Nebraska Law Review

Volume 89 | Issue 2 Article 5

11-2010

If It's Not Broken, then Why Fix It? The U.S. Supreme Court Signals a Shift Under Section 5 of the Voting Rights Act in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009)

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Note*

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I. INTRODUCTION

With its decision in *Northwest Austin Municipal Utility District Number One v. Holder*,[1] the U.S. Supreme Court sounded a warning shot across the bow of Section 5 of the Voting Rights Act.[2] This warning shot was prompted by the "big question"[3] raised by the "small utility district"[4] from Texas; namely, whether the provisions of Section 5, which prevent subject jurisdictions from making any changes in election procedure without advance clearance from authorities in Washington, D.C., are unconstitutional. Although it withheld judgment on the issue by electing to employ the principle of constitutional avoidance,[5] the Court made clear that the preclearance requirements under Section 5 implicated significant constitutional concerns, noting in particular the "federalism costs" of Section 5 and the scope of the Fifteenth Amendment.[6]

In *Northwest Austin*, the Supreme Court avoided ruling on the constitutionality of Section 5 of the Voting Rights Act by providing relief under Section 4 and granting the Northwest Austin Municipal Utility District the ability, as a political subdivision, to bail out of the preclearance requirements of Section 5.[7] While this approach disposed of the case, Chief Justice Roberts's opinion went through considerable pains to comment upon the current status of the Voting Rights Act, as renewed in 2006.[8] In its decision, the Court recited an impressive list of the "undeniable" accomplishments of the Act, which was only surpassed by the number of issues which gave the Court concern.[9] These concerns, which focus upon issues of federalism and the scope of the Fifteenth Amendment, appear to provide the Court with the impetus to do something unprecedented: invalidate a key provision of the Voting Rights Act.[10]

1. 129 S. Ct. 2504 (2009).
2. 42 U.S.C. § 1973c (2006).
3. *Nw. Austin*, 129 S. Ct. at 2508.
4. *Id.*
5. *Id.* at 2513.
6. *Id.* at 2511 (noting Section 5's "federalism costs" and its reach beyond the mandates of the Fifteenth Amendment).
7. *Id.* at 2513.
8. *Id.* at 2511–13.
9. *Id.*
10. *Id.*

Since its original enactment in 1965, Section 5 of the Voting Rights Act has enjoyed the consistent support of the Court, which has upheld the Section's constitutionality in the face of every challenge.[11] However, *Northwest Austin* signals that this support may erode in the near future, if the Court has not shifted its stance already. Central to this occurrence will be the standard that the Court chooses to apply to any future constitutional challenges to Section 5.[12] As noted by the Court, the competing standards are the "congruence and proportionality" test and the "rational means" test.[13] However, the current Court has summarily stated that "serious constitutional questions" exist even under the lower standard of the "rational means" test.[14] This statement, above all else, may be the most telling indicator of the Court's newfound discomfort with the provisions of Section 5.

Although its ultimate holding relied upon constitutional avoidance,[15] *Northwest Austin* is significant because it signals a coming shift in the Court's jurisprudence. Not only an invitation for future challenges to Section 5 of the Voting Rights Act, *Northwest Austin* reveals that the deference once paid to congressional fact-finding, at least under the Voting Rights Act, may well have reached its end. This Note will examine the implications of *Northwest Austin* upon what is arguably the most successful piece of civil rights legislation in our nation's history. In Part II, this Note will examine the history of constitutional challenges to the Voting Rights Act and similar legislation. In addition, this Note will demonstrate the emerging importance of federalism, as embodied in "New Federalism," as the dominant paradigm through which future challenges to the Voting Rights Act may be analyzed. Finally, Part III will analyze how the Court's opinion in *Northwest Austin* foreshadows the Court's shift in support for the Voting Rights Act, perhaps dooming the preclearance provisions of Section 5.

