Judicial Review of the Voting Rights Act (2006): The Court Should Bail-Out

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In 1965 Congress passed the Voting Rights Act (VRA), arguably the crown jewel of civil rights legislation; it was a dramatic effort to uproot processes denying African-Americans Fifteenth Amendment protections. In an exceptional expression of federal power, the VRA granted the national government a direct role in overseeing state and local elections. This oversight led to an immediate increase in African American voter participation. It also structured a long-term conflict over the authority to control electoral processes. Central in this conflict is the singling-out of some jurisdictions for section 5 "preclearance." These "covered" jurisdictions, targeted by an automatic formula, require approval from the Department of Justice (DOJ) or the District Court in D.C. before implementing any changes to their electoral systems. Originally established as a temporary measure, set to expire in 1970, section 5 has been renewed (and even expanded) by Congress four times—most recently in 2006 for an additional twenty-five years. This oversight of elections is seen by many as a federal intrusion on state authority that can only be justified by extreme circumstances.

For most of the Act's history bailout was little used. With its lack of use, its importance has been overlooked. In Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder (2009)—the most recent Supreme Court challenge to the constitutionality of the VRA—the Court dodged the constitutional question by expanding the types of jurisdictions eligible for bailout. The pace of jurisdictions terminating coverage has significantly increased since NAMUDNO. Of the total successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court's 2009 decision. The largest number of jurisdictions bailing-out in one year occurred in the twelve month period from the end of 2011 to the beginning of 2012, and the total number of bailed-out jurisdictions is set to nearly double again in the second half of 2012. Because of bailout the number of jurisdictions subject to preclearance is rapidly shifting. Bailout permitted the Court to avoid constitutional questions in NAMUDNO, but bailout enables more; it provides a constitutional basis for the Court to uphold preclearance.

Given its amplified use, constitutional evaluations of the VRA would be greatly augmented by assessing bailout. This paper argues the Court should uphold section 5 of the VRA because of the existence, and increased use, of the bailout process. In order to make this argument this paper will: (1) review contemporary debates regarding the constitutionality of preclearance; (2) explore the history of the VRA; (3) examine empirical evidence justifying preclearance; (4) explain Congress's power to regulate elections; and (5) examine legal doctrines related to preclearance. The importance of the bailout process will be explored in each section to illustrate preclearance as a constitutionally justified use of congressional power.

I. Introduction

In 1965 Congress passed the Voting Rights Act (VRA), arguably the crown jewel of civil rights legislation; it was a dramatic effort to uproot processes denying African-Americans Fifteenth Amendment protections.[1] In an exceptional expression of federal power, the VRA granted the national government a direct role in overseeing state and local elections. This

[1] For an explanation of such tactics, see the Congressional Research Service's most recent report on the VRA: The Voting Rights Act of 1965, As Amended: Its History and Current Issues. Garrine Laney June 12, 2008. P. 2-5; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 308-313 (1966).

oversight led to an immediate increase in African American voter participation. It also structured a long-term conflict over the authority to control electoral processes. Central in this conflict is the singling-out of some jurisdictions for section 5 "preclearance." These "covered" jurisdictions, targeted by an automatic formula, require approval from the Department of Justice (DOJ) or the District Court in D.C. before implementing *any changes* to their electoral systems. Originally established as a temporary measure, set to expire in 1970, section 5 has been renewed (and even expanded) by Congress four times—most recently in 2006 for an additional twenty-five years.[2] This oversight of elections is seen by many as a federal intrusion on state authority that can only be justified by extreme circumstances.

Scholars, policy analyst and legal practitioners are increasingly asking: *should the Court overturn the "preclearance" requirements of section 5 of the VRA?* However, researchers examining this question from a diversity of perspectives have largely failed to analyze how the "bailout" provisions of the VRA affect the statute's constitutionality.[3] When Congress passed the VRA it recognized some jurisdictions without a history of minority disenfranchisement would be caught by the automatic trigger. To diminish this imprecision Congress allowed jurisdictions to be released from coverage. Because of this bailout provision, the map of jurisdictions covered by the VRA today *does not mirror* the jurisdictions covered by the Act ten years ago (or even one year ago); many previously covered jurisdictions, have terminated coverage. Yet much of the

[2] Congress extended Section 5 for five years in 1970, for seven years in 1975, twenty-five years in 1982, and another twenty-five years in 2006.

[3] See Ellen D. Katz, "Congressional Power to Extend Preclearance: A Response to Professor Karlan," *Houston Law Review* 44(2007): 33-63 as an exception to this. Katz does argue that bailout might provide a means to uphold the constitutionality of preclearance. She does not fully develop the idea and she is writing before the significant increase of successful bailouts have occurred. The idea she posits should be more fully developed in the light of new data.

research into whether the Court should overturn preclearance treats the VRA as if the bailout provision does not exist.

It is perplexing such an important qualifier to the functioning of section 5 is underemphasized. Congress recognized the importance of the bailout provision when passing the law in 1965. The Court recognized its importance when upholding the constitutionality of the VRA in *South Carolina v Katzenbach* (1966). Yet, for most of the Act's history bailout was little used. With its lack of use, its importance has been overlooked. In *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder* (2009)—the most recent Supreme Court challenge to the constitutionality of the VRA—the Court dodged the constitutional question by expanding the types of jurisdictions eligible for bailout. The pace of jurisdictions terminating coverage has significantly increased since *NAMUDNO*. Of the total successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court's 2009 decision.[4] The largest number of jurisdictions bailing-out in one year occurred in the twelve month period from the end of 2011 to the beginning of 2012, and the total number of bailed-out jurisdictions is set to nearly double again in the second half of 2012.[5] Because of bailout the number of jurisdictions subject to preclearance is rapidly shifting.

Since *NAMUDNO* new challenges to section 5 have surfaced. In fact a record five challenges to the constitutionality of the VRA were in the federal courts in 2012; two were appealed the Supreme Court. There have been more court challenges to the VRA in the last two years than in the Act's previous forty-five year history. Bailout permitted the Court to avoid

[4] *Shelby County, Alabama. v. Holder* 679 F. 3d 848 (2012).

[5] "Department of Justice Consents to Merced County, California Voting Rights Act 'Bailout' *Largest Number of Political Subdivisions to Bail Out at Once,"* J. Gerald Herbert: Attorney at Law, accessed August 16, 2012, http://voterlaw.com/press07302012.htm; "Biggest Local Government Receives Voting Rights Act 'Bailout,' " J. Gerald Herbert: Attorney at Law, accessed August 16, 2012, http://voterlaw.com/press04102012.htm

constitutional questions in *NAMUDNO*, but bailout enables more. It provides a constitutional basis for the Court to uphold preclearance.

