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See Also

Essay

The Voting Rights Act Through the Justices' Eyes: *NAMUDNO* and Beyond

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The most surprising action from the Supreme Court's latest term may be what it did not do: strike down Section 5 of the Voting Rights Act (VRA) as unconstitutional.¹ After the oral argument in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*),² most Court observers expected the Court to issue a strongly divided opinion invalidating Congress's reauthorization of the provision that requires certain "covered jurisdictions" to seek preapproval, or preclearance, before enacting any change that affects voting.³ Instead, the Court issued an 8–1 opinion that avoided the constitutional question and decided the case on a narrower statutory ground.⁴ This Essay discusses what the Court said—and did not say—in *NAMUDNO* and explores the emerging trends in current election law jurisprudence.⁵

I proceed in three Parts. Part I discusses the Court's statutory interpretation and constitutional avoidance approach in *NAMUDNO*. In Part II, I explain how each current Justice generally views the VRA by coding each Justice's votes in prior VRA cases as either "expansive" or "restrictive"

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1. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 129 S. Ct. 2504, 2514–17 (2009) (addressing Section 5 of the Voting Rights Act).

2. 129 S. Ct. 2504 (2009).

3. 42 U.S.C. § 1973c(a) (2006); *see, e.g.*, *NAMUDNO*: The Answer to My Question Appears to Be "Yes," Posting of Rick Hasen to Election Law Blog, <http://electionlawblog.org/archives/013533.html> (Apr. 30, 2009, 08:00 EST) (claiming that the Court was likely to invalidate Section 5 of the VRA).

4. *NAMUDNO*, 129 S. Ct. at 2516–17.

5. For a more comprehensive history of the Voting Rights Act, see generally J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEXAS L. REV. 667 (2008).

toward the Act. Part III concludes by analyzing how the Court's recent approach in *NAMUDNO* and other election law cases reveals a trend toward "strategic compromise" among the Justices in this area. Based on the Justices' typical voting patterns, the decision in *NAMUDNO* was quite surprising. I explain the outcome by looking at how the Justices, over the past few years, have compromised their usual positions in election law cases in favor of a strategic and incremental approach to effectuate their long-term goals (or ward off starker and less favorable results).

This Essay thus provides some historical and analytical backbone to the debate surrounding how the Court approaches VRA cases. That is, I hope to provide context for the continued discussion of these issues in light of the Court's constitutional avoidance approach in *NAMUDNO*. My goal here is merely descriptive: what did the Court do in *NAMUDNO*, how does that comport with the Justices' typical voting patterns in VRA decisions, and what does this mean for future cases?

I. *NAMUDNO v. Holder*

NAMUDNO involved a water district in Travis County, Texas, that sought exemption from the requirements of Section 5 of the VRA.⁶ The water district is a small utility district that has an elected board of five members.⁷ The district does not register voters, but it is responsible for its own elections.⁸ Because the water district is located in Texas, it is required to "preclear," or preapprove, any changes it makes to its election processes with the Department of Justice or the D.C. District Court.⁹ Section 5 allows preclearance of a voting change only if the change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."¹⁰ Along with this oversight mechanism, Congress allowed covered jurisdictions that meet certain criteria to "bail out" of the preclearance requirement by bringing a declaratory judgment action before a three-judge panel in the D.C. District Court.¹¹ The water district sought to bail out from preclearance and also asserted, in the alternative, that Congress's 2006 reauthorization of Section 5 of the VRA was unconstitutional.¹² The district court rejected its arguments, and the water district appealed to the Supreme Court.¹³

6. *NAMUDNO*, 129 S. Ct. at 2510.

7. *Id.*

8. *Id.*

9. 42 U.S.C. § 1973c(a) (2006); *NAMUDNO*, 129 S. Ct. at 2510.

10. 42 U.S.C. § 1973c(a).

11. *Id.* § 1973b(a)(1).

12. *NAMUDNO*, 129 S. Ct. at 2510.

13. *Id.* at 2508.

The Court ruled, 8–1, that the water district could bail out of Section 5’s coverage.¹⁴ Chief Justice Roberts wrote the majority opinion, explicitly avoiding the constitutional issue by resolving the case on statutory grounds.¹⁵ Justice Thomas concurred in the judgment but dissented in part, explaining why he would rule Section 5 unconstitutional.¹⁶

To several commentators, the statutory argument seemed fairly implausible.¹⁷ Section 4(b) of the Act, the bailout provision, applies only to a “State or political subdivision.”¹⁸ Section 14(c)(2) defines “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”¹⁹ The water district is not a county or parish, and it does not conduct registration for voting.²⁰ This would suggest that the water district is ineligible for a bailout under the plain text of the Act. Moreover, the Supreme Court had previously ruled, in *City of Rome v. United States*, that ““political units of a covered jurisdiction cannot independently bring a § 4(a) bailout action.””²¹

The Court ruled to the contrary, however, thereby allowing it to avoid the constitutional issue.²² Without much supporting authority, the majority determined that Section 14(c)(2)’s definition does not apply to all instances of the term “political subdivision” in the Act.²³ The Court observed that previous cases had construed “political subdivision” broadly for purposes of whether Section 5 covers a particular jurisdiction.²⁴ The Court also suggested that Congress’s 1982 amendments to the VRA overruled the Court’s “logic” in *City of Rome*.²⁵ Thus, the Court simply decreed that “all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit.”²⁶ In sum, the Court provided a tortured statutory analysis to expand bailout eligibility to all covered political subdivisions, mostly so it could avoid the difficult political and legal questions inherent in the water district’s constitutional argument.

14. *Id.*

15. *Id.*

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

17. See Adam Liptak, *Justices Retain Oversight by U.S. on Voting*, N.Y. TIMES, June 23, 2009, at A1 (quoting Professors Ellen D. Katz and Richard L. Hasen for their view that the statutory interpretation was improbable and implausible).

18. *NAMUDNO*, 129 S. Ct. at 2513 (citing 42 U.S.C. § 1973b(a)(1)(A) (2006)).

19. *Id.* at 2514 (citing 42 U.S.C. § 1973(c)(2)).

20. *Id.*

21. *Id.* at 2515 (quoting *City of Rome v. United States*, 446 U.S. 156, 167 (1980)).

22. *Id.* at 2516.

23. *Id.* at 2515.

24. *Id.* at 2514–15 (citing *United States v. Sheffield Bd. of Comm’rs*, 435 U.S. 110 (1978), and *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32 (1978)).

25. *Id.* at 2515–16.

26. *Id.* at 2516.

The Court, however, did not simply ignore the constitutional issue. Instead, it spent several pages speculating as to why Section 5 might be unconstitutional,²⁷ highlighting how Section 5's coverage formula "raise[s] serious constitutional questions."²⁸ The Court noted that black and white voter registration and participation rates are now nearly identical in most of the country and that minority candidates hold many political offices (although it failed to mention the obvious backdrop of the recent election of the country's first African-American president).²⁹ The Court also observed that preclearance presents considerable federalism concerns, as the Act differentiates between States (regarding which ones must seek preclearance) and encroaches significantly upon state autonomy.³⁰ Finally, the Court questioned Congress's continued reliance on data that was more than thirty-five years old for Section 5's coverage formula.³¹ The Court admonished, "[T]he Act imposes current burdens and must be justified by current needs."³² After including all of this dicta about the potential constitutional pitfalls surrounding the Act, however, the Court essentially ran out of gas. It acknowledged some of the arguments in favor of upholding the law but ultimately cited the constitutional avoidance doctrine in concluding that because it could resolve the dispute under its statutory interpretation, it need not pass upon Section 5's constitutionality.³³

Justice Thomas dissented.³⁴ He concluded that the Court was required to reach the constitutional issue because it could not provide the water district the full relief it sought: actual bailout from Section 5's requirements.³⁵ Instead, the Court's statutory resolution merely made the water district *eligible* for bailout and still required the water district to convince the district court that it meets the statutory criteria.³⁶ Because the water district sought actual exemption from Section 5, therefore, Justice Thomas determined that the Court had to reach the constitutional question.³⁷ Turning to the constitutionality of Section 5, Justice Thomas concluded that "the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional."³⁸ He discussed in detail the federalism costs of the Act, the history of its passage, and the lack of evidence of current

27. *Id.* at 2511–14.

28. *Id.* at 2513.

29. *Id.* at 2511.

30. *Id.* at 2512; *see also id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part).

31. *Id.* at 2512 (majority opinion).

32. *Id.*

33. *Id.* at 2513.

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

35. *Id.* at 2517–18.

36. *Id.* at 2518.

37. *Id.*

38. *Id.* at 2519.

discrimination in voting on the basis of race.³⁹ “The burden remains with Congress to prove that the extreme circumstances warranting § 5’s enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.”⁴⁰

In sum, eight Justices agreed with a statutory interpretation that broadened the meaning of “political subdivision” for purposes of bailout, and Justice Thomas acquiesced in that decision (by concurring in the judgment). None of the Justices mentioned the obvious flaws inherent in the statutory analysis. For example, the Court failed to acknowledge that an expansive reading of “political subdivision” for purposes of Section 5’s coverage formula effectuates the broad goals of the Act, while a broad reading of “political subdivision” for bailout eligibility does just the opposite. Nor did any Justice highlight the fact that the Court’s analysis was completely unfaithful to the text of the Act or the Court’s prior precedent in *City of Rome*.

