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Section 5 of the Voting Rights Act is No Longer Tailored to Remedy Current Patterns of Voting Discrimination: The State of Section 5 after *Northwest Austin Utility District No. 1 v. Holder*

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I. INTRODUCTION

At the heart of the Voting Rights Act of 1965[1] ("VRA") lies the controversial Section 5. Section 5 requires select regions of the United States with a history of disenfranchising minorities to seek federal approval before modifying any local voting procedures.[2] Reauthorized by Congress as recently as 2006,[3] Section 5 was originally enacted in 1965 under the enforcement provision of the Fifteenth Amendment.[4] The purpose of the VRA was to eliminate

1. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

2. 42 U.S.C. § 1973c (1994).

3. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81. *See also* NW. AUSTIN MUN. UTIL. DIST. NO. ONE V. HOLDER, 129 S. Ct. 2504, 2510 (2009).

4. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The first section of the Fifteenth Amendment states as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race,

the taint of racial discrimination in the voting process that had been repeated in parts of the country for nearly one hundred years.[5] Due to its effectiveness, Section 5 became the cornerstone of the VRA and is still largely recognized as one of the most effective pieces of civil rights legislation ever enacted.[6]

The purpose of this comment is to discuss whether or not Congress possessed the constitutional authority under the Fifteenth Amendment to reauthorize Section 5 where the historical patterns of systematic disenfranchisement have largely ceased in the covered regions. While supporters of reauthorization are quick to point out that this cessation was achieved only because of the enactment of Section 5,[7] a legitimate question now arises concerning whether or not the preclearance requirement is still needed considering its effectiveness at eliminating the past methods used by the covered jurisdictions to deviously promote racial discrimination at the polls.

To complicate matters, the United States Supreme Court pronounced two standards for evaluating congressional legislation enacted pursuant to the Fourteenth and Fifteenth Amendments. The first standard is found in the seminal case of *South Carolina v. Katzenbach*,[8] where the United States Supreme Court upheld the original enactment of the VRA against constitutional challenges raised by South Carolina and other supporting states.[9] Under this particular standard, the Supreme Court paid a high level of deference to Congress's findings that the VRA was necessary to combat the persistent discrimination found at the polls and that the piecemeal approach of litigating individual cases was far too burdensome.[10] This same deferential standard was the one adopted by the United States Supreme Court as it struck down, on four different occasions, various constitutional challenges to the congressional reauthorizations of Section 5.[11]

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color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. The enforcement provision states: "The Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2.

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

6. Barbara Arnwine, *Voting Rights at a Crossroads: Return to the Past or an Opportunity*, 29 SEATTLE U. L. REV. 301, 30 (2005).

7. *See, e.g.*, Arnwine, *supra* note 5, at 308-09.

8. 383 U.S. 301 (1966).

9. *Id.* at 337.

10. *Id.* at 327-28.

11. Oregon v. Mitchell, 400 U.S. 112 (1970); Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey County, 525 U.S. 266 (1999).

The second standard is found in the case of *City of Boerne v. Flores*,[12] where the United States Supreme Court heightened its scrutiny of legislation passed under the Fourteenth Amendment and held that the enactment of the Religious Freedom Restoration Act of 1993[13] ("RFRA") exceeded congressional power.[14] Relying on the holding in *Katzenbach v. Morgan*,[15] the United States Supreme Court found that the enabling provision of the Fourteenth Amendment was a "positive grant of legislative power"[16] meant to cure actual harm, but not a grant of power to "decree the substance of the Fourteenth Amendment's restrictions on the states."[17] For this reason, the Court held that, to support legislation applicable against the states, Congress was to provide a record of findings demonstrating a "congruence and proportionality" between the alleged constitutional harm to be prevented and the legislative means adopted to prevent such harm.[18]

There can be no doubt that the original enactment of the VRA and subsequent reauthorizations of Section 5 were rightly passed pursuant to the Fifteenth Amendment and were supported strongly by a record of misconduct by the covered regions. However, in the past four decades, practically every aspect of the voting process has changed throughout the country.[19] Representation in political offices has increased considerably among minorities.[20] Voter turnout and registration have increased far beyond the low levels of involvement existing at the time of the original enactment of the VRA.[21] Most notably, however, the country has elected its first African-American president, Barack Obama, "who received a larger percentage of the white vote than each of the previous two Democratic presidential nominees."[22]

In light of these changes in the voting environment, the issue of whether the preclearance requirement of Section 5 is constitutional was recently presented to the District Court for the District

12. 521 U.S. 507 (1997).

