THE VOTING RIGHTS ACT AND THE FIFTEENTH AMENDMENT
STANDARD OF REVIEW

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ABSTRACT

One of the most successful pieces of civil rights legislation in American History, the Voting Rights Act of 1965 helped achieve a level of black enfranchisement that had seemed impossible since the ratification of the Fifteenth Amendment nearly a century earlier. Indispensable to the VRA’s success was Section 5, which turns the tables on jurisdictions deemed to be the worst offenders by creating a presumption of racial discrimination that had to be overcome by “preclearing” any change in voting practices with federal authorities. Although the VRA has withstood a number of constitutional challenges over the years, the Supreme Court recently held that the formula determining which jurisdictions are subject to preclearance is outdated and unconstitutional. Left unresolved, however, is what standard of review should apply in assessing the constitutionality of statutes enacted under Congress’s Fifteenth Amendment enforcement power.

This Article argues that if the Court eventually applies the well-established Fourteenth Amendment “congruence and proportionality” standard, this will be a rather remarkable doctrinal development. Instead, legislation enforcing the Fifteenth Amendment should be subject to a more deferential standard for several reasons. First, there is no reason why the similarities in the two amendments’ enforcement clauses must necessarily lead to identical enforcement powers. Second, the Supreme Court has not, in fact, applied the Fourteenth Amendment standard to Section 5. Third, because the subject matter of the Fifteenth Amendment is so much narrower than that of the Fourteenth, the Court need not worry about granting more deference to Congress in enforcing it. Finally, to prevent the Fifteenth Amendment from being swallowed by the Fourteenth, the Court should decline to conflate the applicable standards of review.

INTRODUCTION

The Voting Rights Act of 1965 (VRA) has been one of the most successful pieces of civil rights legislation in American history. Enacted at the height of the Civil Rights Movement, the VRA helped achieve, in just a few years, a level of meaningful black enfranchise-
ment in the South that had seemed impossible for nearly a hundred years since the passage of the Fifteenth Amendment to the Constitution.

Indispensable to the VRA’s success is Section 5. This provision was specifically designed to extend the protections of the VRA into those states and jurisdictions that most obstinately clung to discriminatory practices. To achieve this end, Section 5 turned the tables on those jurisdictions deemed to be the worst offenders, essentially creating the presumption that any change in voting practices or procedures, however minor, was racially discriminatory. In order to effect any change in election practices, the jurisdiction had to overcome this presumption by “preclearing” the change with federal authorities.

Though initially intended to be a temporary measure, Congress extended and amended the VRA four times. It withstood a number of challenges to its constitutionality in the United States Supreme Court. Then, in November 2012, the Court granted certiorari on the question of whether the 2006 reauthorization exceeded Congress’s authority under the Fourteenth and Fifteenth Amendments. One of the great unresolved questions was what standard of review the Court would apply to legislation enacted pursuant to Congress’s power to enforce the Fifteenth Amendment. Previously, the Court had specifically avoided specifying the correct standard, but the Court of Appeals stated that its reading of Supreme Court precedent “send[s] a

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1 To avoid confusion, this Article will refer to sections of the VRA with the word “Section” written out, and sections of constitutional amendments with the § symbol. For example, “Section 5” refers to a portion of the VRA, while “§ 5” refers to U.S. Const. amend. XIV, § 5. In addition, statutes and their sections are referred to by their conventional names, with citations to the codified statute provided in footnotes where helpful. Thus, quotations from Section 5 will be cited to 42 U.S.C. § 1973c.


3 See Lopez v. Monterey Cnty., 525 U.S. 266, 269 (1999) (holding that the Voting Rights Act’s requirements are applicable to changes made in a “noncovered State” if those changes will have an effect on changes made in a “covered county”); City of Rome v. United States, 446 U.S. 156, 172 (1980) (holding that Congress “plainly intended” that a voting procedure not be granted preclearance unless it lacked both discriminatory purpose and effect); Georgia v. United States, 411 U.S. 526, 531–35 (1973) (holding that reapportionment changes that could have the effect of decreasing minority voting power constitute “practices” that are subject to Section 5 protection); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding Section 5 and other sections of the Voting Rights Act against a constitutional challenge).


powerful signal that congruence and proportionality is the appropriate standard of review.”6 “Congruence and proportionality” is the well-established standard for evaluating federal legislation enacted pursuant to Congress’s power to enforce the protections of the Fourteenth Amendment.7 The Voting Rights Act, however, was enacted first and foremost under the Fifteenth Amendment.8 Moreover, shortly after the VRA was first enacted, the Court upheld Section 5 under a standard that found congressional power to use “any rational means” to enforce the Amendment.9

In its decision in Shelby County, however, the Court avoided the question of the standard of review applicable to Fifteenth Amendment legislation. Rather than determining the constitutionality of preclearance itself, the Court struck down the coverage formula, Section 4(b), which determined which states and jurisdictions would be required to submit changes in election practices for preclearance by federal authorities.10 In so doing, the Court relied on a rather novel principle of the states’ “equal sovereignty.”11 But in striking down the coverage formula, the Court specifically declined to invalidate the preclearance procedures of Section 5 itself, and indeed invited Congress to enact another coverage formula based on more current conditions.12 Whether or not Congress does so, the Shelby County Court specifically reserved the question of the constitutionality of Section 5, but implied that such a determination might be appropriate in some future case.13

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6 Shelby Cnty., 679 F.3d at 859. Though divided 2 to 1 on the constitutionality of the preclearance regime, the three circuit judges agreed on the applicable standard. See id. at 885 (Williams, J., dissenting).


8 There is significant overlap, of course, in Congress’s enforcement powers under the two amendments, and the Voting Rights Act might conceivably be held constitutional under the Fourteenth Amendment’s enforcement power, the Fifteenth’s, both, or neither. This Article will argue, however, that it is not a foregone conclusion that the two amendments grant Congress powers that must be evaluated under the same standard. Moreover, it is obvious that to be constitutional, legislation need only fall within the scope of one enforcement clause or the other. The question is therefore really whether the enactment of Section 5 exceeded Congress’s power under the Fourteenth or Fifteenth Amendment, and the question of the appropriate standard is relevant.

9 Katzenbach, 383 U.S. at 324.


11 Id. at 2623.

12 See id. at 2631 (“Such a formula . . . justif[i]es] such an ’extraordinary departure from the traditional course of relations between the States and the Federal Government.’” (citation omitted)).

