

a constitutionally suspect — if not outright invalid — regulatory change.

H. Voting Rights Act

1. *Preclearance.* — Section 5, one of the most expansive provisions in the Voting Rights Act of 1965¹ (VRA), prohibits covered jurisdictions from making any changes to their voting procedures without first obtaining federal approval.² The Supreme Court has repeatedly voiced concern about this preclearance requirement's "federalism costs,"³ and more recently has taken measured steps to cabin section 5's applicability.⁴ Last Term, in *Northwest Austin Municipal Utility District No. One v. Holder*⁵ (*NAMUDNO*), the Supreme Court held that *any* political subdivision in the ordinary sense, and not just one satisfying a narrower definition provided in section 14(c)(2) of the VRA, can "bail out" of — that is, be exempt from — the preclearance provisions of the Act if it meets the statutory prerequisites.⁶ In reaching this conclusion, the Court abandoned the widely accepted convention that statutory definitions control the meaning of statutory words, asserting that the canon of constitutional avoidance necessitated a broader reading of "political subdivision."⁷ On the one hand, the *NAMUDNO* opinion can be characterized as minimalist: it adopts a consensus view that skirts the more difficult question of the VRA's constitutionality and largely leaves the preclearance system intact. On the other hand, the Court's largely status quo-preserving decision offers Congress little incentive to alter its current practice of political avoidance in the voting rights arena. Thus, in practical terms, the *NAMUDNO* decision more likely elevates, not diminishes, the future role of the Court in shaping the VRA's reach — a strongly maximalist result. A more holistic approach to judicial minimalism in *NAMUDNO* would have accounted for both the immediate consequences of the Court's ruling and the decision's effects on *future* cases.

¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

² 42 U.S.C. § 1973c (2006).

³ *E.g.*, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)) (internal quotation marks omitted).

⁴ *See, e.g.*, *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (holding that a reduction in the power of county commissioners in anticipation of the ascension of a black commissioner is not a change "with respect to voting," *id. passim* (quoting 42 U.S.C. § 1973c), in violation of section 5 of the VRA).

⁵ 129 S. Ct. 2504 (2009).

⁶ *Id.* at 2516; *see* 42 U.S.C. § 1973b(a) (2006) (listing six requirements that must have been met over the ten years before a subdivision can seek bailout).

⁷ *NAMUDNO*, 129 S. Ct. at 2513.

Confronted with decades of Jim Crow laws and intentional state and local evasion of antidiscrimination laws,⁸ Congress decided in 1965 to use its enforcement authority under Section 2 of the Fifteenth Amendment to pass the VRA.⁹ Far-reaching in scope and in impact, the VRA included a number of prophylactic provisions designed to curb both direct acts of voting discrimination and more subtle means of disenfranchisement.¹⁰ Today, the VRA retains all of its substantive provisions, including section 5, which mandates that covered states and political subdivisions¹¹ obtain pre-approval from either the Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia before effecting any changes to their election procedures.¹² Section 4(a) of the Act, however, allows jurisdictions to bail out from section 5's strictures if they meet certain statutory requirements.¹³ A separate section, section 14(c)(2), defines "political subdivision" as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."¹⁴

Northwest Austin Municipal Utility District Number One is a small utility district in Travis County, Texas, that holds public elections for membership on its governing board.¹⁵ Created in 1987, the district has no demonstrated history of racial discrimination in voting but is nevertheless subject to preclearance requirements because it is located within a covered jurisdiction (Texas).¹⁶ The district brought suit in the D.C. district court seeking bailout from section 5.¹⁷ The district argued that it was a political subdivision within the common meaning of the term for purposes of section 4(a), even if it did not conduct voter registration as required by section 14(c)(2), and asserted in the alternative that section 5 was unconstitutional.¹⁸

⁸ See J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 678–80 (2008).

⁹ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO)*, 573 F. Supp. 2d 221, 224–25 (D.D.C. 2008) (quoting U.S. CONST. amend. XV, § 2).

¹⁰ See *South Carolina v. Katzenbach*, 383 U.S. 301, 315–16 (1966) (describing the various provisions of the VRA).

