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Towards a Post-*Shelby County* Section 5 Where a Constitutional Coverage Formula Does Not Reauthorize the Effects Test

JOSHUA P. THOMPSON¹

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I. INTRODUCTION

The 2012 Supreme Court term was supposed to be remembered as the beginning of the end of race-based government decision making. *Fisher v. University of Texas*² and *Shelby County, Alabama v. Holder*,³ were supposed to clarify the legality of racial classifications in both university ad-

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2. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

3. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

missions and voting. Additionally, two cases from the 2013 term—*Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*⁴ and *Schuette v. Coalition to Defend Affirmation Action*⁵—dealt with the legality of racial classifications in federal housing and state government respectively. With three of the four cases completed, it is fair to say that governmental race-based classifications have survived.

In *Fisher*, the Supreme Court issued a 7-1 opinion remanding the case to the Fifth Circuit with instructions on how to properly analyze the program under strict scrutiny.⁶ *Mount Holly* was dismissed on the eve of oral argument under circumstances reminiscent of *Magner v. Gallagher*.⁷ *Schuette* has yet to be decided.

Shelby County, on the other hand, was a 5-4 opinion declaring section 4(b) of the Voting Rights Act unconstitutional.⁸ Insofar as the coverage formula authorized by Congress in 2006 is concerned, the Court's opinion provides clarity. No longer may Congress base the preclearance coverage formula on data collected from the Lyndon Johnson-Barry Goldwater Presidential vote.⁹ A new coverage formula is needed for preclearance to be enforced.

Despite the outrage following *Shelby County*,¹⁰ the outcome was foreseen by many.¹¹ Even before Congress reauthorized the Voting Rights Act

4. *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013).

5. *Schuette v. Coal. to Def. Affirmative Action*, 701 F.3d 466 (6th Cir. 2012) (en banc), *cert. granted*, 133 S. Ct. 1633 (2013).

6. *Fisher*, 133 S. Ct. at 2419-22.

7. See Ralph Kasarda, *Settlement in Disparate Impact Case Means More Government Discrimination*, PAC. LEGAL FOUND. LIBERTY BLOG (Nov. 14, 2013, 12:50 PM), <http://blog.pacificlegal.org/2013/settlement-in-disparate-impact-case-means-more-government-discrimination>. During the 2011 term, the Supreme Court granted certiorari in a different case challenging the legality of a disparate impact cause of action under the Fair Housing Act. See *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 123 S. Ct. 994. However, after pressure from the Obama Administration, the City of St. Paul voluntarily dismissed its petition. See *Magner v. Gallagher*, 132 S. Ct. 1306 (2012); Editorial, *Squeezed in St. Paul*, WALL ST. J., Feb. 13, 2012, at A14.

8. *Shelby Cnty.*, 133 S. Ct. at 2631.

9. The coverage was based in part on the voter registration numbers on November 1, 1964. See 42 U.S.C. § 1973b(b)(2) (2008), *invalidated by Shelby Cnty.*, 133 S. Ct. 2612.

10. See, e.g., Zachary Roth, *Supreme Court Guts Landmark Civil Rights Law*, MSNBC (June 25, 2013), <http://www.msnbc.com/msnbc/supreme-court-guts-landmark-civil-rights-law>; Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, *Court Rejects Congress' Determination of Where the Voting Rights Act Should Apply, Leaving Voters Unprotected*, NAACP LEGAL DEF. AND EDUC. FUND (June 25, 2013), <http://www.naacpldf.org/update/supreme-court-ruling-voting-rights-opens-door-wave-minority-voter-suppression>.

11. See Joshua Thompson, *Shelby County v. Holder: Forget the Coverage Formula, What About the Effects Test?*, SCOTUSBLOG (Feb. 12, 2013),

in 2006, scholars were urging Congress to amend the coverage formula in order to save preclearance.¹² In 2009, a unanimous Supreme Court asked Congress to do the same.¹³ “Congress could have updated the coverage formula at that time, but did not do so. Its failure to act [left the Supreme Court] with no choice but to declare § 4(b) unconstitutional.”¹⁴

For opponents of governmental racial classifications, the disappointing nature of the *Shelby County* decision stems not from its predictable result, but rather that the unconstitutionality of the coverage formula was the *only* result. The constitutionality of section 5 was before the Court, but it declined to address it.¹⁵ The Court’s reluctance to address the deeper issues will likely necessitate future litigation. Indeed, less than a month after *Shelby County*, the Department of Justice (DOJ) filed a new lawsuit seeking to reimpose preclearance on the State of Texas.¹⁶ Further, Congress may even undertake the arduous process of creating a new coverage formula—one that targets the most discriminatory jurisdictions of today—even though the preclearance may be unconstitutional.¹⁷

Given the continuing validity of section 5 of the Voting Rights Act, and the strong desire by some to see preclearance reintroduced, this Article examines the most pernicious aspect of that law: the effects test. While the coverage formula was certainly problematic, insofar as it seriously en-

<http://www.scotusblog.com/2013/02/shelby-county-v-holderforget-the-coverage-formula-what-about-the-effects-test/> (“Despite many claims to the contrary, the sky will not fall when the Court strikes down section 5’s coverage formula. The constitutional problems are easily fixed.”).

12. See, e.g., Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 723 (2006) (describing the over- and under-inclusiveness of the coverage formula); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710 (2004); DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 16 (2001) (noting no difference in the office holding rates of minorities in covered versus non-covered jurisdictions).

13. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”).

14. *Shelby Cnty.*, 133 S. Ct. at 2631.

15. *Id.* (“We issue no holding on § 5 itself, only on the coverage formula.”).

16. See Dep’t of Justice Office of Pub. Affairs, *Justice Department to File New LawsUIT Against State of Texas Over Voter I.D. Law*, THE U.S DEP’T OF JUST.(Aug. 22, 2013), <http://www.justice.gov/opa/pr/2013/August/13-ag-952.html>.

