

THE 1982 AMENDMENTS TO SECTION 2 OF THE VOTING RIGHTS ACT: CONSTITUTIONALITY AFTER *CITY OF BOERNE*

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INTRODUCTION

The Voting Rights Act of 1965, a major piece of civil rights legislation, was intended—and destined—to change the longstanding pattern of black disenfranchisement in the South. Early litigation undertaken pursuant to the Act centered on the controversial section 5, which applied, in its original incarnation, exclusively to Southern jurisdictions, requiring them to obtain preclearance by federal authorities for any change in any voting procedure.¹ Section 2 of the Act, which was far less controversial, simply tracked the language of the Fifteenth Amendment prohibiting disenfranchisement on account of race or color.²

Challenges to an election districting scheme on the grounds of vote dilution are prosecuted under section 2 of the Act. Prior to 1980, plaintiffs making these challenges could prevail by proving that a specific districting scheme had discriminatory effects. This changed when the Supreme Court decided *City of Mobile v. Bolden*.³ *City of Mobile* required that plaintiffs, in order to prevail in a section

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1. See *South Carolina v. Katzenbach*, 383 U.S. 301, 320, 334 (1966). In the first challenge to the Act, South Carolina challenged, and the Court upheld, the requirement for preclearance for extending the polling place closing time from 6 p.m. to 7 p.m.

2. The original language of section 2 was as follows: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” 79 Stat. 437, as amended, 42 U.S.C. § 1973, *quoted in* *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980). Section 1 of the Fifteenth Amendment states: “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.” U.S. CONST. amend. XV, § 1, *quoted in* *City of Mobile*, 446 U.S. at 60 n.9.

3. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

2 vote dilution challenge to an election districting scheme, prove the discriminatory intent of the districting authority.⁴

In reaction to this decision, Congress amended section 2 to require a showing of discriminatory results, rather than intent; this change returned the law to a form more advantageous to plaintiffs in vote-dilution cases. The amended version, embodied in S. 1992, included the following language:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.⁵

In four parts, this Note will analyze the constitutionality of the amended section 2 in the wake of *City of Boerne*, a much later case that dealt with a different, but similar statute. In the first section, this Note will examine the case law prior to *City of Mobile v. Bolden*, which the proponents of the section 2 amendment were arguably trying to reinstate. Section Two then discusses the scope of Congress's power to enact remedial legislation under the Enforcement Clause of the Fourteenth Amendment, and that power's dependence on evidence of past violations of constitutional rights. Section Three will address portions of the legislative history of the 1982 amendments and the constitutionality of the amendments, noting that, instead of focusing on evidence of existing discrimination, the legislators instead focused on the meaning of the statute. Finally, in light of this legislative history and the framework laid out in *City of Boerne*, Section Four will discuss the constitutionality of the amendments, concluding that although the evidentiary basis examined by Congress during the deliberations may not be clearly sufficient under the standards articulated in *City of Boerne*, the Court may have left open some room in its holding that preserves the constitutionality of the amendments.

4. *Id.* at 62, 66.

5. S. 1992, 97th Cong. § 2 (1982) (emphasis added). The bill also included a disclaimer which stated, "[t]he fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." Although the disclaimer was eventually changed, the results test itself is what garnered the most discussion in the Senate, and will be the focus of this Note. For the Act in its current form, see 42 U.S.C. § 1973 (2003).

I.

CITY OF MOBILE AND PRIOR LAW

Cases prosecuted under section 2 tend to deal with the claim of vote dilution. Plaintiffs in vote dilution cases allege that the challenged jurisdiction has structured its voting regime such that a minority population is being deprived of electoral power, even though individual voters may retain access to the polls. An example of potential dilution is seen in multi-member districts: if the population of a district is one-third minority, and that district elects three at-large representatives, then the likelihood exists that all three representatives will be of the majority race. If, on the other hand, the district is divided into three single-member districts drawn appropriately, the likelihood is far greater that one of the representatives will be of the minority race.

Prior to 1980, the only Supreme Court case to require that multi-member districts be replaced with single-member districts on grounds of vote dilution was *White v. Regester*.⁶ That case, decided in 1973, involved the 1970 reapportionment by the Texas legislature of state house of representatives districts located in Dallas and Bexar Counties. In Dallas County, the Court ruled that the multi-member districts had to be replaced with single-member districts, due to a number of factual circumstances leading the Court to conclude that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”⁷ These circumstances included a history of racial discrimination, such as the inability of African Americans to register to vote; the Texas rule requiring that candidates obtain a majority vote in order to participate in primaries; the election in Dallas County of only two African American representatives since Reconstruction—both of whom were slated by the all-white organization that controlled the Democratic Party, the Dallas Committee for Responsible Government (DCRG); and the DCRG’s use of “racial campaign tactics” to defeat black-supported candidates as recently as 1970.⁸ Based on these circumstances, the Court affirmed the District Court’s ruling that “the black community

6. 412 U.S. 755 (1973).

7. *Id.* at 766 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149–50 (1971)).

8. *Id.* at 766–67.

ha[d] been effectively excluded from participation in the Democratic primary selection process.”⁹

The Court also affirmed the District Court’s judgment regarding the Mexican American community in Bexar County, determining that Mexican Americans had been denied access to the political processes. There, the District Court took into account a history of discrimination, cultural and language barriers that made political participation more difficult, and the poll tax and restrictive registration procedures. As further evidence, the Court noted a low rate of voter registration among Mexican Americans in that county, as well as the fact that only five had served in the Texas Legislature from there since 1880.¹⁰ The Supreme Court affirmed the District Court’s conclusion that, based on the “totality of the circumstances,” Mexican Americans had been barred from the political process.¹¹ The remedy in both counties was mandated replacement of the existing multi-member districts with single-member districts,¹² although the Court noted that multi-member districts were not per se unconstitutional.¹³

White was followed by *Zimmer v. McKeithen*, a Fifth Circuit case. In both *White* and *Zimmer*, the courts did not expressly mention or find evidence of discriminatory intent in the creation of the voting schemes they struck down.¹⁴ These two cases became the premier examples later used by the amendment’s proponents to show that case law associated with the Act originally required plaintiffs to show only discriminatory results, rather than intent, to prevail in vote dilution cases.¹⁵ *Zimmer* listed analytical factors, many of which were found in *White*, and stated that any number of them may contribute to a finding of vote dilution.¹⁶ These factors included a lack of minority access to the slating process, legislative unresponsiveness to minority interests, tenuous state policy preferring multi-member or at-large districting to single-member districts, and evi-

9. *Id.* at 767, *affg* *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972).