¹¹ The current formula provides that the requirements of section 4(a) and section 5 apply to any state or political subdivision that in 1972 (1) maintained a test or device to determine eligibility for voting; and (2) had registration or turnout rates below fifty percent of the voting-age population. 42 U.S.C. § 1973b(b) (2006).

¹² See *id.* § 1973c(a).

¹³ See *id.* § 1973b(a).

¹⁴ *Id.* § 1973l(c)(2).

¹⁵ *NAMUDNO*, 129 S. Ct. at 2510.

¹⁶ See *id.*

¹⁷ *Nw. Austin Mun. Util. Dis. No. One v. Mukasey (NAMUDNO)*, 573 F. Supp. 2d 221, 223 (D.D.C. 2008).

¹⁸ See *id.*

The district court, in a unanimous opinion by Judge Tatel,¹⁹ rejected both claims.²⁰ In addressing the first argument, the court noted that both the text and the legislative history behind section 4(a) suggest that Congress intended for section 14(c)(2) to cabin eligibility for bailout.²¹ The court then addressed the district's "primary argument" that section 5 was an unconstitutional exercise of Congress's enforcement power under the Fifteenth Amendment.²² After reviewing the evidence in the 2006 congressional record showing that covered jurisdictions continued to discriminate on the basis of race in voting, the court concluded that section 5 passed muster under both a more lenient rational basis test and the more stringent "congruence and proportionality" test²³ articulated in *City of Boerne v. Flores*.²⁴

The Supreme Court reversed,²⁵ but on unexpectedly narrow grounds. The majority, in an opinion by Chief Justice Roberts,²⁶ ruled that the definition of "political subdivision" provided in section 14(c)(2) does not apply uniformly throughout the VRA generally, and does not dictate bailout eligibility specifically.²⁷ The Court conceded that "[s]tatutory definitions control the meaning of statutory words, of course, in the usual case."²⁸ But this case, Chief Justice Roberts noted, was exceptional for two reasons.

First, Chief Justice Roberts argued that a broader reading of "political subdivision" under section 4(a) would bring the bailout provision in line with earlier Court precedent surrounding section 5.²⁹ He pointed out that *United States v. Sheffield Board of Commissioners*³⁰ had already determined that section 14(c)(2) does not apply to section 5.³¹ There, the Court held that when a state meets the coverage criteria, all political units within it are also subject to the preclearance requirement, whether or not the units conform to the "political subdivi-

¹⁹ Circuit Judge Tatel was joined by District Judges Friedman and Sullivan. VRA cases require a three-judge panel with at least one circuit judge. See 42 U.S.C. § 1973b(a)(5); see also 28 U.S.C. § 2284 (2006).

²⁰ *NAMUDNO*, 573 F. Supp. 2d at 223.

²¹ See *id.* at 232–34.

²² *Id.* at 235.

²³ See *id.* at 283. For a full explication of the "congruence and proportionality" test, see *id.* at 268–69.

²⁴ 521 U.S. 507 (1997).

²⁵ *NAMUDNO*, 129 S. Ct. 2504. The VRA provides for direct appeals to the Supreme Court. 42 U.S.C. § 1973b(a)(5) (2006).

²⁶ Chief Justice Roberts was joined by Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, Breyer, and Alito.

²⁷ See *NAMUDNO*, 129 S. Ct. at 2515.

²⁸ *Id.* at 2514 (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)) (internal quotation marks omitted).

²⁹ See *id.* at 2514–16.

³⁰ 435 U.S. 110 (1978).

³¹ See *NAMUDNO*, 129 S. Ct. at 2514.

sion” definition.³² Accordingly, if “all political units in a covered State are to be treated for § 5 purposes as though they were ‘political subdivisions’ of that State,” the principle of symmetry demanded that “they should also be treated as such for purposes of § 4(a)’s bailout provisions.”³³ Second, Chief Justice Roberts argued that the canon of constitutional avoidance also compelled the broader reading, since the alternative relief sought by the district would force the Court to rule on the constitutionality of section 5.³⁴ Although the Court expressed serious misgivings about the constitutionality of section 5,³⁵ it was nevertheless “keenly mindful of [its] institutional role,” arguing that separation of powers concerns required the Court to consider disposal on all other grounds before ruling on a congressional statute’s constitutionality.³⁶ Finding it unnecessary to address the constitutional question, the majority held that the district was eligible for bailout.

