

# ***VOTING RIGHTS LITIGATION: DEALING WITH THE 2010 CENSUS***

***International Municipal Lawyers Association  
Radisson Hotel, Columbia, SC  
December 10, 2009***

***Voting Rights, Electoral Transparency &  
Participation in the Political Process: Current Trends***

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## Introduction

During the 2008 Presidential Election, the nation has witnessed the election of its first African-American president, and a record numbers of minority candidates were elected to office on the local, state and federal level. Two years before, Congress overwhelmingly approved an extension of the Voting Rights Act's key preclearance and minority language provisions for another 25 years, enacting the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*.

Our national commitment to protect minority voting rights rests on the twin pillars of equal access to the electoral process and effective participation in the political process. That commitment since 1965 has provided protection for the fundamental right of minority citizens to cast an effective vote.

## Crown Jewel of the Civil Rights Movement

The chief vehicle for protecting minority voting rights has been the Voting Rights Act of 1965, the Crown Jewel of the Civil Rights Movement<sup>1</sup>, and the subsequent reauthorizations and extensions of its key provisions. Without question, at the time the Voting Rights Act of 1965 was enacted, a massive record was compiled to demonstrate the clear need for such drastic remedial legislation, which in the eyes of many exacted very high federalism costs – but the benefits clearly outweighed those costs.

The Voting Rights Act of 1965 was enacted at the height of the Civil Rights Movement to bar widespread systemic voting discrimination. The Act was passed by Congress at a watershed moment in our nation's turbulent history of racial injustice and discrimination in voting. While it imposed substantial federalism costs, the Act validly "authorized

federal intrusion into sensitive areas of state and local policymaking.” Indeed, as the Court recently reminded us, the historic accomplishments of the Act are undeniable.

Many still recall when the Voting Rights Act was signed into law by President Lyndon Johnson, who echoed Congress when he described the Act as a means of providing an effective remedy for combating massive resistance by southern states to federal attempts to enforce the 15<sup>th</sup> Amendment to the United States Constitution. It was a just and necessary law.

#### Focus of this Presentation

This presentation will address emerging trends in vote dilution litigation, current issues arising under §§2 and 5 that are being litigated in the federal courts, recent Supreme Court decisions addressing §5 bailout and precisely what minority groups are entitled to the protections of the Voting Rights Act, and the responsibilities of cities and counties, particularly in covered states, under the VRARA.

#### End of the Term: Who Really Noticed?

This past term of Supreme Court ended on a strangely muted note. There was a lot of background noise. Less than eight months earlier, Barack Obama had been elected to the highest office in the nation. By inauguration day, it was clear that the financial infrastructure of our country was plummeting to its most precarious level since the Great Depression. Tens of thousands of our men and women in the armed forces were in harm’s way, fighting an elusive but deadly enemy in Iraq and Afghanistan. President Obama was deeply mired in a struggle with Congress to get a major national health care bill reported out by the August recess. Justice David Souter had submitted his resignation effective at the close of the term of Court, and President Obama had nominated Second Circuit Judge Sonia Sotomayor to fill his seat. And gas prices were starting to inch up – again.

With such a backdrop, it is no small wonder that relatively little media publicity and even less public attention seemed to be given to two major voting rights decisions handed down by the Court.

Each was a landmark in its own right.

#### *Bartlett v. Strickland*<sup>2</sup>: Numerical “Majority” Required for §2 Districts

One of the cases came from North Carolina and involved a fundamental interpretation of one of the three threshold requirements that must be satisfied in order for a §2 suit to survive a motion for summary judgment.

First, consider the legal landscape.

§2 of the Voting Rights Act requires a showing that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice." In a nutshell, the *Gingles*<sup>3</sup> preconditions, named after the first case to reach the Court following the 1982 amendments to the Voting Rights Act, are (1) a geographically compact majority-minority district, (2) minority political cohesion, and (3) legally significant white racial bloc voting. *Strickland* dealt with what it takes to constitute a majority minority district.

As part of their threshold *Gingles* showing to establish liability for vote dilution, the §2 plaintiffs in *Strickland* were required to prove the minority population in the potential election district at issue was greater than 50%. Moreover, for remedial purposes in vote dilution cases like the one before the Court, only if all three *Gingles* preconditions were met and a §2 violation was established based on the totality of the circumstances, then and only then could majority-minority districts be required

Second, consider the facts before the Court.

Pender County, N.C., challenged a 1991 legislative redistricting plan that divided the county in order to increase a legislative district's minority voting strength, alleging that the district violated the state's Whole County Provision. The county argued that creation of an intermediate, "crossover" district, in which the minority made up less than a majority of the voting-age population, but was large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate, nonetheless failed to satisfy the threshold *Gingles* precondition for §2 liability, since African-Americans were not a majority of the district's voting-age population, but could get enough support from crossover majority voters to elect their preferred candidate. The stage was set for the U. S. Supreme Court to address whether there was a numerical majority requirement for majority-minority district under §2 of the Voting Rights Act

#### No De Facto Majority-Minority Districts

Affirming the North Carolina Supreme Court, the U.S. Supreme Court concluded in a March 9, 2009 decision that this was not enough to render the district a "de facto" majority-minority district for purposes of §2 liability. Addressing an issue left open in *LULAC v. Perry*<sup>4</sup>, *Johnson v. DeGrandy*<sup>5</sup>, *Voinovich v. Quilter*<sup>6</sup> and *Grove v. Emison*<sup>7</sup>, the Court held instead that a minority group must constitute a numerical majority of the voting-age population in an area before it can satisfy the threshold *Gingles* preconditions for establishing §2 liability to require the creation of a legislative district to prevent dilution of that group's votes. Because African-Americans did not have such a numerical majority in the district at issue, the Court ordered the legislature to redraw the district.

