RECONCEPTUALIZING THE VRA AFTER NAMUDNO

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INTRODUCTION

On June 22, 2009, the Supreme Court released its opinion in Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO).1 The plaintiff was a Texas utility district with an elected board. Because Texas is a covered jurisdiction under the Voting Rights Act (VRA),2 the utility district was required to seek preclearance for any changes in its election procedures.3 The district initially sought to bailout4 of the preclearance requirements. When this was denied by the U.S. District Court for the District of Columbia, the utility district appealed on the merits and argued in the alternative that the preclearance

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3 Section 5 of the VRA concerns preclearance and requires that covered jurisdictions gain approval from the Department of Justice or the U.S. District Court for the District of Columbia prior to any change in election laws. 42 U.S.C. § 1973c.
4 Jurisdictions that can demonstrate they have successfully eliminated discriminatory and dilutive voting procedures can seek a declaratory judgment from the D.C. District Court exempting them from preclearance requirements under Section 4(a) of the VRA. 42 U.S.C. § 1973b(a).
requirements were unconstitutional. In an 8-1 decision, the Court adopted the first line of argumentation and found the district statutorily eligible to bailout of the VRA’s preclearance requirements. Notably, the Court did not reach the constitutionality of the Section 5 preclearance requirements. Instead, it invoked the avoidance canon, "avoid[ing] the unnecessary resolution of constitutional questions" and sparing a key provision of the VRA.

Reached by a super-majority of the Court and decided on statutory—not constitutional—grounds, the decision seemed almost ordinary statutory interpretation. However, the decision appeared to many an unlikely one, a position supported by two events in the litigation of the case. First, the District Court had soundly and forcefully rejected the utility district’s eligibility for bailout, holding that the “plaintiff is ineligible to seek a declaratory judgment exempting it from Section 5 because it does not qualify as a ‘political subdivision’ as defined in the Voting Rights Act.” Second, at oral argument, the Court seemed most concerned with whether Congress had exceeded its powers in reauthorizing the VRA in 2006, not the question of bailout eligibility.

As a result, many expected a decision directly addressing the constitutionality of Section 5’s reauthorization. Agreeing that the

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5 The District’s second question presented concerned the constitutionality of the preclearance regime: “Whether, under the Court’s consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress’s remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.” Brief of Appellant at i, Nw. Austin, 129 S. Ct. 2504 (2009) (No. 08-322).
6 Nw. Austin, 129 S. Ct. at 2508.
7 The avoidance canon is a substantive canon of interpretation instructing courts to “avoid interpretations that would render a statute unconstitutional or that would raise serious constitutional difficulties.” WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY App. B 29 (West 4th ed. 2007); see also Richard Hasen, Constitutional Avoidance and Anti-Avoidance by the Roberts Court, 2009 SUP. CT. REV. 181.
8 Nw. Austin, 129 S. Ct. at 2508.
constitutional question would be determinative, Professor Heather Gerken anticipated the inquiry would turn on the application of the Court’s “congruence and proportionality” standard to renewed prophylactic legislation, writing that “[t]he Court must answer this legal question in order to write this opinion.”11 Similarly, describing the Roberts Court’s tendency to mask facial challenges as as-applied challenges, Professor David Franklin surmised that NAMUDNO would leave the Justices no such option, explaining, “the Supreme Court in NAMUDNO is faced with what seems an inescapably facial constitutional question.”12 After the decision’s release, commentators viewed the Court’s opinion with skepticism. Professor Richard Hasen argued that the Court “embraced a manifestly implausible statutory interpretation to avoid the constitutional question.”13 Hasen relied on the analysis of the lower court to explain the resulting implausibility of the decision, noting, “In light of the statutory tour de force of the district court, voting rights experts believed that the statutory bailout argument had no chance when NAMUDNO was appealed to the Supreme Court.”14 Likewise, reviewing the decision for The New Republic, Professor Barry Friedman stated, “No one but the justices thought this argument held water: The bailout provision they cited applied only to counties and parishes, neither of which the district was.”15

Though many election law scholars and commentators were surprised that the Court avoided the constitutional question, they offered a variety of explanations for the Court’s behavior in the discussion that followed the decision.16 These ranged from prudential characterizations to political indictments of the Roberts Court, most proceeding from the baseline that addressing the constitutionality of congressional reauthorization of Section 5 should have been necessary to the case’s resolution. Most explain the decision as resulting from the Court’s recognition that speaking negatively of the VRA was untenable, possibly after considering the legitimacy costs or political fallout of invalidating a key provision of the VRA.

Less voiced—and indeed, less accepted—was an argument positing a more expansive conception of the VRA: that the VRA is a landmark statute with special status that should command greater respect from

13 Hasen, supra note 7, at 182.
14 Id. at 201.
16 See discussion infra Part III (examining accounts of the NAMUDNO Court).
courts than ordinary statutes command. Scholars have advanced various theories to argue that such a body of special laws exists, though they disagree on the constitutive criteria and the ultimate content of that canon. Encompassing theories of constitutional canonization, central constitutional constructs, and super-statutes, the arguments are many, but all aim to recognize texts (and tenets) that arise from and are affirmed by a process of deliberation that ultimately reflects popular will. All ultimately confront more formalist accounts of what should constitute key sources: while the formalist reading favors the traditional Constitution and its Article V amendment process, many of these theories argue that other texts have acquired fundamental or quasi-constitutional status.

This Note seeks to parallel the prudential and political accounts of the Court’s decision in NAMUDNO with theories that advocate a special status for landmark texts like the VRA. While one can argue that such a hallowed role for the VRA is normatively desirable, this Note also seeks to advance another argument: that while many (even most) of the current Justices may not abide any such theory, these alternate theories nevertheless provide powerful explanations for their decision. That is, the most effective explanations for the Court’s stance in NAMUDNO ultimately turn on some recognized special role of the VRA. Whether or not normatively the VRA’s landmark status should matter, descriptively it did matter to the NAMUDNO Court, working to blunt invalidation, if not bolstering Section 5’s affirmation.