10. *Id.* at 767–68.

11. *Id.* at 769.

12. *Id.* at 759.

13. *Id.* at 765.

14. *Id.* at 766–69; *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

15. *Zimmer*, 485 F.2d at 1304; *see also* SENATE COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, at 22–23 (1982) [hereinafter SENATE REPORT]; *Voting Rights Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong. 1184, at 1201–04 (1982) [hereinafter *Senate Hearings*] (statement of Frank Parker, Director, Voting Rights Project, Lawyers’ Committee for Civil Rights Under Law).

16. *Zimmer*, 485 F.2d at 1305.

dence of past discrimination. Beyond these, the court listed additional factors which would enhance such a showing of dilution: large districts, majority vote requirements, anti-single shot voting, and the failure to make special provision for candidates running from particular geographical subdistricts in an at-large race. Conversely, if a court hearing a section 2 case found the presence of opportunities for minorities to participate in candidate slating, elected representatives responsive to minority needs, and strong state policies providing for multi-member districting, that court would be prohibited from finding dilution, despite a lack of proportionality between the percentage of minority residents and elected officials.¹⁷

In 1980, the Court decided *City of Mobile v. Bolden*, which ultimately spurred the movement to amend section 2 of the Voting Rights Act.¹⁸ *City of Mobile* was a case brought to challenge the at-large election of the three commissioners of Mobile, Alabama. Although the plaintiffs demonstrated a history of racial discrimination in the jurisdiction and that an African American had never been elected commissioner, the Court ruled that, because there was no hindrance to minorities' registering and voting, neither section 2 of the Voting Rights Act nor the Fourteenth or Fifteenth Amendments had been violated. It stated that section 2 of the Voting Rights Act was simply a restatement of the Fifteenth Amendment,¹⁹ and that proof of discriminatory purpose was required in order to show a violation of the Fifteenth and Fourteenth Amendments.²⁰ The Court reconciled this decision with *White* by stating that that case was determined on a principle of tracing the identified circumstances back to purposeful racial discrimination.²¹ Accordingly, the Court concluded that *Zimmer* was wrongly decided, inasmuch as it relied on a totality of the circumstances test without ultimately relating those circumstances back to a discriminatory purpose.²²

Justice White, the author of *White v. Regester*, dissented in *City of Mobile*, stating that the opinion was squarely inconsistent with *White*,

17. *Id.*

18. See SENATE REPORT, *supra* note 15, at 15.

19. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980).

20. *Id.* at 62 (“Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”); *id.* at 66 (“We have recognized . . . that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.”).

21. See *id.* at 69.

22. *Id.* at 71.

which clearly stated that an invidious purpose could be inferred from the sort of objective factors enumerated in *White* and *Zimmer* and found by the lower courts in *City of Mobile*.²³

With this recent case law in the background, and amidst a great deal of popular criticism of the *City of Mobile* decision, Representative Peter Rodino, Jr., chairman of the House Judiciary Committee, introduced the bill that contained the amendments to section 2 of the Voting Rights Act.²⁴

II.

CITY OF BOERNE AND CONGRESS'S SECTION 5 POWERS UNDER THE FOURTEENTH AMENDMENT

The Supreme Court has not directly confronted the constitutionality of the amended section 2. Fifteen years after the amendments were passed, however, a similar, yet unrelated piece of legislation was analyzed and struck down by the Court as being beyond congressional power under the Fourteenth Amendment. The Court's analysis in that case is instructive in evaluating the constitutionality of section 2 as amended in 1982.

The Religious Freedom Restoration Act of 1993 (RFRA), like the section 2 amendment, was enacted in reaction to a Court decision that Congress found undesirable:²⁵ *Employment Division, Department of Human Resources of Oregon v. Smith*.²⁶ This case, decided in 1990, rejected a claim brought by the Native American Church, whose members were denied unemployment benefits after losing their jobs for using peyote. In upholding the denial of benefits, the Court rejected a balancing test, applied in an earlier case, which would have required a compelling governmental interest for a statute that substantially burdened religious practice to be deemed constitutional.²⁷ In reaction to the outcome in *Smith*, in 1993 Con-

23. *Id.* at 94–95 (White, J., dissenting).

24. H.R. 3112, 97th Cong. (1982); see Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355–57 (1983) [hereinafter Boyd & Markman].

25. 42 U.S.C. § 2000bb (2003). The Congressional findings of the Act state that the Court's decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), eliminated the requirement that the government justify its facially neutral laws that burden religious exercise; in contrast, the findings state, governments should have to justify these laws with a compelling reason.

26. 494 U.S. 872 (1990).