By stretching the statutory analysis, the eight Justices in the majority avoided ruling on the constitutionality of Section 5. They did, however, expound upon the Act’s possible deficiencies. Thus, all nine Justices narrowed the possible application of the Act by allowing more jurisdictions to bail out, and both the majority and Justice Thomas’s dissent provided several reasons for striking down Section 5 as unconstitutional.

This approach, however, was uncharacteristic for several of the Justices. Examining the history and voting patterns of the Justices will help to provide context for why the decision in *NAMUDNO* was so surprising.

II. Aggregating Each Justice’s Votes in VRA Cases

To understand where the Supreme Court might be heading in a future constitutional challenge to the VRA, we first need some history. The Court has averaged one or two VRA cases each term. The newest members of the Court (before Justice Sotomayor’s appointment), Chief Justice Roberts and Justice Alito, have heard only four VRA cases during their tenure, while the most senior Associate Justice, Justice Stevens, has heard forty-five cases.⁴¹ These cases provide a wealth of information on how the Justices view the VRA. Tracking each Justice’s vote also demonstrates how the trends on the Court have changed over the years.

I analyzed every Supreme Court case discussing the VRA from 1975, when Justice Stevens joined the Court, to the present.⁴² I then coded the

39. *Id.* at 2520–23.

40. *Id.* at 2526–27.

41. The Court decided one case shortly after Justice Stevens joined the Court, *Beer v. United States*, 425 U.S. 130 (1976), but Justice Stevens did not participate in that decision. Accordingly, I have excluded it from my analysis.

42. I searched for the term “Voting Rights Act” on Lexis and weeded out the cases that mentioned the Act only nominally or tangentially. I also excluded cases that involved solely

majority's holding as either "expansive" or "restrictive" toward the VRA. Did the majority's ruling conform to a broad understanding of the Act, or did it narrowly construe the Act's scope through a statutory or constitutional interpretation? Did the majority conclude that the Act covered the particular voting practice in question (an "expansive" result), or did it cabin the Act's reach (a "restrictive" outcome)? Did the Court rule in favor of the plaintiffs who brought a VRA claim ("expansive") or did it reject that claim ("restrictive")? Finally, I compiled and aggregated each Justice's votes in these cases.⁴³ At the end, I provide an analysis of new Justice Sotomayor's prior interpretation of the VRA and a prediction of how she will vote in VRA cases.

What emerges is a generalized picture of the current Justices' voting patterns in VRA cases. Given space constraints, I am unable to provide an in-depth analysis for each Justice. What I offer instead is a high-level compilation of the trends among the Justices. Of course, my evaluation of the majority's holding as "expansive" or "restrictive" toward the VRA is inherently subjective. Further, construing the Justices' votes includes some generalizations, as a Justice might have ruled in an expansive manner for some aspect of a case but in a restrictive way for another portion; in that instance, I had to make a judgment call as to the main thrust of that Justice's opinion. Similarly, two Justices might both vote in an "expansive" manner with respect to the Act even if they write separate opinions with very different reasoning.⁴⁴ Nevertheless, this analysis provides at least a rough measure of where the current Supreme Court is coming from—and where it might go in the future. An Appendix, which lists every case and each Justice's vote, appears at the end of this Essay.⁴⁵

A. Overall trends

In the forty-five VRA cases that at least one of the current Justices considered, the majority ruled in an expansive manner twenty-five times, or

constitutional challenges to a state's reapportionment; although these cases sometimes included extensive discussion of the VRA, the Court did not make express holdings about the Act. *E.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). However, I included two cases involving constitutional challenges in which the Court explicitly determined whether complying with Section 2 of the VRA provides a narrowly tailored compelling interest for a particular redistricting. *See* *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996). These decisions analyzed the interplay of the VRA with the Equal Protection Clause, and the Justices thus expressly rested their holding in part on VRA concerns.

43. Although I omitted an analysis of Justice Souter's votes in this Essay because he is no longer on the Court, I included the data of his votes in the accompanying table at the end of this Essay.

44. *See infra* note 77. Compare *NAMUDNO*, 129 S. Ct. at 2504 (majority opinion), with *id.* at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part). I consider both opinions in *NAMUDNO* as "restrictive" toward the Act, as both limited the scope of Section 5's coverage.

45. *See* Appendix, *infra* pp. 25–32.

in 55.6% of the cases. Overall, fourteen (31.1%) of the VRA decisions were unanimous, and eleven of those were expansive toward the Act. The Court decided ten (22.2%) of the cases 5–4, and only three of those entailed expansive interpretations of the Act. Notably, since 2000, only one decision, *Branch v. Smith*, had a unanimous holding—that a covered state must preclear its redistricting before it can go into effect—and the Court still split on the proper remedy (single member districts or an at-large election).⁴⁶ By contrast, four of the ten 5–4 splits occurred within the past nine years. Thus, the Court has exhibited greater acrimony more recently regarding the proper interpretation of the Act. Of course, the membership of the Court has changed over the years, which can explain this trend. Regardless, by just looking at the past few years under this light, the 8–1 vote in *NAMUDNO* seems like an anomaly: in the six VRA cases the Court decided prior to *NAMUDNO*, it split 5–4 four times, ruled 7–2 in an arcane issue relating to the effect of an Alabama Supreme Court decision that invalidated a new non-precleared practice (with the effect of reinstating a prior precleared practice),⁴⁷ and ruled 9–0 in *Branch v. Smith*, which actually elicited four different opinions regarding the proper remedy for the VRA violation.⁴⁸ Lying underneath the surface of the 8–1 decision in *NAMUDNO*, therefore, are the Justices’ prior conceptions of the VRA, which split divergently. The Justices’ recent votes in VRA cases makes the outcome in *NAMUDNO*—and the fact that eight Justices signed on to a questionable statutory interpretation—that much more surprising.

46. *Branch v. Smith*, 538 U.S. 254 (2003) (comparing the majority opinion with the other filed opinions concurring in part).

47. *Riley v. Kennedy*, 128 S. Ct. 1970 (2008).

48. *Branch*, 538 U.S. 254.

The overall percentage of each Justice’s votes that were expansive toward the VRA is itself enlightening:

Justice	Number of Cases	Percentage of “expansive” VRA votes
Majority Opinion from 1976-present	45	55.6%
Chief Justice Roberts	4	0.0%
Justice Alito	4	0.0%
Justice Thomas	22	18.2%
Justice Scalia	26	26.9%
Justice Kennedy	25	28.0%
Justice Stevens	45	73.3%
Justice Ginsburg	19	73.7%
Justice Souter (excluded from substantive analysis below because no longer on Court)	25	80.0%
Justice Breyer	17	82.4%
Justice Sotomayor	N/A	N/A

The numbers reflect that the typically “liberal” Justices tend to vote expansively toward the Act much more frequently than the typically “conservative” Justices, with Justice Kennedy among the conservatives. Moreover, there is no Justice in the “middle.” This Part explores these numbers in greater detail. Beginning with the newest Justices—who have not adopted a broad interpretation of the Act in any case—and moving to the Justices who espouse a more expansive reading, I examine each Justice’s voting history in VRA cases to develop a generalized understanding of how that Justice views the Act.

B. Chief Justice Roberts

Chief Justice Roberts assumed his position as Chief Justice in 2005. During his first four years leading the Court, he has heard four VRA cases, and he voted in a manner that restricted the Act’s scope all four times.⁴⁹ For example, in his very first VRA case, *League of United Latin American*

49. Chief Justice Roberts did not rule on any VRA cases during his tenure as a Circuit Judge on the D.C. Circuit.

Citizens v. Perry (LULAC),⁵⁰ Chief Justice Roberts wrote a lengthy dissent to state his view that the majority went astray in finding liability on a vote-dilution claim based on the lack of compactness in the proposed new district.⁵¹ This opinion narrows the scope of the VRA because it limits the ability of a plaintiff to establish a vote-dilution claim.⁵² Chief Justice Roberts summed up his view by lamenting, “It is a sordid business, this divvying us up by race.”⁵³ Given that Congress enacted the VRA specifically to remedy historical racial inequalities in voting,⁵⁴ this statement reveals Chief Justice Roberts’ skepticism toward the underlying purposes of the Act.

Chief Justice Roberts also wrote the majority opinion in *NAMUDNO*, a case that restricts the scope of the VRA because it increases the number of covered political subdivisions that can bail out of Section 5’s preclearance requirement, but is notable for its refusal to rule upon the constitutional issue.⁵⁵ Thus, *NAMUDNO* qualifies as a restrictive decision, even if it was not as restrictive as it could have been. As discussed above, the Chief’s opinion provides great ammunition for a future constitutional challenge to the Act.⁵⁶ Moreover, it is quite possible that Chief Justice Roberts sought to lay the groundwork in *NAMUDNO* for a starker decision in the future that strikes down portions of the VRA. In this way, Chief Justice Roberts can adhere to his mantra that his is a Court of slow adjudication and constitutional avoidance, even as it dismantles prior precedent through piecemeal opinions.⁵⁷ That is, it would not be surprising for Chief Justice Roberts to invalidate some of the VRA in the future and claim legitimacy for his vote by pointing to the “precedential” decision in *NAMUDNO*.