Justice Thomas concurred in the judgment in part and dissented in part.³⁷ He noted that the district, even if eligible for bailout under the majority’s broader definition of “political subdivision,” still had not demonstrated its compliance with the statutory requirements for bailout. Consequently, because “the Court [was] not in a position to award [the district] bailout, adjudication of the constitutionality of § 5 . . . [could not] be avoided.”³⁸ Moreover, he also observed that “an interpretation of § 4(a) that merely makes more political subdivisions *eligible* for bailout does not render § 5 constitutional.”³⁹ Because “[b]ailout eligibility is a distant prospect for most covered jurisdictions,”⁴⁰ Justice Thomas argued that the Court’s resolution of the bailout eligibility problem did “not eliminate the issue of § 5’s constitutionality.”⁴¹ Turning to section 5’s constitutionality, Justice Thomas conceded that although the preclearance requirement’s remedial character had made it constitutional at its inception, “[t]he extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.”⁴² For that rea-

³² See *Sheffield Bd. of Comm’rs*, 435 U.S. at 128–29.

³³ *NAMUDNO*, 129 S. Ct. at 2516 (quoting *City of Rome v. United States*, 446 U.S. 156, 192 (1980) (Stevens, J., concurring)) (internal quotation marks omitted).

³⁴ *Id.* at 2514 (“But here . . . underlying constitutional concerns compel a broader reading of the bailout provision.”).

³⁵ See *id.* at 2511–13 (raising the federalism concerns surrounding section 5 and noting that “[t]he Act’s preclearance requirements and its coverage formula raise serious constitutional questions,” *id.* at 2513).

³⁶ *Id.* at 2513.

³⁷ *Id.* at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part).

³⁸ *Id.*

³⁹ *Id.* at 2518.

⁴⁰ *Id.*

⁴¹ *Id.* at 2519.

⁴² *Id.* at 2525.

son, section 5's imposition on state sovereignty, in his view, was no longer justified, rendering the provision unconstitutional.⁴³

People of all political stripes have praised the VRA's successes,⁴⁴ but some, including current and past members of the Court, have evinced unease with the stigma and burdens the VRA imposes on states and localities.⁴⁵ In a show of Chief Justice Roberts's commitment to judicial minimalism, the *NAMUDNO* Court was careful to preserve the existing breadth and applicability of section 5, even arguably ignoring the statutory language to sustain its interpretation. But the *NAMUDNO* opinion, intentionally or not, disregarded the politics of voting rights. Many election law observers have noted that congressional engagement with the VRA has largely amounted to an act of political avoidance.⁴⁶ Congress has rarely spoken on the issue outside the confines of reauthorizing the statute, and even then has made few efforts to alter the VRA's operative provisions. The Court in *NAMUDNO* could have, in applying section 14(c)(2) uniformly throughout the VRA, sent a stronger signal to Congress to address the VRA's infirmities without ruling on the constitutionality of section 5. Its failure to do so, however, means that the Court, not Congress, will play a much greater role in deciding the VRA's scope.

The *NAMUDNO* opinion thus takes an approach to judicial minimalism that considers only the judicial involvement in a given case and the breadth of the decision under specific facts, without regard to the role of the courts in later cases. This type of judicial minimalism, most famously identified with Professor Cass Sunstein, embraces narrow and shallow decisionmaking — narrow in the sense that the Court leaves important, related issues undecided, and shallow in the sense that the Court refuses to venture into a deeply politicized area of law when consensus is possible on a more broadly acceptable ground.⁴⁷

The narrow scope of the opinion is unmistakable: the *NAMUDNO* Court went to great lengths to rule on a technical statutory ground to avoid tackling the broader constitutionality of section 5. By compari-

⁴³ *Id.* at 2527.