17. See Karoun Demirjian, *Reid Vows Quick Work on Rewriting Voting Rights Act After Court Decision*, LAS VEGAS SUN, June 26, 2013, <http://www.lasvegassun.com/news/2013/jun/26/reid-vows-quick-work-rewriting-voting-rights-act-a/>.

croached on the principle of equal sovereignty,¹⁸ it served the laudable goal of ensuring everyone the right to vote.¹⁹ The same cannot be said of the effects test.

By definition, the effects test seeks to equalize election *results*. Racial groups must be permitted to “elect their preferred candidates of choice.”²⁰ Unsurprisingly, by requiring equal outcomes, the effects test has largely turned into a mechanism to racially gerrymander election districts.²¹ However, “[s]eparate but equal’ and ‘separate but better off’ have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.”²²

This Article places the effects test squarely in its crosshairs in the hope that if preclearance survives, it will only be used to end intentional voting discrimination. Part II briefly defines the effects test and explains its origins. Part III establishes the proper standard of review for congressional enactments under the Fifteenth Amendment before explaining why the effects test exceeds that congressional power. Part IV offers three reasons why the effects test violates the individual right to equal protection.

II. THE EFFECTS TEST

The Fifteenth Amendment to the Constitution guarantees that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”²³ section 2 of that Amendment grants Congress the power to adopt “appropriate legislation” to enforce that guarantee.²⁴ Congress invoked this power when it adopted the Voting Rights Act of 1965. section 5 of the Act targeted southern legislatures that had defiantly denied the right to vote to black Americans by requiring any proposed voting change to be precleared with the courts or federal government.²⁵

18. See, e.g., *Nw. Austin*, 557 U.S. at 203 (explaining how section 5 encroaches on federalism); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (detailing section 5’s federalism costs).

19. See *Nw. Austin*, 557 U.S. at 201-02 (detailing the undeniable successes of the Voting Rights Act).

20. 42 U.S.C. § 1973c(b) (2006), *invalidated by Shelby Cnty.*, 133 S. Ct. 2612 .

21. Roger Clegg, *The Future of the Voting Rights Act After Bartlett and NAMUDNO*, 2009 CATO SUP. CT. REV. 35, 40.

22. *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

23. U.S. CONST. amend. XIV, § 1.

24. U.S. CONST. amend. XV, § 2.

25. 42 U.S.C. § 1973c(a) (explaining how a “covered” jurisdiction must either obtain approval for its proposed voting change from the District of Columbia District Court or the Attorney General before the change is deemed effective).

For its first forty-two years, the text of section 5 of the Voting Rights Act required that intent be at the heart of all preclearance decisions. The language by which voting standards were judged required jurisdictions to demonstrate that it “does not have the purpose and will not have effect of denying or abridging the right to vote.”²⁶ After years of focusing almost solely on the effect of proposed voting changes, the Supreme Court explained in *Georgia v. Ashcroft* that the DOJ should refocus its efforts to “encourage the transition to a society where race no longer matters.”²⁷

Then, in 2006, Congress amended that language to require jurisdictions to show that a voting practice “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”²⁸ This subtle change was designed to ensure that intent need never be present to deny preclearance.²⁹ Congress expanded the “effects test” by mandating the preclearance be denied where a voting change “will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice.”³⁰

III. WHY THE EFFECTS TEST EXCEEDS CONGRESSIONAL POWER

A. THE STANDARD OF REVIEW FOR LEGISLATION PASSED PURSUANT TO SECTION 2 OF THE FIFTEENTH AMENDMENT

Throughout the litigation in both *Shelby County* and its predecessor, *Northwest Austin*, the standard of review was a major point of contention.³¹ A by-product of the *Shelby County* Court’s decision to only address the coverage formula is that the standard of review for legislation adopted pursuant to Congress’s Fifteenth Amendment enforcement power remains unanswered. The dispute concerns whether Congress need only have a rational basis for invoking its Fifteenth Amendment power, or whether it may only invoke that power in a manner that is “congruent and proportional” to

26. The Voting Rights Act of 1965, 42 U.S.C. § 1973c, Pub. L. 89-110 (1965) (codified as amended 42 U.S.C. § 1973c (2006)) (emphasis added).

27. See *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003).

28. 42 U.S.C. § 1973c(a) (2006) (emphasis added).

29. See Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL’Y 561, 565 (2007).

30. 42 U.S.C. § 1973c(b) (2006). The “preferred candidate of choice” language in section 5(b) of the Voting Rights Act is an extension of the effects test in section 5(a). This discussion of the effects test in this Article applies equally to the “candidate of choice” requirement.

31. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (“[The standard of review] has been extensively briefed in this case, but we need not resolve it.”); Brief for Petitioner, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

the individual right to vote irrespective of one's race. The former standard would give Congress considerably more latitude for legislation.

The formulation of two independent tests for legislation passed pursuant to Congress's Fourteenth or Fifteenth Amendment enforcement powers has never been articulated by the Court. In cases where the Supreme Court has reviewed Congressional legislation adopted under one of these powers, the Court has used precedents from the Fourteenth Amendment and Fifteenth Amendment identically.³²

That the enforcement clauses should be treated coextensively is obvious, but two independent reasons call for the more stringent congruent and proportional review. First, the text and history of the two amendments demonstrate that its framers intended for Congress to enact similar legislation when needed to enforce the rights guaranteed.³³ Second, the Supreme Court cases that purport to establish a more lenient standard of review fail to support that narrative upon closer examination.

1. *A Brief History of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment*

The Fourteenth Amendment was added to the Constitution in July of 1868.³⁴ Once ratified, the Enforcement Clause of the Fourteenth Amend-

32. See *City of Boerne v. Flores*, 521 U.S. 507, 518-28 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966); *James v. Bowman*, 190 U.S. 127, 137-39 (1903). See also Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance*, 91 CALIF. L. REV. 769, 786 (2003) (stating that the history and text of the enforcement powers leads the Supreme Court to treat them identically); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 n.6 (Thomas, J., dissenting) (“[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive.”); Clegg & Chavez, *supra* note 29, at 570 (“[T]he two were ratified within nineteen months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens’ voting rights.”).

