

# IS THIS THE BEGINNING OF THE END OF THE SECOND RECONSTRUCTION?



BY LUIS FUENTES-ROHWER



The Voting Rights Act (VRA) of 1965 is, without question, the most important and effective civil rights statute in U.S. history.<sup>1</sup> Within the space of three years, the VRA transformed the structure of electoral politics in the South and allowed African-Americans to finally enjoy the right to vote as guaranteed by the Fifteenth Amendment of the U.S. Constitution. This tremendous record of success is the reason why the VRA is deservedly known as the hallmark of the Second Reconstruction.

Recent cases suggest, however, that the constitutionality of the VRA hangs in the balance and may soon be struck down by a conservative Supreme Court. In *Namudno v. Holder*, for example, Chief Justice Roberts recited the usual criticisms lodged at the act—that it unfairly targets the covered states, for example, or that conditions have improved—only to then invoke the avoidance doctrine and decide the case on statutory grounds.<sup>2</sup> The Court decided to postpone the constitutional question for another day. Similarly, during oral argument in the case, the questions from the conservative justices underscored their unease over the constitutionality of the VRA. This year, in the Texas redistricting case, *Perez v. Perry*, Justice Thomas concurred in the judgment vacating the lower court's judgment but wrote a separate opinion to highlight his view that the VRA—particularly § 5, the central feature of the law, which demands that covered jurisdictions pre-clear their voting changes prior to implementation—is unconstitutional.<sup>3</sup>

The constitutionality of the Voting Rights Act may be the biggest story of our generation. The Roberts Court appears poised to bring down the Second Reconstruction. We may be on the cusp of a new constitutional moment.

Yet no one seems to be paying attention.<sup>4</sup>

The story begins in 1966, in the chambers of Chief Justice Warren.

As soon as President Johnson signed the Voting Rights Act into law on Aug. 6, 1965, the state of South Carolina challenged its constitutionality. The Supreme Court expedited the case and heard oral arguments a scant five months later, on Jan. 17–18, 1966. Three weeks later, on Feb. 8, Chief Justice Warren finished his draft of the opinion, which he circulated two weeks later, on Feb. 23. The Court issued its opinion on March 7, 1966.<sup>5</sup>

It was clear that the Voting Rights Act was no ordinary statute; rather, it was an aggressive and assertive solution to a grave national embarrassment. According to the VRA, select jurisdictions could not be trusted to implement and/or enforce fair and nonracially discriminatory voter registration tests. Given this history, the VRA targeted these jurisdictions and provided for the appointment of federal examiners and registrars as needed. More important, the act required that these jurisdictions pre-clear any changes to their voting laws with the U.S. Department of Justice or in the district court in Washington, D.C. The radical nature of this approach was undeniable. This is the reason why Congress limited these special provisions of the act to five years; in the words of Rep. Don Edwards during the House hearings in 1975, “After a few years of harsh measures, the practices of a lifetime would be reversed and special federal protection would no longer be necessary.”<sup>6</sup>

It came as no surprise that the Warren Court upheld the Voting Rights Act in *South Carolina v. Katzenbach*. Central to the Court's opinion in this case was the view

that Congress had “explored with great care the problem of racial discrimination in voting” and had documented “in considerable detail” its findings and conclusions. Early in his opinion, the chief justice noted that Congress had debated the measure in hearings that lasted more than nine days, and the debate on the floor of both chambers had taken 29 days. For further support, the chief justice “pause[d] ... to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these reactions by Congress.”<sup>7</sup> The conclusion was inescapable: “an insidious and pervasive evil ... had been perpetuated in certain parts of our country,” and earlier attempts to deal with the problem had proven unsuccessful; they “would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.” Without question, legislative findings—that is, the record of abuses put together by Congress—played a prominent role in the case of *South Carolina v. Katzenbach*.<sup>8</sup>

