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Will the Supreme Court Send the VRA's Biggest Sunset Provision into the Sunset?: Northwest Austin Municipal Utility District Number One and the 2006 Reauthorization of Section Five of the Voting Rights Act

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WILL THE SUPREME COURT SEND THE VRA’S BIGGEST SUNSET PROVISION INTO THE SUNSET?:
NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE AND THE 2006 REAUTHORIZATION OF SECTION FIVE OF THE VOTING RIGHTS ACT

Cameron Eubanks†

“We may finally look forward to the day when truly ‘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.’” Chief Justice Earl Warren.‡

“It is a sordid business, this divvying us up by race.” Chief Justice John Roberts.*

ABSTRACT

The D.C. Circuit correctly decided Northwest Austin Municipal Utility District Number One v. Mukasey. The court subjected the 2006 reauthorization of § 5 of the Voting Rights Act to the rational and appropriate test announced in South Carolina v. Katzenbach. Under this test the court found that Congress had a rational basis to extend § 5 based on evidence of continued racial discrimination in voting. On review, the Supreme Court will uphold the § 5 reauthorization in spite of the congruent and proportional test announced in City of Boerne v. Flores which is used to review enactments passed pursuant to Congress’ Fourteenth Amendment enforcement power. Even though the Amendments are supposed to be enforced coextensively, the Court will continue to apply the Katzenbach test to enactments passed pursuant to § 2 of the Fifteenth Amendment or apply the congruent and proportional test in the same loose fashion that it was applied in Tennessee v. Lane. The disconnect occurs because § 5 of the VRA combats racial discrimination—a suspect class, in voting—a fundamental right. Both are subject to strict scrutiny and the Court gives Congress wide latitude to remedy Constitutional violations in these areas. Justice Scalia has hinted that he endorses the disconnect between the Fourteenth and Fifteenth Amendment enforcement powers and Justice Kennedy will also side with the Court’s more liberal bloc in NAMUDNO based on past positions he has taken.

INTRODUCTION

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Northwest Austin Municipal Utility District Number One v. Mukasey\textsuperscript{1} is the latest installment in the battle over the constitutionality of Section Five ("§ 5") of the Voting Rights Act ("VRA").\textsuperscript{2} This time the fight centers on the constitutionality of Congress’ decision to reauthorize § 5 for another twenty five years in 2006. Many critics of the Act feel its day has passed,\textsuperscript{3} while supporters of the VRA strongly believe the Act is still needed to combat discrimination in the voting process and work must still be done in the fight to enfranchise minorities.\textsuperscript{4}

In 2008, the D.C. Circuit held that the reauthorization of § 5 was again constitutional under § 2 of the Fifteenth Amendment.\textsuperscript{5} While at the moment all seems well for proponents of the VRA, there is a dark cloud forming in the very near future. The Supreme Court has granted certiorari on \textit{NAMUDNO} and will hear the case this term.\textsuperscript{6} With the addition of new Chief

\textsuperscript{1} \textit{NAMUDNO}, 557 F. Supp. 2d 9 (D.C. Cir. 2008). The case in front of the Supreme Court is renamed \textit{Northwest Austin Municipal Utility District Number One v. Holder}, now that Eric Holder has been appointed attorney general and is the named defendant.

\textsuperscript{2} § 5 of the VRA, codified at 42 U.S.C. § 1973c, requires preclearance by the Justice Department of any change in election procedures of covered jurisdictions. Covered jurisdictions include those that employed a device or test as of November 1, 1964. The 1975 Amendments added any jurisdiction with less than fifty percent turnout in the 1972 Presidential election or if more than five percent of the voting age citizens are a language minority. 42 U.S.C. § 1973b.


\textsuperscript{5} § 1. 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.

\textsuperscript{6} § 2. The Congress shall have power to enforce this article by appropriate legislation. U.S. CONST. AMEND. XV.

Justice John Roberts, this may be the time the Court is most likely to strike back against Congress and declare that the 2006 reauthorization of § 5 is unconstitutional.

Part I will delve into the past and explore the history of the VRA and the decision to reauthorize § 5 in 2006. All prior reauthorizations of § 5 have been subjected to the appropriate and rational standard of review announced in South Carolina v. Katzenbach\textsuperscript{7} that controls § 2 of the Fifteenth Amendment enactment cases.\textsuperscript{8} In contrast to the more deferential test laid out in Katzenbach is the congruent and proportional test announced in City of Boerne v. Flores\textsuperscript{9} which has been applied to § 5 of the Fourteenth Amendment.\textsuperscript{10} The D.C. Circuit correctly applied the Katzenbach test instead of the City of Boerne test and upheld the reauthorization of § 5. Part V attempts to shed some predictive light on the rumblings of the Supreme Court to determine how it will decide NAMUDNO, and ultimately the constitutionality of § 5 of the VRA.

I. FROM JIM CROW, TO THE GREAT SOCIETY, TO THE 2006 REAUTHORIZATION

The VRA is the most important piece of civil rights legislation ever passed by Congress.\textsuperscript{11} Congress designed § 5 to give the Federal Government a weapon to proactively

\textsuperscript{7} 383 U.S. 301 (1966).


\textsuperscript{9} 521 U.S. 507 (1997).

\textsuperscript{10} The text of § 5 of the Fourteenth Amendment is nearly identical to that of § 2 of the Fifteenth Amendment. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. AMEND. XIV § 5.

combat the problem of discrimination in the political process, especially in the South. From the end of Reconstruction to the Civil Rights Revolution of the 1950’s and 1960’s, African Americans were routinely excluded from the political process. This invidious goal was accomplished a number of ways. From literacy tests, to grandfather clauses, to racial gerrymandering, to refusal to register black voters, white majorities systematically ensured that black citizens could not vote, and therefore could not participate in the political process.

With the landslide victory of Lyndon Johnson in 1964 came a mandate for change in America. Civil Rights legislation would be just one prong in LBJ’s Great Society programs.

12 See Katzenbach, 383 U.S. at 308. (“The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country . . . The Act creates stringent new remedies . . . and in addition the statute strengthens existing remedies[.]”)


14 Katzenbach, 383 U.S. at 310 (“[B]eginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use [at the time of the passage of the VRA] which were specifically designed to prevent Negroes from voting.”).