This Note proceeds in three parts. Part I provides a brief account of the litigation in NAMUDNO, demonstrating the centrality of the avoided constitutional question. Endorsing the view that the Supreme Court’s statutory analysis was unpersuasive, Part I establishes the Court’s equivocation with regard to the VRA, corroborated by reference to oral argument and the ensuing decision. Part II then departs from the case to describe and develop arguments supporting the proposition that the VRA has assumed special status within the body of statutory law. This Part engages theories embracing a more affirmative and expansive role for the VRA and does not simply defend against federalism-based critiques like those charged—but not ultimately confronted—in the NAMUDNO opinion. Drawing on the scholarship of Professors Ackerman, Balkin, Eskridge, and Ferejohn, Part II identifies two strands to these theories: that some texts and statutes derive special force from both the breadth of their support and the iterative process involved in their creation and entrenchment. Finally, Part III argues that explanations of the NAMUDNO Court’s behavior reflect much of the argumentation of the Part II theories: even if the Court is wary and not reverential, strategic

17 See discussion infra Part II (examining theories of Professors Ackerman, Balkin, Eskridge, and Ferejohn).
and not acquiescing, something particular about the VRA gave the Court pause. Yet even if the Court did implicitly incorporate aspects of these theories in choosing not to strike down the preclearance requirement, it nonetheless did not abide the theories’ embrace of a continuing relationship between the Court and the political branches. Though uncertain as to the Court’s motivation, this Note ends by suggesting that the declining emphasis on Congress—and likewise, on the Court, which was similarly stymied in its action—may suggest the primary focus is now the text itself, not the working relationship between the institutional actors that promulgated it.

I. NAMUDNO LITIGATION

Part I examines the Court’s stance toward the VRA at oral argument and in the Court’s ultimate opinion. Although only two months apart, the two diverged noticeably in their treatment of the statute. Taken alongside the Court’s unlikely statutory interpretation, these contextual factors indicate the Court’s uncertainty in dealing with the VRA.

A. ORAL ARGUMENT

Oral argument at the Supreme Court was particularly heated. Conservative Justices evidenced frustration at the constitutional implications of renewal, while liberals seemed unconvinced by the statutory interpretation offered by the utility district. Questioning reflected the expectations of many Court watchers who anticipated that the Court would impose federalism-based limits on Congress’s renewal of the VRA.

With his first question to Deputy Solicitor General Katyal, Chief Justice Roberts seemed ready to subject the VRA to the congruence and proportionality standard of City of Boerne, noting the high rate of preclearance (greater than 99 percent) and explaining, “That, to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment.”18 He referenced the VRA’s success only in passing and only to make the distinction between historic and current need, asking, “Obviously no one doubts the history here and that the history was different. But at what point does that history seek—stop justifying action with respect to some jurisdictions but not with respect to others that show greater disparities?”19

Justice Kennedy then targeted this differential treatment of the states, viewing the VRA as a judgment by Congress that “the

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19 Oral Argument, supra note 10, at 31.
sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments [in] the other. As a result, Kennedy advised Katyal, “[Y]ou have a very substantial burden if you’re going to make that case.”

Finally, Justice Scalia argued that bailout was impractical, given that only eighteen jurisdictions had availed themselves of it. When Katyal replied that Congress had rejected that argument, Scalia admonished, “The question is whether it’s right, not whether Congress rejected it.”

Taken together, Roberts’ indignation at the preclearance regime’s broad sweep, Kennedy’s concern with state sovereignty, and Scalia’s rejection of Congress’s judgment caused many to expect the invalidation of Section 5.

Meanwhile, liberal Justices questioned the utility district’s counsel regarding the statutory argument, relying heavily on the District Court’s extensive analysis. To the utility district’s argument that it was a “political subdivision” for bailout purposes, Justice Ginsburg asked, “And what do you do with a statute that has three categories—the State, political subdivision, and then there’s ‘governmental unit’? The district qualifies as a governmental unit. Why would Congress add that third category if the district came within ‘political subdivision’?”

Ginsburg continued beyond the definitional terms of the statute, noting, “[T]he district court had some assistance from the legislative development of this latest extension. There was a proposal, was there not, to allow governmental units to bailout—to allow anyone who was required to preclear to bailout?”

Though Ginsburg would later join Roberts’s majority opinion, her comments at oral argument pointed to the plain meaning of the VRA and its legislative history as reasons to reject the statutory argument.

Some commentary from Justices Ginsburg and Souter was predictive of the Court’s ultimate opinion. In quick succession, Ginsburg confirmed that the utility district was not “contesting the constitutionality of the act if it matched your obligation to preclear with the right to bailout,” and Souter added, “[D]o you acknowledge that if we find on your favor on the bailout point we need not reach the constitutional point?”

Though skeptical of the statutory argument, these Justices appeared cognizant of what rejecting that argument might entail.

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20 Id. at 34.
21 Id. at 35.
22 Id. at 37.
23 Id. at 4.
24 Id. at 8.
25 Id. at 13–14.
B. THE SUPREME COURT OPINION

Given the tenor of the litigation before it and the expectations of commentators, the ensuing opinion proves difficult to situate. An 8-1 decision, it rendered a “decidedly nonexplosive resolution”\(^\text{26}\) of the case, finding the district eligible for bailout and avoiding the constitutional question. On each point, however, something is lacking. As noted before, the statutory interpretation is unconvincing and the constitutional avoidance is only partial, with the Court detailing a host of constitutional infirmities before deciding on statutory grounds. Both the majority opinion and Justice Thomas’s dissent perform the same two-step with regard to the VRA, lauding its success in remedying discrimination while finding its constitutionality seemingly exhausted.

