



# The Voting Rights Act Is In Jeopardy, But It Shouldn't Be:

A Close Look at *Shelby County v. Holder*

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## Introduction

For the last 47 years, year in and year out, the Voting Rights Act (VRA) has stood as our nation's most effective civil rights law to realize the guarantees of the Fifteenth Amendment and prevent and deter state-sponsored racial discrimination in voting. Much of the Act's success is due to the preclearance requirement contained in Section 5 of the Voting Rights Act, which requires state and local jurisdictions with a history of racial discrimination in voting to get "preclearance" from the U.S. Department of Justice (DOJ) or a three-judge federal court in Washington, D.C., before changing their voting laws and regulations. Preclearance requires that covered jurisdictions demonstrate that proposed changes do not have a discriminatory purpose or will not have a discriminatory effect on racial minorities. Proving to be a critical tool to secure our Constitution's promise of a multi-racial democracy, the preclearance requirement was subsequently renewed in 1970, 1975, 1982, and 2006, and signed into law respectively by Presidents Richard Nixon, Gerald Ford, Ronald Reagan, and George W. Bush. Indeed, in the run up to the 2012 presidential election, we saw how vital preclearance remains as a tool for preventing racial discrimination in voting. Judges across the ideological spectrum applied the Act's preclearance requirement to prevent states, including Florida, Texas and South Carolina, from disenfranchising African-American and Latino voters and diluting their voting strength. Despite its success (or, perhaps because of it), every time the Act has been reauthorized, it has faced a constitutional challenge. This time has been no different.

This Term, in *Shelby County v. Holder*,<sup>2</sup> the Supreme Court will take up the constitutionality of the preclearance requirement for the sixth time since the Voting Rights Act was enacted in 1965. The Supreme Court has upheld the Act's preclearance provision four different times – in 1966, 1973, 1980, and 1999 – recognizing that the Act falls squarely within congressional power to enforce the constitutional ban on racial discrimination in voting.<sup>3</sup> *Shelby County*, however, contends that the Act is now badly outdated and that the Act's renewal in 2006 exceeded the scope of Congress' power under the Constitution. In 2009, in *Northwest Austin Municipal Dist. No. 1 v. Holder*,<sup>4</sup> a precursor to *Shelby County*, the Supreme

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<sup>2</sup> *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert granted*, No. 12-96.

<sup>3</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterrey County*, 525 U.S. 266 (1999).

<sup>4</sup> 557 U.S. 193 (2009).

Court sidestepped a similar constitutional challenge. In an opinion by Chief Justice Roberts, the Court wrote that the Act’s burdens must be justified by “current needs,” but did not reach the question of the constitutionality of the Act’s preclearance requirement.<sup>5</sup> Incorporating responses to *Northwest Austin* opinion, the lower courts rejected Shelby County’s challenge in a pair of thoughtful and thorough opinions. These opinions, written by judges across the ideological spectrum, have set the stage for a showdown in the Supreme Court. Unlike in *Northwest Austin*, there is no way to sidestep the constitutional question in *Shelby County* – Shelby County cannot “bailout” from the preclearance requirement because of recent voting rights violations.<sup>6</sup> The Justices will have to grapple with Shelby County’s argument that this critical part of the Act is outdated and unnecessary, and hence beyond the power of Congress to protect the right to vote free from racial discrimination.

The Court should reject Shelby County’s argument. In this Issue Brief, we show that the constitutionality of the preclearance requirement of the Voting Rights Act should not be in serious doubt. Part I demonstrates that the Voting Rights Act falls squarely within the constitutional powers granted to Congress in the Fifteenth Amendment, which specifically empowers Congress to enact “appropriate legislation” to “enforce” the text’s prohibition on racial discrimination in voting. The text and history of the Reconstruction Amendments establish that “appropriate” enforcement legislation includes broad prophylactic regulation to protect the right to vote free from racial discrimination and ensure that the right to vote is meaningfully enjoyed by all citizens regardless of race. Part II examines the massive legislative record that Congress assembled in concluding that the preclearance requirement continues to be a necessary tool to enforce the Constitution’s promise of a multi-racial democracy. Shelby County argues that preclearance is now an unnecessary, gratuitous burden, but Congress – which is charged with the responsibility of enforcing the Fourteenth and Fifteenth Amendments – concluded otherwise. Moreover, the simple reality is that the preclearance requirement is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. Finally, Part III examines the vital role preclearance played in the run up to the 2012 election, demonstrating that, in state after state in the South, preclearance prevented state governments from enacting new discriminatory changes that would have denied African-American and Latino citizens an equal right to cast a ballot and diluted their voting strength. This recent history is proof positive that the Act is still very much needed to ensure compliance with the Fifteenth Amendment’s promise of voting equality.

By any measure of constitutional fidelity, *Shelby County* should be an easy case for three reasons. First, the Constitution’s text expressly gives to Congress the power to enact legislation to enforce the Constitution’s prohibition against racial discrimination in voting, arming Congress with substantial power to ensure that our most precious fundamental right is enjoyed by all

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<sup>5</sup> *Id.* at 203.

<sup>6</sup> The Voting Rights Act provides that a jurisdiction covered by the preclearance requirement may escape from preclearance obligations – “bailout” – by demonstrating a clean voting rights record for the last ten years. As Shelby County concedes, it cannot meet that standard. For further discussion of bailout, see text accompanying notes 81-84.

Americans regardless of race. Second, the Supreme Court already has affirmed the constitutionality of this very Act four times previously. Third, and finally, the record developed by Congress in 2006 – as well as the actions of states in the course of the 2012 elections – manifestly shows that racial discrimination in voting is still a blot on our Constitution’s promise of a multiracial democracy. The question, then, is whether Chief Justice Roberts and the Court’s conservatives will recognize or stifle Congress’ power to enforce the Constitution’s guarantee of equality in the ballot booth, turning the Fifteenth Amendment on its head. Unfortunately, the conservatives on the Court have been willing to sacrifice fidelity to the Constitution in cases that have the potential to substantially advance the right’s political agenda – cases such as *Bush v. Gore* and *Citizens United v. FEC*.<sup>7</sup> It would be tragic to see one of the most iconic civil rights statutes fall in a decision likely to be added to this ignominious group.

