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## FEDERAL GOVERNMENTAL POWER: THE VOTING RIGHTS ACT

*Michael C. Dorf*\*

### I. BACKGROUND

Following the contested election of 1876, as part of the compromise that gave the United States Presidency to Rutherford B. Hayes, Union troops were withdrawn from the states of the former Confederacy.<sup>1</sup> As a more or less direct consequence, the formerly enslaved African Americans, who had begun to exercise political power under Reconstruction,<sup>2</sup> were once again disenfranchised.<sup>3</sup> The Fifteenth Amendment would remain all but a dead letter until the civil rights movement of the mid-twentieth century.

Along with direct challenges to Jim Crow came legal challenges to the various restrictions and qualifications that states and their subdivisions placed on African-American suffrage.<sup>4</sup> Literacy tests were a favorite device.<sup>5</sup> As Justice Thomas recounted in his separate opinion in *Northwest Austin Municipal Utility No. One v. Holder*<sup>6</sup> (“NAMUNDO”), such tests dated back to the period imme-

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\* Robert S. Stevens Professor of Law, Cornell Law School. This Article is based on an oral presentation given at the Practising Law Institute’s Eleventh Annual Supreme Court Review Program in New York, New York. The printed text retains much of the conversational style of the initial presentation. Many thanks to the editors of the *Touro Law Review* for supplying formal citations for my oblique references.

<sup>1</sup> Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 940-41 (2009).

<sup>2</sup> Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2129-30 (1996).

<sup>3</sup> Hutchinson, *supra* note 1, at 942.

<sup>4</sup> *Id.* at 965.

<sup>5</sup> *Id.*

<sup>6</sup> 129 S. Ct. 2504 (2009).

diately following the adoption of the Fifteenth Amendment.<sup>7</sup>

Literacy tests were an effective tool of racially selective disenfranchisement because, as a legacy of slavery and continuing inequality in educational opportunities, the African American population was disproportionately illiterate.<sup>8</sup> To compound the disproportionate impact of literacy tests, white illiterates were often permitted to vote under “grandfather clauses” extending the franchise to those whose grandparents (in the time of slavery) had voted.

The blatant race discrimination of the literacy-test-plus-grandfather-clause was invalidated by the Supreme Court as early as 1915.<sup>9</sup> Nevertheless, state officials were creative, so when one stratagem failed, a new one sprang up, and the new ploy was used until it, too, was struck down.<sup>10</sup> But, by then, yet a new disenfranchising technique had been developed.

These tactics were very effective at disenfranchising African Americans in the South, and accordingly, when, a century after the conclusion of the Civil War, Congress finally addressed them, it needed equally effective countermeasures. The Voting Rights Act (“VRA”) of 1965 created one such mechanism. Devices that have the purpose or effect of suppressing minority votes violate the substance of the VRA.<sup>11</sup> In addition, under section 5 of the VRA, if a state or one of its subdivisions in a “covered jurisdiction” attempts to change its voting rules in any way, it must first submit the proposed change either to a three-judge court in the District of Columbia or to the Attorney General for what has become known as preclearance.<sup>12</sup>

The Attorney General or special court determines whether the change would have the effect of disproportionately disenfranchising or diluting the voting strength of the minority population.<sup>13</sup> The preclearance requirement is limited to certain statutorily specified covered jurisdictions, mostly in the South.<sup>14</sup> Congress originally deter-

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<sup>7</sup> *Id.* at 2521 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>8</sup> *Id.*

<sup>9</sup> *Guinn v. United States*, 238 U.S. 347, 367 (1915).

<sup>10</sup> *NAMUNDO*, 129 S. Ct. at 2520.

<sup>11</sup> 42 U.S.C.A. § 1973 (West 2009).

<sup>12</sup> *Id.* § 1973(c).

<sup>13</sup> Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 350 (2008).

<sup>14</sup> Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81

mined which areas were covered by identifying those places that had a history of disenfranchisement.

Shortly after its adoption, the VRA was challenged and sustained. In *South Carolina v. Katzenbach*,<sup>15</sup> the Court found that the VRA was a valid exercise of Congress' power to enforce the substantive provisions of the Fifteenth Amendment.<sup>16</sup> Since then, the VRA has been periodically reauthorized, most recently by a near-unanimous Congress in 2006.<sup>17</sup>

## II. *NORTHWEST AUSTIN MUNICIPAL UTILITY NO. 1 V. HOLDER*

The *NAMUNDO* case presented two questions: (1) whether a municipal district in Austin, Texas was eligible to “bail out” of the provisions of the VRA; and if not, then (2) whether the VRA as applied in *NAMUNDO* was unconstitutional as beyond the power of Congress to enforce the Fifteenth Amendment.<sup>18</sup> The Court only addressed the statutory issue, although its statutory interpretation was clearly influenced by constitutional considerations.