To Justice Brennan, it was a mistake to accept the findings of the Congress in this way. In a memo to the Chief Justice written Feb. 26, 1966, Justice Brennan wrote that “this is really a fine opinion,” and he gladly joined the majority. But he had many questions, which he expressed in the margins of his circulated draft. For example, in response to the first part of the opinion, he complained that “[i]t seems to me one thing to summarize the facts put before the legislature, and another to do what the Chief seems to be up to in this [section]—accepting the Congressional findings because they correspond to our own.” The chief justice’s references to the process that led to the passage of the legislation were similarly misguided: “Do we judge statutes by no. of witnesses[,] length of hearings[,] unanimity of vote? The Chief is judging the legislative product as if it were a judicial one.” Brennan repeated this criticism at the close of the first part of the draft: “In several places, like this one, the Chief comes close to writing this as if it were an advisory opinion. I think this might be avoided. Are we reviewing the sections, any more than we are the adequacy of the hearings?”<sup>9</sup>

The debate between Chief Justice Warren and Justice Brennan was a debate about the scope of congressional power and the demands of rationality review—that is, whether there exists a rational relation to a legitimate state interest. The justices agreed that rationality review applied, as well as its demand that the law must be rationally related to a legitimate state interest. To Justice Brennan, however, rationality review did not require explicit findings by the U.S. Congress. This assessment had been true in the Commerce Clause context since at least 1937, and Justice Brennan did not want the Court to establish such a requirement under the Reconstruction amendments. After all, different minds in the future could always disagree about the sufficiency of the available record. Or, what if Congress had no findings at all? Quite presciently, Justice Brennan wished to avoid this problem.

But the Chief Justice had a different set of concerns. Aware of criticisms of the VRA as a punitive measure against the Southern states, Chief Justice Warren seemed to

go out of his way to show otherwise. If findings were not necessary as a matter of law, he believed that they were necessary *in this case*.

Justice Brennan’s concerns surfaced in the very next VRA case, *Katzenbach v. Morgan*, decided on June 13, 1966. Under § 4(e) of the act, an otherwise eligible voter who completed a sixth-grade education in an “American-flag” school, where the language of instruction was not English, may not be denied the right to vote on account of his or her failure to pass an English literacy test. This section was in direct conflict with a case decided only seven years earlier, *Lassiter v. Northampton Election Board*, which upheld the constitutionality of literacy tests.<sup>10</sup> To be sure, Justice Douglas emphasized in *Lassiter* that “a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.” No such discrimination could be charged in *Morgan*, because, as Justice Harlan highlighted in his dissenting opinion, “[t]here is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns.” What would the Chief Justice do this time?

Chief Justice Warren ended up doing a very smart thing: he assigned the opinion to Justice Brennan. There is a great deal of irony in the Chief Justice’s decision to do so. Had he followed Brennan’s advice, *Morgan* would have been an easy case. Instead, *South Carolina v. Katzenbach* forced Brennan to do the very thing he had tried to avoid: point to the record in order to uphold § 4(e) of the Voting Rights Act. This was the only way that Congress could comply with the explicit demands of *Lassiter*. Or so it appeared.

As in *South Carolina*, the Court in *Morgan* happily deferred to the work of Congress in a matter of great national importance. Accordingly, the Court found that § 4(e) was “appropriate legislation” to enforce the Fourteenth Amendment because it “*may* be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government.” (Emphasis added.) The scope of congressional authority in this area was wide, and the role for the Court was quite limited. For example, in reference to the argument that § 4(e) would result in enhanced political power, which would in turn “be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community,” Justice Brennan explained that “[i]t is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”

Justice Brennan’s quandary needs to be understood: The Court in *Lassiter* upheld the constitutionality of literacy tests absent a finding of racial discrimination. Congress had no such findings in support of § 4(e), yet it struck down such a test as applied to a narrow subset of voters. Could Congress reinterpret the meaning of “equal protection” as applied to this narrow subset in the face of a contrary judicial interpretation? Put differently: What should the Court do when Congress enforces—that is, defines—“equal protection” in a way that directly contradicts a prior judicial

definition? Justice Douglas' conference notes in *Morgan* make it clear that the justices considered *Morgan* an easy case. To Justice White, for example, § 4(e) was simply "a congressional definition of 'equal protection.'" Chief Justice Warren similarly argued that "Congress need not make findings if it can justify its conduct on any rational basis," and Justice Fortas agreed with this position. This view was in tension with the *South Carolina* case, yet neither justice apparently saw it that way. Justice Black was "happy to agree to this historic opinion which for the first time gives [§] 5 of the Fourteenth Amendment the full scope it was intended to have." Only Justice Harlan disagreed, stating that "Congress can't define what is equal protection."<sup>11</sup>

