

The Future of the Voting Rights Act after *Bartlett* and *NAMUDNO*

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According to my handy pocket copy of the U.S. Constitution (Cato edition), Section 1 of the Fifteenth Amendment provides: “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.” Section 2 provides: “The Congress shall have power to enforce this article by appropriate legislation.”¹

It’s hard to fault either provision. Of course nobody should be kept from voting because he or she is the wrong color; and, given the historical context, it makes perfect sense to give the national legislature the authority to pass statutes that make the guarantee a reality.

The trouble is that the principal statutes that Congress has passed in the name of the Fifteenth Amendment go far beyond enforcing this guarantee. Worse, in many respects the statutes passed are used to encourage racial segregation of voting districts through racial gerrymandering—a result quite at odds with the underlying constitutional guarantee.

In its 2008–2009 term, the Supreme Court handed down decisions in two cases that involved the Voting Rights Act. One, *Bartlett v. Strickland*,² involved Section 2 of the Act; the other, *Northwest Austin Municipal Utility District Number One v. Holder*, involved Section 5.³

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¹ Useful histories of the passage of the Fifteenth Amendment can be found in Alexander Keyssar, *The Right to Vote* 93–104 (2000), and *The Heritage Guide to the Constitution* 409–11 (Edwin Meese III et al. eds., 2005). Neither suggests, however, that the amendment means or was intended to mean anything more or less than what its text actually says.

² *Bartlett v. Strickland*, 129 S. Ct. 1231, 556 U.S. ____ (2009).

³ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 557 U.S. ____ (2009).

The focus of this article will be on those two decisions; its theme is the abyss between those two sections of the Voting Rights Act and the important but precise guarantee of the Fifteenth Amendment.

I. The Problem with the Voting Rights Act

A. *The Devolution of Sections 2 and 5 of the Voting Rights Act*

One's suspicion that there is an abyss between the statutory provisions and the constitutional language is aroused by the disconnect between the prolixity of the Voting Rights Act and the short and simple guarantee of the Fifteenth Amendment.

Section 2 of the VRA, which deals with the "[d]enial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation," contains over 200 words.⁴ Section 5, which covers the "[a]lteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates," contains over 650 words.⁵

⁴ 42 U.S.C. 1973 (2006). Section 2 provides:

(a) No 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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

⁵ 42 U.S.C. 1973c (2006). Section 5 provides:

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section

Now, what is going on here? One could understand how a constitutional provision “[t]o provide and maintain a Navy”⁶ might necessitate

1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General’s failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

⁶ U.S. Const. art. I, § 8.

an enacting statute of more than a few words, but why does a bar on racial discrimination in voting require all this verbiage? There is a different answer for each provision.

With regard to Section 2, it is instructive to begin by noting that the original 1965 version was much shorter: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁷ The longer version was enacted in 1982 in order to overturn a Supreme Court decision—*Mobile v. Bolden*⁸—that had determined this shorter language was coextensive with the Constitution and prohibited only racially disparate *treatment*, and not voting practices and procedures that a judge or bureaucrat determined had a racially disparate *result*.⁹ In other words, Congress decided to use its enforcement power under Section 2 of the Fifteenth Amendment to ban actions that aren’t illegal under Section 1 of the Fifteenth Amendment. Hmm.

With regard to Section 5, there is a more sympathetic answer. Certain jurisdictions in the South had played a cat-and-mouse game with federal voting rights enforcement, and so Congress decided to require them to get permission from the U.S. Department of Justice or a District of Columbia—no hometowning allowed—court before making any voting changes. Fair enough, although it is problematic that Congress has outlawed not only actions with a racially disparate “purpose” but also those with a racially disparate “effect”—so once more what is permitted by the Constitution is not permitted under a statute supposedly passed to enforce it.¹⁰ Hmm again.

B. Why Sections 2 and 5 Are Objectionable

If a voting practice or procedure is racially nondiscriminatory on its face, is applied equally and nondiscriminatorily, and was not

⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. 1973 (2006)). For anyone interested in the Voting Rights Act, its history, and its abuses, see Abigail Thernstrom, *Voting Rights and Wrongs: The Elusive Quest for Racially Fair Elections* (2009). Thernstrom’s work in this area over the years has been and continues to be invaluable.

