared about 16,100 changes it describes as "miscellaneous." See *Section 5 Changes 2000s*, *supra* note 159. Most of these changes would probably be included in the vote denial category.

The states do, however, have a long history of purposeful denial of minority voters' access to the ballot.¹⁶² But, the congruence and proportionality test may require more recent evidence of widespread purposeful discrimination in this area.¹⁶³ True, there have most certainly been instances in the past couple of decades of state officials' purposeful discriminatory denial of minority voters' access to the ballot.¹⁶⁴ Yet, despite

162. See *supra* Part I.A.

163. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (searching the congressional effort for "modern instances" of unconstitutional state action).

164. For example, the State of Mississippi operated a very burdensome voter registration system until the late 1980s. See generally Mississippi State Chapter, *Operation PUSH, Inc. v. Mabus*, 932 F.2d 400, 402-04 (5th Cir. 1991) (discussing Mississippi's past purposeful, discriminatory efforts of impeding black citizens' participation in voting). The State of Mississippi used a "dual registration" system requiring a citizen to register with the county to vote in federal, state, and county elections, and to register with the city to vote in municipal elections, while also severely limiting county registrars from conducting registration outside of the registrar's office. *Mabus*, 932 F.2d at 402. This system was challenged under Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments, and was ultimately found to violate Section 2. See *id.* at 404 n.3.

The mere existence of felon disenfranchisement laws may provide a modern-day example of arguably unconstitutional race discrimination, with the basic argument being that felon disenfranchisement laws constitute racial discrimination because they disproportionately impact African-American voters and are often adopted with discrimination in mind. See Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1160-69 (1994) (discussing constitutional arguments against felon disenfranchisement); see also Tanya Dugree-Pearson, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359, 391-95 (2002) (arguing that felon disenfranchisement violates the Fourteenth and Fifteenth Amendments). In addition, the manner in which these laws are implemented could provide evidence of arguably unconstitutional behavior. See Laura Parker, *Panel Scrutinizes Mistake-Riddled 'Cleansing' of Voter Rolls*, USA TODAY, Jan. 15, 2001, at 4A (describing Florida officials' bungled attempt to purge felons from the registration books); see also Robert E. Pierre, *Botched Name Purge Denied Some the Right to Vote*, WASH. POST, May 31, 2001, at A01 (describing how Florida's felon purge procedures disproportionately affect African-Americans); John Lantigua, *How the GOP Gamed the System in Florida*, THE NATION, Apr. 30, 2001, at 11 (describing Florida's felon purge as "a very old, traditional form of racism").

However, the courts have generally looked unfavorably on challenges alleging that felon disenfranchisement laws violate either the Constitution or the Voting Rights Act. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 53-54 (1974) (refusing to apply strict scrutiny to a felon disenfranchisement law); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810-11 (1969) (holding that pretrial detainees have no Equal Protection right to an absentee ballot); see also *Wesley v. Collins*, 605 F. Supp. 802, 814 (M.D. Tenn. 1985) (holding that the Tennessee felon disenfranchisement law does not violate the Constitution or the Voting Rights Act). But see *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (finding a felon disenfranchisement law unconstitutional because it was adopted with a discriminatory purpose).

While overt barriers to access have greatly receded, more subtle barriers may still exist, such as through programs to intimidate or harass minority voters. See, e.g., Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 360-67 (2002) (describing anecdotal evidence of minority voter intimidation and harassment). However, while some intimidation and harassment undoubtedly occurs, it is not clear this activity is recent and widespread. See *id.* at 381 (acknowledging "a surprising dearth of serious news reporting on minority voter intimidation in recent years"). Moreover, some of this activity could be characterized as politically, rather than racially motivated; that is, of course, unless minority voters are the only voters targeted. See *id.* at 383 (noting that "in close races in which Democrats regard the turnout of their traditional minority base as critical to victory, Republicans can be expected to respond with attempts to suppress that turnout"). Finally, much of this action is perpetrated by private individuals or political parties, not state or local government actors, and thus, will likely not qualify as evidence to support the need to extend Section 5. See *Garrett*, 531 U.S. at 368 (noting that Congress's enforcement power "is appropriately exercised only in response to state transgressions").

this recent evidence, the Court will likely view it as much more limited than the recent evidence of vote denial surrounding passage of Section 5 in 1965 and its subsequent extensions in 1970, 1975, and 1982.¹⁶⁵

b. Evidence of unconstitutional vote dilution

Congress could encounter some difficulty proving recent instances of unconstitutional discrimination in the area of vote dilution. There will likely be few clear examples and court findings of purposeful, unconstitutional adoption or maintenance of discriminatory methods of election or districting plans.¹⁶⁶ Yes, Congress can cull a number of examples of grossly outrageous purposeful discrimination, such as when Georgia had a legislator who was found by a federal court to be a “racist” as chair of one of its redistricting committees.¹⁶⁷ However, a substantial amount of

There have also been cases involving arguably unconstitutional behavior in the hiring of poll workers and in the hostile actions of poll workers toward minority voters. *See, e.g.*, *United States v. Berks County*, 250 F. Supp. 2d 525, 527 (E.D. Pa. 2003) (describing poll workers’ hostile treatment of Latino voters); *United States v. Charleston County*, C.A. No. 2:01-0155-23 (D.S.C. Mar. 6, 2003) (describing hostile actions of poll workers toward African-American voters), at http://www.scd.uscourts.gov/Judges/P_Duffy.asp (last visited Jan. 31, 2004); *Harris v. Graddick*, 615 F. Supp. 239, 242 (M.D. Ala. 1985) (confirming a settlement in a class action suit against the State of Alabama which alleged discrimination in the appointment of poll workers). But, again, these problems seem unlikely to be pervasive enough to satisfy a conservative, skeptical court.

165. A compelling case might be made that ballot access still presents a major problem for language-minorities because of the use of English-only elections. For example, the registration rate for Latinos lags far behind whites and African-Americans. However, this may result from factors apart from purposeful discrimination. *See* Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, in *RACE AND REDISTRICTING IN THE 1990S*, at 13, 25-26 (Bernard Grofman ed., 1998) (noting that there is “a greater proportion of non-voters among the Hispanic population. This is largely a product of the lower citizenship rates among the Hispanic population.”); *see also* Steve Bickerstaff, *Effects of the Voting Rights Act on Reapportionment and Hispanic Voting Strength in Texas*, 6 *TEX. HISP. J.L. & POL’Y* 99, 112 (2001) (noting that in Texas “[a] significant percentage of Hispanic residents remain non-citizens and cannot register to vote”).

Nevertheless, other provisions of the Voting Rights Act specifically guarantee language-minorities access to the ballot. Section 4(e) of the Act protects the rights of Puerto Rican citizens. 42 U.S.C. § 1973b(e); *see also* *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (holding that failure to provide Spanish-language materials and assistance violates Section 4(e)); *Torres v. Sachs*, 381 F. Supp. 309, 311-12 (S.D.N.Y. 1974) (same); *Arroyo v. Tucker*, 372 F. Supp. 764, 767-68 (E.D. Pa. 1974) (same). Language minorities may also bring ballot-access cases under Section 2 of the Voting Rights Act. *See* *Hernandez v. Woodard*, 714 F. Supp. 963, 972-73 (N.D. Ill. 1989) (applying Section 2 to the failure to appoint Spanish-speaking registrars). Finally, and most significantly, Section 203 of the Act requires certain covered jurisdictions to provide materials and assistance to language-minorities, including Asians and Native Americans. 42 U.S.C. § 1973aa-1a; 28 C.F.R. §§ 55.1 to 55.24 (West 2003) (outlining the requirements of Section 203); *see also* *United States v. Metropolitan Dade County*, 815 F. Supp. 1475, 1478-79 (S.D. Fla. 1993) (requiring the provision of Spanish-language election materials pursuant to Section 203).

166. This is evident from the types of cases the Supreme Court has decided in recent years. The Court has not issued an opinion regarding unconstitutional vote dilution since 1982. *See* *Rogers*, 458 U.S. at 616 (finding an invidious purpose in the dilution of voting strength).

167. *Busbee*, 549 F. Supp. at 500 (noting that the Chairman of the Georgia House Permanent Standing Committee on Legislative and Congressional Reapportionment after the 1980 Census frequently used a highly offensive, pejorative term to refer to African-Americans). Another example of blatant racism was one Pennsylvania state legislators’ reaction upon learning the minority percentage in his district would be increased. *See* Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?* 4 *U. PA. J. CONST. L.* 735,

counter-evidence might be presented to demonstrate that a great number of systems that prevented minority voters from electing candidates of choice have been changed, and that a vastly greater number of minority candidates have been elected to government at all levels. After all, in 1965 there were fewer than 200 African-American elected officials nationwide,¹⁶⁸ whereas in 2000, there were 9,040 such officials, with large gains in the number of African-American officials in Section 5 covered states such as Georgia, Louisiana, Mississippi, South Carolina, and Texas.¹⁶⁹

Despite these facts, Congress should have a relatively easy time compiling a record of recent arguably unconstitutional behavior in the vote dilution area. This is because, since 1982, many cases have been successfully brought under Section 2 of the Voting Rights Act challenging dilutive practices, especially the practice of using at-large elections.¹⁷⁰ While these challenges do not necessarily amount to constitutional violations, the standard under the Section 2 "results test" seems to closely, if not precisely, mirror the standard for proving vote dilution under the Fourteenth Amendment.¹⁷¹

750 (2002) ("Look, I'm a white mother-f--er from Philadelphia. And I don't want no more blacks or Spics in my district." (internal quotations omitted)).

168. See U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 15 (1968). In 1968, there were 1,469 African-American elected officials. DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000, at 5 (2002).

169. BOSITIS, *supra* note 168, at 5. The number of Latino elected officials has also increased. In 1981, there were six Latinos in Congress and in 1995 there were seventeen Latinos. See Bickerstaff, *supra* note 165, at 105 tbl.1. In Texas, there were twenty-one Latinos in the legislature in 1981 and thirty-five Latinos in the legislature in 1999. *Id.* at 106 tbl.2.

170. Section 2 bars the use of election procedures that have a discriminatory result. 42 U.S.C. § 1973(a) (barring the imposition of any voting practice 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 [or membership in a minority language group]"). Most commonly, Section 2 has been used to attack at-large methods of election. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 42 (1986); see also Davidson & Grofman, *supra* note 44, at 383-86 (describing the "numerous suits attacking . . . at-large elections" since passage of the 1982 amendment to Section 2); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707 (1993) (describing how the 1982 amendment to Section 2 left the courts to confront with "literally thousands of challenges to election schemes that did not fairly reflect the voting strength of minority communities"). And it is this type of voting rights litigation that has greatly contributed to the increases in the number of minority officials.

171. See James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 32 (1982) ("It is difficult, however, to distinguish the Rogers 'intent' test from the 'results' test of the Voting Rights Act."). This position, however, runs against conventional wisdom of many commentators and a short history lesson is necessary to justify this position.

In the early 1970s, it appeared that minority plaintiffs would not have to prove a discriminatory purpose to successfully challenge dilutive election systems as violative of the constitution. See, e.g., White v. Regester, 412 U.S. 755, 765-66 (1973). However, this standard appeared to markedly shift when the Supreme Court decided *City of Mobile v. Bolden*, 446 U.S. at 66-67, with a plurality of the Court holding that a discriminatory purpose was necessary to successfully bring a vote dilution challenge under the Fourteenth Amendment.

The *City of Mobile* decision sparked severe outrage and criticism. See Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 347 (1982) (describing the criticism of *Bolden*). In response, Congress amended Section 2 to revert to the standard prior to the plurality opinion in *City of Mobile*. See Kathryn Abrams, 'Raising Politics Up':

Nevertheless, in many respects, the Voting Rights Act, and particularly Section 5, has created the lack of evidence of recent widespread and persisting purposeful, unconstitutional voting-related discrimination. Section 5 has prevented such purposeful discrimination in two ways: by preventing the implementation of purposefully discriminatory voting changes through denial of preclearance by federal authorities and, most importantly, by deterring the adoption of these practices in the first place

Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. REV. 449, 458 (1988) (describing how Congress amended Section 2 to remove the *Bolden* intent requirement).

Most commentators focus on this history when describing the difference between the Section 2 results test and the constitutional standard for proving vote dilution while ignoring an important case, *Rogers v. Lodge*, regarding the constitutional standard that was issued shortly after amended Section 2 became law. See generally Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1 (1987) (engaging in an extended discussion of vote dilution jurisprudence while virtually ignoring *Rogers*). *Rogers*, however, represented a retreat from the Court's position in *City of Mobile*, which, after all, was a mere plurality opinion.

In *Rogers*, the Court reviewed the standard of proof necessary to win a case challenging an at-large election system as being maintained with a discriminatory purpose under the Fourteenth Amendment. See *Rogers*, 458 U.S. at 617. The Court noted that "discriminatory intent need not be proved by direct evidence" and "may often be inferred from the totality of the relevant facts." *Id.* at 618. The Court then expounded on the type of relevant facts involved in this analysis, which included: (1) the registration level of minority citizens; (2) evidence of racial bloc voting; (3) the electoral success (or lack thereof) of minority candidates; (4) evidence of past discrimination in the political process; (5) evidence of past discrimination in education and employment; (6) evidence that officials were unresponsive and insensitive to minority residents; (7) evidence of the minority community's depressed socio-economic status; (8) the size of the area encompassed by the at-large district; (9) the legitimate state interest in using at-large elections; and (10) whether devices such as numbered posts and a majority vote requirement were used. *Id.* at 623-27.