⁴⁴ See 152 CONG. REC. S7967 (daily ed. July 20, 2006) (statement of Democratic Sen. Edward Kennedy) ("These gains [in minority Congressmen] would not have been possible without the Voting Rights Act."); *id.* at S7950 (daily ed. July 20, 2006) (statement of then-Republican Sen. Arlen Specter) ("There is no doubt this improved [voting] record is a direct result of the Voting Rights Act.")

⁴⁵ See, e.g., *Lopez v. Monterey County*, 525 U.S. 266, 293–98 (1999) (Thomas, J., dissenting); *South Carolina v. Katzenbach*, 383 U.S. 301, 358–62 (1966) (Black, J., concurring and dissenting).

⁴⁶ See, e.g., Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148 (2007), <http://yalelawjournal.org/images/pdfs/614.pdf>.

⁴⁷ See Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 129, 129 (2005). Professor Sunstein has written extensively about judicial minimalism and its contours. See, e.g., Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996).

son, the district court devoted relatively little space in its opinion to addressing the statutory argument, precisely because treating the Texas district as a political subdivision was a manifestly implausible reading of the text and the legislative history. The bailout provision provides that, in addition to states and political subdivisions separately designated for coverage, any political subdivision within a covered state can seek exemption from section 5.⁴⁸ But the statute gives no indication that a more common definition of “political subdivision,”⁴⁹ as opposed to the statutorily provided one, should control. The *NAMUDNO* Court justified its disregard of the statutory definition by effectively shifting blame onto an earlier Court’s decisionmaking. Using a “principle of symmetry,” the *NAMUDNO* Court in essence argued that its questionable circumvention of the statutory definition was only as suspect as the Court’s earlier construction of section 5’s scope in *Sheffield*.⁵⁰ But the *NAMUDNO* Court assumed, without any justification, that Congress would have desired to make bailout available to all jurisdictions subject to the preclearance requirement.

In fact, the legislative history of the 1982 amendments to the bailout provision shows that this assumption was unwarranted. The 1981 House Report stated that “[t]he standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek to bail out although the state itself may remain covered.”⁵¹ To reinforce the point, the report stated that “[w]hen referring to a political subdivision this amendment refers only to counties and parishes except in those rare instances in which the county does not conduct vote[r] registration; only in such rare instances . . . can a jurisdiction smaller than a county or parish file for bailout.”⁵² The Senate Report echoed the House Report’s comments⁵³ and expressed the pragmatic concern that “if every political subdivision were eligible to seek separate bailout, we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits.”⁵⁴ Both the text and the legislative history make the *NAMUDNO* Court’s interpretation implausible. But the linguistic acrobatics on display in the Court’s opinion show the extent to which the Justices in the majority were unwilling to stomach the “premature resolution of difficult issues”⁵⁵ — a hallmark of minimalism.

⁴⁸ 42 U.S.C. § 1973b(a)(1) (2006).

⁴⁹ *Id.*

⁵⁰ *NAMUDNO*, 129 S. Ct. at 2516.

⁵¹ H.R. REP. NO. 97-227, at 2 (1981) (emphasis added).

⁵² *Id.* at 39.

⁵³ S. REP. NO. 97-417, at 2, 69 (1982).

⁵⁴ *Id.* at 57 n.192.

⁵⁵ Sunstein, *Testing Minimalism: A Reply*, *supra* note 47, at 129.

The *NAMUDNO* opinion is not only narrow, but also shallow, in that it limits its reach in order to avoid fracturing consensus. As it stands, the *NAMUDNO* opinion leaves the VRA largely undisturbed. Before *NAMUDNO*, few if any of the political subunits that were eligible for bailout had sought the exemption.⁵⁶ Though the number of bailout applications will likely increase post-*NAMUDNO*, other factors, such as lack of awareness of bailout availability and perceived difficulty in meeting the statutory prerequisites,⁵⁷ will still deter political subdivisions from seeking bailouts. If the pre-*NAMUDNO* experience is any indication, the vast majority of jurisdictions that were covered pre-*NAMUDNO* will likely continue to be covered.