II. BACKGROUND

A. Section 5 and Congressional Fact-Finding

1. The Voting Rights Act

The Fifteenth Amendment provides that the "right of citizens of the United States to vote shall not be denied or abridged . . . on ac-

11. *See, e.g.,* Lopez v. Monterey County, 525 U.S. 266, 282–85 (1999); City of Rome v. United States, 446 U.S. 156, 177–78 (1980); Georgia v. United States, 411 U.S. 526, 534–35 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).
12. *Nw. Austin*, 129 S. Ct. at 2512.
13. *Id.* (citing Appellant's Brief at 31, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 453246; Brief for the Federal Appellee at 6, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 819480).
14. *Id.* at 2512–13.
15. *Id.* at 2513.

count of race, color, or previous condition of servitude."[16] Congress is vested with the power "to enforce this article by appropriate legislation."[17] Accordingly, the Voting Rights Act has been described as "a complex scheme of stringent remedies" purposed to "rid the country of racial discrimination in voting."[18] Specifically, Section 2 of the Voting Rights Act "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.'"[19]

Instead of relying on piecemeal litigation to address the flagrant violations of voters' rights, Congress fashioned the Voting Rights Act as a remedy to "directly pre-empt[ ] the most powerful tools of black disenfranchisement in the covered areas."[20] Section 5 of the Voting Rights Act requires that any covered state or political subdivision may not enact a change in voting "standard, practice, or procedure" without showing that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[21] In short, the effect of Section 5 was to suspend all changes in state election procedure for covered jurisdictions "until they were submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General."[22] Covered jurisdictions are defined under Section 4 of the Voting Rights Act, which provides "a formula defining the States and political subdivisions" to which the preemptive remedy applies.[23] Although the measures provided by Section 5 may appear stringent, a covered jurisdiction has the option of "bailing out" of the preclearance requirements if it can establish a number of facts.[24]

The Voting Rights Act was originally enacted in 1965, and it was initially authorized for five years.[25] It has been subsequently reauthorized by Congress a number of times, including: in 1970, when it was extended for five years; in 1975, when it was extended for seven years; in 1982, when it was extended for twenty-five years, and in 2006, when it was extended for another twenty-five years.[26]

16. U.S. CONST. amend. XV, § 1.
17. U.S. CONST. amend. XV, § 2.
18. South Carolina v. Katzenbach, 383 U.S. 301, 315 (1965).
19. *Nw. Austin*, 129 S. Ct. at 2509 (quoting 42 U.S.C. § 1973(a) (2006)).
20. *Id.*
21. 42 U.S.C. § 1973c(a) (2006).
22. *Nw. Austin*, 129 S. Ct. at 2509.
23. *Katzenbach*, 383 U.S. at 315.
24. *See Nw. Austin*, 129 S. Ct. at 2509 (noting that a jurisdiction must show the following: that it has not used a forbidden voting test in the previous ten years, that it has not been subject to any valid objection under Section 5, that it has not been found liable for any other voting rights violations, and that it has engaged in constructive efforts to eliminate intimidation and harassment of voters).
25. *Id.* at 2510.
26. *Id.*

2. South Carolina v. Katzenbach

The first challenge to the Voting Rights Act was presented to the U.S. Supreme Court less than one year after President Johnson signed the original bill into law.[27] In *South Carolina v. Katzenbach*, the State of South Carolina filed a bill of complaint seeking a declaration that provisions of the Voting Rights Act were unconstitutional and requesting an injunction to prevent enforcement of the Voting Rights Act by the U.S. Attorney General.[28] The Supreme Court took original jurisdiction over the matter and expedited the case because of South Carolina's upcoming primary elections, which were to be held in June 1966.[29] The Supreme Court ruled that the challenged sections of the Voting Rights Act, including Section 5, were "an appropriate means for carrying out Congress's constitutional responsibilities" and denied South Carolina's requested injunction.[30]

In affirming the Voting Rights Act, the U.S. Supreme Court also validated the "voluminous legislative history" which Congress compiled in support of the Act.[31] The Supreme Court summarized the majority reports of the House and Senate Committees, and noted the legislative record documented "in considerable detail the factual basis" behind Congress's decision to address voter discrimination.[32] Further, the Court commented on the "great care" with which Congress explored the "problem of racial discrimination in voting"[33] and cited the significant amount of time that Congress spent on debate and hearings.[34] As later cases would illustrate, this kind of intensive congressional fact-finding would become a common theme in the Court's decisions upholding the Voting Rights Act.