33. Compare U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”), with U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). The *City of Boerne* Court used precedents from past Voting Rights Act cases to demonstrate the standard of review under the Fourteenth Amendment. See *City of Boerne*, 521 U.S. at 518 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *City of Rome v. United States*, 446 U.S. 156 (1980)). That Court also noted that the two clauses were “parallel.” *City of Boerne*, 521 U.S. at 518. More recently the Supreme Court has reiterated that, “Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment.” *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001).

34. U.S. CONST. amend. XIV. See also Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 575 (2002) (discussing issues surrounding ratification).

ment would come to represent “a positive grant of legislative power.”³⁵ The debate surrounding ratification of the Enforcement Clause clarified that the new grant of legislative power should be seen as “remedial and preventive” in nature.³⁶ The remedial and preventive nature of the Enforcement Clause is treated as hornbook law.³⁷

The Fifteenth Amendment was ratified in February of 1870,³⁸ and it too included an enforcement clause.³⁹ The purpose of that clause was identical: “[M]any Republicans believed that the Fifteenth Amendment would remain ineffective until and unless it was enforced by additional federal laws [I]f no further federal laws were enacted, racial discrimination in voting would be constitutionally feasible.”⁴⁰ The framers of the Fifteenth Amendment believed that the right to vote, irrespective of one’s race, would only become a reality if Congress retained power to adopt legislation when called for.

2. Katzenbach *Did Not Announce a Rationality Standard*

The idea that mere rationality is the standard of review for legislation passed pursuant to Congress’s Fifteenth Amendment power stems from *South Carolina v. Katzenbach*,⁴¹ the Supreme Court’s first Voting Rights Act case.⁴² The Court held that “[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁴³ The first clause of that passage is the most important. The Court is not explaining the extent of congressional power under the Fifteenth Amendment, only Congress’s

35. *Morgan*, 384 U.S. at 651.

36. *See City of Boerne*, 521 U.S. at 520-24 (discussing the ratification history of the Fourteenth Amendment).

37. *See id.* at 525 (citing *United States v. Reese*, 92 U.S. 214, 218 (1875); *United States v. Harris*, 106 U.S. 629, 639 (1883); *James v. Bowman*, 190 U.S. 127, 139) (noting that the Court has always viewed Congress’s power under section 5 of the Fourteenth Amendment as corrective or preventive).

38. *See* U.S. CONST. amend XV; James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 483-85 (1999) (discussing the congressional history of the Fifteenth Amendment).

39. U.S. CONST. amend XV, § 2. *See also* *United States v. Price*, 383 U.S. 787, 804-05 (1966) (discussing ratification of the Reconstruction Amendments).

40. Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 CHI.-KENT L. REV. 1013, 1020 (1995).

41. *South Carolina v. Katzenbach*, 383 U.S. 301 (1965).

42. The district court in *Northwest Austin* adopted this view. *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241-46 (D.D.C. 2008).

43. *Katzenbach*, 383 U.S. at 324.

power *vis-a-vis* the states. “The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.”⁴⁴

The *Katzenbach* Court explained, however, that rationality was not “the standard[] which govern[ed] . . . review of the Act.”⁴⁵ For that point, the *Katzenbach* Court turned to the Fifteenth Amendment’s Enforcement Clause, which allows Congress to “enforce the prohibitions by appropriate legislation.”⁴⁶ Further, the Court cited to *Ex parte Virginia*, a case that clearly holds that, for congressional legislation to be adopted constitutionally, there must be a closer fit between the ends and the means than mere rationality.

In the post-*Katzenbach* cases, while the Court was reaffirming *Katzenbach*, it was not reaffirming “rational basis” as the standard of review.⁴⁷ Rather, the Court was continuing—often explicitly—the tradition from *Ex parte Virginia*, which held that “legislation is appropriate . . . [when it is] adapted to carry out the objects the amendments have in view.”⁴⁸ For example, in *Morgan* the Court clarified that section 5 requires that legislation be “‘plainly adapted’ to furthering . . . [the] aims of the Equal Protection Clause.”⁴⁹ The *City of Rome* Court used similar language.⁵⁰

3. City of Boerne and the Congruence and Proportionality Test

In 1997, the Court enunciated a clear standard for evaluating whether Congress has constitutionally invoked its powers under the Fourteenth Amendment. Beginning its analysis with *McCulloch* and *Ex parte Virginia*,⁵¹ the *City of Boerne* Court explained that the enforcement clauses limit

44. *Id.* at 317.

45. *Id.* at 324.

46. *Id.* at 326 (emphasis added) (citing *Ex parte Virginia*, 100 U.S. 339, 345 (1879)).

47. It’s worth noting that had the Court wanted to invoke simple rational basis review, it easily could have. By 1966, “rational basis” review was prevalent in the Supreme Court. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *Carmichael v. S. Coal Co.*, 301 U.S. 495, 509 (1937).

48. *Ex parte Virginia*, 100 U.S. at 345. *See also* *Katzenbach v. Morgan*, 384 U.S. 641, 648 (citing *Ex parte Virginia*, 100 U.S. at 345). The *Morgan* Court articulated that standard of review to require the Court to evaluate whether the legislation is “‘plainly adapted’ to furthering the[] aims of the Equal Protection Clause.” *Id.* at 652. *City of Rome* is similar. *See* *City of Rome v. U.S.*, 446 U.S. 156, 177 (“[U]nder . . . [section] 2 of the Fifteenth Amendment Congress may prohibit practices . . . so long as the prohibitions attacking racial discrimination in voting are ‘appropriate,’ as that term is defined in *McCulloch v. Maryland* [17 U.S. 316 (1819)] and *Ex parte Virginia* . . .”).