The lack of a record forced the Court to interpret the power provided by § 5 of the Voting Rights Act expansively, as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." But, as Justice Harlan pointed out in dissent, would this mean that Congress could exercise its discretion the other way and "dilute equal protection and due process decisions of this Court"? Not so, stated Brennan: "§ 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."

This solution, known as the "*Morgan* power," harmonized with Justice Brennan's notion in *South Carolina* about the proper role of Congress in carrying out the promise of the Reconstruction amendments. This solution relies on the justices' implicit commitment to share power with Congress. The justices do not have all the answers, and the *Morgan* power simply recognizes that fact.

If this sounds too good to be true, it was. The ultimate fate of the *Morgan* power is reminiscent of Justice Roberts' passage in *Smith v. Allwright* in 1944. In the dissenting opinion, Justice Roberts wrote that "the instant decision ... tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." This is because by the very next case, *Oregon v. Mitchell*, the *Morgan* power had apparently accomplished everything it had set out to do. The justices would no longer invoke it.<sup>12</sup>

But the *Morgan* power is still important today for how it frames the debate about the proper role of the Supreme Court in a society committed to democratic values. Justice Brennan was on one side of this debate. He believed that the Court should defer to Congress when Congress attempts to remedy a difficult public policy problem. This view recognizes the limits of judicial review and the fallibility of the Court.

Justice Harlan is on the other side of the debate, as is Chief Justice Warren's opinion in *South Carolina*. This side takes a muscular view of the Court and its role in a mature democracy. Under this view, the Court's deference to Congress is much more conditional. The Court—and only the Court—decides when the legislative record rises to an acceptable constitutional level so as to justify the legislation. But this is a matter of degree and needs to consider the following questions:

- How many witnesses are needed?

- How many committee hearings should take place?
- What kind of evidence is needed to show that racial discrimination in voting has, or has not, been eradicated?

These might have been easy questions to answer in 1966, in the days of Sheriffs Jim Clark and Bull Connor, notoriously racist law enforcement officials in Alabama, and when disenfranchising practices were rampant and in the open. In taking the long view, it is likely that Justice Brennan understood quite well that these questions would become much harder to answer in due time.

History shows that Justice Brennan's concerns have come to pass. In 1975, Congress extended the special provisions of the Voting Rights Act for seven years, on the basis that the act had yet to accomplish its stated goals. The Supreme Court upheld this extension five years later, in *City of Rome v. United States*, in which the arguments were eerily familiar. To the majority, "Congress[]" considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable." In his dissent, then Justice Rehnquist objected to the Court's abdication of its authority, traced back to the canonical *Marbury v. Madison*, "to ensure that a challenged congressional Act does no more than 'enforce' the limitations on state power established in the Fourteenth and Fifteenth Amendments." The debate was repeated in 1989, in *Lopez v. Monterey County*: one side showing deference, buttressed by adequate findings, the other side favoring muscular, aggressive review.<sup>13</sup>

When Congress extended the special provisions of the Voting Rights Act for another 25 years in 2006, the debate predictably focused on the issue of congressional findings. The central question seemed deceptively simple: Have we reached a point in our history where the act is no longer an appropriate response to any remaining racial discrimination in voting? But make no mistake, this was not an easy question. Witnesses gave Congress conflicting answers to this question. After hearing the evidence, Congress extended the act until 2032.

Only this time, the Court did not stick to its traditional script. It is true that, in its ruling in *Northwest Austin Municipal District Number One v. Holder (NAMUDNO)* in 2009, the Court deferred to Congress, in the limited sense that the justices did not strike down the VRA. But that case was not like the cases that had preceded it. Whereas in prior cases the Court happily pointed to the record and interpreted it in helpful and forgiving ways, in *NAMUDNO*, the Court took a more critical approach. Writing for the Court, Chief Justice John Roberts conceded that "[t]he historic accomplishments of the Voting Rights Act are undeniable." For example—

- Discrimination in the South is now much improved.
- Voter turnout and registration rates between whites and African-Americans are close to equal.
- Blatant evasions of federal decrees are no longer the norm.
- There are more offices held by members of minority groups today than ever before.