⁸ *Mobile v. Bolden*, 446 U.S. 55 (1980).

⁹ 42 U.S.C. 1973 (2006).

¹⁰ *Id.* § 1973c.

adopted with any discriminatory intent, then can it be said to be racial discrimination? For example, suppose that a state does not allow prison inmates to vote. Suppose further that this law applies to all inmates without regard to color, was adopted without a desire to disenfranchise African Americans (indeed, perhaps when the state had very few African Americans, or when most of the African Americans there were slaves and thus were never expected to vote anyhow), and has always been applied to all inmates without regard to race. But it turns out that, in 2009, there is now a substantially higher percentage of African Americans in the prison population than in the general population. Are African Americans now being denied the right to vote “on account of race” (to quote the Fifteenth Amendment)?

If you said yes, you may have a future in this-or-that Legal Defense and Education Fund. The correct answer is that this is *not* racial discrimination, and so such laws are not fairly within Congress’s enforcement authority under Section 2 of the Fifteenth Amendment.

What’s more, whenever the government bans actions (public or private) that merely have racially disparate impact, two bad outcomes are encouraged that would not be encouraged, or would at least be encouraged less, if the government stuck to banning actions that are actually racially discriminatory. First, actions that are perfectly legitimate will be abandoned. Second, if the action is valuable enough, then surreptitious—or not so surreptitious—racial quotas will be adopted so that the action is no longer racially disparate in its impact.¹¹

In employment, for example, an employer who has required each of his employees to have a high school diploma, and who does not want to be sued for the racially disparate impact this criterion creates, has two choices: He can abandon the requirement (thus hiring

¹¹ My criticisms of the disparate-impact approach are set out in *Disparate Impact in the Private Sector: A Theory Going Haywire* (2001). This monograph elaborates on my article, *The Bad Law of “Disparate Impact,”* *Public Interest* (Winter 2009), at 79. Even under a disparate impact/effects/results approach, the defendant can prevail if he can show a sufficiently strong reason for the challenged practice. Thus, for example, I’ve argued that the disenfranchisement of felons ought to be lawful under Section 2 of the Voting Rights Act, even if it has racially disproportionate results. See, e.g., Roger Clegg, *The Case against Felon Voting*, 2 *U. St. Thomas J.L. & Pub. Pol'y* 1, 12 (2008). But the pressure to abandon criteria with racially disproportionate results, or to overlay them with quotas, remains.

employees he believes to be less productive) or he can keep the requirement but instruct his managers to meet racial hiring quotas (thus, perversely, engaging in the very discrimination that the statute supposedly is designed to ban). This latter tension—between the anti-race-conscious mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact—was at the forefront of another civil rights case the Supreme Court decided last term, *Ricci v. DeStefano*.¹² Justice Antonin Scalia’s concurrence in that case noted that, indeed, the tension is so strong that disparate impact statutes may violate the Constitution’s equal-protection guarantee.¹³

We see the same phenomenon with respect to the Voting Rights Act. Some legitimate voting practices—for example, making sure that voters can identify themselves as registered-to-vote, U.S. citizens—will be challenged if they have a racially disparate impact; this problem is beyond the scope of this article. The other problem is central to it: Jurisdictions will be pressed to use racial gerrymandering—racially segregated districting—to ensure racially proportionate election results and thus, perversely, to engage in the very discrimination that is at odds with the underlying law’s ideals.

Let me emphasize and elaborate on that last point, because otherwise the *Bartlett* decision, to which I turn next, is incomprehensible—and so are the high stakes regarding the constitutionality *vel non* of Section 5, which I discuss thereafter: *The principal use of Sections 2 and 5 in 2009 is to coerce state and local jurisdictions into drawing districts with an eye on race, to ensure that there are African American (and, in some instances, Latino) majorities who will elect representatives of the right color.*

Note also that the VRA literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies to others. A minority group may be entitled to have a racially gerrymandered district, or be protected against racial gerrymandering that favors other groups. At the same time, other groups are not entitled to gerrymander and indeed may lack protection against gerrymandering that hurts them. This is nothing if not treating people differently based on their race. Under the Constitution, no racial

¹² *Ricci v. DeStefano*, 129 S. Ct. 2658, 555 U.S. ____ (2009).