The Court recognized that a §2 vote dilution claim where minority voters cannot elect their candidate of choice based on their own votes and without assistance from others would grant special protection to their right to form political coalitions that is not authorized by the §. Further, while §2 can require the creation of a "majority-minority"

district, in which a minority group composes a numerical, working majority of the voting-age population, it does not require the creation of an "influence" district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.

Trend: Increased focus on white majority districts in evaluating legally significant white racial bloc voting

*Bartlett v. Strickland* suggests the first trend we may find in voting rights litigation. Minority electoral success in white majority districts will continue to be a focal point for demographers and statisticians in evaluating legally significant white racial bloc voting. Indeed, minority electoral success is the antithesis of legally significant white racial bloc voting.

As the lower courts further refine *Strickland's* strong reinforcement of a numerical majority in order to prove the hypothetical existence of a §2 district, that is, one meeting the definitional requirement for a geographically compact majority-minority district with 50% or greater minority population, proof of the second *Gingles* precondition of legally significant white racial bloc voting will necessarily entail an inquiry into the voting patterns of a majority white district. It will call for the court to examine whether the white district under scrutiny for racial bloc voting purposes is in fact "majority" white. This is a particularly significant complication for what most federal judges already classify as among the most difficult and challenging of federal civil actions. In light of our nation's rapidly changing demographic characteristics that render decennial census results arguably outdated by mid-decade, look for the battle lines to be formed at the second *Gingles* threshold condition.

Stated differently, satisfying the numerical majority requirement while establishing a hypothetical majority-minority district for purposes of the first *Gingles* precondition of geographical compactness may not necessarily lead to victory for plaintiffs in a vote dilution suit. This is true since the same type of evidence – a numerical majority *vel non* – may not be available to establish the existence of a majority white district in which minority candidates usually suffer defeat despite some degree of white crossover voting. Therefore, unless numerical majority status can be established for the white district under scrutiny, a plaintiff may be unable to satisfy the second *Gingles* precondition of legally significant white racial bloc voting. Attempting to satisfy that numerical majority requirement with anything less, like a functional white majority or *de facto* white majority district, could doom a plaintiff's §2 case based on the absence of legally significant white racial bloc voting and spell victory for the defense.

Trend: *Strickland's* adoption of a numerical majority requirement provides a safe harbor for the redistricting process.

Before *Strickland*, there was no bright line rule in this area of the law. *Strickland* now provides a clear and objective 50% rule that should give state and local government legislative bodies some measure of relief in not having to defend every redistricting plan

in court whenever they are faced with plaintiff's competing redistricting plans containing "opportunity" districts, and thus not having to devote scarce public funds to finance the defense of such plans. Contrary to outgoing Justice Souter's dissent in *Strickland*, race will become less and less of a determinant in state and local government redistricting decisions where plaintiffs are unable to satisfy the numerical majority requirement.

Under the bright line rule established in *Strickland*, absent satisfaction of the first *Gingles* precondition, minority voters like all other voters do not have any entitlement to constitutional protection from defeat at the polls. Nor do minority voters any more than other voters have a constitutionally or statutorily protected right to form coalitions with non-minority voters, absent satisfaction of the first *Gingles* precondition. Of course, they can pull, haul and trade, to borrow our departing Justice Souter's words in *DeGrandy*, and compete for votes and electoral support in the marketplace of political ideas. In short, absent satisfaction of the first *Gingles* precondition, §2 should not be applied post-*Strickland* to permit minority voters to benefit from special treatment.

Trend: *Strickland* spells the demise of "opportunity districts" by striking a class of potential §2 claims from §2 coverage.

Before *Strickland*, opponents of the numerical majority or "bright line" rule felt that the first *Gingles* precondition of geographical compactness could be satisfied by establishing the existence hypothetically of a district in which minority voters could be shown by reconstructed electoral data to have an "opportunity to elect" their preferred candidate. Use of an "opportunity district," however, would have armed Article III courts with a subjective standard and unbridled discretion to decide whether there are enough disparate racial minorities in a given district to support a finding that they have a "potential" to elect a representative of choice.

Further, in determining a racial minority's ability to vote by analyzing historical voter turnout differentials in a particular district, there may not be any remaining relevance to the question whether a less-than-50% minority group has an opportunity to elect. In the same sense, such a minority group's measured minority voter effectiveness will likely not be given any consideration in determining any of the *Gingles* preconditions, although it may have some limited relevance with respect to one or more of the Senate Report factors.

Trend: In implementing *Strickland*'s 50% rule as a numerical population standard, the lower courts will have to determine whether non-citizen undocumented aliens or only the citizen voting age population (CVAP) can or should be counted in determining that 50%. The greater weight of authority indicates that CVAP only will be counted.

The 50% rule is one that rests on a numerical population standard, but 50% of what? *Strickland* did not specifically address whether citizen voters only (citizen voting age population or CVAP) or non-citizen undocumented aliens would be counted. Nor did the Court address who should be counted as "African-American" under the 50% rule, an

especially difficult question in light of the creation of the multiracial category first used in the 2000 Census and in light of the somewhat ambiguous questions on race and ethnicity used to determine who counts as African-American. Some have taken the position that the 50% rule can create the risk of skewing the percentages of racial groups who are actually eligible to vote.