27. This rejected balancing test was set forth in *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963). The *Smith* Court distinguished *Sherbert*, and declined to apply it when it would result in exemption from a generally applicable criminal law. *Smith*, 494 U.S. at 884.

gress passed RFRA, reinstating a compelling justification test for statutes that substantially burden religious exercise.²⁸

RFRA was challenged in *City of Boerne v. Flores*.²⁹ In this case, the city council of Boerne, Texas, passed an ordinance authorizing the local Historic Landmark Commission to prepare a historic preservation plan. This ordinance, and the commission's subsequent plan, conflicted with expansion plans of St. Peter Catholic Church, which had been submitted to the Archbishop of San Antonio for approval a few months before. As a result of the ordinance, the church's building permit was denied. The Court granted certiorari to determine the constitutionality of RFRA, one of the grounds upon which the Archbishop relied in contesting the application of the city's ordinance to the church.³⁰ In the case that followed, the Court held RFRA unconstitutional, exceeding Congress's enforcement power under section 5 of the Fourteenth Amendment.³¹

The *City of Boerne* Court, in an opinion by Justice Kennedy, carefully examined the limits of Congress's power to pass legislation under the Enforcement Clause of the Fourteenth Amendment. Examining the legislative history of the amendment itself, as well as the interpretive case law both immediately after its passage and almost a century later, the Court concluded that Congress's powers were strictly "remedial,"³² and that any remedy Congress devised must have both "congruence and proportionality" to the injury to be remedied.³³ Although strictly construed, this remedial power

28. 42 U.S.C. § 2000bb(b) (2003).

29. 521 U.S. 507 (1997).

30. *Id.* at 511–12.

31. *Id.* at 536.

32. *Id.* at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

33. *Id.* at 520. The "congruence and proportionality" language, coined in *City of Boerne*, has been used similarly in five other Supreme Court cases, most notably *United States v. Morrison*, 529 U.S. 598 (2000), which struck down the Violence against Women Act as being similarly beyond Congress's enforcement powers under the Fourteenth Amendment. See also *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82 (2000); *Fla. Prepaid Post-secondary Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). In its scrutiny of the legislative history of the Fourteenth Amendment, the *City of Boerne* Court noted that a version that would have given Congress "power to make all laws . . . necessary and proper" to secure equal protection was rejected in favor of the current version, which imposes limits on the states in section 1, and gives Congress the power to "enforce" its provisions in section 5. See *City of Boerne*, 521 U.S. at 520–23; see also U.S. CONST. amend. XIV, §§ 1, 5. This phrase has also engendered a great deal of scholarly commentary. See, e.g., J.W. Blatnik, *No RFRA Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne*

does allow a certain amount of congressional overbreadth; in other words, Congress has the power to prohibit some constitutional conduct, even where the federal legislation intrudes into legislative territory that would otherwise be reserved to the states.³⁴

City of Boerne was not the first time these limits were addressed by the Court. *Gaston County v. United States* was an early challenge to a literacy test ban. Gaston County argued that its literacy test could not be banned in the absence of evidence of discriminatory testing or administration.³⁵ The Court upheld the ban and ruled that the evidence of past systematic discrimination in education that resulted in unequal effects of the literacy test provided the appropriate evidentiary basis for such legislation.³⁶ In *Oregon v. Mitchell*, the Court dealt with similar issues while upholding the 1970 amendments to the Voting Rights Act, which mandated, among other things, a nationwide ban on literacy tests.³⁷ There, Arizona objected to the ban on its literacy tests, and argued that any discriminatory effects resulting from unequal educational systems, as in *Gaston County*, resulted from discrimination in other jurisdictions.³⁸ In response, Justice Brennan wrote in his concurrence that

The legislative history of the 1970 Amendments contains substantial information upon which Congress could have based a finding that the use of literacy tests in Arizona and in other States where their use was not proscribed by the 1965 [Voting Rights] Act has the effect of denying the vote to racial minorities whose illiteracy is the consequence of a previous, govern-

v. Flores, 98 COLUM. L. REV. 1410 (1998) (arguing that RFRA violates the separation of powers and Article V); Catherine Carroll, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026 (2003) (comparing the Fourteenth Amendment cases to First Amendment cases); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (criticizing the recent cases limiting Congress's section 5 powers under the Fourteenth Amendment); Edward Rachel Toker, *Tying the Hands of Congress – City of Boerne v. Flores*, 33 HARV. C.R.-C.L. L. REV. 273 (1998) (criticizing *City of Boerne* as limiting the ability of Congress to protect minority groups); Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567 (2003) (examining the limitation on Congress's powers through a comparative analysis with European systems).

34. *City of Boerne*, 521 U.S. at 518 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

35. *Gaston County v. United States*, 395 U.S. 285 (1969), *cited in* *Oregon v. Mitchell*, 400 U.S. 112, 232 (1970) (Brennan, J., concurring in part).

36. *Gaston County*, 395 U.S. at 289–91, 296–97.

37. *Mitchell*, 400 U.S. at 118 (1970).

38. *Id.* at 233 (Brennan, J., concurring in part).

mentally sponsored denial of equal educational opportunity. . . . In short, there is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education.³⁹

In both *Gaston County* and *Mitchell*, Congress was able to use its enforcement powers under the Fourteenth Amendment to limit the states' powers because it had before it sufficient evidence of discrimination.

However, this ability to encroach into state power is constrained by important limits. The *City of Boerne* Court stated that Congress oversteps these limits when it attempts to determine the substance of a constitutional violation, rather than to enforce its boundaries.⁴⁰ But this issue has been the subject of some debate. For example, Justice Brennan, in his majority opinion in *Katzenbach v. Morgan*, suggested that Congress had the power to substantively legislate. Congress did have the power, Brennan indicated, to determine that certain behavior—in that case, denying the franchise to Spanish-speaking immigrants from Puerto Rico—would violate the Fourteenth Amendment. Congress could make this determination even in the absence of a judicial ruling on the subject.⁴¹ While

39. *Id.* at 234–35 (Brennan, J., concurring in part).

40. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Congress “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).

41. *Katzenbach v. Morgan*, 384 U.S. 641, 648–49, 656 (1966) (“A construction of § 5 [of the Fourteenth Amendment] that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.”) (“[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools . . . constituted an invidious discrimination in violation of the Equal Protection Clause.”). Justice Harlan dissented in *Morgan*, taking issue with the majority’s view of congressional power:

I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature . . . [I]t is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all.