¹³ *Id.* at 2681–83 (Scalia, J., concurring).

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group should be guaranteed “safe” districts or districts where it has “influence” or some combination thereof unless all other groups are given the same guarantee—a guarantee that is impossible to give (even if it were a good idea to encourage racial obsession).

The racial gerrymandering Sections 2 and 5 foster is pernicious. The Supreme Court has warned about the unconstitutionality of racial gerrymandering in a number of decisions, because the practice encourages racial balkanization and identity politics.¹⁴ In addition, the segregated districts that gerrymandering creates have contributed to lack of competitiveness in elections, districts that are more polarized (both racially and ideologically), the insulation of Republican candidates and incumbents from minority voters and issues of particular interest to them—to the detriment of both Republicans and minority communities—and, conversely, the insulation of minority candidates and incumbents from white voters (making it harder for those politicians to run for statewide or other larger-jurisdiction positions).¹⁵ As Chief Justice John Roberts wrote, it is, indeed, “a sordid business, this divvying us up by race.”¹⁶

II. The Court’s Decisions

A. Bartlett v. Strickland

North Carolina’s state constitution contains a “Whole County Provision” that prohibits the General Assembly from dividing counties when it draws its own legislative districts.¹⁷ The issue in *Bartlett v. Strickland* was whether, nonetheless, Section 2 of the Voting Rights

¹⁴ Among the Supreme Court’s anti-racial-gerrymandering pronouncements, see especially *Shaw v. Reno*, 509 U.S. 630 (1993); and *Miller v. Johnson*, 515 U.S. 300 (1995).

¹⁵ Regarding these bad side-effects of racial gerrymandering, see generally Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol'y 561 (2007) (citing, *inter alia*, Christopher M. Burke, *The Appearance of Equality: Racial Gerrymandering, Redistricting, and the Supreme Court* 32–33 (1999); Katharine Inglis Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. Rev. 749, 780–81 (2006)). See also Jim Sleeper, *Liberal Racism* 43–66 (1997); Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 Wash. U. J.L. & Pol'y 71, 90 (2006).

¹⁶ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, J., concurring in part and dissenting in part).

¹⁷ *Bartlett v. Strickland*, 129 S. Ct. 1231, 1239 (2009).

Act required that this be done, when the resulting, racially gerrymandered district would not be majority African American, but would nonetheless have given African American voters the potential to join with like-minded white voters to elect the black voters' candidate of choice.¹⁸

A majority of the justices say “no.” Three of them—Chief Justice Roberts and Justice Samuel Alito joining an opinion by Justice Anthony Kennedy—apply the Court’s seminal ruling on Section 2 after it had been amended in 1982, *Thornburg v. Gingles*.¹⁹ There the Court had identified three “necessary preconditions” for a Section 2 malapportionment claim, the first of which was that the relevant minority group be “sufficiently large and geographically compact to constitute a majority in a single-member district.”²⁰ Thus, if there was no majority, there was no possible Section 2 malapportionment claim. Two of the justices—Scalia joining an opinion by Justice Clarence Thomas—concur in the *Bartlett* judgment but because, in their view, “[t]he text of Section 2 . . . does not authorize any vote dilution claim, regardless of the size of the minority population in a given district.”²¹ They reject the *Gingles* framework “because it has no basis in the text of Section 2”; that framework, they added, has produced “a disastrous misadventure in judicial policymaking.”²²

Four justices dissent—Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer all joining an opinion by Justice David Souter,²³ with Breyer and Ginsburg also adding separate dissenting opinions of their own.²⁴ Souter’s dissent centers on the right way to interpret and apply *Gingles*, as a matter of both logic and policy. Breyer writes to explain why, even if bright lines are needed, he has a better idea than the majority’s 50 percent rule, namely a “2-to-1 rule”—that is a 2-to-1 ratio “of voting age minority population to necessary non-minority crossover votes.”²⁵ Ginsburg’s dissent is

¹⁸ *Id.* at 1231.

