November 4, 2008

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE V. MUKASEY: THE SUPREME COURT'S OPPORTUNITY TO EXAMINE AND CLARIFY THE LAW SURROUNDING SECTION 5 OF THE VOTING RIGHTS ACT

Matthew C. Dahl, University of Richmond

Available at: https://works.bepress.com/matthew_dahl/2/
Northwest Austin Municipal Utility District Number One v. Mukasey: The Supreme Court’s Opportunity to Examine and Clarify the Law Surrounding § 5 of the Voting Rights Act

By: Matt Dahl

I. Introduction

In July of 2006 Congress voted to renew § 5 of the Voting Rights Act (“VRA”) until the year 2031.¹ This part of the VRA applies to certain voting districts throughout the country, and requires that they submit any change in their voting laws to the Department of Justice for “pre-clearance” before that law can be passed.² This law has been renewed by Congress repeatedly since its passage in 1965, but in September 2008 a Texas voting district filed a writ of certiorari with the Supreme Court concerning §§ 4(a) and 5 of the Voting Rights Act.³ If this case is granted review by the Court it would be the most significant voting rights case in decades.⁴

The filing by Northwest Austin Municipal Utility District One (“NAMUD1”) challenges the VRA in two ways. First, it challenges § 4(a), or what is more commonly known as the VRA’s “bailout” provision. This provision allows for a district to apply for removal from the restrictions of § 5 if it complies with voting regulations for ten years.⁶

² Id.
³ http://www.scotusblog.com/wp/?s=election+pre-clearance
⁴ http://www.law.com/jsp/article.jsp?id=1202424741254
⁶ Petition for Writ of Certiorari, Northwest Austin Municipal District Number One v. Mukasey, (No. 08-322) (hereinafter “Writ”).
NAMUD1’s appeal challenges a decision by the D.C. District Court in which the court said that NAMUD1 cannot make use of the bailout provision because it is not a “political subdivision” contemplated by the statute.\(^7\) NAMUD1 argues that the court’s interpretation of “political subdivision” is erroneous, and that § 4(a) must be available for all covered districts because it is the only part of the VRA that makes § 5 constitutional.\(^8\)

The second, and more serious challenge, is NAMUD1’S challenge of § 5’s\(^9\) constitutionality. NAMUD1 challenges § 5 as being an unconstitutional exercise of congressional power in which Congress used an outdated formula to find the need to reauthorize § 5 even though it represents “an unparalleled federal veto over law – and policy making decisions by certain States and localities.”\(^10\) NAMUD1 says first that the district court used the wrong standard in upholding the 2006 reauthorization of § 5, and that if the correct standard were used § 5 would not withstand judicial scrutiny.\(^11\) Furthermore, it argues that even if the district court used the standard that it chose, § 5 would still be unconstitutional.\(^12\)

_Northwest Austin Municipal District Number One v. Mukasey_ has the potential to be a landmark case not only in the area of voting rights, but in constitutional law in general. With respect to voting rights this case could – and should – cause the Court to step in and put a check on the congressional power the VRA gives over the states. With respect to general constitutional law a decision by the Court in NAMUD1’s favor could


\(^8\) Writ at 12-23.

\(^9\) 42 U.S.C. § 1973c

\(^10\) NAMUD1 Appeal at 2.

\(^11\) Id. at 23-41.

\(^12\) Id. at 41-43.
solidify a heavier burden on Congress when passing legislation that might allow it to affect state governments.

This paper will analyze both NAMUD1’s appeal to the Supreme Court, and the D.C. District Court’s ruling which is being appealed. Part II will analyze the district court’s finding that NAMUD1 is not a “political subdivision” as contemplated by § 4(a) of the VRA, and that courts must only use a “rationality standard” in upholding legislation like § 5. Part III will analyze NAMUD1’s arguments on appeal to the Supreme Court that all jurisdictions covered by § 5 should be allowed to take advantage of the bailout provision, and that § 5 of the VRA is unconstitutional. Part IV will then conclude that the Supreme Court should adopt the “congruence and proportionality” standard argued for by NAMUD1, and further conclude that every jurisdiction that is forced to preclear its voting laws should be eligible to bail out of coverage under § 4(a).