13. 42 U.S.C. § 2000bb, *declared unconstitutional by* Merced v. Kasson, 577 F.3d 578, 579 (5th Cir. 2009).

14. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

15. 384 U.S. 641 (1966).

16. *Morgan*, 384 U.S. at 651.

17. *City of Boerne*, 521 U.S. at 519.

18. *Id.* at 520.

19. Appellant's Brief at 1, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (No. 08-322).

20. *Id.*

21. *Id.*

22. *Id.*

of Columbia in the 2006 case of *Northwest Austin Municipal Utility District No. One v. Mukasey*.[23] There, a small utility district located in Texas sought to bail out from the preclearance provisions of Section 5.[24] While the threshold argument was primarily one of statutory construction, the utility district also sought an alternative ruling that Section 5 was unconstitutional under the *City of Boerne* standard.[25] Employing *Katzenbach's* rational basis review, the district court held that the reauthorization of Section 5 was within congressional power and ruled against the utility district.[26]

The whole country watched closely after an appeal was made to the United States Supreme Court.[27] As a huge letdown, however, the Supreme Court avoided the constitutional question and resolved the matter on a less important threshold issue involving statutory construction of the bailout language.[28] Strangely, as though it had gotten cold feet, the Supreme Court invoked the doctrine of constitutional avoidance, holding that, because the threshold issue was resolved, there was no need to resolve the weightier constitutional question of Section 5.[29]

The United States Supreme Court's unwillingness to address the important constitutional issue means that a major unsettled question concerning the scrutiny with which the Court will analyze Section 5 remains unanswered. While the Supreme Court's decision clearly states that Section 5 "tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional,"[30] the Court's avoidance of the issue also means that the statutory framework will, for the time being, remain intact.

It is the opinion of the author that the preclearance requirements of Section 5 should be overturned. The most recent record upon which Congress based its 2006 reauthorization falls short of

23. 573 F.Supp. 2d 221 (D.D.C. 2008), *rev'd sub nom. Holder*, 129 S. Ct. 2504 (2009).
24. *Nw. Austin*, 573 F.Supp. 2d at 223.
25. *Id.* at 224.
26. *Id.* at 223-24.
27. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 894 (2009). Here, the Supreme Court noted probable jurisdiction on appeal from a three-judge panel as established under 42 USC § 1973b(a)(5). Probable jurisdiction is the practice by the United States Supreme Court whereby four of the justices agree to exercise the Court's appellate jurisdiction. Ohio v. Price, 360 U.S. 246 (1959). The Court then considers the case anew. *Price*, 360 U.S. at 247. Noting probable jurisdiction is very similar to granting a writ of certiorari. *Id.* at 246.
28. *Holder*, 129 S. Ct. at 2516.
29. *Id.* at 2513.
30. *Id.* at 2519 (Thomas, J., dissenting).

indicating any current pattern of state defiance that still justifies the use of such an expansive remedy and departure from our federal system.[31] Additionally, there are no meaningful limitations placed on the durational scope of Section 5's application. While Section 5 was an amazing piece of human rights legislation that brought about vast beneficial changes in the voting process, it is not tailored to patterns of voting discrimination that might arise in the present day. It is no longer constitutional.

