Recent Development: *Northwest Austin Municipal Utility District Number One v. Holder*

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I. Introduction

Legal commentators had billed *Northwest Austin Municipal Utility District Number One v. Holder* [1]—popularly referred to as "*NAMUDNO*"—as a constitutional showdown on the future of congressional power to enforce the Voting Right Act of 1965 ("VRA")[2] and other legislation based on the Reconstruction Amendments.[3] The case concerned the constitutionality of Congress' 2006 reauthorization of the VRA, specifically with regard to section 5 of the Act. But the showdown culminated in a judicial punt: the Roberts Court, in an opinion authored by the Chief Justice, invoked the canon of constitutional avoidance and decided the case on a narrower statutory basis, leaving section 5 intact.

As many have noted, *NAMUDNO* joins a canon of Roberts Court decisions that might be fairly characterized as "minimalist."[4] This Recent Development agrees with this view and explains how *NAMUDNO* helps further define how conservative minimalism operates on the Roberts Court by discussing where exactly it fits into this canon. Additionally, the limited constitutional analysis the Court did provide in *NAMUDNO* is instructive on two smaller points: first, the tension between sections 2 and 5 of the VRA seems to have acquired new constitutional significance; and, second, should the constitutionality of the VRA be questioned in a future case, the Court may not engage with the congressional record of the 2006 reauthorization in the way civil rights groups had hoped.

Part II briefly presents the historical and legal background of the VRA and the procedural history of *NAMUDNO*. Part III summarizes the decision itself. Part IV explains how *NAMUDNO* may fit into Roberts Court minimalism and what we can learn from the limited constitutional analysis the Court did provide.

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[1] 129 S. Ct. 2504 (2009) [hereinafter *NAMUDNO*].

[2] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

[3] Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. Times, Apr. 28, 2009, at A16; Richard L. Hasen, *Will the Supreme Court Kill the Voting Rights Act?*, Slate, Apr. 27, 2009, http://www.slate.com/id/2216888.

[4] *E.g.*, Paul Smith & Josh Block, *Commentary: Supreme Court's Unexpected 'Judicial Minimalism' in Voting Rights Case*, Law.com, July 2, 2009, http://www.law.com/jsp/article.jsp?id=1202431943839.

II. Background

A. Legislative History

In 1965, Congress enacted the VRA,[5] a central accomplishment of the Civil Rights Movement. The VRA has been amended and extended numerous times, most recently in 2006 with the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act,[6] which extended the VRA for an additional twenty-five years. The VRA was enacted pursuant to the Fifteenth Amendment,[7] which provides that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"[8] and grants Congress the "power to enforce this article by appropriate legislation."[9]

The VRA provides two major mechanisms to combat racial discrimination in voting: "vote dilution" claims under section 2[10] and the "preclearance requirement" under section 5.[11] Vote dilution claims under section 2 apply nationwide and create a private right of action for citizens and authorizes the Department of Justice to enforce the VRA's basic principle: "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[12]

Meanwhile, section 5 creates a preclearance requirement that only applies to certain parts of the country known as "covered jurisdictions." Covered jurisdictions must seek either the approval of the Attorney General or a declaratory judgment from the U.S. District Court for the District of Columbia before they can modify any voting qualification, standard, practice, or procedure.[13]

Covered jurisdictions are defined in section 4(b), which focuses on the local history of voter discrimination as the qualifier for being subject to section 5.[14] Effectively, this provision has covered the entirety of the South and

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[5] Pub. L. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

[6] Pub. L. No. 109-246, § 3(c), 120 Stat. 577, 579 (2006).

[7] *Id.*

[8] U.S. Const. amend. XV, § 1.

[9] *Id.* § 2.

[10] Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973 (2006)).

[11] *Id.* § 5 (codified as amended at 42 U.S.C. § 1973c (2006)).

[12] 42 U.S.C. § 1973(a) (2006).

[13] *Id.* § 1973c.