The Chief Justice bookends his discussion of constitutionality with reference to the avoidance canon, noting that that Court’s “usual practice is to avoid the unnecessary resolution of constitutional questions” and later that “the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”\(^\text{27}\) Only at this latter point does the Court note that “the Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it,” and that “Congress amassed a sizable record in support of its decision to extend the preclearance requirements.”\(^\text{28}\)

Ostensibly avoiding the constitutional question under a separation of powers concern, Roberts is nonetheless explicit with regard to constitutional problems, offering a litany of objections: that Section 5 “imposes substantial federalism costs,” that it is “based on data that is now more than 35 years old,” and that “there is considerable evidence that it fails to account for current political conditions.”\(^\text{29}\) He cautions that “[p]ast success alone, however, is not adequate justification to retain the preclearance requirements” and that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”\(^\text{30}\) Referencing the District Court’s finding that the congressional record “documented contemporary racial discrimination” and deterred discriminatory changes,\(^\text{31}\) Roberts does not much engage the

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\(^{27}\) *Nw. Austin*, 129 S. Ct. at 2508–13. Contrast with Hasen’s insistence that avoidance is only possible where the alternate theory is plausible. *Supra* note 7, at 182.

\(^{28}\) *Nw. Austin*, 129 S. Ct. at 2513.

\(^{29}\) *Id.* at 2511–12.

\(^{30}\) *Id.*

\(^{31}\) *Id.* at 2513.
lower court’s opinion on the constitutional question, on which it spent forty pages compared to the Supreme Court’s five.

Consideration of the landmark nature of the VRA is fleeting, even if the opinion is more tepid on this point than was oral argument. At the outset, Roberts allows that “[t]he historic accomplishments of the Voting Rights Act are undeniable” before describing improvements in the rate of black voter registration.\(^{32}\) Indeed, many of the accolades lavished on the VRA seem designed to justify abandoning it: under this view, the VRA has accomplished its purpose and is no longer necessary.\(^{33}\) Indeed, in closing his opinion, Roberts notes, “In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.”\(^{34}\)

While the majority opinion was unprepared to strike down the preclearance mandate, Justice Thomas in dissent signaled his willingness to do so. Like Roberts, he frames invalidation as a testament to the Act’s success. For Thomas, admitting that a “prophylactic law as broad as §5 is no longer constitutionally justified . . . is an acknowledgment of victory.”\(^{35}\) More aggressively than Roberts, Thomas is willing to find the goals of the VRA met, noting that “[a]n acknowledgment of §5’s unconstitutionality represents a fulfillment of the Fifteenth Amendment’s promise of full enfranchisement and honors the success achieved by the VRA.”\(^{36}\) As described later, such a tack implicitly recognizes the Act’s status since it attempts to synthesize the position by reference to the Act itself.\(^{37}\)

II. ALTERNATE THEORIES: AFFIRMATIVE SUPPORT FOR THE VRA

While NAMUDNO leaves the constitutional question open, a variety of arguments can justify the renewal of the VRA. Rather than focusing on federalism-based arguments that tend to position the VRA on the defensive, Part II advances more affirmative, expansive claims, arguing first that the VRA enjoys landmark status and then justifying that

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32 Id. at 2512.
33 Professor Pamela Karlan addresses this possibility in Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act, 44 Hous. L. Rev. 1 (2007), but ultimately endorses a realist view that § 5 continues to work to prevent backsliding. Id. at 22. She details the Act’s functions, one of which gives minorities a bargaining chip in all political discussions, another that assures all election law decisions take place against the backdrop of § 5. Id. at 24.
34 Nw. Austin, 129 S. Ct. at 2516.
35 Id. at 2525.
36 Id. at 2527.
37 See discussion infra, pp. 16–17 (discussing the ideas of Balkin and Karlan that landmark statutes recast the legal landscape, impacting the framework within which both sides will advance arguments).
standing. Scholars who posit a more affirmative role for the VRA tend to recognize other institutional and popular actors that supplement the Court’s role in announcing and developing the contours of key legal texts and sources. Such theories of extra-textual authority, legitimate in their own rights as frameworks for a variety of extra-constitutional sources, validate a role for the VRA independent of a strictly remedial function. This Part recognizes that many of these arguments are outside the mainstream. This alternate status should not be seen as truly fringe, however; indeed, the purpose of Part III is to demonstrate the degree to which descriptive accounts of the NAMUDNO Court’s action incorporate and even assume key tenets of these theories. Even independent of NAMUDNO, this Part can support the normative claim that the VRA should have special status.

In terms of organization, Part II proceeds from the narrower, “revolutionary” theory of Ackerman to a consideration of Balkin’s framework originalism before examining Eskridge and Ferejohn’s more broadly-defined “super-statutes.” At the outset, it should be noted that the VRA derives extra force under each argument: while this survey is non-exhaustive, the emergence of the VRA as a lowest common denominator, as a text accepted under a variety of theories, suggests the depth of its acceptance in some type of extra-constitutional canon.

A. Ackerman’s Theory of Canonization

Ackerman excavates an understanding of the Constitution meant to give expression to the nation’s “collective consciousness,” in the process legitimating and justifying the VRA as the product of a unique constitutional moment, the civil rights movement. Ackerman’s focus is at once popular and legal: seeking to develop a body of texts that resulted from instances of popular sovereignty, he requires that lawyers admit more than the legal system’s own precedents into that canon. Through the lens of the civil rights statutes, Ackerman argues that cycles of popular sovereignty can equal the formal Constitution in their ability

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39 Id. (noting that these texts form “the very center of the legal culture’s self-understanding” and also reflect the public’s “nation-centered self-understanding”). For an article explicitly concerned with the civil rights era where Ackerman and Jennifer Nou argue further that the modern legal profession requires an operational canon to “interpret the achievement of its immediate predecessors,” see Bruce Ackerman & Jennifer Nou, Canonizing the Civil Rights Revolution: The People and the Poll Tax, 103 NW. U. L. Rev. 63, 64–65 (2009).
to shape both the legal and lived experience, and thus both should be admitted into the constitutional canon.\textsuperscript{40}

