Testimony of Debo P. Adegbile

Director of Litigation of the NAACP Legal Defense and

Educational Fund, Inc.

Civil Rights Under Fire: Recent Supreme Court Decisions

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Introduction

Good morning Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee. I am Debo Adegbile, Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc. (LDF). I represented the Intervenors in oral argument before the United States Supreme Court in the recent case concerning the constitutionality of Section 5 of the Voting Rights Act, *Northwest Austin Municipal Utility District No. 1 v. Holder* ("*NWAMUDNO*").[1] I am grateful for the opportunity to testify before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties regarding Section 5.

Today my testimony is divided into three parts. Initially, I will comment on the constitutionality of Congress's 2006 reauthorization of Section 5 of the VRA against the backdrop of established Supreme Court jurisprudence. Next, I very briefly address the record before Congress concerning the selection of jurisdictions for Section 5's preclearance requirements based upon the evidence and nature of continuing discrimination in those jurisdictions as compared to non-covered jurisdictions. Finally, I reflect on some of the questions raised by the Supreme Court in the *NWAMUDNO*. Notwithstanding the *dicta* in Chief Justice Roberts' opinion questioning the constitutionality of Section 5, the Court's own precedents and the record assembled by Congress establish the validity of the provision.

[1] 129 S. Ct. 2504 (2009).

I.

Congress's Reauthorization of Section 5 of the Voting Rights Act

When Congress reauthorized the expiring provisions of the Voting Rights Act in 2006, it did so against the backdrop of four precedents of the Supreme Court upholding the constitutionality of Section 5: *South Carolina v. Katzenbach*,[2] *Georgia v. United States*,[3] *City of Rome v. United States*,[4] and *Lopez v. Monterey County*.[5] These cases, which spanned four decades, amount to a resounding judgment of the Court that Section 5 is within the sphere of Congress's legitimate constitutional authority to address well-documented and persisting obstacles to equal voting opportunity. Indeed, *Katzenbach* is considered a seminal precedent on Congressional enforcement powers more broadly. As this Committee knows very well, in 2005-2006, Congress again took a great deal of care in assessing the nature of continuing voting discrimination since 1982. In so doing Congress noted progress and Section 5's effectiveness in blocking and deterring voting discrimination, as well as the very real and persisting threats to minority voting rights in covered jurisdictions. Many of these threats to minority voters are reminiscent of the discrimination identified during earlier Congressional reauthorizations. Thus, the record revealed both progress and serious continuing problems which threaten the realization of the full promise of the Reconstruction Amendments. Congress reconciled this evidence by drawing upon its expressly granted powers under those Amendments to extend the protections of the right to vote. Given the Court's consistent and appropriate endorsement of Section 5's constitutionality, it was entirely reasonable for Congress to

[2] 383 U.S. 301, 337 (1966).
[3] 411 U.S. 526, 534-535 (1973).
[4] 446 U.S. 156, 177-178 (1980).
[5] 525 U.S. 266, 282-285 (1999).

reauthorize this part of the Voting Rights Act three years ago with the understanding and expectation that the Supreme Court would respect this carefully exercised legislative judgment. As Justice Kennedy has stated, "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."[6]

In some recent cases such as *City of Boerne v. Flores*,[7] the Court has articulated a novel judicial doctrine concerning limitations on Congressional authority under the enforcement provisions of the Fourteenth Amendment. But in reauthorizing Section 5, Congress acted reasonably and respected the constitutional balance embodied in the Reconstruction Amendments and reflected in *Boerne*. Initially, it is worth noting that, in *Boerne* itself as well as the line of cases that followed, the Court has always pointed to Section 5 of the Voting Rights Act as an exemplar of an appropriate exercise by Congress of its powers to enforce the Constitution's express prohibition against racial discrimination in voting.[8] Moreover, the *Boerne* line of cases all arose in a context different from that of the Voting Rights Act reauthorization: in circumstances involving the issue of whether a *new* legislative act improperly extends beyond Congressional authority under the Constitution. In contrast, in 2006 Congress made a policy judgment about whether the *continuation* of a remedy held four times by the Supreme Court as

[6] *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). *See also CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.").
[7] 521 U.S. 507 (1997).
[8] *Id.* at 532-23.

within its well-established power to act against voting discrimination was justified, and opted to stay the course because of the foundational importance of the right to vote and the nature and effects of the voting discrimination which Congress sought to block and deter.

