

COMMENT

The Future of the Voting Rights Act: Lessons from the History of School (Re-)Segregation

INTRODUCTION

On September 21, 2011, U.S. District Judge John Bates upheld the constitutionality of section 5 of the Voting Rights Act (VRA) in *Shelby County v. Holder*, issuing a 151-page opinion that exhaustively analyzed and rejected challenges to the VRA's validity.¹ Oral arguments in the D.C. Circuit are scheduled for January 2012.² Advocates of voting rights have applauded Judge Bates's decision as a victory for section 5,³ which was renewed in 2006 but has been teetering on the brink of being struck down since the Supreme Court's June 2009 decision in *Northwest Austin Municipal Utility District Number One v. Holder* (NAMUDNO).⁴ But this applause may be premature.

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1. No. 10-0651 (D.D.C. Sept. 21, 2011), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/order_008.pdf.
 2. Oral Argument Scheduled for Jan. 19, 2012, *Shelby Cnty. v. Holder*, No. 11-5265 (D.C. Cir. 2011), available at http://legaltimes.typepad.com/files/shelby_brief.pdf.
 3. David H. Gans, *Victory in Shelby County v. Holder: U.S. District Judge Issues Sweeping Ruling Upholding the Voting Rights Act*, CONST. ACCOUNTABILITY CTR. (Sept. 21, 2011), <http://theusconstitution.org/blog/history/?p=3160>; Tyler Lewis, *Federal Court Upholds Constitutionality of Key Provision of the Voting Rights Act*, LEADERSHIP CONFERENCE (Sept. 23, 2011), <http://www.civilrights.org/archives/2011/09/1246-shelby-county.html>; NAACP Legal Defense Fund Commends Court Decision Upholding Constitutionality of the Heart of the Voting Rights Act, NAACP LEGAL DEF. & EDUC. FUND, INC. (Sept. 21, 2011), <http://naacpldf.org/press-release/naacp-legal-defense-fund-commends-court-decision-upholding-constitutionality-heart-vot>; Mark Posner, *Federal Judge Upholds the Constitutionality of a Core Provision of the Voting Rights Act*, ACSBLOG (Sept. 28, 2011), <http://www.acslaw.org/acsblog/federal-judge-upholds-the-constitutionality-of-a-core-provision-of-the-voting-rights-act>.
 4. 129 S. Ct. 2504 (2009).

As this Comment will argue, the survival of the VRA in its current form may turn out to be a defeat for the cause of voting rights. I arrive at this conclusion based on the lessons of school desegregation. After the Court allowed schools to “bail out” of mandatory desegregation by achieving “unitary status,” many schools reverted to degrees of segregation that rivaled the pre-*Brown v. Board of Education* era.⁵ If the Court allows a similar bailout option in the voting rights context, parallel regressions in voter protections could result.

I am not arguing that section 5 is unconstitutional. Nor am I taking a position on whether section 5, if it were not weakened by bailout, might be worth preserving. However, for all the good that section 5 might do in the jurisdictions where it still applies, its reach is underinclusive: states that are not (and never were) subject to section 5 are sites of growing voting rights concerns.⁶ Moreover, if the Court continues to sidestep the question of section 5’s validity using the canon of constitutional avoidance, we will be left with a law that is a shadow of its former self. The cause of voting rights might be better served if the Court addressed the constitutional issue head-on, even if that means possibly finding the current section 5 unconstitutional. Such an outcome could motivate Congress to present a more narrowly tailored and carefully crafted provision that would provide the needed protection *and* would stand up to constitutional scrutiny.⁷

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5. See GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* (2004), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-plessy2019s-nightmare/orfield-brown-50-2004.pdf>; Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597 (2003).
 6. In recent elections, schemes to disenfranchise voters have emerged in states not covered by section 5 of the VRA, such as Wisconsin and North Dakota. Many of these schemes have involved disenfranchising Native American voters. See, e.g., *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (granting a preliminary injunction to stop a North Dakota county from closing polling places on a reservation before Native American voters in that county would have had a fair chance to cast their ballots); Tom Hamburger, *A Targeted Prosecutor, a Pattern*, L.A. TIMES, May 31, 2007, <http://articles.latimes.com/2007/may/31/nation/na-usatty31> (describing state efforts to discourage Native Americans from voting).
 7. Granted, there is no guarantee that new legislation would be better than section 5 in its current form, but I do not see the loss of section 5 as the worst possible outcome. Given Congress’s recent reauthorization of the VRA, there is evidence that Congress still supports these protections. Therefore, judicial decisions that protect an impoverished VRA might be worse than the possibility of a legislatively reinvigorated statute that would better withstand future scrutiny.