Given its amplified use, constitutional evaluations of the VRA would be greatly augmented by assessing bailout. Bailout changes the constitutional argument. In 1997 the Court declared that congressional actions must be "congruent and proportional" to the rights Congress attempts to protect.[6] Bailout provides jurisdictions, without a history of electoral discrimination, the ability to terminate federal oversight of their elections. This process helps ensure jurisdictions singled out for coverage are those with a higher proportion of voter discrimination. The targeted nature of federal oversight, that bailout encourages, meets the "congruent and proportional" test as well as other standards of constitutional review necessary for the Court to uphold section 5 of the VRA.

This paper argues the Court should uphold section 5 of the VRA because of the existence, and increased use, of the bailout process. In order to make this argument this paper will: (1) review contemporary debates regarding the constitutionality of preclearance; (2) explore the history of the VRA; (3) examine empirical evidence justifying preclearance; (4) explain Congress's power to regulate elections; and (5) examine legal doctrines related to preclearance. The importance of the bailout process will be explored in each section to illustrate preclearance as a constitutionally justified use of congressional power.

II. Contemporary Voting Rights Act Debates-

In *NAMUDNO* the Court was asked if it remains constitutional for the federal government to single-out jurisdictions for mandatory preclearance of electoral changes. The plaintiff, Northwest Austin Municipal Utility District No. 1, stressed the massive

[6] *City of Boerne v. Flores* 521 US 507 (1997).

disenfranchisement of African American voters—that inspired prior justifications of the VRA—had significantly improved, negating Congress's power to impose federal oversight. This argument was augmented by the assertion that the criteria for determining coverage is tied to a formula established in the 1960s. Preclearance, the Utility District claimed, indiscriminately imposes burdens on jurisdictions through a formula no longer related to Congress's interest in reducing voter discrimination.

Jurisdictions were originally singled out for coverage based on a two-pronged formula that included: (1) if the jurisdiction used of a "test or device," such as a literacy-test, to determine voter eligibility, and (2) if less than 50 percent of the voting-age residents were registered on November 1, 1964 or voted in the presidential election that year.[7] Successive updates of the VRA used voter turnout rates from 1968 and 1972. The twenty-five year update of the VRA in 2006 used the same basic formula to determine covered jurisdictions; many jurisdictions employing exclusionary tactics in the 1960s will face preclearance requirements until 2031.[8]

This decades-old coverage formula directly affects the development of today's election laws. In 2011-2012 the Justice Department blocked laws in South Carolina and Texas—both covered jurisdictions—requiring voters to show photographic identification. Contrast this with the Supreme Court's ruling in 2008 that Indiana's voter ID law did not violate the Constitution.

[7] US Commission on Civil Rights, "Voting Rights Enforcement and Reauthorization: The Department of Justice's Record of Enforcing the Temporary Voting Rights Act Provisions," May 2006, accessed August 16, 2012, http://www.usccr.gov/pubs/051006VRAStatReport.pdf 7.

[8] After the 2006 update, section 5 "covers" all jurisdictions in nine states, plus a host of jurisdictions scattered through several other states. See Voting Section, U.S. Department of Justice, Section 5 Covered Jurisdictions, accessed August 16, 2012, http://www.justice.gov/crt/about/vot/sec_5/covered.php

Had South Carolina and Texas not been covered jurisdictions, the Justice Department could not have blocked their voter ID laws.[9]

In the light of current circumstances *should the Court overturn the "preclearance" requirements of section 5 of the VRA?* There have been two broad approaches to this question. One approach emphasizes empirical studies to examine Congress's coverage formula. This empirical approach uses data to compare covered and non-covered jurisdictions. This evidence often cites the number of elected officials from minority groups, voting rates of minority versus majority populations, and the quantity of racial discrimination lawsuits. This data is put forward to evaluate if the jurisdictions triggered for preclearance, still warrant coverage. Proponents of preclearance, justify continued coverage by citing evidence that covered jurisdictions still disproportionality engage in minority disenfranchisement. Opponents provide evidence to show the opposite.

The other broad approach is best described as focusing on the process of making this decision. This process perspective seeks to answer questions such as: (1) should the Court overturn preclearance, despite Congress's determination it is a legitimate exercise of power; (2) what are the proper theoretical limits to judicial review of election related cases; (3) what line of precedent should or will guide the Court's constitutional interpretation of preclearance; and (4) what standard of scrutiny should, or will, the Court apply to interpret preclearance.

Both process and empirical approaches are important for understanding how the Court will contemplate a constitutional challenge to preclearance. Many researchers combine data from both approaches. However, research examining this question from a diversity of perspectives has

[9] There are some important differences among all three states voter ID laws. Had Texas and South Carolina's voter ID laws not been blocked through preclearance it is likely they would have been challenged in the courts. It is an open debate if Texas and South Carolina's laws would have been deemed constitutional.

largely failed to analyze how the bailout provisions of the VRA might affect the statute's constitutionality.

Abigail Thernstrom's treatise in opposition to preclearance, *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections,* only twice uses the word "bailout" in its 223 pages.[10] Despite providing extensive evidence that covered jurisdictions no longer engage in voter discrimination at rates substantially different than non-covered jurisdictions, Thernstrom never contemplates how bailout affects her challenges. Samuel Issacharoff's influential article "Is Section 5 of the Voting Rights Act a Victim of its Own Success?" argues improved minority voting rates have "eroded the preconditions" that previously justified preclearance. However, nowhere in Issacharoff's article does he even mention bailout.[11] Supreme Court Justice Clarence Thomas' dissenting opinion, in *NAMUDNO* does discuss bailout but argues it "is a distant prospect for most covered jurisdictions."[12] He further declares the promise of bailout "has turned out to be no more than a mirage."[13] Three years after his assertions, the number of jurisdictions that have successfully bailed-out has increased substantially. Ignoring bailout provisions or dismissing the process as unobtainable is hard to justify given current data.

Articles that do address bailout often argue the current process is inadequate, requiring simplification to be relevant to the constitutional argument. Professor Richard Hasen and Congress member Lynn Westmoreland advocated a bailout process that automatically removed

[10] Abigail Thernstrom, *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections* (Washington DC: AEI press, 2009): 188. Bail out appears in two separate footnotes however one dismisses the importance of the process stating: "it's hardly used and too expensive." This is something that could hardly be argued just 3 years later.

[11] Samuel Issacharoff', "Is Section 5 of the Voting Rights Act a Victim of its Own Success?" *Columbia Law Review,* 104 (2004): 1731.