## **I. The Constitution Gives Congress Broad Power To Prevent And Deter Racial Discrimination In Voting**

The U.S. Constitution’s creation in 1787 was a hinge of modern democratic history, setting our country – and the world – on a path toward more inclusive and participatory government.<sup>8</sup> The Founding generation took important steps to increase the number of voters eligible to ratify the Constitution: many states waived voting restrictions (such as property requirements) and, even as slavery held sway in parts of the Union, African-Americans in some states voted for delegates to the Constitutional Convention.<sup>9</sup> Notwithstanding the expanded ratification pool during the 18th century, by the early 19<sup>th</sup> century people of color and women were almost entirely disenfranchised. Fortunately, after declaring that “We the People” would be the ones to establish and ordain the Constitution, the preamble also boldly states our intention to “create a more perfect union.” The goal was not just to create something “more perfect” than what Americans had seen before – whether it be the tyranny of the British crown or the dysfunction of the Articles of Confederation – but to establish a Union that was itself perfectible across history. Article V, authorizing Amendments, made it clear that the 1787 Constitution was not an end, but a beginning. And perhaps nowhere is the arc of constitutional progress seen more plainly than in the story of suffrage.

Over the past two centuries, the United States has moved ever closer to its full promise of equal citizenship and inalienable rights. Using the Article V amendment process in the wake of the Civil War, “We the People” removed the stain of slavery from our Founding charter through the Thirteenth Amendment, guaranteed equal protection of the laws through the Fourteenth Amendment, and forbid disenfranchisement based on race in the Fifteenth Amendment. Over the next century, the Fifteenth Amendment was followed by a string of additional amendments that expanded the franchise, prohibiting both voting discrimination on

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<sup>7</sup> 531 U.S. 98 (2000); 558 U.S. 310 (2010).

<sup>8</sup> Michael McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of Tradition?*, 25 *LOY. L.A. L. REV.* 1159, 1173 (1992).

<sup>9</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 7-8 (2005).

account of sex and age and abolishing poll taxes in federal elections, and made our government more democratic, granting Americans the right to vote for U.S. Senator.<sup>10</sup> The enforcement powers granted to Congress in these amendments have made possible crucial civil-rights victories – notably the Voting Rights Act of 1965, which for the first time since Reconstruction provided the enforcement tools necessary to make the promise of the right to vote a reality for racial minorities. Written across the very face of our Constitution is a story of hard-won progress toward what President Abraham Lincoln called “government of the people, by the people, and for the people.”<sup>11</sup>

#### **A. The Text and Original Meaning of the Fifteenth Amendment Establish Broad Congressional Power to Protect Voting Rights From State-Sponsored Discrimination**

Proposed in 1869 and ratified in 1870, the Fifteenth Amendment provides that “[t]he 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.”<sup>12</sup> In language “as simple in command as it was comprehensive in reach,” the Fifteenth Amendment “reaffirm[s] the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise.”<sup>13</sup> To make this guarantee a reality, the amendment then provides that “[t]he Congress shall have power to enforce this article by appropriate legislation.”<sup>14</sup> As the Supreme Court recognized just five years after the Fifteenth Amendment’s ratification, “the amendment has invested citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude.”<sup>15</sup> “Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is.”<sup>16</sup>

In writing into the Constitution the “fundamental principle” that state and federal governments “may not deny or abridge the right to vote on account of race,”<sup>17</sup> the Framers explained that the Fifteenth Amendment would be “the capstone in the great temple of American freedom”<sup>18</sup> that would “crown the great work” of emancipation and “make every citizen equal in rights and privileges.”<sup>19</sup> Observing that “[t]he irresistible tendency of modern civilization is in the direction of the extension of the right of suffrage,”<sup>20</sup> the Framers emphasized that the right to vote was a fundamental right, indispensable to ensuring freedom

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<sup>10</sup> See U.S. CONST. amends. XVII, XIX, XXIV, XXVI.

<sup>11</sup> Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).

<sup>12</sup> U.S. CONST. amend. XV, § 1.

<sup>13</sup> *Rice v. Cayetano*, 528 U.S. 495, 512 (2000).

<sup>14</sup> U.S. CONST. amend. XV, § 2.

<sup>15</sup> *United States v. Reese*, 92 U.S. 214, 218 (1875).

<sup>16</sup> *Id.*; see also *Rice*, 528 U.S. at 522 (explaining that the “Fifteenth Amendment has independent meaning and force”).

<sup>17</sup> *Rice*, 528 U.S. at 512.

<sup>18</sup> CONG. GLOBE, 40th Cong., 3rd Sess. 724 (1869) (Rep. Ward).

<sup>19</sup> *Id.* at 672 (Sen. Wilson).

<sup>20</sup> *Id.* at 709 (Sen. Pomeroy).

for African-Americans. Indeed, without protection for the right to vote free from discrimination, the Constitution's promise of equality was "incomplete" and "radically defective."<sup>21</sup> "The ballot is as much the bulwark of liberty to the black man as it is to the white. . . . No class, no race is truly free until it is clothed with political power sufficient to make it the peer of its kindred class or race."<sup>22</sup>

The plain language of the Fifteenth Amendment vests Congress with "power to enforce" the constitutional right to vote free from racial discrimination "by appropriate legislation."<sup>23</sup> The language that the Framers used to define the scope of Congress' authority under the Thirteenth, Fourteenth, and Fifteenth Amendments reflects a decision to give Congress wide discretion to enact whatever measures it deems "appropriate." In giving Congress the power to enact "appropriate legislation," the Framers granted Congress the sweeping authority of its Article I "necessary and proper" powers, as interpreted by the Supreme Court in *McCulloch v. Maryland*,<sup>24</sup> a seminal case well-known to the Framers of those Amendments.<sup>25</sup> In *McCulloch*, Chief Justice Marshall laid down the fundamental principle determining the scope of Congress' powers under the Necessary and Proper Clause: "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."<sup>26</sup> Indeed, in *McCulloch*, Chief Justice Marshall used the word "appropriate" to describe the scope of congressional power no fewer than six times.<sup>27</sup> Thus, by giving Congress the power to enforce the constitutional prohibition on racial discrimination in voting by "appropriate legislation," the Framers "actually *embedded in the text*" the "language of *McCulloch*."<sup>28</sup>

The debates on the Fifteenth Amendment reflect the text's broad grant of power to Congress to secure the right to vote free from racial discrimination. During the debates, the Framers made clear that the Fifteenth Amendment's Enforcement Clause, like that of the Thirteenth and Fourteenth Amendments, gave Congress a broad "affirmative power" to secure the right to vote.<sup>29</sup> Without a broad enforcement power, the Framers feared that the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 983 (Rep. Ross).