3. City of Rome v. United States

The U.S. Supreme Court was again faced with a challenge to the Voting Rights Act in *City of Rome v. United States*.[35] In that case, the City of Rome, Georgia, challenged the Attorney General's refusal to grant preclearance to a number of annexations and electoral changes to the City's local government, specifically to the City Commission and Board of Education.[36] These changes dated back to 1966, when the General Assembly of Georgia substantially altered the electoral pro-

27. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).
28. *Id.* at 307.
29. *Id.*
30. *Id.* at 308.
31. *Id.* at 309.
32. *Id.*
33. *Id.* at 308.
34. *Id.* at 308–09.
35. 446 U.S. 156 (1980).
36. *Id.* at 159–62 (explaining changes to the City's charter).

cess and local government structure of the City of Rome through amendments to the City's charter.[37]

Although these changes fell within the purview of Section 5 of the Voting Rights Act, as each constituted a "standard, practice, or procedure with respect to voting,"[38] the City of Rome failed to seek preclearance for these changes, as well as sixty annexations made by the City between November 1, 1964, and February 10, 1975.[39] The City's oversight was not brought to the attention of the Attorney General until June 1974, when Rome submitted one annexation for preclearance.[40] This prompted numerous inquiries by the Attorney General and eventually led the City to submit all the annexations and the 1966 electoral changes for preclearance.[41] The Attorney General ultimately refused to grant preclearance to the electoral changes as well as a number of the annexations.[42] The City of Rome then filed an action for declaratory judgment with a three-judge court, pursuant to the Voting Rights Act, and appealed that court's decision to the U.S. Supreme Court.[43]

Among the City of Rome's various challenges was the assertion that, while appropriate in 1965, the Voting Rights Act had outlived its usefulness by 1975, when it was extended by Congress for an additional seven years.[44] In response to this challenge, the Supreme Court again recognized the legislative findings of Congress and refused "to overrule Congress's judgment."[45] In rejecting the City of Rome's assertion, the Court not only deferred to Congress's findings, but it also noted the "careful consideration" which Congress applied in deciding to readopt Section 5's preclearance requirement.[46]

4. City of Boerne v. Flores

The factual findings of Congress were given further credence in a case that, at least facially, had very little to do with the Voting Rights Act. In *City of Boerne v. Flores*,[47] the U.S. Supreme Court considered a challenge to the Religious Freedom Restoration Act of 1993,[48] which

37. *Id.* at 160.
38. *Id.* at 161 (quoting 42 U.S.C. § 1973c (1976)).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 161–62 (explaining the process for changes, what was allowed, and what was denied)
43. *Id.* at 162.
44. *Id.* at 180.
45. *Id.*
46. *Id.* at 181.
47. 521 U.S. 507 (1997).
48. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

was an act passed by Congress in direct response[49] to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[50] The Religious Freedom Restoration Act sought to nullify the decision in *Smith* by restoring the "compelling interest test" as set forth in *Sherbert v. Verner*[51] and *Wisconsin v. Yoder*.[52] Specifically, the Religious Freedom Restoration Act prohibited the government from:

> 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'[53]

The Supreme Court ultimately found the Religious Freedom Restoration Act to be an unconstitutional exercise of Congress's enforcement powers under the Fourteenth Amendment,[54] but not before comparing Congress's findings under that Act to those which supported the Voting Rights Act.[55]

In reviewing the congressional factual findings underpinning the Religious Freedom Restoration Act, the Supreme Court utilized as a measuring stick the legislative record which accompanied the Voting Rights Act.[56] The Court noted that under the Religious Freedom Restoration Act, Congress failed to document "examples of modern instances of generally applicable laws passed because of religious bigotry."[57] This was in stark contrast to the legislative record that accompanied the Voting Rights Act, which had provided documented evidence of "subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests."[58] While the Court did not consider the lack of a detailed factual record to be the Religious Freedom Restoration Act's most glaring flaw, it did find the factual inadequacy of the record in comparison to the Voting Rights Act to be "instructive," and the Court subsequently overturned the Act.[59]

Katzenbach,[60] *City of Rome*,[61] and *City of Boerne*[62] established a long line of support for congressional fact-finding under the Voting