I. SAVING SECTION 5?

Congress passed the Voting Rights Act in 1965 to protect the promises of the Fifteenth Amendment against the reality of widespread disenfranchisement.⁸ Section 5, widely considered the key piece of the VRA, requires that certain localities “preclear” changes in voting through an administrative decision of the Department of Justice (DOJ) or a declaratory judgment from the federal district court for the District of Columbia.⁹ These preclearances must establish that the change will not “deny” or “abridg[e] the right to vote on account of race or color.”¹⁰ Portions of the Act were scheduled to expire in 2007, but in 2006, following weeks of legislative hearings, Congress determined that the VRA’s protective measures were still essential to fair voting and reauthorized section 5.¹¹

In spite of Congress’s extensive hearings, in *NAMUDNO*, the Supreme Court suggested that several of its members had “serious misgivings” about the constitutionality of section 5,¹² particularly in light of the “congruence and proportionality” test established in the 1997 case *City of Boerne v. Flores*.¹³ The

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8. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. §§ 1973-1973p (2006)).
 9. 42 U.S.C. § 1973c.
 10. *Id.* §§ 1973b-1973c(a); see also *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Sept. 18, 2011).
 11. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 580-81 (codified at 42 U.S.C. § 1973c(c)). From its inception, section 5 has covered states and subdivisions in which less than 50% of the voting-age population was registered to vote in 1964 or voted in that year’s presidential election. *Id.* § 1973b(b). Section 5 also covers certain counties and towns that have been found in violation of the VRA’s general prohibition on practices and procedures that “result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” *Id.* §§ 1973(a), 1973c(a). States covered by section 5 include Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, although several localities in Georgia, Texas, and Virginia have “bailed out” of section 5. *Section 5 Covered Jurisdictions*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Sept. 21, 2011) [hereinafter *Section 5 Covered Jurisdictions*]; see also *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Sept. 21, 2011) [hereinafter *Section 4 of the Voting Rights Act*] (listing bailed-out jurisdictions).
 12. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2511, 2513 (2009) (“The Act’s preclearance requirements and its coverage formula raise serious constitutional questions . . .”).
 13. *Id.* at 2512-13, 2525; see *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Boerne* held that any statutes enacted under Congress’s Fourteenth Amendment enforcement power must be

Court ultimately avoided the constitutional question by providing the utility district relief under the VRA's section 4 bailout provision, thus releasing NAMUDNO from the section 5 requirement.¹⁴ But this respite for section 5 could be short-lived—Justice Thomas made it clear that he, for one, believes the law is unconstitutional.¹⁵ And in an earlier section 5 case where Justice Thomas raised similar “constitutional concerns,” Justice Kennedy indicated that those concerns could merit consideration.¹⁶

An abundance of commentary about how to save section 5, why to save section 5, and whether we can save section 5 followed the decision.¹⁷ Many

“congruent” and “proportional” to the perceived constitutional violations they aim to correct. *Id.* at 520. Because the VRA protects Fifteenth Amendment voting rights while *Boerne* addressed Congress's Fourteenth Amendment authority, some judges have suggested that the test from *Boerne* should not apply to the VRA. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241 (D.D.C. 2008), *rev'd and remanded sub nom. NAMUDNO*, 129 S. Ct. 2504; Rick Hasen, *Initial Thoughts on NAMUDNO: Chief Justice Roberts Blinked*, ELECTION LAW BLOG (June 22, 2009, 8:00 AM), <http://electionlawblog.org/archives/013903.html> (“[T]he question of the standard to apply to judge Section 5's constitutionality [i]s unsettled: it might be the strict ‘congruence and proportionality’ standard, or it might be something much weaker, akin to rational basis.”). But the Supreme Court has left unresolved the question of whether *Boerne* could be the appropriate test for the VRA. See *NAMUDNO*, 129 S. Ct. at 2513. If the *Boerne* test is applied, any increases in protections must not exceed the need created by the constitutional violation they prevent. Because the VRA was initially enacted in 1965 and has been continually reauthorized since, it is difficult to measure the continued need for the Act to prevent the constitutional harms of voter inhibition and intimidation.