13 Id. (“We issue no holding on § 5 itself . . . .”).
This Article will argue that, if and when the Court revisits this area, it should decline to take the remarkable (if not unexpected) step of subjecting legislation enacted pursuant to § 2 of the Fifteenth Amendment to more than rationality review. Indeed, based on the history and subject matter of the Fourteenth and Fifteenth Amendments, the standard of review the Court applies to Fifteenth Amendment legislation ought to be significantly more deferential. Part I will examine relevant background, including a historical summary of the adoption of the Reconstruction Amendments, the passage of the VRA, and the subsequent effects of the Act’s implementation. Part II will argue that, in the first place, there is no reason why the similarities in the two amendments’ enforcement clauses must necessarily lead to identical congressional enforcement powers. Part III adopts a more doctrinal approach and argues that the Supreme Court has not, in fact, ever applied the current Fourteenth Amendment standard to Section 5. Part IV will take the position that, because the subject matter of the Fifteenth Amendment is so much narrower than that of the Fourteenth, the Court may grant more deference to Congress in enforcing it. Moreover, to prevent the Fifteenth Amendment from being swallowed by the Fourteenth, the Court should decline to conflate the applicable standards of review.

I. BACKGROUND

A. The Fourteenth & Fifteenth Amendments

Following the ratification of the Thirteenth Amendment in December 1865, the attention of Republicans in Congress turned towards establishing civil rights for the newly freed blacks. The Civil Rights Act of 1866 was passed over President Andrew Johnson’s veto and gave all persons in the United States the same rights as whites to enter into contracts, to sue, and the like.


See 42 U.S.C. § 1981(a), (b) (2006) (providing a guarantee of equal rights to “all persons within the jurisdiction of the United States” including the equal right “to make and enforce contracts”).
zenship to former slaves, the evidence suggests that the Fourteenth Amendment was not understood or intended by its framers to guarantee black suffrage.\footnote{Maltz, supra note 15, at 118–20.} For one thing, a proposal dealing with the right to vote was rejected at the last minute and replaced with a provision adjusting congressional representation based on population.\footnote{Id. at 118; see also U.S. Const. amend. XIV, § 2, cl. 1 (modifying the “three-fifths” provision of Article I, § 2 by “counting the whole number of persons in each State, excluding Indians not taxed”).} For another, the provision most likely to grant suffrage, the Privileges and Immunities Clause,\footnote{See U.S. Const. amend. XIV, § 1, cl. 2.} would have done so only if the franchise was understood as a fundamental right of all citizens and not a creation of state law, a view that was, at best, controversial at the time.\footnote{Cf. Maltz, supra note 15, at 118–19 (quoting Jacob Howard as saying that the right to vote “has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society”).} Thus, the ratification of the Fourteenth Amendment left the question of black suffrage unresolved.\footnote{For a discussion of the developments in black suffrage between the passage of the Fourteenth and Fifteenth Amendments, see generally id. at 121–41.} However, Congress began to mandate black suffrage in areas it deemed politically safe, including the District of Columbia, federal territories, and the former Confederacy as a condition of readmission to the Union.\footnote{Daniel Hays Lowenstein et al., Election Law: Cases and Materials 29 (5th ed. 2012).}

Shortly after the election of 1868, a consensus began to develop among Republicans in Congress that a constitutional amendment should be drafted to finally settle the issue of black suffrage.\footnote{See Maltz, supra note 15, at 142–45 (“Within weeks of the [1868] election, representatives from a variety of viewpoints within the Republican party renewed the call for a constitutional amendment to finally settle the suffrage issue.” (internal citation omitted)).} Though some radical Republicans argued that authority to ensure that former slaves had the right to vote existed pursuant to Congress’s power to enforce the Thirteenth and Fourteenth Amendments, moderate Republicans and Democrats did not agree.\footnote{See id. at 147 (“Both Democrats and more moderate Republicans rose to challenge the assertion that Congress had authority to regulate suffrage without a constitutional amendment.”).} In drafting the Amendment, the debate concerned mostly its scope, including concerns that an amendment prohibiting the denial of voting rights on the basis of race alone would leave states free to effectively deny the vote on facially race-neutral grounds.\footnote{See id. (“As Samuel Shellabarger pointed out, a mere requirement of impartial suffrage could be easily circumvented; imposition of race-neutral criteria such as property or education could effectively disfranchise most blacks, particularly in the former slave states.”).} Nevertheless,
the more moderate and conservative forces in Congress forced a compromise, while radical Republicans accepted the narrower language as better than nothing. In the end, the Amendment as adopted provided that the right to vote could not be “denied or abridged . . . on account of race, color, or previous condition of servitude” and that “Congress shall have power to enforce this article by appropriate legislation.” It is worth noting that the framers of the Fifteenth Amendment not only “intend[ed] to leave untouched those qualifications that have a racially disproportionate impact; even those qualifications that [were] intended to disfranchise blacks were purposefully left intact.”

B. The Voting Rights Act of 1965

It goes virtually without saying that the results of the Fifteenth Amendment fell woefully short in terms of actually enabling blacks to cast a vote. The Fifteenth Amendment was “de facto repealed, for all practical purposes, in the South” and became “the most willfully ignored [amendment] in constitutional history.” The disparity between the promise of the Fifteenth Amendment and the realities of the post-Reconstruction South was a result of the very compromise that made the Amendment’s passage possible, that is, by the continuing permissibility of voting requirements that were facially neutral even if intentionally discriminatory. The familiar litany of legal devices used to thwart black voting—secret ballots, poll taxes, literacy tests, grandfather clauses—was of course augmented by outright fraud and violent intimidation. The result was that in 1965, just prior to the enactment of the VRA, and nearly a century after the passage of the Fifteenth Amendment, black voter registration in the seven states

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26 See id. at 155 (noting that “conservative Republicans forced more radical party members to accept a very narrow formulation of the suffrage amendment”).
27 U.S. CONST. amend. XV, § 1.
28 Id. § 2.
29 MALTZ, supra note 15, at 156 (emphasis omitted).
30 Richard H. Pildes, Introduction to THE FUTURE OF THE VOTING RIGHTS ACT xi, xii (David L. Epstein et al. eds., 2006).
soon-to-be covered by Section 5 was 29.3%. In Mississippi, it was 6.7%. A series of civil rights demonstrations demanding voting rights came to a head in a brutal crackdown on demonstrators by state troopers in Selma, Alabama on March 7, 1965. Just days later, President Lyndon Johnson proposed the Voting Rights Act, which he signed into law on August 6. The new law contained several provisions meant to address the dramatic inequities in voting. Section 2, when originally passed, essentially reiterated the Fifteenth Amendment, and plaintiffs could challenge a discriminatory voting scheme either under Section 2 or under the Constitution itself. Other provisions, however, targeted those jurisdictions deemed to be the worst offenders against black voting rights. Section 4 placed more stringent restrictions on those jurisdictions that “maintained on November 1, 1964, any test or device,” such as a literacy or educational test, or which had less than fifty percent voter registration or participation in the 1964 election. According to the Court of Appeals in Shelby County, “Congress chose these criteria carefully. It knew precisely which states it sought to cover and crafted the criteria to capture those jurisdictions.” Since the coverage formula “could be both over- and under-inclusive,” Congress included procedures to remove a jurisdiction (“bailout”) as well as to capture additional jurisdictions and subject them to coverage (“bail-in”).