Chief Justice Roberts’ brief voting history suggests that he views the VRA with great skepticism. He likely would have invalidated Section 5 in *NAMUDNO* if he had the votes. If past is prologue, then we can expect Chief Justice Roberts to continue interpreting the Act restrictively.

C. Justice Alito

There is not much to go on with respect to Justice Alito’s views of the VRA. He has voted consistently with Chief Justice Roberts in all four VRA cases they have heard while on the Supreme Court—voting narrowly toward the Act all four times. Unlike Chief Justice Roberts, however, Justice Alito

50. 548 U.S. 399 (2006).

51. *Id.* at 497–98 (Roberts, C.J., dissenting).

52. *Id.* at 505–06.

53. *Id.* at 511.

54. See, e.g., Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 912 (2008) (describing the VRA’s broad scope of coverage).

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

56. See *supra* Part I.

57. See, e.g., Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court’s Recent Election Law Decisions*, 2009 SUP. CT. REV. 89, 102.

has yet to author a single opinion in a VRA case. Thus, beyond opining that generally Justice Alito has exhibited a restrictive view of the Act based on his votes, there is little to analyze at this point in his career as a Justice.⁵⁸

D. Justice Thomas

Not surprisingly, Justice Thomas has espoused the most stringent interpretation of the VRA, ruling expansively toward the Act in only 18.2% of the cases he has heard. In three of the four decisions in which he ruled that the Act's requirements applied, the Court was unanimous.⁵⁹ In the fourth, Justice Thomas agreed with the rest of his colleagues that the state was required to preclear the state court's redistricting plan but joined Justice O'Connor's dissent as to the proper remedy under the statute.⁶⁰ None of these cases included particularly broad language regarding the scope of the VRA. Moreover, as discussed above, Justice Thomas was the only Justice in *NAMUDNO* to explicitly determine that Section 5 is unconstitutional.⁶¹ Underlying Justice Thomas's concerns with the Act are the federalism costs that the Act—and particularly Section 5—imposes and, as is his custom, a strict adherence to the plain text of the statute.⁶²

Justice Thomas explained his view of how and why the Court has gone astray in VRA cases in his concurrence in *Holder v. Hall* (which Justice Scalia joined).⁶³ In seeking a “systematic reassessment” of the Court's jurisprudence in this area, Justice Thomas wrote a lengthy opinion calling for a strict interpretation of the statutory text.⁶⁴ He discussed in detail his view of the Court's unfaithful reading of the language and the resultant detrimental effects on race relations it has spurred.⁶⁵ He stated unequivocally that Section 2 of the VRA does not encompass claims for vote dilution—a

58. In the one VRA case Justice Alito heard as a Third Circuit Judge, he joined a 2-1 decision affirming the district court's dismissal of a Section 2 claim because the voters had failed to demonstrate that the school board's system of at-large elections for school board members diluted the voting strength of black voters. *Jenkins v. Manning*, 116 F.3d 685 (3d Cir. 1997). Under my coding of VRA cases, this would qualify as a restrictive ruling.

59. *Foreman v. Dallas County*, 521 U.S. 979 (1997) (per curiam); *Young v. Fordice*, 520 U.S. 273 (1997); *Lopez v. Monterey County*, 519 U.S. 9 (1996).

60. *Branch v. Smith*, 538 U.S. 254, 292 (2003) (O'Connor, J., concurring in part and dissenting in part) (determining that under 2 U.S.C. § 2a(c)(5), the district court should have ordered at-large elections for the entire state congressional delegation).

61. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

62. *See, e.g., Lopez v. Monterey County*, 525 U.S. 266, 293-94 (1999) (Thomas, J., dissenting) (“Section 5 is a unique requirement that exacts significant federalism costs, as we have recognized on more than one occasion. The section's interference with state sovereignty is quite drastic—covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government's approval.”) (citations omitted).

63. *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment).

64. *Id.* at 914.

65. *Id.* at 905-09.

common claim under the Act.⁶⁶ The following passage is emblematic of Justice Thomas's views:

In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the Federal Judiciary. The “inherent tension”—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the Federal Judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate understanding of the Act.⁶⁷

Thus, along with his voting history, an examination of Justice Thomas's opinions reveals that he is the Justice most ready to invalidate all or portions of the VRA. His writings demonstrate his belief that the Court's jurisprudence goes well beyond the statute's language, imposes serious federalism concerns, and contributes to racial unrest in this country.⁶⁸

E. Justice Scalia

Justice Scalia most often agrees with a narrow interpretation of the VRA. He has voted in a manner that broadly construes the Act in only 26.9% of the cases he has heard. In fact, with respect to whether their general rulings were expansive or narrow toward the VRA, Justice Scalia has differed with Justice Thomas in only one case,⁶⁹ even though they may not have joined the same opinion or espoused the exact same reasoning in every decision (such as in *NAMUDNO*). Moreover, five of the seven cases in which Justice Scalia agreed with a more expansive interpretation were unanimous decisions. Thus, when Justice Scalia stakes out a particular position in a VRA case, it will very often include a narrow construction of the Act, placing him solidly with the conservative Justices. Further, in contrast to some of the other Justices, Justice Scalia has remained generally consistent in his jurisprudence in this area.

66. *Id.* at 923.

67. *Id.* at 944. For a perspective on *Holder* by the current Chief Judge of the Fifth Circuit, see Edith H. Jones, *Justice Thomas and the Voting Rights Act*, 12 REGENT U. L. REV. 333, 333 (2000) (praising Justice Thomas for the views he expressed on the VRA in his concurrence in *Holder v. Hall*).

68. See Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 144–45 (2005) (discussing Justice Thomas's “unique perspective” in VRA cases).

69. *Lopez v. Monterey County*, 525 U.S. 266, 289 (1999) (Thomas, J., dissenting).

One nugget that emerges from Justice Scalia's opinions in VRA cases is his desire to stick to a narrow interpretation of the text itself. Justice Scalia, as is his custom,⁷⁰ adheres to his precise reading of the "ordinary meaning" of the text in the statute, regardless of the Act's purpose.⁷¹ He has refused to adopt the more liberal Justices' broader reading of the VRA to effectuate Congress's goals. Consider his dissent in *Chisom v. Roemer*.⁷² In that case, the majority ruled that Section 2 of the VRA applies to state judicial elections.⁷³ Justice Scalia began his dissent by noting, "Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute."⁷⁴ In essence, then, Justice Scalia's general plain-text jurisprudence precludes him from joining opinions that give broader meaning to the language of the VRA.⁷⁵

F. Justice Kennedy

Justice Kennedy is often considered the current "swing" Justice on the Court, generally espousing a moderate point of view.⁷⁶ But when it comes to the VRA, Justice Kennedy has consistently sided with the conservatives. He has espoused a broad interpretation of the VRA in only 28% of the cases he has heard. In fact, on the expansive/restrictive scale, Justice Kennedy has voted opposite to Justice Scalia in only *one* case,⁷⁷ *League of United Latin*

70. See, e.g., Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 397-98 (1996) (noting Justice Scalia's articulation of the tenets of textualism).

71. See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (taking a narrow view of the language of the VRA).

72. *Id.*

73. *Id.* at 404 (majority opinion).

74. *Id.* at 404 (Scalia, J., dissenting).

75. Although not directly related to an interpretation of the VRA, one of Justice Scalia's main contributions to this area of the law is his determination that constitutional partisan-gerrymandering claims are nonjusticiable because there is no discernible and manageable standard for adjudication. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Scalia, J., dissenting). As a general matter, this is similar to a narrow construction of the VRA in that it cuts off a plaintiff's case.

76. See, e.g., Edward Lazarus, *The Current Supreme Court Term, and the Pivotal Role of "Swing" Justice Anthony Kennedy*, FINDLAW, Dec. 6, 2007, <http://writ.news.findlaw.com/lazarus/20071206.html>. Indeed, after the oral argument in *NAMUDNO*, most commentators believed that the Court's decision would come down to Justice Kennedy's vote. See Hasen, *supra* note 3.

77. I do not mean to suggest that the Justices voted for the *same opinion* in every case. Instead, I am categorizing each Justice's vote as either expansive or restrictive toward the VRA as a general matter. On this score, even if they might have written separate opinions, at this higher level Justice Kennedy's votes look remarkably similar to Justice Scalia's and Justice Thomas's. For example, although Justice Thomas wrote a dissenting opinion in *NAMUDNO* and therefore differed from Justice Kennedy's vote, both the majority and the dissent restricted Section 5's reach; the majority constrained Section 5 by opening the door to additional bailout suits, while the dissent stated that Section 5 was unconstitutional in all applications. Therefore, all nine Justices voted in a manner that was restrictive toward the Act, albeit in differing ways.