[14] *Id.* § 1973b(c).

only a handful of jurisdictions outside of the South.[15] The VRA also contains a "bailout" provision for "political subdivisions" that wish to be exempted from the preclearance requirement.[16] Section 14(c)(2) specifically defines "political subdivision" as a parish, county, or any "subdivision of the state which conducts registration for voting."[17] Historically, the bailout provision has been seldom used.[18]

B. Legal Precedent

Questions about the constitutionality of section 5 have reached the Court before, most notably in *South Carolina v. Katzenbach*,[19] decided immediately after Congress passed the VRA. Invoking *McCulloch v. Maryland*, the Court applied a relatively modest rationality test ("[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate")[20] and upheld the constitutionality of section 5.[21] After a set of amendments in 1975 extending the VRA, section 5 was challenged again in *City of Rome v. United States*,[22] and the Court again employed the rationality test.[23] The Court subsequently continued to apply the rationality test in a series of decisions that challenged the VRA with each extension or amendment.[24] With this line of cases, section 5's constitutionality seemed fairly secure.

That security was shaken in 1997 when the Court decided *City of Boerne v. Flores*.[25] *City of Boerne* concerned the constitutionality of the Religious Freedom and Restoration Act ("RFRA").[26] Passed in response to a series of Supreme Court decisions unpopular in Congress, RFRA restored strict scrutiny analysis in considering burdens on free exercise of religion under the First Amendment.[27] When the statute was challenged, the Court found that RFRA did not have the adequate "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"[28] and that Congress had exceeded its authority under the Four-

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[15] Currently nine states, fifty-four counties, and twelve smaller subdivisions are covered jurisdictions. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 470 (3d ed. 2007).

[16] 42 U.S.C. § 1973c(a).

[17] *Id.* § 1973(c)(2).

[18] Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 389-90 (1985).

[19] 383 U.S. 301 (1966).

[20] 17 U.S. 316 (1819).

[21] *See Katzenbach*, 383 U.S. at 337.

[22] 446 U.S. 156 (1980).

[23] *See id.* at 177.

[24] *See* Lopez v. Monterey County, 525 U.S. 266 (2000).

[25] 521 U.S. 507 (1997).

[26] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[27] *City of Boerne*, 521 U.S. at 507.

[28] *Id.* at 520.

teenth Amendment.[29] After *City of Boerne*, scholars questioned whether a "congruence and proportionality" test could be applied to other legislation based on the Reconstruction Amendments like the VRA.[30]

This remained an open question when, in 2006, Congress reauthorized the VRA for an additional twenty-five years. Days after the reauthorization, a municipal utility district in Texas filed an action in the U.S. District Court for the District of Columbia challenging the constitutionality of section 5. Pursuant to the VRA, this court has jurisdiction over questions arising under the VRA with decisions directly reviewable by the Supreme Court.[31]

C. The Decision Below

The plaintiff, the Northwest Austin Municipal Utility District No. 1, provides limited, local municipal services to constituents inside Travis County, Texas.[32] The district is governed by a five-member board that is elected by those living within the district.[33] The district's elections are administrated by Travis County, and the district does not conduct its own voter registration.[34] As a municipal district within a covered state, the district is subject to section 5 preclearance before making any changes to election practices. The district asked the court to deem it eligible for bailout under section 4, and in the alternative, to rule section 5 unconstitutional.[35] The three-judge district court panel refused both remedies. In a 136-page opinion, Judge David Tatel[36] addressed both of the questions in great depth, beginning the opinion with a detailed description of the VRA and its history.[37]

The court then addressed the bailout question. In its brief, the district had argued that although it did not meet section 14(c)(2)'s definition of a political subdivision because it did not register its own voters, the court should rely on the plain meaning of "political subdivision" as a more accurate indicator of congressional intent based on the 1982 amendments, which had expanded bailout eligibility to political subdivisions within formally covered jurisdictions.[38] Prior to the amendments, the Court had held in *United States v. Board of Commissioners of Sheffield, Alabama*[39] that once

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[29] *Id.* at 536.

[30] *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 15, at 484-85.

[31] 42 U.S.C. § 1973b(a) (2006).

[32] Complaint at 1, Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008) (No. 06-1384).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Judge Tatel of the Federal Court of Appeals for the District of Columbia Circuit was sitting with the district court panel for this case.

[37] *Nw. Austin*, 573 F. Supp. 2d at 221.

[38] Plaintiff's Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 12-13, *Nw. Austin*, 573 F. Supp. 2d 221 (No. 1:06-CV-01384), 2007 WL 5918668.