¹⁹ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

²⁰ *Id.* at 50. See also *Grove v. Emison*, 507 U.S. 25 (1993).

²¹ *Bartlett*, 129 S. Ct. at 1250.

²² *Id.* (citing *Holder v. Hall*, 512 U.S. 874, 893 (1994)).

²³ *Bartlett*, 129 S. Ct. at 1250.

²⁴ *Id.* at 1260.

²⁵ *Id.* at 1262.

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simply a paragraph inviting Congress to overturn the Court's ruling.²⁶

B. Northwest Austin Municipal Utility District Number One ("NAMUDNO") v. Holder

NAMUDNO is a small utility district in Texas that is covered by Section 5 of the Voting Rights Act. It filed suit seeking relief under the "bailout" provision of Section 4(a), which allows a "political subdivision" to be released from Section 5's preclearance requirements if certain conditions are met. But it also argued in the alternative that Section 5 is unconstitutional. The three-judge District of Columbia district court ruled that NAMUDNO was ineligible for bailout, and then upheld the constitutionality of Section 5.²⁷ The Supreme Court noted probable jurisdiction over the utility district's appeal, ruled that in fact NAMUDNO was eligible for bailout, and therefore did not rule on Section 5's constitutionality.²⁸

1. The Majority Opinion

Part I.A of the Court's decision—written by Chief Justice Roberts and joined by every justice except Thomas—recounts the history of the Voting Rights Act, particularly Sections 4 and 5, and part I.B briefly summarizes the litigation below. Part II provides the critical discussion for those pondering the future of the Voting Rights Act and will be discussed at greater length later, but can be summarized in the opinion's conclusion:

More than 40 years ago, this Court concluded that "exceptional conditions" prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. . . . In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.²⁹

²⁶ *Id.* at 1260.

²⁷ *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008).

²⁸ *Nw. Austin Mun. Util. Dist. No. One ("NAMUDNO") v. Holder*, 129 S. Ct. 2504 (2009).

²⁹ *Id.* at 2516.

Part III explains how the Court concluded that the utility district is eligible to invoke Section 4's bailout provision, acknowledging: "Were the scope of §4(a) considered in isolation from the rest of the statute and our prior cases, the District Court's approach might well be correct. But here specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision."³⁰ All in all, concludes the Court, "It is unlikely that Congress intended the provision to have such limited effect."³¹

As noted above, Part II is the part of the opinion of most interest for this article. The Court begins by acknowledging that "[t]he historic accomplishments of the Voting Rights Act are undeniable" in fighting discrimination,³² but then turns to the constitutional problems that the VRA raises. For starters, Section 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs."³³ What's more, "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C."³⁴ The Court warns: "Past success alone . . . is not adequate justification to retain the preclearance requirements."³⁵

The Court expresses concern that the VRA "also differentiates between the States."³⁶ This state-discrimination problem is aggravated by the fact that the statute's coverage formula is dated and may no longer correctly target the worst offenders.³⁷ Most telling with regard to the concerns expressed in this article is this paragraph in Part II:

These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. See *Georgia v. Ashcroft*, 539 U.S.

³⁰ *Id.* at 2514.

³¹ *Id.* at 2516.

³² *Id.* at 2511.

³³ *Id.* (internal quotation marks and citations omitted).

³⁴ NAMUDNO, 129 S. Ct. at 2511 (emphasis in the original).

³⁵ *Id.*

³⁶ *Id.* at 2512.