American Citizens v. Perry (LULAC).⁷⁸ Similarly, Justice Kennedy has differed from Justice Thomas in only two cases—*LULAC* and *Lopez v. Monterey County*,⁷⁹ an 8–1 decision about whether a covered county in a noncovered state must preclear voting changes required under state law, in which Justice Thomas wrote the lone dissent.⁸⁰

With only one exception,⁸¹ Justice Kennedy’s written opinions have attempted to cabin the reach of the VRA whenever practicable. For example, in *Presley v. Etowah County Commission*,⁸² Justice Kennedy wrote the majority opinion in a 6–3 decision, determining that Section 5’s preclearance requirement does not reach changes in county rules that affect the allocation of power among government officials.⁸³ Similarly, just this past Term, Justice Kennedy wrote the controlling opinion in *Bartlett v. Strickland*,⁸⁴ which severely restricted the availability of a Section 2 vote-dilution suit by holding that to make out a claim, minorities themselves must constitute more than fifty percent of the voting population in the relevant area.⁸⁵ Thus, Justice Kennedy has taken the lead in narrowly interpreting the Act in several cases. It remains to be seen, of course, whether this temperament will spill over in a future case to a ruling that Section 5 is unconstitutional: one possible reason that Chief Justice Roberts wrote a constitutional avoidance

78. 548 U.S. 399 (2006). In that case, Justice Kennedy wrote the controlling opinion in a 5–4 decision that held that Texas’s mid-decade redistricting violated Section 2 of the VRA, and Justice Scalia wrote a dissent.

79. 525 U.S. 266 (1999).

80. *Id.* at 289 (Thomas, J., dissenting). Justice Kennedy wrote a short opinion concurring in the judgment. *Id.* at 288 (Kennedy, J., concurring in the judgment);

81. *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006); *see also* *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J.) (sitting as circuit judge and granting a stay of a school-bond referendum because the County Education Board had not precleared the change). As Professor Heather Gerken observes, “Until *LULAC*, Justice Kennedy had never voted to find a violation of the Voting Rights Act and had repeatedly expressed reservations about the Act’s constitutionality because it required the state to engage in race-conscious districting.” Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 109 (2007). Professor Gerken explains Justice Kennedy’s vote as less about race and the VRA and more about the inherent First Amendment rights of the Latino voters. *Id.* at 111.

82. 502 U.S. 491 (1992).

83. *Id.* at 504. Justice Kennedy stated:

Appellants and the United States fail to provide a workable standard for distinguishing between changes in rules governing voting and changes in the routine organization and functioning of government. Some standard is necessary, for in a real sense every decision taken by government implicates voting. This is but the felicitous consequence of democracy, in which power derives from the people. Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision. Rather, the Act by its terms covers any ‘voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.’ 42 U.S.C. § 1973c. A faithful effort to implement the design of the statute must begin by drawing lines between those governmental decisions that involve voting and those that do not.

Id.

84. 129 S. Ct. 1231 (2009).

85. *Id.* at 1246.

opinion in *NAMUDNO* might be that he did not have Justice Kennedy as a fifth vote to strike down the law. Perhaps, then, Justice Kennedy has reconsidered his more narrow view of the Act, especially after he became the “swing” Justice after Justice O’Connor retired. Nevertheless, the data of Justice Kennedy’s voting history in VRA cases so far demonstrates that he consistently sides with the conservative Justices, particularly Justices Scalia and Thomas.

G. Justice Stevens

Justice Stevens, the most senior Associate Justice and the Justice with the longest tenure on the Court, has agreed with an expansive ruling in 73.3% of the VRA cases he has heard. Not including *NAMUDNO*, his vote in fifteen of the last sixteen cases has been expansive toward the Act. By contrast, in the first ten cases he heard, he voted expansively in half of them and restrictively in the other half. Thus, Justice Stevens’s jurisprudence toward the VRA has evolved: upon joining the Court he was more likely to vote to narrow the Act’s reach, but his recent votes have been overwhelmingly broader.

For example, in 1978 in *United States v. Board of Commissioners of Sheffield*,⁸⁶ Justice Stevens dissented from the Court’s holding that the definition of “political subdivision” includes a municipality that does not register voters,⁸⁷ but in 1996 in *Morse v. Republican Party*,⁸⁸ he wrote the controlling opinion and ruled that Section 5 of the VRA is expansive enough to include political parties as tantamount to “political subdivisions”—even though the Act does not explicitly list political parties as falling within its scope.⁸⁹ Similarly, in *City of Rome v. United States*,⁹⁰ Justice Stevens concluded that under the statute political subdivisions could not bail out of Section 5’s coverage if the Act covered the entire state,⁹¹ but he joined the *NAMUDNO* opinion that opened bailout eligibility to all political subdivisions—albeit possibly to avoid a more damning opinion that invalidated Section 5 in its entirety.⁹² Thus, Justice Stevens’s recent jurisprudence has demonstrated a willingness to read the statute broadly to effectuate Congress’s goals.

Justice Stevens’s voting pattern stems from his commitment to ensuring that the Court gives deference to Congress’s policy choices as embodied in the Act. As Professor Pamela Karlan explained,

86. 435 U.S. 110 (1978).

87. *Id.* at 149 (Stevens, J., dissenting).

88. 517 U.S. 186 (1996).

89. *Id.*

90. 446 U.S. 156 (1980).

91. *Id.* at 190 (Stevens, J., concurring).

92. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504 (2009); *see infra* Part III.

[Justice Stevens'] effort to give effect to congressional intent often results in a far more plaintiff-friendly approach than he would have taken under the Constitution. Ultimately, Justice Stevens' approach is marked by a deference to the outcome of the political process: courts should be reluctant to overturn the results of local political processes but zealous in enforcing decisions by the "national political culture" to override those local determinations.⁹³

Because Justice Stevens believes that Congress made a valid policy choice to protect minority voters on a national scale through the VRA, he is more likely to vote in a manner that broadly comports with the Act's purposes. For example, Justice Stevens crafted a "workable rule" in his dissent in *Presley v. Etowah County Commission* that he believed comported with the broad purposes underlying the preclearance requirement, explaining that "Section 5 was understood to be a vital element of the Act, and was designed to be flexible enough to ensure that new subterfuges will be promptly discovered and enjoined."⁹⁴

In contrast to the views of some of his more conservative colleagues, then, Justice Stevens starts out with the belief that Congress's choice in this area—to protect particular groups of voters who have suffered past discrimination—is presumptively legitimate. It follows that, as his recent votes in these cases demonstrate, he is more likely to construe the Act in an expansive way to allow courts to vindicate Congress's goals.

H. Justice Ginsburg

Justice Ginsburg has voted expansively toward the VRA in 73.7% of the cases she has heard. Even when Justice Ginsburg wrote a majority opinion that rejected a VRA claim, she cabined the holding by explicitly highlighting its "narrow" and fact-based scope.⁹⁵

Justice Ginsburg has authored only three opinions on VRA claims during her tenure on the Supreme Court. Most recently, she wrote a four-sentence dissent in *Bartlett v. Strickland*, joining Justice Souter's lengthy dissent to the Court's holding that a Section 2 claim for vote dilution requires the minority to demonstrate that it constitutes at least 50% of the majority

93. Pamela S. Karlan, *Perspectives on Justice John Paul Stevens: Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L. J. 521, 522 (1996) (quoting RONALD DWORKIN, *LAW'S EMPIRE* 377 (1986)); see also *id.* at 533 ("The same deference to the political process that counseled Justice Stevens' reticence to intervene in constitutional dilution cases has militated in favor of judicial intervention when it comes to cases brought under the Voting Rights Act, which expresses congressional commitment to a specific vision of electoral fairness.").

94. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 518, 523 (1992) (Stevens, J., dissenting) (internal quotation marks and citations omitted).

95. See *Riley v. Kennedy*, 128 S. Ct. 1970, 1986–87 (2008); see also Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481, 483–506 (2009) (discussing how the Court's decision in *Riley* was either a narrow, fact-based holding or portends a more dangerous trend of the Court limiting the scope of the VRA through procedural rulings).

(thereby refusing to include crossover votes).⁹⁶ She admonished that the plurality's holding was "difficult to fathom and severely undermines the statute's estimable aim," and she called on Congress to rectify the Court's wrong.⁹⁷ A year ago she wrote the majority opinion in *Riley v. Kennedy*,⁹⁸ a Section 5 case arising from a strange confluence of facts that, as I mentioned above, she attempted to limit solely to those facts.⁹⁹ Finally, in *Holder v. Hall*,¹⁰⁰ she joined Justice Blackmun's dissent and Justice Stevens's separate opinion responding to Justice Thomas's concurrence, but also wrote separately to explain that the Court's role is to effectuate Congress's goals as best it can—even if those goals seemed in tension, such as Congress's intent to allow vote-dilution claims but also to avoid mandated proportional representation for minorities.¹⁰¹

The substance of Justice Ginsburg's written opinions thus does not provide a lot of information regarding her views on the VRA. She has authored only one full-length decision that she herself observed would not apply in most instances. At a minimum, Justice Ginsburg's voting pattern demonstrates that she generally espouses a broad interpretation of the Act.¹⁰²

I. Justice Breyer

Justice Breyer has expansively interpreted the VRA in 82.4% of the cases he has heard—the highest rate of any of the Justices. His voting history is quite similar to that of Justice's Ginsburg's; he has differed from Justice Ginsburg on the expansive/restrictive scale in only one case.¹⁰³ In that case, Justice Breyer was in the dissent, arguing that Section 5 required a Georgia city to preclear its decision to use a rule that a mayoral winner must receive a majority of the vote instead of a plurality.¹⁰⁴ Thus, in the one case in which he parted ways with Justice Ginsburg, Justice Breyer ruled more broadly toward the VRA.

96. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1260 (2009) (Ginsburg, J., dissenting).

97. *Id.*

98. 128 S. Ct. 1970.

99. *Id.* at 1986–87.

100. 512 U.S. 874 (1994).

101. *Id.* at 956 (Ginsburg, J., dissenting).

102. Justice Ginsburg has written one notable opinion regarding constitutional challenges to redistricting. In *Miller v. Johnson*, she dissented from the Court's holding that courts must analyze under strict scrutiny review any redistricting that includes race as a "predominant factor." *Miller v. Johnson*, 515 U.S. 900, 934 (1995) (Ginsburg, J., dissenting). As she explained, "That ethnicity defines some of these groups is a political reality." *Id.* at 947. "Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters." *Id.* at 948. This opinion is consistent with an expansive view of the goals and ideals underlying the Voting Rights Act. See Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 15 (2000).

103. *City of Monroe v. United States*, 522 U.S. 34 (1997) (per curiam).

104. *Id.* at 45 (Breyer, J., dissenting).

A sense of pragmatism runs through Justice Breyer's VRA opinions. For example, in *Reno v. Bossier Parish School Board*,¹⁰⁵ he wrote separately to explain that he believed the Court should explicitly determine that the "purpose" inquiry of Section 5—which asks whether the requested change in voting has as a purpose discrimination on the basis of race—extends beyond the search for retrogressive intent, because otherwise the district court would have a difficult time applying Section 5 on remand.¹⁰⁶ Using a hypothetical example of a covered jurisdiction choosing between two possible voting systems, he concluded that the "purpose" inquiry is broad.¹⁰⁷ Thus, Justice Breyer attempted to demonstrate how the Court's rulings on the VRA will operate in the real world of a local election.¹⁰⁸

Justice Breyer has used this pragmatic approach to inform his broad reading of the statute's text. For example, in *Morse v. Republican Party*, he concurred in the Court's ruling that Section 5 covers political parties, even though the statute does not explicitly name political parties as "political subdivisions" under the Act.¹⁰⁹ In his separate opinion, Justice Breyer wrote, "One historical fact makes it particularly difficult for me to accept the statutory and constitutional arguments of [the political party]. In 1965, to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a mountain. And everybody knew it."¹¹⁰

In sum, Justice Breyer has exhibited a very broad view of the VRA. His opinions demonstrate that, much like in the rest of his jurisprudence,¹¹¹ he considers how lower courts and local authorities will actually apply the VRA and espouses an expansive reading of the Act that will, in his view, effectuate Congress's underlying goals.

J. Justice Sotomayor

It is of course impossible to know how newly-appointed Justice Sotomayor will rule in a VRA case. On the Second Circuit, she participated in only one significant VRA decision, *Hayden v. Pataki*,¹¹² in which she

105. 520 U.S. 471 (1997).

106. *Id.* at 493–94 (Breyer, J., concurring in part and concurring in the judgment).

107. *Id.* at 494–95.

108. *Id.*; see also *Bartlett v. Strickland*, 129 S. Ct. 1231, 1261 (Breyer, J., dissenting) (using the same approach to demonstrate why the majority went astray in ruling that a minority must actually constitute a majority in a district to bring a successful vote-dilution claim under Section 2).

109. 517 U.S. 186, 235 (1996) (Breyer, J., concurring in the judgment).

110. *Id.*; see Paul E. McGreal, *On the Illogic of Ordinary Speech in Statutory Interpretation* 52 KAN. L. REV. 325, 381–82 (2004) (suggesting that Justice Breyer's dissent represents "strategic purposivism," the idea of reading a statute with Congress's goals in mind).

111. See, e.g., Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1274 (2003) (discussing Justice Breyer's pragmatic approach to campaign-finance law).

112. 449 F.3d 305 (2d Cir. 2006).

dissented from the en banc court's ruling that Section 2 of the VRA does not cover a state's felon-disenfranchisement law.¹¹³ She wrote,

It is plain to anyone reading the Voting Rights Act that it applies to all "voting qualifications." And it is equally plain that [New York's felon-disenfranchisement law] disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.¹¹⁴

Then-Judge Sotomayor thus grounded her analysis in the text of the Act itself but ruled in a manner that she believed comported with the Act's goals. Further, she joined Judge Parker's vigorous dissent, in which he detailed Congress's broad power to enforce the Constitution's ban on racial discrimination in voting.¹¹⁵ These actions are consistent with a generally expansive view of the Act.

Although there is little evidence either way, then, it is probably safe to assume that Justice Sotomayor will be similar to Justice Souter¹¹⁶ with respect to the VRA and will vote in a generally expansive manner toward the Act in most cases. Of course, it is possible that Justice Sotomayor will shape the Court's VRA jurisprudence in any number of ways. For example, given her seemingly strict adherence to the statutory text in *Hayden*, perhaps she will refuse to expand the interpretation of the Act's language in certain instances. Or perhaps she will fall in line with Justice Breyer and read the Act more pragmatically with an eye toward effectuating Congress's goals. My view, based purely on speculation after analyzing numerous VRA cases, is that Justice Sotomayor will be similar to Justice Ginsburg. She will not adopt as broad a reading as Justice Breyer, but she will normally espouse an expansive view of the Act. That is, although she will vote in favor of coverage in most instances, she will refuse an analysis that deviates too far from the actual text of the statute.

In sum, notwithstanding the 8–1 vote in *NAMUDNO*, the Court is generally split 5–4 with regard to how it views the VRA: Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito tend to vote narrowly or restrictively, while Justices Stevens, Ginsburg, Breyer, and (likely) Sotomayor vote expansively toward the VRA. The next Part reconciles the decision in *NAMUDNO* with this history.

113. *Id.* at 367–68 (Sotomayor, J., dissenting).

114. *Id.*; see Erika Wood, *Judge Sotomayor in Good Company on Restoring Voting Rights* BRENNAN CENTER FOR JUSTICE, June 2, 2009, http://www.brennancenter.org/blog/archives/judge_sotomayor_in_good_company_on_restoring_voting_rights/.

115. *Hayden*, 449 F.3d at 349–52 (Parker, J., dissenting).

116. As the table at the end of this Essay demonstrates, Justice Souter voted expansively toward the VRA in 80% of the cases he heard. Moreover, most of his "narrow" votes occurred during the beginning of his tenure on the Court, and two were in 9–0 decisions.

III. Strategic Compromise in Recent Election Law Cases

At its simplest level, the analysis above demonstrates what we already know: ideology matters in VRA cases.¹¹⁷ The “conservative” Justices tend to vote narrowly when interpreting the Act, and the “liberals” tend to construe the Act broadly. The one surprise might be Justice Kennedy. Although he is considered to be a “moderate” and a “swing Justice,” he has voted with the conservative Justices most of the time. Why, then, did the Court not rule 5–4 in *NAMUDNO*? Why did no other Justices join Justice Thomas’s dissent? I think we can trace this result to an emerging trend in election law: strategic compromise.

NAMUDNO represented a compromise of the utmost proportions. The four liberal Justices (Stevens, Souter, Ginsburg, and Breyer) compromised in concurring with a suspect statutory interpretation, which contracts the scope of Section 5’s coverage by opening bailout eligibility to all political subdivisions. Normally, these Justices would reject such a reading, particularly because it limits Section 5’s reach and therefore is contrary to Congress’s broad remedial goals. None of the Justices, however, highlighted the implausibility of the Court’s textual reading, which simply read the statutory definition of “political subdivision” out of the statute for almost all purposes without much textual or precedential support. Nor did any of these liberal Justices respond to Justice Thomas’s dissent or attempt to refute his constitutional interpretation.

Chief Justice Roberts and Justices Scalia, Kennedy, and Alito also compromised in several ways. First, they *broadly* read the language of the statute to allow bailout eligibility for as many covered jurisdictions as possible (by expanding the definition of “political subdivision”), which is contrary to their usual practice of reading the Act textually and narrowly. Second, they essentially abandoned the constitutional issue. A more “restrictive” vote in this case likely would have invalidated Section 5 for all of the reasons that Chief Justice Roberts provided in dicta, thereby eliminating Section 5 completely (at least until Congress acted to correct the constitutional deficiencies). Even Justice Thomas compromised. Although his vote was faithful to his generally restrictive approach toward the Act, he failed to call out the majority for its unsatisfying textual interpretation, instead concurring in the judgment.¹¹⁸

On one level, the compromise in these votes is superficial. For example, some of the conservative Justices abandoned their typical method of statutory analysis—a narrow and strictly textual reading of the statute—to achieve their policy preferences of limiting the Act’s reach. But election law

117. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 19–25 (2008) (finding that judicial ideology significantly influences judicial decision making in VRA cases).

118. See The Thomas Mini-Enigma in *NAMUDNO*, Posting of Rick Hasen to Election Law Blog, <http://electionlawblog.org/archives/013928.html> (June 24, 2009, 08:20 EST).

has seen a different kind of give-and-take in recent years: strategic compromise.