14. *NAMUDNO*, 129 S. Ct. at 2508. Section 4 of the VRA allows jurisdictions to “bail out” and release themselves from the section 5 preclearance requirement, based on an objective measure set in the 1982 amendments to the VRA. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified in scattered sections of 42 U.S.C. §§ 1973 to 1973aa). Jurisdictions must present requests for bailout to a three-judge panel in the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a) (2006). Before *NAMUDNO*, bailout was relatively rare. Less than sixty political subdivisions bailed out in the thirty-four years between the enactment of the Voting Rights Act and *NAMUDNO*, but nine localities, including at least two utility districts, have bailed out in the three years since the *NAMUDNO* decision. See *Section 4 of the Voting Rights Act*, *supra* note 11. The success of the utility district in *NAMUDNO* suggests that all jurisdictions required to make section 5 submissions could request bailout if they could show that they had a satisfactory VRA track record for the past ten years. For further discussion of the requirements for bailout, see *id.*
15. *NAMUDNO*, 129 S. Ct. at 2517 (Thomas, J., concurring in part and dissenting in part).
16. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 288 (1999) (Kennedy, J., concurring).
17. See, e.g., Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010); Heather K. Gerken, *An Uncertain Fate for Voting Rights*, AM. PROSPECT, June 23, 2009, <http://www.prospect.org/article/uncertain-fate-voting-rights>; Bruce Ackerman, *Section Five and the On-Going Canonization of the Civil Rights Revolution*, BALKINIZATION (June 22, 2009, 4:09 PM), <http://balkin.blogspot.com/>

scholars argued that *NAMUDNO* was the Court's way of warning Congress to reform section 5 or risk losing it altogether.¹⁸ However, in the months following the *NAMUDNO* decision, Congress failed to act, and before a year had elapsed two new cases—*Shelby County v. Holder* and *LaRoque v. Holder*—arose in which plaintiffs challenged the constitutionality of section 5.¹⁹

While numerous scholars have recommended expanding bailout in an effort to preserve section 5,²⁰ this Comment counsels against those proposals, arguing that the greater danger to voting rights is for section 5 to continue to exist in a toothless form. Indeed, if the expansion of bailout allows the VRA to survive, then the persistence of the Act in diluted form could actually undermine voter protection more than outright invalidation of the VRA. The Court's current approach to section 5—expanding bailout while circumventing

2009/06/section-five-and-on-going-canonization.html; Bruce Cain & Dan Tokaji, *Promoting Equal Participation: A Voting Rights Act for the 21st Century*, ELECTION LAW BLOG (June 23, 2009, 12:04 PM), <http://electionlawblog.org/archives/013914.html>; Hasen, *supra* note 13; Pamela S. Karlan, *Validating Congress's Approach*, N.Y. TIMES: ROOM FOR DEBATE (June 22, 2009, 7:30 PM), <http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/#pamela>; Nate Persily, *Perpetual Constitutional Avoidance?*, ELECTION LAW BLOG (June 24, 2009, 8:39 PM), <http://electionlawblog.org/archives/013941.html>; Rick Pildes, *Going Forward*, ELECTION LAW BLOG (June 24, 2009, 10:11 AM), <http://electionlawblog.org/archives/013929.html>; Mark A. Posner, *Analysis: Northwest Austin Municipal Utility District Number One v. Holder*, ACSBLOG (June 23, 2009, 3:39 PM), <http://www.acslaw.org/acsblog/node/13620>.