II. HISTORY

A. Voting Rights Act of 1965

The Fifteenth Amendment guarantees that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[32] To ensure this guarantee, Congress has the power to enact enforcement legislation.[33] Any legislation enacted pursuant to the Fifteenth Amendment, however, must be carefully scrutinized to ensure that any intrusion on a state's right to self-government is limited to the proper level of enforcement.[34]

In 1965, Congress enacted the momentous Voting Rights Act pursuant to the Fifteenth Amendment.[35] Its primary purpose in doing so was "to banish the blight of racial discrimination in voting, which had infected the electoral process in parts of our country for nearly a century."[36] Importantly, prior to the enactment of the VRA, Congress had carefully explored the problem of racial discrimination in voting and generated a substantial record supporting its findings.[37]

The record clearly revealed extensive abuses in many jurisdictions. It showed that, almost immediately after the adoption of the Fifteenth Amendment, blacks in the Deep South attempting to exercise their constitutional right to vote were openly met with systematic threats, intimidation, and extreme violence.[38] The violence would continue over many decades, but would finally sub-

31. *Id.* at 2526.
32. U.S. CONST. amend. XV, § 1.
33. *Id.* at § 2.
34. *Holder*, 129 S. Ct. at 2520.
35. *Katzenbach*, 383 U.S. at 308.
36. *Id.*
37. *Id.* at 308-09.
38. *Holder*, 129 S. Ct. at 2521 (Thomas, J., dissenting).

side and be replaced by less obvious methods of disenfranchisement, such as property qualifications, "good character" examinations, and the now-infamous literacy tests.[39] While over time, the courts had declared most of these requirements unconstitutional, many of the southern states simply ignored the rulings or evaded the reach of the Fifteenth Amendment by readapting their measures to include requirements not addressed by the courts' decisions.[40] Not surprisingly, voter turnout among minorities in the South equaled only a small percentage of the turnout among the white population located in the same jurisdictions.[41]

The passage of the VRA was intended to remedy this historical pattern of abuse. The VRA's primary substantive provision was Section 2.[42] This Section contained a prohibition on voting discrimination, closely tracking the Fifteenth Amendment's guarantee against the abridgment or denial of the right to vote because of race.[43] Notably, Section 2 turned that guarantee into federal law with practical applications intended to eliminate, once and for all, the myriad techniques used by states to disenfranchise minorities.[44] Furthermore, federal legislation lessened the need for individuals to pursue long, costly litigation in pursuit of their Fifteenth Amendment rights.[45] Instead, the whole process would be controlled from the top down.

The VRA's most effective and well-known provision was Section 5.[46] Acknowledged by Congress as a "substantial departure . . . from ordinary concepts of our federal system,"[47] Section 5 requires that certain covered[48] jurisdictions obtain approval from the United States Attorney General or the District Court for the Dis-

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39. *Id.*
40. *Id.* at 2522.
41. *Id.* at 2523.
42. 42 U.S.C. § 1973.
43. *See id.*
44. *Holder*, 129 S. Ct. at 2520 (Thomas, J., dissenting).
45. *Katzenbach*, 383 U.S. at 314.
46. 42 U.S.C. § 1973c.
47. *Hearing on S. 407 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 536 (1975) (statement of J. Stanley Pottinger).
48. In explaining covered jurisdictions, the *Katzenbach* Court stated:

> The remedial sections of the Act . . . automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a 'test or device,' and (2) the Director of the Census has determined that less than 50% of its voting age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. These findings are not reviewable in any court and are final upon publication in the Federal Register.

Katzenbach, 383 U.S. at 317 (quoting 42 U.S.C. 1973b(b)).

trict of Columbia before changing any aspect of their voting rules or requirements.[49] Under Section 5, the presumption of validity normally given by the courts to state actions is rejected, and state officials carry the burden of proving that any changes made to their election procedures will not have a discriminatory impact on minorities in their jurisdiction.[50] If a covered region desires to terminate coverage under Section 5, then Section 4 of the VRA provides certain criteria that must be met to effectuate withdrawal.[51]

Due to its high level of infringement on the rights normally afforded to the states, Section 5 was to be temporary in nature and coverage was to lapse after five years.[52] Congress, however, reauthorized Section 5 on four different occasions. In 1970, Congress extended Section 5 for an additional five years and, again, in 1975 for an additional seven years.[53] In 1982, Congress reauthorized Section 5 once again; however, this time the reenactment would extend for an additional 25 years.[54]

As the 1982 reenactment approached the end of its extension period, Congress began creating a fresh record in support of a new reauthorization. During this time, congressional committees held over twenty hearings and received testimony from many witnesses.[55] In the end, Congress created a record of over 15,000 pages in support of reauthorization, focusing largely on proving that general racial discrimination had not been completely eliminated.[56]

The most recent reauthorization of Section 5 occurred on July 27, 2006 in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act and Reauthorization and Amendments Act.[57] Under this reauthorization, Section 5 was extended for an additional 25 years, until 2031.[58] Despite the positive changes it brought within the covered jurisdictions, Section 5, it seems, was left practically unchanged from its 1965 form.