49. *Morgan*, 384 U.S. at 652 (emphasis added).

50. *City of Rome*, 446 U.S. at 177.

51. *City of Boerne v. Flores*, 521 U.S. 507, 516-18 (1997).

Congress's power such that legislation must be "adapted to carry out the objects the amendments have in view"⁵²

The *City of Boerne* Court then analyzed the Voting Rights Act cases that purport to establish a "rationality" standard.⁵³ The Court recognized that Congress's enforcement power extends only to enforcing and remedying the provisions of the amendment invoked.⁵⁴ "It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, 'the provisions of the Fourteenth Amendment.'"⁵⁵ From this analysis, the Court adopted the congruence and proportionality standard. This means-ends test requires a significant link between the amendment that Congress seeks to enforce and the legislation adopted.⁵⁶

4. *Lopez v. Monterey County and the Post-Boerne Cases*

If the Supreme Court applied a more relaxed standard of review in cases decided after *City of Boerne*, that would lend credence to the view that separate standards govern the two different enforcement clauses. In *Northwest Austin*, the district court relied on *Lopez v. Monterey County*⁵⁷ for its conclusion that Congress need only have some rational basis for adopting legislation pursuant to its Fifteenth Amendment power.⁵⁸ A closer examination of the case reveals the district court's error.

52. *Id.* at 517 (quoting *Ex parte Virginia*, 100 U.S. at 545).

53. *See City of Boerne*, 521 U.S. at 518 (discussing the holdings of *Katzenbach, Morgan*, and *City of Rome*).

54. *Id.* at 519.

55. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1965)) (internal quotations omitted).

56.

"While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. *There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.* Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment."

City of Boerne, 521 U.S. at 519-20 (emphasis added).

57. *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999).

58. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 239 (D.D.C. 2008) (referring to *Lopez* as "the final case in this [rational basis] series").

In *Lopez*, the Supreme Court was only considering whether “requiring preclearance here would *tread on rights constitutionally reserved to the States*.”⁵⁹ The extent of Congress’s power to enact legislation to enforce the reconstruction amendments was not at issue. Thus, it is unsurprising that the *Lopez* Court described its review in rational basis terms. As discussed above, this is the precise point that gave rise to the “rationality” language in the first place.⁶⁰ Lest there be any doubt whether *Lopez* reaffirmed the rationality standard of review, the *Northwest Austin* Court announced that the issue remained an open question.⁶¹ Further, given that the two enforcement clauses should be treated coextensively, it is telling that all Supreme Court cases reviewing legislation adopted under Congress’s Fourteenth Amendment power have applied the more stringent form of review.⁶²

B. THE EFFECTS TEST IS NOT CONGRUENT AND PROPORTIONAL TO ENFORCING FIFTEENTH AMENDMENT RIGHTS

The Fourteenth Amendment bans only disparate treatment—i.e., intentional discrimination—on the basis of race, not disparate impact.⁶³ Disparate impact alone cannot justify a government’s race-based action. Similarly, the Supreme Court has also held that the Fifteenth Amendment only reaches intentional discrimination.⁶⁴ Conversely, the effects test only reaches racially disparate impacts.⁶⁵ Accordingly, section 5 of the Voting Rights

59. *Lopez*, 525 U.S. at 282 (emphasis added).

60. See *supra* Part III.A.2.

61. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009).

62. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 639 (1999) (reviewing the Patent and Plant Variety Protection Remedy Clarification Act under congruence and proportionality); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81-91 (2000) (using the same review for the Age Discrimination in Employment Act); *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-74 (2001) (discussing Title I of the Americans with Disabilities Act); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728-740 (2003) (discussing the Family and Medical Leave Act); *Tennessee v. Lane*, 541 U.S. 509, 519-34 (discussing the Americans with Disabilities Act).

63. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (citation omitted) (“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.”); *Washington v. Davis*, 426 U.S. 229, 238-46 (1976) (finding no violation solely based on racially disparate impact).

64. See, e.g., *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) (citations omitted) (“[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote ‘on account of race, color, or previous condition of servitude.’”).

65. To be sure, section 5(a) of the Voting Rights Act also prohibits voting practices that are adopted with the purpose of abridging the right to vote on the basis of race. See 42 U.S.C. § 1973c(a) (2006). That language does not raise the equal protection concerns addressed in this Article.

Act can require preclearance denial where only disparate impact, and not intentional discrimination, is proven.

To the extent that Congress has the constitutional authority to rectify racially disparate impacts, however, it must demonstrate that there is “congruence and proportionality” to rights respected by the Fifteenth Amendment. Congress must show that its means—banning racially disparate impacts—is tied to ending intentional racial discrimination in voting. Yet, the 2006 reauthorization of the Voting Rights Act makes no effort to tie its ban on disparate impacts in voting to intentional discrimination.⁶⁶ To the contrary, “the record reads like an after the fact justification rather than a serious effort to provide constitutional justification for the reauthorization.”⁶⁷

In 2014, the effects test is not needed to remedy widespread intentional discrimination. By 2009, African Americans accounted for over 600 seats in state legislatures.⁶⁸ In many of the states in the Deep South—like Mississippi, Alabama, and Georgia—the percentage of African Americans mirrors the racial makeup of the state.⁶⁹ Further, in many other states, African-American representation exceeds population levels.⁷⁰ And no state with a population of African Americans greater than three percent failed to elect an African American to its state legislature.⁷¹

As would be expected with these numbers, there are very few instances today of intentional discrimination in state redistricting. According to the DOJ, only thirteen preclearance objections in the past twelve years involved allegations of intentional discrimination in redistricting. But a closer examination of those thirteen cases reveals that the number is even lower. For example, the DOJ inferred intentional discrimination in five of the thirteen cases, simply because the jurisdiction rejected plans submitted by politically interested groups like the National Association for the Advancement of Colored People (NAACP).⁷²

66. See Clegg & Chavez, *supra* note 29, at 568-69 (demonstrating how the congressional justifications for the effects test are not tied to intentional discrimination).