What really made the VRA, in the words of President Johnson, the “goddamnedest toughest” law the Attorney General could come up with was the preclearance requirement of Section 5. Case-by-case litigation had “done little to cure the problem of voting discrimination” in the face of “unremitting and ingenious defiance” of the Fif-

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33 Id.
34 See id. at 16 (detailing the events of Bloody Sunday, the civil rights march on March 7, 1965 that demanded increased voting rights).
35 Id. at 16–17.
40 Davidson, supra note 32, at 17.
teenth Amendment on the part of much of the country. Section 5 shifted the burden of proof by requiring preclearance of any change in a voting “standard, practice, or procedure” in the jurisdictions covered by Section 4. The Attorney General (or a three-judge panel of the District Court for the District of D.C.) must determine that the change has neither the “purpose nor . . . effect of denying or abridging the right to vote on account of race or color, or” on the basis of membership in a language minority group.

C. Subsequent History

Almost as soon as it was enacted, the constitutionality of Section 5 was challenged in the United States Supreme Court. In upholding the law, the Court made the following finding:

The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.

Although the Court stated that this test “is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States,” including those under each of the enforcement clauses of the Reconstruction amendments, South Carolina v. Katzenbach nevertheless clearly articulated a standard of review for Fifteenth Amendment legislation that the Court did not explicitly call into question for over forty years.

The scope of congressional power to enforce the Fifteenth Amendment was further clarified in Allen v. State Board of Elections, which addressed the issue of whether Section 5 applies only to the core right to cast a ballot or extends to other changes in practices related to voting. The Court explained that the VRA “gives a broad interpretation to the right to vote, recognizing that voting includes

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42 Id. at 309.
44 Id.
45 Katzenbach, 383 U.S. at 324.
46 Id. at 326.
49 Id. at 550. Among the proposed changes was a change from election of members of a county board of supervisors from single-member districts to at-large. Id. Another proposal was to change the position of an education superintendent from elected to appointed. Id. at 550–51.
‘all action necessary to make a vote effective.’ 50 Congress’s decision to extend the VRA in 1970, without adding language contrary to the holding in *Allen*, is arguably a “ratification of that decision.” 51

It is difficult to overstate the Voting Rights Act’s success in extending de facto voting rights to blacks. “The act simply overwhelmed the major bulwarks of the disenfranchising system” and, in the covered states, led to a near doubling in the black voter registration rate to 56.6% by 1972. 52 Since it was enacted, Congress has extended the VRA four times, most recently in 2006 for twenty-five years. 53 Though in most respects the coverage formula has remained unchanged since 1965, 54 it was extended in the 1975 amendments to those jurisdictions that “provided any registration or voting [materials] . . . only in the English language” and where more than five percent of voting-age citizens “are members of a single language minority.” 55 The goal of this change was to extend coverage to Texas, which despite its history of voting discrimination against Spanish-speakers, had never used an actual literacy test and thus was not included under the prior coverage formula. 56

Before the decision in *Shelby County*, the jurisdictions covered by Section 4 included the entirety of the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. 57

Section 5 of the Voting Rights Act has withstood several attacks on its constitutionality over the years. 58 In 2009, however, the Supreme Court heard a case that directly called the 2006 extension of Section 5 into question. In *Northwest Austin Municipal District Number One v. Holder*, the appellant was a utility district that sought bailout from the preclearance requirement of Section 5 or, in the alternative, a find-

51 LOWENSTEIN ET AL., *supra* note 22, at 168; *see also* Georgia v. United States, 411 U.S. 526, 533 (1973) (“Had Congress disagreed with the interpretation of [Section] 5 in *Allen*, it had ample opportunity to amend the statute.”).
52 *Davidson, supra* note 32, at 21.
54 *Id.* at 855 (comparing Section 4 as it currently exists with its original version).
56 *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 58 (2009) (discussing the myriad of methods the Texan government used to disenfranchise Spanish-speakers, and the consequent expansion of Section 4 to prevent this discrimination).
ing that Section 5 was unconstitutional. The Court held that the
district was entitled to bailout, thus avoiding the constitutional ques-
tion.  

The *Northwest Austin* Court engaged in what was arguably an “act of statesmanship” in avoiding the constitutional question. Professor Richard Hasen views the case as “a questionable application of the doctrine” made possible by a “conspiracy of silence on the Court” in which no Justice, not even the partially-dissenting Justice Clarence Thomas, questioned the analysis. He suggests that the medicine of drastic constitutional change “goes down more palatably when in small doses.” A perhaps less cynical view is that the Court intended to send a signal to Congress that it needed to make changes to the VRA. According to Professor Ellen Katz, the “Court structured its opinion to encourage, to prod, and—almost certainly—to require Congress to act.” Nevertheless, “Congress has shown no inclination to consider amending Section 5 since [Northwest Austin] came down.” In the meantime, of course, the Court decided to hear a case in which the question of Section 5’s constitutionality was unavoidable.

In stopping short of ruling on Section 5’s constitutionality in *Northwest Austin* the Court also did not say what standard of review should apply when determining whether Congress acts under the enforcement clause of the Fifteenth Amendment. Nevertheless, the Court presented two options. The first possibility is the “congruence and proportionality” standard borrowed from the Court’s Fourteenth Amendment jurisprudence. The other possibility comes from the case in which the Court first upheld Section 5, and would require “that the legislation be a ‘rational means to effectuate the constitu-

60 See id.
63 Id. at 206.
64 Id. at 223.
65 Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 999 (2009); see also Stuart Taylor, *Judicial Statesmanship on Voting Rights*, NAT’L JOURNAL, June 27, 2009, at 15 (arguing that the *Northwest Austin* Court has “sent Congress a clear message: Fix the constitutional problems, or Section 5 may be doomed”).
66 LOWENSTEIN ET AL., supra note 22, at 201.
68 See id. (citing City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).
According to the Court, however, the preclearance requirements and the coverage formula raise serious constitutional questions under either test.\(^{69}\)

In *Shelby County*, the case decided by the Court last term, the petitioner, Shelby County, Alabama, had been subject to preclearance since the VRA was enacted in 1965.\(^{71}\) The County argued that, unlike the plaintiff in *Northwest Austin*, it was ineligible for bailout because of a 2008 objection by the Justice Department to a redistricting plan submitted by a city within its borders.\(^{72}\) The County therefore sought “a declaration that Section 5 [is] . . . facially unconstitutional, as well as a permanent injunction prohibiting” its enforcement.\(^{75}\) Both the district court and the court of appeals found for the Attorney General and upheld Section 5.\(^{74}\) Interestingly, however, the two courts took distinct approaches to the question of the standard of review to apply in making this determination.

