In the eleven years since the Supreme Court decided in *City of Boerne v. Flores* that legislation enacted pursuant to the enforcement clause of the Fourteenth Amendment must be “congruent[and proportional]” to the severity of the constitutional violation, critics of the Voting Rights Act of 1965 (VRA) have been waiting for the opportunity to show that the landmark voting rights law fails to meet the *Boerne* standard. Congress gave opponents that chance when it reauthorized the VRA in 2006 without the slightest effort at updating the law, despite “obviously changed circumstances” since it was last amended in 1982. Within days of the reauthorization, foes of the VRA filed a lawsuit viewed as the test case for the new law’s validity. In that case, *Northwest Austin Municipal Utility District No. One (NAMUD) v. Mukasey*, a three-judge panel of the U.S. District Court for the District of Columbia upheld the new section 5. Current doctrine under *Boerne* may have compelled that decision, but the court bent over backward to avoid taking up the “gauntlet” that Congress had thrown down by refusing to answer critical questions surrounding the 2006 reauthorization. It remains to be seen whether the Supreme Court will accept the challenge by striking down the statute in order to force Congress to update it. If not, VRA critics and voting rights activists alike should hope that the Court will at least shun the district court’s approach of uncritical approval, lest the next renewal debate be as unproductive as the last.

Northwest Austin Municipal Utility District Number One (NAMUD) is a small utility district in Austin, Texas, that holds public elec-
tions for its board members. It is a “covered jurisdiction” under section 5, meaning that it must “preclear” any proposed change in voting qualifications or any new voting “standard, practice, or procedure” by sending it to either the Attorney General of the United States or the District Court for the District of Columbia. The change will not be precleared if it “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” However, covered jurisdictions may “bail out” of section 5 coverage if they meet a stringent set of requirements.

In 2006, Congress reauthorized the VRA in an “exceptionally freighted” environment, with politicians of both parties falling over each other to declare support for the bill. Eight days after the reauthorization bill was enacted, NAMUD filed suit in the District Court for the District of Columbia, seeking bailout or, in the alternative, a declaratory judgment that section 5 was unconstitutional. Writing for a unanimous panel, Judge Tatel began by reciting the history of the VRA, from its initial enactment in 1965 and the Supreme Court’s affirmation of its constitutionality in South Carolina v. Katzenbach through the reauthorizations and expansions of 1970, 1975, and 1982, to arrive finally at the evidence marshaled by Congress in support of the 2006 reauthorization. The court then rejected NAMUD’s request for bailout, holding that NAMUD did not conduct voter registration and was thus not a “political subdivision” eligible to seek bailout under the 1982 amendments.
The court then turned to NAMUD’s “primary argument”\textsuperscript{21} that section 5 “is an unconstitutional overextension of Congress’s enforcement power to remedy past violations of the Fifteenth Amendment.”\textsuperscript{22} Addressing NAMUD’s suit as a facial challenge,\textsuperscript{23} the court began by deciding what standard of review governed the case.\textsuperscript{24} In their briefs, both sides had focused their arguments on the \textit{Boerne} “congruence and proportionality test.”\textsuperscript{25} The court, however, found that the correct standard of review was \textit{Katzenbach}'s rationality standard, under which legislation is constitutional if it is a “rational means” of addressing the specific problem of racial discrimination in voting.\textsuperscript{26}

The court pointed out that the only other challenge to section 5 since \textit{Katzenbach} itself also applied the \textit{Katzenbach} standard.\textsuperscript{27} It found similarly persuasive the fact that “this case implicates Congress’s express constitutional authority to remedy \textit{racial} discrimination in \textit{voting}” through the Fifteenth Amendment,\textsuperscript{28} given that the Supreme Court has never applied \textit{Boerne} to a statute that was enacted under the Fifteenth as well as the Fourteenth Amendment.\textsuperscript{29} In other words, because there is less danger that Congress will step beyond its enforcement powers when it legislates to enforce the Fifteenth Amendment, \textit{Boerne} was especially inapplicable.