15 Rodriguez, supra note 13, at 772 (Forms of structural discrimination included: poll taxes, literacy tests, grandfather clauses, white primaries, gerrymandering and at-large voting.).

16 Id.

17 If we cannot bring ourselves to declare [socioeconomic guarantees] “rights,” we can well legislate them as entitlements, . . . our ideology, our values were not frozen in 1791 when the Bill of Rights was adopted, or in 1868 when the [Fourteenth] Amendment was ratified. Instead, by legislation, by civil rights[,] and voting rights act, we have moved toward our aspirations for the Great Society.
and the VRA may be the biggest Act passed during time period. No longer would the South rule its slanted elections, it was now under the thumb of the federal government.

State’s rights advocates have decried § 5 since its creation as a massive violation of our federal style of government. Elections have traditionally been a matter of state control and § 5 is a huge shift in the balance of power between the federal government and the covered states. To make any change in election procedure, a covered jurisdiction must ask permission from Washington, D.C. This change could be as small as moving a polling location from a school to a church or extending polling times one hour on election day. While sweeping in its grant of power, § 5 is limited in the length of time it is effective and to the jurisdictions in the United States that are covered. Under §5, all covered jurisdictions have to preclear their election procedures with either the Attorney General or a three judge panel of the D.C. Circuit to determine whether the change in election procedure has a retrogressive effect on minority voting. Congress provided that § 5 must be periodically reauthorized if the section is still


18 Id.

20 Posner, supra note 11, at 54.

21 See Clegg, supra note 3.

22 See Donahue, supra note 19, at 1651–52.

23 Id.

24 Id. Section 5 of the Act serves as the heart of the VRA’s protections. It requires certain [covered] jurisdictions, primarily Southern, to receive prior approval (“preclearance”) before enforcing any new “standard, practice, or procedure with respect to voting.” Changes will not be precleared unless the jurisdiction
necessary to effectuate its goals of increasing minority voting and political participation. The initial § 5 was authorized for five years. In 1970, just before the original § 5 was set to expire, Congress reauthorized it for the same five year period and the 1975 Amendments to the VRA reauthorized the section for seven years. In 1982 Congress examined all the evidence and extended § 5 for a lengthy twenty five years.

In 2006, prior to the 1982 reauthorization sunset, Congress reauthorized § 5 for another twenty five years. The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 extended § 5 in mostly the same form as the 1982 reauthorization. Though Congress at each point examined evidence of discrimination in voting, the 2006 reauthorization may be the occasion when the Court finds Congress finally overstepped its power in regards to § 5 of the VRA.

II. THE EVOLUTION OF THE APPROPRIATE AND RATIONAL TEST FOR ENACTMENTS PASSED PURSUANT TO § 2 OF THE FIFTEENTH AMENDMENT

demonstrates that they will not “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”

Id.


26 NAMUDNO, 557 F. Supp. 2d at 14.

27 Id.

28 Id.

29 Id. at 16.

30 Tokaji, supra note 23, at 349.

31 Id.

32 Posner, supra note 4, at 74–75.
This part will analyze four opinions\textsuperscript{33} handed down by the Supreme Court on the constitutionality of the VRA in general and, more specifically § 5. Each time the Court upheld the VRA and § 5 as constitutional enactments under a permissive standard of review. In \textit{Katzenbach} and \textit{City of Rome v. United States} § 5 was directly challenged and upheld. The VRA was more generally attacked in \textit{Oregon v. Mitchell} and \textit{Lopez v. Monterey County}, but it still withstood constitutional scrutiny.

In 1966, South Carolina immediately challenged the new VRA by seeking an injunction preventing enforcement of the Act.\textsuperscript{34} South Carolina argued the VRA exceeded the power granted to Congress pursuant to § 2 of the Fifteenth Amendment and encroached on areas traditionally reserved to the states.\textsuperscript{35} The issue the Court had to decide in \textit{Katzenbach} was whether the VRA was a valid enactment under § 2 of the Fifteenth Amendment.\textsuperscript{36}

Writing for the Court, Chief Justice Warren began by noting the graveness of the problem faced by Congress when it enacted the VRA. He said, “[t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”\textsuperscript{37} Next, the Court acknowledged the amount of thought that was put into the new VRA by Congress. The judiciary committees of each


\textsuperscript{34} \textit{Katzenbach}, 383 U.S. at 307.

\textsuperscript{35} \textit{Id.} at 323.

\textsuperscript{36} \textit{Id.} at 325.

\textsuperscript{37} \textit{Id.} at 308–09.
chamber of Congress heard sixty-seven witnesses at hearings covering nine days.\textsuperscript{38} Senate debate lasted nearly a month. Each house relied on voluminous findings of an insidious and pervasive evil to finally enact the VRA.\textsuperscript{39} After reviewing Congress’ findings the Court settled on a test to judge enactments passed pursuant to § 2 of the Fifteenth Amendment, and it was a test that is all too familiar. The Court decided the basic test to review enactments passed pursuant to § 2 of the Fifteenth Amendment was the exact same test to review enactments passes pursuant to Congress’ enumerated powers. The Court quoted \textit{McCulloch v. Maryland} and stated, “[l]et 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.”\textsuperscript{40} Finally, the Court upheld the Act, the § 4 coverage formula, and the § 5 preclearance requirements as an appropriate means of enforcing the Fifteenth Amendment.\textsuperscript{41} The basic formula to review the VRA was now in place.

The next case to shape review of the VRA was \textit{Oregon v. Mitchell}.\textsuperscript{42} Oregon challenged provisions of the 1970 Amendments\textsuperscript{43} to the VRA as infringing on the traditional state power to control its own elections in a state that had no history of discrimination in voting. Similarly to \textit{Katzenbach}, the Court acknowledged the epidemic of racial discrimination in voting throughout

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{41} \textit{Katzenbach}, 383 U.S. at 337.

\textsuperscript{42} 400 U.S. 112 (1970).