49. *City of Boerne*, 521 U.S. at 512–13.
50. 494 U.S. 872 (1990).
51. 374 U.S. 398 (1963).
52. 406 U.S. 205 (1972).
53. *City of Boerne*, 521 U.S. at 515–16 (quoting Religious Freedom Restoration Act (RFRA) § 2000bb-1, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997)).
54. *Id.* at 513.
55. *Id.* at 530.
56. *Id.*
57. *Id.*
58. *Id.* at 525–26 (citing South Carolina v. Katzenbach, 383 U.S. 301, 333–34 (1966)).
59. *Id.* at 529–31.
60. 383 U.S. 301 (1966).
61. 446 U.S. 156 (1980).

Rights Act. Not only did Congress's legislative record become a reliable justification for the constitutionality of the Voting Rights Act,[63] but it also served as a model against which other congressional acts were to be judged.[64] The deference which the Court provided to Congress's legislative record became a hallmark of the Court's jurisprudence under the Voting Rights Act, a characteristic that is curiously absent in *Northwest Austin*.[65]

B. *Northwest Austin* Facts and Holding

1. Facts and Procedural History

Formed in 1987, Northwest Austin Municipal Utility District Number One (the District) was established to deliver certain city services, including bond issuance and tax assessment, to residents of a section of Travis County.[66] The District was governed by a board of five members and was responsible for its own elections, even though it did not register its own voters.[67] Although there was no evidence that the District had ever discriminated on the basis of race, it was still subject to the provisions of Section 5 because the State of Texas had been designated as a state subject to federal preclearance.[68]

Prior to 2004, the District's elections had been held at residences precleared by the federal government.[69] In 2004, the District entered into a contractual relationship with Travis County, wherein the District delegated the responsibility for its elections to Travis County and thus allowed the District's nominees to appear on the same ballot as other county officials.[70] This arrangement was also precleared by the federal authorities and continued as the operative mode of elections for the District after 2004.[71]

The District filed an action for declaratory relief with the federal district court in Washington, D.C., on August 4, 2006, asking the court to rule that it satisfied the bailout provisions of the Voting Rights Act, or, in the alternative, that Section 5 was unconstitutional.[72] The District filed its action eight days after Congress reauthorized Section 5.[73]

62. 521 U.S. 507 (1997).
63. *Katzenbach*, 383 U.S. at 309; *City of Rome*, 446 U.S. at 180.
64. *City of Boerne*, 521 U.S. at 529–31.
65. 129 S. Ct. 2504 (2009).
66. Appellant's Brief at 8, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 453246.
67. *Nw. Austin*, 129 S. Ct. at 2510.
68. *Id.*
69. Appellant's Brief, *supra* note 66, at 9.
70. *Id.*
71. *Id.*
72. *Id.* at 10.
73. Brief for the Federal Appellee at 4, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 819480.

A three-judge panel rejected the District's initial contention that it was entitled to bail out of the Act's preclearance requirements on the basis that only a State or political subdivision is permitted to pursue a bailout.[74] The court held that the District failed to meet the definition of a political subdivision because only "counties, parishes, and voter-registering subunits" qualify as political subdivisions.[75] The three-judge panel then considered the District's constitutional argument. It ruled that Congress's twenty-five year extension of Section 5 was constitutional under both the lower "rational-basis" standard and the much more demanding "congruence and proportionality standard."[76]

2. Majority Opinion

After summarizing the substantive provisions of Voting Rights Act at issue and the procedural posture of the case, the majority in *Northwest Austin* praised the "historic accomplishments of the Voting Rights Act."[77] After one scant paragraph of praise, however, the Court began enumerating the "substantial 'federalism costs'" which Section 5 imposes upon the subject jurisdictions.[78] The Court included among these costs Section 5's prohibition against "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C."[79] and the Voting Rights Act's overarching differentiation "between the States, despite [the] historic tradition that all the States enjoy 'equal sovereignty.'"[80]