Their argument is that a racial minority group in a district where they do not constitute 50% of the population, but nonetheless are able to elect their preferred representatives, should have access to §2's protections against vote dilution. Absent a 50% population in any hypothetical geographically compact district, a minority group should not be able to argue post-*Strickland* that because one of the purposes of §2 is to give minority groups more voting power, that group should be given more voting power than it would otherwise have. That argument is precluded now under *Strickland* and was already in doubt under earlier circuit authority.<sup>8</sup>

Trend: *Strickland* should not have the unintended consequence of encouraging jurisdictions to engage in packing, cracking and fragmentation of minority voters.

Prior to *Strickland*, opponents of the numerical majority requirement raised the specter of jurisdictions rushing to pack as many minority voters as possible into districts in order to prevent them from electing candidates of their choice in surrounding districts, or to fragment or "crack" an otherwise compact minority population into multiple districts to dilute their vote. This cynical argument belongs to a bygone era and does anything but seek to minimize the role of race in politics. It puts race in the forefront by taking it into account more than necessary or factually justified, even to the point of trumping legitimate, racially neutral redistricting objectives. It exacerbates the risk of creating an even greater racial divide and eliminating the desire or foundation of trust essential to forming coalitions. This threadbare argument posits race as the predominant determinant of redistricting decisions. It ignores the political landscape of 2009, does nothing to encourage coalitions that discourage racial divisions and dooms racially polarized factions to retreat into majority-minority districts based on a quintessentially race-conscious calculus.

*Reyes v. City of Farmers Branch, Texas*<sup>9</sup>

In one of the first appellate court decisions following *Bartlett v. Strickland*<sup>10</sup> the Fifth Circuit was confronted with the somewhat novel argument that *Bartlett v. Strickland*, had held that only voting-age population matters under the first Gingles preconditions. There, the minority Plaintiffs argued that *Bartlett v. Strickland* had implicitly overruled Fifth Circuit precedent requiring a minority citizen voting-age population in a district proposed under §2 to exceed 50% of its total citizen voting-age population. The Fifth Circuit in this case was confronted with a §2 vote dilution challenge filed by Hispanic Plaintiffs in which they claimed that the City's numbered at-large system of electing its five city council members diluted minority voting strength of the Hispanic minority. As part of their threshold burden under *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), which held that the minority group must be able to demonstrate that it is sufficiently large and

geographically compact to constitute a majority in a single-member district. The Plaintiffs were thus required to show that Hispanics would comprise a majority of the citizen voting-age population. Under the City's at-large electoral system, all voters were permitted to vote for all five council positions, and there was no requirement that a voter be a resident of any particular district.

According to Plaintiffs, if the City were required to convert to single member residential districts that one "demonstration district" with 78% TPOP and 75%VAP, that district would contain a sufficient number of Hispanics to satisfy the first precondition under *Gingles*. Since Plaintiffs had failed to make the threshold showing that the Hispanic citizen voting-age population exceeded the non-Hispanic citizen voting-age population, and no actual data was available to reflect the actual number of Hispanic citizens of voting age living in the demonstration district, the Fifth Circuit held that the district court properly rejected Plaintiffs' claim for failure to show Hispanics would comprise a majority of the citizen voting-age population.

The Fifth Circuit also rejected Plaintiffs' argument that under *Bartlett v. Strickland*, only voting age population matters under the first *Gingles* precondition, not citizen voting-age population, and that the district court had erroneously applied too stringent a test when it rejected Plaintiffs' claim. The Fifth Circuit specifically rejected the argument that *Bartlett v. Strickland* had implicitly overruled Fifth Circuit precedent requiring a minority citizen voting-age population in a district proposed under §2 to exceed 50% of its total citizen voting-age population. Its reasoning was based on four key points:

(1) The question of citizenship was not before the Court in *Bartlett v. Strickland*, but the question there was quantitative, how many, and not qualitative, what kind of people. The Court was focused on the question of whether a minority population in a demonstration district comprised less than 50% of the possible voters could nonetheless meet the first *Gingles* precondition by showing it can win elections with the help of a reliable crossover vote.

(2) Only voting-age citizens can be "voters" who could form a majority, and the plurality opinion in *Bartlett v. Strickland* evidenced the vitality of the citizenship requirement, particularly when Justice Kennedy concluded that "only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met." *Bartlett v. Strickland*, 129 S.Ct. at 1249.

(3) "[T]he jurisprudential backdrop belies the notion that the Court would hold that citizenship is irrelevant under Section 2 of the VRA, particularly where several sister Circuits joined the Fifth in requiring voting rights plaintiffs to prove that the minority citizen voting-age population comprises a majority."<sup>11</sup>

(4) The Court issued no binding opinion in *Bartlett v. Strickland*, only a judgment. There were only three justices who joined in the plurality opinion, and two others joined the judgment affirming that no voting rights violation existed while flatly denying that any

voter dilution claim could be made under §2 of the VRA. “[T]hree justices a rule do not make.”<sup>12</sup>

### NAMUDNO<sup>13</sup>

The other case from Texas was nothing less than a frontal assault on the constitutionality of one of the federal government’s most formidable weapons in fighting racial and ethnic discrimination in elections, the §5 preclearance provision as it was renewed and extended for another 25 years under the VRARA of 2006.

#### §5 Preclearance under the 1965 Act

The heart of the Act was a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. One of the Act’s key provisions was §5<sup>14</sup>, passed originally for five years. §5 prohibits covered jurisdictions from changing any voting or election law, policy, practice or procedure without first obtaining federal preclearance. §5 was seen by many at the time of its initial enactment as a temporary remedy to an emergency situation.<sup>15</sup> §5 prescribed a remedy by which the suspension of new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination.