\textsuperscript{43} The 1970 Reauthorization amendments attempted to lower the voting age from 21 to 18, continue a federal ban on literacy tests, and allow citizens to vote in federal elections even if they had not met state residency requirements. \textit{Id.} at 117.
the country, and deemed this reauthorization to be an appropriate piece of legislation pursuant to § 2 of the Fifteenth Amendment.\textsuperscript{44} Justice Black, writing for a plurality of the Court, concluded the VRA was still an appropriate means to a legitimate end using the same permissive test applied in \textit{Katzenbach}.\textsuperscript{45}

In 1980, § 5 was directly challenged, and ultimately upheld by the Court in \textit{City of Rome v. United States}.\textsuperscript{46} Prior to the lawsuit, the General Assembly passed several laws that altered Rome, Georgia’s electoral scheme.\textsuperscript{47} Under the new scheme, Rome was reduced from nine to three wards, all commissioners were elected at large, and commissioners and board members served altered term lengths in addition to newly staggered terms.\textsuperscript{48} Rome never sought preclearance for these changes, nor for sixty annexations made between 1964 and 1975.\textsuperscript{49} After the Attorney General made inquires to the city, Rome provided all changes and annexations for preclearance.\textsuperscript{50} The Attorney General subsequently denied preclearance to all of Rome’s changes so the city brought an action to declare the preclearance framework of § 5 unconstitutional.\textsuperscript{51}

\begin{itemize}
  \item \textsuperscript{44} Id. at 132–33.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} 446 U.S. 156 (1980).
  \item \textsuperscript{47} Id. at 159.
  \item \textsuperscript{48} Id. at 160.
  \item \textsuperscript{49} Id. at 161.
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Id.
\end{itemize}
The Court in *City of Rome* addressed the question of § 5’s constitutionality in much the same manner that it reviewed the Act in *Katzenbach*.\(^{52}\) The Court’s interpretation of § 2 of the Fifteenth Amendment was broad enough that Congress may use its enforcement power to prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as Congress had a rational basis to believe that the prohibitions were an appropriate means to enforcing the commands of the Fifteenth Amendment.\(^{53}\) The Court once again upheld § 5 as an appropriate remedy to racial discrimination in voting using a permissive standard of review.\(^{54}\)

The final case born from *Katzenbach*, and possibly the most telling\(^{55}\) in what the Supreme Court may ultimately do in *NAMUDNO* is *Lopez v. Monterey County*.\(^{56}\) The Court in *Lopez* upheld § 5 with respect to a covered jurisdiction in an uncovered state where the state itself made the changes to the covered subdivision’s election procedures.\(^{57}\) *Lopez* is extremely important for several reasons. First, it was decided after *City of Boerne v. Flores* announced the congruent and proportional test to review actions passed pursuant to § 5 of the Fourteenth

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\(^{52}\) *Id.* at 175.

\(^{53}\) *Id.* at 177.

\(^{54}\) *Id.*

\(^{55}\) Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2374 (2003) (“*Lopez* suggests that the . . . Court not only accepts the measures upheld in the VRA quartet but actually prospectively embraces congressional power to intervene intrusively into state affairs to block racial discrimination in the political process.”).

\(^{56}\) 525 U.S. 266 (1999).

\(^{57}\) *NAMUDNO*, 557 F. Supp. 2d at 28.
Amendment.\textsuperscript{58} The majority in \textit{Lopez} made no mention of applying the congruent and proportional test and instead used the \textit{Katzenbach} appropriateness standard to the VRA.\textsuperscript{59} Next, the Court dismissed any federalism concerns posed by the VRA, stating simply that, “[t]he Voting Rights Act, by its nature, intrudes on state sovereignty[.] The Fifteenth Amendment permits this intrusion . . . and our holding today adds nothing of constitutional moment to the burden the Act imposes.”\textsuperscript{60} Finally, only Justice Thomas in dissent wanted to apply the congruent and proportional test to the VRA, while eight members of the Court were satisfied with the \textit{Katzenbach} standard of review.\textsuperscript{61} As of today, \textit{Katzenbach} still controls review of enactments passed pursuant to Congress’ Fifteenth Amendment enforcement power, it is a matter of whether the Roberts Court will keep it that way. The next section discusses the congruent and proportional test that is applied to enactments pursuant to § 5 of the Fourteenth Amendment.

\textbf{III. THE EVOLUTION OF THE CONGRUENT AND PROPORTIONAL TEST FOR ENACTMENTS PASSED PURSUANT TO § 5 OF THE FOURTEENTH AMENDMENT}

The Supreme Court under Chief Justice Rehnquist spawned a revolution in “New Federalism”\textsuperscript{62} against what it saw as a bloated and lazy Congress. It struck down Congressional Acts under the Commerce Clause\textsuperscript{63} for the first time since the New Deal and also severely

\textsuperscript{58} City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

\textsuperscript{59} \textit{Lopez}, 525 U.S. at 283.

\textsuperscript{60} \textit{Id.} at 284–85.

\textsuperscript{61} \textit{Id.} at 295–96. (Thomas, J., dissenting).

restricted Congress’ power to act pursuant to its enforcement power under the Fourteenth Amendment. Currently, only the Fourteenth Amendment enactments must meet the more searching review even though the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been viewed as coextensive.64

Prior to City of Boerne, where the Court announced the congruent and proportional test, Congress passed the Religious Freedom Restoration Act (“RFRA”) pursuant to § 5 of the Fourteenth Amendment to overrule the Supreme Court’s holding in Department of Human Resources v. Smith.65 After passage of the RFRA, City of Boerne’s zoning authorities denied a church a building permit. The church challenged the denial under the RFRA as an undue burden on its free exercise of religion.66 The Court ultimately struck down the RFRA as beyond Congress’ § 5 of the Fourteenth Amendment enforcement power.67 In the process, the Court created a new standard of review for enactments passed pursuant to Congress’ enforcement power under the Fourteenth Amendment. Prior to City of Boerne the Court applied the same deferential treatment to Fourteenth and Fifteenth Amendment enforcement enactments.68 After reviewing the controlling cases, the Court announced the new more stringent test is these terms:

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


64 City of Rome, 446 U.S. at 207 (Rehnquist, J., dissenting).

65 Smith held that if an individual violated a neutral and generally applicable statute they could not claim as a defense to violating the statute that it was an undue burden on their freedom of religion. 494 U.S. 872 (1990).