II. The D. C. District Court’s Opinion in *Northwest Austin Municipal District Number One v. Mukasey*

A. NAMUD1 is not eligible for “bailout” under § 4(a) because it is not a “political subdivision” contemplated by the statute.

The D.C. District Court enumerated several reasons why NAMUD1 did not fall into the category of a “political subdivision” that was available for a bailout under § 4(a). Section 14(c)(2) of the VRA defines “political subdivision” as a “county or parish, except that where registration for voting is not conducted by the county or parish, the term shall include any other subdivision of a State which conducts registration for voting.”13 In 1982 Congress added a phrase into § 4(a) itself saying that the section applied to all political subdivisions of a state “though such determinations were not made with respect

13 District Court Opinion at 16; See 42 U.S.C. § 1973l(c)(2).
to such subdivision as a separate unit.”\textsuperscript{14} NAMUD1 argued that the term “political subdivision” in the 1982 amendment was to have its normal meaning\textsuperscript{15}, and thus that it should be able to bail out of § 5 coverage.\textsuperscript{16}

The district court disagreed with NAMUD1’s argument saying that § 14(c)(2)’s definition of “political subdivision” still controlled. The court reasoned that NAMUD1’s argument would make the phrase, “though such determinations were not made with respect to such subdivision as a separate unit”, surplasage and that such an interpretation would be counter to well established rules of statutory interpretation.\textsuperscript{17} The court goes on to cite House and Senate reports from 1981 and 1982 that support its position. A 1981 House report said that the bailout is aimed at subdivisions “as defined in § 14(c)(2).”\textsuperscript{18} A 1982 Senate report specifically said that “[t]owns and cities within counties may not bail out separately” because allowing this would cause a flood of bailout suits that the government would not be able to handle.\textsuperscript{19} Furthermore, the court found it especially significant that Congress did not change the statute in its 2006 reenactment even though there were calls to change the statute so as to cover smaller political subunits like NAMUD1.\textsuperscript{20}

B. § 5 of the Voting Rights Act is a “rational”, and therefore valid, exercise of congressional power.

The district court begins it discussion of § 5’s constitutionality by clarifying what the appropriate standard of review is. It recognizes that two potential standards exist in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{14} Id. at 17.
\item \textsuperscript{15} Id; “A political subunit is a division of a State that exists primarily to discharge some function of local government” See Black’s Law Dictionary 1197 (8th ed. 2004).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 19.
\item \textsuperscript{18} Id. at 20
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id. at 21-22.
\end{itemize}
\end{footnotesize}
Supreme Court precedent. First, *City of Boerne v. Flores*, 521 U.S. 507, the case relied on by NAMUD1, created a “congruence and proportionality” test that the Supreme Court applied to a case involving § 5 of the Fourteenth Amendment.21 Second, *South Carolina v. Katzenbach* articulated a “rationality standard” that the Court used to uphold the 1965 passage of the VRA, and that offers a lower hurdle for Congress to clear.22

The district court first analyzed the “rationality standard” adopted in *South Carolina v. Katzenbach*. In *Katzenbach* several states argued that Congress overstepped its powers under § 2 of the Fifteenth Amendment to protect against racial discrimination in voting by passing the VRA.23 The Court concluded that any “rational means” used to protect against racial discrimination in voting was a constitutional use of congressional power.24 Because Congress was faced with repeated attempts by certain jurisdictions to conduct racially discriminatory voting practices it need only prove that its action was “relevant to the problem” in order for it to pass constitutional muster.25