By “strategic compromise,” I mean to suggest that currently the Justices are taking a holistic view of election law and sacrificing their short-term goals in a particular case for the greater good of long-term ends.¹¹⁹ The Justices know that these issues will recur, especially given the increase in election litigation.¹²⁰ They can thus choose their battles as they see fit. Because they are currently in the majority, the conservative Justices can settle for minor victories and incremental change, knowing that they are laying the groundwork for setting future precedent. While doing so, they can extend an olive branch to the liberal Justices by not going too far and embracing alternative resolutions, thereby including them in the decision-making process. Compromise is thus not solely for consensus building.¹²¹ There is a long-term strategy involved: move the Court as a whole toward a particular direction. Through strategic compromise, the Justices retain the Court’s legitimacy while advancing the law in the manner they want.

Perhaps the Court went the statutory route in *NAMUDNO* because Chief Justice Roberts did not have a fifth vote (likely in Justice Kennedy) for striking down Section 5 as unconstitutional. But I am not sure that this tells the whole story. Instead, Chief Justice Roberts might have realized that strategically, a decision merely highlighting but not ruling upon the constitutional deficiencies would have more legitimacy and yet still move the Court in the direction he desired. The statutory alternative was not merely a “way out” of a difficult constitutional question. It was instead an opportunity to expound upon the constitutional infirmities while taking a more incremental approach, which no doubt the liberal Justices favored over outright invalidation. The conservative Justices can now rely upon the precedent in *NAMUDNO* for a ruling that further restricts the scope of the Act (or strikes down Section 5 entirely). Moreover, the Court squarely put the fate of the Act back in Congress’s hands; if Congress chooses not to correct the constitutional problems, then it has only itself to blame if the Court later invalidates Section 5.¹²²

119. See generally MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005) (describing the Rehnquist Court’s divisiveness on constitutional law issues and suggesting that the Court’s decisions reflected strategic compromise).

120. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 28–29 (2007) (finding a large increase in election litigation since 2000).

121. See Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 780 (1993) (explaining that consensus or coalition-building within the Court results in doctrinal ambiguities but may be done to produce a majority coalition in the first place).

122. See Roberts Didn’t Blink, Posting of Ellen Katz to Election Law Blog, <http://electionlawblog.org/archives/013926.html> (June 24, 2009, 08:05 EST) (characterizing the Chief Justice’s opinion as “savvy” because it effectively stayed a constitutional holding); On Statesmanship, Posting of Sam Issacharoff to Election Law Blog,

The liberal Justices also engaged in strategic compromise in *NAMUDNO*. The four liberals were faced with the possibility of having the Court strike down Section 5 in its entirety. By embracing a less drastic alternative—the statutory resolution—the liberal Justices were able to ward off a negative ruling on the constitutional question. These Justices probably wanted to engage Justice Thomas in his constitutional analysis, but if they had done so, it likely would have set off a firestorm. Chief Justice Roberts created a highly delicate coalition of Justices who concurred in his opinion for varied reasons: some because it foreshadowed the ruling they ultimately seek, and others because it cabined a harsher result they feared. Refuting Justice Thomas likely would have toppled this balance. Thus, the liberal Justices compromised their positions to ensure that the Court limited Section 5 only incrementally: they accepted a weak statutory analysis with which they likely disagreed and held off on responding to Justice Thomas so that the Court would avoid the constitutional issue. By acquiescing to Chief Justice Roberts’s dicta on the possible constitutional deficiencies, the liberal Justices guaranteed that the conservatives would not rest their holding on this basis and that Section 5 would remain in force, putting the ball back in Congress’s court with explicit guidance on what it needs to fix.

Under this analysis, Justice Thomas’s opinion in *NAMUDNO* appears to be the most faithful to his overall jurisprudence in this area. Justice Thomas did not use strategic compromise to eventually achieve his desired result in the long term; he instead would go for it all now and invalidate Section 5, much as he would prohibit vote-dilution claims under Section 2.¹²³ Justice Thomas did not compromise his core principles to either achieve his goals incrementally (like the other conservatives) or cabin a harsher result (like the liberals). Instead, he stuck true to his ideals, and, in fact, is the only Justice who has not exhibited strategic compromise in his votes in recent election law cases.

Strategic compromise has permeated several recent election law decisions. In *Crawford v. Marion County Election Board*,¹²⁴ the Court ruled, 6–3, that Indiana’s voter identification law was not invalid on its face.¹²⁵ Justice Stevens wrote the opinion for the Court. His opinion is a model of strategic compromise—in this instance, to ward off a less palatable result. Instead of voting to strike down the voter ID law and likely being in the dissent, Justice Stevens crafted an opinion that precluded facial invalidation but left open the possibility of an as-applied challenge.¹²⁶ This same as-

<http://electionlawblog.org/archives/013927.html> (June, 24, 2009, 08:11 EST) (claiming the compromise was an “act of judicial stewardship”).

123. *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment).

124. 128 S. Ct. 1610 (2008).

125. *Id.*

126. See Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009) (discussing the importance of the Court’s shift to as-applied challenges in election law); Nathaniel Persily & Jennifer Rosenberg, *Defacing Democracy?*:

applied approach also runs through the Court's decision in *Washington State Grange v. Washington State Republican Party*,¹²⁷ which rejected a constitutional challenge to the state's newly enacted blanket primary system but left open the possibility of future as-applied suits.¹²⁸

Riley v. Kennedy presents a similar lesson and demonstrates how the Justices compromise by restricting the scope of their opinions.¹²⁹ In a 7–2 decision, the Court held that a state need not preclear a “change” in an election practice when that change stemmed from the Alabama Supreme Court's invalidation of a new practice, with the result being a reversion to the older baseline practice.¹³⁰ But the Court attempted to cabin its holding as much as possible.¹³¹ The fact that Justice Ginsburg's majority opinion significantly narrowed the scope of the rule it crafted made the decision easier to swallow for those Justices who would typically vote in a more expansive manner, such as Justice Breyer. The conservative Justices compromised to obtain the rule they wanted—no preclearance required—by going along with Justice Ginsburg's limiting language. Of course, in a future case, the Court could disregard Justice Ginsburg's dicta and limit Section 5 further based on this holding.¹³²

What about *Bartlett v. Strickland*, the case in which the Court ruled that a minority group bringing a vote-dilution claim must comprise a majority in a single-member district?¹³³ That case might slightly undermine my theory of strategic compromise, because the Justices seemingly did not compromise their positions: the conservatives had five votes to restrict vote-dilution claims under Section 2 of the VRA. But Chief Justice Roberts, Justice Kennedy, and Justice Alito still did not go as far as Justice Thomas (joined by Justice Scalia), who wrote separately to reassert his view that Section 2 does not authorize *any* vote-dilution claim.¹³⁴ I would think that at least some of the other conservatives might agree, but they believe that a more effective way to achieve this result while preserving the Court's legitimacy is to cut off a plaintiff's ability to prove a vote-dilution claim instead of precluding this type of litigation entirely. In this way, Chief Justice Roberts, Justice Kennedy, and Justice Alito may have actually compromised their true

The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions, 93 MINN. L. REV. 1644 (2009) (arguing that the Court strongly prefers as-applied challenges in the area of election law).

127. 128 S. Ct. 1184 (2008).

128. *Id.*

129. *Riley v. Kennedy*, 128 S. Ct. 1970 (2008).

130. *Id.* at 1976.

131. *Id.* at 1986–87.

132. See Pitts, *supra* note 95, at 506 (suggesting that “attacking the procedural aspect of Section 5 represents a possible new strategy for the conservative majority that has controlled the Supreme Court in recent years”).

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

134. *Id.* at 1250 (Thomas, J., concurring in the judgment).

preferences in favor of a long-term strategy to eventually achieve their larger goals.

Even in a recent unanimous decision, *New York State Board of Elections v. Lopez Torres*,¹³⁵ four Justices (Stevens, Souter, Kennedy, and Breyer) felt the need to write separately to explain their positions, limiting the main opinion and giving themselves wiggle room for a future case by questioning the propriety of electing state judges.¹³⁶ Their additional observations demonstrate their eye toward strategic decision making even though they all agreed on the outcome.

I do not want to belabor the point. In sum, this brief review of recent decisions demonstrates that strategic compromise, rather than fidelity to a strict ideological principle, is the current prevailing practice in election law cases. Given the makeup of the Court, *NAMUDNO* likely should have been a 5–4 decision. My analysis of the current Justices’ voting patterns in VRA cases reinforces this premise. Strategic compromise explains the 8–1 outcome in *NAMUDNO* and the Justices’ votes in these other recent election law decisions. Of course, this concept is not unique to election law; there are certainly other areas in which the Justices strategically compromise to effectuate their long-term goals—a discussion that deserves its own comprehensive examination.¹³⁷ Similarly, whether this is an ideal or proper method of decision making warrants further inquiry. My goal in this Essay was merely descriptive: If we assume that the Justices have long-term goals or preferences in a particular area—as opposed to simply a static jurisprudence—then we see that the Justices use strategy and compromise to slowly move the Court to their position or ward off a particularly unpalatable result. More than anything, then, I think the 8–1 decision in *NAMUDNO* resulted from the strategic choices each Justice (except Justice Thomas) made in attempting to advance their long-term goals with respect to the continuing viability of Section 5 of the VRA.