Any change in election practices, procedures or administration, primarily in southern states and certain counties, would be subject to prior administrative or judicial approval, or preclearance. §5 preclearance could be obtained by filing a submission with and seeking a favorable “no objection” determination by the United States Department of Justice in Washington, D.C. or by filing an action for a favorable declaratory judgment and obtaining a favorable determination by the U.S. District Court for the District of Columbia.

#### Subsequent Enactment of Bailout Provision

The Act was later amended and extended several times. A provision was added in 1982 by which covered jurisdictions could apply for an exemption from §5 coverage, upon a showing of sustained compliance with the Act for a certain period of time. This exemption was called bailout. In the most recent extension of the Voting Rights Act enacted in 2006, the bailout provision was contained in §4(a).

#### Course of Proceedings Below

The Northwest Austin Municipal Utility District No. 1 (NAMUDNO) was a small utility district in Austin, Texas, with an elected board of five members. While responsible for its own elections, it did not register voters. Since it was in Texas, a covered jurisdiction, the



utility district was required by §5 to seek preclearance before it could change any aspect of its electoral process, although there was no evidence that the utility district had ever discriminated on the basis of race. The utility district attempted to change the location of its polling station to a public garage from a less convenient location. It considered this change in election procedure devoid of discriminatory intent.

NAMUDNO filed suit seeking relief under the "bailout" provision in §4(a) of the Act, which allows a "political subdivision" to be freed from the preclearance requirements if certain conditions are met.

In the alternative, NAMUDNO argued that, if §5 were interpreted to render it ineligible for bailout, §5 was unconstitutional since it exceeded Congress' 15th Amendment enforcement power. Its challenge to §5's continuing constitutional validity was grounded in part on the fact that the systematic voting discrimination that existed at the time of the 1965 Act no longer existed. Alternatively, NAMUDNO sought bailout under §4(a) of the Act.

#### The Lower Court's Determination

The three-judge U.S. District Court for the District of Columbia, to which this action was transferred from federal court in Texas, upheld the constitutionality of the Voting Rights Act's 2006 extension<sup>16</sup>. It also rejected NAMUDNO's alternative request for bailout since bailout under §4(a) was available only to counties, parishes, and subunits that registered voters, but not to an entity like this utility district that did not register its own voters.

The three-judge Court also concluded that the VRARA of 2006 that extended §5 for another 25 years was constitutional.

#### SCOTUS Decides to Dodge the Bullet

In an 8-1 decision handed down June 22, 2009 that many predicted would be the most important case of this term, the United States Supreme Court reversed in part and held that the utility district was a political subdivision eligible to seek bailout under § 4(a) of the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (VRARA) and thereby seek relief from the Act's preclearance requirement.<sup>17</sup> Even though the utility district did not register voters, the Court reasoned that specific precedent, the Voting Rights Act's structure, and underlying constitutional concerns compelled a broader reading of the bailout provision, that all political subdivisions are entitled to seek relief from the Act's preclearance requirements, and NAMUDNO in particular was eligible to file a bailout suit.

NAMUDNO's broadening of the availability of bailout to "all political subdivisions"<sup>18</sup> means that more state and local governmental entities will likely seek to be exempted from what critics have described as the "draconian" provisions of the Act.

The Court's ruling on bailout, however, was the warm-up for what many thought would be the main event.

The focal point of the attention given to this case before it was decided by the Supreme Court, and the issue surprisingly avoided by that Court, was whether the Voting Rights Act's preclearance provision, §5, was unconstitutional.

We will now turned to a detailed analysis of what the Court did – and what it didn't do.

### Constitutional Avoidance

The 10,000 pound gorilla before the Supreme Court was §5's constitutionality.

The nation had just elected Barack Obama as its first African-American president. To many, the issue before the Court boiled down to whether there was still a strong basis in evidence for the continuation of this remedial legislation.

Resolution of this issue would have to entail an inquiry into whether such legislation was grounded in an appropriately detailed and specific Congressional record of systemic discrimination in the limited number of jurisdictions covered by this provision.

### Political Reality in 2006 v. Political Reality in 1965

The Court was expected to focus on the constitutional justification for §5 as amended and extended under the VRARA of 2006.

This was a far different question, and a far different political landscape, as compared to the conditions existing in 1965 when §5 was initially enacted. Preclearance in 1965 was a constitutionally valid requirement applicable primarily to southern states. Its constitutionality in 2006 was another matter entirely.

### High Expectations of the High Court

It is difficult to say whether commentators were misled by the apparent close divisions on the Court during oral argument or by the tsunami of legal scholarship that preceded the official release of the 8-1 decision. Other legal soothsayers can deal with such speculation.

Whatever prompted those expectations, the Supreme Court was expected to evaluate the constitutional efficacy of what had been reenacted in 2006 as remedial legislation over four decades after the end of the Jim Crow era and elimination of southern states' massive resistance to attempts to enforce the 15th Amendment. While §5 was included in the Voting Rights Act of 1965 as a temporary remedy to an emergency situation, the

version of §5 before the Court was the result of over four decades of amendments and extensions of the Act (e.g., to add linguistic minorities, Pacific Islanders, etc.).

As for the legislative history that accompanied the version of §5 in this most recent renewal and extension in 2006 for another 25 years, Congress introduced over 15,000 pages into the legislative record.

#### The Court's Sidestep in *NAMUDNO*

The Supreme Court in *NAMUDNO* did not reach the constitutionality of §5, the central provision of the Voting Rights Act and its many extensions. The Supreme Court did not address the question whether there was a strong basis in evidence to support this most recent extension of §5 as remedial legislation.

Speaking for the majority, Chief Justice Roberts said that passing judgment on an act of Congress is "the gravest and most delicate duty that this court is called upon to perform," and such a momentous duty need not be undertaken at this time, particularly since a statutory claim also decided by the lower court and properly before the Supreme Court provided a sufficient vehicle for disposing of the entire case.