<sup>23</sup> U.S. CONST. amend. XV, § 2.

<sup>24</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>25</sup> See JOHN T. NOONAN, *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 28-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810-15 (2010); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J. L. & PUB. POL'Y 991, 1002-03 (2008); Evan Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 178 n.153 (1997); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding*, 109 YALE L.J. 115, 131-34 (1999).

<sup>26</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (emphasis added).

<sup>27</sup> *Id.* at 408, 410, 415, 421, 422, 423.

<sup>28</sup> Balkin, *supra* note 23, at 1815 (emphasis in original).

<sup>29</sup> CONG. GLOBE, 40th Cong., 3rd Sess. 727 (1869) (Rep. Bingham); *id.* at 1625 (Sen. Howard) ("Congress . . . under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this.").

constitutional guarantee would not be fully realized: “Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly, no power but that of the central government is or can be competent for their adjustment . . . .”<sup>30</sup>

Both supporters and opponents alike recognized that the Fifteenth Amendment’s Enforcement Clause significantly altered the balance of power between the federal government and the states, giving Congress broad authority to secure the right to vote to African-Americans and to eradicate racial discrimination in state elections. Opponents of the Fifteenth Amendment were vehemently against conferring on Congress “all power over what our Constitution regards as the proper subject of State action exclusively.”<sup>31</sup> As Senator Thomas Hendricks put it, “when the Constitution of the United States takes away from the State the control over the subject of suffrage it takes away from the State the control of her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon.”<sup>32</sup>

These concerns over state sovereignty were flatly rejected by the Framers of the Fifteenth Amendment, who explicitly conferred on Congress the power to secure the right to vote free from racial discrimination. During the debates on the Fifteenth Amendment, Senator George Edmunds explained that it was necessary to “withdraw from the States of this Union who have hitherto exercised . . . the entire power over the political question of the right of suffrage” because “in many of these States there are large classes of citizens who are practically ostracized from the Government . . . .”<sup>33</sup> “The time has arrived,” Senator Joseph Abbott declared, “when the power of the General Government should be felt within every foot of its territory. . . . [T]he time has come when it is the duty of the Government to assert its supremacy and protect life and property everywhere in the United States.”<sup>34</sup> “[T]his Government was founded on the idea that all political power was vested in the people—not a third of a half or any fraction, but all the people.”<sup>35</sup> In giving Congress the power to remedy voting discrimination by the states, the Fifteenth Amendment specifically limited state sovereignty.

In short, the Fifteenth Amendment radically altered the constitutional balance between the states and the federal government on the issue of racial discrimination in voting. It vested Congress with broad power to prevent and deter racial discrimination in voting and placed all citizens “under the shield of national protection.”<sup>36</sup>

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<sup>30</sup> *Id.* at 984 (Rep. Ross).

<sup>31</sup> CONG. GLOBE, 40th Cong., 3rd Sess. 697 (Rep. Burr).

<sup>32</sup> *Id.* at 989.

<sup>33</sup> CONG. GLOBE, 40th Cong., 3rd Sess. 1626 (1869).

<sup>34</sup> *Id.* at 981.

<sup>35</sup> *Id.*

<sup>36</sup> CONG. GLOBE, 41st Cong., 2nd Sess. 3608 (1870) (Sen. Schurz).

## **B. The History Of The Fifteenth Amendment Demonstrates That “Appropriate” Enforcement Legislation Includes Broad, Prophylactic Regulation To Protect The Right To Vote**

The Framers of the Civil War Amendments, including the Fifteenth Amendment, chose broad, sweeping language conferring on Congress the power to enforce the new constitutional guarantees of liberty, equality, and the right to vote free from racial discrimination by all “appropriate legislation” because they were reluctant to leave the judiciary with sole responsibility for protecting against racial discrimination in voting and other constitutional violations. In the aftermath of the Supreme Court’s decision in *Dred Scott v. Sandford*,<sup>37</sup> the Framers were determined to give Congress the lead role in securing the constitutional guarantees of the three Civil War Amendments. As Senator Oliver Morton explained, “the remedy for the violation” of the Fifteenth Amendment, like the remedies for violation of the other Civil War Amendments, “was expressly not left to the courts. The remedy was legislative, because . . . the amendment itself provided that it shall be enforced by legislation on the part of Congress.”<sup>38</sup> Against this backdrop, it is no surprise that the congressional debates surrounding the amendments stressed the importance of a broad federal *legislative* power to protect constitutional rights—with corresponding deference from the courts to respect this new authority. While Congress did not use this power effectively to prevent disenfranchisement of racial minorities until civil rights advocates secured the passage of the Voting Rights Act of 1965, such enforcement power unquestionably lay in repose with Congress.

Congress’s broad legislative power was particularly important to secure the right to vote free from racial discrimination. Because states extensively regulate elections, including by regulating voter qualifications and drawing district lines, states hostile to the Fifteenth Amendment could easily use their power over the election system to deny or abridge the right to vote free from discrimination, as they often did.<sup>39</sup> For that reason, the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both heavy-handed and subtle—was critical to “prevent[ing] any state from discriminating against a voter on account of his race . . . .”<sup>40</sup>

The Framers were well aware that Congress needed broad authority to enact prophylactic legislation to stamp out all forms of racial discrimination in voting. For example, during the debates on the Fifteenth Amendment, Representative William Pile observed that “[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States,” emphasizing that “[w]hat we desire to reach” is “to insure by constitutional enactment . . . the right of suffrage”

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<sup>37</sup> 60 U.S. (19 How.) 393 (1857).

<sup>38</sup> CONG. GLOBE, 42nd Cong., 2nd Sess. 525 (1872); see also McConnell, *supra* note 23, at 182 (explaining that the Enforcement Clauses of the Civil War Amendments were “born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.”).

<sup>39</sup> See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 590-91 (1988) (discussing efforts to defy the Fifteenth Amendment through racial gerrymandering and adoption of discriminatory voting laws).