[39] 435 U.S. 110 (1978).

an area, such as a state, was designated for coverage, all political subdivisions, regardless of whether or not they register their own voters, were subject to section 5 preclearance.[40] The district argued that Congress had passed the 1982 amendments with the *Sheffield* interpretation in mind with respect to bailout.[41] The district court disagreed, finding that such an interpretation rendered too much language within the VRA meaningless or redundant.[42]

As for the constitutional question, the district urged the court to review section 5 not under the *Katzenbach* rationality test, but under the stricter congruence and proportionality test derived from *City of Boerne*.[43] In the end, the court chose to maintain the *Katzenbach* standard, and focused the analysis on rationality.[44] The court was careful to note, however, that section 5 would be likely to survive even under the *City of Boerne* standard.[45]

III. The Supreme Court Decision

The Supreme Court reversed and remanded in an eight-to-one decision authored by Chief Justice Roberts. Justice Thomas concurred in part and dissented in part.

The Chief Justice quickly invoked the canon of constitutional avoidance to make it clear that the Court would not reach the question of section 5's constitutionality, choosing instead to decide the case entirely on the narrower statutory question of whether the utility district was eligible for bailout.[46] Despite this pledge of avoidance, however, the Court went on to provide a fairly comprehensive analysis of section 5's constitutionality. The Court briefly sketched the history of the VRA and carefully noted that the bailout provision existed because "Congress recognized that the coverage formula it had adopted 'might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices.'"[47] The Court also emphasized the "temporary" nature of sections 4 and 5 and provided a further historical account of the VRA's numerous extensions and amendments.[48] The Court went on to hail the historical accomplishments of the VRA, noting the improvements in racial disparities in voting registration in covered jurisdictions since 1965.[49]

This praise for the VRA, however, was abbreviated by the Court's concerns regarding the "federalism costs" of section 5, the first of which was

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[40] *Id.* at 118.
[41] *Nw. Austin*, 573 F. Supp. 2d at 232.
[42] *Id.* at 231-35.
[43] *Id.* at 235.
[44] *Id.* at 241-46.
[45] *Id.* at 268-79.
[46] *NAMUDNO*, 129 S. Ct. 2504, 2508 (2009).
[47] *Id.* at 2509 (quoting Briscoe v. Bell, 432 U.S. 404, 411 (1977)).
[48] *Id.* at 2510.
[49] *Id.* at 2511.

the "federal intrusion into sensitive areas of state and local policymaking."[50] To buttress the credibility of this cost, the Court cited the dissents and concurrences in a series of cases, none of which found section 5 unconstitutional, as reflecting "serious misgivings about the constitutionality of [section] 5."[51] For the Court, the extension of section 5 far beyond the language of the Fifteenth Amendment, along with the Department of Justice's responsibility for monitoring elections for many localities, created a problem of federalism. The Court suggested that this federalism cost was no longer outweighed by the need to correct the injustices of an earlier era, noting improvements in the political participation of African Americans in the covered jurisdictions. According to the Court, "[p]ast success alone, however, is not adequate justification to retain the preclearance requirement."[52]

The second federalism cost the Court cited was the VRA's affront to "equal sovereignty" between states by covering some states and not others.[53] The Court then noted the confusing state of constitutional litigation regarding the use of race as a consideration in regulating voting to "underscore" these federalism concerns. This litigation had created a situation where it may be that race no longer is the predominant consideration in redistricting plans or section 2 vote dilution claims, but race remains a predominant consideration in section 5 preclearance.[54] The fact that some states and not others must face this tension underscored the Court's federalism concerns about equal sovereignty.

The Court refused to choose between the *Katzenbach* and *City of Boerne* tests, although the Court noted that the VRA's "preclearance requirements and coverage formula raise serious constitutional concerns under either test."[55] Insisting that it was in no way shirking its institutional duties by leaving the question unanswered, the Court invoked the canon of constitutional avoidance one final time, allowing the case to be resolved purely on the statutory claim.[56]

Having avoided the constitutional question, the Court went on to reverse the district court's finding that the district did not qualify for bailout under the VRA because it did not meet the statutory definition of "political subdivision." The Court argued that "specific precedent, the structure of the Voting Rights Act, and the underlying constitutional concerns compel a broader reading of the bailout position" to include entities like the district.[57]

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[50] *Id.* (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (2000)).
[51] *Id.*
[52] *Id.*
[53] *Id.* at 2512.
[54] *See id.*
[55] *Id.* at 2513.
[56] *Id.*
[57] *Id.* at 2514.