Most prominent in the Court's criticism, though, was the assertion that "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."[81] More specifically, the Court took issue with the fact that the 2006 reauthorization retained the data set from 1972 as the baseline for determination of eligibility for preclearance.[82] Arguing that the Act's coverage formula is based on data more than thirty-five years old, the Court called attention to the possibility that the most recent enactment may fail to account for "current political conditions."[83] Although the Court seemed to begrudgingly note that the improvements which

74. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 232 (D.D.C. 2008), *rev'd sub nom.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).
75. *Id.*
76. *Id.* at 283.
77. *Nw. Austin*, 129 S. Ct. at 2511.
78. *Id.* at 2511 (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999)).
79. *Id.* at 2511 (emphasis supplied).
80. *Id.* at 2512 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).
81. *Id.*
82. *Id.* at 2510.
83. *Id.* at 2512.

have occurred "are no doubt due in significant part to the Voting Rights Act itself,"[84] the Court was quick to state that "the Act imposes current burdens and must be justified by current needs."[85]

The Court's comments seem to indicate considerable hostility toward the continued constitutionality of Section 5 of the Voting Rights Act.[86] This hostility is a significant departure from the Court's established deference to legislative fact-finding in particular, especially considering the Court's only references to the legislative record negated, rather than supported, the continuing need for the Voting Rights Act.[87] In fact, the Court failed to acknowledge a single aspect of the legislative record which showed a continuing need for the preclearance requirements of the Voting Rights Act.[88]

After producing a litany of criticisms in regard to the current reauthorization, the Court finally broached what had appeared likely to be the heart of decision: a ruling on whether a "congruence and proportionality" standard or a "rational basis" standard is to be applied to Section 5.[89] This issue, in particular, had been briefed extensively by the parties,[90] as well as by amici.[91] While, the Court noted the disagreement between the parties over the proper standard,[92] it summarily stated without further analysis that it "need not resolve it," but the Court also added that the "Act's preclearance requirements and its

84. *Id.* at 2511.

85. *Id.* at 2512.

86. *Id.* at 2511–13.

87. *Id.* at 2512 (recounting warnings from supporters of the Act concerning the lack of systematic differences between covered and non-covered states).

88. *Id.* at 2511–12.

89. *Id*. at 2512.

90. *See, e.g.,* Appellant's Brief, *supra* note 66, at 32–37 (arguing for the "congruence and proportionality" standard from *City of Boerne*, 521 U.S. 507 (1997)); Brief for the Federal Appellee, *supra* note 73, at 16–25 (arguing for a deferential standard of review to be applied to congressional acts which seek to enforce constitutional guarantees).

91. *See, e.g.*, Brief Amicus Curiae of the American Bar Ass'n in Support of Appellees at 17–20, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 796295; Brief of the Brennan Center for Justice at NYU School of Law as Amicus Curiae in Support of Appellees at 33–37, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 797589; Brief of the Leadership Conference on Civil Rights et al. as Amici Curiae in Support of Appellees at 16–21, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 815232; Amicus Curiae Brief of Mountain States Legal Foundation in Support of Appellant at 7–20, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 526208; Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Appellant at 6–19, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 526207; Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 13–16, *Nw. Austin*, 129 S. Ct. 2504 (No. 08-322), 2009 WL 507024.

92. *Nw. Austin*, 129 S. Ct. at 2512.

coverage formula raise serious constitutional questions under either test."[93]

With that abrupt summary, the Court transitioned to the doctrine of constitutional avoidance and provided alternative relief to the District by permitting it to seek preclearance as a political subdivision.[94]

3. Dissenting Opinion

The lone dissenting opinion was offered by Justice Thomas.[95] In his opinion, he argued that the Court improperly applied the doctrine of constitutional avoidance.[96] While the majority offered alternative relief in the form of permitting the District to seek preclearance, Justice Thomas argued that the District had not sought the *opportunity* to seek preclearance, but rather *bailout* itself.[97] Accordingly, Justice Thomas maintained that the doctrine of constitutional avoidance was unavailable because an interpretation that makes the District *eligible* for bailout "does not render § 5 constitutional."[98]

Most notably, however, Justice Thomas makes clear that the majority's opinion is a warning to Congress regarding the extent of its powers under the Fifteenth Amendment.[99] It would seem that this warning should be heeded with regard to the Voting Rights Act.