67. *Id.*

68. Number of African American Legislators, NAT'L CONF. OF ST. LEGISLATURES 2009, <http://www.ncsl.org/legislatures-elections/legisdata/african-american-legislators-2009.aspx> (last visited Jan. 1, 2014).

69. *Id.*

70. *Id.*

71. *Id.*

72. Letter from Thomas E. Perez, Assistant Attorney General, to Everett T. Sanders (Apr. 30, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_043012_ms.pdf (stating that the rejection of NAACP plan was indicative of intent to discriminate); Letter from Thomas E. Perez, Assistant Attorney General, to Tommie S. Cardin (Oct. 4, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_100411.pdf (stating that the rejection of the plan and the anecdotal interviews were sufficient to show discrimination); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Charles T. Edens (June 27, 2002), *availa-*

For example, the DOJ inferred purposeful discrimination in 2002 when a Virginia county did not adopt proposed alternative plans favored by the “black community.”⁷³ According to the DOJ, the county’s decision to reject the plan was pretext, but the DOJ cited no evidence in support of its position. Later that year, the DOJ again inferred intentional discrimination because South Carolina failed to give proper consideration to alternatives proposed by interest groups.⁷⁴ In neither example did the DOJ explain what actions—short of adopting the plans proposed by the interest groups—would have satisfied section 5.

The DOJ’s actions contradict clear Supreme Court precedent holding that jurisdictions are not required to establish “minority districts wherever possible.”⁷⁵ *Miller v. Johnson* concerned the DOJ’s repeated refusal to pre-clear a Georgia redistricting plan that did not maximize black voting strength as DOJ urged it to do. After multiple denials, Georgia caved and simply adopted the “max-black plan” offered by the DOJ. After the DOJ approved that plan, a challenge was brought under the Equal Protection Clause. The Court agreed that districts should not be drawn along racial lines, and chided the DOJ’s section 5 enforcement strategy as precisely the type of action forbidden by equal protection.⁷⁶ While *Miller* may have cabined the DOJ’s overt efforts to draw voting districts along racial lines, there is little doubt that the DOJ’s primary enforcement strategy is to engage in racial gerrymandering.⁷⁷

DOJ’s enforcement of the effects test is done to racially engineer voting districts.⁷⁸ That purpose is in direct conflict with equal protection, and can certainly not be said to be congruent and proportional to the rights protected by the Fifteenth Amendment.

ble at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_062702.pdf(discussing the rejection of the proposed plan and 3-3-1 district); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones (Sept. 3, 2002), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_090302.pdf(stating that the failure to adopt the plan shows “intent to retrogress”); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to William D. Sleeper (Apr. 29, 2002), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_042902.pdf(discussing the failure to adopt the proposed plan).

73. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to William D. Sleeper (Apr. 29, 2002) available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_042902.pdf at 3.

74. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones, Senior Assistant Attorney General (Sept. 3, 2002), available at http://justice.gov/crt/about/vot/sec_5/ltr/l_090302.php, at 2.

75. *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (Kennedy, J., concurring).

76. *Id.* at 927.

77. Clegg, *supra* note 21, at 40.

78. *Shelby Cnty. v. Holder*, 679 F.3d 848, 902-03 (D.C. Cir. 2012) (Williams, J., dissenting).

IV. WHY THE EFFECTS TEST VIOLATES EQUAL PROTECTION

The effects test, in addition to being an unconstitutional exercise of congressional power under the Fifteenth Amendment, also violates the Equal Protection Clause. A facial equal protection challenge to the effects test could be brought on two separate bases: (1) an overt challenge to a race-conscious law; or, (2) as a challenge to a congressional law that encourages local and state governments to engage in race-based decision making. In addition, an as-applied challenge could be brought against the effects test on the grounds that its primary purpose is, and for a long time has been, to encourage presumptively unconstitutional race-based gerrymandering.

A. THE EFFECTS TEST IS AN OVERT RACIAL CLASSIFICATION

In the years immediately preceding the enactment of the Voting Rights Act, the Supreme Court looked to the Equal Protection Clause to ensure equal access to the ballot box.⁷⁹ “[T]he Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”⁸⁰ Two years later, the Voting Rights Act was passed to enforce the rights guaranteed by the Fifteenth Amendment. The Act opposed race-conscious voting districts⁸¹ and was created to ensure that all individuals be given the right to vote.⁸² Under the Equal Protection Clause, the Supreme Court struck down attempts to racially gerrymander voting districts.⁸³

The Fifteenth Amendment right to vote as well as the equal protection guarantees in the Fifth and Fourteenth Amendments protect individuals, “*not groups*.”⁸⁴ Individuality is at the heart of these constitutional amend-

79. *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (“Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.”).

80. *Id.* at 380.

81. *Cf. Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) (explaining why race-specific districts are antithetical to the principle of equality).

82. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 582-94 (1969) (Harlan, J., dissenting).

83. *See Miller v. Johnson*, 515 U.S. 900, 927-28 (1995) (“It takes a shortsighted and unauthorized view of the Voting Rights Act to . . . demand the very racial stereotyping the Fourteenth Amendment forbids.”).