The decision's limited effect is what most likely produced the Court's near unanimity: eight Justices joined in the opinion, despite evidence that a nontrivial number of Justices seemed willing to overturn section 5 in its entirety. For instance, Justice Kennedy, the Court's swing vote, seemed particularly concerned at oral argument over the burdens section 5 imposed on state sovereignty, especially in the absence of compelling, systematic discrimination: "There had been unremitting and ingenious defiance . . . as of the time of the Voting Rights Act . . . [But] that's not true anymore, and to say that the States are willing to yield their sovereign authority and their sovereign responsibilities to govern themselves doesn't work."⁵⁸ He also asked the parties for an explanation of the difference between covered and noncovered jurisdictions at least four times,⁵⁹ perhaps skeptical that there was any. Chief Justice Roberts was even less sympathetic; to him, the 99.98% preclearance rate suggested that "[Congress was] sweeping far more broadly than [it] need[ed] to, to address the intentional discrimination under the Fifteenth Amendment,"⁶⁰ a point he repeated two more times.⁶¹ Chief Justice Roberts, at least in April, appeared ready to rule against section 5. Given this record, an 8-1 decision written by the Chief Justice himself largely preserving the status quo appears to be the product of an intentionally superficial compromise between the conservative and liberal wings of the Court.

⁵⁶ Seventeen subdivisions have bailed out since 1982, *NAMUDNO*, 129 S. Ct. at 2516, out of almost 900 eligible subdivisions, *NAMUDNO*, 573 F. Supp. 2d 221, 234-35 (D.D.C. 2008). Every applicant for bailout since 1982 has succeeded. *Id.* at 234; J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006*, at 257, 271 (Ana Henderson ed., 2007).

⁵⁷ Hebert, *supra* note 56, at 271-72.

⁵⁸ Transcript of Oral Argument at 40-41, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-322.pdf.

⁵⁹ *Id.* at 21-22, 34, 35, 44.

⁶⁰ *Id.* at 27.

⁶¹ *Id.* at 28, 57.

The *NAMUDNO* opinion therefore exemplifies a specific brand of judicial minimalism that decides no more than is necessary and strives for shallow, broad agreement. However, the Court's moves are categorically maximalist in other respects. Notably, the *NAMUDNO* decision, in failing to account for the politics surrounding voting rights, enlarges the political role that the Court will play in future VRA cases.

At first glance, the opinion appears to invite Congress to reconsider the various aspects of the VRA that raise the most serious constitutional concerns for the Court. The Court showed no hesitation in expressing its reservations regarding section 5's constitutionality. The Court unequivocally adopted the position that "the Act imposes current burdens and must be justified by current needs,"⁶² and underscored the federalism concerns raised by a federal statute that denies states "equal sovereignty."⁶³ At the same time, the *NAMUDNO* Court noted that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."⁶⁴ This strategic juxtaposition of what the Court perceived were section 5's constitutional infirmities and the Court's recognition of Congress as the body responsible for the correction appears to be an implicit deferral to Congress's policymaking role.

But the notion that postponing a ruling on section 5's constitutionality will give Congress time to act is untenable when viewed in light of the VRA's political and legislative history. Experts in election law have noted that the VRA, and its coverage formula in particular, is freighted with political baggage and has been nearly impossible to alter⁶⁵ — hence the reason the VRA was renewed in 2006 without even partial recognition of dramatic changes in the 25-year interim. As Professor Pildes writes, "realpolitik provides the best explanation for why Congress left the VRA's essential structure and coverage unchanged."⁶⁶ For instance, although both the Senate Judiciary Committee and the Senate passed the VRA bill in 2006 with unanimous votes, the Judiciary Committee initially could not agree on a committee report to accompany the bill.⁶⁷ The Committee did eventually issue a report — *after* Congress passed the VRA bill — but that report garnered the support of only one party, a show of the "basic disagreement that exist[ed] concerning its key provision."⁶⁸ In the report, multiple Senators

⁶² *NAMUDNO*, 129 S. Ct. at 2512.

⁶³ *Id.* (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)) (internal quotation marks omitted).

⁶⁴ *Id.* at 2513.

⁶⁵ *See, e.g.*, Pildes, *supra* note 46, at 151–52, 154.