³⁷ *Id.*

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461, 491-492 (2003) (Kennedy, J., concurring) (“Race cannot be the predominant factor in redistricting under our decision in *Miller v. Johnson*, 515 U. S. 900 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5’’). Additional constitutional concerns are raised in saying that this tension between §§2 and 5 must persist in covered jurisdictions and not elsewhere.³⁸

The Court does not resolve the question of what degree of scrutiny was appropriate, but noted that the “Act’s preclearance requirements and its coverage formula raise serious constitutional questions” in any event.³⁹

But then the Court shifts gears again, acknowledging the gravity of determining the constitutionality of an act of Congress, “a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States,” and the one which the Fifteenth Amendment empowers “in the first instance” to determine “what legislation is needed to enforce it.”⁴⁰ The Court further acknowledges that “Congress amassed a sizable record” to justify the legislation and that this record had impressed the district court.⁴¹

Still, says the Court, it is a well-established principle that the Court will avoid constitutional pronouncements if there is some other way to dispose of the case, and NAMUDNO had acknowledged in its brief and at oral argument that, if it prevailed on the bailout issue, the constitutional issue need not be reached.⁴² And so, *pace* Justice Thomas’s partial dissent, the Court doesn’t reach it.

2. Justice Thomas’s Partial Dissent

Indeed, only Justice Thomas does not join the Court’s opinion, and only he writes separately, concurring in the judgment in part and dissenting in part. Part I of his opinion explains why he thinks the “doctrine of constitutional avoidance” should not apply in this case and why the Court should have reached the issue of Section

³⁸ *Id.*

³⁹ *Id.* at 2513.

⁴⁰ *Id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57 (1981) (internal quotation marks omitted)).

⁴¹ NAMUDNO, 129 S. Ct. at 2513.

⁴² *Id.*

5's constitutionality.⁴³ In Part II, Justice Thomas explains why Section 5 is, in fact, unconstitutional.⁴⁴

Here he first provides the historical and legal backdrop, noting that voting law is generally a state matter but then reviewing the blatant racial discrimination that prompted Section 5's initial passage in 1965.⁴⁵ He next turns to the Court's decision in *South Carolina v. Katzenbach*,⁴⁶ which upheld Section 5 against an early constitutional challenge, and highlights that “[s]everal important principles emerge from *Katzenbach* and the decisions that followed it”.⁴⁷ (a) Section 5 “prohibits more state voting practices than those necessarily encompassed by the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment”;⁴⁸ (b) thus, Section 5 “pushes the outer boundaries of Congress' Fifteenth Amendment enforcement authority”;⁴⁹ and so (c) “to accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments . . . the constitutionality of Section 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible.”⁵⁰

In the last part of his opinion, Justice Thomas applies these principles and concludes, “The extensive pattern of discrimination that led the Court to previously uphold Section 5 as enforcing the Fifteenth Amendment no longer exists.”⁵¹ This is confirmed by both broad historical and “current statistical evidence”⁵²—“[i]ndeed, when reenacting §5 in 2006, Congress evidently understood that the emergency conditions which prompted §5's original enactment no longer exist,”⁵³ given the weaker evidence it was able to marshal.⁵⁴ And

⁴³ *Id.* at 2517 (Thomas, J., dissenting).

⁴⁴ *Id.* at 2519–27.

⁴⁵ *Id.* at 2519–23.

⁴⁶ 383 U.S. 301 (1966).

⁴⁷ NAMUDNO, 129 S. Ct. at 2523.

⁴⁸ *Id.* at 2523.

⁴⁹ *Id.* at 2524.

⁵⁰ *Id.*

⁵¹ *Id.* at 2525.

⁵² *Id.*

⁵³ *Id.* at 2526.

⁵⁴ *Id.* at 2525.

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cheer up: “Admitting that a prophylactic law as broad as §5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.”⁵⁵ Justice Thomas concludes his opinion on a decidedly upbeat note: “An acknowledgment of §5’s unconstitutionality represents a fulfillment of the Fifteenth Amendment’s promise of full enfranchisement and honors the success achieved by the VRA.”⁵⁶

C. A Word on “Judicial Activism” and NAMUDNO

Were the Court to strike down Section 5 as unconstitutional, would this be judicial activism? A number of people said so in the run-up to the Court’s decision, perhaps the most prominent of whom was Senator Patrick Leahy, chairman of the Senate Judiciary Committee.⁵⁷ But the correct answer is “no.”