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49. *Nw. Austin*, 573 F.Supp. 2d at 225.
50. *Id.*
51. *Holder*, 129 S. Ct. at 2514.
52. *Id.* at 2510.
53. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400.
54. Act of June 29, 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133.
55. *Nw. Austin*, 573 F.Supp.2d at 228-29.
56. *Id.*
57. 42 U.S.C. § 1973 b(a)(8).
58. *Nw. Austin*, 573 F.Supp.2d at 229.

B. Northwest Austin Utility District No. One v. Holder*: Two Competing Standards*

Eight days after the 2006 reauthorization, Northwest Austin Municipal Utility District No. One[59] ("District") brought a suit in the United States District Court for the District of Columbia against the Attorney General of the United States seeking its right under Section 4 to obtain bailout from coverage.[60] In the alternative, District sought to obtain a declaration concerning Congress's constitutional authority to enact Section 5.[61] District filed a motion for summary judgment on both claims, but a three-judge panel denied District's motion, never addressing the question of whether District satisfied the criteria for bailout.[62] Instead, the panel held that, because District was a not a subdivision, it was not eligible for bailout in the first place.[63] The panel held that the term "political subdivision" was meant to cover only counties and governmental subdivisions that register voters.[64]

In resolving the constitutional issue, the court identified two different standards used by the United States Supreme Court to review federal legislation enacted pursuant to the Fourteenth and Fifteenth Amendments. The first was the rational means standard employed by the Supreme Court in the 1966 case of *South Carolina v. Katzenbach*.[65] The second standard was the stricter congruence and proportionality standard, emerging in the later 1997 case of *City of Boerne v. Flores*.[66]

In *Katzenbach*, South Carolina challenged the enactment of the original VRA.[67] As set forth by the United States Supreme Court, the issue was whether Congress had "exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States."[68] To resolve this issue, the *Katzenbach* Court relied

59. "The district is a municipal utility district created under Texas law around 1987 to perform certain governmental functions, including bond issuance for infrastructure construction and tax assessment to service bond indebtedness, for a neighborhood built on previously undeveloped land." Appellant's Brief, *supra* note 15, at 1 (citing Tex. Water Code § 54.239).

60. *Nw. Austin*, 573 F.Supp. 2d at 223.

61. *Id.*

62. *Id.* at 283.

63. *Id.* at 230-35.

64. *Id.* at 231.

65. 383 U.S. 301 (1966).

66. 521 U.S. 507 (1997).

67. *Katzenbach*, 383 U.S. at 323.

68. *Id.* at 324.

on the holding in the seminal case of *M'Culloch v. Maryland*,[69] which set forth an early justification for the rational basis test.[70] In *M'Culloch*, Chief Justice John Marshall authored an opinion stating clearly that, for statutes enacted pursuant to the Necessary and Proper Clause, the standard was simple: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[71]

Applying that principal to its own controversy, the *Katzenbach* Court held that Congress may use "any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[72] The Court then declared the VRA a legitimate remedy to a century of systematic defiance of the Fifteenth Amendment.[73] Looking to Congress's voluminous record that it had amassed, the Court recognized that minorities attempting to exercise their rights to vote had been met by a subtle and persistent resistance that had been systematically maintained in certain regions of the United States.[74] For this reason, the Court held that applying Section 5 to a limited number of states was not unconstitutional because its coverage formula was tailored to address this very specific problem.[75]

After *Katzenbach*, the United States Supreme Court applied the same rational basis standard in a variety of cases challenging the constitutionality of the reauthorizations of the VRA. In both *Oregon v. Mitchell*[76] and *Georgia v. United States*,[77] the Supreme Court applied the *Katzenbach* holding, reaffirming the VRA as an acceptable exercise by Congress of Fifteenth Amendment power.[78]