[12] *Northwest Austin Municipal Utility District No. 1 v. Holder,* 557 U.S. 193 (2009)

[13] Ibid.

jurisdictions from coverage.[14] Columbia University Law Professor Heather Gerkin argues for an opt-in approach where local civil rights groups could decide to advocate for continued coverage or choose to negotiate with political leaders for alternate ways to protect voting rights. However, Professor Gerkin fails to notice that many of the changes she advocates are included in the current bailout process.[15] The motivations to relax the bailout process are based on concerns that few jurisdictions successfully terminated coverage after 1982 update of the VRA. While this may have been a valid concern in 2009, the last few years show a very different story. Despite these rapidly changing conditions even articles appearing in 2011 continue to cite outdated bailout data to justify easing the bailout process.[16]

Immediately prior to, and just following, the 1982 extension of the VRA there were numerous works focused on bailout. Many asserted Congress's relaxed bailout process adopted in 1982 would lead to a flurry of covered jurisdictions being released.[17] By the time the 2006 extension was adopted, only fourteen applicants attempted bailout—all from Virginia.[18] When the flurry of bailouts failed to occur, the flurry of research fell off. Many scholars in 2006 dismissed bailout as a viable option, or as having relevance to the constitutionality of the VRA. Some theorized bailout would only work for certain types of jurisdictions. Recent dismissals of the bailout process include: (1) it has only been employed in jurisdictions with a low percentage

[14] Rick Hasen, "Drafting a Proactive Bailout Measure for the VRA Reauthorization," Election Law Blog, accessed August 16, 2012, http://electionlawblog.org/archives/005655.html

[15] Heather K. Gerken, "A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach," Faculty Scholarship Series, Paper 354, accessed May 27,2012, http://www.columbialawreview.org/assets/pdfs/106/3/Gerken.pdf

[16] Enbar Toledano, "Section 5 of the Voting Rights Act and its Place in 'Post-Racial' America," *Emory Law Journal* (2011) 428-9.

[17] Need to find citation.

[18] U.S. Justice Department, Civil Rights Division, "Section 4 of the Voting Rights Act: Jurisdictions Currently Bailed Out," accessed August 16, 2012, http://www.justice.gov/crt/about/vot/misc/sec_4.php

of racial minorities;[19] (2) it has mostly been confined to jurisdictions in Virginia;[20] (3) the process is too difficult and expensive;[21] and (4) it only works for small jurisdictions. Since 2009 these dismissals of the bailout process are no longer justified; jurisdictions of all varieties have terminated coverage.

III. History of the Voting Rights Act-

Despite the Constitution's celebration of "republican government" it failed to grant anyone the right to vote.[22] In fact, the Constitution in 1791 said surprisingly little about voting. The Constitution's silence on voting rights combined with the Tenth Amendment's reserved powers clause initially granted states almost exclusive authority over suffrage. The Fifteenth Amendment is the first time the phrase "right to vote" appears in the Constitution. This amendment combined with the Fourteenth granted the federal government an active role in defining who could vote.[23] This marked a radical shift in the relationship between the states and the federal government, however this radical shift in authority over electoral processes would not be fully realized until the VRA.

The Fifteenth Amendment did not grant a specific "positive" right to vote, rather it limited the reasons why states could prohibit people from voting. Without a direct constitutional right to vote, states attempted a litany of strategies to prevent African American voting that

[19] J Gerald Hebert, "An Assessment of the Bailout Provisions of the Voting Rights Act," in *Voting Rights and Democratic Participation,* ed. Ana Henderson (Berkley: UC Berkeley Public Policy Press, 2007), 270.

[20] Thernstrom, *Voting Wrongs*, 297 footnote 12.

[21] Ibid.

[22] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*. (New York: Basic Books, 2009), 4.

[23] Keyssar, *Right to Vote,* 82.

supposedly "side-stepped" the Fifteenth Amendment's preclusion of restrictions based "race, color, or previous condition of servitude." These notorious strategies included grandfather clauses, literacy test, poll taxes—and felony disenfranchisement. These supposedly non-race based restrictions were so successful at excluding the black vote that in 1940 a shocking 97 percent of voting-age African Americans in the South were denied franchise.[24] Despite various efforts of the Justice Department and the federal courts, federal legislation such as Civil Rights Acts of 1957, 1960 and 1964, did little to reduce voting discrimination. As cited by the Supreme Court in *Katzenbach* these efforts barely increased the registration of voting-age African-Americans.

> In Alabama it rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.[25]

When Congress adopted the Voting Rights Act in 1965 it represented the most comprehensive measure since 1870 to protect the voting rights of blacks.[26] Indicative of its transformative success is the surge in African American voter registration in the segregated South. In Mississippi, the year before the VRA was adopted, black voter registration was below 7 percent, just two years later, it reached 60 percent.[27] In Alabama registration rose from 19.4 percent in 1964 to 51.6 percent by 1967.[28] The VRA employed extraordinary means to achieve

[24] Thernstrom, *Voting Wrongs*, 4.

[25] *South Carolina v Katzenbach*, 383 U.S. 301 (1966)

[26] Keyssar, *Right to Vote,* 211-212.

[27] Thernstrom, *Voting Wrongs*, 6. cites U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 43.

[28] Ibid., 32.

these exceptional results. At the heart of the 1965 VRA's dramatic powers: the section 5 requirement that "covered" jurisdictions seek preclearance from the federal government for *all* electoral changes. No longer could racially-segregated jurisdictions stay one-step ahead of the next lawsuit by continually deploying new tactics to deny franchise. Preclearance places the burden on the applicant to prove new electoral practices will not injure voting rights before the practice goes into effect.[29]

Shortly after adoption, South Carolina challenged the VRA, arguing "preclearance" unfairly burdened the state and ran afoul of federalist principals. In *South Carolina v Katzenbach (1966)*, the Court upheld all contested provisions of the Act, including section 5, recognizing broad congressional powers to enforce the Fifteenth Amendment.[30] However, the Court also recognized section 5 as *an exceptional statute requiring exceptional justification*. In the face of the "insidious and pervasive evil" of racially motivated disenfranchisement and violence the Court sustained "legislative measures not otherwise appropriate."[31] Also factoring in the Court's decision, to uphold preclearance, was the targeted nature of determining jurisdictions for coverage and its time-experiments (unlike the permanent provisions in the VRA, section 5 was set to expire in 1970).[32] Less recognized in the Court's decision was its finding that bailout provided covered jurisdictions a means of protection. In the words the Court: if the preclearance "formula is improperly applied, the area affected can always…obtain termination."[33] Termination, like preclearance, would place

[29] See 42 U.S.C. § 1973c.

[30] Louis Fisher, "Judicial Finality or an Ongoing Colloquy?" in *Making Policy, Making Law: An Interbranch Perspective*, ed. Mark C. Miller and Jeb Barnes (Washington DC: Georgetown University Press, 2004), 155.