In *Thornburg v. Gingles*, the Court held that a violation of Section 2 could be proved by a totality of the circumstances and listed the following factors as relevant to this totality analysis: (1) the minority group must be sufficiently large and geographically compact to form a majority in a single-member district; (2) the minority group must be politically cohesive; (3) a majority group votes sufficiently as a bloc to enable it to usually defeat the minority group's candidate of choice in an election; (4) the history of voting-related discrimination; (5) the extent to which devices such as numbered posts, unusually large election districts, or a majority vote requirement have been used; (6) whether minority residents were excluded from any candidate slating process; (7) evidence of past discrimination in such areas as education and employment; (8) the use of racial appeals in campaigns; (9) the extent to which minority persons have been elected to office; (10) the extent to which elected officials have been responsive to the particularized needs of the minority community; and (11) the policy underlying the use of at-large elections. See *Gingles*, 478 U.S. at 44-51.

The biggest difference between *Rogers* and *Gingles* would appear to be the emphasis the latter places on certain factors. *Gingles* seems to place primary importance on establishing the ability of the minority group to form a majority in a single-member district and in proving racial bloc voting—the so-called *Gingles* preconditions. See *id.* at 48-49 (stating "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. [Unless a bloc voting majority is usually able] to defeat candidates supported by a politically cohesive, geographically insular minority group"); see also *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996) (noting that "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three [*Gingles*] factors but still have failed to establish a violation of § 2 under the totality of the circumstances" (quoting *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994)); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc) (noting that "[s]atisfaction of the necessary [*Gingles*] preconditions carries a plaintiff a long way towards showing a Section 2 violation").

because state and local lawmakers know the federal government will be reviewing any changes to prevent voting-related discrimination.¹⁷²

The refusal of preclearance under Section 5, while perhaps not providing definitive examples of unconstitutional voting-related discrimination, provides examples of arguably unconstitutional voting-related discrimination. One need not look very far to find recent examples where federal authorities have blocked implementation of retrogressive voting changes that would have diluted minority voting strength. In the post-2000 redistricting cycle, federal authorities refused preclearance to statewide redistricting plans in Arizona, Louisiana, Texas, Florida, and Georgia.¹⁷³ Additionally, preclearance has also been refused to redistricting plans submitted by a number of counties, cities, and school districts.¹⁷⁴

172. Section 5 also provides the intangible benefit of encouraging a continuing dialogue between minority and majority communities, at least as it relates to voting. Local governments know they need federal approval, and community involvement in the adoption of the change is considered in the Department of Justice's preclearance review, so local governments often confer with minority residents before enacting changes. See 28 C.F.R. § 51.57 (West 2003) (noting that among the factors relevant to the Attorney General's preclearance review is the extent to which the jurisdiction allowed minorities to participate in the decision to make the change and the extent to which the jurisdiction took minority citizens' concerns into account). This dialogue both prevents the adoption of discriminatory changes and also increases understanding between majority and minority community residents.

173. See *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 29 (D.D.C. 2002), *vacated by* 123 S. Ct. 2498 (2003); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to The Honorable John M. McKay, President, Florida Senate & Tom Feeney, Speaker, Florida House of Representatives (July 1, 2002) (objecting to a redistricting plan for the Florida House), at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_070102.htm (last visited Feb. 1, 2004); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Lisa T. Hauser, Esq., Gammage & Burnham & José de Jesús Rivera, Esq., Haralson, Miller, Pitt & McAnally (May 20, 2002) (objecting to the redistricting plan for the Arizona legislature), at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_052002.htm (last visited Feb. 1, 2004); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to The Honorable Geoffrey Connor, Acting Secretary of State (Nov. 16, 2001), at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_111601.htm (last visited Feb. 1, 2004) (objecting to the redistricting plan for the Texas House).

The State of Louisiana case necessitates a bit of extra explanation. The state sought preclearance of its plan for the State House in a declaratory judgment action in the United States District Court for the District of Columbia. See *Louisiana House of Representatives v. Ashcroft*, C.A. No. 02-0062 (D.D.C.) (ordering dismissal with prejudice), at <http://www.naacpldf.org/whatsnew/pdfs/OrderDimissingCase.pdf> (last visited Feb. 1, 2004). The Department of Justice opposed preclearance and, after discovery, the case was settled when the state amended its plan to eliminate those aspects that were objectionable to the Department of Justice. See *Feds Approve State House Redistricting Plan; Black Lawmakers Remain Opposed to New Districts*, THE TIMES-PICAYUNE, May 21, 2003, at 5 (describing the Department of Justice's rejection of the initial redistricting plan); see also Laura Maggi, *Remap Needs Federal Approval; Senate Backs Plan, But Opponents Will Sue*, THE TIMES-PICAYUNE, May 8, 2003, at 1 (describing the passage of a plan to settle the litigation in the United States District Court for the District of Columbia).

174. See, e.g., Letter from Andrew E. Lelling, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Walter C. Lee, Superintendent, Parish School Board & B.D. Mitchell, President, Parish Police Jury (Dec. 31, 2002) (objecting to the redistricting plan for the DeSoto Parish School District, Louisiana), at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_123102.html (last visited Feb. 1, 2004); Letter from J. Michael Wiggins, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Al Grieshaber, Esq., City Attorney (Sept. 23, 2002) (objecting to the redistricting plan for the City of Albany, Georgia Board of Commissioners), at

The deterrence factor, though, represents Section 5's greatest influence in the prevention of unconstitutional voting-related discrimination.¹⁷⁵ Jurisdictions covered by Section 5 are acutely aware of the need to garner federal approval. For example, in the context of redistricting, discussion and debate at the state and local level often focuses on how the Department of Justice will view the changes made.¹⁷⁶ So, while Section 5 covers a wide range of constitutional activity, it arguably covers a wide-range of activity that has the likelihood of being unconstitutional but for the existence of Section 5.¹⁷⁷ In other words, the deterrent impact of Section 5 has led to far fewer instances of unconstitutional voting discrimination because state and local officials know they need federal approval of voting changes. Thus, faulting Section 5 for a lack of examples of recent purposeful discrimination may essentially make the statute a victim of its own success.

While the Court may certainly recognize this deterrence factor as contributing to the lack of a record of recent unconstitutional behavior, a Court generally inclined toward limiting federal power seems unlikely to give great weight to this argument. For starters, the deterrence factor will probably be hard for Congress to quantify.¹⁷⁸ The Court might also look skeptically upon the deterrence factor because it has the potential to render as impotent the Court's congruence and proportionality test. The test has touted remedies that are temporary and have an expiration date.¹⁷⁹ But, to allow continuation of such remedies based on a theory that the remedy has caused the lack of unconstitutional behavior would seem-

http://www.usdoj.gov/crt/voting/sec_5/ltr/l_092302.htm (last visited Feb. 1, 2004); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Darwin Satterwhite, Esq., County Attorney (July 9, 2002) (objecting to the redistricting plan for the Cumberland County, Virginia Board of Supervisors), at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_070902.htm (last visited Feb. 1, 2004).

175. See Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in *RACE AND REDISTRICTING IN THE 1990S*, at 80, 94-96 (Bernard Grofman ed., 1998) (describing the "strong deterrent effect" of Section 5 in part because of state and local officials' knowledge that changes would be scrutinized for discrimination); see also Steven A. Light, *Too (Color)Blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 8 GEO. MASON U. CIV. RTS. L.J. 1, 15 n.95 (1997/1998) (noting Section 5's deterrent effect); McDonald, *supra* note 2, at 1285 (same).

Victor Andres Rodriguez argues that Section 5 is constitutional, in part, because the large number of changes submitted to the Department of Justice show the continued "opportunities for mischief" on the part of state and local officials. Rodriguez, *supra* note 20, at 804. This seems to be just another way of making a deterrence argument. In other words, Mr. Rodriguez seems to be asserting that, given the opportunity to make changes without a preclearance mechanism, state and local officials would engage in much more unconstitutional voting discrimination.

176. See, e.g., *Johnson v. Miller*, 864 F. Supp. 1354, 1378 (S.D. Ga. 1994) (describing how the Georgia General Assembly's "only interest" in drafting a redistricting plan was to satisfy the Department of Justice's preclearance requirements).

177. See *Boerne*, 521 U.S. at 534 (faulting RFRA for not being "designed to identify and counteract state laws likely to be unconstitutional" (emphasis added)).

178. Congress might try to develop this record by inviting a large group of minority elected officials to testify on the deterrent effect of having a federal watchdog over the redistricting process. It is, however, less likely such a vast amount of testimony could be developed to show how Section 5 has deterred the adoption of changes that would deny minority voters' access to the ballot.

179. See *supra* note 119 and accompanying text.

ingly leave a major hole in the Court's congruence and proportionality analysis. Finally, even if a deterrence factor gets recognized by the Court, a skeptical Court seems unlikely to find that the current landscape of voting discrimination, absent deterrence, would roughly compare to the "exceptional conditions"¹⁸⁰ the Court has found to be extant or recently extant when Congress previously enacted and extended Section 5.

c. Evidence of racially polarized voting

Congress may also try to build a record of arguable instances of unconstitutional voting discrimination by focusing on the prevalence of racially polarized voting. Simply defined, racially polarized voting, or racial bloc voting, occurs when non-minority voters strongly support one candidate while minority voters support a different candidate.¹⁸¹ While recent history shows a few minority candidates have won in electorates that are not majority-minority, most minority candidates get elected from majority-minority constituencies;¹⁸² a phenomenon that has been largely attributed to the presence of racially polarized voting patterns.¹⁸³ As Professor Lani Guinier has written, "As a general rule whites do not vote for blacks. Numerous court decisions, anecdotal reports, surveys, and scholarly studies have confirmed the existence of racial bloc voting. Based on this overwhelming evidence [one can conclude] that whites still harbor racial prejudice."¹⁸⁴ So, armed with such evidence, Congress may be able to marshal an abundance of examples of arguably unconstitutional voting discrimination to justify extension of Section 5.¹⁸⁵

Yet a conservative, skeptical Court would likely criticize and reject this evidence on two grounds. First, it is not entirely settled that racially polarized voting equals racial discrimination in voting.¹⁸⁶ The traditional statistical analysis used to prove racially polarized voting in Voting Rights Act cases does not account for the multiplicity of reasons why

180. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

181. *See, e.g.*, Issacharoff, *supra* note 151, at 1854-56 (discussing racial bloc voting); *Gingles*, 478 U.S. at 53 n.21, 57 (describing racially polarized voting as being a prominent feature of "American politics").

182. *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 *YALE L.J.* 2505, 2512 n.23 (1997). For example, after the 1992 congressional elections there were thirty-nine African-American representatives, thirty-one of whom were elected from majority-African-American districts, and there were nineteen Latino representatives, sixteen of whom were elected from majority-Latino districts. Stephen Wolf, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 225, 229-30 (1997).

183. Pildes, *supra* note 182, at 2512 n.23 (pinpointing racially polarized voting as the reason "only one percent of white-majority jurisdictions elect black candidates").

184. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 *MICH. L. REV.* 1077, 1112-13 (1991).

185. Professor Pamela Karlan essentially made this case when she argued that Section 5 remained a viable exercise of Congress's enforcement power even after the Court created the congruence and proportionality doctrine. *See* Karlan, *supra* note 20, at 738-41.

186. *See* Pildes, *supra* note 182, at 2512 n.23.

voters cast their ballots in a particular manner.¹⁸⁷ To put it a different way, those with conservative viewpoints often stress that other factors aside from racial discrimination, such as partisan politics, might explain the voting patterns.¹⁸⁸

More importantly, for the purpose of justifying Section 5 as a constitutional exercise of Congress's enforcement power, assuming the Court allows racially polarized voting to equate with racially discriminatory voting, such conduct is private action. This is significant because in one congruence and proportionality case, the Court strongly hinted that Congress must only use its enforcement power to attack discrimination by government officials, not discrimination by private actors.¹⁸⁹ In other words, Congress cannot make discrimination by private actors the object of its remedy.¹⁹⁰

Perhaps, however, the Court will find evidence of racially polarized voting relevant to its calculus of the scope of the problem of unconstitutional voting discrimination because of the "distinctive blend of state action and private choice involved in the electoral process . . ."¹⁹¹ Under such a theory, the act of voting amounts to state action because the purpose of the vote is to choose representatives, and the vote itself is given its effect by the machinery of government.¹⁹² This makes casting a ballot state action akin to conduct of an all-white party primary,¹⁹³ or the use of a peremptory challenge in a racially discriminatory manner by a private, civil litigant¹⁹⁴—two contexts in which the Court has recognized what appears to be purely private action as state action.

187. See *id.*

188. See *Charleston County*, C.A. No. 2:01-0155-23 (describing the county's argument that "the 'cause' of voting polarization in Charleston County is partisan differences rather than racial ones"); see also *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (describing North Carolina as a place where "race and political affiliation are highly correlated").

189. See *United States v. Morrison*, 529 U.S. 598, 625-26 (2000) (faulting the Violence Against Women Act for targeting private discrimination instead of discrimination by state officials); see also *James v. Bowman*, 190 U.S. 127, 139 (1903) (stating that "a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress to prevent action by the state through some one or more of its official representatives").

190. See Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 143-51 (2000) (arguing that *Morrison* stands for the principle that Congress cannot make private discrimination the object of its remedy); see also Hartley, *supra* note 18, at 51 (noting that congruence and proportionality requires that the aim of the legislation be "detering or remedying conduct the judiciary would find is [constitutionally] prohibited").

191. Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1227-31 (1996); see also *Anderson v. Martin*, 375 U.S. 399, 400-04 (1964) (finding unconstitutional a Louisiana law requiring the race of the candidate to be printed on the ballot because the state was contributing to the likelihood that voters would cast ballots along racial lines).

192. See Rubin, *supra* note 11, at 66.

193. See *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944).

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

It seems unlikely, however, that this Court, which has revived the state action doctrine, would find that a private individual's electoral choice constitutes state action.¹⁹⁵ Moreover, congruence and proportionality requires a showing of a constitutional violation.¹⁹⁶ The maintenance or adoption of a voting system in the face of polarized voting does not make for a constitutional violation of the Fourteenth or Fifteenth Amendment.¹⁹⁷ To have a constitutional violation, one needs to prove other factors in addition to racially polarized voting.

In the final analysis, the debate over whether racial bloc voting can serve as evidence of unconstitutional activity may be largely an academic exercise. Racial bloc voting serves as a primary requirement for proving a violation of Section 2 of the Voting Rights Act, and, presumably, much of the evidence of racial bloc voting will come from findings and settlements in Section 2 vote dilution cases. Therefore, if the Court accepts Section 2 violations as evidence of arguably unconstitutional behavior then the Court will likely have already accepted much of the evidence of racial bloc voting.¹⁹⁸

Summing up how the Court will dismantle the hypothetical congressional record if it chooses to engage in a strict skeptical review of the record, as it initially performed in its first five applications of the congruence and proportionality test, it seems likely the Court will: (1) deem evidence of arguably unconstitutional behavior in vote denial to be weak; (2) find evidence of arguably unconstitutional behavior in vote dilution to be more significant; and (3) discount or find as duplicative the evidence of racially polarized voting.¹⁹⁹ However, this strict, skeptical re-

195. The right to cast a ballot, even for illegitimate, hateful reasons, would seemingly be among the most purely private and protected aspects of democracy. See *Rogers*, 458 U.S. at 647 n.30 (Stevens, J., dissenting) (characterizing the act of voting as lacking state action). While the state action doctrine might well extend to the attempted enforcement of discriminatory laws passed by referendum or to the systematic locking out of candidates from access to the ballot, the Court would probably refuse to extend state action to the act of choosing one's representative. The government's provision of a framework for citizens to express their preference as to whom will represent them likely will not be considered state action so long as all preferences can be expressed and all citizens can have access to the framework—absent some evidence of purposeful discrimination. See, e.g., *Delgado v. Smith*, 861 F.2d 1489, 1495-98 (11th Cir. 1988) (refusing to find the circulation and certification of a referenda petition to be state action).

196. See *supra* note 107 and accompanying text.

197. See *supra* note 171 and accompanying text.

198. It seems highly unlikely that the opposite would be true. In other words, it seems unlikely that the Court would reject Section 2 violations as evidence of unconstitutional voting discrimination yet accept evidence of racially polarized voting. This is because a Section 2 violation involves a searching inquiry into a number of additional factors that hint at purposeful discrimination.

199. It might be cleverly argued that factual support for extending Section 5 could be grounded on the unconstitutional racial gerrymandering of state and local electoral districts that occurred during the 1990s round of redistricting. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) (invalidating North Carolina's congressional redistricting plan); see also *Clark v. Putnam County*, 293 F.3d 1261, 1278-79 (11th Cir. 2002) (finding a county redistricting plan to be an unconstitutional racial gerrymander). However, it would be incongruous for the Court to find support for a remedy that requires states and local governments to give particular consideration to the negative impact of changes on minority voters in cases in which the Court expressed dismay at states giving too much consideration to minority voting strength.

view may never occur. Instead, if the Court's more recent review of the record underlying the Family and Medical Leave Act (FMLA) is used, the Court will more easily find a record justifying a prophylactic remedy to prevent voting discrimination.

2. Considering the Evidence from a More Lenient, *Hibbsian* Perspective

A more lenient review of the evidence will start with the nature of the right at issue. Racial classifications, like gender classifications, are subjected to heightened scrutiny. In fact, racial classifications receive the Court's highest level of scrutiny.²⁰⁰ This heightened level of scrutiny puts less of an onus on Congress to identify specific instances of unconstitutional behavior. A more lenient review will also put a major emphasis on the long history of voting discrimination, highlighting the despicable history of voting discrimination from passage of the Fifteenth Amendment to beyond the enactment of the Voting Rights Act.²⁰¹ A more lenient review would also note how racial discrimination in voting did not come under sharp attack from the Courts and Congress until the 1950s and 1960s.²⁰² In this way, voting discrimination may be akin to the gender discrimination that Congress and the courts failed to tackle until the 1960s and 1970s.

In the end, the Court, whether skeptical and stringent or agreeable and deferential, will find enough evidence, both recent and historical, to justify some kind of prophylactic remedy. However, it will also likely recognize the overall evidence of recent unconstitutional activity to be far less than the level of discrimination that occurred prior to, and soon after, passage of the Voting Rights Act that served as the egregious precedent to warrant the initial implementation of the stringent Section 5 remedy and its extensions in 1970, 1975, and 1982.²⁰³ With such a record, the Court will then turn to the last factor: whether the Section 5 remedy remains congruent and proportional to the current problem of voting discrimination.

200. *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (instructing the lower court to apply strict scrutiny to a redistricting plan that segregated voters on the basis of race); *see also* James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 640 (1983) ("A government can make rational classifications in the voting context, on the basis of age for example, but distinctions drawn on the basis of race are inherently suspect and subject to an almost insuperable burden of justification.").

201. *See supra* Part I.A.

202. *See Shaw*, 509 U.S. at 639 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . For much of our Nation's history, that right sadly has been denied to many because of race." (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

203. As one commentator has noted, the Voting Rights Act's "voluminous congressional record" is "unique among modern legislation" passed under Congress's enforcement powers. Laycock, *supra* note 139, at 748.

C. Applying Step Three of the Congruence and Proportionality Test to Section 5: Is Section 5 Proportional to the Modern-Day Problem of Unconstitutional Voting Discrimination?

While the Court should be willing to allow Congress to enact some type of prophylactic remedy to protect minority voting rights, the Court likely will be unwilling to once again embrace the unique and stringent remedy encompassed in Section 5. A Court concerned with federalism seems apt to focus on the fact that Section 5 greatly intrudes into the traditional governing process of the states and covers a vast swath of constitutional activity. Moreover, the Court will probably express concern about retaining the same coverage formula as a proxy for those places where racial discrimination in voting still presents a problem. It may also express anxiety about the difficulty jurisdictions have had in escaping the grip of Section 5 coverage.

There is no doubt that Section 5 covers a large amount of clearly constitutional government action, evidence of which the Court will find in the fact that most of the laws subjected to the preclearance requirement have, in fact, been precleared. The Department of Justice, which reviews the vast majority of these changes, denies preclearance to about one percent of the changes submitted.²⁰⁴ Indeed, even those changes that have not received preclearance may have only a constitutional discriminatory effect and may not have been adopted with an unconstitutional discriminatory purpose. True, Section 5 could be congruent and proportional because it only nullifies a small number of laws while merely delaying implementation of a greater number of laws. In this way, Section 5 may be distinguishable from other remedies rejected under the congruence and proportionality test because, in the final analysis, it actually blocks enforcement of very few laws.²⁰⁵ Yet a Court concerned with the sovereignty of state and local government seems unlikely to split such fine hairs between laws that are temporarily prevented from being enforced and laws that are first temporarily and then permanently prevented from being enforced.

204. See McDonald, *supra* note 2, at 1285 (noting that during the first seven years of the Reagan administration, the Department of Justice objected to 1.02 percent of its submissions); see also *supra* notes 159-61 and accompanying text (describing more recent Department of Justice statistics).

205. See *Boerne*, 521 U.S. at 532 (finding that the RFRA failed the congruence and proportionality test because a large number of laws may be invalidated). To put this idea another way, the Court may view the requirement to submit changes is not so great a burden on federalism, but rather that the burden on federalism comes mostly through application of the substantive preclearance requirements (i.e., the retrogression test). See Katz, *supra* note 4, at 1210-11 (positing that the Court believes the federalism costs are "incurred disproportionately" during the substantive preclearance review process rather than through the necessity of obtaining preclearance at all). Since the Court has recently diminished the reach of the substantive requirement, the Court could consider the burden on federalism to be minimal. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) (*Bossier II*) (limiting the ability of the federal government to deny preclearance); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 483 (1997) (*Bossier I*) (same).

There is also no doubt that Section 5 imposes a substantial and serious burden on the federalist constitutional structure,²⁰⁶ a burden both liberal²⁰⁷ and conservative²⁰⁸ judges have recognized. As Justice Hugo Black famously described it, Section 5 requires state and local governments to “beg” federal officials in Washington for every little voting change they enact.²⁰⁹ Section 5 also implicates numerous laws at all levels of government, thus adding to its intrusive impact on state and local affairs.

In reviewing the remedy, the Court will likely recognize that Section 5 contains a number of the limiting aspects the Court has approved of in the past as means by which Congress may make a remedy congruent and proportional to the problem the remedy addresses. Section 5: (1) is limited in geographic scope and has been aimed at those areas where voting discrimination is likely to have previously occurred; (2) only impacts a discrete class of laws—those that affect voting; and (3) includes a termination date and an opportunity to evade coverage through bailout.

However, the Court may view the coverage formula as outdated. The literacy test, and other such devices, will likely be found to have been used too far back in time to serve as a proxy for those areas where voting-related discrimination has occurred more recently. It has been a long time since any jurisdiction employed a literacy test or other device to intentionally depress minority registration, as the Voting Rights Act has placed a blanket ban on such practices for many years.²¹⁰ In addition, depressed registration and turnout rates due to voting-related discrimination have significantly lessened.²¹¹ Registration rates, especially for mi-

206. See *Bossier II*, 528 U.S. at 336 (describing the “substantial” federalism costs exacted by the preclearance procedure); *Bossier I*, 520 U.S. at 480 (describing the “serious federalism costs implicated” by Section 5); see also James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1263 (1994) (“From a federalism perspective, the preclearance mechanism is surely stiff medicine.”).

207. See *United States v. Bd. of Comm’rs*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (describing Section 5’s encroachment on state sovereignty as being “significant and undeniable”).

208. See *Lopez v. Monterey County*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (“The section’s interference with state sovereignty is quite drastic—covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government’s approval.”); see also *City of Rome*, 446 U.S. at 209 (Rehnquist, J., dissenting) (“[R]equiring localities to submit to preclearance is a significant intrusion on local autonomy . . .” (italics omitted)); *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) (“It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review.”).

209. *Katzenbach*, 383 U.S. at 358 (Black, J., concurring and dissenting) (“Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.”).

210. 42 U.S.C. § 1973aa.

211. See *Bullock & Dunn*, *supra* note 30, at 1252 (noting that the “historic disparity in black and white registration and turnout . . . has waned”). In 1964, the State of Georgia had a white registration rate of 57.2% and a non-white registration rate of 25.0%; the State of Louisiana had a white registration rate of 76.6% and a non-white registration rate of 30.5%; and the State of South Carolina

nority citizens, are much higher than in the past, and while turnout rates have generally declined among all voters,²¹² those decreases appear to reflect factors other than purposeful discrimination against any particular group of citizens.²¹³

And while Section 5 only covers a discrete class of laws, those that relate to voting, it covers all of those laws. The Court may view such broad coverage as failing to account for the fact that the problem of voting discrimination now mostly lies in the area of vote dilution rather than ballot access.²¹⁴ Thus, the overbroad coverage of the type of changes requiring preclearance seems disproportionate to the scope of the modern-day problem.

Finally, the current bailout provision has been little-used.²¹⁵ Only a few jurisdictions have successfully escaped coverage under the bailout

had a white registration rate of 69.5% and a non-white registration rate of 34.3%. *House Hearings*, *supra* note 21, at 32.

Comparing voting age population data from the 2000 Census and recent voter registration data from these same states, it is evident that the registration gap has nearly been closed. In Georgia, the white registration rate is 67.8% and the African-American registration rate is 62.4%; in Louisiana, the white registration rate is 84.1% and the African American registration rate is 82.4%; and in South Carolina, the white registration rate is 71.5% and the non-white registration rate is 69.1%. *See generally* U.S. Census Bureau, *American FactFinder* (providing voting age population data from 2000 Census), at <http://factfinder.census.gov> (last visited Feb. 2, 2004) [hereinafter *American FactFinder*]; Cathy Cox, Georgia Secretary of State, *Georgia Voter Registration Statistics* (providing registration data by race for Georgia as of Sept. 1, 2003), at <http://www.sos.state.ga.us/elections/county.htm> (last visited Feb. 2, 2004); GCR & Associates, Inc., *Louisiana Voter Registration* (providing registration data by race as of Oct. 4, 2003), at <http://www.gcr1.com/elections> (last visited Feb. 2, 2004); South Carolina Voter Registration Demographics (providing registration data by race as of Jan. 5, 2003), at <http://www.state.sc.us/cgi-bin/scsec/96vr?countkey=all&demo=RACE> (last visited Feb. 2, 2004).

212. In the November 2000 Presidential election, 51.3% of the voting age population turned out. *See* Federal Election Comm'n, *Voter Registration and Turnout 2000*, at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (last visited Feb. 2, 2004). In the November 1960 Presidential election, 63.06% of the voting age population turned out. *See* Federal Election Comm'n, *National Voter Turnout in Federal Elections: 1960-1996*, at <http://www.fec.gov/pages/htmlto5.htm> (last visited Feb. 2, 2004).