The *Katzenbach* holding was again applied in the seminal case of *City of Rome v. United States*.[79] In *City of Rome*, Rome, located in the state of Georgia, argued that, because of the progress in the area of minority voting participation, Section 5 had "outlived" its utility where the harm that Congress had originally intended to

69. 17 U.S. (4 Wheat.) 316 (1819).
70. *M'Culloch*, 17 U.S. (4 Wheat.) at 421.
71. *Id.*
72. *Katzenbach*, 383 U.S. at 324.
73. *Id.* at 337.
74. *Id.* at 308-13.
75. *Id.* at 327-28.
76. *Oregon*, 400 U.S. 112.
77. *Georgia*, 411 U.S. 526.
78. *Id.* at 535; *Oregon*, 400 U.S. at 131-34.
79. *City of Rome*, 446 U.S. 156.

remedy had been largely eliminated.[80] Rejecting this argument, the Court found that Congress had amassed suitable evidence demonstrating that the progress made in the area of voting discrimination was still too "modest and spotty."[81] Without stating as much, the Supreme Court again applied a rational means standard, accepting outright the congressional judgment that the continued protections of the VRA were necessary to preserve its past successes.[82]

Another significant application of the rational means test to the VRA occurred in *Lopez v. Monterey County*.[83] In this case, Monterey County was designated as a covered jurisdiction for Section 5 purposes even though California, the state in which it was located, was not covered by the Act.[84] Consequently, the County challenged Section 5's application to itself as a subdivision of a non-covered state after being required to implement changes in its voting process as mandated by state law.[85] In response, the Court upheld Section 5 on the basis that its language did not limit its application to discretionary acts.[86]

Not surprisingly, the County had also asserted as part of its claim that the VRA could not be made constitutionally applicable against non-covered states, such as California, that had no history of wrongdoing.[87] However, applying the *Katzenbach* rational means test, once again, the Supreme Court held that Congress was constitutionally permitted to designate covered regions under Section 5 in order to remedy, not only discriminatory animus in the electoral process, but also the less malicious "harmful effect of neutral laws".[88] The most notable aspect of this decision, however, was not what it asserted but what it did not assert. As the district court in *Northwest Austin* would later point out, this case was decided in 1999, two years after *City of Boerne*, but never once did the majority or dissent question the *Katzenbach* standard as the relevant basis for review of Section 5.[89]

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80. *Id.* at 180.
81. *Id.* at 181.
82. *Id.* at 182.
83. *Lopez*, 525 U.S. 266.
84. *Id.* at 271. "In 1971, Monterey County was designated a covered jurisdiction based on findings that, as of November 1, 1968, the County maintained California's statewide literacy test as a prerequisite to voting . . . ." *Id.*
85. *Id.* at 269.
86. *Id.* at 278.
87. *Id.* at 282.
88. *Lopez*, 525 U.S. at 283.
89. *Nw. Austin*, 573 F.Supp. 2d at 239.

While *Katzenbach* presented a highly deferential standard, the later case of *City of Boerne* presented a more stringent standard of review.[90] In *City of Boerne*, Boerne, Texas denied the Archbishop of San Antonio a permit to expand his church on the basis that it was located in an historic preservation area.[91] The Archbishop sued local authorities for violation of his rights under the RFRA.[92] The City responded that the RFRA was unconstitutional to the extent it interfered with its local ordinance supporting the preservation.[93] Ultimately, the district court ruled against Archbishop Flores,[94] and the United States Court of Appeals for the Fifth Circuit reversed.[95]

On appeal to the United States Supreme Court, the Court considered the question of whether Congress exceeded its powers under the Fourteenth Amendment's enabling provisions by enacting the RFRA and subjecting local ordinances to federal regulation.[96] Applying stringent review, the Court in *City of Boerne* deemed the connection between the statutory mandates of the RFRA and the constitutional injuries it sought to prevent "out of proportion."[97] The Court also held that enforcement legislation required a "congruence and proportionality" between a constitutional injury and the means adopted to prevent that injury.[98] The remedial power under the Fourteenth Amendment permitted Congress to cure reoccurring constitutional violations but did not sanction Congress to make substantive changes to the law.[99]