These facts validate the provisions in the Voting Rights Act and its various extensions. The question for the future, as Chief Justice Roberts put it during the oral argument in *NAMUDNO*, is that, “at some point it begins to look like the idea is that this is going to go on forever.”<sup>14</sup> The conservative justices are clearly skeptical of this assessment.

*Northwest Austin Municipal District Number One* set the stage for the Court finally to strike down the Voting Rights Act on constitutional grounds. The Court could have picked from a number of available arguments. For example, that the VRA is old and “fails to account for current political conditions”; or that the act imposes “substantial ‘federalism costs’”; or else, that the act “differentiates between the States, despite our historic tradition that all states enjoy ‘equal sovereignty.’” The last argument is particularly important because it appears to be on Justice Kennedy’s mind. In oral argument in the case, for example, he offered the following comment: “the Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama ... is less than the sovereignty of Michigan. And the governments in one are to be trusted less than the governments in the other.” And in the recent decision involving redistricting, as argued in *Perry v. Perez*, he similarly complained about the “tremendous disadvantage” at which § 5 of the VRA places Texas. Justice Kennedy saw this as a burden that “applies only to—to some states and not others.” It is well understood that Justice Kennedy holds the fifth vote to strike down the act. It is also true that he is skeptical of the constitutionality of the act.<sup>15</sup>

In the end, however, the Court punted. Rather than address the constitutionality of the VRA, the Court disposed of the *NAMUDNO* case on statutory grounds. In professing adherence to its avoidance doctrine, the Court concluded that the plaintiffs were able to escape from coverage under § 4(b) of the VRA (that is, bailout). And once the plaintiffs could escape coverage, the Court no longer needed to reach the constitutional question. The hitch was that the Court interpreted the statute in a way that its plain language simply did not bear. The Court went out of its way to dispose of the case on nonconstitutional grounds, even if doing so required stretching the language of the act to its outer limits—or perhaps beyond.

What possibly could have happened to make the Court so anxious to dodge the issue of the constitutionality of the act in *Northwest Austin Municipal District Number One*? One explanation is that the Court must tread carefully around these explosive issues. To strike down the Voting Rights Act is to take on the Second Reconstruction and to thrust the Supreme Court into the center of the firestorm over voting rights and minority communities. Another explanation could be the timing of the decision: the Court decided *NAMUDNO* on June 22, 2009; a week later, on June 29, the Court issued its order for the parties to reargue the case of *Citizens United v. Federal Election Commission*.<sup>16</sup> In the tradition of Alexander Hamilton and, later, Alexander Bickel, the Court must take its time and conserve its legitimacy.<sup>17</sup> Striking down the Voting Rights Act while at the same time deciding *Citizens United* might have been too much for the public to

bear. Surely, handing down decisions in both these cases would have been imprudent. Perhaps the justices simply decided to bide their time.

Another possible explanation for failing to consider the constitutionality of the VRA when deciding *NAMUDNO* is that Justice Kennedy simply could not make up his mind. We have seen this before—for example, in the case of *Vieth v. Jubelirer*, which dealt with political gerrymandering in Pennsylvania and a case in which Justice Kennedy could side with neither the plurality nor the four dissenters, yet remained unsure as to whether a standard to govern political gerrymandering cases “will emerge in the future.”<sup>18</sup> As a super median vote, Justice Kennedy’s vote carries great weight, and his uncertainty can lead to puzzling results. *Northwest Austin Municipal District Number One v. Holder* might have been one of those cases.