213. *See* Kimberly C. Delk, *What Will It Take to Produce Greater American Voter Participation? Does Anyone Really Know?*, 2 LOY. J. PUB. INT. L. 133, 134-35, 176 (2001) (discussing possible reasons for low voter turnout including voter apathy and lack of convenient mechanisms for casting ballots).

Lower minority voter turnout may reflect the legacy of discrimination against minority voters. *See* *Uno v. City of Holyoke*, 72 F.3d 973, 986-87 (1st Cir. 1995). *But see* Theana Evangelis, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, 77 N.Y.U. L. REV. 796, 823-25 (2002) (arguing that low minority voter turnout may not necessarily reflect the remnants of discrimination and noting that some political scientists suggest that "differences in turnout rates may be explained best by reference to political factors such as mobilization and competition in politics").

214. *See* discussion *supra* Parts III.B.1-2.

215. For an excellent history of the genesis of the bailout provision, see generally Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379 (1985). The original bailout provisions were considered to be very difficult to achieve. *Id.* at 416 (noting that "the old bailout standard offered no realistic opportunity for bailout" because, for most jurisdictions, "[t]he only possibility for bailout would arise at the end of the defined calendar period, but each time that date approached . . . Congress acted to enlarge the required eligibility period"); *see also* O'Rourke, *supra* note 39, at 774-75 (noting that

standards adopted in 1982.²¹⁶ Thus, the Court may well view the current bailout provision to be, for most jurisdictions, a fiction.²¹⁷ And, if the bailout provision is considered to be one in name only, it is unlikely to provide much aid in finding an extension of Section 5 to be congruent and proportional to the scope of the problem. Moreover, the bailout provision usually does not allow individual local entities, such as cities and school districts, to evade coverage.²¹⁸

only seventeen bailout suits were filed prior to enactment of the 1982 standards and only nine of these actions resulted in a jurisdiction being released from coverage).

The current bailout standard adopted in 1982 was, however, expected to generate a large number of bailouts. See Hancock & Tredway, *supra*, at 411; see also S. REP. NO. 97-417, at 59 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 237 (noting that implementation of the 1982 bailout standards would be delayed for a couple of years to allow the Department of Justice “to prepare for such a heavy load of litigation under the new standards”). But see H.R. REP. NO. 97-227, at 64 (1981) (dissenting opinion of Honorable M. Caldwell Butler who believed the 1982 bailout standards “would establish requirements impossible to achieve”).

216. See U.S. Dep’t of Justice, Civil Rights Division, Voting Section, *About Section 5 of the Voting Rights Act* (noting that the City of Fairfax, and Frederick and Shenandoah Counties, Virginia, have bailed out under the 1982 standards), at http://www.usdoj.gov/crt/voting/sec_5/types.htm (last revised Feb. 2, 2004).

217. In 1981, as Congress debated extension of Section 5, a few legislators noted that an overly stringent bailout mechanism could call into question the constitutionality of the statute:

[T]he Act’s constitutionality was upheld in the 1966 decision of *Katzenbach v. South Carolina*, and last year in *City of Rome, Georgia v. United States*, on the presence of certain unique factors. One was the belief that the 1965 departure from historical tenets of federalism was only “temporary”, but necessary based on pre-1965 conduct in the covered jurisdictions. A great many things have changed in the South since 1965, as our hearings demonstrated, and new, more progressive racial attitudes have begun to replace the cultural bias of the past. This change is, as [we] have said, far from complete. It is sufficient, though, to effectively dilute the force of the showing before the court in 1966.

Moreover, the language [we] have discussed, together with other limitations on bailout incorporated into the amendment adopted by the Committee would make its availability highly unlikely, as a practical matter, thereby changing the temporary status of the Act to a more constitutionally suspect permanent condition. In [our] judgment, such a change can only survive constitutional scrutiny if the method of escape is reasonably achievable.

H.R. REP. NO. 97-227, at 57-58 (1981) (supplemental views of Reps. Hyde and Lungren).

218. See *City of Rome*, 446 U.S. at 168-69. Cities can only bail out if they are separately covered jurisdictions, but generally, cities are not separately covered. See *supra* note 40 and accompanying text.

Victor Andres Rodriguez views the lack of bailout actions as evidence that “there have been ongoing violations and thus a continued need for Section 5.” Rodriguez, *supra* note 20, at 805. Basically he seems to view the inaction of jurisdictions as a tacit admission of discrimination. But Mr. Rodriguez fails to explain why jurisdictions who are apparently bent on discriminating against minority voters would not, at the very least, try to escape the grip of Section 5 coverage and, thus, make it even easier to carry out their discriminatory policies. It seems a more likely assumption that the bailout standards are too difficult to meet, and Mr. Rodriguez seems to admit as much as he appears to have arrived at his conclusions about the future of Section 5 based on the assumption that Congress will revise the bailout standard to make it easier. *Id.* at 814.

Paul Winke recognizes the problem a strict bailout provision poses to the constitutionality of Section 5. See Winke, *supra* note 20, at 111-12. However, he suggests that it is not constitutionally suspect, in part, because each of the elements of the bailout formula relates to “a court’s finding of discrimination, or to a jurisdiction’s willingness to abandon a challenged voting practice before a judicial determination of whether the practice is discriminatory.” *Id.* at 112. Yet the failure to submit non-discriminatory voting changes for preclearance is a bar to bailout that involves no finding of discrimination. See 42 U.S.C. § 1973b(a)(1)(D).

Mr. Winke focuses his concern on the affirmative steps necessary to bailout (e.g., the obligations to eliminate intimidation, harassment, and barriers to participation) as the primary potential

In sum, the Court seems likely to allow Congress to enact a prophylactic remedy to protect minority voting rights. The long history of discrimination combined with the more recent problems will justify some action on the part of Congress. However, because the problem of voting discrimination has been reduced and because Section 5 amounts to such a unique and stringent intrusion into the governing process of state and local governments, an extension of Section 5 will face trouble. Another way of putting this is as follows: on a scale of one to ten, with ten being the highest, voting discrimination in 1965 was a ten, and in 1965 Congress chose a remedy that was a ten; however, in 2007, on that same scale, voting discrimination is more like a five, so Congress has to choose a remedy that is more like a five. Thus, the Court will likely reject Section 5 unless the congruence and proportionality test does not even apply to the Voting Rights Act, or unless Congress revises Section 5 to comply with the test.

IV. A GLIMMER OF HOPE FOR SECTION 5: IS THERE AN IMPLICIT OR WILL THERE BE AN EXPLICIT VOTING RIGHTS EXCEPTION TO THE CONGRUENCE AND PROPORTIONALITY TEST?

While an extension of Section 5 seems likely to fail the congruence and proportionality test, it may never come to that. The congruence and proportionality test may actually not be applicable to the statute as there is a chance that a voting rights exception to the test, either implicit or explicit, will be carved out by the Court. The implicit exception is evident from the Court's language in most of the congruence and proportionality cases in which it touts the Voting Rights Act generally, and Section 5 specifically, as the paradigm of a remedy properly calibrated to the scope of a problem. Indeed, in one opinion issued after development of the congruence and proportionality test in which Section 5's constitutionality played a minor role, the Court did not even bother to apply the test.²¹⁹ An explicit exception to the test could be found in the fact that all of the recent cases rejecting Congress's exercise of its enforcement power have been decided under Congress's Fourteenth Amendment power while previous cases involving Section 5 have always been resolved under Congress's Fifteenth Amendment power, perhaps indicat-

problem for Section 5's constitutionality. But, in his view, the reason more bailouts have not been achieved stems from jurisdictions' "lack of political will to remedy the discrimination that gives the act its continuing relevance and constitutional validity." Winke, *supra* note 20, at 116. Mr. Winke then cites evidence of discrimination from the 1982 congressional record as support for these affirmative obligations. *Id.* at 83.

Mr. Winke's arguments make sense inasmuch as they serve to justify the current extension of Section 5 and the bailout provision. And that appears to be all Mr. Winke is trying to prove. This argument, however, seems unlikely to add much to the case for extension beyond 2007. It seems doubtful that evidence from the 1982 hearings will be enough to justify another extension of a stringent bailout provision and Mr. Winke admits that evidence of intentional discrimination will be "increasingly hard to find" because there is less of it and jurisdictions have become more clever at hiding it. *Id.* at 118-19.

219. See *Lopez v. Monterey County*, 525 U.S. 266 (1999) (*Lopez II*).

ing a broader mandate for congressional remedies designed to enforce the latter amendment.²²⁰

A. Will There Be An Implicit Voting Rights Exception?

Despite the fact that most federal statutes the Court has subjected to the congruence and proportionality test have failed to pass the test, almost all these cases provide hope for the Voting Rights Act. In its discussion of the scope of congressional enforcement power in *City of Boerne v. Flores*, the Court expended a considerable amount of language on the appropriateness of the Voting Rights Act, specifically Section 5, as a remedy, approvingly commenting upon its previous endorsement of “new, unprecedented remedies” and “strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional [voting] rights”²²¹ In addition, when subjecting the Religious Freedom Restoration Act (RFRA) to the congruence and proportionality test, the Court’s comparison between RFRA and the Voting Rights Act implied the Court’s continued approval of the remedies encompassed in the latter statute.²²² Moreover, these favorable sentiments toward the Voting Rights Act have been echoed in nearly every subsequent case applying the congruence and proportionality test.²²³

220. The congruence and proportionality test may not be the sole basis for a constitutional challenge to the extension of Section 5. Presumably, it would be possible for the Court to find that the extension of Section 5 amounts to a racial classification subject to strict scrutiny. See Michelle E. O’Connor-Ratliff, *Colorblind Redistricting: Racial Proxies as a Solution to the Court’s Voting Rights Act Quandary*, 29 HASTINGS CONST. L.Q. 61, 71-74 (2001) (arguing that Section 5 would flunk strict scrutiny). However, Section 5 is probably not the traditional type of race-based remedy to which strict scrutiny has generally been applied.

That said, it seems difficult to determine where the Court will draw the line between congressional acts subject to strict scrutiny and congressional acts subject to the congruence and proportionality test, as Congress will often be forced to make racial distinctions to remedy racial discrimination. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230-31 (1995) (recognizing, but not resolving, the tension between strict scrutiny and Congress’s enforcement power); see also Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 680 (2000) (recognizing that legislation designed to enforce the Fourteenth Amendment could collide with Equal Protection rights).

Should the Court be forced to draw a line between when to apply the congruence and proportionality test and when to apply strict scrutiny, the Court may well end up distinguishing between congressional acts providing a judicial or quasi-judicial remedy to prevent prospective racial discrimination (which would be subjected to the congruence and proportionality test) and congressional acts conferring non-judicial benefits on particular minority groups as a remedy for past discrimination. Though, arguably, the boundaries of such a test would be inherently malleable and could perhaps properly be characterized as a distinction without a difference.

221. *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997). *Boerne* appeared to reiterate the continued precedential value of previous decisions upholding the constitutionality of Section 5. See *id.* at 526-27.

222. See *id.* at 530-33. In *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999), the Court made its favorable view of the Voting Rights Act even more explicit, remarking on how “*City of Boerne* discussed with approval the various limits that Congress imposed in its voting rights measures”

223. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1982-83 (2003) (comparing favorably the record of voting discrimination and the remedy chosen by Congress to solve voting discrimination with the record of gender discrimination and the remedy chosen by Congress in the Family and Medical Leave Act); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373-74 (2001) (looking unfavorably upon the record of unconstitutional behavior by the states as related to

The Court provided even more direct support for Section 5 in *Lopez v. Monterey County (Lopez II)*²²⁴ by reiterating its view of the current extension of Section 5 as an appropriate exercise of Congress's enforcement power.²²⁵ In *Lopez II*, the Court considered whether voting changes mandated in legislation enacted by the State of California, a jurisdiction *not* covered by Section 5, needed preclearance when the legislation caused a voting change to occur in Monterey County, a jurisdiction covered by Section 5.²²⁶ The Court held that California's legislation required preclearance.²²⁷ In pressing for a different result, though, California made several arguments, one of which was that if the preclearance requirement applied in this context, Section 5 would be an unconstitutional exercise of Congress's enforcement power.²²⁸ This, according to the state, was because Congress's enforcement power could not "tread on rights constitutionally reserved to the States" when Congress had not directly "designated [California] as historical wrongdoers in the voting rights sphere."²²⁹

But the Court gave short shrift to California's argument by relying heavily on precedent; namely, its previous decisions in *South Carolina v. Katzenbach* and *City of Rome v. United States* in which it had found Sec-

disability discrimination in comparison to the record of voting-related discrimination); *United States v. Morrison*, 529 U.S. 598, 625-27 (2000) (looking unfavorably upon the remedies encompassed in the Violence Against Women Act as opposed to those in the Voting Rights Act). Of the Court's first six applications of the congruence and proportionality test, only *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), contains no substantial comparison to the Voting Rights Act.

224. 525 U.S. 266 (1999).

225. *Lopez II*, 525 U.S. at 282-83.

226. *Id.* at 278. *Lopez II* involved quite a complicated fact pattern and this was the case's second trip to the Supreme Court. See *Lopez v. Monterey County*, 519 U.S. 9 (1996) (*Lopez I*). *Lopez II* involved numerous changes to Monterey County's trial court system and its method of electing judges. *Lopez II*, 525 U.S. at 271. The changes were put into place both by ordinances adopted at the county level and by statutes adopted at the state level, and almost none of the changes were submitted for preclearance. See *id.* at 271-74.