Thus, the issue at that time was not the Constitutional question of whether Congress has the authority to reauthorize the expiring provisions of the Voting Rights Act, a question that had already been answered conclusively by the Court on several occasions. Rather, the question was whether Congress *should* do so. And, as this Subcommittee is aware, Congress decided to reauthorize Section 5 only after an exhaustive review of a voluminous record documenting continuing voting discrimination in the covered jurisdictions since the last VRA reauthorization in 1982. That record included testimony from over 90 witnesses, totaling over 16,000 pages, presented at a combined 21 hearings spanning over 10 months. The evidence showed that Section 5 prevented more than 600 discriminatory voting changes since the last reauthorization – 60 percent of which involved intentional discrimination. Moreover, the evidence led Congress to the reasonable conclusion that, despite the progress that we have witnessed over the last 45 years, the goal of guaranteeing equal access to the ballot for all citizens regardless of race or ethnicity was not yet complete, and that reauthorization of Section 5 was a necessary step to combat continuing voting discrimination in the covered jurisdictions. By any measure, the record assembled by Congress compares very favorably with those deemed sufficient by the Court to support other remedial legislation enacted pursuant to Fourteenth Amendment powers.

The Supreme Court's ruling in *NWAMUDNO* modified a longstanding interpretation of the statute by interpreting Section 4(a) of the Act in a manner seemingly contrary to its text, which now provides *all* covered jurisdictions, including political subunits like the District, with the option of seeking bailout. Whatever one's calculus was about the constitutional tensions associated with Section 5 before the Court's *NWAMUDNO* decision, those tensions are substantially reduced now that every covered jurisdiction is eligible to seek bailout, and has the incentive to do so if it believes that Section 5 compliance is unduly burdensome. Further bailouts would narrow the reach of the statute, whereas an absence of such efforts would further undermine the undocumented assertion that Section 5 is particularly onerous. The response of the covered jurisdictions to the new interpretation of the bailout provision could be instructive, but the broader availability of the remedy is itself relevant to the federalism question.

Of course, protecting the voting rights of all citizens under the Reconstruction Amendments is no ordinary policy matter. As the Supreme Court has recognized, Congressional power is at its zenith when Congress enacts legislation to protect the fundamental rights of members of classes protected against discrimination by the Court's application of heightened levels of constitutional scrutiny. Section 5 was enacted and reauthorized pursuant to Congress's remedial powers under the Fourteenth and Fifteenth Amendments, which, along with the Thirteenth Amendment, were aimed at recasting American notions of freedom, human dignity, equality, citizenship, and democracy. To accomplish that goal – and to preserve the Union itself – the Reconstruction Amendments reallocated power between the federal government and the states, establishing new

constitutional imperatives that were intended to extirpate the old racially discriminatory order in spite of the attachment many states and citizens had to it.

But the Reconstruction Amendments do not merely declare that certain practices are unconstitutional; rather, they expressly grant Congress broad authority to remedy constitutional violations and to ensure that such violations do not occur in the future.[9] The Court has stated that the Framers of the Reconstruction Amendments "indicated that Congress was to be chiefly responsible for implementing the rights created [therein] . . . . Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[10] Consequently, the Reconstruction Amendments necessarily limit state sovereignty and grant Congress the power to combat racial discrimination by means that may not be permissible in other contexts.[11]

The Court, however, has acknowledged that Section 5 imposes certain "federalism costs."[12] And yet, even after *Boerne* was decided, the Supreme Court did not shrink from the longstanding reading of the Reconstruction Amendments.[13] As the