[31] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)

[32] Voting Rights Act.

[33] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)

the burden of proof on the jurisdictions to defend their innocence. Despite this unusual arrangement the Court asserted the bailout process is "quite bearable."[34]

Since the *Katzenbach* decision, Congress has renewed section 5 four times, changing and enlarging the statute. In 1980 the Supreme Court upheld the constitutionality of Congress's second extension of section 5.[35] In sustaining the extension, the Court highlighted Congress's conclusion that progress under the act was still limited and fragile.[36] After being extended in 1970, 1975, and again in 1982 for twenty-five years, section 5 was most recently extended in 2006 for another twenty-five years.[37] The time-limited measure originally set to expire in 1970, had been extended until 2031.

IV. Contemporary Empirical Evidence for the Coverage Formula-

Opponents of preclearance argue significant suppression of voting rights in covered jurisdictions must exist to justify federal intrusion into state elections. These opponents assert, jurisdictions currently forced to seek preclearance no longer display discernible differences in voter suppression from non-covered jurisdictions. The majority in *NAMUDNO* similarly pointed out that "today the registration gap between white and black voters is in the single digits in covered states; in some of those state, blacks now register and vote at higher rates than whites." This potentially signals the Court's changing interpretation of preclearance.

[34] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)

[35] *Rome v. United States*, 446 U.S. 156 (1980)

[36] US Commission on Civil Rights, "Voting Rights Enforcement and Reauthorization," 11.

[37] Pei-te Lien, et al. "The Voting Rights Act and the Election of Nonwhite Officials." *Political Science and Politics* (2007): 489, accessed July 7, 2011. doi: 10.1017/S1049096507070746. the U.S. House voted 390-33, and the Senate 98-0, to extend the Act, citing evidence that significant barriers to voting still existed.

Proponents for continued preclearance likewise proclaim the successes of the VRA, but additionally emphasize contemporary racial disparities in electoral power. In an attempt to generate empirical evidence for this debate Ellen Katz, law professor at University of Michigan, led an extensive study of section 2 violations of the VRA from 1982 to 2004.[38] While section 5 requires preclearance for voting changes, section 2 allows a plaintiff to challenge a law after adoption. Importantly, section 2 applies to all jurisdictions, not selectively covered ones. While not a perfect parallel to section 5 its universal coverage allows comparisons in voter discrimination between jurisdictions.[39]

Professor Katz's study showed some stark differences between covered and non-covered jurisdictions. Of the section 2 lawsuits that ended with merit based decisions, 46.4 percent originated in covered jurisdictions, while 53.5 percent were filed in non-covered jurisdictions. Yet only 25 percent of the population lives in a covered jurisdiction.[40] Perhaps a better way to compare the rates of section 2 lawsuits is based on the percentage of the total jurisdictions that are covered. Out of the 89,476[41] jurisdictions in the U.S. only 12,000 (about 13.4 percent) are forced to seek preclearance.[42] When the number of jurisdictions is factored *a covered jurisdiction was more than five-and-a-half-times as likely to be sued for a section 2 violation of minority voting rights*.

The difference between covered and non-covered jurisdictions becomes more pronounced when successful section 2 lawsuits and unpublished section 2 decisions are included. Plaintiffs

[38] Ellen Katz, "Documenting Discrimination in Voting: Judicial Finding Under Section 2 of the Voting Rights Act Since 1982," *Michigan Journal of Law Reform* 39 (2006): 643-772. It should be noted that while section 2 is designed to protect minority voting rights it has different voter discrimination standards than section 5.

[39] Ibid., 650.

[40] Ibid., 655.

[41]This is the number of jurisdictions as of 2007 according to the U.S. Census on Governments updated every five years. http://www.census.gov//govs/cog/GovOrgTab03ss.html

[42] *Shelby County, Alabama. v. Holder* 679 F. 3d 848 (2012)

were also more likely to win section 2 lawsuits in cases originating in covered jurisdictions (42.5 percent versus 32.2 percent in non-covered).[43] Published section 2 lawsuits are only a portion of all section 2 claims filed—many claims are settled without a published opinion. When published and unpublished cases are combined, 81 percent that resulted in favorable outcomes for minority voters—originated in covered jurisdictions.[44] If discrimination were evenly distributed throughout the nation, we would expect to see a *significantl*y lower percentage of successful section 2 lawsuits (and settlements) in covered jurisdictions because section 5 blocks much of the voter discrimination that would constitute a section 2 violation.[45] The high number of section 2 lawsuits and decisions provide an observable difference between covered and non-covered jurisdictions.

In addition to the blocking function of section 5 it also acts as a deterrent. One measure of its deterrence includes DOJ "Request for More Information" (MRIs) and the rate of withdrawn voting change proposals.[46] The DOJ sends out MRIs when a jurisdiction seeking preclearance does not provide enough information to determine if the voting change complies with federal guidelines. From 1982 to 2006 the DOJ filed 800 MRIs leading to 205 instances of voting changes being withdrawn. Likely these changes were withdrawn because the DOJ would have refused clearance. Countless other changes to voting practices were modified in a dialogue between the DOJ and covered jurisdictions to ensure clearance. This data indicates that in the absence of section 5, covered jurisdictions would be subjected to more voter discrimination suits.

[43] Adam B. Cox and Thomas J. Miles, "Documenting Discrimination," *Columbia Law Review Sidebar* 108 (2008): 31-8 responds to Katz's study. Cox and Miles found the likelihood a judge votes in favor of section 2 lawsuit is strongly influenced by both partisan affiliation and race. Their own study also shows that while this correlation exist at the trial court level it does not exist at the appellate court level, a point that Katz concedes. Cox and Miles also pose the important question: "how should we interpret differences in liability rates across different courts, places, or time periods?"

[44] *Shelby County, Alabama. v. Holder* 679 F. 3d 848 (2012)

[45] *Shelby County, Alabama. v. Holder* 679 F. 3d 848 (2012)

[46] Nathaniel Persily, "The Promise and Pitfalls of the New Voting Rights Act," *Yale Law Journal* 117 (2007): 200.

Abolishing preclearance does not get rid of federal oversight of elections, instead it shifts some voter discrimination challenges from preclearance to after-the-fact lawsuits.[47] Nothing precludes someone from suing a jurisdiction in federal court for a violation under section 2, or the Fourteenth or Fifteenth Amendment even if the electoral process was pre-cleared; however preclearance reduces some of these challenges. From 1982 to 2006 section 5 was used to block more than 1,000 changes to electoral processes that could have impaired the voting rights in covered jurisdictions.[48] Given that covered jurisdictions make up a significantly higher rate of section 2 violations, even with preclearance blocking and deterring numerous others, it appears on average covered jurisdictions are engaging in a significantly higher percentage of actions that infringe on minority voting rights.