Ackerman identifies five stages in which constitutional change occurs outside the formal amendment process, resulting in a small number of historical moments that are both popularly derived and sufficiently legitimated to merit inclusion in the canon.\textsuperscript{41} These stages include a signal, proposal, trigger, ratification, and consolidation occurring over a relatively short time period.\textsuperscript{42} In the civil rights era, he takes \textit{Brown} as the signaling moment, the Civil Rights Act (CRA) as the ensuing proposal for change, and the 1964 presidential election as the trigger.\textsuperscript{43} From this triggering election, ratification of the change in constitutional order was found in the resulting progressive policies and a concomitant onus on conservatives to displace them.\textsuperscript{44} Finally, the Nixon administration’s entrenchment of (some) civil rights policies, such as affirmative action, served as evidence of consolidation.\textsuperscript{45} Legitimating change wrought through popular movement and not the formal Article V amendment process,\textsuperscript{46} Ackerman nonetheless imposes an analytical process on that transformation to test its strength and validity.

If Ackerman employs a meaningful process to legitimate constitutional change, the purpose seems to be to recognize the variety of institutional and popular actors who were integral to it. Taking a broad view of what constitutes a period’s sources, Ackerman very consciously admits the role of non-legal actors, describing “the process through which the Court, the President, and Congress manage to speak for the people during the civil rights era.”\textsuperscript{47} Though not excluding the role of courts, Ackerman writes that “constitutional leadership turned to other branches, which broadened and consolidated \textit{Brown’s} promise in.

\textsuperscript{40} Ackerman, \textit{supra} note 38, at 1761 (casting “the landmark statutes of the 1960s as functionally equivalent to the constitutional amendments of the 1860s” and arguing from this equivalence “that they deserve a central place in the constitutional canon for the twenty-first century”); \textit{see also} Ackerman & Nou, \textit{supra} note 39.

\textsuperscript{41} 2 \textsc{Bruce Ackerman}, \textit{We The People: Transformations} 23–25 (1998).

\textsuperscript{42} Ackerman, \textit{supra} note 38, at 1762 (summarizing parts of three of his own works: \textsc{Bruce Ackerman}, \textit{The Failure of the Founding Fathers} 224–44 (2005), \textsc{Bruce Ackerman & David Golove}, \textit{Is NAFTA Constitutional?} 45–96 (1995), and 2 \textsc{Ackerman}, \textit{supra} note 41, at 24–25).

\textsuperscript{43} \textit{Id.} at 1771.

\textsuperscript{44} \textit{Id.} at 1779.

\textsuperscript{45} \textit{Id.} at 1785.

\textsuperscript{46} \textit{See} William Eskridge & John Ferejohn, \textit{Super-Statutes}, 50 \textsc{Duke L.J.} 1215, 1272 (2001) (believing that “[t]he genius of Ackerman’s constitutional moments theory is that it exploits the legitimacy-enhancing features of Article V (deliberation about an important principle) and makes it operate without the now-unworkable Article V apparatus”).

\textsuperscript{47} Ackerman, \textit{supra} note 38, at 1761.
landmark statutes like the Civil Rights Act of 1964 and the Voting Rights Act of 1965.48 Understood as a recognition of leadership, Ackerman’s theory also underscores a recognition of legitimacy: here, Congress is the torch-carrier because it gave expression to the popular will that civil and voting rights should enjoy formalized protection.

The Court in Ackerman’s theory played a key role in validating the statute and expanding doctrine to accommodate it, though not in expounding the text’s initial form or giving the VRA its initial force. The Court supports Congress, however, in its mode of review: in Katzenbach v. Morgan, the Court sustained the first challenge to the VRA and upheld the Act by expansively interpreting congressional power under Section 5 of the Fourteenth Amendment.49 By contrast, the Court upheld the Civil Rights Act in Heart of Atlanta Motel v. U.S. without empowering Congress; it relied instead on the legislature’s traditional Commerce Clause powers, ultimately “treat[ing] a landmark statute as if it involved the sale of hamburger meat in interstate commerce . . .”50

Ackerman faults the Heart of Atlanta Court’s method as formalistic in its refusal to “treat the history of [the CRA’s] enactment with the same respect that we give to the debate[] surrounding the formal amendments of the First Reconstruction.”51 Using a notably different approach, the Morgan Court validated the process by which the VRA was enacted: it affirmed Congress’s use of its Fourteenth Amendment enforcement powers to pass a piece of legislation vital to securing the goals of the much earlier First Reconstruction. As a result, Ackerman credits Morgan as “the canonization of the landmark statute,”52 something he believes evaded the CRA and the Heart of Atlanta Court.53

Arguing that statutory creations of popular sovereignty should be recognized alongside constitutional amendments, Ackerman disputes both the legal profession’s preference for the formal Reconstruction amendments of the 1860s and that same group’s privileging of the

48 Ackerman & Nou, supra note 39, at 65.
49 Ackerman, supra note 38, at 1791. Morgan used the rationality standard of McCullough v. Maryland, 17 U.S. 316 (1819), and in language also cited by Ackerman, it found Section 5 was “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,” 384 U.S. 641, 651 (1966).
50 Ackerman, supra note 38, at 1781; see Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (sustaining the CRA against a constitutional challenge).
51 Ackerman, supra note 38, at 1781–82.
52 Id. at 1791.
53 Id. at 1781–82 (noting that the Heart of Atlanta Court did not “admit the landmark statute itself into the constitutional canon . . .”).
Court’s precedents over Congress’s. From a pragmatic standpoint, Ackerman faults the legal community’s choice “to emphasize the First Reconstruction, the one that failed, while trivializing the Second Reconstruction, the one that succeeded.” 54 Election scholar Pamela Karlan affirms this position, writing that the Second Reconstruction was necessary “to resuscitate” the 1860 amendments. 55 Indeed, the civil rights movement of the 1960s served to effectuate the goals of the First Reconstruction a century prior. If that period’s principles achieved formal status in the Reconstruction Amendments, they did not achieve real success in combating problems of racial subordination and segregation.