18. See, e.g., Heather Gerken, *Can Congress Take a Hint?*, ELECTION LAW BLOG (June 23, 2009, 8:15 AM), <http://electionlawblog.org/archives/013911.html>.
19. *Shelby Cnty. v. Holder*, No. 10-0651 (D.D.C. Sept. 21), *appeal docketed*, No. 10-0651 (D.D.C. Sept. 23, 2011); *LaRoque v. Holder*, 755 F. Supp. 2d 156 (D.D.C. 2010), *rev'd*, 650 F.3d 777 (D.C. Cir. 2011).
20. For example, Michael McDonald argues that the government should encourage more localities to bail out to reserve resources for localities still struggling with voter discrimination. Michael P. McDonald, *A Proactive Bailout for the Voting Rights Act*, AM. PROSPECT: TAPPED (June 23, 2009, 3:09 PM), <http://prospect.org/article/proactive-bailout-voting-rights-act>. Stephen Ansolabehere and Nathaniel Persily make a similar suggestion but also highlight the need for more data to determine the extent of voter discrimination. Stephen Ansolabehere & Nathaniel Persily, *Deciding Not To Decide—For Now*, AM. PROSPECT: TAPPED (June 23, 2009, 2:35 PM), http://www.prospect.org/csnc/blogs/tapped_archive?month=06&year=2009&base_name=deciding_not_to_decide_for_now.

Prior to *NAMUDNO*, Rick Hasen called for a “proactive bailout” measure under which the Attorney General would be required to “promptly notify complying jurisdictions of their status and their ability to apply to the district court for bailout.” Rick Hasen, *Drafting a Proactive Bailout Measure for VRA Reauthorization*, ELECTION LAW BLOG (May 18, 2006, 9:37 AM), <http://electionlawblog.org/archives/005655.html>; see also Rick Hasen, *Could Congress Moot NAMUDNO by Passing the Proactive Bailout Amendment Now?*, ELECTION LAW BLOG (Apr. 30, 2009, 2:45 PM), <http://electionlawblog.org/?p=12564> (summarizing the fate of proposals for proactive bailout measures).

the constitutional question—is as grave a threat to the cause of voting rights as outright invalidation.

A. Bailout

To avoid the constitutional question in *NAMUDNO*, the Court declared the utility district eligible for bailout.²¹ Political subdivisions that bail out of the VRA are relieved of the VRA's requirements to preclear any changes in voting practices or procedures with the Department of Justice.²² To be eligible for bailout, a jurisdiction must demonstrate a ten-year track record of compliance with certain voting rights standards.²³ Furthermore, to be allowed to bail out, jurisdictions must show that they have taken affirmative steps to widen ballot access and include minority officials in election administration.²⁴ In order to prove this, the state or subdivision should provide evidence that minority participation has increased and that disparities in participation between minority and white voters have declined.²⁵

Before *NAMUDNO*, fewer than sixty political subdivisions had bailed out of section 5 coverage, many of them in Virginia.²⁶ Although the Court surprisingly held in *NAMUDNO* that “all political subdivisions”—even those as small as the Northwest Austin Municipal District—could request bailout,²⁷ very few people had interpreted section 4's definition of a “political subdivision”

21. See *NAMUDNO*, 129 S. Ct. 2504, 2516 (2009).

22. *Id.* at 2509.

23. 42 U.S.C. § 1973b(a)(1)(A)-(a)(1)(E) (2006). To be eligible for bailout, a jurisdiction must show that, for at least ten years, (a) no test or device has been used to determine voter eligibility; (b) no court has issued a final judgment, other than a denial of bailout, which found that the state or subdivision had engaged in “denials or abridgements of the right to vote on account of race or color”; (c) no federal examiners were assigned; (d) all voting changes were submitted for approval in a timely manner; and (e) the DOJ made no objections to changes proposed by the district, and no changes were blocked by the D.C. District Court. *Id.*

24. *Id.* § 1973b(a)(1)(F). A district must show that (i) the district is not engaging in practices that hinder or dilute voting; (ii) the district has engaged in constructive measures to eliminate voter harassment and intimidation; and (iii) the district has expanded measures that make it more convenient to vote and register to vote, and has appointed minority election officials for all stages of the voting and election process. *Id.*

25. *Id.* § 1973b(a)(2).