Judicial activism, properly defined, is a court’s substitution of its own policy preferences for what the text of the Constitution—or other law—actually says. The classic instance involves inventing a limitation on a legislature that doesn’t actually exist in the Constitution, but it also includes ignoring a limitation that actually *does* exist.

The problem with Section 5 is that it prohibits many state actions that are not unconstitutional because, as discussed, it employs an “effects” test while the Fifteenth Amendment prohibits only disparate treatment, namely actions taken “on account of race.” Indeed, its principal use today is applying this effects test to *require states to engage in disparate treatment*: the racial segregation of voting districts by racial gerrymandering. In addition, Section 5 supplants state authority in matters committed to them by the Constitution and substitutes federal judicial and bureaucratic supervision. (This could be justified if necessary to stop states from violating the Constitution but, as just noted, Section 5 goes far beyond that.) Finally, Section 5 applies to some states and not others—without any existing factual basis for doing so—which is likewise inconsistent with the Constitution’s federalist structure.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2527.

⁵⁷ See Patrick Leahy, Senator, UDC David A. Clarke School of Law Annual Rauh Lecture: The Supreme Court and the Nomination of Judge Sonia Sotomayor (June 16, 2009).

So, in reauthorizing Section 5 in 2006, Congress exceeded its constitutional authority. Striking it down would honor the Constitution's text and would not be judicial activism. Indeed, upholding it would mean *ignoring* constitutional text and would thus be true judicial activism.⁵⁸

What about the argument that the Court cannot legitimately conclude that Section 5 might once have been constitutional but, because of changes in the facts, isn't any longer—because such fact-finding is up to Congress? The answer is that courts determine facts all the time and changes in factual circumstances may mean that what once met an *unchanging* constitutional standard no longer does.

For example, if a policeman asks a court for a search warrant and produces no evidence, he won't get it; if he produces good evidence, he will. That's hardly judicial activism. Likewise, as the evidence of severe discrimination peculiar to the South diminishes, so will the defensibility of Section 5 before the courts. That's not judicial activism either.

The Fifteenth Amendment says that legislation passed by Congress to enforce the Amendment is to be "appropriate." There is nothing in the text to suggest that Congress intended to insulate such legislation from judicial review to make sure it is.⁵⁹

III. What Next?

A. Good News and Bad News

Given the tension between racial gerrymandering and the ideals of the Voting Rights Act—to say nothing of the Fifteenth Amendment itself—it makes sense to limit Section 2 in the way that the Court

⁵⁸ I testified before both the House and the Senate in 2006, urging them not to reauthorize Section 5 on the grounds that to do so was both bad policy and unconstitutional. See Reauthorization of the Voting Rights Act Before the H. Comm. Subcomm. on the Constitution, 110th Cong. (2006) (statement of Roger Clegg); Reauthorization of the Voting Rights Act Before the S. Comm. on the Judiciary, 110th Cong. (2006) (statement of Roger Clegg). See also Clegg & Chavez, *supra* note 15. Alas, they did not listen.

⁵⁹ It is interesting that in both cases discussed in this article the Court interpreted the Voting Rights Act in a particular way to avoid having to reach a constitutional question. This principle led to a more "conservative" result in *Bartlett*, but it need not always do so. Indeed, "constitutional avoidance" might have saved the Act in *NAMUDNO*—if a majority of justices were willing to strike it down had the case not been disposed of on statutory (bailout) grounds.

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did in *Bartlett v. Strickland*. The question in *Bartlett* could not be clearly answered by the statute's text. Accordingly, the three-justice plurality—and, implicitly, the two-justice concurrence—was correct in adopting an interpretation that limited the requirement of constitutionally dubious race-based redistricting.⁶⁰ Given that tension, however, as well as the federalism problems recognized by all nine justices, it is disappointing that the Court left Section 5 intact in *NAMUDNO*—although we can take solace in the warning shot it fired.