Relatedly, Ackerman argues that the formalist preference for the First Reconstruction elevates the Court over more democratic actors, specifically Congress. He notes the tendency to “worship[] the Court in Brown while disparaging the decision of the American people to heed the call of King and Johnson,” 56 and from this seeks to achieve some equity between precedents of the Court—Brown—and precedents of Congress—the CRA and VRA—all of which resulted from the same popular mobilization. 57 Recognizing Congress’s achievement as much as the Court’s, Ackerman is willing to ascribe the Court a more supportive role in expanding doctrine to accommodate Congress’s legislation. The resulting body of texts includes the Court’s and Congress’s precedents, serving Ackerman’s stated goal to expand the constitutional canon to include “the principles expressed in the landmark statutes of the period, which served as the preeminent—if not the exclusive—vehicle for popular sovereignty in the civil rights era.” 58 Tying legitimacy to the branch most reflective of popular will, Ackerman’s model aims to more faithfully admit the products of the civil rights movement: understood functionally, it combats the formal preference for the Reconstruction Amendments and judicial precedents. 59

54 Id. at 1792.
55 Pamela S. Karlan, Voting Rights and the Third Reconstruction, in THE CONSTITUTION IN 2020, at 159 (Jack M. Balkin & Reva B. Siegel eds., 2009) (explaining that “[i]t took the civil rights movement of the 1950s and 1960s to resuscitate the Fourteenth and Fifteenth amendments’ promise of political integration”).
56 Ackerman, supra note 38, at 1792.
57 Id. at 1790 (arguing that “[w]e put the cart before the horse when we treat Brown as a superprecedent without recognizing that Brown’s canonization is a product of the very same popular sovereignty dynamic that gave us the landmark statutes”).
58 Ackerman & Nou, supra note 39, at 148.
59 Id.
B. Balkin’s Theory of Constitutional Constructions

Professor Balkin, meanwhile, advances a conception of constitutional development that fits within the originalism model but incorporates changes in constitutional constructions. He terms this model “framework constitutionalism,” in which the constitution gives a framework for governance that is then filled in by successive constructions. Like Ackerman, Balkin explicitly departs from a pure Article V mode of constructing the Constitution and embraces the legislative—and not simply the legal—role in providing content to that constitutional framework. If the trend is toward expanding the permissible institution for initiating and implementing change, Balkin’s model supports Ackerman’s in recognizing the benefits of collaboration between the judiciary and legislature in better reflecting popular will than when the judiciary acts alone.

Courts are necessary to rationalize constitutional constructions emerging from the political branches, “mak[ing] sense of them and legitimat[ing] them while subjecting them to legal authority created by the courts . . . .” Under this legal authority, courts “provid[e] reasons why the constructions are faithful to the Constitution,” a process that involves “subjecting these constructions to reasons—articulating rules and principles of judgment—that will presumably be binding on the political branches in the future.” Under this legitimacy-enhancing role, the courts synthesize Congress’s work with its precedents, thereby fitting new additions within the accepted legal landscape. Through this iterative and confirmatory process, the courts can legitimate change that it did not promulgate, which Balkin notes was increasingly the case during the civil rights era. Though the Court is not the leader, Balkin’s theory nonetheless crafts an important role for the Court. Under his theory:

Courts play their supporting role by shifting what is “off-the-wall” and “on-the-wall” in constitutional doctrines and expectations about the likely application

61 Id. at 559. Balkin finds a “major role for constitutional construction and implementation by the political branches as well as by the Judiciary.” Id. at 550.
62 Id. at 551 (noting their “joint responsiveness to public opinion over long stretches of time” such that “they inevitably reflect and respond to changing social demands and changing social mores”).
63 Id. at 570.
64 Id.
65 Id. at 575 (admitting that “[t]wentieth-century constitutional revolutions, like the New Deal revolution of the 1930s or the civil rights revolution of the 1960s, have not primarily been led by the federal Judiciary”).
of constitutional doctrines. They do this in order to make sense of the facts on the ground created in ordinary politics. Key questions of judicial construction concern whether and how to legitimate changes or innovations in statecraft and whether and how to cooperate with parts of the national political coalition . . . .

The courts are arguably more required than in Ackerman’s theory to legitimate different constitutional constructions, but Balkin notes that his is a theory of judicial review and not judicial supremacy, in which courts “act as a stabilizing force, and hold officials . . . accountable to law, but they never have the last word.” Cooperative rather than primary actors, courts are essential to maintaining and, when necessary, recasting the legal landscape.

Balkin’s theory continues key strands of Ackerman’s theory, while noting particular points of difference and departure between the two. Balkin’s mission is in the construction of the Constitution, Ackerman’s the composition of a twentieth-century constitutional canon. To that end, Balkin’s constitutional constructions are also marked by the degree to which they are canonical. Constructions are canonical when “their meaning is salient and important to our political regime,” when “they symbolize important commitments and values” such that “people feel the need to rationalize and synthesize their positions with these constructions.” Karlan highlights a similar concept in Law of Small Numbers, in which she discusses Brown and the degree to which competing sides in the affirmative action debate seek to be understood as the true inheritor of its legacy, what she terms the “struggle for the constitutional high ground.” Like Ackerman’s canonization, Balkin’s constitutional constructions recast and reshape the contours of legal culture: extending from Karlan’s example of Brown, the larger civil rights era recast the legal landscape in which its statutes operate. Under this view, canonical constitutional constructions derive force because they have reframed the argument and required that people—in particular, litigants—confront these particular constructions and the values they embody.