The Court reinforced the use of this standard in a similar case, *City of Rome v. United States*.26 In this case the Attorney General of the United States decided not to preclear newly proposed election law from the city of Rome, Georgia because the law had the effect of depriving black voters of their opportunity to elect a candidate that they desired.27 In response, the city of Rome filed a suit in the D.C. District Court seeking relief from the actions of the Attorney General.28

---

21 District Court Opinion at 25.
22 Id. at 25-26.
23 Id. at 27.
24 Id; *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).
25 Id. at 28; *Katzenbach* 383 U.S. at 329-330.
26 446 U.S. 156 (1980).
27 Id. at 161.
28 Id. at 162.
In *City of Rome* the Court reiterated that Congress only needed to rationally conclude that § 5 was still needed in order for its action to be constitutional.\(^{29}\) The Court found that because Congress had compiled a record of evidence showing only slight progress in the areas of black voter registration and turnout rates, number of elected black officials, and amount of voting changes submitted for preclearance; that Congress had acted within its constitutional power in extending § 5.

The district court next moved on to analyze the “congruence and proportionality” standard laid out in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The dispute in *City of Boerne* involved the city challenging the Religious Freedom Restoration Act (“RFRA”) as an unconstitutional use of Congress’s power under § 5 of the Fourteenth Amendment.\(^{30}\) The Court said that Congress must pass remedial legislation that is “congruen[t] and proportional[] to the injury to be prevented or remedied and the means adopted to that end.”\(^{31}\) The Court found that the RFRA did not meet this standard because the legislative history did not show any state law deliberately discriminating against religion in the previous forty years, the overreaching breadth of coverage of the RFRA and its indefinite termination date, and that the RFRA exacted too steep a price for the conduct that it prevented.\(^{32}\)

After its analysis of both the “rationality standard” and “congruence and proportionality” standard the district court chose the less restrictive “rationality standard” to decide NAMUD1’s case.\(^{33}\) It found that while *City of Boerne* laid out a standard by which challenges to § 5 of the Fourteenth Amendment should be judged, the *City of

---

\(^{29}\) Id. at 31; *City of Rome* 446 U.S. at 177.
\(^{30}\) Id. at 32.
\(^{31}\) Id. at 32-33; *City of Boerne* 521 U.S. at 520.
\(^{32}\) Id. at 33; *City of Boerne* 521 U.S. at 530-34.
\(^{33}\) Id.
Boerne decision never said that the new standard should apply to challenges based on racially discriminating voting laws. As evidence of this it pointed to a case handed down by the Court two years after City of Boerne that dealt with a challenge to § 5 of the VRA in which the Court chose not to use the “congruence and proportionality” standard.

The district court further backs up its decision to used the “rationality standard” by arguing that the use of the “congruence and proportionality” is determined by what class Congress seeks to protect. If the challenged congressional act attempts to protect a class that receives heightened judicial scrutiny then Congress will have a lower burden in showing a pattern of constitutional violations by the state. The district court found that acts of racial discrimination by states receive a great deal of judicial scrutiny, therefore, in order to reauthorize § 5, Congress only needed to have some evidence that covered jurisdictions continued to attempt to abridge voting rights through racial discrimination.

III. NAMUD1’s Argument in its Writ of Certiorari to the Supreme Court

A. Argument for that NAMUD1 is a “political subdivision” eligible for bailout.

In its appeal to the United States Supreme Court, NAMUD1 sticks by its argument that it is a “political subdivision” contemplated by the VRA, and therefore eligible to bail out of § 5 coverage. For Supreme Court precedent backing up its argument, it turns to United States v. Board of Comm’rs of Sheffield, 435 U.S. 110 (1978) and Dougherty County, Ga., Board of Educ. v. White, 439 U.S. 32 (1978), which both

---

34 Id. at 37.
36 D.C. District Opinion at 35.
37 Id. at 36
38 Id.
interpret § 4(a) of the VRA to allow for any jurisdiction to bail out as long as that jurisdiction is affected by § 5.