Under the VRA, a political subdivision of a covered state is a covered jurisdiction.<sup>19</sup> However, the VRA permits a subdivision to “bail out”—that is, to avoid the requirement—of pre-clearance if it can show that notwithstanding the factors that led Congress to classify the larger jurisdiction as covered, the particular subdivision is, so to speak, “clean.”<sup>20</sup> Although the City of Austin is clearly a subdivision of the state of Texas, it was not obvious that the municipal district at issue in *NAMUNDO* counted as a subdivision under the VRA's language, because it is not a county and does not register its own voters, but instead relies on another political entity for voting registration.<sup>21</sup> Thus, the quite technical question of statutory interpretation was whether the VRA could be construed to make the municipi-

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DENV. U. L. REV. 225, 231 (2003).

<sup>15</sup> 383 U.S. 301 (1966).

<sup>16</sup> *Id.* at 308.

<sup>17</sup> *NAMUNDO*, 129 S. Ct. at 2510.

<sup>18</sup> *Id.* at 2517 (Thomas, J., concurring).

<sup>19</sup> *Id.* at 2511 (majority opinion).

<sup>20</sup> *Id.* at 2509 (“Congress recognized that the coverage formula it had adopted ‘might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices’ . . . . It therefore ‘afforded such jurisdictions immediately available protection in the form of . . . [a] ‘bailout’ suit.’”).

<sup>21</sup> *Id.* at 2514.

pal district eligible for bailout.

The Court, in an opinion by Chief Justice Roberts that garnered eight votes, said yes.<sup>22</sup> Even though the statutory language is most straightforwardly read to indicate that the district should not be eligible, the Court appeared to rely on a principle of constitutional avoidance to find nevertheless that the district was eligible for bailout. Hence, there was no need to reach the more difficult constitutional question of whether section 5 of the VRA is still valid.<sup>23</sup>

In a lone opinion concurring in the judgment in part and dissenting in part, Justice Thomas disagreed on the statutory point, but not on the point that the Austin district should be eligible for bailout.<sup>24</sup> He contended that even assuming that his colleagues reached the right conclusion—that the district was eligible for bailout—the majority should not have avoided the constitutional question because, in his view, the decision did not give the plaintiff district everything it requested.<sup>25</sup>

Only Justice Thomas directly reached the constitutional question,<sup>26</sup> but the majority opinion of Chief Justice Roberts included pointed hints about the Court's view of that question.<sup>27</sup> Had the majority reached the constitutional question, there is a good chance it would have found section 5 of the VRA unconstitutional. Justice Thomas directly stated that he would find it unconstitutional without delay.<sup>28</sup>

### III. THE DOG THAT DIDN'T BARK: WHERE WERE THE LIBERALS?

Interestingly, none of the more liberal Justices wrote separate-

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<sup>22</sup> *NAMUNDO*, 129 S. Ct. at 2516-17.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2517 (“Given its resolution of the statutory question, the Court has thus correctly remanded the case for resolution of appellant's factual entitlement to bailout.”).

<sup>25</sup> *Id.* at 2518 (“Absent a determination that appellant is not just eligible for bailout, but is entitled to it, this case will not have been entirely disposed of on a non-constitutional ground . . . . Invocation of the doctrine of constitutional avoidance is therefore inappropriate in this case.”).

<sup>26</sup> *Id.* at 2519 (Thomas, J., concurring).

<sup>27</sup> *NAMUNDO*, 129 S. Ct. at 2510-12 (majority opinion).

<sup>28</sup> *Id.* at 2517, 2519 (Thomas, J., concurring) (“[T]he constitutional issue presented and hold that [section] 5 exceeds Congress' power to enforce the Fifteenth Amendment.”).

ly in *NAMUNDO* to take issue with the Chief Justice's hints that the VRA could be held invalid in a future case. In this respect, *NAMUNDO* calls to mind *Grutter v. Bollinger*.<sup>29</sup> There, after upholding the University of Michigan Law School's program of race-based affirmative action in admissions, Justice O'Connor suggested that her ruling could be expected to expire after twenty-five years.<sup>30</sup> She was joined by the Court's four most liberal Justices, none of whom registered any disagreement with that prediction. Thus, it appears that even for relatively liberal Supreme Court Justices, government interventions to promote racial equality—whether in the context of voting, as in *NAMUNDO*, or higher education, as in *Grutter*—have a limited shelf life.