The Court held that the RFRA could not meet these requirements.[100] First, the congressional record did not reveal one state law that actually led to religious persecution.[101] Instead, the record revealed only accidental burdens on religion.[102] Furthermore, Congress's failure to include a deadline, coupled with the extensive reach of the statute, led the Court to view the RFRA as going well beyond the scope of a remedial law.[103] During its analysis,

90. *City of Boerne*, 521 U.S. 507.
91. *Id.* at 512.
92. *Id.*
93. *Id.*
94. *Id.*
95. *City of Boerne*, 521 U.S. at 512.
96. *Id.*
97. *Id.* at 532.
98. *Id.* at 520.
99. *Id.* at 519-20.
100. *City of Boerne*, 512 U.S. at 532.
101. *Id.* at 530.
102. *Id.* at 530.
103. *Id.* at 532.

the United States Supreme Court contrasted Section 5 of the VRA with the RFRA, holding up the VRA as an example of proper legislation.[104] To explain why Section 5 was proper, the Court noted that it had been tailored only to apply to those regions where violations regularly occurred, had provided a method for bailout, and had included a termination date.[105]

After considering the two contrasting standards in *Katzenbach* and *City of Boerne*, the district court in *Northwest Austin* held that the *Katzenbach* standard was applicable.[106] First, the district court noted that *City of Boerne* repeatedly described the VRA as congruent and proportional.[107] Even though it could have easily done so, the *Boerne* Court never stated that *Katzenbach's* rational basis standard no longer governed challenges to legislation intended to remedy voting discrimination.[108] In fact, no voting rights discrimination was even at issue in *City of Boerne*.[109]

Second, the district court noted that, in *Lopez*, a case decided two years after *City of Boerne*, the Court denied a constitutional challenge that Section 5 violated the doctrine of federalism, citing the more deferential *Katzenbach* rational means test as the true standard.[110] The district court stated that, despite the fact the *City of Boerne* standard had already been adopted by the United States Supreme Court, the Court in *Lopez* did not apply that standard to its Section 5 challenge.[111]

After upholding the *Katzenbach* standard as the appropriate one, the district court addressed the *City of Boerne* standard in the alternative. The district court held that, even if it applied the congruence and proportionality standard of *Katzenbach*, Congress had properly documented evidence sufficient to prove that racial disparities still existed at a higher rate in the covered regions[112] and that the remedy for these disparities had been narrowly tailored.[113] Thus, under the alternative standard, Section 5 was still constitutionally compliant.

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104. *Id.* at 532-33.
105. *City of Boerne*, 512 U.S. at 532-33.
106. *Nw. Austin*, 573 F.Supp. 2d at 224.
107. *Id.* at 242.
108. *Id.*
109. *Id.*
110. *Lopez*, 525 U.S. at 282-83.
111. *Nw. Austin*, 573 F.Supp. 2d at 239.
112. *Id.* at 247-65.
113. *Id.* at 268-69.

On appeal to the United States Supreme Court, the majority took a very different approach. Acknowledging the irrefutable, historic successes of the VRA, the Court then agreed with Northwest Austin Municipal Utility District, stating clearly that the VRA now raises genuine constitutional concerns.[114] The Supreme Court opined that many of the historical problems it had accepted as support for *Katzenbach* and its progeny had been successfully remedied.[115] Nevertheless, because the district had presented the question concerning bailout, the Court was able to resolve the case without directly addressing the more important constitutional issue. Invoking the doctrine of constitutional avoidance,[116] the Court opted not to address the issue directly, and instead ruled that political subdivisions were permitted to seek a bailout under the language of the statute.[117]

III. ANALYSIS

A. Section 5 of the Voting Rights Act is No Longer Tailored to Remedy Current Patterns of Voting Discrimination

In his lone dissent, Justice Clarence Thomas raised serious doubts about whether Section 5 is still tailored to remedy current patterns of discrimination.[118] Noting that Section 5's preclearance requirement is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies,"[119] Justice Thomas went on to describe Section 5 as a great deviation from the central notion of the American federal system.[120] Considering Section 5's level of encroachment on the sovereignty of the covered states, such an observation must be conceded as true. This departure from the norm is especially worrying because of the way that it impairs the key values of self-determination and self-government by the people of a state.