III. ANALYSIS

A. The Rise of "New Federalism"

According to Justice O'Connor, the purpose of federalism is to "ensure against federal tyranny by dividing power between state and federal governments."[100] The immediate question, however, becomes what fear of tyranny arises from Congress's legislative expansion of individual rights?[101] Perhaps best of all, this question encapsulates the irony surrounding the interplay between the protections of the Voting Rights Act and the federalism considerations highlighted by the opinion in *Northwest Austin*. Arguably, the Voting Rights Act provides one of the most dramatic backdrops for the continuing evolution of federalism, as embodied in the current paradigm of "New Federalism." It is this paradigm, and its lack of deference to congressional

93. *Id.* at 2513.
94. *Id.* at 2513–17.
95. *Id.* at 2517–27 (Thomas, J., dissenting).
96. *Id.* at 2517.
97. *Id.*
98. *Id.* at 2518.
99. *Id*. at 2519.
100. Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?*, 40 VAL. U. L. REV. 589, 595 (2006).
101. *Id.*

findings, which will likely shape future challenges under the Voting Rights Act.

1. The Rehnquist Court

Over the course of nearly twenty years, the Rehnquist Court developed a unique jurisprudence that was simultaneously "conservative"[102] and "activist."[103] This activism cannot be overstated, since the Rehnquist Court "overturned more acts of Congress than all previous Supreme Courts combined."[104] This arguably radical strain of constitutional interpretation colored a wide field of landmark cases, which respectively reshaped the Commerce Clause,[105] the Tenth Amendment,[106] the Eleventh Amendment,[107] and the Fourteenth Amendment.[108] In developing and applying its doctrine of "New Federalism," the Rehnquist Court sought to establish "meaningful limits on Congressional power."[109] Chief Justice Rehnquist himself described the Court's role under this process as "delineating, and then policing, the 'distinction between what is truly national and what is truly local.'"[110]

However, critics have charged that the Rehnquist Court's activist approach to questions of federalism was rooted in "a deeply problematic vision of the relationship between the Supreme Court and the national political system."[111] More specifically, critics allege that the Rehnquist Court disregarded the "need to defer to judgments by Congress as a coordinate branch of government," and instead assumed the role of "sole authoritative expositor of constitutional values in the na-

102. *Id.* at 590 (noting that much of the conservative agenda of the Rehnquist Court was accomplished under the doctrine of federalism).

103. *Id.* (noting that a recurring theme in Rehnquist Court decisions was the need to curb Congress's authority).

104. *Id.* (quoting Martha Neil, *Cases & Controversies*, 91 A.B.A. J. 38, 41 (2005)).

105. *See* United States v. Lopez, 514 U.S. 549 (1995) (ruling that the targeted activity under the Gun-Free School Zones Act did not substantially affect interstate commerce).

106. *See* New York v. United States, 505 U.S. 144 (1992) (ruling that the congressional Act regarding radiation disposal impermissibly allowed the federal government to commandeer the legislative function of the states).

107. *See* Alden v. Maine, 527 U.S. 706 (1999) (ruling that Congress did not have the authority to subject the states to private suits in state court unless sovereign immunity had been waived).

108. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (ruling that the Religious Freedom Restoration Act was an unconstitutional exercise of Congress's powers under the Fourteenth Amendment).

109. Theodore W. Ruger, *New Federalism—Introduction*, 16 WASH. U. J.L. & POL'Y 89, 89 (2004).

110. *Id.* (quoting *Lopez*, 514 U.S. at 567–68).

111. Thomas O. Sargentich, *The Rehnquist Court and State Sovereignty: Limitations of the New Federalism*, 12 WIDENER L.J. 459, 462 (2003).

tion."[112] This assumed role has been described as "sovereignty over constitutional interpretation."[113]

Regardless of whether one believes that the Rehnquist Court policed the boundary between national and local issues or instead assumed the role of constitutional sovereign, the "New Federalism" of the Rehnquist Court undeniably altered the well-established standard of judicial restraint, which generally required only the application of a rational basis test to an act of Congress that did not burden an individual's rights.[114] This standard of judicial restraint was first articulated in a footnote in *United States v. Carolene Products Co*.[115] Described as "the most celebrated footnote in constitutional law,"[116] this brief synopsis established the basis of judicial restraint: that the Court should focus its "formidable powers of judicial review on protecting individual rights, not on displacing general economic or social policies chosen by Congress and approved by the President in statutes."[117] Accordingly, the Court has declared that "in general, [it] should give deference to the findings and conclusions made by Congress in enacting statutes."[118]