Rather than finding that two distinct standards apply in Fourteenth and Fifteenth Amendment enforcement cases, or that the *Boerne* standard has superseded *Katzenbach*, the district court argued that *Boerne* represents a “refined version of the same method of analysis utilized in *Katzenbach*.”\(^{75}\) The court of appeals, by contrast, “read *Northwest Austin* as sending a powerful signal that congruence and proportionality [i.e., *Boerne*] is the appropriate standard” for legislation enacted under the Fifteenth Amendment.\(^{76}\) Though this is the standard the court applied, it stopped just short of holding definitively that this is the correct standard, since *Boerne* is “arguably more rigorous” than the “any rational means” standard of *Katzenbach*.\(^{77}\) Thus, though the court of appeals did not conflate the standards as did the district court, it reasoned that since Section 5 would survive *Boerne*, it would also survive *Katzenbach*.\(^{78}\) In this way, the court applied *Boerne* while managing to avoid choosing a standard.

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\(^{69}\) *Id.* (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)).

\(^{70}\) *Id.*


\(^{72}\) *See id.* at 443; *see also* 42 U.S.C. § 1973b(a)(1)(E) (2006) (permitting bailout only to those jurisdictions for which “the Attorney General has not interposed any objection”).

\(^{73}\) *Shelby Cnty.*, 811 F. Supp. 2d at 443.

\(^{74}\) *Id.* at 428; *Shelby Cnty. v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012).

\(^{75}\) *Shelby Cnty.*, 811 F. Supp. 2d at 449.

\(^{76}\) *Shelby Cnty.*, 679 F.3d at 859.

\(^{77}\) *Id.*

\(^{78}\) *Id.* The D.C. Circuit upheld Section 5 over the dissent of Judge Stephen Williams. Despite their disagreement over the outcome, both the majority and dissent were in agreement that *Northwest Austin* indicates that the *Boerne* standard should apply. *See id.* at 885 (Williams, J., dissenting).
In a surprising turn of events, however, the Supreme Court took a somewhat different tack, and once again did not resolve the issue of what standard of review applies. Rather than tackling the constitutionality of Section 5, the Court instead voided the coverage formula on the grounds that it offended the “‘equal sovereignty’ among the states,” a doctrine which seems to have originated in dicta three years earlier in *Northwest Austin.* 79 The Court, in explaining why it issued no holding on Section 5 itself, invited Congress to “draft another formula based on current conditions” 80 and stated that such a formula would be “an initial prerequisite to a determination that exceptional conditions still exist” to justify preclearance at all. 81

Whether Congress will accept this invitation is a question of no small moment, although some commentators have argued that the political will to do so is unlikely to materialize. 82 Nevertheless, *Shelby County* specifically reserved the question of the constitutionality of Section 5, but implied that such a determination might be appropriate in some future case. 83 What is clear, however, is that notwithstanding the readiness of the lower courts to apply *Boerne* to legislation enforcing the Fifteenth Amendment, the Supreme Court itself has never stated with definiteness whether the legislation enacted by Congress pursuant to the enforcement clauses of the Fourteenth and Fifteenth Amendments are to be analyzed under the same standard of review. When and if the Court does make such a ruling it will represent an important doctrinal development. The remainder of this Article argues that such a ruling would be a mistake.

79 Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2623 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder 557 U.S. 193, 203 (2008)); see also Zachary S. Price, NAMUDNO’s Non-Existent Principle of State Equality, 88 N.Y.U. L. REV. ONLINE 24, 24 (2013) (arguing that the doctrine of equal sovereignty is both unjustified and without basis in precedent). Interestingly, Justice Ruth Bader Ginsburg, in dissent, perceived that the equal sovereignty analysis does in fact amount to a kind of heightened scrutiny by imposing a “double burden” requiring the government to show both “a need for continuing the preclearance regime in covered States” and also “to disprove the existence of a comparable need elsewhere.” *Shelby Cnty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting). Nevertheless, the Court did not present its analysis in conventional standard-of-review terms.

80 Shelby Cnty., 133 S. Ct. at 2631.

81 Id.

82 See, e.g., Adam Liptak, Justices Void Oversight of States, Issue at Heart of Voting Rights Act, N.Y. TIMES, June 26, 2013, at A1 (asserting that most analysts agree that “the chances that the current Congress could reach agreement on where federal oversight is required are small”).

83 Shelby Cnty., 133 S. Ct. at 2631.
II. THE POSSIBILITY OF DISTINCT STANDARDS OF REVIEW

The threshold question in the Article’s analysis is whether it is even possible, as a matter of either logic or of constitutional construction, for the scope of congressional power under the enforcement clauses of the Fourteenth and Fifteenth Amendments to differ. The answer to this question is not immediately obvious. This Part will argue, notwithstanding a superficial similarity in language, that the very different substantial guarantees of the respective amendments may plausibly give rise to significant differences in Congress’s power to enforce those guarantees.

Of course, one argument for applying the same standard of review for legislation under the enforcement clauses of the Fourteenth and Fifteenth Amendments (and, for that matter, the Thirteenth) is that the clauses share virtually identical language. Indeed, this has been accepted as compelling evidence by several courts that the congressional powers are identical (or very nearly so) under each clause. This was one of the reasons, for example, given by the district court in Shelby County. The district court also cites decisions from the courts of appeals to support its position. For example, in finding that Congress may abrogate state sovereign immunity under both the Fifteenth and Fourteenth Amendments, the Sixth Circuit reasoned that there was “no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment.” In addition to the courts, some scholarly commentaries have predicted that the Court would likely apply the same analysis to legislation enacted to enforce the guarantees of these two amendments. Professor Pamela Karlan, for example, has pointed out that the Court has already muddied the distinction between the Fourteenth and Fifteenth Amendment enforcement powers, probably on the basis that “the two amendments are rough con-

84 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 the power to enforce this article by appropriate legislation.”); see also U.S. Const. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).
85 Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 449–50 (D.D.C. 2011) (noting “the nearly identical language and similar origin of these two Reconstruction Amendments’ seemingly provides "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment" (internal citations omitted)).
temporaries and their enforcement power provisions are articulated in similar terms . . . .

The assumption that these distinct grants of authority comprise the same scope, however, is questionable in light of the different ways the Court has defined the Reconstruction Amendments enforcement powers in other areas. For example, there is a marked contrast in the ability of Congress to regulate private conduct under the Thirteenth and Fourteenth Amendments. In Jones v. Alfred H. Mayer Co., the Court held that 42 U.S.C. § 1982 “bars all racial discrimination, private as well as public, in the sale or rental of property, and . . . is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.”

Several subsequent cases further upheld Congress’s right to regulate private behavior under the enforcement clause of the Thirteenth Amendment. By contrast, regulation of private conduct falls outside Congress’s Fourteenth Amendment enforcement power under current law. In United States v. Morrison, the Court held that Congress’s enactment of a private remedy for gender-motivated violence exceeded its Fourteenth Amendment powers.