Id. at 666 (Harlan, J., dissenting).

Justice Brennan continued to argue for such powers in *Oregon v. Mitchell*,⁴² he could not garner a majority of votes for his views. Ultimately, the *City of Boerne* Court explicitly rejected such an approach.⁴³ Citing the *Civil Rights Cases*, the *City of Boerne* Court stated that the Enforcement Clause did not permit Congress to pass “general legislation,” but only “corrective legislation,” in order to counteract impermissible laws of the States.⁴⁴ In order to judge the propriety of legislation passed under the Clause, it “‘must be judged with reference to the historical experience . . . it reflects’”⁴⁵—that is, the federal legislation in question must be correcting some past unconstitutional behavior.

In striking down RFRA, the *City of Boerne* Court pointed out the weaknesses in the evidentiary record before Congress at its passage, contrasting the rich historical record cited in the cases upholding the original Voting Rights Act. For example, the *City of Boerne* Court recalled the discussion of Congress’s power in *South Carolina v. Katzenbach*.⁴⁶ That case, which discussed the measures of the original Act applying only to covered jurisdictions, was the first challenge to the Voting Rights Act, and the Court noted the substantial evidence “reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests.”⁴⁷ In contrast, the RFRA evidence lacked any incidents of religious persecution from the past forty years and also included a witness who testified that “deliberate persecution is not the usual problem in this country.”⁴⁸ Instead of hearings regarding patterns of religious discrimination, the RFRA hearings centered mainly on “anecdotal evidence of autopsies performed on Jewish individuals and Hmong

42. *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (stating that Congress found that a state law imposing a durational residence requirement for voting was not reasonably related to a compelling state interest) (Brennan, J., concurring in part); see also *id.* at 240 (“[I]t is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases.”) (Brennan, J., concurring in part).

43. “There is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.” *City of Boerne*, 521 U.S. at 527–28 (citation omitted).

44. *Id.* at 525 (citing *The Civil Rights Cases*, 109 U.S. 3, 13–14 (1883)).

45. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

46. *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. at 333–34).

47. *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. at 333–34).

48. *Id.* at 530.

immigrants in violation of their religious beliefs . . . and on zoning regulations and historic preservation laws (like the one at issue here), which, as an incident of their normal operation, have adverse effects on churches and synagogues.”⁴⁹ Thus, congressional focus was not on intentional discrimination surrounding the passage of such regulations and laws, but rather on the incidental burdens the regulations and laws may have on religious exercise.⁵⁰ As such, RFRA as a remedy was found to be too disproportionate to the injury it supposedly addressed—so much so that it could not be considered remedial. In order to pass general prohibitions like RFRA, the Court held that Congress must have “reason to believe that many of the laws affected by the prohibition have a significant likelihood of being unconstitutional,”⁵¹ a test that RFRA, by prohibiting many constitutionally permissible acts of government, failed.

Moreover, the scope of RFRA was found to be overly broad. Again, the *City of Boerne* decision contrasted RFRA with the Voting Rights Act, which was confined to only the parts of the country where the discrimination had been the worst, which affected only voting laws rather than laws of general application, and which included a sunset on its harshest provisions—those of section 5. Indeed, the Voting Rights Act’s ban on literacy tests affected an even smaller subset of behavior—only one particular type of voting qualification. These limitations on the Act “tend to ensure Congress’s means are proportionate to ends legitimate under [section] 5 [of the Fourteenth Amendment].”⁵²

RFRA, on the other hand, affected primarily laws that were not motivated by bigotry. Its sweep too broad and its burden too heavy,⁵³ RFRA was struck down for its lack of congruence and proportionality.

49. *Id.* at 531.

50. *Id.*

51. *Id.* at 532 (“[S]ince ‘jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination,’ Congress could ‘prohibit changes that have a discriminatory impact’ in those jurisdictions.”) (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)); *see also id.* (“Remedial legislation under § 5 ‘should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.’”) (alteration in original) (quoting *The Civil Rights Cases*, 109 U.S. 3, 13 (1883)).

52. *Id.* at 533.

53. *Id.* at 535 (“RFRA’s substantial-burden test . . . is not even a discriminatory-effects or disparate-impact test.”).

III. EVIDENTIARY RECORD BEHIND THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT

A thorough examination of the legislative history behind the 1982 amendments to section 2 of the Voting Rights Act is required under *City of Boerne* in order to test the amendment's constitutionality. *City of Boerne* requires a strong evidentiary basis of past wrongs before legislation passed under the enforcement power of the Fourteenth Amendment can be considered remedial, rather than substantive. The legislative history of the amendments to section 2 of the Voting Rights Act, however, shows that Congress appeared to be primarily concerned with the meaning of the amendments and the prospective effect they would have on the electoral process, rather than on a history of discrimination preceding them.

The amendments to section 2 were first introduced in the House of Representatives as H.R. 3112. The primary focus of the House, however, was on the extension of section 5—the provisions requiring covered jurisdictions to obtain preclearance before implementing any change in their election laws—as well as on the section 4 bailout provisions and the provisions regarding language minorities.⁵⁴ The House investigations even included hearings in Austin, Texas, and Montgomery, Alabama, in order to determine the continuing need for section 5.⁵⁵ It was not until the hearings before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, chaired by Senator Hatch, that section 2 was fully discussed and analyzed.⁵⁶

54. See Boyd & Markman, *supra* note 24, at 1357–59 (Boyd's & Markman's article provides a very useful and thorough road map to the entire legislative proceedings leading up to and including the passage of the amendments); see also 42 U.S.C. §§ 1973b, 1973c (2003).