<sup>40</sup> CONG. GLOBE, 41st Cong., 2nd Sess. 3663 (1870) (Sen. Sherman).

of citizens without regard to race.<sup>41</sup> In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African-Americans on account of their race. Highlighting the importance of providing “proper machinery . . . for enforcing the fifteenth amendment,” Senator William Stewart explained that “it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting . . . . The states can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day.”<sup>42</sup> “There may be a hundred prerequisites invented by the States,”<sup>43</sup> “a hundred modes whereby [an African-American] can be deprived of his vote.”<sup>44</sup>

Senator Stewart was prescient. The struggle for voting rights for African-Americans did not end with the ratification of the Fifteenth Amendment. Even with crystal clear constitutional protection of the right to vote, a number of states across the country – concentrated in the Southern states that made up the former Confederacy – flouted the command of the Fifteenth Amendment, with whites-only primaries, literacy tests, poll taxes, and registration restrictions that combined with segregation to suppress racial minorities’ political participation.<sup>45</sup> The promise of the Fifteenth Amendment rang hollow throughout the South. It was not until civil rights champions fought long and hard to make Congress use its Fifteenth Amendment enforcement powers to pass the Voting Rights Act of 1965 that there was a successful response to nearly a century of minority disenfranchisement. The Voting Rights Act has subsequently been expanded by bipartisan majorities and remains one of the most iconic civil rights statutes on the books.

The history summarized above documents that the Framers of the Fifteenth Amendment wanted to and by their words did ensure that Congress had the authority to stamp out and deter the full range of racial discrimination in voting, including by enacting prophylactic regulation. This history demonstrates why the preclearance requirement of the Voting Rights Act falls squarely within Congress’ express power to protect the right to vote free from racial discrimination.

### **C. The Supreme Court Has Upheld Congress’s Broad Power to Protect Voting Rights—and the VRA, in Particular—Many Times Before**

Consistent with the text and history of the Fifteenth Amendment, the Supreme Court has held numerous times that “Congress’ authority under § 2 of the Fifteenth Amendment . . . [is] no less broad than its authority under the Necessary and Proper Clause.”<sup>46</sup> In these cases,

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<sup>41</sup> CONG. GLOBE, 40th Cong., 3rd Sess. 725 (1869).

<sup>42</sup> CONG. GLOBE, 41st Cong., 2nd Sess. 3658 (1870) .

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 3657 (Sen. Stewart).

<sup>45</sup> See J. MORGAN KOUSSER, SHAPING OF SOUTHERN POLITICS (1974).

<sup>46</sup> *City of Rome v. United States*, 446 U.S. 156, 174-75 (1980); *id.* at 177 (“[U]nder § 2 of the Fifteenth Amendment Congress may prohibit practices that . . . do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are ‘appropriate’ as that term is defined in *McCulloch*.”); *cf.* *Jones v. Alfred H. Mayer*



broad deference was applied to the means Congress adopted to enforce the constitutional right to vote free from racial discrimination. The preclearance requirement contained in Section 5 of the Voting Rights Act seeks to enforce the core purpose of the Fifteenth Amendment, and the nearly unanimous, bipartisan decision of Congress to re-authorize it falls squarely within Congress's broad power to enforce the Fifteenth Amendment.

In *South Carolina v. Katzenbach*,<sup>47</sup> the Supreme Court deferred to Congress's broad authority to protect voting rights in holding that the preclearance and coverage provisions of the Voting Rights Act—the same provisions Shelby County attacks—were “appropriate legislation” within Congress's Fifteenth Amendment enforcement power. “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition on racial discrimination in voting.”<sup>48</sup> The *Katzenbach* Court analyzed the history of the Fifteenth Amendment, noting that “[b]y adding th[e] authorization [for congressional enforcement in Section 2], the Framers indicated that Congress was to be *chiefly responsible* for implementing the rights created. . . . Congress has full remedial powers to effectuate the constitutional prohibition on racial discrimination in voting.”<sup>49</sup>

Based on this text and history, the Court rejected “South Carolina’s argument that Congress may do no more than to forbid violations of the Fifteenth Amendment in general terms. . . . Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment.”<sup>50</sup> Similarly, the Court rejected South Carolina’s argument that Congress could not single out states with a history of voting discrimination for special prophylactic regulation under its express power to enforce the Fifteenth Amendment. “In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of equality of states, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”<sup>51</sup> Since then, the Supreme Court has reaffirmed both the reasoning and result of *Katzenbach* on three separate occasions, rejecting challenges to the 1970, 1975, and 1982 renewals of the Act’s preclearance requirement.<sup>52</sup>

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Co., 392 U.S. 409, 439 (1968) (explaining that the Enforcement Clause of the Thirteenth Amendment “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States’”) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1886)); *James Everard’s Breweries v. Day*, 265 U.S. 545, 558-59 (1924) (applying *McCulloch* to analyze constitutionality of congressional action under the Enforcement Clause of the Eighteenth Amendment).

<sup>47</sup> 383 U.S. 301 (1966).

<sup>48</sup> *Id.* at 324.

<sup>49</sup> *Id.* at 325-26 (emphasis added).

<sup>50</sup> *Id.* at 326, 327.

<sup>51</sup> *Id.* at 328-29.

<sup>52</sup> *Georgia v. United States*, 411 U.S. 526, 535 (1973) (reaffirming that “the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment”); *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (explaining that “we have reaffirmed our holdings in *South Carolina v. Katzenbach* that the Act is ‘an appropriate means for carrying out Congress’ constitutional responsibilities’ and is ‘consonant with all . . . provisions of the Constitution’”) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ); *Lopez v.*

To be sure, beginning with *City of Boerne v. Flores*, the Supreme Court in a long line of cases since the mid-1990s has limited the power of Congress to enforce the guarantees of the Civil War Amendments, crafting a “congruence and proportionality” test to assess the constitutionality of congressional efforts to enforce the Fourteenth Amendment.<sup>53</sup> Using this test, the Court struck a balance, reaffirming the power of Congress to enact prophylactic rules to protect established constitutional guarantees while striking down efforts to provide additional guarantees not properly rooted in the Constitution. In short, the Court ruled that Congress had to be enforcing actual constitutional guarantees – there must be a “congruence and proportionality” between the injury to be prevented or remedied and the means adopted to that end – but once it was, the Court recognized that Congress had wide latitude to act.<sup>54</sup> That balance allowed the Court to limit the reach of federal age and disability discrimination laws and, most recently, the Family and Medical Leave Act,<sup>55</sup> but it does not work in favor of Shelby County. The Court has said time and again that racial discrimination by the states, particularly when it concerns the fundamental right to vote, violates the Constitution.