Of course, the discrepancy in the scope of the enforcement powers under the Thirteenth and Fourteenth Amendments cannot possibly derive from the superficial difference in the wording of § 2 of the former and § 5 of the latter. Rather, the difference stems from each amendment’s underlying substantive guarantees that Congress might seek to enforce. In the case of the Thirteenth Amendment, this was the power to “abolish[] all badges and incidents of slavery in the United States” no matter their source. The Fourteenth, meanwhile, specifically frames its provisions as restrictions on actions of the states. Thus, the Fourteenth Amendment’s “state action require-

87 Pamela S. Karlan, Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores, 39 WM. & MARY L. REV. 725, 726 n.5 (1998); see also infra notes 101–103 and accompanying text.
91 Jones, 392 U.S. at 439 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).
92 See U.S. CONST. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .”). Similarly, the Fifteenth Amendment’s substantive guarantees include an explicit state action requirement. See U.S. CONST. amend. XV, § 1 (“The rights of citizens of the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude.”).
ment sets a limit on its effectiveness that the Thirteenth Amendment does not impose.\[^{93}\] This limitation, naturally, carries into the subsequent conferral of power to enforce the underlying substance of the amendment.

The conclusion we can draw from this example, then, agrees with a logical reading of the enforcement clauses. Because the enforcement clauses grant Congress the power to “enforce this article by appropriate legislation,” the scope of the enforcement power, that is, what legislation is appropriate, must be tied to the nature of the amendment’s underlying substantive guarantees. Logically, then, to the extent that the Fourteenth and Fifteenth Amendments differ in their substantive guarantees, they may also differ in their grant of congressional enforcement powers. Furthermore, the nearly identical language of the enforcement clauses need not lead \textit{a priori} to the conclusion that the scope of congressional power is identical under each. Whether an analogous difference in the enforcement powers under the Fourteenth and Fifteenth Amendments exists, based on those amendments’ underlying subject matter, is an important question. More important still, for the purposes of this Article, is whether such a difference might plausibly give rise to different standards of review.

III. THE FOURTEENTH AND FIFTEENTH AMENDMENT STANDARDS

A. Boerne and the New Federalism

\textit{City of Boerne v. Flores}\[^{95}\] is the seminal case in the Supreme Court’s current line of § 5 jurisprudence. In \textit{Boerne}, the Court invalidated the Religious Freedom and Restoration Act of 1993 (RFRA),\[^{96}\] holding that it exceeded Congress’s power to enforce the Fourteenth

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\[^{93}\] Alexander Tsesis, \textit{Furthering American Freedom: Civil Rights & the Thirteenth Amendment}, 45 B.C. L. REV. 307, 361 (2004); \textit{see also} Laurence H. Tribe, \textit{American Constitutional Law} 927 (3d ed., 2000) (stating that “Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination or subordination and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment”).

\[^{94}\] \textit{See U.S. Const. amend. XV, § 2} (emphasis added).

\[^{95}\] 521 U.S. 507 (1997).

\[^{96}\] According to the \textit{Boerne} Court, “RFRA prohibits \‘[g]overnment\’ from \textit{substantially burdening} a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden \‘(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.\’” \textit{Id.} at 515–16 (internal citations omitted).
Amendment. In so doing, the Court found that Congress’s power was “remedial” rather than “substantive,” meaning that Congress “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” The Court then examined RFRA under a new standard of review: “there must be a congruence between the means used and the ends to be achieved.” Interestingly, the Court illustrated this principle with reference to the VRA, pointing out that the record of voting rights abuses confronting Congress in 1965 was vastly more extensive than the record of religious discrimination purported to justify RFRA. In addition, the Court cited the geographical limitations of Section 5 as evidence of the VRA’s proportionality. The district court in Shelby County, for one, interpreted this—along with Boerne’s reliance on several Section 5 cases—to mean that Boerne is “best read to mean that the nature of Congress’s enforcement powers under the two amendments is the same.”

Underlying Boerne, however, is the imperative to preserve the subordination of Congress to the Constitution by constraining Congress’s ability to “define its own powers by altering the Fourteenth Amendment’s meaning . . . .” Indeed, Boerne helped launch what has been characterized as a “federalism revolution” in which the Court has placed limits on congressional power under two constitutional provisions in particular. First, of course, is § 5. Boerne was followed by a line of cases dealing with congressional power to enforce the Equal Protection Clause by abrogating sovereign immunity enjoyed by the states under the Eleventh Amendment. To simplify somewhat, the result of these cases is that Congress’s power to enact an antidiscrimination measure increases with the level of judicial scrutiny that would be applied to the discrimination the measure seeks to prevent. For example, in University of Alabama v. Garrett, the

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97 Id. at 536 (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).
98 See id. at 520.
99 Id. at 519.
100 Id. at 530.
101 See id. (comparing RFRA and the VRA).
102 See id. at 533 (describing the geographic restrictions of the VRA).
104 Boerne, 521 U.S. at 529.
106 See id. at 95–96 (“The Court noted that a higher level of scrutiny applies in assessing the constitutionality of legislation that discriminates on the basis of gender . . . compared to
Court held that a state cannot be sued for violating the Americans with Disabilities Act.\textsuperscript{107} Two years later, in Nevada Department of Human Resources v. Hibbs, the Court upheld the provision of the Family and Medical Leave Act permitting suits against state governments.\textsuperscript{108} The Court explicitly acknowledged that the disparate outcomes resulted from the different standards of review for discrimination on the basis of disability and sex.\textsuperscript{109} The Court noted that “[b]ecause the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.”\textsuperscript{110} By adjusting the evidentiary burden on Congress to justify antidiscrimination legislation according to the standards applied “[u]nder . . . equal protection case law,”\textsuperscript{111} the Court reinforces the underlying purpose of Boerne to prohibit Congress from using its § 5 power to “determine what constitutes a constitutional violation”\textsuperscript{112} and reasserts the role of the judiciary as the sole interpreter of the Amendment’s meaning.\textsuperscript{113}

Boerne is just one significant case in a trend in the Supreme Court’s jurisprudence that has been called “New Federalism.”\textsuperscript{114} This trend has led to a significant shift in the balance of power from the federal government to the states.\textsuperscript{115} In addition to the limitations on § 5 power imposed by Boerne, congressional power under the Commerce Clause,\textsuperscript{116} too, has been curtailed. The Court’s decision in Morrison, in addition to dealing with § 5, also brought the commerce power within what the Court called “effective bounds.”\textsuperscript{117} More re-