The good news—and it is *very* good news—is that the problem of systemic exclusion of racial minorities from the polls no longer exists. This is not to say that there are not still occasional instances of such discrimination, but they are aberrant: The problem that the framers of the Fifteenth Amendment undoubtedly had foremost in their minds—and that, unconscionably, had festered until 1965—has been addressed. In this respect, then, Sections 2 and 5 of the Voting Rights Act can be hailed as stunningly successful.

But there is bad news, too. First, there is no longer any rhyme or reason to the jurisdictions that are covered by Section 5. And given the intrusiveness of the statute, this problem is not simply an aesthetic one: It raises serious federalism concerns. Second, both Sections 2 and 5—by incorporating “results” and “effects” tests, respectively—have banned much that is *not* illegal under the Fifteenth Amendment. Further, not only have they required something that is not required by the Fifteenth Amendment, but the requirement itself undermines the Amendment’s guarantees and voting integrity generally. This in turn is objectionable not just as a matter of federalism and federal overreach, but because state laws that might be objectively good are discouraged or struck down (e.g., anti-voter-fraud measures that might have a disparate impact, or long-standing laws preventing criminals from voting), and because state practices

⁶⁰ *Bartlett*, 129 S. Ct. at 1247–48. The amicus brief filed by Pacific Legal Foundation and joined by the author’s Center for Equal Opportunity had urged this approach. After all, if the line is not drawn at 50 percent, then it is hard to see why the line should be drawn anywhere, and every jurisdiction in the country that has a minority resident will be subject to racial gerrymandering requirements. In this regard, while *Bartlett* received much less publicity than *NAMUDNO*, had it had come out differently then its impact would have been dramatic and lamentable. Thus, one hopes Congress will not accept Justice Ginsburg’s dissenting invitation to overturn the majority opinion.

that are bad are now required (in particular, racial segregation of voting districts through racial gerrymandering).

What's more, Section 2 and Section 5 *are* the Voting Rights Act: They are by far its most important provisions. Realizing the deep flaws at the heart of the VRA leads one to wonder whether it wouldn't be better to scrap the law altogether and start anew.⁶¹

B. Concluding Libertarian Postscript

Because this is an article in a Cato Institute publication, a decent respect to the opinions of one's host suggests that I end by posing and answering this question: What's a libertarian to think of all this?

Libertarians ought to oppose government policies that racially discriminate in voting; there is no issue here, really, of private discrimination. But whom ought we to trust to make sure this discrimination doesn't happen? The federal government or state and local entities? The political branches or the judiciary?

Given American history, it is easy to recognize, to borrow Clint Bolick's phrase, the problem of "grassroots tyranny" here⁶²—that, as James Madison discussed in *Federalist* No. 10, the federal government might be needed to prevent abuses by state and local governments. On the other hand, the federal government is also perfectly capable of abusing its power in this area, and, as an unintended (perhaps) consequence, this is what's happened. As is often the case, in this abuse there has been collaboration between liberal federal bureaucrats and activist judges. As is also often the case, this collaboration has replaced a colorblind ideal with politically correct color-consciousness. Adding to the problem is that partisans from both parties have happily supported the abuse.

Bottom line: Friends of liberty—and opponents of racial discrimination in voting—should now favor less of a federal role than could have been justified in 1965. This aim of lessening the federal role

⁶¹ And let me add that another provision, Section 203, is at least as objectionable and even more unconstitutional than Sections 2 and 5. Section 203 requires some jurisdictions to print ballots and other election materials in foreign languages. 42 U.S.C. 1973b(f) and 1973aa-1a. This is bad policy because it balkanizes our country, facilitates voter fraud, and wastes state and local government resources. And it is unconstitutional because it lacks all congruence and proportionality to the end of stopping purposeful racial and ethnic discrimination by state and local jurisdictions. See Clegg & Chavez, *supra* note 15, at 575–80.

⁶² Clint Bolick, *Grassroots Tyranny: The Limits of Federalism* (1993).

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should be pursued both through the political branches and through litigation, because the current text of the Voting Rights Act exceeds Congress's power. The Act should be refocused on fulfilling—not undermining—the Fifteenth Amendment's purpose: ensuring that the right to vote is not denied or abridged on account of race.