The Court in *Boerne* was concerned that Congress might invent constitutional rights in the guise of enacting enforcement legislation. That concern does not have any force when it comes to the Fifteenth Amendment’s focused and express prohibition on racial discrimination in voting. Both constitutional text and history, as well as the unbroken line of Supreme Court precedent, dictates that Congress has broad leeway to design remedies to protect against discrimination based on race—the most constitutionally suspect form of discrimination—in order to protect the right to vote, which has always been recognized as a fundamental right of the highest order, “preservative of all rights.”<sup>56</sup> Even Justice Scalia, who has been a trenchant critic of most congressional enforcement legislation, has recognized that “[g]iving [Congress] . . . more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctly violative of the principal purpose of the [Civil War] Amendment[s] . . . .”<sup>57</sup> Not surprisingly, the Court’s modern cases have repeatedly described

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Monterrey County, 525 U.S. 266, 283 (1999) (reaffirming that “Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions”).

<sup>53</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 637 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012).

<sup>54</sup> See, e.g. *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003) (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”); *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (explaining that “Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions”).

<sup>55</sup> *Kimel*, 528 U.S. 62; *Garrett*, 531 U.S. 356; *Coleman*, 132 S. Ct. 1327.

<sup>56</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>57</sup> *Lane*, 541 U.S. at 561 (Scalia, J., dissenting); see also *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.) (“[w]here Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intentions of the Framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.”).

the Voting Rights Act’s preclearance requirement as the classic example of appropriate enforcement legislation.<sup>58</sup>

*Boerne* itself recognized that when Congress enforces recognized fundamental constitutional rights—such as the right to vote expressly enumerated in the Fifteenth Amendment—rather than, in the Court’s view, inventing new ones, “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>59</sup> As history shows, the Fifteenth Amendment was designed to radically alter constitutional principles of federalism, giving to Congress a broad sweeping power to ensure that the right to vote free from racial discrimination was actually enjoyed by all Americans. While “the Voting Rights Act, by its nature, intrudes on state sovereignty,” “the Fifteenth Amendment permits this intrusion.”<sup>60</sup>

Indeed, since the function of *Boerne*’s congruence and proportionality test is to distinguish “measures that remedy or prevent unconstitutional actions” and “measures that make a substantive change in the governing law,”<sup>61</sup> when Congress enforces an expressly enumerated constitutional right, such as the Fifteenth Amendment’s prohibition on racial discrimination in voting, “Congress ought to have wide latitude in choosing among enforcement remedies.”<sup>62</sup> As the Constitution’s text reflects, “[t]he Fifteenth Amendment empowers Congress, not the Court, to determine . . . what legislation is needed to enforce it.”<sup>63</sup>

## **II. Extensive Evidence Of Continuing Voting Discrimination Supports Congress’ Re-Authorization Of The Preclearance Requirement**

Examination of the legislative record assembled by Congress demonstrates that the 2006 renewal of the Voting Rights Act’s preclearance requirement falls squarely within Congress’ power to protect against racial discrimination in voting – the single purpose of the Fifteenth Amendment. Acting within its wide discretion to select appropriate means, Congress conducted an extensive inquiry into the current state of racial discrimination in voting and permissibly determined that prophylactic measures were “current[ly] need[ed]”<sup>64</sup> to protect against unconstitutional racial discrimination in the administration of elections concentrated in

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<sup>58</sup> See *Boerne*, 521 U.S. at 526 (reaffirming *Katzenbach*’s recognition of “the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights”).

<sup>59</sup> *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

<sup>60</sup> *Lopez v. Monterrey County*, 525 U.S. 266, 284-85 (1999).

<sup>61</sup> *Boerne*, 521 U.S. at 519.

<sup>62</sup> Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1436 (2009).

<sup>63</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009).

<sup>64</sup> *Nw. Austin*, 557 U.S. at 203.

the covered jurisdictions. By an overwhelming margin – 98-0 in the Senate and 390-33 in the House – bipartisan majorities agreed that the preclearance provision of the historic Voting Rights Act continued to serve the critical purpose of preventing and deterring racial discrimination in voting. Under any standard – whether the *McCulloch* standard reflected in the text of Section 2 of the Fifteenth Amendment or *Boerne*'s more restrictive congruence and proportionality standard used in the Supreme Court's recent cases – the legislative record compiled by Congress establishes that the preclearance requirement is “appropriate legislation” enforcing the Constitution's prohibition on racial discrimination in voting.

Based on a record “over 15,000 pages in length,” including “statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination,”<sup>65</sup> Congress concluded that state-sponsored racial discrimination in voting continues to be concentrated in the jurisdictions long covered by the Voting Rights Act. Indeed, Congress found that many of the same state and local governments that had flouted the Fifteenth Amendment and had first occasioned the Voting Rights Act in 1965 continue to engage in racial discrimination in voting on a systematic basis. Thus, despite considerable progress towards the goal of a multiracial democracy demanded by the Fifteenth Amendment, Congress found that preclearance still served the vital goal of preventing government-sponsored racial discrimination in voting. In many cases, Congress found that just as minorities were close to exercising political power, state and local governments interposed discriminatory voting changes. As conservative jurist District Court Judge John Bates observed in rejecting Shelby County's challenge, given “the extensive evidence of recent voting discrimination reflected in th[e] virtually unprecedented legislative record . . . Section 5 remains a ‘congruent and proportional remedy’ to the 21<sup>st</sup> century problem of voting discrimination in the covered jurisdictions.”<sup>66</sup>

The raw numbers show that preclearance has protected hundreds of thousands – if not millions – of citizens from voting discrimination. Between 1982-2006, more than 750 Section 5 objections by the Attorney General blocked the enforcement of approximately 2400 discriminatory voting changes; over 800 other proposed voting changes were withdrawn or modified when DOJ asked for more information to justify the voting changes, many in circumstances suggesting intentional discrimination was afoot.<sup>67</sup> These findings are just the tip of the iceberg. As both Congress and courts below found, Section 5's preclearance requirement both prevents voting discrimination and deters constitutional violations *ex ante*; accordingly, there are discriminatory “voting changes that have never gone forward as a result of Section

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<sup>65</sup> *Shelby County*, 811 F. Supp. 2d at 435 (quoting S. Rep. No. 109-295 at 10 (2006)).

<sup>66</sup> *Id.* at 428.