After using the Supreme Court’s decision in \textit{City of Rome v. United States}\textsuperscript{30} to “dispose of three . . . broader attacks on the Act’s constitutionality,”\textsuperscript{31} the court proceeded to its “primary task”: to determine, using the deferential \textit{Katzenbach} standard, whether Congress “acted rationally when it extended section 5 for another twenty-five years.”\textsuperscript{32}

\begin{footnotesize}
\begin{enumerate}
\item Id. at *12.
\item Complaint, supra note 10, at 8.
\item See \textit{NAMUD}, 2008 WL 4097645, at *13–23.
\item See Memorandum in Support of Defendant’s Motion for Summary Judgment at 9–11, \textit{NAMUD} (No. 1:06-CV-1384); Plaintiff’s Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 36, \textit{NAMUD} (No. 1:06-CV-1384).
\item See \textit{NAMUD}, 2008 WL 4097645, at *14 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)). This standard, the court suggested, applied to VRA cases regardless of whether the legislation was passed pursuant to the Fifteenth Amendment or the Fourteenth Amendment. See id. at *15 (citing Katzenbach v. Morgan, 384 U.S. 641 (1966)).
\item See id. at *19 (citing \textit{City of Rome}, 446 U.S. 156).
\item Id. at *22.
\item Id. at *21.
\item 446 U.S. 156.
\item \textit{NAMUD}, 2008 WL 4097645, at *23.
\item Id. at *24.
\end{enumerate}
\end{footnotesize}
The court held that it did, citing several categories of evidence showing that covered jurisdictions continue to discriminate in voting.

The court began by noting that minority registration and turnout in covered jurisdictions is lower than white registration and turnout and that, despite some gains, the number of minority elected officials is out of proportion with the minority population in those jurisdictions. It further recognized the poor record of covered jurisdictions in four related categories: Attorney General objections to proposed changes (that is, preclearance denials), Attorney General letters requesting more information about a change, court decisions denying preclearance, and private section 5 enforcement suits. Finally, Judge Tatel credited evidence that section 5 significantly deters racial discrimination in voting that would occur if the law expired. Taking all of this evidence into account, the court found that Congress had justified the restrictions of section 5 just as convincingly as it had in the original VRA, upheld in Katzenbach, and in the 1975 reauthorization, upheld in City of Rome. The new VRA thus easily met Katzenbach’s standard.

Although the court could have ended its analysis there, Judge Tatel went on to uphold the law under the District’s preferred Boerne standard as well. Addressing the first step of the Boerne test, “the nature of the constitutional right Congress sought to protect,” the court held that section 5 “simultaneously enforces two rights, each of which receives the highest level of judicial scrutiny”: the right to be free of racial discrimination and the right to vote. Continuing to the second step, the seriousness of the constitutional violations Congress sought to remedy, the court held that the record compared very favorably with that of the Boerne line of cases. The evidence supporting racial discrimination in voting, it held, was “far more powerful” than the evidence of constitutional violations in cases where the Supreme Court found the congressional remedy congruent and proportional.
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citing the favorable comparisons drawn by the Court between the Voting Rights Act — praised as a “detailed but limited remedial scheme” — and legislation where Congress went too far, the court found that the new VRA was congruent and proportional to the violations of the Fourteenth and Fifteenth Amendments in covered jurisdictions.

The post-Boerne doctrine left room for the NAMUD court to uphold the new VRA, despite Boerne’s stricter test and the fact that Congress failed in 2006 to update the law. On the way to that conclusion, however, the court blurred several important questions, treating the 2006 VRA as if it were as straightforwardly justified by the situation on the ground as in 1965. Political constraints made this the easy path for the court, as they did for Congress and may yet for the Supreme Court. But in upholding the law, the court need not have shrunk from drawing attention to the law’s deficiencies.

The court first blurred the analysis of the standard of review, holding that the standard was clearly Katzenbach’s rational basis. Because Congress “could have relied solely on the Fifteenth Amendment” each time it reauthorized the VRA, NAMUD was “a sequel to [Katzenbach and] City of Rome” and the court needed only to find that Congress’s judgment in reauthorizing the statute was rational. Yet that conclusion is not obvious. It was not obvious to the parties, who focused their arguments on whether the new law satisfied Boerne. And it is not obvious from the history of the statute. The 1969 decision in Allen v. State Board of Elections marked a shift in the focus of section 5 from access to the voting booth to more subtle forms of discrimination,