NAMUD1 argues that Sheffield rejects the notion that § 14(c)(2)’s definition of “political subdivision” limits the districts that are eligible for a bail out. The Court in Sheffield found that 14(c)(2) was solely meant to define which jurisdictions may be covered under § 4(b), and that expanding 14(c)(2)’s definition of “political subdivision” outside of that section of the statute would be “nonsensical.” Furthermore, NAMUD1 argues that the district court ignored the Supreme Court’s ruling in Dougherty County which specifically states that “any political subunit of a covered state” could fall under the umbrella of “political subdivision.” The Court in Dougherty County goes on to say that 14(c)(2)’s definition is useless in determining the reach of § 5 once a state is designated for coverage.

Put plainly, since 14(c)(2) is only meant to determine what jurisdictions are covered by § 5, as Sheffield said, then 14(c)(2)’s definition of “political subdivision” has nothing to do with bailing out of § 5 coverage. Furthermore, because the entire state of Texas is covered by the VRA, Dougherty says that 14(c)(2)’s definition of “political subdivision” is useless since the Court determined that any political subunit in a covered state can be considered a “political subdivision” under the VRA and eligible to bail out.

Moving on, NAMUD1 criticizes the district court’s use of legislative history to back up its position and says that legislative history is actually in NAMUD1’s favor. NAMUD1 says that Congress chose to reenact the same statutory language that the VRA

39 NAMUD1 Appeal at 12
40 Id. at 12-13; Sheffield 435 U.S. at 128-129.
41 Id. at 23; Dougherty County 439 U.S. at 43-44
42 Id.
43 Id. at 14.
always had subsequent to *Sheffield* and *Dougherty County*.\(^{44}\) Because Congress chose not to change the language of the statute after these decisions it must have accepted the definition of “political subdivision” given by the judiciary since Congress must give explicit definition to a term if it disagrees with the judicial definition.\(^ {45}\)

NAMUD1 also points out that a House Report explicitly shows a belief by Congress that all jurisdictions covered by the VRA have the ability to qualify for bailout. “[T]he expiring provisions of the Voting Rights Act allow *any covered jurisdiction to remove itself from coverage.*”\(^ {46}\)

The appeal goes on to address the district court’s argument that Congress’s 1982 amendment to § 4(a) applies 14(c)(2)’s definition to the bailout provision.\(^ {47}\) NAMUD1 argues that the district court incorrectly interpreted the 1982 amendment as a limiting provision.\(^ {48}\) NAMUD1 says that the 1982 amendment was meant to clarify § 4(a) so as to allow all political subunits within a covered state to have the ability to bail out.\(^ {49}\) Since the 1982 amendment had the effect of clarifying rather than limiting, the language of the amendment as interpreted by NAMUD1 is not surplussage, but rather is vital to understanding congressional intent as to the bailout provision.\(^ {50}\)

**B. Argument that § 5 is an unconstitutional exercise of congressional power.**

NAMUD1’s appeal asks the Supreme Court to find that the district court incorrectly chose the “rationality standard”, and asks the Court to clearly state, once and

\(^{44}\) Id.
\(^{45}\) Id. at 15-16.
\(^{46}\) Id. at 17.
\(^{47}\) District Court Opinion at 17. The district court’s decision said that the addition of the phrase “though such determinations were not made with respect to such subdivision as a separate unit” meant that 14(c)(2) applied to § 4(a).
\(^{48}\) NAMUD1 Appeal at 18.
\(^{49}\) Id.
\(^{50}\) Id. at 19.
for all, that the “congruence and proportionality” standard is the test by which cases like this should be governed.\textsuperscript{51} NAMUD1 says that the district court mistakenly found that \textit{Katzenbach} and \textit{Boerne} articulate two different standards when in fact the “congruence and proportionality” standard was a refinement of on the “rationality standard.”\textsuperscript{52} Taking this argument one step further, NAMUD1 says that the district court’s argument that the “congruence and proportionality” standard has only been applied to Fourteenth Amendment challenges is flawed because the two standards are the same, and thus the “congruence and proportionality” standard can be readily applied to the Fifteenth Amendment.\textsuperscript{53}