66 City of Boerne, 521 U.S. at 511.

67 Id.

connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.69

The Court reasoned that if Congress did more than merely enforce the provision, then it could alter the substance of the provision and enlarge § 1 of the Fourteenth Amendment.70 Writing for the Court, Chief Justice Rehnquist did not want Congress determining what the provisions of § 1 of the Fourteenth Amendment mean through a nearly plenary enforcement power. The Court wanted to maintain its position as the final arbiter of the Constitution.71

The next case that continued to shape the congruent and proportional test was Board of Trustees of the University of Alabama v. Garrett.72 After Garrett, for an enactment to pass this new congruent and proportional test, Congress must “identi[fy] a history and pattern of unconstitutional [action] by the States. . . . Congress’ § 5 authority is appropriately exercised only in response to state transgressions.”73 Responding to detailed findings of a history and pattern of unconstitutional activity is the only way to enact legislation pursuant to § 5 of the Fourteenth Amendment.74 The existence of anecdotal evidence of discrimination does not allow Congress to use its Fourteenth Amendment enforcement power.75 In Garrett, the Court held

69 City of Boerne, 521 U.S. at 520 (emphasis added).

70 Id. at 519.

71 Id.


73 Id. at 368.

74 Id. at 374.

75 The majority heavily criticized Justice Breyer’s dissent in this regard. Justice Breyer believed that the recorded evidence of discrimination against the disabled was sufficient to allow
Congress exceeded\textsuperscript{76} its power under § 5 of the Fourteenth Amendment through enacting the Americans with Disabilities Act (“ADA”) to abrogate state sovereign immunity under the Eleventh Amendment because Congress did not rely on sufficient evidence of persistent discrimination against the disabled.

After \textit{City of Boerne} and \textit{Garrett}, Congress can only use its § 5 of the Fourteenth Amendment enforcement power to enact a congruent and proportional remedy to a well documented pattern of recent discrimination. While this task seems daunting, the Court has not always rigorously enforced these commands. The Court has been less willing to challenge Congress’ power and has held enactments to be congruent and proportional that probably do not meet the \textit{Garrett} requirements when a suspect class is implicated. For example, the Court relaxed the test in \textit{Nevada Department of Human Resources v. Hibbs}\textsuperscript{77} because gender was at issue. Hibbs sought leave from his employer, the Nevada Department of Human Resources, to care for his ailing wife under the Family and Medical Leave Act (“FMLA”) of 1993.\textsuperscript{78} Hibbs sued his employer when he was forced to report back to work, claiming the Department’s policy of giving males less leave time to care for their families as opposed to females was unconstitutional.\textsuperscript{79} Once again, the issue was whether Congress had validly used its § 5 of the Fourteenth Amendment power to enact the FMLA.\textsuperscript{80} As opposed to \textit{Garrett}, the Court in \textit{Hibbs} took Congress to exercise its § 5 of the Fourteenth Amendment enforcement power, but it was not widespread or pervasive. \textit{Id.} at 372 n.7.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} 538 U.S. 721 (2003).

\textsuperscript{78} \textit{Id.} at 724.

\textsuperscript{79} \textit{Id.}
Congress’ evidence of gender discrimination at face value, instead of being highly skeptical. It said that Congress documented a history of discrimination against women that would satisfy the requirements of *Garrett*, even though the record in *Hibbs* was similar to the record rejected in *Garrett*. While the Court in *Hibbs* said the evidence was sufficient, the Court actually relaxed the test because a suspect class—gender—was implicated. The enactment in *Hibbs* was not put through the same rigorous findings requirement as in *Garrett* and *City of Boerne*.

In addition to relaxing the congruent and proportional test and requirements of *Garrett* when a suspect class is implicated, the Court relaxes the test when fundamental rights are at stake. This is what happened in *Tennessee v. Lane*, the final case to date building upon *City of Boerne*. Lane sued the state of Tennessee under Article II of the ADA for violating his due process and right to confrontation because the state court houses did not provide adequate facilities for the disabled. The Court upheld this enactment pursuant to § 5 of the Fourteenth Amendment as a congruent and proportional measure. The majority opinion written by Justice Stevens, who had been in the dissent in *Garrett* and *City of Boerne*, continued to clarify the test by saying when Congress seeks to remedy violations of fundamental rights the Court will allow

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80 *Id.*

81 *Id.* at 740.

82 The evidence presented in *Hibbs* was not very impressive and certainly not enough after *Garrett*. *Id.* at 729.

83 *Id.* at 740.


85 *Id.* at 515. In *Garrett*, the suit was brought pursuant to Art I of the ADA on Equal Protection Grounds. There the Court held the enactment was beyond Congress’ § 5 enforcement power, but left the constitutionality of Art. II of ADA, presented in *Lane*, open. *Id.* at 514.

86 *Id.* at 534.
Congress to enact prophylactic remedies instead of requiring the full inquiry into the evidence based on City of Boerne and Garrett.\textsuperscript{87} The record in Lane was the thinnest of the series on constitutional violations, but the Court in Lane did not focus heavily, or at all, on the record of evidence put together by Congress in sharp contrast to the position the Court took in Garrett.\textsuperscript{88} The majority also noted that if the enactment does not substantially rework the text of the Amendment then Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions.\textsuperscript{89} If fundamental rights violations are remedied, the Court approves any enactment that will not substantially redefine the Fourteenth Amendment even if the enactment is not based on a repeated pattern and history of unconstitutional conduct.\textsuperscript{90}

Principles emerge to guide the Court in determining whether an enactment is congruent and proportional under Congress’ Fourteenth Amendment enforcement power after City of Boerne, Garrett, Hibbs, and Lane. First, Congress’ remedy must be congruent and proportional to violations of the Fourteenth Amendment.\textsuperscript{91} Next, Congress must have a well documented history and pattern of these violations and they must be recent and more than anecdotal.\textsuperscript{92} Finally, the test is relaxed when dealing with either a suspect class, like in Hibbs, or a

\textsuperscript{87} Id. at 520.
\textsuperscript{88} Hasen, supra note 71, at 180.
\textsuperscript{89} Lane, 541 U.S. at 520.
\textsuperscript{90} Id.
\textsuperscript{91} See City of Boerne, 521 U.S. at 520.
\textsuperscript{92} See Garrett, 531 U.S. at 368.
fundamental right, like in *Lane*. This now takes us to the present day and the D.C. Circuit’s opinion in *NAMUDNO*.