55. See Boyd & Markman, *supra* note 24, at 1360–61.

56. See *Senate Hearings*, *supra* note 15, at 1, 3 (opening statement of Senator Hatch, Chairman, Subcommittee on the Constitution). As the Subcommittee Hearings were the forum at which section 2 received its primary scrutiny, this Note will focus exclusively on those Hearings, the subsequent Committee Hearings and the resultant Report. Although the House of Representatives may have examined some evidence that would also pertain to section 2, that was not the focus of their inquiry, and those hearings will not be discussed here. Senator Hatch remarked on the lack of House scrutiny, saying “[u]nless I recall the [House] debate incorrectly, there were approximately two witnesses who testified on this issue during the entire hearings, neither of whom had any reservations whatsoever about it. In fact, that balance somewhat typified the entire set of House hearings on this issue.” *Id.* at 259. On a later day of hearings, Senator Hatch commented again upon the lack of House attention to this issue: “The House does a lot of that, you know.

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These hearings were comprised of nine days of testimony from a variety of experts, attorneys, academics, civil rights activists, legislators, and other officials;⁵⁷ in total, fifty-one witnesses testified before the Subcommittee. Without question, Senator Hatch's primary concern at the hearings was not finding an evidentiary basis of past discrimination, but determining whether the proposed amendments to section 2—those reinstating a results test for vote dilution rather than requiring a finding of discriminatory intent—would effectively mandate proportional representation. The witnesses were divided as to whether this would be the natural effect of the results test. Proponents of the amendment emphasized that proportional representation would not be required; they also testified that an intent test would be an insurmountable barrier for future plaintiffs, and that the pre-*City of Mobile* effects test was already difficult for plaintiffs.⁵⁸ Opponents insisted it would result in proportional representation, and questioned what other meanings could possibly attach to the new language. They pointed out that lack of proportional representation was always one of the factors courts looked to under common law interpretations of the results test, and they testified that the intent test would not be an impossible barrier for plaintiffs.⁵⁹

They throw insufficiently researched bills over here and expect us to do the cleanup." *Id.* at 648.

57. The Hearings took place on January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982. See *Senate Hearings*, *supra* note 15.

58. See, e.g., *Senate Hearings*, *supra* note 15, at 298, 304–06 (statement of Vilma Martinez, President and General Counsel, MALDEF) (stating the difficulties plaintiffs had navigating and prevailing in the confusing post-*City of Mobile* landscape, and that a return to the effects test would not require proportional representation); *id.* at 795–97 (testimony of Armand Derfner, the Joint Center for Political Studies) (testifying that, in attempting to challenge districts before *City of Mobile*, he lost many cases despite the fact that the systems in question did not have proportional representation); *id.* at 1611–13 (testimony of Arnolando S. Torres, National Executive Director, League of United Latin American Citizens) (pointing out case law in which defendants prevailed, and stating that the effects test did not require proportional representation); *id.* at 366–71 (testimony of Laughlin McDonald, Director, Southern Regional Office, ACLU Foundation, Inc.) (likening the intent test to the requirement of a body in a shallow grave in a criminal case, and giving examples of several jurisdictions in Georgia, South Carolina, and other states, in which primarily black districts elected white officials and were not vulnerable to litigation, despite the resultant lack of proportionality).

59. See, e.g., *id.* at 423, 428 (testimony of Professor Barry R. Gross, York College of the City University of New York) (testifying that the amendments could lead to litigation in every jurisdiction in which there was less than proportional representation); *id.* at 647, 655 (testimony of Professor John Bunzel, The Hoover Institution, Stanford University) (testifying that the results test was too vague, and that the disclaimer put in by the House would be ineffectual. The disclaiming

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A few other issues were touched on repeatedly during the hearings, although none as extensively as the proportionality issues. These issues included discussion over whether the intent test would lead to racial divisiveness, as it would require an accusation of discriminatory motivation,⁶⁰ and whether the statute would lead to more minority representatives but less minority influence over legislation.⁶¹

The Subcommittee and its witnesses were not unaware of the need for an evidentiary basis when passing remedial legislation. *South Carolina v. Katzenbach*, the case that upheld the original challenge to the Voting Rights Act, repeatedly emphasized the necessity—and prevalence—of evidence demonstrating the discrimination being remedied by the legislation.⁶² Some witnesses expressed concern that there was not enough evidentiary basis for the changes that would be implemented by the amendment. Representative Hyde stated his concerns:

Experience has shown us that the effects test now in section 5 of the act is very broad in its application. Proponents of the House amendments to section 2 wish to extend that breadth nationwide. Since the section 5 requirements are based on a congressional finding in 1965 that reprehensible State action had occurred in jurisdictions now so covered, I do not believe a

language to which Professor Bunzel referred is found in S. 1992, 97th Cong. § 2 (1982) (“The fact that members of a minority group have not been elected in numbers equal to the group’s proportion of the population shall not, in and of itself, constitute a violation of this section.”); *id.* at 1307, 1309–10 (testimony of Professor Donald L. Horowitz, Professor of Law, Public Policy Studies, and Political Science, Duke University) (testifying that the amendments would lead to proportional representation, and emphasizing the nationwide scope of the amendment); *id.* at 1408–09 (testimony of Irving Younger, Esq.) (testifying that an intent test, far from being unusual or difficult, is used in criminal cases across the land, and was clearly mandated by the Fifteenth Amendment).

60. *See, e.g., id.* at 1365, 1367 (testimony of Drew Days, Associate Professor of Law, Yale University) (stating that Congress should not hang something as important as a decision about the proper role of an intent test on worries about name-calling); *id.* at 1177, 1181 (statement of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights) (predicting that the intent test would cause racial divisiveness).

61. *See, e.g., id.* at 542, 545 (testimony of Professor Susan A. MacManus, University of Houston) (saying it would be better for the black community to have influence on three commissioners than to be lumped into one district); *id.* at 1307, 1309 (testimony of Professor Donald L. Horowitz, Professor of Law, Public Policy Studies and Political Science, Duke University) (describing the proposed amendment as “a wonderful amendment for prospective black elected officeholders” and “a very bad amendment for their constituents”).

62. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

case has been made which demonstrates that the same onerous test should be applied at all levels of elective government nationwide. It will be too strong an antibiotic to the body politic of this country, resulting in an affirmative action plan for minority public officials.⁶³

William Reynolds, Assistant Attorney General of the Civil Rights Division, indicated similar sentiments:

The concern that one would have from a constitutional standpoint is that a standard is being put in place not unlike the “effect” test in section 5 without the kind of evidentiary basis or record that normally you would expect to be developed to show the need for this departure from the constitutional norm of the [Fifteenth] amendment.⁶⁴

However, the hearings were not completely devoid of evidence of the need for the new section 2. Vilma Martinez testified about the need to challenge discriminatory behavior outside the reach of section 5. Pointing to the at-large voting systems common in California and the corresponding under-representation of Hispanic elected officials, she asserted that the “smoking gun” requirement of proving discriminatory intent articulated in *City of Mobile* would make challenging such gerrymandering and discrimination difficult, if not impossible. Ms. Martinez also pointed out the pervasiveness of racially polarized voting.⁶⁵ Laughlin McDonald stated that the amended section 2 was needed to fill in the gaps left by section 5; that is, to check discriminatory voting practices implemented before November 1, 1964, and therefore left unaffected by section 5.⁶⁶ Arthur Flemming discussed his report *The Voting Rights Act: Unfulfilled Goals*, and discussed lack of proportional representation in various jurisdictions.⁶⁷ However, evidence such as this necessarily implicated only covered jurisdictions. Pointing out this deficiency in Flemming’s evidence, Hatch asked Flemming if he considered jurisdictions other than covered jurisdictions. Flemming stated in reply, “[t]he answer is no.” Hatch then responded, “[y]et, you are so enthusiastic about extending the effects test to the entire coun-

63. *Senate Hearings*, *supra* note 15, at 392, 408 (testimony of Honorable Henry Hyde, U.S. Representative from the State of Illinois).

64. *Id.* at 1677, 1703 (testimony of Honorable William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice).

65. *See id.* at 304–06 (statement of Vilma Martinez, President and General Counsel, MALDEF).

66. *Id.* at 374, 377 (statement of Laughlin McDonald, Director, Southern Regional Office, ACLU Foundation, Inc.).

67. *See id.* at 1167, 1172–73.

try.”⁶⁸ Julius Chambers, from the NAACP, did have evidence involving both covered and non-covered counties in North Carolina. Chambers submitted with his testimony an extensive case study by Steven Suits, of the Southern Regional County (who also testified during the hearings). Chambers stated that North Carolina was the best of the Southern states at “belittling” the voting strength of black voters, and pointed out the low number of black legislators in North Carolina, as compared, for illustration, to Mississippi, concluding that efforts at discrimination continued, yet had been moved “backstage.”⁶⁹ The study itself detailed suits prosecuted in North Carolina, the history of discrimination, election laws passed, the effects of voting changes in both covered and non-covered counties, and similar voting-related data.⁷⁰

Therefore, although some evidence describing the need for the amended section 2 was presented, the primary focus of the hearings was on the meaning of the amendments rather than evidence of the specific behavior to be remedied. This could potentially call the constitutionality of the Act into question, especially after the Court’s decision in *City of Boerne*.

IV. ANALYSIS OF AMENDED SECTION 2 IN LIGHT OF *CITY OF BOERNE*

In the aftermath of *City of Boerne*, the constitutionality of section 2 as amended is openly in question.⁷¹ *City of Boerne* itself, despite its extensive contrasting of the Voting Rights Act with RFRA,

68. *Id.* at 1174 (testimony of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights).

69. *Id.* at 1251 (testimony of Julius L. Chambers, President, NAACP Legal Defense Fund, Inc.).

70. *Id.* at 1269–1307 (“Blacks in the Political Arithmetic After *Mobile*: A Case Study of North Carolina,” by Steven Suits).

71. The analysis in *City of Boerne* has spurred significant commentary regarding both section 2 and other sections of the Act. See, e.g., Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998) (arguing that the Voting Rights Act is still constitutionally valid after *City of Boerne*); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749–51 (1998) (questioning the constitutionality of the 1982 amendments to the Voting Rights Act, and criticizing *City of Boerne*); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769 (2003) (suggesting a new constitutional vulnerability of the preclearance provisions of the Voting Rights Act after *City of Boerne*); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003).

does not once mention the amended section 2 in its approving description of the former.⁷² Shortly before the decision in *City of Boerne*, Justice O'Connor wrote a concurring opinion in *Bush v. Vera* (in addition to her announcement of the judgment of the Court) undisguisedly questioning the constitutional validity of the amended section 2.⁷³ Although conceding that compliance with section 2 was a compelling state interest when the state was faced with a challenge to its districting scheme, she was quick to mention that its constitutionality had never been passed on by the Supreme Court: "In the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligations that it places on States in a succession of cases, assuming but never directly addressing its constitutionality."⁷⁴ However, she stated that because many lower courts had determined that section 2 was constitutional, "[w]e should allow States to assume the constitutionality of § 2 of the VRA, including the 1982 amendments."⁷⁵

The fact that the primary evidence offered during the hearings centered on the provision's meaning does not bode well for its soundness under *City of Boerne*'s congruence and proportionality test. The members of the Senate Judiciary Committee realized that the necessary evidentiary basis was lacking, and addressed the issue directly; however, much of the justification for this deficiency put forth in the Committee Report was later directly controverted by language in *City of Boerne*. For instance, the Report clearly states that the purpose of the amendment is to return to what it believed the case law held prior to *City of Mobile*. "In adopting the 'result standard' as articulated in *White v. Regester*, the Committee has codified the basic principle in that case as it was applied prior to the *Mobile* litigation."⁷⁶ However, the Report went further, stating the following regarding the inquiry into motivation:

The Fifth Circuit . . . held that the *White-Zimmer* factors allowed the district court to infer discriminatory purpose. Under the Committee bill that step is unnecessary: a finding of the appropriate factors showing current dilution is sufficient, without any need to decide whether those findings, by themselves, or with additional circumstantial evidence, also would warrant an inference of discriminatory purpose.⁷⁷

72. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

73. *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring).