Why has the Court's liberal wing accepted these limits? I would offer three potentially overlapping hypotheses. First, it is possible that the Court's liberals in *Grutter* and *NAMUNDO* joined opinions with which they did not fully agree in an effort to moderate the overall impact. In *NAMUNDO* in particular, the liberals may have feared that the conservatives would cast five votes actually to invalidate section 5 of the VRA. By giving Chief Justice Roberts a near-unanimous opinion, they may have gotten an opinion that, at least formally, rested only on grounds of statutory interpretation.

Second, it may simply be a mistake to refer to "liberals" on the current Supreme Court. Justice Stevens, who is arguably the most liberal member of the Court, was a staunch centrist on the Burger Court—and Justice Stevens is widely expected to retire at the conclusion of the October 2009 Term. By the standards of the Warren and Burger Courts, the Roberts Court has a center-left, a center, a right, and a far right, but no left.

Third, even if one thinks that there are real liberals on the Roberts Court, on matters of race, the political center of the Court and of the country have moved decidedly away from the sort of identity politics that the VRA could be thought to reflect. Here we may draw a useful comparison with the confirmation hearings of Justice Sotomayor. Democratic Senators who strongly supported confirmation took pains to portray her as a moderate or even a tough-on-crime conservative. None made any serious effort to defend her much-

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<sup>29</sup> 539 U.S. 306 (2003).

<sup>30</sup> *Id.* at 325.

discussed “wise Latina” remark<sup>31</sup> or the opinion she authored in *Ricci v. DeStefano*.<sup>32</sup>

#### IV. THE STANDARD OF REVIEW

Among the constitutional issues the Court did not reach in *NAMUNDO* was a long-simmering question: what is the standard for judging Acts of Congress purporting to enforce the Thirteenth and Fifteenth Amendments? Beginning in 1997, in *City of Boerne v. Flores*, a series of Supreme Court cases have held that the power of Congress to enforce section 5 of the Fourteenth Amendment only extends to laws that are “congruent and proportional” to an underlying violation of section 1 of the Fourteenth Amendment, as the Court would understand it.<sup>33</sup> As a result, Congress cannot, in the guise of adopting remedial and preventative measures under the Fourteenth Amendment, stray too far from what the Court would say are violations of section 1 of that Amendment.

Although the Court has not attempted to specify with mathematical precision just how closely related a remedial or preventative measure must be in order to satisfy the congruence-and-proportionality test, the pattern of results makes clear that the test is considerably more demanding than the test applied in earlier cases construing the enforcement provisions of the Thirteenth and Fifteenth Amendments. In those cases, which include *South Carolina v. Katzenbach*, upholding the VRA in the first instance, the Court applied the relaxed judicial scrutiny associated with Chief Justice John Marshall’s opinion in *McCulloch v. Maryland*.<sup>34</sup> As long as Congress could have rationally believed that there was a problem to be ad-

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<sup>31</sup> See Mireya Navarro, *Claiming A Loaded Phrase*, N.Y. TIMES, Aug. 9, 2009, at ST1.

The phrase was the sound bite from a longer quote—‘I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life’—that drew ridicule from opponents of her nomination.

*Id.*

<sup>32</sup> 530 F.3d 87 (2d Cir. 2008).

<sup>33</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 639 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

<sup>34</sup> 17 U.S. (316 Wheat.); see, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968); *Katzenbach*, 383 U.S. at 324.

dressed, the Court afforded very wide latitude.<sup>35</sup>

Had the Court reached the constitutionality of section 5 of the VRA in *NAMUNDO*, it would have had to resolve whether Acts of Congress purporting to enforce the Thirteenth and Fifteenth Amendments continue to be judged under the forgiving test of *McCulloch* or whether, instead, the more demanding test of the recent Fourteenth Amendment cases applies. In his *NAMUNDO* opinion, Chief Justice Roberts sidestepped the standard-of-review issue.<sup>36</sup> Yet oddly, he asserted that section 5 of the VRA presents serious constitutional questions under either standard.<sup>37</sup> That assertion is odd because the Thirteenth and Fifteenth Amendment test focuses only on the rationality of Congressional action, and just about anything passes the rational basis test.<sup>38</sup>