Advocates for reenactment of Section 5 maintain that, without the remedial provisions of this law, the covered jurisdictions would

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114. *Northwest Austin*, 129 S. Ct. at 2511-12.

115. *Id.* at 2511.

116. Invoking the doctrine, the Court noted that "it is . . . well established . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." Escambia County v. McMillan, 466 U.S. 48, 51 (1984).

117. *Holder*, 129 S. Ct. at 2516.

118. *Id.* at 2526 (Thomas, J., dissenting).

119. *Id.* at 2524. (quoting United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting)).

120. *Holder*, 129 S. Ct. at 2524 (Thomas, J. dissenting).

backslide and return to their discriminatory ways.[121] Such speculation alone, however, has never been sufficient to uphold legislation passed pursuant to the Fourteenth or Fifteenth Amendments. This is because the Constitution does not support an encroachment by the federal government on a state's fundamental right to self-determination solely in an effort to prevent a future return to conditions that have already been remedied.[122] Furthermore, the Constitution does not support such an intrusion as a penalty for past defiance.[123] As rightly observed by Justice Thomas, "[m]ore than 40 years after its enactment, this intrusion has become increasingly difficult to justify."[124]

Interestingly, there seems to be no real need for the United States Supreme Court to rule *directly* on whether *Katzenbach* or *Boerne* is controlling. As a condition to Section 5's "uncommon exercise of congressional power,"[125] the United States Supreme Court, even under the stricter *Katzenbach* standard, would be required to examine the congressional record to determine whether there has been a systematic constitutional defiance.[126] Even assuming *Katzenbach* was the accepted standard, various stray acts alone would not be enough to support federal legislation passed pursuant to the Fourteenth or Fifteenth Amendments.[127] Thus, absent current evidence that the covered jurisdictions are likely to engage in the type of discrimination that supported the original enactment of Section 5, there would be no basis, under either standard, for continuing legislation that so vastly encroaches upon the historical rights of the states to self-government.

The most recent statistics concerning political participation by minorities reveal that systematic voting discrimination no longer pervades the covered jurisdictions.[128] There is simply no evidence

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121. *See, e.g.*, Reaction of Senator Leahy to the Supreme Court's Decision on Section 5 of the Voting Rights Act, http://leahy.senate.gov/press/200906/062209a.html (last visited Jan. 28, 2010).

122. *Id.* at 2525.

123. *Holder*, 129 S. Ct. at 2525 (Thomas, J., dissenting).

124. *Id.* at 2524

125. *Id.* at 2523 (citing *Katzenbach*, 383 U.S. at 334-35).

126. *Id.*

127. *Id.*

128. In his dissent, Justice Thomas provides this rather strong evidence:

The current statistical evidence confirms that the emergency that prompted the enactment of § 5 has long since passed. By 2006, the voter registration rates for blacks in Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively. Therefore, in contrast to the *Katzenbach* Court's finding that the 'registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration' in these States in 1964, since that time this disparity has nearly vanished. In 2006, the disparity

that these particular states and localities continue to direct campaigns of intimidation against black voters, and there is no evidence that these particular jurisdictions are attempting to employ the unfair testing devices, such as property ownership clauses, once used to systematically disqualify minorities.[129] Furthermore, there is no evidence that these jurisdictions stand ready to return to their defiant ways.[130] To the contrary, we are now just as likely to find a voting discrimination case in a non-covered jurisdiction as we are to find one in a covered jurisdiction.[131]

B. The United States Supreme Court Takes the Easy Way Out

While one can speculate about whether or not the United States Supreme Court had, at the time it accepted the case, actually intended to rule on the constitutional issue presented in *Northwest Austin*, one thing is certain: the United Supreme Court resisted the obvious temptation to strike down Section 5 and left the issue for the Court to resolve in the future. While the latest renewal of Section 5 is not set to expire until the year 2031,[132] in choosing to sidestep the issue, the United States Supreme Court's ruling in *Northwest Austin* did nothing to ensure that it will last for that duration.