IV. **NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE V. MUKASEY**

Just days after the 2006 Reauthorization, NAMUDNO’s94 sought to bail out of the preclearance requirements of § 5 of the VRA. The bailout request was denied and NAMUDNO brought suit in the D.C. Circuit.95 The District challenged the constitutionality of § 5 of the VRA claiming that Congress irrationally and incongruously chose to reauthorize § 5 based on evidence of discrimination that existed over forty years ago, but has since been remedied.96

The D.C. Circuit had to address the heart of matter, § 5’s constitutionality.97 The first determination that the court made was on the appropriate standard of review,98 meaning the D.C. Circuit was forced to choose between *Katzenbach* and *City of Boerne*.99 After a detailed summary of both standards, the D.C. Circuit decided that *Katzenbach*’s rationality standard governed the case.100 The first reason why the court retained the more lenient standard is the

93 *See Lane*, 541 U.S. at 520.

94 NAMUDNO is a municipal utility district in Texas, which is a covered state. Created in the late 1980’s to facilitate the development of a residential subdivision, the District sits within Austin, Texas and Travis County but remains independent of both. The District attempted to alter its election scheme for its board of directors who serve staggered four year terms with elections held every two years. *NAMUDNO*, 557 F. Supp. 2d 9 (D.C. Cir. 2008).

95 *Id.*

96 *Id.*

97 *Id.* at 24.

98 *Id.*

99 *Id.*

100 *Id.* at 30.
precedential value of *City of Rome*, which also dealt with a facial challenge to § 5.\(^{101}\) The court noted that the standard for Fourteenth Amendment review was altered by *City of Boerne*, but in spite of this change in doctrine the D.C. Circuit reapplied *Katzenbach*. The court defended its choice and said the *City of Boerne* standard does not apply to *NAMUDNO* because the Supreme Court never stated that *Katzenbach*’s and *City of Rome*’s more deferential standard no longer governed. The D.C. Circuit further noted that the *City of Boerne* cases did not involve a statute dealing with racial discrimination or voting rights, which is exactly what § 5 of the VRA is aimed at.\(^{102}\) In addition, *Lopez* was decided after *City of Boerne* and the Court cited both *Katzenbach* and *City of Rome* with approval in *Lopez* further strengthening the D.C. Circuit’s decision.\(^{103}\)

The second reason that the court feels obligated to apply *Katzenbach* is that the *City of Boerne* cases are still at their core Fourteenth Amendment cases, and any language hinting at the Fifteenth Amendment is dicta.\(^{104}\) To the D.C. Circuit, the *City of Boerne* cases are not sufficient justification to overrule *Katzenbach* and *City of Rome*.\(^{105}\) Continuing on this point, the D.C. Circuit classified *NAMUDNO* as a sequel to *City of Rome*, meaning that it must apply the *Katzenbach* standard of review to § 5 of the VRA once again.\(^{106}\)

\(^{101}\) *Id.* (“The first reason is *City of Rome*. There, the Supreme Court addressed a facial challenge to the 1975 extension of *section 5[. . .]* To resolve the challenge, the Court applied *Katzenbach*[. . .] Here we confront precisely the same issue.”).

\(^{102}\) *Id.* at 31.

\(^{103}\) *Id.*

\(^{104}\) *See id.* at 32.

\(^{105}\) *Id.*
Once the court was set on *Katzenbach*, it analyzed three categories of evidence in determining whether the reauthorization in 2006 was enacted pursuant to a rational basis: racial disparity in registration and turnout, the number of minority elected officials, and objections by the Attorney General. The D.C. Circuit first noted that Congress saw a sixteen percent gap in registration between whites and latinos in Texas as of 2004. Disparities in registration and turnout still exist between white and black citizens in all the covered states, enough where Congress could conclude that more remained to be done. When dealing with minority elected officials, Congress realized that blacks represent only twenty one percent of the state legislators of the six originally covered states, but make up thirty five percent of the population. In addition, latinos and asians elected to national office have also failed to keep pace with their population growth as well. On the final category of Attorney General objections to procedure changes in covered jurisdictions, the D.C. Circuit agreed that objection rates have indeed declined, but that hardly means § 5 has outlived its usefulness. While the Attorney General now only objects to .05 percent of changes some are still extremely discriminatory, enough

106 *Id.* at 34–35.

107 *Id.* at 36. These three categories were announced in *City of Rome. City of Rome*, 446 U.S. at 184–87.

108 *Id.* at 37 (citing H.R. REP. No. 109–478 (2006)).

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*
where § 5 could be rationally reauthorized. The court concluded the 2006 extension represented a reasonable prophylactic measure targeted to a legitimate end. There was no basis for overturning Congress’ vision that § 5 preclearance is still a necessary and vital tool.

V. THE D.C. CIRCUIT GOT IT RIGHT BY CONTINUING TO APPLY THE KATZENBACH STANDARD

NAMUDNO was correctly decided by the D.C. Circuit. Only rational basis review should be applied to determine whether an enactment passed pursuant to §2 of the Fifteenth Amendment is an appropriate response to racial discrimination in voting. Even though § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment are similar, real reasons do exist for deference to the Fifteenth Amendment enforcement power. The first reason lies in the rights protected by the Fourteenth Amendment compared to those protected by the Fifteenth Amendment. The Fourteenth Amendment’s protections are significantly broader and more general than those of the Fifteenth Amendment. Since Griswold v. Connecticut breathed new life into substantive due process the Fourteenth Amendment also protects many implied, unwritten rights that

113 Three Mississippi objection letters are particularly revealing. The first involves the town of Kilmichael, where the white mayor and the all-white Board of Aldermen cancelled local elections in 2001 when an “unprecedented number” of African Americans sought office. . . . The town refused to reschedule elections, but after the Attorney General forced it to do so, Kilmichael elected three African American aldermen and its first African American mayor.

Id.

114 Id. at 76 (quoting Lane, 541 U.S. at 533).

115 Id.


117 381 U.S. 479 (1965).