\textsuperscript{109} See id. at 735–36.
\textsuperscript{110} Id. at 736. The Court also noted the constitutionality of the VRA and linked it to the heightened scrutiny associated with racial classifications. Id. at 735.
\textsuperscript{111} Id. at 736. The Court also noted the constitutionality of the VRA and linked it to the heightened scrutiny associated with racial classifications. Id. at 735.
\textsuperscript{112} City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
\textsuperscript{113} See id. at 524 (“The power to interpret the Constitution in a case or controversy remains in the Judiciary.”).
\textsuperscript{114} Hasen, supra note 105, at 85. For a larger discussion of this shift in the Court’s jurisprudence, see generally Mark Tushnet, The New Constitutional Order (2003).
\textsuperscript{115} See Hasen, supra note 105, at 85 (describing new federalism as a “seismic shift in power from the federal government to the states”).
\textsuperscript{116} U.S. Const. art. I, § 8, cl. 3 (giving Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).
\textsuperscript{117} United States v. Morrison, 529 U.S. 598, 608 (2000). In Morrison, the Court evaluated a statute in light of Congress’s power under the Commerce Clause and, in the alternative, § 5 of the Fourteenth Amendment. See id. at 619.
cently, while upholding the individual mandate in the Patient Protection and Affordable Care Act, the Court explicitly found that the law exceeded the congressional power under the Commerce Clause.\(^{118}\) As in the § 5 cases, these checks are remarkable precisely because they limit Congress’s power under a provision “previously thought to be virtually limitless.”\(^{119}\)

The question, then, is whether constraints imposed by the Court’s new federalism on congressional power in commerce and § 5 areas might similarly constrain Congress in the area of enforcing the Fifteenth Amendment. It goes without saying that a crucial—perhaps the most crucial—task of the Supreme Court is to flesh out the meaning of the Fourteenth Amendment’s rather vague guarantees of equal protection and due process. Likewise, the commerce power may be, and has been, used to enact all manner of legislation. The Court’s new federalism decisions may be fairly read as an attempt to rein in these powers, lest they become plenary. The Fifteenth Amendment, however, poses no such risk: its subject matter is far narrower than that of the Fourteenth, and its terms are much less vague.\(^{120}\) Strict judicial constraints seem unnecessary for an enforcement power narrowly focused on guaranteeing voting rights regardless of race. As Professor Evan Caminker puts it,

\>[t]he ends authorized by [§ 2 of the Fifteenth Amendment] are far more constrained than those authorized by [§ 5 of the Fourteenth]; whereas the latter touch upon a wide variety of liberty and property interests in a wide variety of contexts, the former focus exclusively on voting rights. For this reason, [§] 2 could not possibly give rise to a legitimate fear that, if construed to require only *McCulloch*-style means-ends tailoring, it would functionally award Congress a virtually plenary police power.\(^{121}\)

Thus, it seems that, notwithstanding *Boerne*’s nominal reliance on the VRA and associated cases, its underlying reasoning does not really apply to Fifteenth Amendment legislation. Absent an explicit equivalence between the two standards, it is likely that *Boerne*’s approving discussion of the VRA was meant to be illustrative of a statute that

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\(^{119}\) Hasen, *supra* note 105, at 85; *see also Sebelius*, 132 S. Ct. at 2586 (acknowledging the commerce power’s “expansive scope” and the varied uses to which Congress has put it).

\(^{120}\) *See* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 91 n.126 (2000) (“[U]nlke the Fourteenth Amendment [§] 5 power, the power to enforce the Fifteenth Amendment does not pose a risk of becoming a plenary power. The Fifteenth Amendment is limited to a much narrower subject matter—race discriminating in voting—than the Fourteenth Amendment.”).

\(^{121}\) Evan H. Caminker, *“Appropriate” Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1190–91 (2001). Nevertheless, Caminker concedes that “Boerne strongly suggests” that § 2 measures are subject to the same standard of review. *Id.* at 1191.
would meet the congruence and proportionality standard if it had to.\textsuperscript{122} The mere fact that the VRA does meet the \textit{Boerne} standard does not mean that it must. Indeed, the \textit{Northwest Austin} Court’s equivocation on this question\textsuperscript{123} ten years after \textit{Boerne} makes this interpretation even more plausible.

\textbf{B. Mobile, Rome, and the § 2 Enforcement Power}

While the Fifteenth Amendment thus falls outside the new federalism rationale underlying the \textit{Boerne} standard, an examination of the Supreme Court’s VRA jurisprudence indicates that the Court has in fact interpreted the § 2 power more broadly than § 5. While \textit{Boerne} aimed to restrict Congress’s ability to define the meaning of the Fourteenth Amendment’s substantial guarantees,\textsuperscript{124} there is a pair of cases that when read together arguably suggests that Congress has power under § 2 to interpret the meaning of the Fifteenth Amendment. The question in \textit{City of Mobile v. Bolden} was whether at-large elections for city commissioners violated Section 2 of the VRA.\textsuperscript{125} The Court began by finding that Section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself.”\textsuperscript{126} The Court upheld the election scheme, holding that the Fifteenth Amendment “prohibits only purposefully discriminatory denial or abridgment” of the right to vote,\textsuperscript{127} and that a discriminatory purpose had not been proven in this case.\textsuperscript{128} Decided on the same day as \textit{Mobile}, \textit{City of Rome v. United States} arose out of a Section 5 challenge to the city’s annexation of several areas and the resulting change in the racial composition of the electorate.\textsuperscript{129} Since the district court found a discriminatory effect, but no discriminatory purpose, the city argued that Section 5’s prohibition on changes that have a discriminatory effect exceed Congress’s power under the Fifteenth Amendment.\textsuperscript{130} The Court

\textsuperscript{122} \textit{See id.} at 1191 n.269 (acknowledging that the \textit{Boerne} Court may have meant “to highlight the distinctions between a well-tailored and poorly tailored enforcement measure, without meaning to hold that such well-tailoring is now a prerequisite for the constitutionality of Section 2 measures”).

\textsuperscript{123} \textit{See Nw. Austin Mun. Util. Dist. No. One v. Holder}, 557 U.S. 193, 204 (2009) (noting that the “question has been extensively briefed in this case, but we need not resolve it”).

\textsuperscript{124} \textit{See supra} note 104 and accompanying text.

\textsuperscript{125} \textit{City of Mobile v. Bolden}, 446 U.S. 55, 58 (1980).

\textsuperscript{126} \textit{Id.} at 61.

\textsuperscript{127} \textit{Id.} at 65.

\textsuperscript{128} \textit{See id.} at 74 (“They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.”).


\textsuperscript{130} \textit{Id.} at 172.
held, however, “that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment” subject to requirement that the prohibition be “appropriate.” 131 A broad side-by-side reading of these cases, then, indicates that the Court was “authorizing Congress independently to interpret the Fifteenth Amendment and even to adopt a view contrary to the Supreme Court.” 132 So envisioned, Congress’s § 2 power is clearly much broader in scope than that envisioned by Boerne for the Fourteenth Amendment.