Even with a correlation between voting discrimination and covered jurisdictions, coverage determined by a statistical trigger will necessarily be over- and under-inclusive—it will include some jurisdictions that have few violations and leave out others with many. Specific singled-out jurisdictions are unlikely to be comforted by the fact on average covered jurisdictions are more likely to violate minority voting rights. The bailout process refines coverage. Consider, since the above studies were completed about 1 percent of all covered jurisdictions have bailed out and nearly another 1 percent are pending termination. In order to bailout, a jurisdiction must have few federal violations of minority voting rights. As the percentage of covered jurisdictions decreases the remaining covered jurisdictions will be those disproportionality engaged in violations of minority voting rights. While a statistical trigger might be a blunt instrument, the bailout process

[47] Katz, "Documenting Discrimination," 655-6.

[48] Pamela S. Karlan, "Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act," *Houston Law Journal* 44 (2007): 22.

acts like a sharping stone. It also alleviates the specific jurisdictions that feel burdened by coverage (provided they can prove non-discrimination in electoral processes.)

Another argument in opposition to preclearance focuses on the burden federal oversight imposes on covered jurisdictions. In 1966 the Court ruled this burden was "quite bearable." It can be argued this is still true today. In 2006 the U.S. Commission on Civil Rights concluded most covered jurisdictions submit their proposed voting changes to the Attorney General (rather than the District Court for the District of Columbia).[49] This choice is made in part because the DOJ responds quickly and engages in a dialogue to improve voting change proposals. In the end, the DOJ rarely objects to a proposed voting change. In fact, even as submissions to the Justice Department have dramatically increased the percentage of objections has fallen significantly. From August 1965 to June 30, 2004, jurisdictions filed 117,057 voting change submissions. The DOJ filed objections to just 1,400 of these, a mere 1.2 percent.[50] In more recent years the objection rate has fallen even lower—only .1 percent of pre-clearance request brought before the DOJ from 1995-2004 were denied.[51] The Commission's report notes the falling levels of objections over time by comparing three different periods: 1965–1974, 1975–1982, and 1982–2004. In these time-blocks the proportion of objections to submitted changes decreased from an initial rate of 14.2

[49] A court clearance option was provided for jurisdictions concerned about partisanship. Despite this option, in the twenty-four years from 1982, to 2006 covered jurisdictions have only filed forty-one preclearance appeals with the District Court compared to over 100,000 submissions to the DOJ. See US Commission on Civil Rights, "Voting Rights Enforcement and Reauthorization,"

[50] U.S. Commission on Civil Rights, "Voting Rights Enforcement and Reauthorization," 21-2.

[51] Chris Kromm, "Voting Rights Act survives court test, but how long will it last?" *Facing South* May 5, 2012, accessed August 16, 2012, http://www.southernstudies.org/2012/05/voting-rights-act-survives-court-test-but-how-long-will-it-last.html

percent to 3.1 percent in the second period, and to 0.7 percent in the third.[52] Table 4 from the Commission's report captures this rate of reduction.

Preclearance Statistics by Submissions and Objections (August 1965 to December 2004)

	1965–1974 (8/65–9/30)	1975–1981 (10/1–12/31)	1982–2004 1/1–12/31	Total
Submissions	1,542	13,874	101,641	**117,057**
Objections	219	429	752	**1400**
Objections as a percentage of submissions	14.2%	3.1%	0.7%	**1.2%**

Caption: During the three legislative periods, the number of submissions rose significantly while the percentage of objections fell steeply.
Note: Data in 1965–1974 covered about 9.2 years, in 1975–1981, about 6.5 years, and in 1982–2004, 23 years. Data for 1974 through 1979 are for fiscal years.
Source: Derived from Bradley J. Schlozman, acting assistant attorney general, Civil Rights Division, U.S. Department of Justice, testimony before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, "Administrative Review of Voting Changes," Oct. 25, 2005, no page number.

The DOJ estimates it will receive over 2,700 redistricting plans for administrative review between 2011 and 2013.[53] Based on current trends, only a fraction will be blocked. Different conclusions can be drawn from this information. Opponents of preclearance claim the low-level of DOJ objections signal federal oversight is no longer necessary or legally justified. Another way of interpreting this data: preclearance has the desired effect of reducing discriminatory electoral changes and the burden placed on covered jurisdictions is not all that great.

The Justice Department's declining objection rate also ensures more jurisdictions will be eligible for bailout. DOJ objections to preclearance submissions over the previous ten years is one barrier to a jurisdiction being released from coverage. It is not surprising that as the number of DOJ objections has decreased, bailouts have increased. Given the extremely low number of objections over the last periods of the Commission's study, many jurisdictions are likely eligible for bailout.

[52] U.S. Commission on Civil Rights, "Voting Rights Enforcement and Reauthorization," 7.

[53] U.S. Department of Justice, Civil Rights Division, Redistricting Information, accessed August 16, 2012. http://www.justice.gov/crt/about/vot/redistricting.php

While more jurisdictions are becoming eligible for bailout, and bailouts have substantially increased, many jurisdictions do not attempt to terminate coverage. Critics of bailout assert jurisdictions may decline to terminate coverage because it is too expensive. J Gerald Herbert who has represented the majority of jurisdictions bailing out since 1982 cites the cost of bailout for a small local government as ranging from $2,500 to $5,000. Hardly a prohibitive expense when one considers each application for preclearance can cost $500. Herbert goes on to note that as of August 2012 "not a single local government that has sought a bailout has been denied one."[54] The high number of jurisdictions that qualify for bailout, combined with the low expense, and the 100 percent success rate indicates some jurisdictions may be making a conscious choice to remain covered. It is possible jurisdictions receive benefits from section 5 coverage; it grants a measure of protection against lawsuits and provides DOJ feedback on proposed election changes. Remember removal from preclearance does not end a jurisdiction's obligation to follow section 2 of the VRA or the Fourteenth and Fifteenth Amendments. Federal oversight with elections continues without preclearance. Compared to the expense of defending against voter discrimination lawsuits remaining covered by preclearance requirements might be a desirable choice.

The empirical evidence paints a complex picture. Both sides can point to some data to defend their position. Voter registration and turnout is less stratified by race than when the Court first upheld preclearance. Further, this stratification is not obviously connected to covered versus non-covered jurisdictions. At the same time there is a high correlation between covered jurisdictions and the rate of minority voter discrimination lawsuits. This correlation is likely getting stronger as more jurisdictions bailout. As those jurisdictions with no violations in the last ten years cease to be covered the remaining jurisdictions will account for an even greater percentage of violations of minority voting rights. Because of bailout it is increasingly difficult to

[54] J Gerald Hebert, e-mail message to the author, August 4, 2012.

argue that on average Congress's coverage formula has no rational relation to achieving its goal to effectuate Fourteenth and Fifteenth Amendment protections even if voter registration and turnout is less stratified.