The Court agreed with the district's interpretation of *Sheffield*, holding that at the least *Sheffield* stood for the proposition that section 14(c) did not provide the exclusive definition of a political subdivision to be used in the VRA.[58] It found a logical symmetry between criteria for being subject to section 5 and criteria for eligibility to bailout from section 5.[59] The Court also found that the 1982 amendments endorsed a piecemeal vision of the bailout, rejecting the government's argument that this question was previously decided in *City of Rome*.[60] Thus, the Court held that any political subdivision, as the term is generally understood, is eligible for bailout from section 5.

The Court concluded the majority opinion with a succinct statement suggesting the unconstitutionality of section 5. Recalling *Katzenbach*, the majority reasoned that the "exceptional circumstances" that made section 5 constitutional in 1965 may no longer exist.[61]

Justice Thomas concurred in part and dissented in part. He agreed with the majority's interpretation of the bailout provision, but insisted that the Court was required to address the constitutional question in order to afford the district the full relief that it sought.[62] According to Justice Thomas, the district was seeking actual bailout from the preclearance requirement, not mere eligibility to bail out, and thus the canon of constitutional avoidance could not be appropriately invoked.[63]

Justice Thomas squarely addressed the constitutionality of section 5, claiming that the "lack of current evidence of intentional discrimination with respect to voting renders section 5 unconstitutional."[64] Justice Thomas distinguished between provisions of the VRA that "directly" enforce the Fifteenth Amendment, such as section 2, from section 5, which was enacted for the "different purpose" of "prevent[ing] covered jurisdictions from circumventing the direct prohibitions imposed by sections 2 and 4(a)."[65] Thomas provided an evocative description of the historical circumstances that made section 5 necessary—with the widespread use and development of supposedly race-neutral tests and devices to keep African Americans from voting, discrimination in the covered jurisdictions was simply too prevalent and innovative for section 2 to tackle alone.[66]

These historical circumstances provided the "back-drop" to *Katzenbach*, which Justice Thomas then analyzed in depth. Justice Thomas emphasized the exceptional circumstances that the *Katzenbach* Court perceived in

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[58] *Id.*
[59] *See id.*
[60] *Id.* at 2515-16.
[61] *Id.* at 2516.
[62] *Id.* at 2517.
[63] *Id.*
[64] *Id.* at 2519.
[65] *Id.* at 2520.
[66] *Id.* at 2520-21.

upholding the constitutionality of section 5 and which "radically interfere[d] with control over local elections."[67]

Justice Thomas noted three principles that one could derive from *Katzenbach* and subsequent VRA cases. First, section 5 necessarily prohibits voting practices not directly prohibited by the text of the Fifteenth Amendment.[68] Second, because of this first principle, section 5 "pushes the outer boundaries" of Congress' power to enforce the amendment.[69] Third, this boundary-pushing legislation and its tension with certain notions of federalism requires "the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible" to sustain its constitutionality.[70] The remedy must match the evil.

For Justice Thomas, it was clear that the remedy of section 5 no longer matched the evil. Thomas flatly stated, "the extensive pattern of discrimination that led the Court to previously uphold section 5 as enforcing the Fifteenth Amendment no longer exists."[71]

IV. Effects and Analysis

The narrow holding of *NAMUDNO* has at least one clear effect: bailout is now available to more political entities than before. Expanding eligibility, however, may not be significant in practice. The stringent requirements that an eligible political subdivision must meet to achieve bailout remain in place, and historically, few eligible entities have attempted to demonstrate that they meet these requirements. Conceivably, *NAMUDNO* and the conservative political momentum around it could lead to a new generation of attempts to bailout. Or, as Justice Thomas suggested in his opinion, the bailout requirements themselves could present constitutional issues in a future case by their stringency.

NAMUDNO reveals more than this, however. The decision helps further refine the notion of minimalism that has come to characterize the Roberts Court. Additionally, the constitutional analysis the Court did provide suggests two smaller points: (1) there may be a new constitutional dimension to a particular tension between sections 2 and 5 of the VRA; and, (2) the congressional record compiled during the 2006 reenactment of the VRA may not be as important to constitutional challenges of the VRA as scholars once thought it would be.

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[67] *Id.* at 2522.
[68] *Id.* at 2523.
[69] *Id.* at 2524.
[70] *Id.*
[71] *Id.* at 2525.