26. Section 4 of the Voting Rights Act, *supra* note 11.

27. *NAMUDNO*, 129 S. Ct. at 2516.

to include anything smaller than a town or county.²⁸ While it is probably too soon to tell how many smaller political subdivisions will seek bailout in the wake of *NAMUDNO*, the Court's positive response to the bailout option in that case has already encouraged nine political subdivisions that may not have previously been exploring the bailout option to bail out successfully.²⁹ While few jurisdictions have sought bailout, either because they believe it is too expensive, they believe it is too difficult, or they actually prefer to have the regulation,³⁰ future political subdivisions could easily be encouraged by the success of *NAMUDNO*.

Several scholars have argued in favor of expanding the Court's decision in *NAMUDNO* to create a more robust bailout option as a means of preserving the protections of section 5.³¹ The Court in *NAMUDNO* suggested that, as long as it *can* use bailout as a means of avoiding the question of section 5's constitutionality, it will.³² Thus, scholars recommend that localities make the most of that suggestion.³³ To many, bailout seems like the perfect way for the Court to avoid unfairly regulating localities (no matter how small and apolitical), as long as those localities have had a spotless ten-year record of abiding by the VRA. However, while bailout could help preserve section 5, it offers little hope for long-term civil rights victories—at least not if we learned anything from the school desegregation cases.

B. Lessons from Desegregation

This Comment seeks to show that bailout, while initially appealing as a means of life support for section 5, could actually endanger voter protections. When courts, in an analogous measure, allowed schools to “bail out” of

28. In fact, *NAMUDNO* was the first case in which a district smaller than a town or county attempted bail-out, and the district court determined that the utility district was not eligible for bailout because it was not a “political subdivision” according to section 5. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 233 (D.D.C. 2008), *rev'd and remanded sub nom. NAMUDNO*, 129 S. Ct. 2504.

29. *Section 4 of the Voting Rights Act*, *supra* note 11. These nine subdivisions include four cities, three counties, and two subdivisions that look more like *NAMUDNO*: a “Drainage District” in Jefferson County, Texas, and an “Irrigation District” in California.

30. For a discussion of various reasons political subdivisions might not bail out, see comments made by Justice Scalia, Neal Katyal, and Justice Kennedy in the oral arguments for *NAMUDNO*. Transcript of Oral Argument at 37-38, 45, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322).

31. *See supra* note 20.

32. *NAMUDNO*, 129 S. Ct. at 2513.

33. *See supra* note 20.

desegregation mandates through unitary status, they hurt the progress made by previous desegregation decisions. The same fate could result from bailout in the voting rights context. One key difference separates school desegregation and voting rights, however: the existence of section 5.³⁴ No similar legislation existed to guarantee the promises of *Brown*. Even Title IV of the Civil Rights Act of 1964,³⁵ which was enacted as a legislative mandate for school desegregation, was initially questioned with regard to whether it could require the busing of students to correct de facto segregation.³⁶ It was not until two years later, after the Department of Health, Education, and Welfare stated that all Southern school districts must use busing to reach mathematical desegregation, that federal courts began placing schools that refused to desegregate under indefinite court-ordered injunctions requiring the schools to do so.³⁷ The lack of legislation in the school desegregation context only strengthens the analogy between schools and voting. As long as *Brown* remained good law,³⁸ Congress had no impetus to use its Fourteenth Amendment enforcement powers to pass legislation. Similarly, as long as the VRA is upheld, Congress will remain unmotivated to address the Act's shortfalls.

As early as 1968, the Supreme Court allowed for the lifting of desegregation decrees if a district could show that it had established a "unitary, nonracial system," which included the desegregation of students, faculty, staff, facilities, transportation, and extracurricular activities.³⁹ From 1991 onwards, it became much easier for school districts to achieve and maintain unitary status (the educational equivalent of bailout) because the Court in *Board of Education v. Dowell*⁴⁰ held that "federal supervision of local school systems was intended as a temporary measure."⁴¹ This decision led to other prominent unitary status

34. This is, of course, not the only difference between school desegregation and voter protection. The analogy between the two is not perfect, but both voting and education are affected by the way we choose to live in communities, and corrective legal measures for discrimination in both areas prevent us from measuring the effects of such discrimination.