V. Federal Power and Preclearance-

Congress's broad powers to regulate elections derive from Article I, Section 4 of the Constitution as well as the Fourteenth and Fifteenth Amendments. Citing these constitutional provisions Congress passed the Voting Rights Act in 1965. Immediately after adoption, the Act was legally challenged and upheld. Each time Congress has extended preclearance it has been subjected to Supreme Court review. In cases going back to 1966 the Court has agreed the Constitution allows Congress to single-out jurisdictions for coverage. However, the Court has signaled this power has limits. Granting jurisdictions the ability to get out from coverage plays an important role in these interpretations. In *NAMUDNO* the Court broadly interpreted bailout to expand eligibility. In future Court decisions bailout should be viewed as ensuring preclearance remains within Congress's broad powers to regulate state elections.

Article I, Section 4 of the Constitution stipulates "Congress may at any time by Law make or alter" regulations that states establish for congressional elections. The Court has even interpreted the Elections Clause to allow Congress to regulate "mixed elections"—elections that place state and local candidates on the same ballot with congressional candidates.[55] This implies Congress has constitutional authority under the Elections Clause to impose requirements such as preclearance in any election where congressional candidates are on the ballot. This would cover the vast majority of elections that occur in the U.S. Also Congress's authority under Article I,

[55] In re Coy, 127 U.S. 731 (1888)

Section 4 does not seem limited by the need to accomplish a specific congressional purpose. Congress is allowed to act under Article I, Section 4 because it is an enumerated constitutional power, whereas actions Congress takes under the Fourteenth and Fifteenth Amendments must help achieve the specific goals of those Amendments. Thus Congress may not need to justify an "insidious and pervasive evil" still exist to impose preclearance for the majority of elections that occur in the U.S. The Elections Clause would arguably cover voter ID laws and most registration processes because it is unlikely governments would maintain two separate registrations process, (one for congressional elections and one for other elections). With this interpretation of the Elections Clause Congress only needs to find constitutional authority to impose preclearance in elections without congressional candidates on the ballot. This narrows the required search for constitutional justification to impose preclearance to those elections not covered by Article I, Section 4. It also shows that federal oversight of elections operates outside and independent of preclearance. For those arguing federal the Court should strike down preclearance it is not enough to claim federal oversight imposes a burden on states, it must be argued to be an unconstitutional burden.

The other broad grant of authority that Congress can cite to enact preclearance is under the Reconstruction amendments. The Fifteenth Amendment prevents U.S. or state governments from abridging the right to vote based on race. The Fourteenth Amendment forbids a state from denying any person "the privileges or immunities of citizenship" or "equal protection of the laws." The Reconstruction amendments radically redefined the relationship between the states and federal government; the federal government has more authority to intervene in state affairs. In *Lopez v. Monterey County* (1999) Justice O'Conner stated "the Voting Rights Act, by its nature, intrudes on

state sovereignty" but "the Fifteenth Amendment permits this intrusion."[56] Both the Fourteenth and Fifteenth Amendments grant Congress the power to enforce their provisions. These enforcement grants are more than idle words; these clauses were included in part to prevent the judiciary from limiting Congress's power by narrowly interpreting the amendments.[57] Congress has broad authority to interpret its own power under the Fourteenth and Fifteenth Amendments. Congress has interpreted the VRA as consistent with these powers. The Court must carefully weigh these intentions behind the Fourteenth and Fifteenth Amendments when considering the constitutionality of the Voting Rights Act.

VI. Judicial Review and the Voting Rights Act-

After Congress voted, by an overwhelming margin, to extend preclearance until 2031 the political struggle shifted to the courts. In *NAMUDNO* the Court heard the first constitutional challenge to the 2006 extension of the VRA. The Court side-stepped the constitutional question. This constitutional avoidance combined with the Court's questions about the continuing constitutionality of preclearance ensured the debate would reach the Court again. For example Chief Justice John Roberts' majority opinion offered that "in part due to the success of that legislation, we are now a very different nation," adding continued enforcement of the VRA "must be justified by current needs." The opinion went on to state preclearance "authorizes federal intrusion into sensitive areas of state and local policymaking that imposes substantial federalism costs." This opinion signals the changing circumstances may induce the Court to no longer justify Congress's constitutional authority to adopt preclearance. Specifically the Court noted improved

[56] *Lopez v. Monterey County* 525 U.S. 266 (1999)

[57] Pamela S. Karlan, "Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act," *Houston Law Journal* 44 (2007): 11

minority voting and registration rates and a coverage formula no longer tied to current-day voting rights violations may undermine the circumstances that previously justified the law. As if sensing a change in the Court's willingness to uphold preclearance, a record five challenges to the constitutionality of the VRA were in the federal courts in 2012, two of these were appealed the Supreme Court. It is simply a matter of time before the Court takes up the constitutionality of the VRA again.

The decision in *NAMUDNO* came on the heels of the Court's 1990s federalism revolution where the Court struck down a series of federal laws for imposing on state sovereignty. In fact, the Court became so active in striking down federal laws while Rehnquist was the chief justice (1986-2005) it led one legal scholar to call it the "most activist Court in history."[58] In terms of sheer volume the Court struck down an average of 2.16 federal laws per year which is two-and-a-half times the Court's average prior to 1986. Thus far the Roberts Court has continued to strike down acts of Congress at nearly the same rate of the Rehnquist Court.[59] Given the precedent established by the federalism revolution many theorized the Court would no longer defer to Congress on preclearance.

Perhaps the most important case in the federalism revolution leading up to *NAMUDNO* was *City of Boerne v. Flores* (1997).[60] *City of Boerne* struck down the recently enacted Religious

[58] Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University Of Chicago Press, 2004).