In fact, the scope of Section 5 of the VRA (and thus the scope of Congress’s § 2 enforcement power) has long been acknowledged to extend beyond the narrow confines of prohibiting clear violations of the Fifteenth Amendment itself. Of course, the core guarantee of the Fifteenth Amendment is the right to cast a ballot. What proved to be a thornier issue, at least in the years immediately following the passage of the VRA, was whether Section 5 could extend to instances of vote dilution where blacks were able to vote but where their votes were rendered ineffective due to districting. 133 In Allen v. State Board of Elections, the Supreme Court held that Section 5 “gives a broad interpretation to the right to vote includ[ing] ‘all action necessary to make a vote effective.’” 134 The Court’s decision transformed Section 5 from a “little used” provision into a formidable “weapon to prevent minority vote dilution.” 135 The extension of federal authority over election practices beyond registration and enfranchisement is a significant expansion beyond the core of the Fifteenth Amendment. 136 Indeed, the Supreme Court has “[n]ever held that vote dilution vio-

131 Id. at 177. In fact, Section 2 itself was subsequently amended in 1982, in response to Mobile, to include a prohibition on election practices with discriminatory effects. See Laughlin McDonald, The 1982 Amendments of Section 2 and Minority Representation, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 66, 67–68 (Bernard Grofman & Chandler Davidson eds., 1992) (“Congress responded overwhelmingly to Mobile in 1982 by extending the preclearance provisions of section 5 for another twenty-five years and amending section 2 to prohibit voting practices, regardless of their purpose, that result in discrimination.”).


133 See Davidson, supra note 32, at 27–28 (discussing challenges to voter dilution practices in the South).


135 Davidson, supra note 32, at 28.

136 See City of Rome v. United States, 446 U.S. 156, 207–08 (Rehnquist, J., dissenting) (arguing that absent a finding of discrimination in registration, voting, or candidacy, the congressional prohibition cannot “be characterized as enforcement of the Fourteenth or Fifteenth Amendment”).
lates the Fifteenth Amendment.\textsuperscript{137} Congress has thus prohibited (with the Court’s approval) practices that lie far outside the Amendment’s core guarantee of the right to cast a ballot regardless of race.

Since the time of its enactment, then, the understanding of the Fifteenth Amendment’s scope has expanded, from prohibiting only \textit{facially} discriminatory voting practices to forbidding any \textit{intentional} abridgement of the right to vote. Perhaps just as dramatically, the scope of Congress’s Fifteenth Amendment enforcement power has grown to include not only direct violations of the Amendment itself, but also any discriminatory practice relating to elections, including districting, whether that practice is discriminatory on its face, in its purpose, or in its effect. In the meantime, the Court has severely limited the power of Congress to act in other areas. Most significantly for the purposes of this Article, the Court has limited the power to enforce the Fourteenth Amendment to those measures considered “congruent and proportional” as measured by a scheme intimately connected with the Court’s own standards of review in evaluating violations of the Amendment itself.\textsuperscript{138} An examination of the Court’s VRA jurisprudence reveals no such limitation imposed on the power to enforce the Fifteenth Amendment. Along the way, of course, both courts and legal scholars have assumed and argued that the enforcement powers under the amendments are comparable or even identical. Nevertheless, one thing that is clear after both \textit{Northwest Austin} and \textit{Shelby County} is that the applicability of the \textit{Boerne} standard to the Fifteenth Amendment legislation remains unresolved.\textsuperscript{139}

\textbf{IV. THE IMPORTANCE OF DIFFERENT STANDARDS}

Thus far, this Article has advanced two main arguments. First, it has argued that there is no reason why the constitutionality of legislation enacted under the enforcement clauses of the Fourteenth and Fifteenth Amendments, as a matter of logic, must be evaluated under identical standards. Rather, each amendment’s enforcement power is derived from the underlying prohibition Congress may seek to enforce, and differences in the content, breadth, and specificity of the


\textsuperscript{138} See supra notes 101–109 and accompanying text.

\textsuperscript{139} Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009) (declining to decide upon the standard of review to apply in the case); see also Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2638 (2013) (Ginsburg, J., dissenting) (“Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed ‘rational means.’”).
amendments may significantly affect their attending enforcement powers. Second, this Article has contrasted the case law surrounding legislation enacted pursuant to each amendment’s enforcement power and found that, as a doctrinal matter, the Supreme Court has treated them very differently. Furthermore, the likely reasons for the stricter limitation on the Fourteenth Amendment legislation do not apply readily to the Fifteenth Amendment, which is far more confined in its subject matter and purpose. As this Part will argue, the Court should maintain separate standards for Fourteenth and Fifteenth Amendment enforcement legislation. Failing to do so would endanger the continuing vitality of the Fifteenth Amendment.

A. Historical Perspective

In granting Shelby County’s petition for certiorari, the Supreme Court took the unusual step of modifying the wording of the question presented. While the petitioner asked only whether Section 5 exceeds Congress’s authority under the Fifteenth Amendment, the Court added the question of whether it violates the Fourteenth as well.\footnote{See Tony Mauro, The Court’s Slight Rewrite in Voting Rights Case, NAT’L LAW JOURNAL (Nov. 13, 2012), http://www.nationallawjournal.com/id=1202578216205 (“[T]he court [sic] did a slight rewrite of the question offered by Shelby County, adding the Fourteenth Amendment to the case—and giving a glimmer of hope to worried supporters of the Voting Rights Act.”).} This shift serves to underscore the fact that, while the VRA was enacted first and foremost under the Fifteenth Amendment, the legislative history and case law involve a far more complex set of interactions between the two amendments.

When originally enacted, the VRA explicitly identified itself as a measure to enforce the Fifteenth Amendment.\footnote{See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (referencing the Fifteenth Amendment specifically when discussing enforcement).} One portion in particular, Section 4(e), however, was enacted to secure rights under the Fourteenth Amendment.\footnote{See id. at 439 (prohibiting discrimination against voters educated in Puerto Rico from being discriminated on the basis of the ability to speak English).} Indeed, by the time of the 2006 reauthorization, the purpose of the law was simply to preserve the right to vote “as guaranteed by the Constitution.”\footnote{Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, 120 Stat. 577.} This language, clearly, evinces a congressional intent to legislate under the authority granted by both amendments and perhaps other provisions as well.

As discussed earlier, the framers of the Fifteenth Amendment almost certainly did not understand the Fourteenth Amendment to
guarantee black suffrage. At the time of its adoption, the Fifteenth Amendment was really understood only to prohibit a voting provision that is racially discriminatory on its face. Today, however, the notion that such a law could pass muster under the Equal Protection Clause of the Fourteenth Amendment is absurd. The reality is that the Fourteenth Amendment, as we understand it today, probably encompasses everything prohibited by the core guarantees of the Fifteenth Amendment. In Katzenbach v. Morgan, the Supreme Court upheld Section 4(e) of the VRA and confirmed congressional power under the Fourteenth Amendment to prohibit laws requiring a voter to read and speak English. Even in a pre-VRA case with no racial discrimination at issue, the Court held that “the Equal Protection Clause guarantees the opportunity for equal participation by all voters . . . .” And of course, the Court has repeatedly held that racial classifications are subject to strict scrutiny. It seems, therefore, as if the protections of the Fifteenth Amendment simply represent the very core of the Fourteenth Amendment guarantee of equal protection of the laws. In this light, is it unfair to ask what remains of the purpose of the Fifteenth Amendment? Would it be wrong to de facto collapse the two amendments into one and, with them, their respective standards of review? This Article answers the latter question in the negative for reasons detailed below.