66 Id. at 577.
67 Id. at 601.
68 Id. at 585 (defining canonical constructions as those that are “important to legal understanding—and especially professional legal understanding—in the current constitutional culture”).
69 Id. at 586.
In addition to canonicity, Balkin also requires durability, a measure of statutory entrenchment that militates against the easy repeal of such constructions.\textsuperscript{71} Unlike Ackerman, however, Balkin does not attribute these constitutional constructions the same legal status as Article V amendments; rather, they constitute “ordinary legislation,” but legislation with such a degree of durability and canonicity that changing it is difficult in practice.\textsuperscript{72}

Balkin also discusses the VRA directly, ascribing it significant constitutional import. Moreover, he cites the VRA’s inclusion as part of “the ‘constitutional catechism’ that all Supreme Court Justices who seek confirmation must accept as valid.”\textsuperscript{73} One virtue of this catechism is its reflection of current norms—if not resulting as directly from moments of mass mobilization and popular sovereignty, sources rationalized under Balkin’s model now enjoy popular support sufficient to form part of the national consciousness. Indeed, the VRA would seem to form an unequivocal part of this collective consciousness, with Balkin writing that “even though parts of [the VRA] must be renewed by Congress, it is currently unthinkable that Congress would not renew it.”\textsuperscript{74} It is interesting that, just prior to \textit{NAMUDNO}, Balkin offers such an assertive and predictive statement, suggesting that the VRA is so central to current constitutional construction that its validity is not even debatable.

\textbf{C. Eskridge and Ferejohn’s “Super-Statutes”}

Finally, Professors Eskridge and Ferejohn’s theory of “super-statutes” identifies a potentially broader set of statutes that have attained special force given the rigorous process and debate to which they were subjected.\textsuperscript{75} In turn, these statutes stimulate debate and focus popular attention. The result is that longstanding statutes “successfully penetrate public normative and institutional culture in a deep way,” entrenching themselves both legally and publically.\textsuperscript{76} Their model derives legitimacy through “feedback from the populace, experts, and officials that allows these super-statutes to sink deeply into our normative consciousness.”\textsuperscript{77} Focusing on the quality of the debate both leading to and following enactment, the authors aim to capture statutes that reflect this ‘normative

\textsuperscript{71} Balkin, \textit{supra} note 60, at 586 (defining durability as those constructions that are “embedded in political, economic, and social practices . . .”).

\textsuperscript{72} \textit{Id.} at 582.

\textsuperscript{73} This catechism “suggests there are a series of decisions, institutions, and statutes that have been so accepted by the public and by political elites that no judicial nominee can be confirmed if he or she would threaten their continuation.” \textit{Id.} at 589.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Eskridge & Ferejohn, \textit{supra} note 46, at 1216.

\textsuperscript{76} \textit{Id.} at 1215.

\textsuperscript{77} \textit{Id.} at 1217.
constructions have no set time limit. Some very important shifts have emerged
— constitutional change that takes place over a longer period of time, arguing
―single stylized dramatic confrontation.‖ That said, super-statutes are not exclusive of Ackerman’s theory; rather, Eskridge and Ferejohn’s model is broader and takes account of more statutory events than does Ackerman’s. Aware of the difference, they note that “few of such moments meet the Ackermanian model as well as the Civil Rights Act does, and none engaged the public at the high level they were engaged in 1963–64.”81 Seemingly, then, their model includes Ackerman’s but captures those longer processes and deliberations that might not be encompassed within Ackerman’s model.

By illustration, in their historical review of super-statutes, the authors identify a large number of statutes that are sufficiently principled and deliberative to come within their broader definition. Noting the use of super-statutes in early American history, the authors point to the statutory creation of the Bank of the United States, which was “adopted only after a great normative debate.”82 Similarly, landmark legislation from the New Deal Congress—including but not limited to the Securities Act, the National Labor Relations Act, and the Fair Labor Standards Act—also meets the authors’ criteria of statutes affirmed and reaffirmed in an iterative process between courts, Congress, and the public.83 While Eskridge and Ferejohn focus their discussion on the CRA, their argument extends to the VRA, given the two statutes’ similar historical positioning. They write that the CRA “is a proven super-statute because

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78 Id. (explaining that “the laws we are calling super-statutes are both principled and deliberative and, for those reasons, have attracted special deference and respect”).
79 Id. at 1271.
80 Id. at 1270. Notably, Balkin also differentiates his theory as allowing for constitutional change that takes place over a longer period of time, arguing “[b]y contrast, my model assumes that constitutional constructions come in many different sizes, from very great to very small. Moreover, constitutional constructions have no set time limit. Some very important shifts have emerged from modest changes that culminate over time.” Balkin, supra note 60, at 580.
81 Eskridge & Ferejohn, supra note 46, at 1270 (footnote omitted).
82 Id. at 1223.
83 Id. at 1227.
it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life...86 Given the process of origination and entrenchment, the civil rights statutes now form part of the normative consciousness.