[59] U.S. Senate Document 110-17, *The Constitution of the United States of America: Analysis and Interpretation 2008 Supplement* (Washington, DC : GPO, 2008), 163-4. www.gpoaccess.gov/constitution/browse2002.html#04supp (accessed June 11, 2010); U.S. Senate Document No. 108-17. *The Constitution of the United States of America: Analysis and Interpretation* of the Constitution Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States (Washington DC: GPO, 2002), 2117-59. www.gpoaccess.gov/constitution/pdf2002/046.pdf (accessed June 11, 2010). *The Supreme Court Database: 2006-2010 Cases Declaring Federal Laws Unconstitutional, SCDB, http://scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).*

[60] *City of Boerne v. Flores* 521 US 507 (1997)

Freedom Restoration Act (RFRA) for exceeding Congress's Fourteenth Amendment authority. According to the Court, Congress could not constitutionally enact RFRA because the law was not designed with "congruence and proportionality" for the rights it forced states to uphold.[61] The Court argued the RFRA was "a considerable congressional intrusion into the states' traditional prerogatives and general authority."[62] Both Thernstrom and Issacharoff argue preclearance no longer meets the "congruence and proportionality" test, established in *Boerne,* because the "insidious and pervasive evil" that once justified the law has waned, leaving preclearance an overbearing intrusion on state authority. The opinion in *Boern*e relied heavily on the history of Supreme Court cases upholding Congress's Fourteenth and Fifteenth Amendment authority to impose preclearance. The Court cited a series of voting rights cases as examples where Congress appropriately used its Reconstruction amendments' authority to juxtapose the congressional overreach of the RFRA. The Court noted preclearance had historically been upheld because: (1) it was confined to those regions of the country where voting discrimination had been most flagrant, (2) it permitted a covered jurisdiction to terminate preclearance requirements, and (3) it was time limited. The RFRA on the other hand had "no termination date or termination mechanism" and no comparable congressional record of states passing laws to infringe on religious liberty.[63]

Also important to the Court's decision was the RFRA requirement that state laws meet the "compelling state interest" test. For a law to meet this standard, a legislative body must demonstrate a compelling interest to pass the law and show the legislation is the least restrictive

[61] Ibid.

[62] Ibid.

[63] Ibid.

means for achieving that interest. This is the most rigorous test the Court applies when examining constitutionality. If this test is applied "many laws will not meet the test" severely limiting state's authority to pass legislation of any kind.[64] Preclearance under the VRA imposes no such standard; a jurisdiction does not need to meet a compelling state interest to clear its election laws. Rather, jurisdictions must simply show that proposed election laws do not make it more difficult for protected minority group to elect their candidate of choice.[65] This is a far less demanding standard. There may be several methods to accomplish this requirement as opposed to a single best or least restrictive method. Also, a state interest in adopting new election processes is typically obvious. The ten-year census often requires new district boundaries; frequently the Constitution compels the state to modify election laws. Additionally, the Justice Department works with jurisdictions to ensure their election laws can meet preclearance. The RFRA simply prevented laws that would infringe on religious liberties providing no administrative assistance in crafting legislation that could comply with the law.

From a legal standpoint the question becomes: is preclearance in the 2006 VRA extension more similar to the unconstitutional RFRA or the past adoptions of preclearance the Court upheld. Based on *Boerne* most legal scholars want to know if section 5 is still "proportional and congruent." One of the tests for this standard the RFRA failed was its lack of expiration date. It is becoming increasingly difficult to argue that preclearance is time-limited; by the time the law expires it will have been in effect for sixty-six years. Additionally those skeptical of the constitutionality of preclearance argue that voter registration and turnout data fails to show covered jurisdictions engage in the most flagrant discrimination, potentially causing preclearance to run afoul of another test for "proportionality and congruence."

[64] Ibid.

[65] Candidate of choice standard.

The analysis of empirical data in section IV in no way proves that every covered jurisdiction is disproportionally engaging in voter discrimination. Likewise it does not prove that every non-covered jurisdiction is free from voter discrimination. In fact the analysis does not claim that the current preclearance formula is the best one conceivable. However, preclearance should not be held to that standard. In *Boerne* the Court stated federal legislation could prevent state laws from taking affect if there is a "significant likelihood" the laws could be unconstitutional.[66] Based on the distribution of section 2 lawsuits, the blocking, and deterrence features of sections 5, and the increased targeting of jurisdictions because of bailout and bail-in provisions this standard seems to be met in a reasonably justified way. Except when the compelling state interest test is applied legislation cannot, and should not, be measured by hypothetical legislation that would achieve the results in a better manner. Legislation is a series of compromises, not necessarily the most strategic path for solving problems. Compromise is the intended function of a legislative body. In *Munn v. Illinois* (1877) the Court took this deferential approach to reviewing legislation:

> Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.[67]

It seems the record is at the very most hazy surrounding preclearance's ability to achieve the results Congress desires, it surely is not irrational to assume the empirical data justifies continued preclearance. In preparation for the vote on the 2006 VRA Congress gathered reams of testimony, it made necessary compromises, and it passed a law that some of the best researchers

[66] "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne v. Flores 521 US 507* (1997)

[67] *Munn v. Illinois*, 94 US 113 (1877)

in the world see as having a rational relation to what Congress hoped to achieve. Thus, like the standard in *Munn* the Court should defer to the elected branch.

In the end, the crux of an argument for why preclearance remains constitutional should focus on bailout. The prospect of termination was cited in *Boerne* as a component of the consideration of a law's "proportional and congruent." The mere existence of a termination provision should place preclearance on firmer footing than the RFRA. Under the VRA jurisdictions are not simply forced to face preclearance requirements because they get caught by a trigger formula. They can get out of coverage. In order to terminate coverage jurisdictions simply need to show they are complying with federal law and administrative requirements related to voting rights. This is a standard that should be expected. But bailout also serves another important function for meeting the constitutional standard established in *Boerne*. The increasing number of jurisdictions bailing-out leaves the remaining targeted jurisdictions as the most deserving of coverage. While a preclearance formula may be a blunt instrument to root out discriminatory election laws the bailout and bail-in provisions are sharpening it approach. This is happening at an increasing rate. The jurisdictions now covered by preclearance could be argued to be more directly related to the goals of Congress than the covered jurisdictions from years ago. Thus the actual functioning of bailout, not simply its existence, helps ensure preclearance is meeting another of the test under the *Boerne* standard; it is increasingly confined to those regions where violations of the law are most flagrant.

The standard developed in *Boerne* is an important consideration when contemplating how the Court might interpret the VRA. However it is not the only insight into a constitutional challenge of the VRA. Both the Family Medical Leave Act and the Americans with Disability Act were upheld by the Court after *Boerne* was decided. They were deemed constitutional

because they protected suspected classes *or* fundamental rights. *The VRA does both*.[68] Further Congress can cite Article I, Section 4 for most elections it "intrudes" upon and for others it can cite both Fourteenth and Fifteenth Amendment authority. Lastly, bailout ensures that preclearance meets the "proportionally and congruence" standards established in *Boerne*. This seems to indicate that the VRA is at the apex of congressional power. When all these factors are considered it is a strong legal argument for the Court to uphold section 5 of the VRA.