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[9] *See Boerne*, 521 U.S. at 518 ("Legislation 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").
[10] *Katzenbach*, 383 U.S at 325-26.
[11] *See Fitzpatrick v. Bitzer*, 427 U. S. 445, 455-56 (1976) ("[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. . . . There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States") (internal citations and quotation marks omitted).
[12] *Lopez*, 525 U.S. at 282 (citation and internal quotation marks omitted).
[13] *See id.* at 283-85 ("We have specifically upheld the constitutionality of §5 of the Act against a challenge that this provision usurps powers reserved to the States. . . . Recognizing 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, we find no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law that may have just such an effect in a covered county. . . . In short, the Voting Rights Act, by its nature, intrudes on state

Constitution expressly delegates this authority to Congress, it is not Congress's mere prerogative, but rather its *obligation* to engage in legislative judgments that at times vigorously employ its constitutional authority. As the Court itself has explained, "when Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[14]

Not only did the Reconstruction Amendments vest broad authority in Congress, but the actual burdens imposed by Section 5 on the covered jurisdictions are outweighed by its substantial benefits. For instance, as discovery in the recent Section 5 case revealed, the District spent an average of $233.00 a year on Section 5 compliance, and had delegated most of its election-related obligations to Travis County. Significantly, Travis County, which has greater Section 5 obligations, because of the number of political subunits contained within its boundaries, intervened to *defend* the constitutionality of Section 5 in *NWAMUDNO*.

As Congress learned during the reauthorization process, many election officials in the covered jurisdictions view Section 5 as a tool that enhances the integrity of the political process and helps avoid litigation. Significantly, six covered states – including North Carolina, Arizona, California, Louisiana, Mississippi, and New York, filed a brief in support of the constitutionality and administrability of Section 5.[15] As the Attorneys

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sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burden the Act imposes").

[14] *Boerne*, 521 U.S. at 535. *See also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (stating that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process," warranting deference by courts to Congress's "predictive judgments.").

[15] *See* Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York, as Amici Curiae in Support of Appellee, *NWAMUDNO*, 129 S. Ct. 2504 (2009).

General of those States explained in their brief, "[t]he Amici States do not believe the requirements of Section 5 to be burdensome or onerous. Rather, our experience demonstrates that the preclearance requirements of Section 5 do not impose undue costs or delays on covered jurisdictions."[16]

The fact that these States, many of which have very well-documented histories of voting discrimination, have come to appreciate the important role that Section 5 plays in ensuring compliance with the Constitution makes a powerful statement about the ways in which this statute points toward progress. Indeed, Section 5 helps our nation to become "a more perfect union". Additionally, during the reauthorization, numerous organizations representing the interests of local and state governments – including the Council of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors – filed a statement of unqualified support for Section 5's renewal.[17] In contrast to these expressions of support, of the covered jurisdictions, only the Governor of Georgia filed a brief in support of the appellant in the *NWAMUDNO* case.[18] In sum, concerns about the administrative costs imposed by Section 5 at once elevate the burden and underestimate the benefits of the statute. Congress, and not insignificantly, the covered jurisdictions themselves have made an entirely different calculation.

[16] *Id.* at 5.
[17] *See* 152 Cong. Rec. H5143-02 (daily ed. July 13, 2006).
[18] *See* Brief for Georgia Governor Sonny Perdue, as Amicus Curiae in Support of Appellant, *NWAMUDNO*, 129 S. Ct. 2504 (2009).

II.

Evidence Supporting Section 5 Coverage

The record considered by Congress in 2006 led it to conclude that there are persistent and significant differences between the covered as opposed to non-covered jurisdictions, such that it was reasonable for Congress to maintain the existing geographic scope of Section 5 coverage. As an initial matter, although a strict comparison of voting discrimination in covered and non-covered jurisdictions has not been the touchstone of Section 5's earlier legal challenges to Section 5 reauthorizations, and was not the primary focus of the legal defense in *NWAMUNDO*, the Court, and Justice Kennedy in particular,[19] gave special emphasis to this issue. While it is fair to say that during the reauthorization debate Congress did not devote an equal amount of its energy to investigating evidence of voting discrimination in each of the 50 states, it made a broad and instructive assessment of comparative circumstances with respect to voting obstacles in covered versus non-covered jurisdictions. The record before Congress demonstrated that, in spite of progress, there is a continuing pattern of problems in the covered jurisdictions to which Section 5 addresses itself.