The Rehnquist Court, however, "moved far beyond base-line rationality review in developing the new federalism."[119] Instead, the Rehnquist Court adopted "much more demanding and particularized" requirements for statutes that appeared to implicate state sovereignty issues.[120] For instance, in *City of Boerne*, the Court ruled that the Religious Freedom and Restoration Act was neither "congruent" nor "proportionate" to the supposed objectives of the Act.[121] Aside from invalidating the Religious Freedom and Restoration Act, this novel formula concocted by the Court not only departed from the Court's

112. *Id.*

113. *Id.* at 463; *see also* Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 13 (2002) ("There is . . . a world of difference between having the *last* word and having the *only* word: between judicial supremacy and judicial sovereignty. We may choose to accept judicial supremacy, because we need someone to settle certain constitutional questions . . . . But it does not follow either that the Court must wield its authority over every question or that, when it does, the Court can dismiss or too quickly supplant the views of other, more democratic institutions.") (emphasis supplied).

114. Sargentich, *supra* note 111, at 463–64.

115. 304 U.S. 144, 152 n.4 (1938).

116. Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

117. Sargentich, *supra* note 111, at 464.

118. *Id.*; *see, e.g.*, United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) ("The practice of deferring to rationally based legislative judgments 'is a paradigm of judicial restraint.'") (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993)).

119. Sargentich, *supra* note 111, at 465.

120. *Id.*

121. 521 U.S. 507, 533–34 (1997).

traditional standard of judicial restraint, but it also carried serious implications for other congressional acts under the Fourteenth Amendment.[122] Accordingly, the Rehnquist Court established a paradigm under which a successful challenge to the Voting Rights Act became a viable possibility.[123]

B. The Scope of the Fifteenth Amendment

1. Congressional Authority Under Section 2

Arguably, the heart of Congress's authority to adopt the Voting Rights Act can be found under the Fifteenth Amendment.[124] Specifically, Section 1 of the Fifteenth Amendment provides, "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."[125] Section 2 of the Fifteenth Amendment provides that, "The Congress shall have power to enforce this article by appropriate legislation."[126] In addition, the Court has read Section 5 of the Fourteenth Amendment "coextensively" with the enforcement powers under the Fifteenth Amendment.[127]

Beginning with its review of the Voting Rights Act in *Katzenbach*, the Court "gave considerable deference to congressional determinations about the means necessary to 'enforce' the Fifteenth Amendment."[128] In doing so, the Court ruled that Congress had not exceeded its authority under Section 2 of the Fifteenth Amendment in enacting the Voting Rights Act.[129] Similarly, in *City of Rome*, the Court provided considerable deference to Congress's enforcement powers by holding that it was proper for the Voting Rights Act to address not only those changes in voting procedure which were purposefully discriminatory, but also those which had a discriminatory impact.[130] Perhaps the most notable aspect of *City of Rome*, however, is then-Justice Rehnquist's dissent, in which he argues that the Fourteenth and Fifteenth Amendments limited the application of the Voting Rights Act to only those instances were discriminatory intent could be

122. Levinson, *supra* note 100, at 594 ("[T]he principle that acts of Congress must pass a rigid 'congruent and proportionality' test threatened other civil rights provisions enacted under the Fourteenth Amendment to expand individual liberty.").
123. Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769, 794–95 (2003).
124. Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 178 (2005).
125. U.S. CONST. amend. XV, § 1.
126. U.S. CONST. amend. XV, § 2.
127. Hasen, *supra* note 124, at 178–79 (quoting Bd. of Trs. v. Garrett, 531 U.S. 356, 373 n.8 (2001)).
128. *Id.* at 181.
129. South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966).
130. 466 U.S. 156, 177 (1980).

shown.[131] While Rehnquist's dissent failed to convince a majority of his colleagues, it did portend the "seismic shift" that ensued as a result of Rehnquist's "New Federalism."[132]