The appeal argues that § 5 of the VRA is not a congruent and proportional response to racial discrimination in voting because the historical record compiled by Congress was insufficient to justify an extension of § 5 in 2006, and § 5 is no longer seen as an emergency remedy, but as substantive law. NAMUD1 argues that Congress used out-dated data to determine that § 5 should be re-enacted in 2006.\textsuperscript{54} NAMUD1 says that the Congress in 2006 used metrics used in 1965 and 1975 to determine what districts would be covered by § 5.\textsuperscript{55} This data included voter registration and turnout, and the use of literacy tests or other discriminatory tests, which NAMUD1 argues are no longer relevant today.\textsuperscript{56} NAMUD1 points out that Congress did not use any data from the 2000 or 2004 election cycles, nor did they gather relevant data that would have allowed them

\textsuperscript{51} NAMUD1 Appeal at 27.
\textsuperscript{52} Id. at 26.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 35-36
\textsuperscript{55} Id. at 37.
\textsuperscript{56} Id.
to compare activities in covered and non-covered jurisdictions. NAMUD1 argues that Congress cannot make a valid determination to extend § 5 without this vital data.

NAMUD1 ultimately concludes that § 5 represents an unparalleled intrusion into state sovereign power and that Congress can only countenance such an intrusion as long as it has strong evidence that the remedy is still a congruent and proportional response. It argues that if Congress insists on renewing this law over and over again then it effectively has no termination date and falls into the category of substantive law. If Congress’s continued reauthorization of § 5 makes it a permanent legal fixture rather than a remedial measure then it violates Congress’s constitutional powers as the Court determined in Boerne.

IV. Why the “congruence and proportionality” test should be adopted, and why § 4(a)’s bailout provision should be available to every covered jurisdiction

A. The reinforcement of the “rationality standard” in City of Rome should be questioned.

The Katzenbach Court based the “rationality standard” in the seminal case of McCullough v. Maryland in which Justice Marshall said, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” The Court felt that Congress was well within its powers to pass this legislation as a remedial measure to “combat widespread and

57 Id. at 38
58 Id.
59 Id. at 39-40
60 Id. at 41.
61 Id. at 40
62 4 Wheat 316 (1819).
63 Id. at 421.
persistent discrimination in voting.\textsuperscript{64} The Court felt this way because of the voluminous record compiled by Congress showing just how widespread and serious the problem of voting discrimination was.\textsuperscript{65} The record of evidence convinced the Court that significant remedial action was needed to control discrimination in the six states originally targeted by the VRA. It found that such selective targeting was “rational”, and thus constitutional, based on evidence of those states repeated attempts to discriminate against voters using tests and other devices, and for their low voting rates.\textsuperscript{66} The \textit{Katzenbach} opinion showed that the Court was willing to give Congress a good deal of leeway as long as it could definitively show that the leeway was justified by evidence of discrimination.

In \textit{City of Rome} the Court’s opinion glaringly omits any discussion of what evidence Congress used in reenacting the VRA since its initial passage in 1965. The \textit{City of Rome} opinion was handed down in 1980, and during the time in between 1965 and 1980 the VRA was reenacted twice by Congress.\textsuperscript{67} The Court in \textit{City of Rome} did not talk about the evidence compiled by Congress to reenact the VRA when the \textit{Katzenbach} Court relied on that evidence as proof of Congress’s rationality. By ignoring the congressional record in \textit{City of Rome}, its seemed as if the Court wanted to use the “rationality standard” as a judicial rubberstamp on the VRA because it did not want to overturn § 5.