118 E.g., Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (“[I]n addition to the specific freedoms of the Bill of Rights, the Due Process Clause protects ‘the right to marry, to have
belong to citizens. The narrowness of the Fifteenth Amendment stands in stark contrast—it protects against one thing, racial discrimination in voting. The D.C. Circuit in \textit{NAMUDNO} explained it this way: “Because the [Fourteenth A]mendment’s phrases are so open to a range of interpretations, they invite not only remedial congressional legislation, but congressional definition of the very rights themselves.”\textsuperscript{119} The limited nature of what Congress can legislate on in regards to the Fifteenth Amendment makes it a much less dangerous vehicle for the Congress to aggrandize itself and redefine what a Constitutional violation really is.\textsuperscript{120} While in fact potentially broad, the power to address racial discrimination in voting still seems unlikely to devolve into a plenary power.\textsuperscript{121} The Court need not put the brakes on Congress in the area of remedying racial discrimination in voting. Also, § 5’s power should not be confused with broad applicableness, like the RFRA and the ADA. § 5 is narrowly tailored to the focused goal it seeks to achieve, and that is to end racial discrimination and disenfranchisement in voting.\textsuperscript{122}

The next reason the \textit{Katzenbach} standard should continue to apply is because of \textit{Hibbs} and \textit{Lane}. In addition to being more limited than the Fourteenth Amendment, the Fifteenth implicates two things that both are subject to strict scrutiny—a suspect class\textsuperscript{123} and a

\begin{itemize}
\item children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.”).
\end{itemize}

\begin{itemize}
\item \textsuperscript{119} \textit{NAMUDNO}, 557 F. Supp. 2d at 32 (quoting 1 Laurence H. Tribe, \textit{AMERICAN CONSTITUTIONAL LAW} 936 (2000)).
\item \textsuperscript{120} \textit{See} Oregon v. Mitchell, 400 U.S. 112 (1970).
\item \textsuperscript{121} \textit{Katz}, \textit{supra} note 64, at 2388.
\item \textsuperscript{122} \textit{Katzenbach}, 383 U.S. at 308.
\item \textsuperscript{123} \textit{See} Loving v. Virginia, 388 U.S. 1 (1967) (classification drawn on race receives strict scrutiny).
\end{itemize}
fundamental right.\textsuperscript{124} While scholars have argued the level of scrutiny should not matter to the analysis of the validity of the enactment,\textsuperscript{125} the Supreme Court’s jurisprudence shows that it does matter and correctly so.\textsuperscript{126} Ending racial discrimination and remedying violations of the right to vote should be areas that the Court will defer to Congress when enacting legislation pursuant to the Fifteenth Amendment. In \textit{Lane}, the ADA allowed claims where due process rights were violated, a fundamental right, and the Court relaxed the test a great deal in finding a congruence and proportionality.\textsuperscript{127} With respect to the Fifteenth Amendment protecting a suspect class, Justice Scalia in his \textit{Lane} dissent provides powerful support for an expanded reading of § 2 of the Fifteenth Amendment by saying, “I shall henceforth apply the permissive \textit{McCulloch} standard to congressional measures designed to remedy racial discrimination by the States.”\textsuperscript{128} Congressional power is at its broadest when directed to the goal of eliminating discrimination on account of race and protecting fundamental rights.\textsuperscript{129} In \textit{Hibbs} the congruent and proportional test was relaxed when dealing with a suspect class under the FMLA, such as gender.\textsuperscript{130} Because

\textsuperscript{124} See Bush v. Gore, 531 U.S. 98 (2000) (right to vote is fundamental).

\textsuperscript{125} Hasen, \textit{supra} note 71, at 196 (‘‘[T]he level of scrutiny should be irrelevant to the congruence and proportionality analysis. Nonetheless, the fact that the Court has said otherwise suggests that the Court may consider it relatively easier for Congress to show a pattern of racial discrimination[.]’’).

\textsuperscript{126} See \textit{Lane}, 541 U.S. at 509.

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 563 (Scalia, J., dissenting).

\textsuperscript{129} Id.

\textsuperscript{130} \textit{Hibbs}, 538 U.S. at 721.
§ 5 of the VRA implicates fundamental rights and a suspect class, the Court must allow Congress to “paint with a broad brush.”

Lastly, the Court should apply the permissive standard of Katzenbach or the congruent and proportional test in the same manner as in Hibbs and Lane based on the history and spirit embodied in the Civil War Amendments. Only this country’s sad history when it comes to racial discrimination could ever lead to the passing of the VRA, which has been the “goddamndest toughest” voting statute ever created. The VRA must be judged with reference to the historical experience which it reflects. To enforce the Fifteenth Amendment against a systemic disenfranchisement of minorities a slow moving case-by-case process did not work, and the massive framework of the VRA was all that could be done to enforce the commands of the Amendment. Congress deserves wide latitude to enfranchise this Nation so that “[h]opefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.”

VI. WHAT WILL THE SUPREMES HAVE TO SAY?

The Supreme Court has granted certiorari in NAMUDNO and must make the same choice between Katzenbach and City of Boerne as the D.C. Circuit did. The City of Boerne cases

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131 Lane, 541 U.S. at 520.

132 Donahue, supra note 19, at 1651 (quoting Lyndon Johnson).

133 Katzenbach, 383 U.S. at 308.

134 Id. at 312 (“Grandfather clauses were invalidated . . . [p]rocedural hurdles were struck down . . . [t]he white primary was outlawed . . . [r]acial gerrymandering was prohibited. Finally, discriminatory application of voting tests was condemned.”).

135 Id. at 337.
appear to be irreconcilable with the earlier VRA precedent, but now is the Court’s chance to finally clear up the mess, or to muddle it further. Ultimately, the Court will uphold the reauthorization of § 5 of the VRA and use the rational basis standard of Katzenbach, but may pretend to label it the congruent and proportional test like in Lane and Hibbs. § 5 will not be subjected to the full congruent and proportional test of City of Boerne and Garrett. First, the arguments that the Court will actually strike down § 5 will be discussed before returning to the proposition that § 5 of the VRA will be upheld under a more permissive standard of review.