Latino voters brought a Section 5 enforcement action and the district court ruled in their favor, concluding that the changes were unenforceable until precleared. *Id.* at 274. The County then determined that the changes could not be proven to lack a discriminatory purpose or effect, so the County and the Latino plaintiffs tried to devise a mutually agreeable plan to submit for preclearance. *Id.* However, the State of California intervened and opposed the remedial electoral schemes proffered by the County and the Latino plaintiffs. *Id.*

With this stalemate, the district court devised and implemented an interim electoral plan. *Id.* at 275. But soon after the interim plan's implementation, the district court became concerned that it had ordered an unconstitutional plan. *Id.* The district court then ordered new elections under the unprecared scheme initially challenged by the Latino plaintiffs. *Id.* This order became the subject of the Supreme Court's first opinion, where it held that the district court erred in implementing an unprecared plan. See *Lopez I*, 519 U.S. at 20-25.

On remand, the district court held that the changes involved in the case were the product of action by the State of California and that a non-covered entity such as the state had no responsibility to preclear its voting changes. *Lopez II*, 525 U.S. at 276-77. The district court held that the county was not required to submit the changes because it "had no choice but to implement" the state legislation. *Id.* at 277.

227. *Lopez II*, 525 U.S. at 269.

228. *Id.* at 282.

229. *Id.*

tion 5 to be a constitutional exercise of Congress's enforcement power.²³⁰ Thus, the Court initially remarked on its previous upholding of "the constitutionality of § 5 of the Act against a challenge that this provision usurps the powers reserved to the States."²³¹ Indeed, the power of precedent was so strong, the Court's *Lopez II* opinion did not even bother to mention the words "congruence and proportionality," much less to apply the test.²³² In rejecting California's contention, the Court reiterated its view that Congress's enforcement power "contemplate[d] some intrusion into areas traditionally reserved to the States,"²³³ while only citing *City of Boerne v. Flores* for the proposition that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' 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."²³⁴

Using this framework, the Court found "no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law . . . in a covered county."²³⁵ The Court concluded that the state was burdened only to the extent that its laws affected voting in a properly covered jurisdiction.²³⁶ Moreover, the Court gave little weight to California's inability to bail out of Section 5, finding that this inability resulted in a minimal increase in the burden on state law because Monterey County itself could bail out.²³⁷ As the Court summarized: "In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."²³⁸ Thus, amazingly, just a couple of years after developing the congruence and proportionality test, the Court failed to apply the test in deciding whether Section 5, one of the most stringent remedies ever adopted by Congress, remained a valid exercise of Congress's enforcement power.²³⁹

230. See generally John Matthew Guard, "Impotent Figureheads"? State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After *Lopez v. Monterey County* and *City of Boerne v. Flores*, 74 TUL. L. REV. 329, 356-57 (1999) (discussing the importance of *stare decisis* to the *Lopez II* decision).

231. *Lopez II*, 525 U.S. at 283.

232. See Guard, *supra* note 230, at 350 (noting that the *Lopez II* Court did not conduct a congruence and proportionality analysis); see also Katz, *supra* note 4, at 1179, 1202 (noting how *Lopez II* "easily upholds the constitutionality" of Section 5 while "pay[ing] little attention to the factors that have become increasingly important to establishing congruence and proportionality").

233. *Lopez II*, 525 U.S. at 282.

234. *Id.* at 282-83 (quoting *Boerne*, 521 U.S. at 518).

235. *Id.* at 283-84.

236. *Id.* at 284.

237. *Id.*

238. *Id.* at 284-85.

239. Justice Thomas dissented; he primarily objected to the majority's analysis of the statutory language. See *id.* at 289 (Thomas, J., dissenting). More interestingly, without using the words "congruence and proportionality," Justice Thomas sketched the outlines of the test in a discussion that implied the majority's statutory interpretation rendered Section 5 an unconstitutional exercise of

With this failure to apply the congruence and proportionality test, *Lopez II* might be read along with the Court's other praiseworthy statements in the congruence and proportionality line of cases, as providing an implicit exception to the test for voting rights remedies based on well-established precedent. Thus, if faced with an extension of Section 5, one could envision the Court relying heavily on its previous precedents without truly delving into a full-blown congruence and proportionality analysis. In this way, Section 5 and perhaps other core civil rights statutes may have been grandfathered in under the congruence and proportionality doctrine.²⁴⁰

Yet some reasons remain to doubt whether an extension of the current Section 5 will receive the same platitudes that the previous enactments have received in the Court's applications of the congruence and proportionality test. In some respects, an extension of Section 5 may wipe the slate clean for constitutional challenges using the congruence and proportionality test, freeing the Court from its previous precedents upholding Section 5. A review of the standards of the congruence and proportionality test itself shows how the Court might come to such a conclusion. In its application of the test, the Court has looked approvingly on temporary remedies that include a sunset provision.²⁴¹ But, for this aspect of the congruence and proportionality test to have any meaning, the Court cannot simply allow unfettered extensions of statutes previously upheld. Moreover, despite *Lopez II*, the Court's decisions regarding the scope of congressional enforcement power prior to development of the congruence and proportionality test may have little future applicability.²⁴²

Congress's enforcement power. *See id.* at 289, 297-98 (Thomas, J., dissenting) (arguing that the majority's interpretation of Section 5 raised "grave constitutional concerns").

In seeming to apply the test, Justice Thomas noted Section 5 exacted significant federalism costs, but recognized it had twice been upheld as a constitutional exercise of Congress's enforcement power. *Id.* at 293-94 (Thomas, J., dissenting). However, citing *Boerne*, he noted that the Court had "taken great care to emphasize that Congress's enforcement power is remedial in nature." *Id.* at 294 (Thomas, J., dissenting). He then chided the majority for overlooking "our warning in *City of Boerne* that '[t]he appropriateness of remedial measures must be considered in light of the evil presented.'" *Id.* at 295 (Thomas, J., dissenting) (quoting *Boerne*, 521 U.S. at 530). Justice Thomas found that there was paltry evidence of intentional discrimination by the State of California with respect to voting and he saw little reason to presume California would adopt unconstitutional laws in the future. *Id.* at 296 (Thomas, J., dissenting). He noted that the majority's interpretation of the statute raised the federalism costs associated with Section 5 because the state might be unable to develop a uniform statewide voting policy and because the state would need to rely on its covered jurisdictions to defend its interests before the federal government. *Id.*

240. Laycock, *supra* note 139, at 749 (noting a previous decision upholding voting rights remedies may have been reaffirmed "under an implicit grandfather clause" and that the congruence and proportionality test "is, in practice, prospective only"). Another potential reason to uphold Section 5's extension would be the uniqueness of the Court finding a statute unconstitutional after it had clearly upheld its constitutionality on a number of previous occasions.

241. *See supra* note 119 and accompanying text.

242. As Professor Michael Gottesman has remarked: "[I]t is surely doubtful that the Court as presently constituted would have upheld the statutes in *Katzenbach v. Morgan* or *City of Rome* One may wonder whether the Court is paying lip service to the earlier opinions while, as a practical

The upholding of Section 5 as a constitutional exercise of Congress's enforcement power in *Lopez II* may well be best understood as a tacit adherence to the doctrine of *stare decisis*²⁴³ and little else. The Court's primary justification for denying California's challenge in *Lopez II* seems to be its prior precedents. Thus, one might surmise that, armed with the knowledge that the most recent extension of Section 5 had been implemented for seventeen years and would expire in only a few more, the Court decided to look the other way in the interest of preserving its institutional integrity.²⁴⁴ There are also other lesser reasons to put a reduced value on the outcome of *Lopez II*. The case mostly involved an issue of statutory interpretation with the constitutional issue acting as a mere sidelight.²⁴⁵ In addition, and perhaps most simply, the State of California failed to argue for application of the congruence and proportionality test in its brief to the Court.²⁴⁶ For these reasons, *Lopez II* probably should not provide unmitigated comfort to those who think the Court will easily uphold the constitutionality of another extension of Section 5.

B. Will There Be An Explicit Voting Rights Exception?

Lopez II might, however, provide some additional comfort to Section 5's proponents as the case hints at the outline of a framework for doctrinally synthesizing the Court's previous upholdings of Section 5 and its more recent congruence and proportionality cases. This framework would be based on the fact that in the more recent cases the Court has rejected use of Congress's enforcement power in the Fourteenth Amendment²⁴⁷ context while in all of its reviews of Section 5 the Court has upheld use of Congress's enforcement power in the Fifteenth Amendment²⁴⁸ context. So perhaps the Court will make an explicit

matter, relegating them to the junk pile." Michael H. Gottesman, *Disability, Federalism, and a Court With an Eccentric Mission*, 62 OHIO ST. L.J. 31, 60 (2001); see also Ana Maria Merico-Stephens, *United States v. Morrison and the Emperor's New Clothes*, 27 J.C. & U.L. 735, 736, 742-43 (2001) (criticizing the Rehnquist Court's federalism decisions for failing to be candid in acknowledging that previous precedents have basically been discarded).

243. For a discussion of the doctrine of *stare decisis* and the reasons the Court might choose to abandon prior precedent, see *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

244. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (describing how *stare decisis* contributes to "actual and perceived integrity of the judicial power").

245. The Court framed the question presented as a statutory one: "whether a covered jurisdiction 'seeks to administer' a voting change when, without exercising any independent discretion, the jurisdiction implements a change required by the superior law of a noncovered State." *Lopez II*, 525 U.S. at 278.

246. See Brief for Appellee at 31-34, *Lopez v. Monterey County*, 525 U.S. 266 (1999) (No. 97-1396).

247. See *supra* note 14 and accompanying text (listing cases decided under the Fourteenth Amendment using the congruence and proportionality test).

248. See *Lopez II*, 525 U.S. at 284-85; *City of Rome v. United States*, 446 U.S. 156, 180 (1980); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

distinction between the two enforcement powers, allowing Congress broader powers in the Fifteenth Amendment context.²⁴⁹

If the Court chooses to give Congress broader powers under the Fifteenth Amendment, such a standard could be rationalized in several ways. First, the Court could reasonably carve out different levels of enforcement power because voting is such “a fundamental matter in a free and democratic society.”²⁵⁰ Thus, Congress should have broader power to eradicate voting discrimination than, say, employment discrimination. Second, the Court might be more willing to give Congress greater leeway under the Fifteenth Amendment because that amendment has a much more limited scope than the Fourteenth Amendment.²⁵¹ To put it another way, the Court will grant more power to Congress because the Fifteenth

249. Professor Peter Rubin has made a case for broader congressional enforcement power in the districting context. He argues that, in passing voting rights remedies to prevent dilution of minority votes, Congress appropriately used its enforcement power because: (1) Congress judged dilutive election systems to almost always be adopted with a dilutive intent; (2) politicians at the state and local level will generally have the sophistication to hide dilutive intent; (3) divisiveness could be created by requiring an inquiry into dilutive intent; and (4) dilution reflects discriminatory intent on the part of the voters through racial bloc voting. See Rubin, *supra* note 11, at 132-34. For these reasons, Professor Rubin concludes that voting rights remedies will meet the congruence and proportionality test as:

Congress’s judgment in the exercise of its power under the Fifteenth Amendment is due great deference. And indeed, its authority to prohibit discriminatory effects in the exercise of its power under section 2 of the Fifteenth Amendment has been consistently upheld. Whatever the limits of congressional power to address discrimination under the Civil War Amendments, where the exercise of that power raises only the relatively few concerns presented in the districting context, Congress’s judgment of what is appropriate should be given effect.

Id. at 135 (footnotes omitted).

Professor Rubin’s arguments make sense if the Court gives greater deference to Congress’s power under the Fifteenth Amendment. However, these arguments will likely carry little weight in a strict congruence and proportionality analysis. After all, most of these same arguments could have been made about the Religious Freedom Restoration Act which also represented Congress’s judgment about a type of discrimination engaged in by local governments that could create divisiveness. And, as previously discussed, racially polarized voting will likely be minimized as evidence of unconstitutional activity when the Court conducts a congruence and proportionality analysis. See *supra* Part III.B.1.c. Finally, Professor Rubin only applies this analysis to vote dilution and not ballot access.

250. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see also *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.” (internal quotes omitted)); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (holding that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. . . because statutes distributing the franchise constitute the foundation of our representative society”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[T]he political franchise of voting is . . . a fundamental political right, because [it is] preservative of all rights.”); see also *Ex Parte Siebold*, 100 U.S. 371, 382 (1879) (describing Congress’s power to regulate federal elections as “a most important power . . . of a fundamental character. . . [and] necessary to the stability of our frame of government”); Caminker, *supra* note 102, at 1156 (speculating that Congress’s enforcement power may be greater depending on the nature of the constitutional right being protected).

251. See Day, *supra* note 88, at 368; see also D. Grier Stephenson, Jr., *The Supreme Court, the Franchise, and the Fifteenth Amendment: The First Sixty Years*, 57 UMKC L. REV. 47, 49 (1988) (“By comparison with the single objectives of the thirteenth and fifteenth amendments, the fourteenth is actually five amendments rolled into one.”).

Amendment only implicates voting while the Fourteenth Amendment implicates a vast number of constitutional norms.

While *Lopez II* and the congruence and proportionality line of cases hint at a potential distinction between the Fourteenth and Fifteenth Amendment enforcement power, it bears noting that the Court recently characterized Congress's enforcement power under the Fourteenth Amendment as no different from its enforcement power under the Fifteenth Amendment—seemingly indicating that the Court would grant Congress no greater leeway under the latter amendment. The Court has, on several recent occasions, noted that Congress's enforcement power under the Fourteenth Amendment is “virtually identical”²⁵² and “parallel”²⁵³ to the power Congress may wield under the Fifteenth Amendment.²⁵⁴ Moreover, the enforcement clauses in the Fourteenth and Fifteenth Amendments contain nearly identical language,²⁵⁵ though the

252. *Garrett*, 531 U.S. at 373 n.8.