Interpretation of a super-statute is an open exercise, putting the authors in agreement with Ackerman and Balkin. Where Ackerman notes that identifying a canon is different from interpreting a canonical text85 and where Balkin allows each generation to fill in constitutional constructions,86 Eskridge and Ferejohn are comfortable with the CRA proving “the situs of normative conflict.”87 Super-statutes are admitted only when their principle is sufficiently important to have stimulated debate and focused attention on that issue. It is almost prerequisite to debate of this magnitude that there be significant disagreement; thus, the conflict is not only permissible, but desirable in that it stimulates the community to formulate and codify its norms.88

Still, there are limits to permissible interpretation of super-statutes. In the late 1980s when the Rehnquist Court narrowly construed the employment discrimination provisions of the CRA, the pushback from the public was considerable. Eskridge and Ferejohn note that while, for the Justices, simple strict construction might have dictated the result, they “did not appreciate sufficiently... that much of the public did not consider these ordinary cases,” a fact that ultimately led Congress to reaffirm the CRA’s core principles in the CRA of 1991.89 Given the view that these statutes are different, the authors advise that such statutes be interpreted liberally.90 In part, this interpretive methodology relates to the relevant institutional actor: indeed, given the intense public debate and the requirement that super-statutes penetrate the normative consciousness, “Congress is deemed the most appropriate forum for correction,” almost forcibly relieving the Court of some of its usual tools of interpretation

84 Id. at 1237.
85 Ackerman asks that the reader “distinguish two issues: canon definition and canon interpretation. The first seeks to identify the key texts of our tradition; the second, to figure out what they mean. Almost all of our debates center on the second question.” Supra note 38, at 1755.
86 Balkin, supra note 60, at 560.
87 Eskridge & Ferejohn, supra note 46, at 1237.
88 Id. (writing that “[g]iven its commitment to a great principle and the requirement of deliberation, it is hard to imagine a super-statute that would not generate intense disagreements as to the application of the principle to particular cases”).
89 Id. at 1238–1239.
90 Id. at 1247 (advising that super-statutes “be construed liberally and in a common law way”).
and requiring a lower standard of review. The authors argue that "where a statutory precedent has stimulated focused normative attention in the political process—and survived it intact—stare decisis values are and ought to be heightened," and ultimately that the Court should afford more weight to those judgments of Congress forged through such a process.

In sum, Eskridge and Ferejohn advance a model that, like the theories of Ackerman and Balkin, credits popular sovereignty while in some form embracing traditional separation of powers: they see super-statutes as a means of mediating the "tension between the desirability of normative updating and the need for it to be legitimate along lines of popular sovereignty." Believing that this body of "fundamental or quasi-constitutional law" does this, the authors offer an argument directly applicable to Congress’s statutory texts.

III. COMMENTARY

Where Part II sought to describe affirmative arguments for according the VRA extra force as precedent, Part III argues that many descriptive accounts of the NAMUDNO Court invoke key tenets of the theories outlined in Part II. These analyses describe a Court that takes account of the VRA’s landmark status. However, where the theories all posit some meaningful, collaborative role for Congress, the actual experience appears less positive. Indeed, a significant debate preceded NAMUDNO concerning Congressional willingness to meaningfully amend the VRA. The Court’s ultimate avoidance of the reauthorization question, then, should be read in line with Congress’s alleged avoidance: if some view the Court as hostile to what it considered inadequate efforts by Congress, then in NAMUDNO the Court seems similarly stymied in its actions, opting to rest on the statutory argument rather than directly confront the constitutional one at the heart of the legislation. This Part suggests that the ultimate testament to the strength of the VRA may be the weakened role of institutional actors—it is not simply that the

91 Id. at 1251 (arguing that super-statutes deserve “a super-strong presumption of correctness, exceeding even that which stare decisis normally accords common law precedents,” while noting that the authors “have been critical of that super-strong presumption for ordinary statutes because there are many barriers (including inertia) to Congress’s correction of ordinary precedents”).
92 Id. at 1252.
93 Id. at 1272.
94 Id. at 1275.
95 See id. at 1216 for the proposition extendable to the VRA that “[s]uper-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem.”
iterative process behind the VRA has declined, but that each body, the Court and Congress, is less able to act with respect to the VRA. Such a reading may assume the legitimacy of the process underpinning the VRA, simplifying the inquiry and asking whether the VRA has cultural and popular import, not whether the statute should receive special deference by virtue of the process leading to its creation. If unwilling to place explicit reliance on the VRA’s special force, the Court can be seen to have implicitly endorsed some mode of its continued viability, even as it seems to resist collaboration with Congress. Indeed, concern over unsettling norms is a core aspect of the Part II arguments, a tenet the Court seems to have followed.

A. REALIZED SPECIAL STATUS?

In the week following the decision’s release, Ackerman and Balkin each commented directly on the applicability of his own theory to the result at hand. Ackerman argued that the Court treated the VRA differently than it would treat routine legislation from Congress, which the Court would have invalidated had it suffered from similar constitutional defects. Explaining this result under his theory of constitutional moments, Ackerman stressed “Robert’s [sic] (reluctant) recognition that there really is something special about section 5,” and offered his theory as one that “vindicates [Roberts’s] sober second thoughts, and his surprising turnaround from the aggressive line he was taking at oral argument.” Notably, Ackerman views this as a realization of Roberts, born of the VRA and not of practical necessity. Where others may view Roberts’s opinion as more strategic, Ackerman attributes it a certain sincerity in its view of the VRA, with almost lately-discovered respect. In his outlook, Ackerman is similarly optimistic, believing that “[t]he Justices’ anxious hand-waving shouldn’t be taken too seriously.” If Roberts’s sincerity is accepted, then Ackerman is right that the Court’s opinion seemingly militates against later invalidation of the VRA. More broadly, however, the question of sincerity may be immaterial if what precipitated the Court’s decision was a realization that the VRA does have special meaning, at least to some. If the decision reflects the Court’s capitulation to popular sentiment, its own beliefs are less

97 Posting of Bruce Ackerman to Balkanization, Section Five and the On-Going Canonization of the Civil Rights Revolution, available at http://balkin.blogspot.com/2009/06/section-five-and-on-going-canonization.htm l (June 22, 2009, 16:09 EST) (asking, “Quite simply, if the Court had treated the VRA as a run-of-the-mill statute, can there be any doubt that the five conservatives would have struck it down?” and answering that “invalidation was not only suggested by the Justices’ comments at the oral argument, but by their genuine commitments to the dignity of the states, their notions of proportionality, and other principles of federalism”).

98 Id.

99 Id.
relevant. Such a result would suggest in part a hyper-entrenchment of the statute based on popular sentiment which the Court is hard-pressed to dislodge.