Invoking the doctrine of constitutional avoidance, the Supreme Court stopped short of actually declaring Section 5 to violate the constitution.[133] Yet for reasons that the majority never expressly stated, the Supreme Court went through considerable lengths to spell out Section 5's constitutional weaknesses and doctrinal violations. In fact, the majority opinion reads like a laundry list of constitutional challenges to Section 5. First, the opinion speaks plainly about Section 5's race-conscious nature and examined the costs imposed by Section 5 on the key American tenets of federalism and equality of state sovereignty.[134] Second, the majority suggested strongly that the electoral conditons for

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was only 3 percentage points in Alabama, 8 percentage points in Louisiana, and in Mississippi, black voter registration actually exceeded white voter registration by 1.5 percentage points. In addition, blacks in these three covered States also have higher registration numbers than the registration rate for whites in noncovered states.
Holder, 129 S. Ct. at 2525-26 (Thomas, J., dissenting) (citations omitted).

129. *Id.* at 2525.
130. *Id.*
131. *Id.* at 2512.
132. *Northwest Austin*, 573 F.Supp. 2d at 229.
133. *Holder*, 129 S. Ct. at 2513.
134. *Id.* at 2510-13.

minorities in the covered jurisdictions has improved and that the coverage formula is outdated.[135] While these issues have been raised and rejected in prior challenges, by restating them in *Northwest Austin*, the Roberts Court sends a strong signal that it would be willing to entertain these challenges in the future.

C. What Comes Next?

For the time being, Section 5 remains in full effect. However, the Northwest Austin Municipal Utility District will return to the district court for a determination about whether or not it may obtain a bailout.[136] While hardly the victory that most states' rights advocates were seeking, there is still one beneficial effect of the ruling in *Northwest Austin*. After this decision, a larger group of covered jurisdictions may now seek to bailout from Section 5. Still, whether or not bailouts are granted to any individual district, it seems highly likely, given the alarms sounded by the majority, that a new wholesale challenge to the constitutionality of Section 5 will soon be forthcoming. Considering the mood of the Roberts Court as expressed in *Northwest Austin*, it is likely that the offending portions of Section 5, if left unmodified by Congress, will be declared unconstitutional.

Another result of the decision in *Northwest Austin* is that Congress will be forced to reconsider Section 5 of the VRA. One of the most logical ways to interpret the majority's decision in *Northwest Austin* is that it is a warning to Congress to reassess the coverage formula set forth in Section 5 and to stop disproportionately applying the mandates of the VRA to states that have long since made atonement for the sins of their past. In fact, this seems to be the only sensible way to interpret a decision that states a desire to avoid the constitutionality of a particular statute then goes through great lengths to discuss it. It is as though the Court is issuing to Congress an advisory opinion about how it will rule in the future and a lesson on how to avoid the ruling.

Ultimately, Congress has a decision to make. If it modifies Section 5 to meet the requirements of the majority, then the statute will likely survive, albeit in a weaker form. However, if Congress chooses not to modify Section 5, then it runs the risk that many of the current Supreme Court Justices will still be on the bench at

135. *Id.*
136. *Id.* at 2517.

the time the challenge is raised. If this occurs, it is likely that Section 5 will be stricken in its entirety.

IV. CONCLUSION

Nobody can doubt that Section 5 of the VRA is one of the most effective pieces of civil rights legislation ever enacted; nor can any person doubt the benefits that it has brought to our society. By imposing strict government oversight on the most discriminatory voting jurisdictions, Section 5 single-handedly brought about extensive progress in the area of voting rights by improving minority participation in the electoral process and increasing minority representation throughout those jurisdictions. However, it must be acknowledged that, by doing its job, Section 5 may no longer be needed in its current form.

This is not to say that striking Section 5 would, in any way, constitute a defeat. To the contrary, considering Section 5's extensive role in breaking the cycle of oppressiveness at the polls, it appears that Section 5 is a conclusive victory—a fulfillment of the promise of the Fifteenth Amendment.

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