Surely that includes section 5 of the VRA. Congress could have rationally concluded that there remains a risk of racial discrimination in voting, and under the old test under the Thirteenth and Fifteenth Amendments, that should have been enough. One is thus left with the suspicion that a majority of the Court thinks that the congruence and proportionality test would, if the issue were squarely faced, be deemed applicable to the Thirteenth and Fifteenth Amendments as well as the Fourteenth. Elsewhere I have suggested a basis (besides

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<sup>35</sup> See *Alfred H. Mayer Co.*, 392 U.S. at 440-41 (“Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one.”).

<sup>36</sup> *NAMUNDO*, 129 S. Ct. at 2512-13.

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that ‘[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end’ . . . ; the Federal Government asserts that it is enough that the legislation be a ‘rational means to effectuate the constitutional prohibition’ . . . . That question has been extensively briefed in this case, but we need not resolve it.

*Id.*

<sup>37</sup> *Id.* at 2513.

<sup>38</sup> Cf. Gerald Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“[T]he deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”).

*stare decisis*) for maintaining the looser standard in Thirteenth and Fifteenth Amendment cases,<sup>39</sup> but whether that or some other argument prevails will await a later day.

Meanwhile, if the congruence and proportionality test does apply to section 5 of the VRA, the law faces serious constitutional obstacles, as illustrated in the separate opinion of Justice Thomas. Section 5 of the VRA Rights Act is three layers removed from the underlying constitutional violation—if there is one. First, whereas constitutional equality norms are only violated by express or purposeful discrimination,<sup>40</sup> the substantive provisions of the VRA forbid practices with a merely discriminatory effect.<sup>41</sup> According to Justice Scalia's concurrence in the *Ricci* case, not only do constitutional equality norms permit disparate impact without discriminatory purpose, the prohibition of disparate impact may itself be unconstitutional.<sup>42</sup>

The second level of prophylaxis in section 5 of the VRA is the scope of the pre-clearance obligation. All changes must be pre-cleared—even if there is no prior indication that a change will have a discriminatory effect.<sup>43</sup>

Finally, there is a third level of prophylaxis: Even sub-units of covered jurisdictions are subject to the pre-clearance requirement, even when the individual sub-units have not been shown to have any record of prior discrimination with respect to voting.<sup>44</sup> With section 5 of the VRA thus triply removed from underlying violations of the

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<sup>39</sup> Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 91 n.126 (2001) (noting that an expansive interpretation of Congressional power to enforce the Thirteenth and Fifteenth Amendments would not pose the same risk of Congressional omnipotence that an expansive interpretation of Congressional power to enforce the Fourteenth Amendment poses, in light of the more specific subject matter of the Thirteenth and Fifteenth Amendments).

<sup>40</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 90 (1986) (stating that the most important question was “whether the defendant had met his burden of proving purposeful discrimination on the part of the State”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that a facially neutral law or policy will not be deemed discriminatory unless it both has a racially disproportionate impact and results from discriminatory motivation on the part of the state).

<sup>41</sup> *NAMUNDO*, 129 S. Ct. at 2523; David O. Barrett, *The Remedial Use of Race-Based Redistricting After Shaw v. Reno*, 70 IND. L.J. 255, 265-66 (1994).

<sup>42</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

<sup>43</sup> Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended By Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 79 (2006).

<sup>44</sup> *Id.* at 86, 88.



Fifteenth Amendment, it would be relatively easy for the Court to find that it fails the congruence and proportionality test, should that test be deemed applicable.

#### IV. CONCLUSION

Finally, a deep irony if not cynicism infects the majority opinion in *NAMUNDO*. Chief Justice Roberts criticized the selective application of the pre-clearance requirement of section 5 of the VRA. He deemed the singling out of particular parts of the country an affront to the equal sovereignty of the states.<sup>45</sup> Yet, in recent cases interpreting Congress' power under the Fourteenth Amendment, the Court cited the *failure* of Congress to write geographical restrictions into its statutes as a ground for finding those Acts unconstitutional.<sup>46</sup> As far as civil rights laws are concerned, the rule appears to be "heads the Court wins, tails Congress loses."

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<sup>45</sup> See *NAMUNDO*, 129 S. Ct. at 2511-12.

<sup>46</sup> See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368, 374 (2001); *United States v. Morrison*, 529 U.S. 598, 626-27 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).