<sup>67</sup> See *Shelby County v. Holder*, 679 F.3d 848, 866-68 (D.C. Cir. 2012). These are only two of the most relevant sets of data on which Congress relied. As the courts below explained, Congress also appropriately drew on: (1) registration and turnout rates; (2) minority officeholding; (3) successful litigation under the nationwide prohibition on discriminatory results in Section 2 of the Voting Rights Act; (4) dispatch of federal observers to covered jurisdictions; (5) judicial actions to enforce the preclearance requirement; (6) declaratory judgments for preclearance denied by the courts; (7) racially polarized voting and vote dilution. See *Shelby County*, 679 F.3d at 862-73; 811 F. Supp. 2d at 466-70, 477-90.

5.”<sup>68</sup> Just a small sample of the evidence of continuing voting discrimination in the record powerfully makes the case for why huge bipartisan majorities concluded that the Voting Rights Act is still a necessary tool to eliminate the scourge of racial discrimination in voting:

- *Mississippi*: In the early 1990s, state legislators opposed a redistricting plan that would have increased the number of majority-minority districts in which African-Americans would have the opportunity to elect representatives of their choice, privately disparaging the plan as the “nigger plan.” Several years later, in 1995, Mississippi sought, without ever seeking pre-clearance, to institute a dual registration system requiring individuals to register separately for federal and state elections, a system nearly identical to the one the state had enacted in 1892 to flout the Fifteenth Amendment. Congress also found evidence of discrimination by political subdivisions in Mississippi. For example, in 2001, the all-white Board of Aldermen for the town of Kilmichael, Mississippi, made a sudden decision to cancel a general election three weeks before it was supposed to occur after the town had become majority African-American and “an unprecedented number” of African-Americans ran for office.<sup>69</sup>
- *Alabama*: Congress, too, found continuing discrimination in Shelby County’s home state. In the 1990s, Selma, Alabama – the site of the famous march on the Edmund Pettus bridge that helped lead to the initial passage of the Voting Rights Act – attempted to enact multiple redistricting plans that sought to dilute the voting strength of African-Americans after the 1990 Census showed that the African-American population of Selma had grown to 58%. On these occasions, DOJ objected to the discriminatory plans. Elsewhere in Alabama, Congress heard evidence of election officials “closing the doors on African-American voters before the . . . voting hours were over,” as well as evidence of white officers “using racial epithets to describe African-American voters in the presence of federal observers.”<sup>70</sup>
- *Georgia*: In the early 1980s, Georgia’s discriminatory congressional redistricting was denied preclearance by a three-judge court based on the fact that the state’s House Reapportionment Committee Chairman “told his colleagues on numerous occasions, ‘I don’t want to draw nigger districts.’”<sup>71</sup> Congress also found numerous more recent discriminatory acts. In 1992, Johnson County, Georgia sought to move a polling place from a county courthouse to an “all-white club with a history of refusing membership to black applicants,” a change blocked by DOJ because of its purpose and effect of “discouraging black voters

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<sup>68</sup> H.R. Rep. No. 109-478, at 24; *Shelby County*, 679 F.3d at 871-72; *Shelby County*, 811 F. Supp. 2d at 490-92.

<sup>69</sup> See *Shelby County*, 679 F.3d at 865-66; *Shelby County*, 811 F. Supp. 2d at 464, 473-74, 480-81.

<sup>70</sup> See 1 *Voting Rights Act: Section 5 of the Act – History, Scope & Purpose: Hearing before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109th Cong. 391-92, 403 (Oct 25, 2005); *Shelby County*, 811 F. Supp. 2d at 464 (quoting 1 *Evidence of Continued Need* 182 (Nat’l Comm’n Report)).

<sup>71</sup> H.R. Rep. No. 109-478, at 67 (2006) (quoting *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982)).

from turning out to vote.”<sup>72</sup> In 1998, after Webster County, Georgia, had elected a majority-black school board for the first time, the County sought to reduce the African-American population in three out of five of the Board’s single-member districts, a change DOJ found was designed to “intentionally decreas[e] the opportunity of minority voters to participate in the political process.”<sup>73</sup>

- *Texas*: Congress also found systematic racial discrimination in jurisdictions that were covered beginning in 1975, when the Act’s coverage formula was expanded. Congress heard evidence that, since 1975, every redistricting plan for the Texas House of Representatives has received a preclearance objection.<sup>74</sup> Congress also found numerous acts of racial discrimination in voting on the local level. For example, in 2004, in Waller County, Texas, election officials sought to “reduce early voting at polling places near a historically black college” and “prosecute students for ‘illegal voting, after two black students announced their intent to run for office.’”<sup>75</sup> As a result of successful litigation to enforce the Act’s preclearance provision, “five times as many . . . students were able to vote in the primary, in which the African-American student seeking election . . . won a narrow victory.”<sup>76</sup>

These examples are just a small slice of the evidence that Congress drew on when it reauthorized the Voting Rights Act in 2006. Numerous other examples of discriminatory voting changes abound in Louisiana, South Carolina, Virginia and other covered jurisdictions.<sup>77</sup>

One of the most prominent charges made by opponents of the Voting Rights Act is that – notwithstanding this mountain of evidence of racial discrimination in voting persisting in covered jurisdictions – the Voting Rights Act is now out of date and unconstitutional because Congress did not update the Act’s coverage provision. But, on close analysis, these arguments cannot withstand scrutiny. Congress had good reason to reauthorize the Act’s geographic coverage provision, which has captured and still captures the jurisdictions with the worst record of adhering to the Constitution’s promise of a multi-racial democracy. Shelby County and its supporters have made a number of policy arguments about why a new coverage formula should have been designed. But they are exactly that – policy arguments. The Constitution specifically entrusts to Congress the power to select the means to eliminate the scourge of racial discrimination in voting. The question whether to use or amend the coverage formula was one for Congress to decide, using the broad power specifically conferred in the Constitution.

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<sup>72</sup> 1 *Voting Rights Act: Section 5 of the Act – History, Scope & Purpose: Hearing before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109th Cong. 727 (Oct 25, 2005).

<sup>73</sup> *Id.* at 830; see also *Shelby County*, 679 F.3d at 865.

<sup>74</sup> 2 *Voting Rights Act: Section 5 of the Act – History, Scope & Purpose: Hearing before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 2177-80, 2319-23 (Oct 25, 2005).

<sup>75</sup> *Shelby County*, 679 F.3d at 865-66.