Not surprisingly, the Court's view of Congress's ability to interpret and enforce the Constitution has been modified as the doctrine of New Federalism gained prominence.[133] Moving away from its interpretations under *Katzenbach* and *City of Rome*, the Court's holding under *Boerne* provides substantially less deference to Congress's determination of appropriate legislation by imposing the proportionality and congruence requirement.[134] In other words, the Court determined that "Congress may enforce constitutional rights, but the set of constitutional rights is determined by the Court."[135] Absent the ability to identify substantive rights, Congress is left with a remedial power to enforce the Fourteenth Amendment, the boundaries of which the Court seems to have left ill-defined.[136]

Following *Boerne*, then, there appear to be two lines of authority: one in which Congress is given wide latitude under the Fifteenth Amendment to enforce substantive voting rights[137] and another in which Congress has virtually no authority under the Fourteenth Amendment to enforce any constitutional rights other than those identified by the Court.[138] It appears that a potential conflict exists, at least in regard to the extent that the Fourteenth and Fifteenth Amendments are actually "coextensive."[139]

C. Future Application

1. Proper Standard?

While the Court's decision in *Northwest Austin* disposed of the case by providing the District with the option to seek preclearance, the constitutionality of Section 5 remains vulnerable.[140] The issue will likely be delayed for several years as litigation develops, but another challenge is very likely after the next two or three years.[141]

131. Hasen, *supra* note 124, at 182–83.
132. *Id.* at 183.
133. *Id.*
134. *Id.* at 184–85.
135. Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 6 (2008).
136. Hasen, *supra* note 124, at 185.
137. *See* City of Rome v. United States, 466 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966).
138. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).
139. Hasen, *supra* note 124, at 177.
140. Rick Hasen, *Initial Thoughts on* NAMUDNO: *Chief Justice Roberts Blinked*, ELECTION LAW BLOG (Jun. 22, 2009, 8:00 AM), http://electionlawblog.org/archives/013903.html.
141. *Id.*

While the make-up of the Court cannot be foreseen at this time, the key issues likely to confront the Court are somewhat clearer. As the Court somewhat casually noted in *Northwest Austin*, "The parties do not agree on the standard to apply in deciding whether . . . Congress exceeded its Fifteenth Amendment enforcement power."[142] While it concisely framed the issue, the Court did not specifically indicate whether it would adopt the "congruence and proportionality" standard from *City of Boerne* or the "rational means" standard which had vindicated the Voting Rights Act under *Katzenbach*.[143]

While this determination has been identified by some as being central to any future ruling, it may not even prove to be determinative.[144] Instead, the federalism concerns highlighted earlier in the Court's decision will likely play a much larger role, which will mean that little deference is afforded to the congressional findings that supported the Act. As the Court noted, "serious constitutional questions"[145] exist under either test. In light of this language and the Court's litany of qualms over the continued application of a law that was based on factors that "may no longer be concentrated in jurisdictions singled out for preclearance,"[146] it is entirely likely that future challenges will be met with a heavy dose of New Federalism, severely limiting the chances of the preclearance requirements surviving even a rational basis test.

IV. CONCLUSION

With its ruling in *Northwest Austin Municipal Utility District Number One v. Holder*, the U.S. Supreme Court signaled a coming shift in its interpretation of the Voting Rights Act. Specifically, the deference which it once paid to legislative fact-finding will no longer suffice to sustain the protracted extensions of the Act. Due in large part to the rise of New Federalism, the Court has assumed an assertive role in the nation's debate over the continued necessity of the protections afforded to minorities under the Voting Rights Act. Regardless of one's opinion of the appropriateness of the Court's approach, a change has been signaled. It is entirely likely, in light of the well organized efforts of some groups, that another challenge to the Act will face the Court in the near future. If *Northwest Austin* is any indication, the days of the most successful piece of civil rights legislation in this country's history may be numbered.

142. 129 S. Ct. 2504, 2512 (2009).
143. *Id*.
144. *Id.* (noting that the preclearance requirements and its coverage formula raise serious constitutional questions under either test).
145. *Id.* at 2512–13.
146. *Id.* at 2512.