Perhaps the principal way in which Congress compared voting discrimination in the covered and non-covered jurisdictions was by looking at lawsuits brought under Section 2 of the Voting Rights Act, which applies nationwide. Since 1982, most successful Section 2 lawsuits – a total of 57 percent – were brought in covered

[19] Indeed, during the oral argument Justice Kennedy observed that Section 2 had proven inadequate to address the problem of voting discrimination in the covered jurisdictions, and that voting discrimination persists. *See NWAMUDNO*, 129 S. Ct. 2504 (2009), Oral Argument Tr. at 48, lines 3-7 (JUSTICE KENNEDY: "I think that's absolutely right. Section 2 cases are very expensive. They are very long. They are very inefficient. I think this section 5 preclearance device has — has shown — has been shown to be very very successful"). The coverage decision was his principal focus. *Id.* at 48, 55-56.

jurisdictions, even though such jurisdictions hold less than one-quarter of the country's total population.[20] Rates of success also differed between covered and non-covered jurisdictions, with covered jurisdictions losing Section 2 cases at twice the rate of non-covered jurisdictions. These statistics are significant because without the more than 600 objections and other deterred changes in covered jurisdictions, this imbalance between the covered and non-covered jurisdictions would have been even more stark.

Another important metric is racially polarized voting, which also persists in covered jurisdictions. Racially polarized voting is generally found where there is unconstitutional discrimination against minority voters, such as the drawing of election district lines that fragment minority populations, in order to dilute minority voting strength and prevent minority voters from electing their candidates of choice. Indeed, polarized voting is a necessary precondition for that common form of discrimination, which has been recognized in many Section 2 lawsuits. Congress heard evidence of racially polarized voting in the covered jurisdictions, including testimony that the "degree of racially polarized voting in the South is increasing, not decreasing."[21] Congress therefore concluded that "continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the [Act's] continued protection."[22] More recently, in an *amicus* brief documenting post-enactment racially polarized voting filed before the Court in *NWAMUDNO*, Professors Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III, underscored Congress's finding by documenting considerable evidence of

[20] *See March 8, 2006 Hearing Vol. 1* at 125-26, 202-04.
[21] H.R. REP. NO. 109-478, at 34 (2006) (citation omitted).
[22] 2006 Amendments § 2(b)(3), 120 Stat. at 577.

persistent racially polarized voting in the covered jurisdictions, even in the recent 2008 elections, with significant differences when compared to non-covered jurisdictions.[23] Exacerbating this backdrop of racially polarized voting, campaigns in covered jurisdictions have often been marked by racial appeals. In one recent race in South Carolina, for instance, Congress heard testimony that a white candidate published his black opponent's photograph in campaign literature, but intentionally darkened the image; such appeals are unfortunately still routinely employed in some covered jurisdictions.[24]

Moreover, the record before Congress demonstrated numerous repetitious violations of minority voting rights in the covered jurisdictions,[25] and there can be little doubt that the number of violations would have been even higher in the absence of Section 5. Although violations of the Voting Rights Act also occur in non-covered jurisdictions, in most cases, such incidents tend to be more episodic, or "one-off" events, unlike the persistent and adaptive forms of discrimination occurring with more frequency in the covered jurisdictions. A few examples compiled in the 2006 congressional record – though far from exhaustive – are illustrative of this particular point.

The first is Waller County, Texas, and its treatment of students from historically Black Prairie View A&M. The Court had ruled in the late 1970s that students at the college could vote in county elections; nevertheless, throughout the 1990's and early

[23] *See* Brief for Nathaniel Persily, *et al.*, as Amici Curiae in Support of Neither Party, *NAMUDNO*, 129 S. Ct. 2504 (2009).
[24] *See, e.g., October 20, 2005 Hearing* at 84-85; *May 9, 2008 Hearing* at 44.
[25] The brief filed in *NWAMUDNO* by the NAACP Legal Defense and Educational Fund, Inc., and MALDEF, *et al.* provides a non-exhaustive sample of more than six dozen circumstances in which covered jurisdictions had repetitious voting violations where Section 5 or some combination of Sections 2 and 5 were required to block voting discrimination.