B. The Limited Scope of the Fifteenth Amendment

The first reason why the Boerne standard should not be applied to Fifteenth Amendment legislation such as the VRA is, simply put, that the Amendment’s narrow scope obviates the need for the Supreme Court to restrict Congress’s power to enforce it. The Fourteenth Amendment’s core guarantees of equal protection and due process, and the power to enforce those guarantees, provide indispensable federal protection for civil rights. To prevent an abuse of this broad grant of power, the Supreme Court, as part of its movement towards a “new federalism” has adopted a standard—congruence and proportionality—under which Congress’s ability to enforce the Fourteenth

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144 See supra note 17 and accompanying text.
147 See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (stating that all racial classifications must be narrowly tailored to achieve compelling state interests).
148 See supra notes 114–19 and accompanying text.
Amendment’s guarantees is carefully calibrated to the interpretation of its meaning as articulated by the Court.\textsuperscript{149}

The Fifteenth Amendment, by contrast, is concerned primarily with the much narrower field of racial discrimination in voting. As such, it is far less crucial that the Court so jealously guard it against congressional interpretation or redefinition. As Professors Michael Dorf and Barry Friedman put it,

\begin{quote}
unlike the Fourteenth Amendment [§ 5] power, the power to enforce the Fifteenth Amendment does not pose a risk of becoming a plenary power. The Fifteenth Amendment is limited to a much narrower subject matter—race discrimination in voting—than the Fourteenth Amendment. Hence, it could be argued, the Court can afford to grant Congress greater deference under the Fifteenth Amendment than under the Fourteenth.\textsuperscript{150}
\end{quote}

Preventing congressional overreach, arguably the central concern of the \textit{Boerne} Court, is thus far less salient in the context of the Fifteenth Amendment and the VRA. As a result, the Court may safely allow Congress significantly more latitude and need not apply so strict a standard of review to legislation enacted under § 2.

\section*{C. The Distinctiveness of the Fifteenth Amendment}

As argued above, modern conceptions of the Fourteenth Amendment, specifically equal protection and due process, may well encompass the core guarantees of the Fifteenth Amendment.\textsuperscript{151} One of the most important aspects of the Fifteenth Amendment is its separateness, the fact that it recognizes the special importance of the right to vote and the peculiar evils of racial discrimination. For this reason, legislation meant to enforce the Fifteenth Amendment is entitled to a special deference in the form of a distinct standard of review.

By way of analogy, it is again worth considering the Thirteenth and Fourteenth Amendments. Supposing that the Fourteenth Amendment existed while the Thirteenth Amendment did not, it is still inconceivable that slavery could exist under our current understanding of the Equal Protection Clause. Nevertheless, Congress was able to accomplish under the Thirteenth Amendment (prohibiting both public and private racial discrimination in housing) what it

\begin{footnotes}
\item \textsuperscript{149} \textit{See} City of Boerne v. Flores, 521 U.S. 507, 520, 524 (1997).
\item \textsuperscript{150} Dorf & Friedman, supra note 120, at 91 n.126; \textit{see also} Caminker, supra note 121, at 1190–91 (comparing the enforcement provisions of the Fourteenth and Fifteenth Amendments).
\item \textsuperscript{151} \textit{See supra} Part IV.A.
\end{footnotes}
could not under the Fourteenth Amendment given the latter’s state-action requirement. Just as important as the absence of an explicit state action requirement in the Thirteenth Amendment, however, is the Court’s assertion in the Civil Rights Cases that Congress has “power to pass all laws necessary and proper for abolishing all badges and incidents of slavery” in enforcing the Thirteenth Amendment. Replacing this standard with one borrowed from the Fourteenth Amendment, the Jones Court may not have so easily upheld Congress’s prohibition on private discrimination in housing. The distinctiveness of the Thirteenth Amendment made this possible. Assuming one thinks that such a prohibition is a good thing, the difference becomes quite important.

Like the Thirteenth Amendment, the Fifteenth Amendment’s distinctiveness is worth preserving, not only symbolically, but also pragmatically. It represents the recognition, in the Constitution’s text itself, of the importance of preventing racial discrimination in voting. That “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights” is a long-recognized principle in American law. This principle and its enforcement are even more indispensable when the right of minorities to vote is at issue. Thus, because of its narrow scope, the need to limit its enforcement through a higher standard of review is not pressing, and its danger of morphing into a plenary power is nonexistent. And because of the particular importance of its protections, § 2 should be preserved as a distinct source of congressional power subject to its own standard of review.

CONCLUSION

Last term, the Supreme Court seemed poised to consider the constitutionality of Section 5 of the Voting Rights Act, and with it, to determine what standard of review should apply to the legislation enacted to enforce the Fifteenth Amendment. Somewhat surprisingly, however, the Court struck down the coverage formula on the

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152 See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (rejecting the argument that Congress lacks the power under § 2 of the Thirteenth Amendment to ban private discrimination in housing).


155 See Pamela S. Karlan, Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act, 44 Hous. L. Rev. 1, 17 (2007) (arguing that “congressional power is at its apogee when Congress acts to protect fundamental rights, [and] to protect suspect or quasi-suspect classes”).
grounds that it violated the equal sovereignty of the states, and left unresolved the question of what standard of review applies to a statute enacted pursuant to Congress’s power to enforce the Fifteenth Amendment.

The Reconstruction Amendments share a good deal of common history and language, and of course, a common purpose. Nevertheless, there exist important differences in the amendments that have persisted from the time of their adoption to the present day. These differences, naturally, carry over into the scope the amendments’ respective enforcement clauses.

Though the Court has never explicitly applied the Boerne standard in the Fifteenth Amendment context, it is possible, even likely, that the Court will do so in the future. This would be a mistake. First, despite the similar language in the enforcement clauses, it is clear that it is not inevitable that the standards of review must be the same. Second, an examination of the Court’s historical treatment of both § 5 legislation and of the VRA reveals that the Court has thus far applied quite different standards to legislation enacted pursuant to these two amendments. Finally, the special protections provided by the Fifteenth Amendment, as well as the Amendment’s narrow scope, mean that Congress’s power to enforce its protections deserves a special deference that cannot be achieved by borrowing a standard of review from the Fourteenth Amendment.