\textsuperscript{64} \textit{Katzenbach} 383 U.S. at 328.
\textsuperscript{65} Id. at 329-30.
\textsuperscript{66} Id. at 328-30.
B. *City of Boerne v. Flores* and why the Court should adopt the “congruence and proportionality” standard.

While *Katzenbach* and *City of Rome* entrenched the “rationality standard” – rightly or wrongly – into the constitutional analysis of the VRA, the Court’s opinion in *City of Boerne v. Flores* raises serious questions as to whether the “rationality standard” has not been replaced. In *City of Boerne* The Court concluded that the RFRA was unconstitutional and that Congress had overstepped its bounds because Congress compiled no modern examples of “laws passed because of religious bigotry.” Since Congress had no examples of religious bigotry to protect people from it had exceeded its powers to pass remedial legislation, and instead passed unconstitutional substantive legislation. In reaching its conclusion the Court came up with the “congruence and proportionality” standard. “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” The Court created this standard in order to determine if congressional action exceeds a remedy and enters the realm of substantive legislation.

In NAMUD1’s case the district court opinion concludes that *City of Boerne* created a separate standard that courts can use in analyzing constitutional issues rather than creating a standard that replaced the “rationality standard.” The district court goes on to argue that the “congruence and proportionality” standard is only applicable in the context of a Fourteenth Amendment challenge because there is there is heightened

68 Id. at 518.
69 Id. at 532.
70 Id. at 520 (emphasis added).
71 District Court Opinion at 37.
concern of Congress creating substantive legislation in that context.\footnote{Id. at 38.}
Even though \textit{City of Boerne} relies heavily on the \textit{Katzenbach} opinion to develop its decision, the district court denied that such reliance meant that the Supreme Court was trying to replace the “rationality standard.”\footnote{Id. at 37.}

The district court’s logic in its attempt to stand by the “rationality standard” seems forced. The district court’s opinion adopts the position that Supreme Court precedent is clearly on its side in upholding the “rationality standard”; however, the retention of this standard is hardly a foregone conclusion, in fact some legal scholars took it for granted that \textit{City of Boerne} replaced the “rationality standard” with “congruence and proportionality.” In a 2007 article for the Yale Law Journal, Nathaniel Persily analyzed Congress’s 2006 reenactment of the VRA through the lens of “congruence and proportionality.”\footnote{Persily supra note 13.} He explicitly stated that \textit{City of Boerne} created a “new constitutional standard for congressional authority to enforce civil rights” and that all civil rights thereafter should be measured against the “congruence and proportionality” standard.\footnote{Id. at 193.}


Posner does recognize the fact that \textit{City of Boerne} was a Fourteenth Amendment challenge and that VRA challenges are generally brought under the Fifteenth Amendment, but he recognizes that there is no substantive difference between the two amendments. Because there is no substantive difference the application of the “congruence and
proportionality” test to Fifteenth Amendment cases is logical.\textsuperscript{77} Furthermore, he found that \textit{City of Boerne} “strongly intimated that the same analysis applies when assessing Congress’s authority under the [Fourteenth and Fifteenth] amendments to enact prophylactic legislation.”\textsuperscript{78} This unflinching acceptance leads to the conclusion that the clear meaning of \textit{City of Boerne} was that the “congruence and proportionality” standard was meant as a replacement for the old “rationality standard” and not as a separate standard.

In defense of the D.C. District Court, the “rationality standard” is the only one used thus far by the Supreme Court in its decisions regarding the constitutionality of the VRA. Since the district court was faced with this precedent it may have been apprehensive to go against it, and place a heightened burden on Congress to justify legislation that curbs racial discrimination. However, fear should not be allowed to cloud the objectivity of the courts and Congress. The Supreme Court should use NAMUD1’s case to clear up any confusion about the possibility that the “rationality standard” and the “congruence and proportionality” standard might exist simultaneously and independently of each other. The Court needs to stand by its decision in \textit{City of Boerne} and analyze the continuing need for § 5 of the VRA using the heightened standard of “congruence and proportionality.”