44 Id. at *51 (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001)) (internal quotation mark omitted).
45 See id. at *55. On the issue of congruence and proportionality, the court found it particularly convincing that the 2006 reauthorization expanded and facilitated bailing out and bailing in under VRA § 3 and that it had a twenty-five-year time limit. See id. at *51.
46 See SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 481 (3d ed. 2007) (questioning whether “City of Boerne simply treat[ed] . . . voting rights precedents as sacrosanct, without giving persuasive grounds for doing so”); Persily, supra note 16, at 176 (describing the VRA as “the standard against which all other statutes are judged” with regard to congruence).
47 NAMUD, 2008 WL 4097645, at *22.
49 393 U.S. 544 (1969). At issue in Allen were four proposed changes to state election laws: a statute switching from districted to at-large elections, a statute changing a local office from elected to appointed, a new set of state requirements for independent candidates to get on the ballot, and a bulletin issued to election judges permitting them to help illiterate voters who wanted to write in. Id. at 550–54.
an "expansive reading"50 that "breathed new life into Section 5."51 The Court soon found covered changes in cases that, contrary to the NAMUD court’s view, seem to have had no more than a tangential connection to race or voting.52 This drift in section 5’s meaning has, in at least one coverage case, resurrected the federalism concern dismissed in Katzenbach,53 a concern that the court might have done well to address directly.54

Even when the court did take the time to decide the case under Boerne’s congruence and proportionality standard, it often accepted uncritically the quantitative measures that Congress crafted with the goal of supporting renewal. The court’s discussion of the number of minority elected officials in covered jurisdictions is a good example:

In three of the six originally covered states — Mississippi, Louisiana, and South Carolina — the House committee found that not one African American had ever been elected to statewide office. The committee also reported that African Americans accounted for only 21% of state legislators in six southern states where the black population averaged 35% . . . .55

The number of minority representatives does say something about whether minority voters have equal access to the political process. On its face, however, this seems to be a “sixth-grade arithmetic”56 ap-

50 ISSACHAROFF ET AL., supra note 46, at 495.
52 See, e.g., Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 42 (1978) (holding that a local school board’s enactment of a rule requiring school board employees who ran for office to take an unpaid leave of absence was a covered change); Perkins v. Matthews, 400 U.S. 379, 388 (1971) (holding that a small city’s annexation of adjacent areas, which enlarged the number of eligible voters, was a covered change).
53 See Presley v. Etowah County Comm’n, 502 U.S. 491, 510 (1992) (“If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments.”); see also id. at 506 (“[T]he constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to . . . confine the coverage of § 5 to its legitimate sphere: voting.”).
54 Cf. Pildes, supra note 4, at 153 (arguing that, in renewing the VRA, Congress should have demonstrated “a good-faith effort to honor the Court’s modern Boerne line of cases” in order to appease the Supreme Court).
55 NAMUD, 2008 WL 4097645, at *26 (internal citation omitted).
56 Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 750 (1964) (Stewart, J., dissenting). Justice Marshall expressed well the problem of overquantifying the question of voting rights progress in his dissent in Beer v. United States, 425 U.S. 130 (1976). Rejecting the Court’s establishment of a retrogression standard for section 5, he questioned whether drawing one more black-majority district would be progress if that district decreased black voting strength elsewhere: ‘I realize, of course, that determining the ultimate question of ‘abridgment’ may involve answering questions similar to those I have posed above and that those questions will be just as difficult to answer. My point, however, is exactly that the inquiry is a difficult one . . . .” Id. at 154 n.12 (Marshall, J., dissenting). The Court addressed Justice Marshall’s point directly in Geor-
approach to voting rights that tells us little about whether African Americans and other minority groups are really making progress toward equality. Is all finally forgiven, and can Congress allow the VRA to expire, when the percentage of black legislators reaches 35% in those six southern states,\footnote{Full proportionality in covered states may be impossible anyway due to the concentration of southern black voters in cities or belts and the reality of territorial districting, even assuming no discriminatory intent on the part of those drawing districts.} or when South Carolina, Louisiana, and Mississippi elect their first black statewide officeholders? The concerns expressed by black leaders about complacency in the wake of victory by Senator Barack Obama\footnote{See, e.g., Rachel L. Swarns, Blacks Debate Civil Rights Risk in Obama's Rise, N.Y. TIMES, Aug. 25, 2008, at A1; see also Abigail Thernstrom, Op-Ed., The Voting Rights Battle Is Over; We All Won, L.A. TIMES, Aug. 31, 2008, at A26 (apparently bearing out this concern).} indicate that the answer is no. But the court did not raise any concern on that point, simply accepting the evidence as good enough to satisfy Katzenbach.