74. *Id.*

75. *Id.* at 992.

76. SENATE REPORT, *supra* note 15, at 28.

77. *Id.* at 28 n.112.

The description arguably indicates that the intent of the legislation was not to return to the test under pre-*City of Mobile* case law, but to change the test to reach beyond what existed before. Such interpretation could run afoul of *City of Boerne*'s insistence that Congress does not have the power to define the substance of Fourteenth Amendment rights. *City of Boerne* suggested that, in enacting this legislation, Congress must first consider findings that show that the "appropriate factors" referred to above correlate with purposeful discrimination.⁷⁸ As held in *City of Boerne*, RFRA's attempt to change the standard of scrutiny by which legislation burdening religious exercise was measured was struck down as altering the meaning of the Free Exercise Clause.⁷⁹ Similarly, the amended section 2 of the Voting Rights Act changed the test by which courts would measure potential violations, and therefore might also be held to have altered the meaning of the Fourteenth and Fifteenth Amendments. The Report openly states the desire of the Committee to change the test articulated in *City of Mobile*. "The main reason [for the rejection of the intent test] is that, simply put, the test asks the wrong question."⁸⁰

In fact, instead of using the enumerated factors to describe behavior that would be unconstitutional in any event, evidence was given suggesting exactly the opposite. A common theme echoed by those opposing the amendments to section 2 was that its sweep would be so broad as to affect a large number of jurisdictions including those heretofore untouched by the strictest provisions of the Voting Rights Act.⁸¹ To address and contradict those protests, the Committee cited a 1978 study by the Justice Department. The study showed that, of 200 cities in 40 northern and western states, most raised no concerns after an initial review, and the leftover few

78. See *City of Boerne v. Flores*, 521 U.S. 507, 525–27 (1997).

79. *Id.* at 519.

80. SENATE REPORT, *supra* note 15, at 36. Professor Douglas Laycock quoted this statement as an indication that Congress was not simply trying to implement a simplified standard for proving intent, but that it disagreed with the Court's requirement of intent at all. Laycock, *supra* note 71, at 749–51.

81. See, e.g., REPORT OF THE SUBCOMM. ON THE CONSTITUTION TO THE COMM. ON THE JUDICIARY ON THE VOTING RIGHTS ACT [hereinafter SUBCOMMITTEE REPORT], largely contained in the SENATE REPORT, *supra* note 15, at 107. The Subcommittee listed a number of jurisdictions that would be vulnerable to court-ordered change under the new amendments. See SUBCOMMITTEE REPORT, at 152–58. The Report listed jurisdictions that had a lack of proportional representation and said that, with further objective evidence of discrimination (set out in a chart listing as examples "cancellation of registration for failure to vote," "minimum residence requirement," and "staggered terms for members of state senate"), the jurisdictions would be subject to judicial attack. *Id.* at 154.

were also found, after more detailed investigation, not to warrant litigation.⁸² However, this evidence—intended to placate those who believed the legislation would disrupt far too many jurisdictions—could have the unintended effect of proving that the legislation lacks the necessary factual backing for this type of congressional action, and that Congress was, in fact, attempting to substantively legislate and reach beyond its enforcement powers as described in *City of Boerne*.⁸³

Opponents to the amendments maintained that a record of evidence similar to that in *South Carolina v. Katzenbach* needed to be shown. The Committee Report, in response, detailed the reasons the legislators believed that amended section 2 was constitutional and stated that analogy to *Katzenbach* was misplaced for four reasons. First, preclearance, as mandated in section 5, is a far more onerous remedy than simply a change in the standard of review given by a court. Supported by Professor Norman Dorsen's testimony, the Report states that the remedy offered by the new section 2 would be less intrusive than the section 5 remedy, and therefore would require less evidentiary backup.⁸⁴ Second, there is no need to justify singling out jurisdictions for special treatment—as done by section 5—for a law to be applied nationwide.⁸⁵ Third, *Oregon v. Mitchell* upheld a nationwide ban on literacy tests, despite a lack of finding that all literacy tests were used in order to discriminate against minorities, thus showing that a certain amount of overinclusion is permissible.⁸⁶ Fourth and finally, the overinclusion in *Mitchell* would surpass that of the section 2 amendments, because the very terms of the provision indicate that it would target only systems infected with actual racial discrimination.⁸⁷

City of Boerne addresses each of these justifications differently, indicating that some would be more successful today than others. As for the first argument, preclearance does seem to be a significantly more onerous remedy than a different standard of review—something that would indicate that amended section 2 has the proportionality that *City of Boerne* demands. In contrast to *City of Boerne*, the proportionality comparison at issue here is not between preclearance and court review, but one between different standards of review and between the different laws affected. It is notable that

82. SENATE REPORT, *supra* note 15, at 35.

83. See discussion *supra* notes 43–45 and accompanying text.

84. SENATE REPORT, *supra* note 15, at 41–42.

85. *Id.* at 42.