35. 42 U.S.C. § 2000c (2006).

36. DAVID FRUM, *HOW WE GOT HERE: THE 70'S*, at 251-52 (2000).

37. *Id.* at 251-53.

38. Of course, it still remains good law, even though some scholars believe it has been overturned de facto. See, e.g., GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1997).

39. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 435-40 (1968) (quoting *Bowman v. Cnty. Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (internal quotation marks omitted)).

40. 498 U.S. 237 (1991).

41. *Id.* at 247.

cases, as well as many school bailouts that never reached the Supreme Court; in subsequent decisions, the Court made the path to unitary status clearer and easier to achieve, resulting in an increasing number of school boards having desegregation decrees lifted.⁴² Further, unitary status meant that even actions that reestablished racial segregation⁴³ or economic inequality⁴⁴ in these schools were no longer open to court review. Most recently, the Court declared that even voluntary corrections of de facto segregation are unconstitutional.⁴⁵

The education cases of the 1990s initiated a trend of resegregation in U.S. schools, particularly in the South.⁴⁶ While 43.5% of black students in the South attended majority-white schools in 1988, that number had dropped to 31% by 2000, and across the United States the percentage of black students attending all-minority schools grew from 32% in 1988 to 37.4% in 2000.⁴⁷ These numbers were especially striking in districts that had been the subject of Supreme Court desegregation decisions.⁴⁸ Social factors may have played a role in resegregation as well. Nonetheless, the Court had the power and the opportunity to counteract those forces, but instead it allowed schools to become more racially segregated and economically unequal than they had been since desegregation began.

Should the Court continue to encourage bailout, section 5 litigation could begin to look much like the “unitary status” litigation of the second wave of school desegregation cases. The stream of scholarship that followed the cases granting unitary status to individual school districts was just as unsure about the future of desegregation as the scholarship following *NAMUDNO* is about section 5.⁴⁹ This uncertainty was not because the Court had been particularly

42. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992). For an extended discussion of unitary status and the lifting of desegregation orders, see James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 262-65 (1999).

43. *Freeman*, 503 U.S. at 476-77; *Dowell*, 498 U.S. at 249-50.

44. *Jenkins*, 515 U.S. at 73, 99-100.

45. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

46. ORFIELD & LEE, *supra* note 5, at 2.

47. See ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?, at 31 fig.6, 37 tbl.10, 38 fig.10 (2003), available at <http://pages.pomona.edu/~viso4747/h21/readings/AreWeLosingtheDream.pdf>.

48. *Id.* at 37.

49. Compare Erica Frankenberg, Leah C. Aden & Charles E. Daye, *The Future Is Now: Legal and Policy Options for Racially Integrated Education*, 88 *N.C. L. REV.* 713, 714 n.3 (2010) (discussing the “rapid resegregation of schools throughout the United States, particularly in the South,” in the past two decades), and Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 *EMORY L.J.* 759, 759 (1993) (noting the

unclear, but because each case was proceeding individually as a fact-based unitary status decision, much like the bailout provision functions in the context of section 5. While a case-by-case bailout seems more judicious than the total eradication of section 5, there are hidden dangers in this approach that the Court should address. Increased use of the bailout option as a means of protecting section 5 from being found unconstitutional could lead to a weak, toothless form of section 5 that does little to protect voters' rights.

II. MOVING FORWARD

Two cases currently winding through the federal courts address the constitutionality of the VRA. A petition for certiorari in *Shelby County v. Holder* or another VRA case could come before the Supreme Court in the near future. If the Court allows section 5 to stand, either by explicitly upholding it or by refusing to grant certiorari after a lower court upholds it,⁵⁰ the Court runs the risk of reinforcing bailout and further weakening the VRA. But if the Court strikes down the VRA as unconstitutional, it could spur Congress to create stronger legislation.

A. Shelby County

In his opinion in *Shelby County* this past September, Judge Bates did not hesitate to determine which constitutional test he thought should apply to section 5.⁵¹ In *NAMUDNO*, Judge Tatel argued that the more lenient rationality test—which allows Congress to “use any rational means” to prevent racial discrimination in voting—should apply,⁵² and the Supreme Court avoided addressing whether the rationality test or the “congruence and proportionality”

“troublesome problems” in “districts that have decided to dismantle their desegregation plans”), with sources cited *supra* notes 17-20.