In the stroke of a pen, the Court in its 8-1 ruling declared that there was no need at this time to address the issue of whether §5 was still constitutional in light of fundamental changes that have swept across the South in recent decades.

The Court simply declined to address the constitutionality of a central provision of the Voting Rights Act, passed originally for five years and repeatedly extended, that required covered jurisdictions to get approval from Washington for any change, no matter how trivial, to its voting procedures.

#### Bailout Under §4(a)

The bailout provision of the Voting Rights Act, according to the Court, must be interpreted to permit all political subdivisions, including the utility district in question, to seek to bail out from the preclearance requirements of §5. It was undisputed that the utility district was a "political subdivision" in the ordinary sense, according to the Court, but the Voting Rights Act also provided a narrower definition in §14(c)(2):

" '[P]olitical subdivision' shall mean 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."

#### VRARA of 2006

The Court noted that the Voting Rights Act “also differentiates between the states in ways that may no longer be justified.” Numerous amici had weighed in on both sides of the constitutional issue. As the Chief Justice put it, “[t]hat constitutional question has attracted ardent briefs from dozens of interested parties.”

§5 was reauthorized by Congress for another 25 years in 2006, when it enacted the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, 120 Stat. 577. The legislative record relied on by the House and Senate disclosed for the most part practices that had all but disappeared and cited voting data now decades old.

Writing for the majority, Chief Justice Roberts observed:

[i]n part due to the success of that legislation, we are now a very different nation.... The historic accomplishments of the Voting Rights Act are undeniable.... When it was first passed, unconstitutional discrimination was rampant and the ‘registration of voting-age whites ran roughly 50 percentage points or more ahead’ of black registration in many covered states.”

The Court’s ruling, according to some observers, means that the subject utility district - and implicitly other political units as well — should have less difficulty applying for and obtaining bailout from § 5 preclearance provisions.

#### The Success of Bailout: By the Numbers

Over 12,000 jurisdictions are covered by §5. Since the bailout provision was inserted in the 1982 Voting Rights Act Amendments, a total of 17 jurisdictions have succeeded in bailing out of the Voting Rights Act. In expanding the availability of bailout, the majority in *NAMUDNO* reasoned that it was “unlikely that Congress intended the provision to have such limited effect.”

A stark reminder came from Justice Clarence Thomas, however, when he pointed out that

[a]ll 17 covered jurisdictions that have been awarded bailout are from Virginia, ... and all 17 were represented by the same attorney – a former lawyer in the Voting Rights Section of the Department of Justice. ... Whatever the reason for this anomaly, it only underscores how little relationship there is between the existence of bailout and the constitutionality of §5.

The “same attorney” was J. Gerald Hebert, former acting chief of the Civil Rights Division, and a renowned expert in the field of voting rights litigation, and probably the leading expert in bailout proceedings. In fact, the first bailout action filed after *NAMUDNO* was handed down was brought by Gerry Hebert on behalf of Kings Mountain, North Carolina.<sup>19</sup> According to Hebert, about six more governmental clients

from covered jurisdictions around the country have expressed interest in bailouts.<sup>20</sup> Our own communications with the Voting § of the Civil Rights Division indicates that DOJ may be anticipating a significant wave of bailout actions in the near future. As the opening line puts it in the cited BLT commentary, “[a]nd the bailouts begin.”

#### Justice Thomas’ CIP DIP

Justice Clarence Thomas would have declared §5 unconstitutional, reasoning that “[t]he violence, intimidation and subterfuge that led Congress to pass §5 and this court to uphold it no longer remains.” In his lone dissent, he voiced strong disagreement with the majority’s invocation of the doctrine of constitutional avoidance. Concurring in part and dissenting in part, Justice Thomas said that he considered it inappropriate to sidestep the constitutional question since the bailout approach failed to give the plaintiffs’ full relief: The Court itself could not give the plaintiff bailout because it had not yet proved its compliance with the statutory requirements for such relief, and, moreover, the record showed that its entitlement to bailout was a vigorously contested issue.

Justice Thomas opined that the lack of current evidence of intentional discrimination with respect to voting rendered §5 unconstitutional and that §5 could no longer be justified as an appropriate mechanism for enforcing the 15<sup>th</sup> Amendment. His rationale was clear and to the point:

The lack of sufficient evidence that the covered jurisdictions currently engage in the type of discrimination that underlay the enactment of §5 undermines any basis for retaining it.<sup>21</sup>

#### A Reprieve or Cause for Celebration?

For now, §5 has been given a reprieve, but one cannot lightly disregard the fact that a significant number of Justices have now expressed the view that §5 poses serious constitutional concerns. Indeed, when *NAMUDNO* was argued on April 22, 2009, several justices hinted at a willingness to find §5 unconstitutional.