IV. Conclusion

Most observers implicitly realize that the Supreme Court is split on many issues along ideological lines, and election law is no exception. The study of each current Justices’ votes in VRA cases affirms this notion, with Justice Kennedy solidly on the side of the conservatives. Whether this will lead the Court to strike down portions of the VRA remains to be seen. What

135. 552 U.S. 196 (2008).

136. *Id.* at 801 (Stevens, J., concurring); *id.* (Kennedy, J., concurring in the judgment).

137. *See, e.g.*, Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009). Professor Sunstein explains the interpretative strategy of “trimming,” whereby judges attempt to “steer between the poles,” particularly in crafting doctrines involving constitutional law. *Id.* at 1051. He identifies two types of “trimmers”: “compromisers, who follow a kind of ‘trimming heuristic’ and thus conclude that the middle course is best; and preservers, who attempt to preserve what is most essential to competing reasonable positions, which they are willing to scrutinize and evaluate.” *Id.* Strategic compromise in recent election law cases encompasses both concepts.

is more certain is that the Justices will continue to espouse a long-term view, using strategic compromise to move the Court incrementally toward their preferred position or limit what they view as a negative result. If nothing else, then, the theory of strategic compromise cogently reconciles the Justices' prior voting patterns with the Court's unexpected decision in *NAMUDNO*.

Texas Law Review See Also
Justice's Votes in Voting Rights Act Cases—Did the Justice Rule Expansively or Narrowly Toward VRA?

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<u>Case</u>	<u>Primary Holding</u>	<u>Justice Who Wrote Controlling Opinion</u>	<u>Was majority's holding expansive toward VRA?</u>	<u>Vote</u>	<u>Chief Justice Roberts</u>	<u>Justice Stevens</u>	<u>Justice Scalia</u>	<u>Justice Kennedy</u>	<u>Justice Souter</u>	<u>Justice Thomas</u>	<u>Justice Ginsburg</u>	<u>Justice Breyer</u>	<u>Justice Alito</u>
Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009)	Any political subdivision can bail out of Section 5 preclearance; Court avoided constitutional question.	Chief Justice Roberts	No	8-1	<i>No</i>	No	No	No	No	No	No	No	No
Bartlett v. Strickland, 129 S. Ct. 1231 (2009)	To satisfy the requirement for a claim of vote dilution under Section 2 that the minority be sufficiently large to constitute a majority in a single-member district, the minority is required to constitute more than 50% of the voting population in the relevant area.	Justice Kennedy	No	5-4	No	Yes	No	<i>No</i>	Yes	No	Yes	Yes	No
Riley v. Kennedy, 128 S. Ct. 1970 (2008)	State need not preclear "change" in election practice when change was Alabama Supreme Court invalidation of new practice, with result being reversion to older baseline practice.	Justice Ginsburg	No	7-2	No	Yes	No	No	Yes	No	<i>No</i>	No	No
League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006)	Mid-decade redrawing of Latino-majority districts violated Section 2.	Justice Kennedy	Yes	5-4	No	Yes	No	Yes	Yes	No	Yes	Yes	No
Georgia v. Ashcroft, 539 U.S. 461 (2003)	District court failed to consider relevant factors in denying preclearance-- Court provided guidance that lower court must consider effect of redistricting on other districts, support of legislators representing majority-minority districts, etc.	Justice O'Connor	No	5-4	--	Yes	No	No	Yes	No	Yes	Yes	--
Branch v. Smith, 538 U.S. 254 (2003)	District court properly enjoined state court redistricting plan as not precleared; this holding was unanimous, but the Court split on whether district court had to require single-member districts or at-large election for MS's house seats after redistricting that reduced number of representatives.	Justice Scalia	Yes	9-0	--	Yes	Yes	Yes	Yes	Yes	Yes	Yes	--
Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000)	Section 5 does not prohibit preclearance of a redistricting plan that was enacted with a discriminatory but nonretrogressive purpose.	Justice Scalia	No	5-4	--	Yes	<i>No</i>	No	Yes	No	Yes	Yes	--
Lopez v. Monterey County, 525 U.S. 266 (1999)	County, a covered jurisdiction, was obligated to seek preclearance before giving effect to voting changes required by state law, notwithstanding the fact that the state itself was not a covered jurisdiction.	Justice O'Connor	Yes	8-1	--	Yes	Yes	Yes	Yes	No	Yes	Yes	--

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City of Monroe v. United States, 522 U.S. 34 (1997)	City did not need to seek preclearance and was entitled to conduct elections under the auspices of a controlling state-law default rule that required a majority vote in a municipal election if the municipal charter did not provide for plurality voting and the Attorney General had previously precleared state-law default rule of majority vote. Therefore, change in practice from plurality to majority to win need not be precleared	Per Curiam	No	7-2	--	No	No	No	Yes	No	No	Yes	--
Foreman v. Dallas County, 521 U.S. 979 (1997)	(1) the fact that the county had exercised its discretion, pursuant to state statute, to adjust the procedure for appointing election judges according to party power did not mean that the methods at issue were exempt from Section 5 preclearance; (2) the preclearance of Texas's 1985 submission did not operate to preclear the county's use of partisan considerations in selecting election judges, as the submission had been insufficient to put the Department on notice that the state was seeking preclearance of the use of specific, partisan-affiliation methods for selecting such judges; and (3) remand was necessary	Per Curiam	Yes	9-0	--	Yes	Yes	Yes	Yes	Yes	Yes	Yes	--
Abrams v. Johnson, 521 U.S. 74 (1997)	Court upheld district court's redrawing of district lines, concluding that district court acted within its discretion in including only one majority-black district (instead of two as the legislature had proposed) and ruling that district court's redistricting plan did not violate Sections 2 or 5 of the VRA	Justice Kennedy	No	5-4	--	Yes	No	No	Yes	No	Yes	Yes	--
Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997)	(1) a Section 2 violation consisting of dilution of a minority group's voting strength is not a ground in and of itself for denying preclearance under Section 5, but (2) evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities in violation of Section 2 may, under some circumstances, be relevant to establish the jurisdiction's intent to cause retrogression in the position of minority voters in violation of Section 5. Court remanded for an inquiry on this second holding (and eventually heard the case again, see above).	Justice O'Connor	No	7-2	--	Yes	No	No	Yes	No	No	No	--

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Young v. Fordice, 520 U.S. 273 (1997)	Mississippi had new dual system for registration, which applied the new changes to registration for federal elections (to comply with the NVRA) and maintained the state's former procedure as the only way to register for state elections and as one method to register for federal elections. The dual system was a result of legislature's failure to pass a law that made changes for federal elections apply to state registration. Court held that Mississippi must seek preclearance of its new dual system of registration.	Justice Breyer	Yes	9-0	--	Yes	Yes	Yes	Yes	Yes	Yes	Yes	--
Lopez v. Monterey County, 519 U.S. 9 (1996)	District Court had erred in ordering the county to conduct the election under a plan that had not received preclearance under Section 5.	Justice O'Connor	Yes	9-0	--	Yes	Yes	Yes	Yes	Yes	Yes	Yes	--
Bush v. Vera, 517 U.S. 952 (1996)	Redistricting, which included oddly shaped districts to ensure two majority-minority districts, was unconstitutional. Court ruled that even if avoiding Section 2 liability is a compelling state interest, the districts were not narrowly tailored to achieve this goal. A state must have "strong basis in evidence" that gerrymandered district is needed to avoid Section 2 liability.	Justice O'Connor	No	5-4	--	Yes	No	No	Yes	No	Yes	Yes	--
Shaw v. Hunt, 517 U.S. 899 (1996)	Revised redistricting plan that included two majority-minority districts violated Equal Protection Clause; creating a second majority-minority district is not narrowly tailored to achieve the compelling state interest of avoiding Section 2 liability (Justice Souter's dissent simply referred to his dissent in <i>Bush v. Vera</i>).	Chief Justice Rehnquist	No	5-4	--	Yes	No	No	Yes	No	Yes	Yes	--
Morse v. Republican Party, 517 U.S. 186 (1996)	Political party must preclear a change to the way it selects nominees, such as a registration fee for attendance at its nominating convention.	Justice Stevens	Yes	5-4	--	Yes	No	No	Yes	No	Yes	Yes	--
Johnson v. De Grandy, 512 U.S. 997 (1994)	District court erred in finding that redistricting violated Section 2. There was no voter dilution because minority voters enjoyed substantial proportionality. Note that the two dissenters, Justice Scalia and Justice Thomas, would hold that voters cannot challenge an apportionment plan under the VRA.	Justice Souter	No	7-2	--	No	No	No	<i>No</i>	No	No	--	--