50. Because VRA cases are only heard in the D.C. District and Circuit Courts, there is no possibility of a circuit split. 42 U.S.C. § 1973b (2006). Therefore, the Supreme Court could continue to avoid the issue of section 5's constitutionality by simply refusing to grant certiorari.
51. *Shelby Cnty. v. Holder*, No. 10-0651, slip op. at 3-4 (D.D.C. Sept. 21, 2011), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/order_008.pdf, appeal docketed, No. 10-0651 (D.D.C. Sept. 23, 2011).
52. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 226 (D.D.C. 2008) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)).

test was appropriate.⁵³ But Judge Bates applied the more stringent “congruence and proportionality” test from *Boerne* and still found that section 5 passed it.⁵⁴

The plaintiffs in *Shelby County* did not seek bailout,⁵⁵ but this did not prevent the option from coming up in Judge Bates’s opinion. Unlike in the *NAMUDNO* decision, where the Supreme Court used bailout to avoid the constitutional issue,⁵⁶ Judge Bates was forced to decide the constitutional issue and used bailout to buttress his argument that section 5 was congruent and proportional.⁵⁷ His argument might encourage the Circuit Court to uphold the VRA under this test. Furthermore, because VRA cases are confined to the D.C. District and Circuit Courts,⁵⁸ Judge Bates’s dicta, which argued that getting bailout might be easier than *Shelby County*’s lawyers suggested,⁵⁹ could affect the interpretation of the requirements for bailout in all VRA cases going forward.

B. New Legislation

Many scholars welcome the bailout option.⁶⁰ Others have recommended that Congress not rely on the Court’s protection of section 5 through bailout, but should proactively replace section 5 with new legislation. These recommendations range from shifting the focus to participation,⁶¹ to

53. *NAMUDNO*, 129 S. Ct. 2504, 2513 (2009).

54. *Shelby Cnty.*, No. 10-0651, slip op. at 150.

55. Complaint, *Shelby Cnty. v. Holder*, No. 110-cv-00651 (D.D.C. Apr. 27, 2010), 2010 WL 1813891. *Shelby County*’s motion sought a declaratory judgment that sections 4(b) and 5 of the VRA are unconstitutional, but it did *not* seek bailout relief as an alternative because it admitted that the county did not have the spotless ten-year record needed to qualify for bailout relief. *See id.* at 13-14.

56. *NAMUDNO*, 129 S. Ct. at 2513.

57. *Shelby Cnty.*, No. 10-0651, slip op. at 136-41.

58. 42 U.S.C. § 1973b (2006).

59. *Shelby Cnty.*, No. 10-0651, slip op. at 136-41.

60. *See supra* note 20.

61. For example, Bruce Cain and Dan Tokaji argue that Congress should pass a law “that broadly targets barriers to participation among racial minorities, economically disadvantaged, and other vulnerable groups” and focuses on decreases in participation instead of targeting the localities specified by section 5. Cain & Tokaji, *supra* note 17; *see also* Bruce Cain & Daniel Tokaji, *Stopping the New Vote Denial*, AM. PROSPECT: TAPPED (June 23, 2009, 12:16 PM), <http://www.prospect.org/article/stopping-new-vote-denial> (pointing to “serious cracks in the foundation of voting-rights law that need to be addressed”).

instituting a “right to vote” model,⁶² to replacing the bailout system with “opt-in” coverage.⁶³ While these legislative proposals have their merits, the pressing nature of the currently pending cases suggests that it might be too late to preempt a Court decision with legislation. Further, Congress’s hesitation to take action—even in the face of a difficult redistricting term—indicates that Congress may be unwilling to pass new, broad-sweeping legislation to reform voting rights. Perhaps if the Court, instead of bolstering bailout and avoiding the issue of section 5’s constitutionality, strikes down the law as unconstitutional, it could spur Congress to create a reinvigorated law that would address voter discrimination problems in a targeted way and withstand future scrutiny.