⁶⁶ *Id.* at 154 (citing Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174 (2007)).

⁶⁷ Persily, *supra* note 66, at 186–92.

⁶⁸ *Id.* at 187.

expressed their dismay over what they viewed as “[a]n artificial rush to move the House version”⁶⁹ a full year before the VRA was set to expire. But despite considerable concern over the law’s provisions, the VRA still passed by overwhelming margins and about a year ahead of schedule.⁷⁰ Today, amending the VRA is a Herculean task — Democrats risk political suicide in opposing it, and Republicans believe it advances their political interests.⁷¹ Without substantial prodding by the Court,⁷² Congress will likely never muster the political resolve to tackle the constitutionally suspect portions of the VRA.

Thus, because *NAMUDNO* preserves the status quo and Congress is unlikely to act, the Court will almost certainly be forced to address the constitutionality of section 5 in the future. That future Court may well decide that changes to the VRA are required on multiple or all fronts of the preclearance requirement, a probable conclusion given the Court’s intimations in *NAMUDNO*. A holding along these lines would effectively designate certain areas as constitutionally off limits to Congress in its efforts to combat racial discrimination in voting — and the prevailing preferences of the Court would largely dictate the placement of those boundaries. Conversely, a decision upholding the VRA’s constitutionality would be, like *South Carolina v. Katzenbach*⁷³ before it, condition-dependent and subject to later reexamination. In either case, the Court will be assuming an inflated policy role in the VRA’s future; the *NAMUDNO* opinion merely postpones the constitutional showdown. The long-term result of *NAMUDNO* is a world in which the Court, not Congress, decides how best to enforce Section 2 of the Fifteenth Amendment.

The *NAMUDNO* opinion is consequently a chameleon of sorts. On the one hand, it is a highly minimalist opinion in that it adopts a position that does little to alter the status quo, appeals to a broad spectrum of political views, and at least appears to cede responsibility for policymaking to the appropriate decisionmaker. On the other hand, the opinion, in failing to account for the politics behind voting rights reform, seems to entrust the Court, and not Congress, with the ulti-

⁶⁹ S. REP. NO. 109-295, at 31 (2006) (statement of Sens. Cornyn and Coburn).

⁷⁰ Persily, *supra* note 66, at 181, 183, 185. “The timetable for the legislation was moved up a year” because Representative Sensenbrenner desired to have the “reauthorization of the Voting Rights Act . . . occur on his watch.” *Id.* at 181.

⁷¹ *See id.* at 180.

⁷² The *NAMUDNO* Court was clearly aware of the political avoidance that had permeated the VRA renewal debates. It even cited Professor Persily’s article in its opinion, including as a parenthetical Professor Persily’s view that “[t]he most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations.” *NAMUDNO*, 129 S. Ct. at 2512 (second and third alterations in original) (quoting Persily, *supra* note 66, at 208) (internal quotation marks omitted).

⁷³ 383 U.S. 301 (1966).

mate determination concerning the VRA's reach. The idea that the *NAMUDNO* Court adopted a minimalist approach is therefore only partially accurate, as that characterization obscures significant maximalist undercurrents in the opinion.

An alternate route was available in *NAMUDNO* that would have permitted the Court to sidestep these maximalist tendencies, while still producing a relatively narrow and shallow decision: the Court could have held that section 14(c)(2) applied both to section 5 and to the bailout provision, which would have left only higher-level political subdivisions within covered states subject to section 5 and freed smaller political units like Northwest Austin from preclearance requirements altogether. Like the *NAMUDNO* decision, an opinion tying section 5 and section 4(a)'s use of "political subdivision" to the statutory definition would have avoided the constitutional question and permitted the Court to dismiss the case on a statutory ground.⁷⁴ However, such an approach differs from *NAMUDNO* in one crucial respect: by effecting a change of consequence in the scope of section 5, a direct application of section 14(c)(2) would have sent a stronger signal to Congress to reconsider the breadth of the preclearance requirement along with the statutory definition issue. Under this scenario, there likely would have been pressure on Congress to restore section 5's preclearance coverage to its earlier state. But Congress could have seized this moment to narrow section 5, perhaps by framing the changes as necessary to placate activist courts or camouflaging the amendments as a restoration of the status quo. And even if ignored by Congress, the Court's decision would still have reduced the VRA's federalism costs and made subsequent invalidation of section 5 less likely.