The court’s discussion of other statistics was similarly superficial. It pointed to disparities in registration rates between whites and non-whites without examining whether or how Congress had attributed those disparities to racial discrimination and without making the basic distinction between black turnout and Hispanic turnout.\footnote{The registration rate among Hispanic citizens in the South (including Texas and Florida) is actually higher than in the Midwest, a region that includes almost no covered jurisdictions. U.S. Census Bureau, Voting and Registration in the Election of November 2006: Detailed Tables, available at http://www.census.gov/population/www/socdemo/voting/cps2006.html (last visited Nov. 9, 2008) (click on Table 3: Hispanic).} By contrast, its lengthy discussion of Attorney General objections to voting law changes strayed from discussion of bare statistics, which the court conceded were uninformative.\footnote{See NAMUD, 2008 WL 4097645, at *28 (“[A]s the intervenors point out, the number and rate of objections reveal little about the true impact of a proposed change.”).} Indeed, the court was at its most persuasive here, acknowledging that the number of objections “depends on a variety of factors unrelated to actual levels of discrimination,” then bolstering the data by noting the relative evenness of objection rates across geography and level of government.\footnote{Id.}

Worst of all, perhaps, the court shrugged off NAMUD’s argument that the VRA’s coverage formula — which was based on turnout from the 1964 election and was itself the product of a political compromise that did not fully respond to the problem\footnote{See E.W. Kenworthy, Debate Clouds Voting Bill, N.Y. TIMES, Apr. 25, 1965, at E5. There was “criticism . . . that the bill . . . left untouched areas of discrimination in states without literacy} — needed to be up-

\textit{gia v. Ashcroft, 539 U.S. 461 (2003), holding that drawing districts this way could satisfy the non-retrogression burden. Cf. Samuel Issacharoff, \textit{Is Section 5 of the Voting Rights Act a Victim of Its Own Success?}, 104 COLUM. L. REV. 1710, 1729 (2004) (arguing that “a narrow focus on securing the electability of minority candidates could . . . actually thwart minority political gains” when interracial coalitions are possible).}
dated. The court first held that the “way out” for jurisdictions like NAMUD is “declaratory judgments allowing bailout,” a particularly perverse holding given that the court had already ruled that NAMUD was ineligible for bailout. It went on to call “incorrect” NAMUD’s argument that there was no evidence that section 5 coverage under the new VRA satisfied what Professor Adam Cox calls “the ‘things are worse there than elsewhere’ test.” The court cited Professor Ellen Katz’s research for the proposition that “the success rate of section 2 suits in covered jurisdictions exceeded the success rate of such litigation elsewhere,” showing that the coverage formula still makes sense. As with much of the other evidence supporting renewal, the court ignored counterarguments, like the rejoinder that Professor Katz’s inquiry failed to control for factors more likely to explain the disparity between covered and non-covered jurisdictions.

How exactly Congress should have adapted the VRA to modern times is up for debate. Asking whether the law should be done away with entirely may be premature in light of the stories of persisting discrimination that the court was able to cite in its opinion and appendix, but the view has its adherents, and the Supreme Court itself may reject political expediency and reach this result. Alternatively, a politically sensitive Congress, or a Congress convinced that keeping the VRA is the right policy, might have chosen a narrower improvement: updating the coverage formula, or, less ambitiously, making bailout easier or giving the statute an earlier sunset date. The court should have raised these difficult questions explicitly, or at least signaled that there were questions that Congress had neglected to answer. By failing to do so, it simply passed to the Supreme Court the dilemma that Congress had passed to it, a strategy that may lead to a well-received opinion, but not to a Voting Rights Act that will help solve the political problems of today rather than those of 1965.

63 See NAMUD, 2008 WL 4097645, at *52–53.
64 Id. at *52.
65 Id. at *53.
68 NAMUD, 2008 WL 4097645, at *53.
71 See, e.g., Issacharoff, supra note 56, at 1731 (“[S]ection 5 has served its purposes.”).
72 See Pildes, supra note 4, at 153.