2000's, local officials indicted students and threatened them with prosecution for voting.[26] In 2004, the County changed the date of its elections to a time when students would be on break, and did not preclear this change in accordance with Section 5. Ultimately, the County only abandoned these efforts after the local NAACP brought a Section 5 enforcement action.[27] As this lengthy history demonstrates, incidents of voting discrimination in Waller County, rather than episodic one-off occurrences, have been persistent and adaptive.

A second example is the City of Seguin. Between 1978 and 1993, plaintiffs filed three separate successful lawsuits to challenge Seguin's malapportioned, multi-member, or otherwise dilutive districting plans.[28] A settlement in 1993 led to the creation of single member districts, but after the 2000 census revealed that Latinos had become a majority in five of the eight city council districts, Seguin dismantled a Latino-majority district in order to block Latinos from electing a majority of council members. After the Attorney General indicated that preclearance would be unlikely, Seguin withdrew its proposal but promptly closed the candidate filing window to prevent Latino candidates from competing. This change was not submitted for preclearance, but was ultimately blocked by a successful Section 5 enforcement suit.

Third, the City of Freeport has a similar history of voting rights violations. Until 1990, the City elected its city council members in at-large elections by a plurality vote, but when the first and only Latino-preferred candidate was elected by a slim plurality, the

[26] *See* J.S.App. 90, 92; *March 8, 2006 Hearing*, at 185-86.
[27] *See* J.S.App. 92; *March 8, 2006 Hearing*, at 185-86.
[28] *See* Texas Report, at 36-37.

City responded by enacting a majority-vote requirement.[29] After the Department of Justice objected, the City settled a separate Section 2 case and agreed to adopt single-member districts, but after 2002 drew another retrogression objection for attempting to reinstitute at-large elections.

These are not isolated incidents, but rather part of a pattern of repeat offenses in the covered jurisdictions. The State of Texas, from which the above examples have been drawn, was subject to 105 Section 5 objections interposed the Department of Justice between the 1982 reauthorization and 2004.[30] During this period, an additional 60 submissions from Texas jurisdictions were either withdrawn in response to a Request for More Information or denied judicial preclearance.[31] Additionally, more than 150 Section 2 suits were resolved in favor of minority voters in Texas, leading 142 jurisdictions to alter discriminatory voting practices.[32] Finally, Texas' redistricting plans for its House of Representatives have drawn Section 5 objections after each decennial census since the State was covered in 1975.[33]

Although I have used Texas to illustrate the persistent nature of voting discrimination in the covered jurisdictions because the latest constitutional challenge involved a municipal utility district in that state, Texas is not alone. The Congressional record also contains evidence that in Louisiana, for instance, 11 parishes had repeat problems since the last VRA reauthorization, having submitted multiple voting changes that drew objections. In Mississippi in 1997, Section 5 prevented the institution of a new

[29] *See October 25, 2005 Hearing*, at 2291-92; 2528-30.
[30] *See* J.S.App. 68, 71.
[31] *See id.* at 87, 90.
[32] Texas Report, at 34.
[33] *See October 25, 2005 Hearing*, at 2177-80, 2319-23, 2518-23.

iteration of a Jim-Crow era dual registration system that had been invalidated only years earlier.[34] Dallas County, Alabama, where Selma is located, drew three separate objections during the 1990s for retrogressive redistricting plans that appeared motivated by an attempt to limit Black electoral success.[35] Jenkins County, Georgia drew multiple objections, first for delaying an election in majority-Black district that would allow Blacks to elect a majority of council members, and second, for moving polling place to a remote and predominately white location outside of City.[36] And Spartanburg County, South Carolina engaged in multiple attempts throughout the 1990s to abolish elections to its County Board of Education after plaintiffs in a Section 2 case had obtained a consent decree requiring the creation of single-member voting districts.[37]