<sup>76</sup> *Shelby County*, 811 F. Supp. 2d at 480.

<sup>77</sup> *Id.* at 470, 474-76, 478-79, 482-84.

The Act's geographic formula covers state and local governments that (1) maintained a voting "test or device" as of either November 1964, 1968, or 1972; and (2) at the same time had a low-registration or turnout rate below half the voting age population (1964 and 1968), or citizen voting age population (1972).<sup>78</sup> The Act's triggers were designed to capture those places where voting discrimination was most entrenched. Going all the way back to 1965, "Congress identified the jurisdictions it sought to cover – those for which it had 'evidence of actual voting discrimination' – and then worked backward, reverse-engineering a formula to cover those jurisdictions."<sup>79</sup> As the Court observed in *South Carolina v. Katzenbach*, "Congress began work with reliable evidence of actual voting discrimination" and the "formula eventually evolved to describe these areas . . ."<sup>80</sup> As in 1965, in 2006, preclearance coverage was "not predicated on statistics alone," but rather "on recent and proven instances of discrimination in voting rights compiled in the . . . record."<sup>81</sup> And, as the voluminous record compiled by Congress and detailed by the lower courts in *Shelby County* shows, the covered jurisdictions continue to be the worst offenders, consistently refusing to live up to the Constitution's promise of a multi-racial democracy.

As important, the coverage formula has never stood on its own. Even at the time of the 1965 Act, Congress recognized that the coverage formula had the potential to be both over- and under-inclusive. To address this problem, Congress designed two remedies: bailout, which permits covered jurisdictions to escape from preclearance obligations by demonstrating a clean voting record, and bail-in, which allows courts to extend preclearance to jurisdictions that have committed violations of the Fourteenth or Fifteenth Amendments.<sup>82</sup> In 2006, rather than try to create a wholly-new, untested coverage formula, Congress examined the state of voting discrimination both within and outside the covered jurisdictions and appropriately chose to continue to rely on bail-out and bail-in to address any conceivable problems in the scope of the Act's coverage formula. Doing so was well within the choice of means permitted Congress under its express power to enforce the Constitution's prohibition on racial discrimination in voting.

The history of bailout confirms that covered jurisdictions are not locked into the Act's coverage, but rather have a full and fair opportunity to be free of federal supervision, an opportunity which many jurisdictions have taken advantage of. At one time, towns or counties in the states of Colorado, Connecticut, Hawaii, Idaho, Maine, Massachusetts, New Mexico, and Wyoming were covered by the preclearance requirement; today, none of them are covered. Throughout the 1970s and 1980s, each bailed out.<sup>83</sup> In the 1982 renewal of Section 5, Congress liberalized the bailout provision, making it easier for covered jurisdictions to free themselves of

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<sup>78</sup> 42 U.S.C. § 1973b(b).

<sup>79</sup> *Shelby County*, 679 F.3d at 879 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966)).

<sup>80</sup> *Katzenbach*, 383 U.S. at 328, 329.

<sup>81</sup> 152 CONG. REC. H5181-82 (daily ed. July 13, 2006).

<sup>82</sup> 42 U.S.C. § 1973a(c) (bail-in); 42 U.S.C. § 1973b(a) (bailout).

<sup>83</sup> See Dep't of Justice, Section 4 of the Voting Rights Act, Jurisdictions Currently Bailed Out, [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php#bailout\\_list](http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list) (last visited Jan. 5, 2013).

the Act's preclearance regime. Since then, in *Northwest Austin*, the Supreme Court expanded eligibility for bail-out to a broader range of political subdivisions, allowing them to be able to demonstrate a clean voting record and bail out.<sup>84</sup> As a result, "[s]ince 2009, numerous local political subdivisions have sought and obtained a bailout . . . . [N]ot a single jurisdiction seeking a bailout has been turned down, and . . . States and political subdivisions are pursuing bailouts with ease in greater numbers than ever before."<sup>85</sup>

Likewise, bail-in has been used to impose certain preclearance obligations on a number of jurisdictions who have engaged in a host of discriminatory voting practices. For example, in the last 25 years, federal courts bailed in Arkansas and New Mexico – two states in which there has been a lot of litigation to enforce the nationwide provisions of the Voting Rights – as well as numerous local governments, including Los Angeles County, California, Bernalillo County, New Mexico, Buffalo County, South Dakota, Charles Mix County, South Dakota, and the City of Chattanooga, Tennessee.<sup>86</sup>

Finally, despite claims that the preclearance requirement imposes onerous burdens, the reality is that the preclearance requirement is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. According to congressional testimony, most preclearance submissions take elections administrators "less than an hour to prepare and mail," and, with the exception of more complicated redistricting submissions, the costs are "insignificant."<sup>87</sup>

In sum, a review of the record before Congress in 2006 demonstrates that, despite considerable progress, the Voting Rights Act's preclearance regime is still necessary to prevent and deter racial discrimination in voting in state and local governments with longstanding, proven histories of racial discrimination in voting. The burdens created by the preclearance requirement are modest and fully justified by the need to ensure that states with a long history and contemporary record of voting discrimination live up to our Constitution's promise of a multi-racial democracy.

### III. The Continuing Need for Preclearance: Voter Suppression In The 2012 Election

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<sup>84</sup> *Nw. Austin*, 557 U.S. at 206-11.

<sup>85</sup> Gerry Hebert, *The Shelby County, Alabama Case and Bailouts*, CAMPAIGN LEGAL CTR. BLOG (Nov. 15, 2012), [http://www.clcblog.org/index.php?option=com\\_content&view=article&id=494:the-shelby-county-alabama-case-and-bailouts-](http://www.clcblog.org/index.php?option=com_content&view=article&id=494:the-shelby-county-alabama-case-and-bailouts-).

<sup>86</sup> The history of bail-in is described in Travis Crum, Note, *The Voting Rights Act's Secret Weapon, Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2010-15 (2010); see also *Shelby County v. Holder*, 679 F.3d 848, 881 (D.C. Cir. 2012).

<sup>87</sup> Testimony of Donald M. Wright, General Counsel of the N.C. State Bd. of Elections, Senate Jud. Comm., *Voting Rights Act: Policy Perspectives and Views From the Field* (June 21, 2006), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da116cea9&wit\\_id=e655f9e2809e5476862f735da116cea9-1-5](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da116cea9&wit_id=e655f9e2809e5476862f735da116cea9-1-5).