Those same concerns surfaced in the majority opinion by Chief Justice Roberts, albeit in terms that were sufficiently muted to draw the support of eight other Justices. One may go so far as to consider the following as potential building blocks for the core constitutional issues that will be framed in the next challenge to §5:

(1) “The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.”<sup>22</sup>

(2) “The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”<sup>23</sup>

(3) “[T]he racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide.”<sup>24</sup>

(4) “[T]he evidence that is in the record suggests that there is more similarity than difference [between covered and non-covered areas of the United States].”<sup>25</sup>

(5) While the parties did not agree on the standard or test to apply in deciding whether Congress exceeded its 15<sup>th</sup> Amendment enforcement power in extending the § 5 preclearance requirements, “[t]he Act]s preclearance requirements and its coverage formula raise serious constitutional questions under either test.”<sup>26</sup>

(6) “[T]he Act imposes current burdens and must be justified by current needs.”<sup>27</sup>

(7) “The Act also differentiates between the States in ways that may no longer be justified.”<sup>28</sup>

(8) “Many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated.”<sup>29</sup>

(9) “Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>30</sup>

(10) “[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>31</sup>

(11) “[T]he registration gap between white and black voters is in single digits in the covered states; in some of those states, blacks now register and vote at higher rates than whites.”<sup>32</sup>

(12) “Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved.”<sup>33</sup>

#### Post-NAMUDNO Fallout

In his recent blog posting *The New South and the Voting Rights Act, Post-NAMUDNO*,<sup>34</sup> Michael Kang noted that the common response to *NAMUDNO* “was to note the triumph of racial progress and the outdatedness of the Voting Rights Act, once born as a forceful response to the Jim Crow South.”

In one of her first editorials on *NAMUDNO* following the release of the decision, Abigail Thernstrom, Vice-Chair of the U.S. Commission on Civil Rights and author of *Voting Rights – And Wrongs: The Elusive Quest for Racially Fair Elections* (2009), described the Court’s action as a “punt” on the constitutional challenge to this “antiquated provision” of the Voting Rights Act. The real significance of the decision, she noted, lies

in what was foreshadowed, particularly when one considers the encouraging signs from the Court and how *NAMUDNO* “clearly invites another case that properly frames the core constitutional issues.” Her June 24, 2009 New York Post op-ed, *A Wise Punt? Court Demurs on Election Law*,<sup>35</sup> also provided a sobering reminder that we should be careful about what we pray for. While it was clear that the Chief had identified most, if not all, of the core constitutional questions that the right §5 challenge would raise, that day is not imminent; moreover, Thernstrom warned, a complete invalidation of §5 on constitutional grounds could have invited our Democratically-controlled Congress to “fix” §5 in a way that would legislatively reverse the high Court. Moreover, “lawmakers would likely embark on a range of fresh voting-law innovations. A new statute might well prohibit felon disfranchisement and state voter-identification laws, for instance.”

In the where-do-we-go-from-here department, Thernstrom concluded that while the right case may reach SCOTUS a few years from now. As she put it,

[i]n the meantime, we might hope for a better alternative: more aspiring black politicians running and winning in majority-white settings. If that happens, they will create a record of electoral success that will make unmistakably clear how obsolete §5 has become.<sup>36</sup>

Many point to Barack Obama’s election as a triumph over racial polarization and historical exclusion of African-Americans from the political process. They see it a realization of full political equality and electoral access by minority voters, the best evidence of our nation’s racial progress since the beginning of the Civil Rights Movement. They point to the Obama election as proof that race-based remedies in voting rights are now irrelevant.

Others paint a more sobering portrait. As Kang notes, §5 has always had its most meaningful bit in the Deep South, and we should not shelve it anytime soon just because of this election:

However, Obama’s election demonstrated not only American racial progress over the last fifty years, but also its surprising stagnation in some parts of the South. Particularly in the deeper South, racial polarization seemed not to have diminished nearly as much. The available data, summarized in an amicus brief written by Nate Persily, Charles Stewart, and Steve Ansolabehere for *NAMUDNO*, confirms that Obama actually received a lower percentage of the white vote in a number of southern states than John Kerry, who was clearly a weaker candidate in a much more difficult election year for Democrats in 2004. Such patterns of racial polarization need not always suggest race-based reasons for the divergence in voting patterns, but it is difficult not to draw race-based conclusions from Obama’s lack of success among white voters in these areas, particularly given Obama’s advantages in 2008 compared to Kerry in 2004.

With respect to a universal right to vote and a race-neutral “right to vote” model for voting rights, Kang agrees that national efforts to enact universal laws to protect all voters from vote denial are appropriate, but rejects

an implicit choice between maintenance of the Voting Rights Act and new efforts to bolster a universal right to vote as a false one. There are pitfalls when historic legislation like the Voting Rights Act cast such a big shadow that it threatens to bind up newer, overlapping efforts in the same policy domain, but these pitfalls are not inevitable. We can have both, please. The Voting Rights Act may continue to do valuable work even as the voting rights community expands its attention to non-race based concerns about voter identification, restrictive registration requirements, and voting technology, among other things. The success of the past need not define the present, but it is not inconsistent with it either.<sup>37</sup>

#### Implicit Message from *NAMUDNO* and *Ricci*

Before and after the current term of the Supreme Court came to an end, the political pundits went into overdrive. In his Washington Post editorial, *For Obama, Court Cases That Matter*,<sup>38</sup> David S. Broder opined that the implicit message delivered by the majority in *NAMUDNO* and *Ricci*, the New Haven firefighters case, was that “racial discrimination is no longer as big a problem as we once thought.”

In a 5-4 decision, the Supreme Court in *Ricci v. DeStefano* held that while employers may use race-conscious policies to avoid disparate impact discrimination, they may do so only where there is a strong basis in evidence that the policies are necessary to avoid disparate impact liability. Since the City of New Haven could not meet that test, the Court in a majority opinion by Justice Kennedy took the unusual step of granting summary judgment for the plaintiffs, New Haven firefighters. Those firefighters had successfully completed a City-administered test to determine firefighters’ promotion eligibility, only to have the City examine and refuse to certify the test results.

The City had found instead that Caucasian candidates significantly outperformed African-American and Latino candidates, and on that basis refused to certify the test results out of a perceived fear that the City would be exposed to liability based on facially neutral promotion and hiring policies with a racially disparate impact.