84. *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added). The Court emphasized that recognizing equal protection as an individual right—and not a group right—is the bedrock principle of all equal protection jurisprudence. *Id.* “The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” *Shelley v. Kraemer*, 334 U.S. 1, 22

ments in order to ensure that persons are treated as individuals, “not as simply components of a racial . . . class,” because “[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.”⁸⁵

The effects test contravenes this hallmark principle of equal protection law. It requires cataloging individual voters into broad racial groups—e.g., “Hispanic” or “African American”—and determining the validity of voting policies according to the effect on those groups.⁸⁶ Yet it is improper to catalog individuals under the law in this manner, as neither individuals’ voting preferences nor everyday experiences are susceptible to such broad generalizations.⁸⁷ Nevertheless, the effects test uses these racial group identities to dole out preferred voting policies, thereby necessarily rejecting the individuality of voters.⁸⁸ Accordingly, it “bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”⁸⁹

The Supreme Court has taken a harsh view of policies that are reliant on group-based stereotypes, because they “promote notions of racial inferiority and lead to a politics of racial hostility.”⁹⁰ The political rights of individuals that are supposed to be protected by the Voting Rights Act are secondary to the group-based rights enforced by the effects test, and “the assignment of group identity becomes the crucial determinant of everything else for the individual.”⁹¹ Individuals—both inside and outside of those racial groups—are required to perpetuate a stereotype that all members of

(1948). *See also* *Hirabayshi v. United States*, 320 U.S. 81, 100 (1943); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

85. *Miller*, 515 U.S. at 911 (citation and quotation marks omitted).

86. 42 U.S.C. § 1973c(b) (2006).

87. *See* PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 25 (2003) (stating that there is nothing inherent in individuals classified into contemporary racial groups, i.e., “black,” “Asian,” “Hispanic,” that justifies laws treating them differently).

88. *Cf.* Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn its Flawed Decision in Grutter*, 15 *TEX. REV. L. & POL.* 437, 484 (2011) (demonstrating that racial preferences in university admissions perpetuate the same pernicious group-based stereotypes).

89. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

90. *City of Richmond v. Croson*, 488 U.S. 469, 493-94 (1989) (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 298 (1978)).

91. WOOD, *supra* note 87, at 636.

that group vote alike.⁹² “[I]t validates and reinforces the dehumanizing habit of judging people by stereotypes.”⁹³

Because the effects test cannot treat voters as individuals, it perpetuates these pernicious group-based stereotypes. The effects test focuses on a racial group’s ability to vote as a bloc and elect the “candidate of [its] choice.”⁹⁴ Instead of reinforcing the individual right to vote irrespective of one’s race, the effects test eschews individual rights in favor of a perceived group right to elect a racial group’s “candidate[] of [its] choice.”⁹⁵ By transforming the right to vote from an individual right into a racial-group right, individuals only count insofar as they embody their racial group identity.

As *Shelby County* was making its way to the Supreme Court, Judge Williams of the D.C. Circuit Court of Appeals recognized this flaw in the effects test.⁹⁶ As a racial group does not vote as a monolith, it cannot be said to have a universal “candidate[] of choice.”⁹⁷ At most, a majority of a particular racial group can be said to prefer one candidate over the other. “Thus, when the [effects test] is translated into operational English, it calls for assuring ‘the ability of a minority group’s majority to elect their preferred candidates.’”⁹⁸

By focusing on the effects a proposed voting change will have on a “racial group,” the effects test contravenes an *individual’s* right to equal protection. Recognizing racial group rights is contrary to the idea of equal protection under the law since it “literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies to others.”⁹⁹ Further, individuals within a “benefitted” racial group are denied equal protection, because some are forced to adopt candidates that are not “of their choice.” Judge Williams questioned: “[W]hat happened to the minority group’s *own minority*—those who dissent from the preferences of the minority’s majority?”¹⁰⁰ The unfortunate answer to Judge Williams’s question is that the effects test has no protections for them.¹⁰¹

92. See *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995).

93. WOOD, *supra* note 87, at 186.

94. 42 U.S.C. § 1973c(b) (2006).

95. *Id.*

96. See *Shelby Cnty. v. Holder*, 679 F.3d 848, 903-04 (D.C. Cir. 2012) (Williams, J., dissenting).

97. *Id.*

98. *Id.* Judge Williams explained the overt racial classification inherent in the effects test even more bluntly: “But the implied ‘they’ of § 5 is not a polity in itself; nor is it an association freely created by free citizens. Quite the reverse: It is a group constructed artificially by the mandate of Congress, entirely on the lines of race or ethnicity.” *Id.*

99. Clegg, *supra* note 21, at 40.

100. *Shelby County*, 679 F.3d at 903 (Williams, J., dissenting).

101. Accordingly, if one accepts the view that section 5 is needed because continued discrimination against minorities is rampant, she must also condone additional discrimina-

B. THE EFFECTS TEST ENCOURAGES RACE-BASED ACTIONS BY LOCAL AND STATE GOVERNMENTS

As established *supra*, the effects test goes beyond the reach of the Fifteenth Amendment by targeting racially disparate impacts, not intentional discrimination.¹⁰² Indeed, the effects test *only* reaches disparate impacts; it has no other use or function given that purposeful discrimination is already prohibited by section 5.¹⁰³ Thus, section 5 mirrors Title VII of the Civil Rights Act of 1964, which prohibits intentional discrimination in employment, but also added provisions in 1991 that prohibit racially disparate impacts.¹⁰⁴

The federal government cannot discriminate on the basis of race, nor can it enact laws requiring covered jurisdictions to do so.¹⁰⁵ But by forcing covered jurisdictions to avoid all racially disproportionate effects—even in the absence of past discriminatory behavior—that is precisely what the effects test requires. Even where it is conceded that a voting change was not adopted with discriminatory intent, the effects test “affirmatively requires” the federal government to act.¹⁰⁶ The comparison to Title VII’s disparate impact provisions comes because both it and the effects test “place a racial thumb on the scales,” thereby requiring government “to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.”¹⁰⁷ But equal protection is implicit in both scenarios: a federal statute is requiring state and local actors to think and act race consciously.

One difference between Title VII’s disparate impact and the section 5 effects test is worth highlighting. In a disparate impact challenge, the defendant can avoid liability if it demonstrates that the challenged practice is job related for the position in question and consistent with business necessity.¹⁰⁸ The effects test contains no similar rebuttal stage, rendering it even more constitutionally suspect. For example, in 2007 the state of Michigan

tion against minorities who fall within that racial group. The racial minority who dissents from the group choice is discriminated against twice.