V. If the Court upholds Congress’s reauthorization of § 5 of the VRA it must hold that the “bailout” provision is applicable to all covered jurisdictions.

If the Court does uphold § 5, the bailout provision in § 4(a) will be essential to § 5’s constitutionality. The bailout provision acts as a constitutional buttress, “shoring” up

\textsuperscript{77} Id. 88-89.
\textsuperscript{78} Id. at 89.
§ 5’s constitutionality.\textsuperscript{79} In his dissent in \textit{City of Rome}, Justice Powell reasons that there can be no justification for allowing some covered jurisdictions to bailout while not allowing others the same opportunity.\textsuperscript{80} He argues that the language of the statute is clear and that if a jurisdiction must preclear its voting law changes then it must also be allowed to bailout.\textsuperscript{81} “If § 4(a) imposes the burden of preclearance on [a covered jurisdiction], the same section must also relieve that burden when the city can demonstrate its compliance with the Act’s quite strict requirements for bailout.”\textsuperscript{82} Justice Powell points out that not allowing bailout for all covered jurisdictions strips § 5 of its remedial purpose, making it substantive law, and thus making it unconstitutional.\textsuperscript{83}

Others have recognized that § 4(a) is essential to the VRA’s constitutionality and call attention to the idea that the current bailout system is ineffective and needs to be fixed. “The infrequency of bailout in the last twenty-five years may indicate that the requirements for bailout are simply too stringent.”\textsuperscript{84} Since 1982 the only successful bailouts have come from Virginia, where fourteen counties have bailed out.\textsuperscript{85} At this point a practical example of the difficulty of qualifying for a bailout would be useful. If Fulton County, Georgia were to try to bail out of § 5 coverage it would have to compile data from all 11 cities in the county, and if any one of those cities had a single objection lodged by the Department of Justice in the previous ten years the county would be unable

\textsuperscript{79} Persily supra note 13 at 212
\textsuperscript{80} City of Rome 446 U.S. at 199 (J. Powell dissenting).
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 200
\textsuperscript{83} Id.
\textsuperscript{84} Persily supra note 13 at 213.
\textsuperscript{85} Id.
to bail out and the ten year clock would start over again.\textsuperscript{86} This exact scenario recently happened to Fulton County. One of the eleven cities in the county failed to receive timely preclearance for one of its annexations in which the African American population was less than 5\%\textsuperscript{87}. This single isolated incident stopped Fulton Country from being eligible to bail out and restarted the ten year clock.

Another one of NAMUD1’s arguments is illustrated by Fulton County. In its appeal NAMUD1 argues that § 5 is over-burdensome because it affects “constitutionally benign” activity.\textsuperscript{88} If Fulton County wants to move a polling place to a different location is must acquire preclearance from the Department of Justice.\textsuperscript{89} This requires election officials to create a map showing where the current polling place is and where the new polling location will be, and then requires the officials to turn the map into the Department of Justice to obtain preclearance for the change.\textsuperscript{90} Even though there has never been an objection to such a small “ministerial” matter the county is still required to do it or face an objection from the Department of Justice which would ruin its chances to bail out.\textsuperscript{91} This illustrates just how important the bailout provision is. Without a bailout provision the jurisdictions covered by § 5 will continue to be viewed through this intense microscope, which hampers even the smallest and most mundane functions of local government.

It is absolutely essential that the bailout provision be available to all covered jurisdictions, and that the law be revised so that “de minimus” changes in voting laws not

\textsuperscript{87} Id.
\textsuperscript{88} NAMUD1 Appeal at 26.
\textsuperscript{89} Senate Hearing at 24.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
be covered by § 5. Without these two changes § 5 will not remain a remedy for discrimination, but will become a perpetual burden imposed by the federal government on state sovereign power.