In the New Haven firefighters’ ensuing Title VII action, the District Court, affirmed by the Second Circuit Court of Appeals, granted summary judgment for the defendants, holding that the City’s alleged fear of an adverse impact claim -- based merely on the fact that the examination results yielded a racial disparity -- was a legitimate reason for its decision not to certify the exams.

In *Ricci*, the Supreme Court held that the City’s actions in scrapping the test results violated Title VII of the Civil Rights Act. In reversing the District Court, which had been affirmed by the Second Circuit Court of Appeals in a one-page summary order, the Supreme Court rendered judgment in favor of the New Haven firefighters, the Court:



clarifie[d] how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.<sup>39</sup>

#### Common Link between *NAMUDNO* and *Ricci*

With respect to the implicit message of these two cases, Broder observed that both *NAMUDNO* and *Ricci* had a common link.

[T]he link between the two is the assumption or assertion that this society has largely healed itself and does not need the race-conscious remedies that the previous generation of politicians thought necessary.<sup>40</sup>

#### Impact upon Sotomayor Confirmation

That view on the question of race, if correct, raises some interesting questions in light of the current composition of the Supreme Court. Associate Justice Sonia Sotomayor, who participated as judge on the Second Circuit panel that denied in a summary order the New Haven firefighters' petition for rehearing en banc, a decision that was later reversed by the Supreme Court, found herself fighting a swarm of tough questions during her televised confirmation hearings. Then Second Circuit Judge Sotomayor was one of three judges who had issued that one-page order summarily denying the petition for rehearing en banc, thereby rejecting the claims of protesting white firefighters that they had been victims of reverse discrimination when the city scrapped an examination on which none of the African Americans who took the test scored well enough to win immediate promotion.

Her confirmation hearings revealed now Associate Justice Sotomayor as a mainstream advocate for the rule of law, with a love for the law that transcended the attempts of a minority of detractors to capitalize on her previous extrajudicial speeches in which she compared the wisdom of a wise Hispanic woman with that of a white male sitting on the bench when ruling upon issues of racial and ethnic discrimination. The efforts to paint her as radical failed.

#### The Beer Summit and the Question of Race

Apparently unrelated to *NAMUDNO*, at least superficially, we might also consider the unfortunate arrest, incarceration and subsequent no-apologies "beer summit" resolution of Harvard Professor Gates' encounter with a police sergeant. Recall that Professor Gates had returned from a trip to China only to find himself locked out of his own home. The police sergeant, responding to a 911 call from an observer who reported that two men appeared to be breaking and entering the Gates home, had experience teaching

Cambridge Police Department officers on such subjects as racial profiling and racial sensitivity. Following this incident and President Obama's poorly calibrated remark that the Cambridge Police Department "acted stupidly," query whether our nation's first African-American president may "find himself in conflict with the court on the question of race?"<sup>41</sup>

### To be Continued

Chief Justice Robert left the door open for another day. In the closing words of the majority opinion, the Chief reminded us:

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 in a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today."

### Treating One Set of States Differently from Others

In David Broder's *Washington Post* op-ed at the end of the term of Court, he noted that seven justices agreed with the Chief, and the eighth, Clarence Thomas, wanted to rule the Voting Rights Act unconstitutional on the spot. As Broder put it, the Chief:

signaled that he thinks time has run out on the remedy that Congress concocted in 1965 to overcome the historical pattern of denying blacks access to the ballot box in much of the South. Given all that, he said, it is hard to justify the constitutionality of treating one set of states differently from all the others. The Voting Rights Act was spared only by the court's discovery that the statute could be interpreted in a way that gives the Texas district involved in the case a chance to be exempted from its terms. So the court deferred judgment on the constitutional question.<sup>42</sup>

All nine Justices of the United States Supreme Court agreed the historic accomplishments of the Voting Rights Act of 1965 and its subsequent extensions and reauthorizations in 1970, 1975, and 1982, are undeniable. The Act's §5 preclearance requirement as renewed for another 25 years in 2006 represents a major intrusion into sensitive areas of state and local responsibility, imposing substantial federalism costs which "have caused Members of this Court to express serious misgivings about the constitutionality of §5." It is problematic whether the federalism costs in 2006 can be equated to those in 1965.

SCOTUS watchers held their breath for months. Many anticipated that the Court would deal squarely with the issue of §5's constitutionality and either uphold it or invalidate it. When the Court avoided the constitutional issue, there was a feeling of relief for proponents of the Act. For those who considered the Act as emblematic of governmental overreach and violative of the most basic principles of self-government and federalism, there was a feeling of frustration. For many on both sides of this issue, there was little to celebrate.

### Conclusion

It has been said that snow and adolescence are the only problems that disappear if you ignore them long enough. Our highest Court has shown that the problem of §5's constitutionality can be ignored for a season, but it will not disappear. §5's constitutional underpinnings will be tested at some point in the future. As President Abraham Lincoln said many generations ago, "The best thing about the future is that it comes only one day at a time."

This much is clear: In *NAMUDNO*, Chief Justice John Roberts signaled that he thinks time has run out on the remedy that Congress concocted in 1965 to overcome the historical pattern of denying blacks access to the ballot box in much of the South. No sitting Justice disagreed with him on that point. One may dispute the continuing damage that segregation has done to this country and the continuing need for race-conscious remedies in 2009 and later, but *NAMUDNO* appears to be the canary in the coal mine for continued viability of such remedial policies as the law of the land.

Our nation has turned a corner since the enactment of the Voting Rights Act of 1965, which reflected Congress' firm intention to rid the country of racial discrimination in voting. Tremendous progress in race relations was made as a result of an increasingly accessible electoral process, facilitated the Act's subsequent revisions and extensions. That racial progress is palpable. Even to the gloomiest of observers, the glass of equal electoral and political opportunity is now more than half full.