86. *Id.* at 42–43 (citing *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

87. *Id.* at 43.

the *City of Boerne* Court specifically mentioned that RFRA did not involve a discriminatory effects or disparate-impact test, but rather imposed the equivalent of strict scrutiny for legislation that substantially burdened religious exercise.⁸⁸ Amended section 2 of the Voting Rights Act, on the other hand, imposes exactly that discriminatory effects test. *City of Boerne* also distinguished RFRA from the Voting Rights Act because RFRA could potentially affect any kind of law passed by any jurisdiction, whereas the Voting Rights Act affected only laws pertaining to voting.⁸⁹ By its nature, amended section 2 affects only laws related to voting and, indeed, affects only those laws pertaining to districting. In comparison to RFRA, this vastly limits the number of constitutional laws and election schemes that would be vulnerable to invalidation by the Act. However, unlike the original Voting Rights Act, the 1982 amendments do suffer a weakness of RFRA. The original Voting Rights Act was lauded for being temporary—one that would eventually terminate when States corrected their behavior.⁹⁰ Amended section 2, on the other hand, is part of the permanent provisions of the Voting Rights Act, and has no sunset or bailout feature.

The second argument, that there is less need to justify a nationwide application of a remedy than one that singles out jurisdictions, is directly addressed in *City of Boerne*. One of the characteristics of the original Voting Rights Act cited favorably by the *City of Boerne* Court was that it was “confined to regions of the country where voting discrimination had been most flagrant.”⁹¹ The exact reason given in the Committee Report to justify a smaller evidentiary basis is called into question on congruence grounds by the reasoning of *City of Boerne*. Precisely because its sweep is nationwide, it must be backed up with a rich record of evidence to support the remedy. Indeed, this argument put forth in the Committee Report is even weaker in the wake of *United States v. Morrison*.⁹² Striking down the Violence Against Women Act for lack of congruence, the Court again cited approvingly various cases upholding the Voting Rights Act because they were so sharply targeted, both geographically and with respect to the most culpable officials.⁹³ The Court distin-

88. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

89. *Id.* at 533.

90. *Id.*

91. *Id.* at 532–33 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)).

92. 529 U.S. 598 (2000).

93. *Id.* at 626–27. The Court cites, among other cases, *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (banning New York literacy tests because they disenfranchised

guished the Violence Against Women Act from the Voting Rights Act because the former

applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan* . . . was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* . . . the remedy was directed only to those States in which Congress found that there had been discrimination.⁹⁴

The third justification—that of *Oregon v. Mitchell*'s pronouncement of the permissibility of some overinclusion—seems hollow without the similar evidentiary basis that originally permitted the overinclusion. *Mitchell* allowed the overinclusion because of the likelihood that most of the prohibited behavior would, in fact, be unconstitutional on its own.⁹⁵ Without a similar basis for the Voting Rights Act, such an assertion loses its grounding.

Finally, the last justification appears to be unassailable. If the Act does, in fact, target only behavior that is the result of actual racial discrimination, then every prohibited activity is, on its own, unconstitutional, and the statute should be immune to challenge. A problem exists, however, in that this statement is an assertion without factual backing. The point of the totality of the circumstances test was to create a litigation landscape in which plaintiffs did not have to prove discriminatory intent; however, without this proof, there could never be certainty that the statute would affect only unconstitutional behavior. Even with case-by-case application of the totality of the circumstances test—as opposed to the blanket prohibition on literacy tests—Congress cannot guarantee the perfect correlation of unconstitutional behavior and judicial remedy.⁹⁶

thousands of Puerto Rican immigrants), and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

94. *Id.*

95. *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970).

96. Furthermore, with the benefit of hindsight, it seems apparent that the application of section 2 is different than the test envisioned by Congress. The application that was ultimately defined and enforced was different than Congress's predicted totality of the circumstances test. Instead, the courts implemented a more simplified three-prong test, thus leaving open the question whether the Act should be scrutinized under its actual application or under that originally intended by Congress. See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (setting forth a three-prong test for vote dilution: (1) whether there is a large, compact minority population; (2) whether the minority population is politically cohesive; and (3) whether the white majority votes as a bloc).

The constitutionality of the 1982 amendments, therefore, remains uncertain. In a continuum of constitutionality, the amendments appear to be not as unconstitutional as RFRA was, but certainly not as firmly constitutional as the original Voting Rights Act was determined to be in *South Carolina v. Katzenbach* and *Oregon v. Mitchell*. The evidentiary basis created during the Senate deliberations seems clearly not what the *City of Boerne* Court was contemplating when discussing the scope of Congress's remedial powers under the Fourteenth Amendment. On the other hand, the Court appeared implicitly to carve out a small constitutional nook into which the 1982 amendments to the Voting Rights Act may fit.

CONCLUSION

Congress must revisit the Voting Rights Act in 2007, when the provisions of section 4 are due to terminate.⁹⁷ It is unfathomable that this issue will be ignored. *City of Boerne* provides an indication of the type of evidentiary basis required to support remedial legislation such as the Voting Rights Act. Considering some of the cursory evidence that came before it when it was not focusing on compiling that basis, as well as the improved technological ability to collect and work with electoral data, it seems likely that Congress will be able to produce and to examine recent and carefully analyzed data concerning the state of electoral systems nationwide.

On the other hand, debates may focus instead on the desirability of the remedy at all. As hinted at by the Senate Hearings, the amendments have, in fact, had a dramatic effect on the electoral landscape, and have resulted in the creation of many majority-minority districts.⁹⁸ Along with this change has come a tension between proportional representation, clearly part of the effect of the provisions, and majority rule, the formal design of our electoral system. The struggle manifested in the case law may foreshadow another battle over these provisions when the Act is once again the

97. See 42 U.S.C. § 1973b(a)(8) (2003). Due to the popularity of the Act, it seems unlikely a jurisdiction will consider it politically feasible to be the one to challenge its constitutionality. As a result, the Court may not have an opportunity to rule on this issue before 2007.

98. A great deal of analytical work has been done since the 1982 amendments were passed on the patterns of voters throughout the country. See, e.g., Bernard Grofman, et. al, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

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subject of congressional attention. This tension may need to be faced anew—this time with the benefit of twenty-five years of experience in its application.

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