Intentionally or not, *NAMUDNO* contemplates a much more active role by the Court in the VRA's future. The Court had a chance to avoid this outcome, but it likely (and ironically) passed up the opportunity out of a misguided attempt at "minimalism." As a result, the *NAMUDNO* Court's own attempt to put Congress on notice through statutory evasion will, in all likelihood, be a futile enterprise. In the

⁷⁴ This alternative interpretation has other benefits as well. Unlike the *NAMUDNO* opinion, this interpretation would retain the interpretive convention that statutory definitions control in the ordinary case and would gel more easily with the legislative history. It is therefore puzzling that the Court neglected to entertain such an interpretation at all. It was not the case that the Court was simply unaware of the problem. The *NAMUDNO* Court itself conceded that *Sheffield's* extension of preclearance requirements to all political subunits in a state was unusual: "We acknowledge, however, that there has been much confusion over why *Sheffield* held the city in that case to be covered by the text of § 5." *NAMUDNO*, 129 S. Ct. at 2516 (citing *City of Rome v. United States*, 446 U.S. 156, 168–69 (1980); *id.* at 192 (Stevens, J., concurring); *Uvalde Consol. Indep. Sch. Dist. v. United States*, 451 U.S. 1002, 1004 n.2 (1981) (Rehnquist, J., dissenting from denial of certiorari)). The most likely explanation is that the Court either refused to disturb what it perceived to be settled precedent or felt that even a partial alteration to the coverage of such a popular Act would undermine the legitimacy of the Court.

final analysis, it will be the Court's myopic view of judicial minimalism that has sealed section 5's fate.

2. *Vote Dilution.* — Section 2 of the Voting Rights Act of 1965¹ (VRA) prohibits any voting standard, practice, or procedure that “results in a denial or abridgment of the right . . . to vote on account of race.” A violation is established when minorities “have less opportunity than other members of the electorate to elect representatives of their choice.”² The Supreme Court has interpreted the VRA to require state legislators to draw minority-controlled districts in situations where minorities meet both (1) the three preconditions established in *Thornburg v. Gingles*³ and (2) a totality-of-the-circumstances test.⁴ Last Term, in *Bartlett v. Strickland*,⁵ the Supreme Court held that section 2 does not compel legislatures to draw a minority district unless the racial group would comprise at least 50% of voters in the district.⁶ The Court read the 50% requirement into the first *Gingles* prong, that the racial minority group be large enough to control a district.⁷ Although the 50% rule is the correct interpretation of the VRA, the plurality should have read this requirement into the totality-of-the-circumstances test rather than hiding behind the first prong of *Gingles*. By building the 50% rule into prong one, the Court mischaracterized the 50% rule as justified on empirical rather than normative grounds. In the changing modern politics of racial polarization, it is now untrue as an empirical matter that the racial minority must constitute 50% of the population to control a district.⁸ However, mandating the construction of such coalition districts unfairly multiplies the obligations on the state well beyond what should be required under the totality of circumstances as equal opportunity to participate in the political process.

In 1991, the North Carolina General Assembly drew District 18 of the North Carolina House of Representatives “to include portions of four counties, including Pender County,” to create a majority African American district as required by the VRA.⁹ By 2000, the minority population of District 18 had fallen below 50%.¹⁰ Following the 2000 census, the North Carolina Supreme Court rejected the legislature's

¹ 42 U.S.C. §§ 1973–1973bb-1 (2006).

² *Id.* § 1973.

³ 478 U.S. 30 (1986).

⁴ *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

⁵ 129 S. Ct. 1231 (2009).

⁶ *Id.* at 1246 (plurality opinion).

⁷ *Id.* at 1245–46.

⁸ *See id.* at 1242 (explaining that minorities as a practical matter are able to control a district with the help of a small number of white “crossover” voters).

⁹ *Id.* at 1239.

¹⁰ *Id.*