A. Refining Roberts Court Minimalism

Beginning with Chief Justice Roberts's first term, the Roberts Court has produced opinions described in various ways as minimalist.[72] *NAMUDNO* best fits into this category alongside *FEC v. Wisconsin Right to Life*[73] and *Hein v. Freedom From Religion Foundation, Inc.*[74] In both of these cases, authored by the Chief Justice and Justice Alito, respectively, the conservative majority on the Court achieved the desired conservative result but avoided the scorn of the public or cries of activism by basing the decision on less objectionable or procedural grounds. In *Wisconsin Right to Life*, the Chief Justice, joined only by Justice Alito, carved out an exception to existing campaign finance law but declined to totally overrule *McConnell v. FEC*.[75] In *Hein*, Justice Alito, joined only by the Chief Justice and Justice Kennedy, declined to actually overturn *Flast v. Cohen*,[76] but rendered a decision on standing that effectively neutered *Flast* anyway.[77] In *Wisconsin Right to Life*, Justices Scalia and Thomas said they would have gone the extra mile and overruled *McConnell*,[78] and in *Hein*, they said they would have done the same for *Flast.*[79]

Like *Wisconsin Right to Life* and *Hein*, in *NAMUDNO*, the Chief Justice declined to follow Justice Thomas to the most conservative result. And as in those two cases, *NAMUDNO* allowed the Roberts Court to maintain its veneer of modesty by avoiding headlines about the Supreme Court striking down one of the central legislative accomplishments of the Civil Rights Movement. Unlike those two cases, however, *NAMUDNO* did not directly achieve a result desired by some conservatives, but may do so indirectly. *NAMUDNO* could add to this group an additional version of conservative judicial minimalism that still achieves conservative results, but does so indirectly.

As attorney Tom Goldstein has argued, *NAMUDNO* signals to Congress that its constitutional lease on section 5, as it currently stands, is coming to an end. Congress could change the coverage formula or make the bailout requirements easier to pass, or take any number of measures that might temper the burdens that section 5 imposes on covered jurisdictions.[80]

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[72] *See, e.g.*, Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL'Y REV. 1 (2007); Cass R. Sunstein, Op-Ed., *The Minimalist*, L.A. TIMES, May 25, 2006; Posting of Jonathan Adler to The Volokh Conspiracy, http://volokh.com/posts/1246374141.shtml (June 30, 2009, 11:02 EST).

[73] 551 U.S. 449 (2007).

[74] 551 U.S. 587 (2007).

[75] 540 U.S. 93 (2003).

[76] 392 U.S. 83 (1968).

[77] *Hein*, 551 U.S. at 603.

[78] *Wis. Right to Life*, 546 U.S. at 504 (Scalia, J., dissenting).

[79] *Hein*, 551 U.S. at 637 (Scalia, J., concurring).

[80] Posting of Tom Goldstein to SCOTUSblog, http://www.scotusblog.com/wp/2009/06/page/3/ (June 22, 2009, 13:13 EST, updated 14:13 EST) ("The decision unambiguously served

What Congress does next could test the effectiveness of this form of minimalism. Currently, there are no proposals to amend the VRA to make it more palatable to the Supreme Court. The next case to test the constitutionality of section 5 is probably two or three years away.[81] However, such a case seems likely to arise, as the Governor of Georgia submitted an amicus brief in *NAMUDNO* urging the Court to rule section 5 unconstitutional and noting the near impossibility for all of the covered jurisdictions within Georgia to meet the bailout requirements.[82]

B. NAMUDNO *and a New Federalism Cost*

In its discussion on the federalism costs of section 5, the Court, citing Justice Kennedy's concurrence in *Georgia v. Ashcroft*,[83] noted the constitutional "tension" between the use of race as a factor in redistricting and its use under section 5.[84] The Court was referring to a line of cases, including *Shaw v. Reno*[85] and *Miller v. Johnson*,[86] in which it had determined that states may not use race as a "predominant" factor in congressional redistricting because doing so would violate the Fourteenth Amendment or section 2 of the VRA.