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Holder v. Hall, 512 U.S. 874 (1994)	The size of a governing body is not subject to a vote dilution challenge under Section 2, as the court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice, and there was no objective and workable standard for choosing such a benchmark. The choice of a benchmark would be inherently standardless.	Justice Kennedy	No	5-4	--	Yes	No	<i>No</i>	Yes	No	Yes	--	--
Voinovich v. Quilter, 507 U.S. 146 (1993)	District court erred in invalidating redistricting under Section 2; District Court erred in holding that Section 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation, as Section 2 contains no per se prohibitions against any particular type of district.	Justice O'Connor	No	9-0	--	No	No	No	No	No	--	--	--
Grove v. Emison, 507 U.S. 25 (1993)	<i>Gingles</i> 's three preconditions to a Section 2 claim also apply to a vote-fragmentation claim with respect to a single-member district; district court erred in finding Section 2 liability because it failed to apply <i>Gingles</i> , and there was no evidence to support liability here; district court should have deferred to state court handling of redistricting litigation.	Justice Scalia	No	9-0	--	No	<i>No</i>	No	No	No	--	--	--
Presley v. Etowah County Comm'n, 502 U.S. 491 (1992)	Section 5 preclearance not required for changes in county rules that affect allocation of power among government officials; also not required for changes that do not affect the manner of voting, candidacy requirements and qualifications, or the composition of the electorate.	Justice Kennedy	No	6-3	--	Yes	No	<i>No</i>	No	No	--	--	--
Houston Lawyers' Ass'n v. Att'y Gen., 501 U.S. 419 (1991)	VRA applies to judicial elections, especially for state trial judges who represent a district.	Justice Stevens	Yes	6-3	--	Yes	No	No	Yes	--	--	--	--
Chisom v. Roemer, 501 U.S. 380 (1991)	VRA applies to judicial elections for the Louisiana Supreme Court.	Justice Stevens	Yes	6-3	--	Yes	No	<i>No</i>	Yes	--	--	--	--
Clark v. Roemer, 500 U.S. 646 (1991)	District court erred in not enjoining election for new judgeships when the Attorney General had denied preclearance for the creation of these judgeships.	Justice Kennedy	Yes	9-0	--	Yes	Yes	Yes	Yes	--	--	--	--

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Pleasant Grove v. United States, 479 U.S. 462 (1987)	Denial of preclearance of a city's desire to annex white and uninhabited areas was correct when the city refused to annex similar black area; the fact that there were presently no black voters in the city whose votes could be diluted by the annexations did not prevent the application of Section 5.	Justice White	Yes	6-3	--	Yes	Yes	--	--	--	--	--	--
Thornburg v. Gingles, 478 U.S. 30 (1986)	Court set out <i>Gingles</i> factors for bringing a vote dilution claim under Section 2. Court unanimously agreed that there was a violation for all but one district; Court split on District 23, the proper test for vote dilution claims in multimember districts, and amount of weight to give to recent minority candidate success.	Justice Brennan	Yes	9-0	--	Yes	--	--	--	--	--	--	--
NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985)	County election commission must preclear change in filing period for election (which had stemmed from rescheduling election from November to March); these are not simply ministerial duties that are exempt, as Section 5 should be given a broad scope. (Justices Powell and Rehnquist concurred in the judgment without an opinion.)	Justice White	Yes	9-0	--	Yes	--	--	--	--	--	--	--
McCain v. Lybrand, 465 U.S. 236 (1984)	Preclearance required for a change from a 1966 statute, even though the Attorney General approved a 1971 statute, and even though the 1966 statute was provided to the Attorney General in response to his request for additional documentation and support of the 1971 submission; the lack of an objection to the 1971 submission did not moot the failure to preclear the 1966 enactment. (Justices Blackmun, Powell, and Rehnquist concurred in the judgment without opinion.)	Justice Stevens	Yes	9-0	--	Yes	--	--	--	--	--	--	--
Lockhart v. United States, 460 U.S. 125 (1983)	Change to city government--from mayor and two commissioners, all serving two-year terms through at-large elections using a numbered post system to mayor and four councilmen serving staggered two-year terms--did not violate Section 5, even though the changes did require preclearance	Justice Powell	No	6-3	--	No	--	--	--	--	--	--	--

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Port Arthur v. United States, 459 U.S. 159 (1982)	District Court correctly denied preclearance because the electoral plan did not sufficiently neutralize the adverse impact on minority voting strength stemming from increasing the borders (by consolidating two smaller cities into one larger one); it was necessary to eliminate the majority-vote requirement for the two non-mayoral at-large council seats for the plan to be approved.	Justice White	Yes	6-3	--	Yes	--	--	--	--	--	--	--
Hathorn v. Lovorn, 457 U.S. 255 (1982)	When a party to a state proceeding asserts that Section 5 renders the contemplated relief unenforceable because it would be a change that must be precleared, the state court must examine the Section 5 claim and refrain from ordering relief that would violate federal law.	Justice O'Connor	Yes	8-1	--	Yes	--	--	--	--	--	--	--
Blanding v. Du Bose, 454 U.S. 393 (1982)	Letter submitted by the county to the Attorney General advising him of the results of the referendum to support changing elections to at-large was not a preclearance submission under Section 5 of the VRA, but was a request under 28 CFR 51.21(b) for reconsideration of the Attorney General's earlier objections.	Per Curiam	Yes	9-0	--	Yes	--	--	--	--	--	--	--
McDaniel v. Sanchez, 452 U.S. 130 (1981)	Section 5 preclearance requirement applied even though a federal court had ordered the reapportionment plan to remedy a constitutional violation that had been established in pending federal litigation.	Justice Stevens	Yes	7-2	--	Yes	--	--	--	--	--	--	--
City of Rome v. United States, 446 U.S. 156 (1980)	Bailout provision does not apply to individual municipalities when the entire state is covered under the VRA; Section 5 is constitutional.	Justice Marshall	Yes	6-3	--	Yes	--	--	--	--	--	--	--
Mobile v. Bolden, 446 U.S. 55 (1980)	City's at-large election system did not violate the Fourteenth or Fifteenth Amendments (and therefore as a collateral did not violate the VRA); Stevens concurred in the judgment, stating that because the test is objective, any subjective intent to discriminate is irrelevant.		No	6-3	--	No	--	--	--	--	--	--	--
United States v. Mississippi, 444 U.S. 1050 (1980)	Court affirmed lower court's decision granting preclearance to reapportionment plan without opinion; Stevens concurred to respond to Marshall's dissent.		No	6-3	--	No	--	--	--	--	--	--	--

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Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32 (1978)	Board of Education had to preclear a new rule that required employees who ran for public office to take unpaid leaves of absence while campaigning. The Board had adopted the rule one month after the first African-American announced his candidacy for the state legislature. The Court used language to highlight the broad scope of Section 5 and extended the definition of "political subdivision" to the Board even though it did not have anything to do with elections. Stevens concurred based on prior precedent, although he thought the Court had not construed the VRA according to Congress's intent	Justice Marshall	Yes	5-4	--	Yes	--	--	--	--	--	--	--
Berry v. Doles, 438 U.S. 190 (1978)	District court properly found that Georgia's change to stagger election of Board of Commissioners had to be precleared, but district court erred in refusing affirmative relief of permitting those challenging the statute to renew their request for simultaneous election of all members of the Board at the next general election	Per Curiam	Yes	7-2	--	No	--	--	--	--	--	--	--
United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110 (1978)	Section 5 applies broadly to all entities having power over any aspect of the electoral process within covered jurisdictions; failure of the Attorney General to object to the holding of the referendum election did not constitute preclearance of the method of electing councilmen under the new government for the purposes of Section 5.	Justice Brennan	Yes	6-3	--	No	--	--	--	--	--	--	--
Briscoe v. Bell, 432 U.S. 404 (1977)	Under Section 4(b) of the VRA, judicial review of the Attorney General and Director of Census Bureau's decision that the VRA covered Texas based on its language minorities was absolutely barred; the only procedure available to Texas is a "bailout" suit under 4(a) of the Act.	Justice Marshall	Yes	9-0	--	Yes	--	--	--	--	--	--	--
Morris v. Gressette, 432 U.S. 491 (1977)	District court did not have jurisdiction to review the Attorney General's refusal to object to a voting change within 60 days under Section 5, as traditional suits attacking the constitutionality of the new law are the only available remedy after the Attorney General fails to object.	Justice Powell	No	6-3	--	No	--	--	--	--	--	--	--

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United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977)	New York's use of racial criteria in revising the reapportionment plan to obtain the Attorney General's approval under Section 5 did not violate the Fourteenth and Fifteenth Amendment rights of Hasidic Jews even though the reapportionment split up the Hasidic Jewish community.	Justice White	Yes	7-1	--	Yes	--	--	--	--	--	--	--
United States v. Bd. of Supervisors, 429 U.S. 642 (1977)	District court erred in deciding that the county redistricting plan was unconstitutional and in approving the second plan submitted to the court by the county, and instead should have determined only whether the county could be enjoined from holding elections under the original redistricting plan because such plan required preclearance under Section 5; a district court's only jurisdiction is to determine if preclearance is required, not to determine the merits.	Per Curiam	Yes	9-0	--	Yes	--	--	--	--	--	--	--
E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976)	Section 5 preclearance is not required when a district court adopts a reapportionment plan submitted to it by a local legislative body covered by the Act. Chief Justice Burger wrote separately to state that the Court need not pass upon the VRA question.	Per Curiam	No	9-0	--	No	--	--	--	--	--	--	--
Percentage of "expansive" VRA votes				55.6%	0.0%	73.3%	26.9%	28.0%	80.0%	18.2%	73.7%	82.4%	0.0%