We have learned how to pull, haul and trade in the marketplace of political competition. We have witnessed the transformation of *E Pluribus Unum* from a nice sounding phrase to a political reality.

We are indeed a better country as a result.

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NOTE: I would like to acknowledge the timely assistance provided by Lauren Webb Carr, an associate in Griffith & Griffith, and thank her for her valuable contribution in proofreading and editing this written presentation.

<sup>1</sup> *America Votes! A Guide to Modern Election Law and Voting Rights* 147 (ABA 2008).

<sup>2</sup> 556 U.S. \_\_\_, 128 S. Ct. 1648 (2009).

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<sup>3</sup> *Thornburg v. Gingles*, 478 U. S. 30 (1986).

<sup>4</sup> 126 S. Ct. 2594 (2006).

<sup>5</sup> 512 U. S. 997 (1994).

<sup>6</sup> 507 U.S. 146 (1993).

<sup>7</sup> 507 U.S. 25 (1993).

<sup>8</sup> *Latino PAC v. Boston*, 784 F. 2d 409, 412 (1<sup>st</sup> Cir. 1986).

<sup>9</sup> *Reyes v. The City of Farmers Branch, Texas*, No. 08-11106 (5<sup>th</sup> Cir. Nov. 3, 2009), accessible online at <http://www.ca5.uscourts.gov/opinions/pub/08/08-11106-CV0.wpd.pdf>

<sup>10</sup> 129 S. Ct. 1231 (2009)

<sup>11</sup> *Barnett v. City of Chicago*, 141 F. 3d 699, 704 (7<sup>th</sup> Cir. 1998); *Negron v. City of Miami Beach*, 113 F. 3d 1563, 1569 (11<sup>th</sup> Cir. 1997); *Romero v. City of Pamona*, 883 F. 2d 1418, 1426 (9<sup>th</sup> Cir. 1989).

<sup>12</sup> *Reyes*, slip op at 8.

<sup>13</sup> *North Austin Municipal Utility District No. 1 v. Holder*, 557 U. S. \_\_\_, 129 S. Ct.2504, 174 L. Ed. 2d 140 (2009).

<sup>14</sup> Codified at 42 U.S.C. §1973(c)

<sup>15</sup> One year after the 1965 Act was signed into law, the U.S. Supreme Court upheld its constitutionality in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). At the heart of its decision was a legislative record that thoroughly documented this systemic voting discrimination. The heart of the Act was a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant §5 prescribed a remedy by which the suspension of new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. According to the Court, Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965, in that the measure prescribed remedies for voting discrimination which went into effect without any need for prior adjudication, a legitimate response to the problem, for which there was ample precedent under other constitutional provisions. Further, Congress found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. As the Court noted, after enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress could well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. Finally, the Court found that the specific remedies prescribed in the Act were an appropriate means of combating the evil. The Act intentionally confined these remedies to a small number of States and political subdivisions, most of which were familiar to Congress by name. This was seen by the Court as a permissible method of dealing with the problem, in that Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, it knew no way of accurately forecasting whether the evil might spread elsewhere in the future, and in an acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.

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<sup>16</sup> 573 F. Supp. 2d 221 (S.D. Tex. 2008), *rev'd*, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. \_\_\_, 129 S. Ct. \_\_\_, 174 L. Ed 2d 140, 2009 U.S. LEXIS 4529 (U.S. June 22, 2009)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, 174 L. Ed. 2d at 155.

<sup>19</sup> *First Local Government Seeks Voting Rights Bailout Post Supreme Court Ruling*, The BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2009/08/first-local-government-seeks-voting-rights-bailout-bailout-post-supreme-court-ruling.html>

<sup>20</sup> Others echoed the prediction that the number of bailout suits would increase at the local government level. "By widening the escape hatch for localities in its extraordinary ruling, the Supreme Court may have launched a town-by-town movement that may release localities that have chafed for years under the law's strict rules; every time a covered jurisdiction wanted to move a polling place from one school to another, it needed Justice Department approval. Now, if they can show they've been adhering to the law for 10 years, they're home free." Tony Mauro, *Can the Voting Rights Act Survive Another Challenge?* National Law Journal, June 29, 2009, accessible at <http://www.nlj.com>

<sup>21</sup> *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. \_\_\_, 129 S. Ct. \_\_\_, 174 L. Ed 2d 140, 165, 2009 U.S. LEXIS 4529 (U.S. June 22, 2009).

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, 174 L. Ed. 2d at 151.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, 174 L. Ed. 2d at 145.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, 174 L. Ed. 2d at 149.

<sup>30</sup> *Id.*, 174 L. Ed. 2d at 150.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, 174 L. Ed. 2d at 149

<sup>33</sup> *Id.*, 174 L. Ed. 2d at 150.

<sup>34</sup> <http://www.concurringopinions.com/archives/2009/08/the-new-south-and-the-voting-rights-act-post-namudno.html>

<sup>35</sup> Abigail Thernstrom, *A Wise Punt? Court Demurs on Election Law*, June 24, 2009, New York Post, accessible at [http://www.nypost.com/seven/06242009/postopinion/opedcolumnists/a\\_wise\\_punt\\_174743.htm](http://www.nypost.com/seven/06242009/postopinion/opedcolumnists/a_wise_punt_174743.htm),

<sup>36</sup> *Id.*

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<sup>37</sup> Id.

<sup>38</sup> David S. Broder, *For Obama, Court Cases that Matter*, The Washington Post, Thursday, July 2, 2009, accessible at [http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103024\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103024_pf.html)

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.