It is fundamentally unfair to allow some jurisdictions to bail out of coverage while not giving the same opportunity to others. NAMUD1 uses the example of Virginia to illustrate its point. As mentioned above, it is the only state to have any jurisdictions successfully bail out of coverage since 1982. NAMUD1 argues this is because of Virginia’s unique local government structure.\(^2\) Virginia’s counties and cities contain few if any smaller governmental units which allows those counties and cities to more easily control their fate in respect to bailing out.\(^3\) The opposite of this is true in Fulton County, Georgia where there are eleven separate cities within the county which all must go ten years without a single objection from the Department of Justice if the county is to have a chance to bail out of coverage. If the bailout provision is to be a viable part of the VRA it must allow for smaller governmental units, like NAMUD1, to bail out of § 5 coverage in order to keep larger units, like Fulton County, from the virtually impossible task of keeping all of its smaller units’ records clean for ten years.\(^4\)

In addition to allowing all covered jurisdictions the opportunity to bail out, the Court should find that some actions by local governments and election boards do not require preclearance. Every time a covered locality wishes to change a polling place or hold a special election it should not be required to prepare an official request to the Department of Justice.\(^5\) The inclusion of these small government functions only

---

\(^2\) NAMUD Appeal at 22.
\(^3\) Id.
\(^4\) See Senate Hearing at 102. “It is conceivable that Fulton County could never be able to bail out.”
\(^5\) Id. at 101.
increases the intrusiveness of an already intrusive federal law. In addition, including these small actions under the umbrella of § 5 unnecessarily increases the work of local governments and the federal government.

VI. Conclusion

There is no doubt that Congress’s goal in passing § 5 in the 1960’s ago was a noble one and that goal still remains noble today. There is no more fundamental right to the citizen of any democratic nation than to have their voice heard through the electoral process. Racial discrimination can silence that voice and can erode the foundation of democracy. While the underlying goal is still noble, the 2006 reauthorization of § 5 of the VRA needs to be reexamined by the Supreme Court. The preclearance requirement is no longer the emergency measure it was meant to be. Many years have passed since it was first used to stamp out rampant racial discrimination at the polls in certain areas of this country. Since then this country has made great strides away from such discrimination, and while discrimination still exists in the United States it is time for the Court to take a hard look at the facts and figures pertaining to discrimination in voting and apply the standard it created in the Boerne case. If, after it considers the facts and figures, the Court finds that § 5 still represents a “congruent and proportional” response to racial discrimination in voting then the law should be allowed to stand, but the Court must examine it through the more strict lens of congruence and proportionality.

If the Court does find that § 5 is still constitutional then it must reevaluate the bail out system in order to allow more jurisdictions the ability to bail out. It is only fair that if a jurisdiction must report its changes to the Department of Justice then that jurisdiction
must be allowed to apply for bail out once it can show ten years of compliance.\footnote{Strickland argues that ten years is too long of a time, but does not suggest what length of time would be reasonable. Id. at 102} Not allowing this for every covered jurisdiction creates a perpetual federal interference into local government. Furthermore, the Court should find that “de minimus” actions of covered jurisdictions such as changes in polling locations and special elections do not fall within the ambit of § 5. Again, requiring reporting of these small actions to the federal government increases the intrusiveness of § 5. Putting these actions under the umbrella of § 5 also makes the process of bailing out significantly more difficult because one slip up on preclearing one of these otherwise benign functions of local government could ruin a jurisdiction’s clean record and force it to wait another ten years before it can bail out.

It is time for the Court to act. Stopping the restrictions of § 5 cannot be left up to Congress because it is such a politically sensitive issue. We cannot trust members of Congress to look at this law objectively because voting to end the application of § 5 could be tantamount to political suicide. The justices of the Supreme Court have no such worries. The Court is meant to be an objective voice above the fray of politics, and should act as a check on unconstitutional practices. It is time for the Court to reexamine the 2006 reauthorization of § 5, and determine if it needs to be modified or even completely abrogated.