It should also be noted that after the Court struck down the RFRA, Congress modified this decision. The Religious Land Use and Institutionalized Persons Act, used the Spending Clause, to require localities receiving federal funding, to adopt land-use laws the federal government thought would accommodate religious freedom.[69] The Court does not have the final say on U.S. law. In the past when the Court has narrowed the power the VRA, Congress has overridden those decisions.[70] Much of the argument for and against preclearance gets bogged down in precedent and legal tests to calculate what the Court will or should do. There is a risk of relying too much on legal formulism to predict the path of the law. The Constitution may establish independent judges, but it also creates a dependent judiciary. Judges do not rule on precedent alone. Judicial decisions have been shown to be based on judge's individual preferences and on strategic desires to protect the interest of the institution. The judicial behavior of the Court is also constrained by other political actors, it is constrained by a desire not to overridden by Congress. For those that believe that judges act strategically, the Court's interpretation of the VRA should be filtered through Congress's likely response. Because the

[68] Nathaniel Persily, "Promise and Pitfalls," 190.

[69] Unlike the RFRA, which required religious accommodation in virtually all spheres of life, RLUIPA only applies to prisoner and land use cases. But the RLUIPA was a direct attempt to blunt the decision of *City of Boerne v. Flores.*

[70] See *Georgia v. Ashcroft*, 539 U.S. 461 (2003) overridden by 2006 VRA and *City of Rome v. United States*, 446 U.S. 156 (1980) overridden by 1982 VRA.

VRA has been in effect since 1965 many members of Congress have been elected based on the current rules for elections. Perhaps it is not surprising that the 2006 VRA passed the House 390 to 33. Maintaining the status quo is a powerful desire for those that run for office in the midst of a perpetual campaign. Congress has in the past shown a willingness to modify Court interpretations of the VRA. A Court nullification of preclearance could be viewed as a prime candidate for a congressional override.

The overwhelming passage of the VRA in 2006 leads to a strong philosophical argument for upholding the law. Because of the increased electoral power of previously excluded voters Congress is more directly representative of, and responsible to, the people today than when the VRA was first passed. In 1982 South Carolina Senator Strom Thurmond—who ran for President as a segregationist in 1948 and set the record for the longest individual filibuster in U.S. history trying to stop passage of the 1957 Civil Rights Act—voted in favor of renewing the VRA. The country was surely altered by the Civil Rights Movement. Strom Thurmond's transformation is in part a product of that movement. However members of Congress take votes based on their self-interest in getting reelected, as well as their personal beliefs. Regardless of Strom Thurmond's personal opinions of the VRA in 1982, if he wanted to remain a Senator he likely had to vote in for the VRA. If the electorate are "forcing" their representatives to vote for the VRA and the voters are drawn from the majority of the public (more so than in 1965) than the 2006 VRA is arguably more justified than the 1965 version. The Court might have a duty to step in when the legislative action is stalled and minority groups are excluded from participation. But it is more difficult to craft a justification for judicial review in this case where there are other political safe guards against preclearance being imposed against a state's will.

Some critics of preclearance have asserted that the Court is justified in nullifying the VRA because it is unrepresentative of Congress members' personal beliefs. Members of Congress, the argument goes, are not free to vote against the VRA because they will be punished at the ballot box for doing so. This view is supported by the fact that some members of Congress that voted in favor of the Act hoped the Court strike down portions. However this proves the opposite of what critics of preclearance assert. If Congress is forced to vote for a measure because that is what the majority of their constituents desire, *that is Congress's will*. Representatives do not have an individual will, outside of the votes they cast on behalf of their constituents, that the courts can divine to justify judicial review. Congress makes political compromises based on electoral considerations. This is preciously how Congress is set up, this does not denote flawed legislation or a flawed process. The Court should not step-in to save Congress members from having to make difficult votes that they need to justify before their constituents.

The difficulty facing the Court is not simply the validity of the VRA, but who should have the authority to determine electoral systems. On the one hand states have traditionally been sovereign over elections. Advocates of state authority critique preclearance because of the federal-state dilemma it creates. It should be remembered that this dilemma is not one entirely of section 5's making. The Fourteenth and Fifteenth Amendments forever altered the federal-state relationship. Also some of the largest intrusions on state election authority are imposed by the federal courts both before and after the VRA was adopted. The "one person, one vote" standard for redistricting was imposed on all electoral districts not because of the VRA but because the Court created the standard in a series of cases. Even in the absence of preclearance states are far from free from federal intrusion on their electoral processes. States also have a voice in stopping

preclearance. Each covered state has two senators and multiple members of Congress. The federal elected representatives of covered jurisdictions could have nearly sustained a filibuster by themselves to block the 2006 VRA. Instead the vast majority of elected representatives from covered jurisdictions voted to pass the VRA. The "federal intrusion" imposed by the VRA is sanctioned by the voters, and the representatives, of the very jurisdictions it imposes upon. It is hard to see what rights (or to who these rights belong) that the Court would be upholding by striking down preclearance.

In addition to federalism dilemma there is a conflict between Congress and the Courts. There is often a tension around Courts answering political questions and differing to elected bodies. The debates about when judicial review is appropriate rage on. At times the Court tries to avoid political issues to minimize its role in politics. It uses various doctrines to do so such as standing, mootness, ripeness, and the political question doctrine. In *NAMUDNO* Professor Rick Hasen, arguably the most prolific election law scholar, asserted the Court "embraced a manifestly implausible statutory interpretation to avoid the constitutional question."[71] This effort appeared as an attempt for the Court to avoid substituting its view for Congress's. Justice for the Seventh Circuit Court of Appeals Richard Posner claims "the soundness of legal interpretations and other legal propositions is best gauged, therefore, by an examination of their consequences in the world of fact."[72] Using Posner's calculation one needs to ask what are the likely results if the Court does strike down section 5. Voter initiated lawsuits under section 2 of the VRA and the Fourteenth and Fifteenth Amendment would likely to increase. Courts would likely be forced to oversee the drawing of district maps in increasing numbers. Such a result would be far from

[71] Richard Hasen, "Constitutional Avoidance and Anti-Avoidance by the Roberts Court," *Supreme Court Review*, 2009 182.

[72] Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), 467.

removing federal oversight of elections, it would simply shift the federal oversight from one imposed by Congress and administrative agencies to one administered by the federal courts. Are after-the-fact lawsuits and court created districts a desirable substitute for DOJ preclearance that resolves the issue in sixty days and includes helpful interactions?

The Court should be careful in its considerations to strike down preclearance. But it should also be careful to rely on the tortured logic of *NAMUDNO* because of the number of challenges to the VRA it spawned. It is merely a matter of time before the Court faces another constitutional challenge to the VRA. The bailout process should again factor heavily in the Court's decision. However this time it should view the bailout as a key to the law's constitutionality. The bailout process does not just allow jurisdictions to be released from coverage it should release the Court from having to second guess Congress.