A. Chief Justice Roberts is no Friend of the VRA

The first reason to believe this may be the time that § 5 rides off into the sunset is the new Chief Justice, John Roberts. During the 1982 reauthorization debate John Roberts was a young lawyer in the Justice Department. He wrote multiple memoranda at the time condemning reauthorization of § 5 of the VRA and to affirmative action programs in general. Chief Justice Roberts also advocated for the continued discriminatory intent test under § 2 of the VRA instead of the effects test. Plaintiffs must prove that there was an actual intent to discriminate against them, instead of just an effect under Chief Justice Roberts’ preferred test. In his confirmation hearing Chief Justice Roberts claimed to only be taking Reagan administration positions and that those were not his personal views. However, his opinions since arriving on the Court bear out the fact that these likely are his beliefs. The first such case is Parents Involved in Community

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136 Katz, supra note 64, at 2369.


138 Id.


140 Young Lawyer Roberts, supra note 188.
Schools v. Seattle School District Number One.\textsuperscript{141} In Parents Involved, Roberts wrote for the Court and struck down Seattle’s integration plan on Equal Protection grounds.\textsuperscript{142} His opinion in Parents Involved leads one to believe the Chief Justice is extremely leery of affirmative action programs and any enactment passed dealing with race or attempting to create some type of racial balance. The Chief Justice noted that “racial balance is not to be achieved for its own sake.”\textsuperscript{143} In his opinion, if legislation meant to create racial equality in the country is never eliminated then it will “assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race’ will never be achieved.”\textsuperscript{144} Such language seems dubious to the survival of the VRA and other enactments seeking racial equality.

B. Was Congress’ Record Sufficient Under City of Boerne?

Next, many have argued that the Congressional record was lacking\textsuperscript{145} in recent constitutional violations and this may be its downfall. City of Boerne and Garrett require a distinct pattern of recent constitutional violations, not anecdotal evidence and hypothetical violations.\textsuperscript{146} There are multiple pieces of evidence that show that there may not actually be a pattern of racial discrimination in voting. First, the Attorney General objects to only .05 percent

\textsuperscript{141} 551 U.S. 701, 137 S. Ct. 2738 (2007).

\textsuperscript{142} Id. at 2746.

\textsuperscript{143} Id. at 2757.

\textsuperscript{144} Id. at 2758.

\textsuperscript{145} See Hasen, supra note 71, at 179.

\textsuperscript{146} Id. at 180.
of procedure changes submitted for preclearance, hardly a distinct pattern of discrimination.\footnote{Id. at 192.} Most of these objections were also in a period prior to \emph{Georgia v. Ashcroft},\footnote{539 U.S. 461 (2003).} when the Justice Department expansively read § 5 and required a maximization of minority vote strength.\footnote{Hasen, supra note 71, at 192.} In addition, this country just elected President Barack Obama. What better evidence could there be that the VRA is no longer necessary and that minorities, especially African Americans, now can participate fully in the political process of this country? While President Obama is proof that anything is possible in this Nation, his election should not overshadow the fact that minority elected officials are still the exception in this country.\footnote{See NAMUDNO, 557 F. Supp. 2d at 9.} Roland Burris is the only African American Senator and Blacks are underrepresented in the House.\footnote{African American make up around thirteen percent of the U.S. population, but around nine percent of representatives. See \textsc{United States House of Representatives} \url{http://www.house.gov/house/MemberWWW_by_State.shtml}.} The D.C. Circuit correctly concluded Congress had a rational basis to reauthorize § 5 of the VRA based on the evidence,\footnote{See supra pages 18–20 and accompanying text.} but some still believe the evidence would fail the \emph{Garrett} requirement of a recent pattern of violations.\footnote{See \textsc{Garrett}, 531 U.S. at 368.} While the evidence may not meet the test of \emph{Garrett}, the Congressional record easily passes the threshold required in \emph{Katzenbach} under a rationality review, and is enough to meet the requirements of \emph{Hibbs’} and \emph{Lane’s} version of the congruent and proportional test.
Congress’ record in *NAMUDNO* should receive the same treatment as in *Hibbs* and *Lane* because a suspect class and a fundamental right are both protected by § 5.

**C. The Court Must Uphold § 5 of the VRA Because it has Relied on § 5 as the Shining Example of Congruence and Proportionality in the Past**

The first reason that the Court will uphold § 5 is the incredible number of times the Court has relied on the VRA and § 5 as the prime example of what a congruent and proportional enactment under the Civil War Amendments should look like. In *City of Boerne*, the Court applauded the VRA ad nauseum. The Court in *City of Boerne* emphasized that legislation passed pursuant to the Civil War Amendments must be judged with reference to the history behind it.\(^{154}\) The Court applauded Congress for documenting systemic voting rights abuses before enacting the VRA.\(^{155}\) It called the VRA a narrowly tailored remedial measure, instead of a broad substantive reworking of the text which distinguished it from the RFRA or the ADA.\(^{156}\)

*Garrett* is even more ringing in its endorsement of the VRA as congruent and proportional. The *Garrett* Court said that the VRA is an appropriate remedy and that Congress took great care in the area of remedying discrimination in voting.\(^{157}\) The majority continued that the VRA was the only remedial scheme that could meaningfully enforcement the Fifteenth Amendment based on the history of racial discrimination in the political process that had infected parts of this country for years.\(^{158}\)

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\(^{154}\) *City of Boerne*, 521 U.S. at 518.

\(^{155}\) *Id.*

\(^{156}\) *See id.* at 519.

\(^{157}\) *Garrett*, 531 U.S. at 374.

\(^{158}\) *Id.*
In both *Hibbs* and *Lane* the Court said the VRA is the example of congruence and proportionality. In *Lane*, the Court notes that the VRA is a valid exercise of federal power into a traditional area of state control.\(^\text{159}\) In addition, if legislation validly remedies or deters constitutional violations the Court will allow Congress to paint with a broad brush even without the existence of a distinct pattern of such discrimination.\(^\text{160}\) § 5 of the VRA is the type of legislation that deters and remedies constitutional violations. The Court will look extremely foolish, rash, and ultra political if it strikes down § 5 in the face of everything that it has said in the recent past.

**D. The Court Has Not Taken Other Opportunities to Strike Down the VRA or § 5**

Another reason that § 5 will continue to survive is that the Court has addressed § 5 and the VRA since *City of Boerne*, failed strike down § 5, and did not put it through the full congruent and proportional gauntlet of *City of Boerne* and *Garrett*. First, in *Lopez* the Court resoundingly rejected constitutional challenges to § 5 after *City of Boerne* and after the 1982 reauthorization. *City of Boerne* is only cited one time for the proposition that Congress can use its enforcement power to curtail state power.\(^\text{161}\) The Court applied *City of Rome* and *Katzenbach* while skipping the true *City of Boerne* and *Garrett* analysis and upheld § 5 once again.\(^\text{162}\) Even though *Lopez* did not examine the 2006 reauthorization, it still only subjected the 1982 reauthorization to a rationality review which the Congressional evidence in 2006 can easily satisfy.