253. *See Boerne*, 521 U.S. at 518.

254. For other statements of the coextensive nature of Congress's Fourteenth and Fifteenth Amendment enforcement powers, see *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (describing Congress's power under Section 2 of the Fifteenth Amendment as “similar” to the power under Section 5 of the Fourteenth Amendment); *see also Lopez II*, 525 U.S. at 294 n.6 (Thomas, J., dissenting) (noting that the Court has “always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive”); *Mixon v. Ohio*, 193 F.3d 389, 398-99 (6th Cir. 1999) (“Section 2 of the Fifteenth Amendment mirrors Section 5 of the Fourteenth Amendment”); Caminker, *supra* note 102, at 1191 (equating the standard for use of Congress's enforcement power under the Fifteenth Amendment with that of the Fourteenth Amendment); Gottesman, *supra* note 242, at 47 n.82 (same).

255. *See supra* note 6. *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 818-27 (1999) (describing a theory in which the meaning of a constitutional provision should be read in light of other constitutional provisions containing similar language and applying it to the enforcement clauses of the Civil War Amendments).

Despite the similarity of language used in the Fourteenth and Fifteenth Amendment enforcement clauses, perhaps a case could be made that the subtle difference in language provides a basis for reading Congress's enforcement power under the two amendments to be different. Such a case would begin by examining the language of the enforcement clauses of all three Civil War Amendments. The Thirteenth Amendment, which outlawed slavery, enforcement clause reads: “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2. The Fourteenth Amendment enforcement clause reads: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. The Fifteenth Amendment enforcement clause reads: “The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV, § 2.

As can be seen, the ordering of the words in the Fifteenth Amendment more closely mirrors that of the Thirteenth Amendment. In fact, the language would be identical but for the placement of “The” at the beginning of the Fifteenth Amendment clause. So perhaps the Thirteenth and Fifteenth Amendment enforcement clauses deserve the same reading—one different from the Fourteenth. And since the Court has seemingly given Congress expansive authority in the Thirteenth Amendment context, so should the Court give Congress the same expansive authority in the Fifteenth Amendment context. *See Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 439 (1968) (allowing Congress to outlaw a private citizens' racially discriminatory refusal to sell property because Congress has broad Thirteenth Amendment authority enforcement power to eliminate “all badges and incidents of slavery”).

However, this assumes the legislative history would support such an interpretation and that the Rehnquist Court would be willing to show an uncharacteristic fondness for Supreme Court precedent from the 1960s. Moreover, even though the order of the words in the Thirteenth and Fifteenth Amendments differs from the Fourteenth, the same words are used—so perhaps all three enforcement clauses were intended to have the same meaning. *See generally* Amar, *supra*, at 822-26 (argu-

Court has yet to explicitly hold that the scope of the Fourteenth and Fifteenth Amendment enforcement powers are identical.

Even if Congress has greater enforcement power under the Fifteenth Amendment than under the Fourteenth Amendment, it is uncertain how much voting-related activity falls under the umbrella of the Fifteenth Amendment. Here, the vote dilution/vote denial dichotomy becomes important because the Court has never definitively indicated where these apparently two distinct rights should be placed in the constitutional framework. The Court has clearly held that the Fourteenth Amendment encompasses instances of vote dilution²⁵⁶ and that the Fifteenth Amendment encompasses instances of the denial of access to the ballot.²⁵⁷ Yet the Court has provided profoundly mixed signals as to whether there is a Fifteenth Amendment constitutional right to not have a vote diluted.²⁵⁸

If the Fifteenth Amendment does not encompass vote dilution, greater enforcement power under the Fifteenth Amendment may provide little aid to upholding an extension of Section 5. However, even if this is the case, the Fifteenth Amendment enforcement power could be interpreted to allow Congress greater leeway to determine the types of changes that are subject to Section 5 preclearance. In other words, even if the Fifteenth Amendment itself does not cover vote dilution, Congress may be able to use its enforcement power to expand the Amendment to cover dilutive changes.²⁵⁹

While it seems possible that the Court will give an extension of Section 5 an implicit or explicit exemption from the rigors of the congruence and proportionality test, such an exemption is not inevitable.²⁶⁰ If Section

ing that the Thirteenth and Fourteenth Amendment enforcement clauses should be given the same interpretation).

256. See, e.g., *White v. Regester*, 412 U.S. 755, 767 (1973) (applying the Fourteenth Amendment to a claim of vote dilution).

257. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 651-52, 663-64 (1944) (applying the Fifteenth Amendment to denial of primary ballot to an African-American citizen).

258. See *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (noting that the Court has yet to decide if the Fifteenth Amendment applies to vote dilution claims); *City of Mobile v. Bolden*, 446 U.S. 55, 65, 66 (1980) (plurality opinion) (implying that vote dilution is not encompassed in the Fifteenth Amendment); *Gomillion v. Lightfoot*, 364 U.S. 339, 342, 345 (1960) (implying that vote dilution is encompassed in the Fifteenth Amendment). Compare *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (holding that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. . . . hit[ting] onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race"), with *Holder v. Hall*, 512 U.S. 874, 920 n.20 (1994) (Thomas, J., concurring) (arguing that the Fifteenth Amendment only implicates access to the ballot (citing *Mobile*, 446 U.S. at 84 n.3 (Stevens, J., concurring))).

259. See Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 299 (1998); see also *Lopez II*, 525 U.S. at 287 (upholding the constitutionality of Section 5 in a case involving changes with the potential for vote dilution); *City of Rome*, 446 U.S. at 187 (same).

260. It is interesting to consider the role Justice O'Connor, the Court's most prominent "swing" vote, might play in deciding whether or not there is an exception to the congruence and proportionality test for voting rights remedies. See David S. Broder, *O'Connor's Special Role*, WASH. POST, Oct. 1, 2003, at A23 (describing how Justice O'Connor holds the "swing vote" on the current Court). It is

5 receives a free pass, no problem, but, if subjected to a genuine application of the congruence and proportionality test, an unamended extension of Section 5 will likely encounter trouble. Thus, Congress may want to consider amending Section 5 to ensure its conformance to Court doctrine.

V. AMENDING SECTION 5 TO CONFORM TO THE CONGRUENCE AND PROPORTIONALITY TEST

In the event the Court declines to adopt a voting rights exception to the congruence and proportionality test, Section 5 could be amended so as to meet the test while still providing an adequate prophylactic mechanism to preserve the gains achieved by minority voters since passage of the Voting Rights Act. The lengthy history of voting-related discrimination, the more recent voting problems, and the deterrent effect of Section 5, provide enough justification for some federal scrutiny of state and local election laws.²⁶¹ Moreover, many of the gains made in the elimination of practices that dilute minority votes have occurred more recently and, in these places, a much greater likelihood exists for voting changes to be made with the unconstitutional, intentional purpose of reverting to previous systems known to dilute minority votes.

noteworthy that she has written the only congruence and proportionality majority opinion that makes no reference or comparison with the Voting Rights Act. See *Kimel*, 528 U.S. at 66-92. Justice O'Connor was also the author of *Lopez II*. Thus, she may be signaling that there is room to argue that Congress has different and greater enforcement powers when it comes to voting rights.

Maybe, though, the focus should not be on Justice O'Connor but on Justice Scalia. In the Court's most recent congruence and proportionality decision, Justice Scalia revoked his support for the doctrine. See *Tennessee v. Lane*, 124 S. Ct. 1978, 2007-09 (2004) (Scalia, J., dissenting) (describing his initial support for congruence and proportionality doctrine but then proposing a different test for future cases). Justice Scalia stated that he will apply a relaxed rational basis standard whenever Congress enacts provisions that are "designed to remedy racial discrimination by the States." *Lane*, 124 S. Ct. at 2011 (Scalia, J., dissenting). However, this "relaxed" standard comes with some significant baggage because Justice Scalia will only allow Congress to use its enforcement power when it enacts a remedy that: (1) is imposed "only upon those particular States in which there has been an identified history of relevant constitutional violations;" (2) is "directed against the States or state actors rather than the public at large;" and (3) does not "violate other provisions of the Constitution." *Id.* at 2012-13 (Scalia, J., dissenting).

My suspicion is that Section 5 would run into trouble even under Justice Scalia's "relaxed" standard. First, it seems likely that Justice Scalia would come to the conclusion that Section 5 so upsets the federal/state balance that it violates another provision of the Constitution—the Tenth Amendment. Even apart from that, one has to wonder how strict Justice Scalia will interpret his requirement that the remedy apply only to states with an identified history of relevant constitutional violations. This standard raises numerous questions: How many violations are needed? How recent does the "history" of violations need to be? And how strict is the determination about what amounts to a constitutional violation—is it "arguable" violations, anything Congress self-identifies as a violation, or only those violations found by the courts? Suffice it to say that Justice Scalia's "relaxed" standard seems likely to be much tighter than the "relaxed" standard previously used to uphold a number of voting rights remedies—cases which Justice Scalia cites as forming a major part of the reasoning for his new test. *Id.* at 2012 (Scalia, J., dissenting) (describing the implications of previous Court decisions concerning voting rights). After all, Justice Scalia, in explicating the parameters of his new test, approvingly cites a dissent from one of those cases. *Id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 666-67, 669, 670-71 (1966) (Harlan, J., dissenting)).

261. See discussion *supra* Part III.B.

A need still exists for Section 5, just, perhaps, in a more limited, modern, and fine-tuned form because of changes to the landscape in terms of the more recent problems with voting discrimination and in terms of the Court's development of congruence and proportionality doctrine. By revising the coverage formula to apply to those areas where voting-related problems have more recently been at issue, by limiting the types of voting changes covered by Section 5, and by easing the restrictions for covered jurisdictions to bail out of Section 5, a revised, modern preclearance mechanism would pass the congruence and proportionality test. Moreover, a carefully revised Section 5 would still enable capture and prevention of most changes harmful to minority voting strength, and perhaps even result in a more effective, targeted tool in preventing voting-related discrimination.

A. Change the Coverage Formula

The first step in revising Section 5 to comport to the congruence and proportionality test would be a revision of the coverage formula to redefine those areas with a history of voting-related discrimination that merit continuing closer scrutiny of their election laws. The current coverage formula targets those jurisdictions that used a literacy test or other device to limit access to the franchise and where the effect of these devices was reflected in unusually low voter registration and turnout levels in the 1960s and 1970s.²⁶² But, as previously discussed, this coverage formula needs an update.

A revised coverage formula might look to more recent history to determine which areas should be the target of increased federal scrutiny. The best way to do so would be to cover jurisdictions where violations of the Fourteenth Amendment, Fifteenth Amendment, and certain provisions of the Voting Rights Act have occurred since 1982. Basically, this would cover any states or counties which, since the 1982 extension of Section 5, have been found: (1) in violation of the Fifteenth Amendment or Fourteenth Amendment as they relate to racial discrimination in voting;²⁶³ (2) in violation of Section 2 of the Voting Rights Act; (3) in violation of the obligation to gain preclearance of voting changes prior to implementation;²⁶⁴ (4) to have had implementation of a voting change prevented by a federal authority—either by an objection interposed by the

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

263. Coverage, however, would not be triggered by the mere failure of a jurisdiction to meet the one person, one vote requirement of *Baker v. Carr*, 369 U.S. 186 (1962), *Gray v. Sanders*, 372 U.S. 368 (1963), and *Reynold v. Sims*, 377 U.S. 533 (1964), because such a constitutional violation does not necessarily equate with racial discrimination. See generally Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561 (1995) (criticizing the one person, one vote standard for its failure to account for the prospect of minority vote dilution).

264. In other words, jurisdictions that have lost Section 5 enforcement actions. Thus, this formula would not cover jurisdictions that merely failed to submit a change for preclearance.

Department of Justice²⁶⁵ or by the denial of a declaratory judgment by the United States District Court for the District of Columbia; (5) in violation of the minority-language provisions of Section 203; or (6) to need monitoring by federal officials of their elections under Section 8²⁶⁶ of the Voting Rights Act.²⁶⁷ In addition, federal courts could continue to have discretion to subject jurisdictions to preclearance upon finding a constitutional violation of the right to vote—an authority currently found in Section 3(c) of the Voting Rights Act.²⁶⁸

265. When the Department of Justice interposes an objection, the Attorney General can reconsider the decision to object, and occasionally, in light of changes in fact or law, the Department of Justice has withdrawn an objection. See 28 C.F.R. § 51.46 (West 2003) (allowing for reconsideration of an objection where “there appears to have been a substantial change in operative fact or relevant law”); see also Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep’t of Justice, to The Honorable Alberto R. Gonzales, Texas Secretary of State (Oct. 21, 1998) (reconsidering and withdrawing a Section 5 objection), at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_102198.htm (last visited Feb. 5, 2004). In such an instance, coverage could not be triggered if the Department of Justice initially objected but then withdrew the objection when presented with new circumstances that indicated the objection was wrongly interposed.

266. 42 U.S.C. § 1973f. This section reads, in part:

[T]he Director of the Office of Personnel Management may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

Id.

During the November 2002 election, federal authorities monitored activity in twenty-six counties. See Press Release, U.S. Dep’t of Justice, *Federal Observers and Justice Department Personnel to Monitor General Election in States Across The Nation* (Nov. 4, 2002), at http://www.usdoj.gov/opa/pr/2002/November/02_crt_640.htm (last visited Feb. 5, 2004). For a discussion on how the federal government chooses which elections to monitor, see generally Barry H. Weinberg & Lyn Utrecht, *Problems in America’s Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 416-18 (2002).