These patterns of discrimination illustrate that Congress acted reasonably in determining the continuing need for Section 5 in the covered jurisdictions. One could, of course, disagree with Congress's fact-finding conclusions and predictive judgments, but such disagreements with the policy judgments do not undermine Section 5's constitutionality. And indeed, the limitations placed by Congress on the geographic reach of Section 5 have been viewed as a factor weighing in favor of the constitutionality of the provision.[38]

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[34] *See* J.S. App. 78-79.
[35] *See October 25, 2005 (History) Hearing*, at 388-90, 397-401.
[36] *See March 8, 2006 Hearing*, at 1524 n.120.
[37] *See id.* at 2041-43, 2049-52.
[38] *Boerne*, 521 U.S. at 532-33 (observing that the provisions of the Voting Rights Act that have withstood constitutional challenge "were confined to those regions of the country where voting discrimination had been most flagrant, and affected a discrete class of state laws, i.e., voting laws," and stating that such "geographic restrictions . . . tend to ensure that Congress's means are proportion to ends legitimate").

III.

Questions Raised During Oral Argument in *NWAMUDNO*

In light of the strong record supporting the reauthorization of Section 5, support in Congress was overwhelming, with votes of 98 to 0 in the Senate and 390 to 33 in the House. During oral argument in the *NWAMUDNO* case, however, there was a suggestion that this tremendous support in Congress somehow undermined the Act's constitutionality. Justice Scalia indicated that he viewed the broad support for reauthorization of the Voting Rights Act with some suspicion, noting that the ancient Jewish court, the Sanhedrin, apparently followed a rule that if the death penalty were pronounced unanimously, it was presumptively invalid. The idea implicit in that observation was that the level of agreement within Congress on a certain piece of legislation should act as a barometer of that legislation's presumed validity, with greater support in Congress warranting heightened suspicion by the Court. But it would, in fact, be just as easy and more consistent with the record to interpret the final vote in Congress on reauthorization of Section 5 as a statement regarding the core importance of the Voting Rights Act, of its practical effects in vindicating the principles of the Reconstruction Amendments, and as a recognition that earlier lesser legislative responses had failed.

Contrary to the colloquy during oral argument, any rule that suggests that a legislative determination should be set aside based on the level of support in favor of that legislation could hardly amount to a workable judicial rule. As Americans, we follow the Supreme Court's decisions whether they are rendered nine to zero or five to four, and so

too does the United States Congress rightly expect its legislation to be effectuated, whether passed unanimously or by a bare majority.

The members of the Court asked many questions about the continuing need for Section 5 itself and about the wisdom of the approach for selecting covered jurisdictions.[39] But in so doing, the Court somewhat unexpectedly appeared to be revisiting policy judgments typically left to the discretion of the Congress, rather than confronting legal questions regarding the constitutionality of Section 5.

Of course, separation of powers questions do not always lend themselves to bright lines, but the concern here is that the Court now risks entering the dangerous terrain about which Justice Scalia warned in an earlier federalism case, where he counseled that the Court should be wary of utilizing a standard under which the Court "must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of government."[40]

Conclusion

In conclusion, while there has been remarkable progress over the last 45 years in the area of voting, that progress was due in large measure to the success of the Voting Rights Act, and specifically, Section 5. It was not until passage of the Voting Rights Act that our nation began to make good on a century-old promise that the right to vote shall

[39] In *Katzenbach*, *Rome*, and *Lopez*, the Court rejected challenges to the selection of jurisdictions for Section 5 coverage. *See* 383 U.S. at 337 (1966); 446 U.S. at 177-178; 525 U.S. at 282-285.
[40] *Tennessee v. Lane*, 541 U.S. 509, 557-58 (2004) (Scalia, J., dissenting).

not be abridged or denied on account of race. It is not an overstatement to say that, absent Section 5, significant backsliding with respect to the right to vote would occur for minority voters in the covered jurisdictions, and nothing in our collective history, the Constitution, or common sense requires Congress to sit idly by while rights are violated. Indeed, the Congressional oath summons this body to vindicate the promises of the Reconstruction Amendments and the right to vote.