This is a pressing question not just because it could appear before the Court soon, but also because rewriting the VRA *now* would better protect minority voting rights than would rewriting the VRA once it has been weakened by bailout. If Judge Bates’s decision is upheld, and his dicta regarding the bailout threshold is applied in future bailout decisions, the composition of Congress and state legislatures could change significantly over the next two decades. If a weakened version of the VRA survives to its next renewal date,⁶⁴ the legislators involved in the decision could look very different from the current legislature. The resulting legislation would quite likely be less protective of minority voting rights than one that was written by a legislature elected before the effects of a watered-down VRA were fully felt. Therefore, a Court decision striking down section 5 could be a blessing in disguise for the VRA.

CONCLUSION

Shelby County could appear in the Supreme Court’s certiorari pool soon. The plaintiffs filed notice of appeal to the D.C. Circuit Court in September

62. Rick Pildes argues that Congress should create new measures that adopt a “right to vote” model by protecting more than just race-based discrimination and therefore avoid the problem of singling out particular parts of the country. Pildes, *supra* note 17.

63. Heather Gerken has recommended that Congress replace section 5 with an “opt-in” system where opposition to changes from civil rights groups or other individuals would trigger the preclearance requirement. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006).

64. The 2006 reauthorization pushed section 5’s expiration date back another twenty-five years to 2031. VRA Reauthorization Act of 2006, 42 U.S.C. § 1973b(a)(8) (2006).

2011,⁶⁵ and the Supreme Court hearing for *NAMUDNO* occurred fewer than eight months after the district court panel issued its decision.⁶⁶ What this means for section 5 is clear: if the Supreme Court grants certiorari in *Shelby County*, it signals its willingness to address the constitutionality of section 5 without help from bailouts or changes to the legislation. While I maintain that the best outcome is a new, more robust section 5, most supporters of continuing voting rights regulation would probably argue that the best outcome would be for the Supreme Court to confirm the constitutionality of section 5 in *Shelby County* or in a similar case. Even so, this result seems remote, so that leaves us to consider second-best options. In *Shelby County*, the Court can either follow Judge Bates and uphold the constitutionality of section 5—most likely by leaning heavily on the existence of bailout as Judge Bates did—or it can strike down section 5 as unconstitutional. Because of Congress’s failure to act, a decision rendering section 5 unconstitutional would leave the country in a quagmire of unregulated and unmanageable voting practices. As frightening as this sounds, this Comment suggests that such uncertainty is hardly the *worst* possible outcome of the *Shelby County* case.

NAMUDNO has already led to increased bailout requests.⁶⁷ If the Court grants certiorari in *Shelby County* and finds section 5 constitutional, that increase could grow to a flood. Even if the Court upholds section 5, robust bailout options—like those recommended by McDonald, Ansolabehere, and Persily—risk undercutting section 5.⁶⁸ This would leave section 5 all but obliterated, like *Brown* in the wake of the unitary school decisions. If the Court upholds section 5, it must create a more manageable standard for dealing with bailout requests. Unlike the *Green* standard in school desegregation cases, this standard must not become watered down to the point of impotency.⁶⁹ However, legislative fixes, even those that would provide measures to counteract bailout, would probably not pass unless the Court strikes down section 5 in its current form as unconstitutional. The two and a half years since *NAMUDNO* with no hint of action from Congress are proof.

If the Court in *Shelby County* finds section 5 unconstitutional, it would force Congress to start from scratch. Only then might the legislative fixes various

65. Notice of Appeal, *Shelby Cnty. v. Holder*, No. 10-0651 (D.D.C. Sept. 23, 2011), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Noticeofappeal.pdf>.

66. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (decision issued Sept. 4, 2008); *NAMUDNO*, 129 S. Ct. 2504 (2009) (argued Apr. 29, 2009).

67. See *supra* note 29 and accompanying text.

68. See *supra* note 20.

69. See discussion *supra* Section I.B.

scholars have proposed become viable and exciting possibilities for the “new section 5” that would result. Creating new civil rights legislation in an atmosphere controlled by the Court’s recent rejection of such a longstanding and highly revered civil rights statute would be difficult. Unless the Court strikes down the current version of section 5 as unconstitutional, however, these new legislative fixes may never have a chance.

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