267. Many of the cases brought pursuant to Voting Rights Act Sections 2, 5, and 203 have been resolved by consent agreement. See THERNSTROM, *supra* note 12, at 9 (noting that “[f]ew voting cases actually reach the courts” as most are “settled without litigation”); see also McCrary, *supra* note 37, at 699 (describing how many Section 2 defendants “settled before trial”). Thus, the Section 5 coverage formula could be triggered by any consent agreement or court finding of a violation of Section 2; any consent agreement or court finding pursuant to a Section 5 enforcement action; any consent agreement or court denial of preclearance in a Section 5 declaratory judgment action in the United States District Court for the District of Columbia; or any consent decree or court finding of a violation of Section 203.

268. 42 U.S.C. § 1973a. Section 3(c) provides:

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attor-

The coverage formula should also avoid “automatic” coverage of all political subdivisions of a covered entity by adopting a two-tier level of coverage. Initially, one would look to states that would fall within these categories. These states would then have any enactments of statewide application subject to the preclearance requirement of Section 5, but “local legislation” targeted at particular counties or governing bodies would be exempted. Then coverage would be examined at the level of government at which voter registration takes place—in most states at the county level. Any county that falls into any one of the six previously mentioned categories or any county that contains a political subdivision that falls into one of these categories would become covered. Legislation adopted at the state level that is aimed at these counties and their jurisdictions (“local legislation”) would also need to be submitted for preclearance.

Such a coverage formula is not flawless and still might not pass a strict interpretation of the congruence and proportionality test. The most obvious problem being that most jurisdictions will become covered because of violations of Sections 2 and 5 and such violations are generally not premised on purposeful, unconstitutional voting-related discrimination—both appear to merely prohibit voting practices that have a discriminatory effect.²⁶⁹ Another problem could be the Department of Justice’s past administration of Section 5 that was later found to be erroneous by the Supreme Court.²⁷⁰ Finally, a very small number of jurisdic-

ney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court’s finding nor the Attorney General’s failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Id. § 1973a(c). For an example of a court ordering coverage under Section 3(c), see *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990) (ordering the State of Arkansas to submit practices related to majority vote requirements for preclearance) (three-judge panel). Such coverage, however, is relatively rare. See *Jeffers*, 740 F. Supp. at 600 (noting the lack of cases discussing standards for imposing the Section 3(c) preclearance requirement).

There may be one pragmatic problem with my proposed coverage formula. Namely, who would be responsible for determining which jurisdictions fall into one of the categories for coverage? It would probably make most sense for the Chief of the Voting Section of the Department of Justice to make these determinations because: (1) the Voting Section probably has the most comprehensive records regarding voting rights enforcement and (2) this would leave the decision in the hands of a non-political, career government official, thus eliminating any potential “gaming” of the decisions by Democratic or Republican political appointees.

269. A Section 5 enforcement action involves no finding of discriminatory conduct; it merely indicates noncompliance with the obligation to seek preclearance. See *United States v. Louisiana*, 952 F. Supp. 1151, 1158 (W.D. La. 1997) (holding that the only issues for the court to determine in a Section 5 enforcement action are “(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5’s approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate” (quoting *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983))).

270. For many years the Department of Justice denied preclearance to nonretrogressive changes that were determined to have been adopted with a discriminatory, but nonretrogressive purpose. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 342 (2000) (*Bossier II*) (Souter, J., concurring in part and dissenting in part) (discussing the longstanding Department of Justice practice of refusing preclearance to changes made with an unconstitutional discriminatory purpose). The Department also used to object to changes that resulted in a “clear” violation of Section 2 of the Act. See 28 C.F.R. § 51.55(b) (1996). The Supreme Court foreclosed these aspects of Section 5 enforce-

tions may have entered consent agreements in Section 2 and Section 5 cases to avoid the expense of litigation.²⁷¹ What all these potential problems with such a revised coverage formula address is the possibility of overbreadth in the coverage of jurisdictions.

Yet most of these problems of overbreadth could be easily resolved through revision to other portions of the statute. As will later be suggested in further detail, jurisdictions could be offered a streamlined process to bail out of Section 5 coverage. As part of the bailout process, jurisdictions could be allowed to present evidence to prove “wrongful” coverage—either because spurious claims were settled to avoid litigation costs or because the Department of Justice interposed an erroneous objection.²⁷² As for the failure of a violation of Section 2 or 5 to equate to purposeful discrimination, the standards for proving such violations, especially in the case of Section 2, approximate those necessary for finding a constitutional violation of the right to vote.²⁷³

In addition to helping meet the congruence and proportionality test, the proposed coverage formula would allow for better enforcement of

ment by the Department of Justice in *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 490 (1997) (*Bossier I*), and *Bossier II*. In addition, the Department’s administration of Section 5 was criticized by the Supreme Court during the 1990s round of redistricting. See *Miller v. Johnson*, 515 U.S. 900, 924-27 (1995) (describing the Department of Justice’s “policy of maximizing majority-black districts”); see also *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (same).

271. Voting rights litigation can be very expensive. See McDonald, *supra* note 2, at 1279 n.173 (listing plaintiffs’ litigation expenses in several voting rights cases); see also Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 93 (1996) (remarking that modern voting rights cases are characterized by “growing sophistication” involving lots of expert witness testimony and “intricate computer models to construct proposed districts”).

272. This would not be the only factor to consider in a bailout hearing, and a jurisdiction would not be allowed an automatic bailout just because the Department of Justice may have wrongfully interposed an objection. Rather, it would be only one part of a totality of the circumstances test for bailout. See discussion *infra* Part V.C.

273. For a discussion of how Section 2 closely approximates the constitutional standard, see *supra* note 171 and accompanying text. While the Section 5 non-retrogression standard does not require a discriminatory purpose, non-retrogression would seemingly be a major factor in any analysis of the constitutionality of a change in election law. In *Bossier II*, Justice Scalia described how the term “abridged” is used in both Section 5 and in the Fifteenth Amendment, that the term “necessarily entails a comparison,” and that “[i]t makes no sense to suggest that a voting practice ‘abridges’ the right to vote without some baseline with which to compare the practice.” *Bossier II*, 528 U.S. at 333-34. See generally John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1215-23 (1998) (describing how non-retrogression plays a primary role in the Court’s approach to constitutional law, especially in the race cases). But see *Beer v. United States*, 425 U.S. 130, 149-50 (1976) (Marshall, J., dissenting) (arguing that the retrogression standard has no constitutional basis).

The Court’s most recent fine-tuning of the retrogression test seems to move it even closer to the constitutional standard for voting discrimination. See *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511 (2003). Prior to *Georgia*, the retrogression test seemed to be a “pure” effects test. In other words, if minority voters were worse off under the change than federal preclearance had to be withheld. *Georgia* replaced this “pure” effects test with a totality of circumstances approach. See *Georgia*, 123 S. Ct. at 2511. This approach requires “an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group’s opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan.” *Id.* In this way, Section 5’s retrogression test seems to be moving toward Section 2’s results test; the latter of which is relatively close to the constitutional standard for vote dilution. See *supra* note 171 and accompanying text.

Section 5. It would target places where recent problems have occurred and these places would seemingly be more likely to have future problems. It would also significantly reduce the number of covered jurisdictions where there is little chance of a change being implemented that violates the nonretrogression principle of Section 5. For example, Georgia and Virginia are currently covered in their entirety, but both states contain a number of counties with very low percentages of minority population.²⁷⁴ Yet these counties, and any cities, school districts, or other governing bodies that conduct elections within these counties, must submit every single voting change enacted when, as a practical matter, federal authorities will likely never prevent implementation of a change because it is impossible to retrogress minority voting strength when minority residents have very little, if any, voting strength to begin with.²⁷⁵ Conversely, there are also a number of counties where minority residents constitute such a great proportion of the population, it is almost equally impossible to retrogress minority voting strength.²⁷⁶ Thus, removing these places from Section 5 coverage would allow the Department of Justice to concentrate its Section 5 resources on those areas where violations more likely will occur.

B. Reduce the Number of Voting Changes Subject to Section 5 Coverage

Aside from changing the coverage formula, to further make Section 5 comply with the congruence and proportionality test, a reduction could be made in the types of voting changes subjected to the preclearance process. Currently, Section 5 applies to all facets of the election process, no matter how minor,²⁷⁷ although many of these innocuous changes have little chance to retrogress minority voting strength.²⁷⁸ As previously

274. For example, in northwest Georgia, the 2000 Census shows that Catoosa County has 53,282 residents, of whom only 669 are black; Dade County has 15,154 residents, of whom 96 are black; and Fannin County has 19,798 residents, of whom 34 are black. *See generally American FactFinder*, *supra* note 211. In southwest Virginia, Buchanan County has 26,978 residents, of whom 708 are black; Dickenson County has 16,395 residents, of whom 58 are black; and Scott County has 23,403 residents, of whom 139 are black. *Id.*

275. *See* John J. Roman, *Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 132 (1972) (discussing how "the reasonable expectancy of fifteenth amendment violations is very slight where the minority group constitutes such a small percentage of the total population"). A lack of minority population also makes it unlikely that local officials would enact changes with a retrogressive purpose.

276. A number of examples of this can be found in counties near the Texas-Mexico border. For example, the 2000 Census shows Brooks County with a population of 7,976, of whom 7,304 are Hispanic; Starr County has a population of 53,597, of whom 52,278 are Hispanic; and Zavala County has 11,600 persons, of whom 10,582 are Hispanic. *See generally American FactFinder*, *supra* note 211.

277. *See supra* note 49 and accompanying text.

278. *See, e.g.*, Letter from Joseph R. Rich, Chief, Voting Section, Civil Rights Division, U.S. Dep't of Justice, to Gary O. Bartlett, Executive Director, North Carolina State Board of Elections (April 17, 2002) (preclearing a state law that "requires state and county election boards to notify candidates for elective office of laws and rules prohibiting display of nonofficial signage on any state traffic device or highway signage or electric power company structures") (on file with the author).

noted, the modern-day problem for minority voters tends to involve vote dilution rather than vote denial.

For this reason, Section 5 could be extended to apply only to changes with the opportunity to retrogress minority voting strength in terms of vote dilution, not to changes that have the potential to retrogress minority voters' access to the ballot.²⁷⁹ Thus, changes in forms of government, methods of election, redistrictings, and annexations could not be implemented without federal approval. But, changes in precinct lines, polling places, methods of voting, and other aspects of the electoral process that involve access to the ballot *could* be implemented without federal approval.²⁸⁰

Such a change would help Section 5 comply with the congruence and proportionality test and also better focus enforcement on the types of changes most likely to violate Section 5. By eliminating many generally non-problematic changes from the preclearance requirement, Section 5 coverage would sweep up less constitutional activity than it does currently—thus lessening the argument of overbreadth of coverage that Section 5 will face in application of the congruence and proportionality test. The burden on federalism would also be reduced as state and local governments would need to submit far fewer changes for preclearance. Moreover, the Department of Justice would no longer have to approve every single voting change, but rather would be able to focus on those changes that have proved the most likely to be objectionable. Importantly, such a scheme would not leave minority voters without a remedy

279. Admittedly, this is not a particularly novel idea as it was floated when Section 5 last came up for extension in 1982. See Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in MINORITY VOTE DILUTION 167, 173 (Chandler Davidson ed., 1984) (describing a Reagan administration proposal to limit “the preclearance requirement to the types of changes that had elicited the most objections from the Justice Department”).

During the 1982 extension debate, the Reagan administration also proposed a “mandatory notice” provision under which jurisdictions would have to provide notice to the Department of Justice about a voting change, but the Department would then have the burden of seeking a court injunction to prevent implementation of the change. *Id.* at 173-74. This Article does not advocate such a revision because it would be a tremendous strain on the Department of Justice’s resources, more time-consuming, and too unprotective of minority voting rights as compared with the current sixty-day preclearance process.

280. The November 2000 Presidential election provides evidence that aspects of the electoral process such as voting machines may still have the potential to discriminate. See U.S. Comm’n Civil Rights, Allan J. Lichtman, *Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida* (June 2001) (attributing at least some of the disparity in ballot rejection between African-Americans and whites to differences in voting methods used), at <http://www.usccr.gov/pubs/vote2000/report/appendix/lichtman/ltrpt.htm> (last visited Nov. 19, 2003); Report of the Minority Staff, Special Investigations Div., Comm. on Gov’t Reform, U.S. House of Representatives, *Income and Racial Disparities in the Undercount in the 2000 Presidential Election* (2001) (same), at <http://www.house.gov/roybal-allard/undercountreport.pdf> (last visited Feb. 6, 2004). But the problem with methods of voting in the 2000 Presidential election was outdated equipment that had not been changed and Section 5 does nothing to impact the status quo. Moreover, the recent adoption of the Help America Vote Act should alleviate problems with voting machines. See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1666-1730 (codified in scattered sections of 42 U.S.C.) (establishing a commission to disburse funds to the states to replace antiquated voting equipment).

to challenge discriminatory rules that limit ballot access, as Section 2 of the Voting Rights Act²⁸¹ would still provide a remedy to address such problems.²⁸²

Finally, a prophylactic remedy in the vote dilution context makes the most sense, and thus is more congruent and proportional, because of the difficulty of proving discriminatory intent in such changes.²⁸³ In the redistricting context, for example, proving an unconstitutional racial purpose can be very onerous because race and ethnicity almost always plays a part in the redistricting calculus.²⁸⁴ And, if race is always a factor, it becomes difficult to separate illicit racial motives from licit ones. Thus, because of the recent history of problems in the vote dilution context and the fact that race almost always plays a role in redistricting, which is perhaps the most important vote dilution change reviewed under the preclearance requirement and the most likely to result in unconstitutional discrimination, it remains congruent and proportional to require preclearance of changes with the potential for vote dilution.