If the experience over the course of the 2012 election has proven anything, it's that the Voting Rights Act is still our nation's first and best defense against efforts to disenfranchise American voters. In the run-up to the 2012 election, the right to vote was under siege. Conservatives tried to change election rules to disenfranchise ordinary Americans, passing restrictive voter ID laws, shortening early voting hours, and making it more difficult to register to vote. These restrictions had the greatest impact on young, minority, elderly, and poor voters. They made a mockery of President Lincoln's description of our government being "of the people, by the people, and for the people," and they failed to honor the fact that the right to vote is perhaps our most fundamental constitutional right, a right "preservative of all rights."<sup>88</sup>

The happier, but lesser known, part of this story is how effective DOJ and public interest organizations were in going to court and using the Voting Rights Act to prevent the worst of these statutes from going into force. In the last few months before the election, there were a number of important lower court rulings that enforced the preclearance requirement and provided critical new evidence of precisely why preclearance is still a much needed tool to protect the right to vote free from racial discrimination. Without the VRA in place, African-American and Hispanic voters – in a number of states in the South and Southwest – might have been denied their constitutional right to cast a ballot on election day.

Voter suppression laws that were held back by Section 5 rulings this year included a strict Texas ID law, which a three-judge panel found was tantamount to reviving the poll tax. In *Texas v. Holder*,<sup>89</sup> the court unanimously blocked Texas' new voter identification statute, the most stringent in the nation, finding that the statute would inevitably disenfranchise low-income Texas citizens, who are disproportionately African-American and Hispanic. The court stressed that Texas had gone to great lengths to suppress the vote in poor and minority communities, strictly limiting the types of photo identifications available – a license to carry a concealed firearm is a valid ID under the law, but not a student or Medicare ID card – and making it costly to obtain a so-called "free" election ID for use at the polls.<sup>90</sup> For those without one of the five permitted photo identifications, the court found that the law was tantamount to a poll tax, "imposing an implicit fee for the privilege of casting a ballot."<sup>91</sup> The "very point" of the Voting Rights Act, the court explained, was to deny "states an end-run around the Fifteenth Amendment's prohibition on racial discrimination in voting."<sup>92</sup>

In *Florida v. United States*,<sup>93</sup> another three-judge panel unanimously held that Florida could not slash the period for early voting, explaining that "a dramatic reduction in the form of voting that is disproportionately used by African-Americans" was akin to "closing polling places

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<sup>88</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>89</sup> 2012 WL 3743676 (D.D.C. Aug. 30, 2012).

<sup>90</sup> *Id.* at \*26-29, 33.

<sup>91</sup> *Id.* at \*28.

<sup>92</sup> *Id.* at \*31.

<sup>93</sup> 2012 WL 3538298 (D.D.C. Aug. 16, 2012).

in disproportionately African-American precincts.”<sup>94</sup> Noting that Congress enacted the Voting Rights Act to enforce the Fifteenth Amendment and “provide robust and meaningful protections for minority voting rights,”<sup>95</sup> the court held that Florida could not suppress the vote through a significant reduction in the hours of early voting.

In *Texas v. United States*,<sup>96</sup> in a yet another unanimous ruling, another three-judge court held that Texas’ new state legislative and congressional districts could not be squared with the Voting Rights Act, finding that new congressional, state senate and state house district lines had either the purpose or effect of diluting minority voting strength. Importantly, because the court’s opinion, authored by George W. Bush appointee Judge Thomas Griffith, held that Texas had purposefully discriminated on account of race in both the congressional and state senate plans, Texas’ districting was both a violation of the Voting Rights Act and the Constitution.

Equally important, laws that ultimately did “clear,” like South Carolina’s voter ID law, which was approved for use beginning in 2013 in *South Carolina v. United States*,<sup>97</sup> did so because Section 5 made lawmakers more careful to avoid problematic outcomes. As District Court Judge John Bates explained, “[w]ithout the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been restrictive. Several legislators have commented that they were seeking to structure a law that could be precleared.”<sup>98</sup> “[T]he key ameliorative provisions were . . . shaped by the need for preclearance” that “the evolving interpretation of these key provisions . . . were driven by South Carolina officials’ effort to satisfy the requirement of the Voting Rights Act.”<sup>99</sup> “The Section 5 process here,” Judge Bates explained, “demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory changes, in state and local voting laws.”<sup>100</sup>

Conservative opponents of the Voting Rights Act argue that the preclearance requirement is outdated and unnecessary, but this past election – six years after huge bipartisan majorities renewed the Act – shows why, for the last 47 years, year in and year out, the Voting Rights Act has stood as our nation’s most effective weapon to realize the guarantees of the Fifteenth Amendment and prevent and deter state-sponsored racial discrimination in voting. If the Supreme Court is faithful to the text and history of the Fifteenth Amendment, it should resoundingly affirm the constitutionality of the Voting Rights Act.

## IV. Conclusion

Three years after *Northwest Austin*, the Supreme Court is once again confronted with questions about the constitutionality of Section 5 of the Voting Rights Act. The Act has been

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<sup>94</sup> *Id.* at \*23.

<sup>95</sup> *Id.* at \*13.

<sup>96</sup> 2012 WL 3671924 (D.D.C. Aug. 28, 2012), *jurisdictional statement filed*, no. 12-496 (dated Oct. 19, 2012).

<sup>97</sup> 2012 WL 4814094 (D.D.C. Oct. 10, 2012).

<sup>98</sup> *Id.* at \*21 (Bates, J., concurring).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*22 (Bates, J., concurring).

one of the most important and successful civil rights laws ever enacted, a law that continues to help our nation live up to our Constitution’s promise of liberty, equality, and democracy. Shelby County has asked the Supreme Court to strike down this key provision of the Voting Rights Act in the name of federalism and state sovereignty, turning on its head the Fifteenth Amendment and the powers specifically granted to Congress in the Constitution. Will the Roberts Court honor the right to vote that is perhaps our most fundamental right, a right “preservative of all rights,” and the express power of Congress to protect that right from state-sponsored racial discrimination? If the Supreme Court is faithful to the text of our Constitution, to the sweep of our constitutional history, and to the efforts of generations of men and women to redeem our Constitution’s promise of “government of the people, by the people, and for the people,” it will reaffirm the broad powers of Congress to eliminate the scourge of racial discrimination in voting and uphold the constitutionality of the Voting Rights Act.