102. See *supra* Part III.

103. See 42 U.S.C. § 1973c(a) (2006).

104. 42 U.S.C. § 2000e-2(a), (k)(1)(A) (2006).

105. See *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). See also *Buchanan v. Warley*, 245 U.S. 60, 78-82 (1917) (holding unconstitutional a Kentucky law that forbade individuals from selling certain property to persons of color).

106. See *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

107. *Id.* See also Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 61-70 (stating that disparate impact raises serious equal protection concerns); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344-45 (2010) (stating the same).

108. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

decided to close one of its Secretary of State branch offices.¹⁰⁹ The DOJ refused to preclear the change, because it would have a disproportionate effect on minority voters.¹¹⁰ The DOJ was clear that any change with a “retrogressive effect” will not survive section 5 review.¹¹¹

Even outside the context of both Title VII and the Voting Rights Act, courts have recognized that disparate impact theory can force actors outside the federal government to engage in unconstitutional race-conscious decision making. In *Lutheran Church-Missouri Synod v. FCC*,¹¹² the D.C. Circuit rejected the government’s claim that government actions that pressure or induce private parties to enact race-conscious hiring practices are immunized from strict scrutiny. The court invalidated the FCC’s decision requiring private parties to make race-conscious hiring decisions to achieve “proper” diversity.¹¹³ “[T]he purpose of statistical evidence,” the court ruled, “is to expose possible discriminatory intent, not to establish a workforce that mirrors the racial breakdown of the . . . [city].”¹¹⁴ Lower courts have applied strict scrutiny to invalidate similar race-conscious schemes that pressured others outside of the federal government to use race, even when they did not require strict quotas.¹¹⁵

The government is prohibited from enforcing or enacting laws that grant preferential treatment to groups because of their perceived racial or ethnic origin.¹¹⁶ Yet the effects test is designed for precisely this purpose—to allow racial groups incontestable voting districts. And experience has shown that the DOJ enforces the effects test to make safe voting districts. Thus, as demonstrated below, even if the effects test is not deemed a facial violation of the Equal Protection Clause, its application makes the unconstitutionality obvious.¹¹⁷

109. Letter from Grace Chung Becker, Assistant Attorney General, to Brian DeBano, Chief of Staff and Chief Operating Officer, and Christopher Thomas, Director of Elections (Dec. 26, 2007), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122607.pdf.

110. *Id.* at 2-3.

111. *Id.*

112. *Lutheran Church-Mo. Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998).

113. *See id.* at 492.

114. *Id.* at 494.

115. *See, e.g., Walker v. City of Mesquite*, 169 F.3d 973, 981-82 (5th Cir. 1999) (stating that the race-conscious requirement that public housing units be developed in predominantly nonminority residential areas triggered strict scrutiny and remanding to the lower court to determine whether requirement was constitutional); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 710-11 (9th Cir. 1997) (stating that the requirement that the contractor make race-conscious efforts triggered strict scrutiny and was unconstitutional).

116. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

117. *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

C. THE EFFECTS TEST IS APPLIED UNCONSTITUTIONALLY

Section 5 was an unqualified success at eliminating gross intentional discrimination by southern legislatures, which it was carefully crafted to do.¹¹⁸ But over the last twelve years the DOJ has only alleged exclusion of minorities in three enforcement actions.¹¹⁹ Instead of protecting minority access to the polls, the DOJ now uses the effects test to ensure racial and political gerrymandering.¹²⁰ Of the sixty-seven section 5 objections pursued since 2000, thirty-nine have centered on redistricting efforts.¹²¹ The trivial details that motivated these preclearance decisions indicate that the DOJ was more concerned with racial politics and protecting “safe districts” than with upholding Fifteenth Amendment rights.¹²²

For example, in 2002 the DOJ rejected a proposed redistricting plan in Virginia that reduced the black share of the population in one district from 55.7% to 55.2%.¹²³ The DOJ acknowledged that population changes had altered the racial makeup of the area, but nonetheless declared that the county must manipulate the district to prevent even a minor decrease in black voting strength and maintain the ability of the black population in that area to “elect their candidate of choice.”¹²⁴

An Arizona redistricting plan met a similar fate when, due to population growth, it split one majority-Hispanic district into two majority-Hispanic districts.¹²⁵ The DOJ concluded that the elimination of one district

118. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 226-29 (2009) (Thomas, J., dissenting).

119. Although the Supreme Court has already ruled that voter ID laws are constitutional, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), each of these objections involved voter ID laws. The DOJ’s charge—that they are designed to deny minorities the right to vote—is similar to the type of problem section 5 was designed to remedy. However, the DOJ’s objections also raise two legitimate concerns: (1) To what extent should the effects test’s conflict with legitimate voting practices undermine its constitutionality as a congruent and proportional means of enforcing Fifteenth Amendment rights? (2) How can section 5 be congruent and proportional to secure Fifteenth Amendment rights if an identical law is legal in one state and illegal in another?

120. See Clegg, *supra* note 21, at 40.

121. Section 5 Objection Determinations, THE U.S. DEP’T OF JUST., http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Jan 1, 2013). This webpage catalogs all the “Section 5 objections interposed, continued or withdrawn by the Attorney General since 1965” on a state-by-state basis. *Id.*

122. *Id.*

123. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Darwin Satterwhite, County Attorney (July 9, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_070902.php.

124. *Id.* at 2-3.

125. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Lisa T. Hauser and José de Jesús Rivera (May 20, 2002), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_052002.php.

with a Hispanic population of 65% and creation of two districts with Hispanic shares of the population of 51.2% and 50.6% violated the effects test, because in the new districts Hispanic voting populations were insufficient to “elect their candidate of choice.”¹²⁶

The DOJ’s interpretation of section 5 has even led it to deny preclearance to redistricting plans that don’t even reduce minority voter strength. In 2001, the DOJ rejected a proposed redistricting plan in Charleston, solely because projected population growth within the proposed district might possibly reduce black voter strength sometime in the future.¹²⁷ The DOJ acknowledged that population changes made redistricting necessary and that the proposed plan retained the correct number of majority-minority districts.¹²⁸ However, because population projections suggested that the electorate might diversify and include more white voters in one of the ‘black’ districts, the plan was deemed retrogressive.¹²⁹

Today the effects test’s main function is to create districts defined by race—not guarantee individuals the right to vote irrespective of race.¹³⁰ “In addition to the illegal and immoral purpose of racial gerrymandering, the unintended side effects of such racial gerrymandering are abundant.”¹³¹

126. *Id.* at 3.

127. Letter from R. Alex Acosta, Assistant Attorney General, to Francis I. Cantwell (Oct. 12, 2001), available at http://www.justice.gov/crt/about/vot/sec_5/ltr/l_101201.php.

128. *Id.* at 2.

129. *Id.* at 2-3.

130. State-imposed racial gerrymanders assume that black voters prefer to exercise narrow influence over a single district rather than broader influence over many different competitive districts. Safe black seats isolate the black community and also reduce electoral competition. Black voters confined to a single constituency, might well be certain of electing one black candidate, but the elected representative may be the only minority elected—or because of district politics a member of a small, heavily outnumbered and consequently ineffective band. Meanwhile, white representatives are insulated from the concerns of the black electorate and do not have to take their concerns into account. J. R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 449-50 (University of Cal. Press, Berkeley, 2d ed. rev. 1993); D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 96 (Basic Books, Inc. 1987) (stating that proportional representation would “worsen racial tensions because it distorts the political process in order to create targeted entities less likely to engage in the coalition building that is the hallmark of American politics”).

131. Many scholars have written at length about the effects of race-based gerrymandering. See JIM SLEEPER, *LIBERAL RACISM* 43-66 (1997); Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL’Y 71, 90 (2006); Roger Clegg & Joshua Thompson, *Overturn Unconstitutional Voting Rights Act*, WASHINGTON TIMES, Nov. 14, 2012; Abigail Thernstrom, *Racial Gerrymandering*, NATIONAL REVIEW (Apr. 29, 2011), available at <http://www.nationalreview.com/articles/265956/racial-gerrymandering-abigail-thernstrom>. See generally Clegg & Chavez, *supra* note 29 (citing, *inter alia*, CHRISTOPHER M. BURKE, *THE APPEARANCE OF EQUALITY: RACIAL GERRYMANDERING, REDISTRICTING, AND THE SUPREME COURT* 32-33 (1999); Katharine Inglis Butler, *Racial Fairness and Traditional*

D. THE EFFECTS TEST FAILS STRICT SCRUTINY REVIEW

Decisions of the Supreme Court have made clear that distinctions between persons based solely upon their race can only be upheld under “extraordinary justification.”¹³² The core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions.¹³³ Any racial classification by the government is “inherently suspect”¹³⁴ and “presumptively invalid.”¹³⁵ Accordingly, to survive an equal protection challenge, the effects test would need to be a necessary means to furthering a compelling government interest.¹³⁶

The Supreme Court has required that any race-based action undertaken to remedy intentional discrimination must specifically identify the discrimination sought to be remedied.¹³⁷ Moreover, the government must also have a “strong basis in evidence” that the means adopted will achieve that goal.¹³⁸ Both requirements go to whether the race-based action is narrowly tailored to the government’s compelling interest in remedying intentional race-based discrimination.¹³⁹ But the effects test fails these requirements: there is little to no evidence that the effects test was designed to remedy intentional discrimination,¹⁴⁰ and there is even less evidence that it is needed to do so.¹⁴¹

V. CONCLUSION

Are elected minority representatives supposed to represent minorities, contribute a minority viewpoint, and be the spokesperson for millions of

Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation, 57 S.C. L. REV. 749, 780-81 (2006).

132. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Racial classifications are “by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Where the government proposes to ensure participation of “some specified percentage of a particular group merely because of its race,” such a preferential purpose must be rejected as facially invalid. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (plurality opinion).

133. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495 (1989).

134. *Adarand*, 515 U.S. at 223 (citation omitted).

135. *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

136. *Adarand*, 515 U.S. at 227.

137. *City of Richmond v. Croson*, 488 U.S. 469, 504 (1989).

138. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

139. *Croson*, 488 U.S. at 510.

140. *See supra* Part III.B.

141. *See* Edward Blum & Lauren Campbell, AM. ENTER. INST., ASSESSMENT OF VOTING RIGHTS PROGRESS IN JURISDICTIONS COVERED UNDER SECTION FIVE OF THE VOTING RIGHTS ACT (2006), available at http://www.aei.org/files/2006/05/15/20060515_BlumCampbellreport.pdf.

individuals who may share similar skin tones? That is how the effects test views them. But this is not how our civil rights ought to operate. Individuals should be treated as such and not as embodiments of a fictional racial viewpoint.

The effects test sows the seeds of racial discord by requiring governments to make decisions along racial lines. But experience has shown that continuing to make race-based decisions is not the way to end discrimination. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁴²

Racial bloc voting is not needed to achieve voting equality. The Voting Rights Act’s purpose is to provide equality of opportunity, not equality of outcome. Minorities and majorities should be able to form voting coalitions on any basis; race should not guarantee voting outcomes. Yet this is the reality of the effects test. By encouraging racial districts and equality of outcome, the effects test distorts the abilities of minority candidates and political organizations. It also maligns the real and substantial achievements that minorities attain, as well as their expected real and substantial achievements in the future.¹⁴³ Legislation that so blatantly violates equal protection cannot be held to be a constitutional means to ensure the Fifteenth Amendment’s guarantee of the right to vote irrespective of one’s race.

142. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

143. *See id.* at 157. *Cf.* THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 49-50 (William Morrow & Co. 1984) (stating that black representation was increasing in many professions prior to the Civil Rights Act of 1964).