C. Make "Bailout" Less Onerous

Section 5 currently allows states and counties to bail out of coverage.²⁸⁵ But, bailout remains difficult for a number of reasons. First, when a state or county attempts to bail out, it also must bail out on behalf of all

281. This Article presumes the constitutionality of Section 2. See *Bush v. Vera*, 517 U.S. 952, 990-92 (1996) (O'Connor, J., concurring) (urging states to assume the constitutionality of Section 2 as lower federal courts have "unanimously affirmed its constitutionality").

282. See, e.g., *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 588 (9th Cir. 1997) (applying Section 2 to a special district's landownership requirement); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 308 (3d Cir. 1994) (applying Section 2 to voter purge procedures); *Lowe v. Kansas City Bd. of Election Comm'rs*, 752 F. Supp. 897, 900 (W.D. Mo. 1990) (applying Section 2 to the use of term limits for city council positions); *Roberts v. Wamser*, 679 F. Supp. 1513, 1516-17 (E.D. Mo. 1987) (applying Section 2 to use of certain types of voting machines), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989); *Brown v. Dean*, 555 F. Supp. 502, 503 (D.R.I. 1982) (applying Section 2 to the location of a polling place).

For an interesting theory on using Section 2 against practices that deny minority voters access to the ballot, see generally Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1188-99 (2001) (arguing that courts generally find voting practices to violate Section 2 when the policy justifying the practice is tenuous, and advocating that "[t]he more severe the racial disparity of voting access that results from a challenged practice, the more tenuous the justification should be seen to be, even if that justification is asserted to have nothing to do with race").

283. See *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1982 (2003) (holding that the FMLA meets the congruence and proportionality test in part because gender discrimination is "subtle" and "may be difficult to detect on a case-by-case basis"); see also Blumstein, *supra* note 200, at 648 ("Proof of discriminatory intent . . . may be difficult to uncover.").

284. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will, for example, almost always be aware of racial demographics . . . , [and] [t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make."); see also *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 176 n.4 (1977) (Brennan, J., concurring) ("It would be naive to suppose that racial considerations do not enter into apportionment decisions."); Karlan & Levinson, *supra* note 191, at 1203 (arguing that legislators "always intend the racial compositions of the districts they draw").

285. See 42 U.S.C. § 1973b.

its subjurisdictions (e.g., cities, school districts, water districts, etc.).²⁸⁶ Second, to bail out, states and counties need to demonstrate compliance with Section 5 for the past ten years.²⁸⁷ To do so, these entities must show that every voting change, no matter how small or insignificant, has been precleared.²⁸⁸ Third, to bail out, jurisdictions need to secure a declaratory judgment from the United States District Court for the District of Columbia.²⁸⁹

These requirements are difficult and burdensome to meet and do not allow many subjurisdictions to even attempt a bailout. For example, a county cannot bail out if one of its municipalities has adopted an annexation that has not been precleared, even if the annexation does not have a negative impact on minority voting strength; and a municipality cannot bail out, even if it has strictly complied with the provisions of Section 5, unless its county decides to bail out and can meet the eligibility requirements as well.²⁹⁰ Further, to undertake a bailout, a county must undergo the expense of litigation in the United States District Court for the District of Columbia.²⁹¹ It is no wonder then that bailouts have been few and far between.²⁹²

A revised Section 5 could broaden the number of jurisdictions eligible to bail out and streamline the bailout process. Every jurisdiction would be eligible to bail out on its own. States, counties, cities, and school districts could bail out on their own merits—regardless of what had happened in other jurisdictions that happen to lie within its borders or because it was subsumed in a covered jurisdiction. The standard could also be changed to a totality of the circumstances test that would consider the factors listed in the current bailout provision and any other evidence the jurisdiction wishes to present to demonstrate that they were wrongly

286. *Id.* § 1973b(a)(1)(A)–(F) (requiring jurisdictions seeking bailout to demonstrate that certain violations of voting rights have not occurred “within its territory”); *see also* S. REP. NO. 97-417, at 56-58 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 234-36.

287. *Id.* § 1973b(a)(1)(D) (requiring a jurisdiction seeking bailout to show all government units within its territory have complied with Section 5, including the requirement that no change be enforced without preclearance and the repeal of all changes denied preclearance).

288. Perhaps a jurisdiction would not be denied a bailout for “technical” non-compliance with Section 5; for example, if some “minute, unsubmitted change” could be identified. *See* Hancock & Tredway, *supra* note 215, at 418. However, the statute’s plain language and legislative history would seemingly indicate otherwise. *See* S. REP. NO. 97-417, at 48 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 226 (noting unintentional failures to seek preclearance should not be excused because jurisdictions had ample knowledge of the need for preclearance).

Victor Andres Rodriguez argues that non-compliance with the current version of Section 5 provides a justification for extending the statute. Rodriguez, *supra* note 20, at 808-09. One problem with this, which he points out, is that there is no real way to measure non-compliance. *Id.* at 808. In addition, it would be difficult to separate negligent non-compliance from non-compliance motivated by bad intent, and the congruence and proportionality doctrine would seemingly require some modicum of proof that changes were not being submitted for the purpose of implementing discriminatory voting practices.

289. *Id.* § 1973b(a)(1).

290. *See supra* note 218 and accompanying text.

291. *See* § 1973b(a)(1).

292. *See supra* note 218 and accompanying text.

covered or that voting discrimination no longer presents a threat requiring preclearance.

The Department of Justice could also be allowed to process bailouts administratively as a surrogate for the United States District Court for the District of Columbia. Much like the current Section 5 preclearance process, an administrative system could be created to review bailouts within a particular time frame, say 120 days. If the Department of Justice disallowed bailout, a dissatisfied jurisdiction could then still bring an action in the United States District Court for the District of Columbia. In addition, the bailout provision could allow for a probationary period of at least five years in which a jurisdiction could be administratively recaptured by the Department of Justice if found to have passed and implemented a retrogressive change or engaged in some other act of voting-related discrimination.

A streamlined bailout again would help make the Section 5 remedy more congruent and proportional to the ill it seeks to curb and simultaneously make for better targeted enforcement of Section 5. No longer would jurisdictions be permanently trapped in Section 5 because of what occurred in another place that lies within its borders or because it was lying within a covered jurisdiction. Bailout would not hinge on technical compliance with Section 5, but rather would look at the real-world consequences of failure to comply. And the Department of Justice would provide a quick yes or no answer for bailout. Such a bailout process would also further streamline for the Department of Justice the number of jurisdictions subject to coverage so that the Department could devote more resources to those areas where problems most likely will occur.

Perhaps the greatest problem with using the Department of Justice to process bailouts would be the potential drain on its resources. However, the Department of Justice typically faces a declining Section 5 workload as a decade progresses—mostly owing to the fact that the Department reviews the bulk of redistricting submissions soon after the release of the decennial Census.²⁹³ Thus, the problem of a potential drain on the Department of Justice's resources could be solved by providing jurisdictions with specific time frames to submit bailouts. For example, the Department of Justice could be limited to reviewing bailouts during the five years immediately prior to the decennial Census. During years when the Department of Justice does not review bailouts, jurisdictions could still seek bailout in the United States District Court for the District of Columbia.

293. See *Section 5 Changes 1990s*, *supra* note 159 (showing that from 1990-1994 the Department of Justice reviewed 2,890 redistricting submissions and that from 1995-1999, the Department reviewed 566 redistricting submissions).

In sum, making bailout more efficient and attainable would help an extension of Section 5 pass the congruence and proportionality test because it would further reduce the potential for overbreadth, and a revised bailout scheme could better focus Department of Justice enforcement of the statute.

D. Some Concluding Thoughts on Revising Section 5

The three revisions suggested in this Article do not, by any means, constitute the universe of proposals that might allow Section 5 to pass the congruence and proportionality test. It could be argued that covered jurisdictions should no longer be saddled with the litigation burden of instituting a declaratory judgment action for preclearance in the United States District Court for the District of Columbia and should be allowed to file such cases in local federal district courts (though the current burden of litigation in this venue seems minimal as most jurisdictions administratively preclear changes through the Department of Justice).²⁹⁴ It could also be argued that the retrogression test should be eliminated in favor of a standard under which a change would only be objectionable if it had been adopted with an unconstitutional discriminatory purpose.

The basic point is that a minimum of changes may need to be made to Section 5 to keep it a congruent and proportional remedy. To meet the congruence and proportionality test, Congress will seemingly need to find a means of: (1) ensuring that the coverage formula targets those places where recent discrimination has occurred; (2) reducing the amount of constitutional activity covered; and (3) streamlining the bailout process.²⁹⁵ The Court has, in recent years, revived federalism concerns and Congress, if it chooses to extend Section 5, would do well to pay some

294. The Court has recognized the litigation burden of bringing claims before the United States District Court for the District of Columbia. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 559-60 (1969).

295. Congress might also want to limit the length of the re-extension to, perhaps, fifteen years instead of twenty-five. *See Boerne*, 521 U.S. at 532-33 (approving of Congress's seven-year extension of Section 5).

Perhaps, though, the Court's entertainment of "as applied" challenges under the congruence and proportionality doctrine negates the need for Congress to show any kind of restraint in enacting prophylactic remedies. *See Lane*, 124 S. Ct. at 2005 (Rehnquist, C.J., dissenting) (remarking that the "as applied" approach could eliminate any incentive for Congress to pass narrowly crafted enforcement power legislation). It is unclear where the Court will go with this "as applied" rule. For example, it may only work with regard to legislation that touches upon a vast number of constitutional rights rather than to legislation that only applies to a discrete type of constitutional rights. *Id.* at 1993 (distinguishing previous congruence and proportionality decisions that did not allow for as applied challenges because these cases "concerned legislation that narrowly targeted the enforcement of a single constitutional right"). Even so, it seems unlikely that an "as applied" rule could rescue Section 5 if Congress passes an overly broad coverage formula or an overly stringent bailout mechanism. Why? Because crafting a totally different coverage formula or bailout standard would, even for an activist Court, be too closely akin to abandoning a judicial role and assuming a legislative one. *Id.* at 2005-06 (Rehnquist, C.J., dissenting) (describing how an "as applied" rule "cannot be squared with . . . the proper role of the Judiciary").

heed to this revival. Otherwise, the Court may find Section 5 to be out-of-step with its recent precedents.²⁹⁶

CONCLUSION

Since its initial enactment in 1965, the remedy encompassed in Section 5 of the Voting Rights Act has helped prevent the erosion of gains made by minority voters and, by providing a prophylactic remedy, has significantly decreased the likelihood for the occurrence of voting-related discrimination.²⁹⁷ Thus, the statute has been a major factor in a wholesale shift, over the last three-plus decades, in the voting landscape from one in which discrimination against minority citizens was routine, to one in which discrimination against minority citizens has become less prevalent.

When Congress revisits the need for Section 5, recognition of this shifting landscape may be required by recent Supreme Court decisions. The Court, under the auspices of the congruence and proportionality test, could strike down any attempt to continue implementation of the same stringent Section 5 remedy initially imposed decades ago. Yet the potential for voting discrimination has not disappeared, and while it seems unlikely that the situation will return to the days of Jim Crow, a need still exists to protect the more recent gains achieved by minority voters. Thus, Congress should carefully consider congruence and proportionality when it extends Section 5 because different circumstances and different Supreme Court jurisprudence may require different remedies.

296. A revision of Section 5 by Congress might make the Court more willing to carve out a voting rights exception to the congruence and proportionality test. As some scholars have noted, the scope of Congress's enforcement power may reflect a continuing dialogue between the Court and Congress over which branch of the federal government has final authority to interpret the Constitution. See Carter, *supra* note 88, at 824, 851-53; McConnell, *supra* note 94, at 172. Through application of the congruence and proportionality test, the Court has staked out a position that reclaims greater authority as the ultimate arbiter of constitutional norms. Put another way, the Court has sent a message to Congress that, in effect, tells Congress to scale back its exercise of the enforcement power. Thus, if Congress responds to the dialogue by indicating acceptance of the Court's authority by slightly limiting the use of the enforcement power, then the Court may be willing to give Congress the benefit of the doubt when reviewing the extension of Section 5.

297. McCrary, *supra* note 37, at 665-66 (describing how, by 1990, the inequality evident in voting laws in 1960 had been "transformed beyond recognition"). As Professor Richard Pildes recently observed:

Of course, like all laws, the Voting Rights Act reflects the problems that shaped its creation. Last amended by Congress in 1982, the act was forged in a different America. Forty years ago, blacks were not permitted to vote in much of the South, an inequity that was the focus of the law.

.....
The South of 2003 is vastly changed. The reign of the one-party [Democratic] monopoly has come to an end. Partly because of the success of the Voting Rights Act, a substantial number of black legislators now wield power, even in the Deep South. Moreover, despite the persistence of racially polarized voting, white voters no longer abandon the [Democratic] party when it nominates black candidates; strong black candidates regularly get about a third of the white vote. The era of interracial harmony has not yet arrived, but these are changes with cultural and legal consequence.

Richard H. Pildes, *Less Power, More Influence*, N.Y. TIMES, Aug. 2, 2003, at A15.