State legislatures may not gerrymander in a way that uses race as a predominant factor, but ensuring minority racial representation is the entire point of section 5.[87] This ambivalence about the propriety of using race in drawing political boundaries produces a system in which we tell some jurisdictions they both *must* and *cannot* consider race in that process. The *NAMUDNO* Court noted that "[a]dditional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere."[88]

The Court appeared to be hinting at a new doctrine in which a constitutional tension existing in some states and not in others somehow itself violates principles of federalism. This is a curious doctrine in that it seems difficult to articulate exactly what the actual federalism cost is. Perhaps it is the existential discomfort of living with an incoherent constitutional framework about the appropriate use of race in redistricting or the long and complicated interpretations of the law that government lawyers and judges must

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notice that the Justices are prepared to invalidate the statute as it stands. Congress is now effectively on the clock . . . .").

[81] Richard Hasen, Initial Thoughts on *NAMUDNO*: Chief Justice Roberts Blinked, Election Law Blog (June 22, 2009), http://electionlawblog.org/archives/013903.html.

[82] Brief for Georgia Governor Sonny Perdue as Amicus Curiae Supporting Appellants at 3, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322).

[83] 537 U.S. 1151 (2003).

[84] *NAMUDNO*, 129 S. Ct. at 2526.

[85] 509 U.S. 630 (1993).

[86] 515 U.S. 900 (1995).

[87] *See* Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (1965).

[88] *NAMUDNO*, 129 S. Ct. at 2512.

engage in when considering a redistricting plan. Whatever this cost really is, *NAMUDNO* represents an incremental development in the Court's discussion of this issue, with eight members now expressing a concern that was previously confined to Justice Kennedy. Future litigation involving this tension between sections 2 and 5 may involve this federalism axis as much as it involves the tension itself.

C. The Court's Engagement with the Congressional Record

Finally, the constitutional analysis in the case indicates the extent to which the Court will actually engage with the congressional record of the 2006 reauthorization if it does actually deal with the constitutional question in a later case.

By all accounts, the assembled record was extraordinary in both volume[89] and political circumstance.[90] Congress received more than 20,000 pages of documents, conducted many weeks of hearings, and dwarfed the record assembled for the 1975 and 1982 amendments.[91] The reauthorization passed unanimously in the Senate and faced little opposition in the House.[92]

Although the civil rights community generally lauded the reauthorization effort, at least one leading election scholar, Richard Pildes, criticized the effort for its inattention to the changed circumstances of the last forty years, and specifically, its inattention to the *City of Boerne* line of cases. Pildes wrote that civil rights advocates pushing the bill through Congress failed to "ma[k]e a good-faith effort" to address the congruence and proportionality standard.[93]

NAMUDNO suggests that, ultimately, the congressional record may be less important to the Court than scholars anticipated it would be at the time of the reauthorization. The constitutional analysis contained in *NAMUDNO* is striking for its absence of any acknowledgement of the 20,000-page record. The *NAMUDNO* Court, armed with a handful of statistics about improvements in African American voter registration and the success of African American political candidates after 1965, seemed content to make its own assessment of the factual conditions that may no longer justify the existence of section 5. Furthermore, the Court ignored the Assistant Solicitor General's repeated references to the massive congressional record at oral argument.[94]

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[89] Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.–C.L. L. REV. 385, 402-03 (2008).

[90] Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179-80 (2007).

[91] Clarke, *supra* note 89, at 402-03.

[92] Persily, *supra* note 90, at 174.

[93] Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 153 (2007), http://thepocketpart.org/2007/12/10/pildes.html.

[94] Transcript of Oral Argument at 27, 36, 44, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322).

One could easily imagine a version of avoidance that noted that substantial record established by Congress, and noted the need to examine that record when the constitutional question was actually addressed. The Court did not do this, however. Rather, the Court seemed content with its own set of criteria for determining the pace of racial justice in America, and even a 20,000-page congressional record seems unlikely to disturb those criteria. While the Court may engage more thoroughly with this record when it actually decides the constitutional question in another round of litigation, *NAMUDNO* suggests that there was little Congress could have done differently in assembling the legislative history behind the reauthorization; the Court already knows what it needs to know.

IV. Conclusion

NAMUDNO is most likely the precursor to an ultimately more famous case in which the Supreme Court directly addresses the constitutionality of section 5, or perhaps the precursor to an amendment to the VRA that scales back its provisions. Either way, *NAMUDNO* adds to our understanding of how minimalism operates on the Supreme Court, and its limited constitutional analysis is revealing on smaller points.