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\(^{159}\) *Lane*, 541 U.S. at 520.

\(^{160}\) *See id.*

\(^{161}\) *See Katz, supra* note 64, at 2372.

\(^{162}\) *Id.*
In *Georgia v. Ashcroft*, decided in 2003, the Court decided to read § 5 narrowly, but did not challenge its ultimate constitutionality.\(^{163}\) It even goes so far as to applaud how flexible\(^{164}\) § 5 is for covered jurisdictions. Instead of questioning § 5’s validity, all the justices in *Ashcroft* accept § 5 and frame their arguments in a way that concedes that it is a constitutional enactment while no opinion casts doubt upon § 5 as a whole.\(^{165}\)

Lastly, earlier this term the Court handed down *Bartlett v. Strickland*.\(^{166}\) While *Bartlett* did not deal with a direct assault on § 5 of the VRA, *Bartlett* is of great importance because Chief Justice Roberts joined the plurality opinion that claims more work must be done under the VRA. After construing § 2 of the VRA narrowly, Justice Kennedy said that “racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic process[.].”\(^{167}\) These cases suggest that the Court will not take this chance to strike down § 5 in *NAMUDNO*.

**E. Justice Kennedy Does Not Want to be on the Wrong Side of History**

Perennial swing voter Anthony Kennedy’s vote is critical in *NAMUDNO*. His curious positions in the majority of *Planned Parenthood of Southeastern Pennsylvania v. Casey*\(^{168}\) and

\(^{163}\) *Ashcroft*, 539 U.S. at 477.

\(^{164}\) *Id.* at 482.

\(^{165}\) *Id.* at 477.

\(^{166}\) 2009 U.S. LEXIS 1842 (Mar. 9th, 2009).

\(^{167}\) *Id.* at *42.

Lawrence v. Texas\textsuperscript{169} suggest that he will vote to uphold § 5. Kennedy probably does not have the stomach to vote down § 5 and does not want that vote to blemish his record.

The Casey majority, in which Kennedy found himself, heavily relied on precedent and the doctrine of \textit{stare decisis} to reaffirm the central holding of \textit{Roe v. Wade}.\textsuperscript{170} The Court deemed that \textit{Roe} was workable, little had changed, and that there was significant reliance on the holding of \textit{Roe}.\textsuperscript{171} Curiously in Lawrence, Kennedy wrote the majority opinion that overruled \textit{Bowers v. Hardwick}\textsuperscript{172} announced only seventeen years earlier. The question to Kennedy is whether adults should be free to enter consenting sexual relations, but he provides none of the \textit{stare decisis} concerns of Casey.\textsuperscript{173} \textit{Stare decisis} is thrown totally out the window in Lawrence because the opinion seemed outdated to Justice Kennedy.\textsuperscript{174} To him the issue in Bowers was misunderstood, meaning that he believed Bowers must be overruled as a historically dubious ruling.\textsuperscript{175} Justice Kennedy’s knack for arriving at the outcome history will look more at favorably leads one to believe he will not vote to strike down § 5 in NAMUDNO.

\textbf{F. Justice Scalia as the Defender of Racial Justice?}

With the four more liberal Justices, and now Justice Kennedy on board, Justice Scalia may be a whopping sixth vote to uphold § 5 by applying a more lenient standard of review.

\textsuperscript{169} 539 U.S. 558 (2003).

\textsuperscript{170} Casey, 505 U.S. at 700.

\textsuperscript{171} Id.

\textsuperscript{172} Bowers upheld a statute banning sodomy between homosexuals. 478 U.S. 186 (1986).

\textsuperscript{173} Lawrence, 539 U.S. at 564.

\textsuperscript{174} Id.

\textsuperscript{175} Id. at 567.
Justice Scalia argued for just that in his dissent in *Lane*. He shockingly announced “I shall henceforth apply the permissive . . . standard to congressional measures designed to remedy racial discrimination by the States.”\(^{176}\) “I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate . . . to prevent or remedy racial discrimination by the States.”\(^{177}\) The one caveat to Scalia’s position is that he believe Congress can only legislate against those states with a history and pattern of discrimination.\(^{178}\) While Justice Scalia seems to say that he does not approve of § 5 applying to political subdivisions in uncovered states, that issue is not before the Court in *NAMUDNO* and any reference to that issue would be mere dicta.\(^{179}\) This bodes well for the Court to uphold § 5 applying the more permissive standard of review.

**CONCLUSION**

§ 5 is in the most danger that it has ever faced. The D.C. Circuit correctly used the same standard in *Katzenbach* to reject the claim that § 5 is unconstitutional in *NAMUDNO*. Even in the face of *City of Boerne* and its progeny, the Court will not apply the entire *City of Boerne/Garrett* congruent and proportional test to the 2006 reauthorization. If the Court does apply the *City of Boerne* test, it will be the *Katzenbach* standard masquerading as the congruent and proportional test because *Lane* and *Hibbs* relax the test if a suspect class or fundamental right was implicated. *NAMUDNO* concerns both. The Congressional findings of discrimination are sufficient to meet the requirements of either *Katzenbach* or *Hibbs/Lane*. Chief Justice Roberts has shown inklings

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\(^{176}\) *Lane*, 541 U.S. at 564 (Scalia, J., dissenting).

\(^{177}\) *Id.*

\(^{178}\) *Id.*

\(^{179}\) *NAMUDNO* is within Texas, a covered state. *NAMUDNO*, 557 F. Supp. 2d at 9.
that he is hostile to enactments attempting to create racial equality, but there are six votes to uphold § 5 of the VRA. Justice Kennedy and Justice Scalia may take unusual positions on § 5 based on their past opinions and vote with the more liberal members of the Court. All of us welcome the day when the VRA really has outlived its usefulness and the intent of the Fifteenth Amendment has truly been realized. Unfortunately, that time has not yet arrived.