Nevertheless, I suspect that a showdown is looming. In every related case, from the South Carolina voter identification case to the *Texas Redistricting Cases*, litigants happily remind the Supreme Court of the constitutional stakes at issue. These questions are not going away. Therefore, as we look to the future, it is worthwhile to take a moment to reflect on the bigger picture. Questions of voting rights in the United States have generally been questions of institutional competence, and this is particularly true for questions of voting rights for communities of color. This is a story, incidentally, in which the Supreme Court has played a secondary role to the work of Congress. Justice Brennan understood this history, as reflected by his critical stance in *South Carolina v. Katzenbach* and his opinion in *Katzenbach v. Morgan*.

The country’s constitutional culture is clearly different today than it was at the time the Court decided *Morgan*. The Court is far more assertive and muscular than it used to be, and the political question doctrine seems to be largely a relic of our constitutional past. But as we debate the constitutionality of the Voting Rights Act—not to mention the constitutionality of President Obama’s health care legislation, which was argued before the Court in March—we must ask ourselves what role the nation’s unelected, largely unaccountable Court should play in deciding these questions. To put the question in a slightly different way, what institution is best situated to decide these questions?

If history serves as a guide, there is an easy answer to the question of the constitutionality of the Voting Rights Act. Deference to Congress has been—and should continue to be—the order of the day. Indeed, were the Supreme Court to second-guess Congress’ findings, the historical parallels to the Waite Court and the fall of the First Reconstruction would be unavoidable. **TFL**

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#### Endnotes

<sup>14</sup>42 U.S.C. § 1973 et seq.

<sup>2</sup>*Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193 (2009).

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## RECONSTRUCTION *continued from page 57*

<sup>3</sup>*Perry v. Perez*, 132 S. Ct. 934 (2012).

<sup>4</sup>See Linda Greenhouse, *Is Anyone Watching?*, N.Y. TIMES (Feb. 23, 2011), available at [opinionator.blogs.nytimes.com/2011/02/23/is-anyone-watching/?ref=lindagreenhouse](http://opinionator.blogs.nytimes.com/2011/02/23/is-anyone-watching/?ref=lindagreenhouse) (last visited Feb. 15, 2012).

<sup>5</sup>*South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>6</sup>U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Extension of the Voting Rights Act, Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501, 94th Cong. 887 (1975) [hereinafter cited as 1975 House Hearings].

<sup>7</sup>*South Carolina*, 383 U.S. at 309.

<sup>8</sup>*Id.*

<sup>9</sup>Chief Justice Warren, Original Draft of *South Carolina v. Katzenbach* 25 (Feb. 23, 1966) (Brennan Papers, Library of Congress, Box I:132, folder 6) (Justice Brennan's handwritten notes on the draft).

<sup>10</sup>*Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959).

<sup>11</sup>Justice Douglas, Notes from *Katzenbach v. Morgan* Conference 2 (Apr. 22, 1966) (Douglas Papers, Library of Congress, Box 1372).

<sup>12</sup>*Smith v. Allwright*, 321 U.S. 649 (1944); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>13</sup>*City of Rome v. United States*, 446 U.S. 156 (1980); *Marbury v. Madison*, 5 U.S. 137 (1803); *Lopez v. Monterey County*, 519 U.S. 9 (1996).

<sup>14</sup>*Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 1146055, Transcript of Oral Argument, at 32 (Roberts, C.J.).

<sup>15</sup>*Id.* at 34, 38; Transcript of Oral Argument at 37, *Perry*, (2012) (No. 11-713), 2012 WL 38642 (Kennedy, J.).

<sup>16</sup>*Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

<sup>17</sup>In his canonical *Federalist* No. 78, Alexander Hamilton wrote that the judiciary has “neither force nor will but merely judgment.” THE FEDERALIST PAPERS 465 (Clinton Rossiter ed., 1961). Writing at the time of *Brown*, Alexander Bickel argued that there are times when the Court must stay its hand and invoke what he labeled the “passive virtues.” See Alexander M. Bickel, *The Supreme Court, 1960 Term*, Foreword: The Passive Virtues, 75 HARV. L. REV. 40 (1961). The Court must not take on any and all cases presented, Bickel argued, lest it ultimately compromise its legitimacy.

<sup>18</sup>*Vieth v. Jubelirer*, 541 U.S. 267 (2004). According to Justice Anthony Kennedy, “[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.” *Id.* at 311.

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