Similarly, Balkin views the Court’s behavior in NAMUDNO as consistent with his theory of constitutional constructions. Explaining an arguably minimalist shift on the Court, Balkin discusses the VRA and the CRA, the latter in the context of the Court’s Title VII ruling in Ricci v. DeStefano that same term.\footnote{Posting of Jack Balkin to Balkanization, Why Has the Roberts Court Suddenly Gone Minimalist?, http://balkin.blogspot.com/2009/06/why-has-roberts-court-gone-minimalist.html (June 29, 2009, 15:50 EST).} He notes that the two civil rights statutes are “characteristic of the constitutional regime in which we currently live” and “central to our notion of what the Federal government can do and should do.”\footnote{Id.} Because of their symbolic import, he believed the Court was loath to invalidate such core statutes, arguing:

> If the Court had struck down elements of these two crown jewels of the civil rights era, passed by democratic majorities, this would have had powerful symbolic significance, and undermined the Justices’ legitimacy, especially if the decisions had been by a vote of 5-4, with the conservatives voting to use the power of judicial review to hold key civil rights provisions unconstitutional.\footnote{Id.}

Under a legitimacy rationale, the Court’s bypass of the constitutional question also prevented it from exercising its powers fully, thus confining its role relative to more democratic actors. Rather than implying judicial respect for the political branch, Balkin’s analysis elevates the popular significance and symbolism of these statutes at the expense of the more institutional actors of the Court and Congress.

Less self-consciously than Ackerman and Balkin, other commentators also ascribe hesitancy to the Court’s opinion. In his analysis for SCOTUSblog, Lyle Denniston postulates, “It is pure speculation, but it is very likely that a decision to nullify Section 5 simply ‘would not write,’ in the vernacular of judging, when it came down to that.”\footnote{Posting of Lyle Denniston to SCOTUSblog, Analysis: Is Section 5’s Future Shaky?, http://www.scotusblog.com/wp/analysis-is-section-5s-future-shaky (June 22, 2009, 12:23 EST).} Former New York Times Supreme Court reporter Linda Greenhouse echoed this view, musing:
Clearly, the conservative justices who forced this case onto the [C]ourt’s plenary docket back in January . . . stared into the abyss and blinked. Or maybe it was just Justice Kennedy who blinked. . . . But I’d like to think it wasn’t simply Anthony Kennedy who got cold feet at the prospect of a decision striking down one of the iconic achievements of the civil rights revolution, one that was not simply lying around unattended but that had been re-enacted with near unanimity by Congress only three years ago.\footnote{104}

Under these views, the weight of the VRA worked to blunt and temper the Justices’ initial inclinations. If at the moment of forming its judgment the Court ‘blinked,’ it is because the standing of the VRA in popular and legal culture cautioned against invalidation, with the continued perpetuation and acceptance by Congress and, even more importantly, the public serving as an obstacle to the Court’s seemingly preferred course of review.

Under the political compromise explanation of commentator E.J. Dionne, Jr., the NAMUDNO Court was not motivated by sincere reverence for the VRA but by the legitimacy and political costs associated with invalidation.\footnote{105} Acting politically, then, the Court can be seen to respond even more directly to public support for the statute. Under this view, prudential concerns weigh on the Court, which acts aware that overturning a key statute by a sharply divided court “would be rightly seen as an outrageous form of judicial activism.”\footnote{106} Thus, Dionne is left with what appears to be “raw political bargaining,” quoting Pamela Karlan for the view that “I don’t think this was a minimalist decision. I think it’s a compromise decision because there are five Justices who didn’t want to strike down the act.”\footnote{107} The reason for this pause is the status of the VRA, according to Karlan “one of the few acts in American history that was the product of a truly mass mobilization.”\footnote{108} Thus, accepting the popular nature of the VRA, such a court is unwilling to depart from public opinion.

Agreeing that the VRA has popular import, these explanations diverge in explaining the Court’s motivation. This may be the point: the question is simply whether the VRA matters more popularly, an inquiry that is less wedded to the promulgating institutional actors.

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B. INTERPLAY WITH CONGRESS

If one prong of the outlined theories involves the respect that landmark statutes derive from their degree of cultural entrenchment, another prong involves their perpetuation by extra-judicial players such as Congress. To this point, the NAMUDNO decision plays an odd role: on the one hand, it may recognize congressional control over civil rights legislation (as derived from the enforcement clauses of the Fourteenth and Fifteenth Amendments), while on the other hand, it may serve to put Congress on notice that its product is constitutionally suspect. Indeed, the NAMUDNO Court’s relationship to Congress depends in part on the degree of institutional respect for the body passing the VRA, a related inquiry to the Court’s respect for the VRA itself that may have given the Court pause. However, NAMUDNO may have severed the relationship between the text and the body that passed it; as described above, the inquiry may now be a simpler one, turning on the Court’s attitude toward the VRA itself and not Congress’s role in renewing it. Indeed, the Court’s own inaction on the constitutional question suggests the broader institutional difficulty in confronting aspects of the VRA, a criticism not merely for Congress. Though the Court questions congressional reauthorization, this section does not seek to explicate congressional power to renew the VRA; that debate is alive, the literature is replete, and the arguments beyond the scope of this analysis.109 However, brief recourse to the reauthorization debates provides the background against which the Court acted.

In The Promise and Pitfalls of the New Voting Rights Act, Professor Nathaniel Persily offers a descriptive account of Congress’s 2006 reauthorization of the VRA. While not uncritical—Persily allows that the reauthorization process was a “missed opportunity” to deal with next-generation voting challenges, such as voter ID laws and felon

disenfranchisement—he ultimately endorses a realpolitik view of congressional legislating, writing that the structure remained intact in order to preserve an otherwise tenuous political coalition. 110 Of the Section 5 coverage formula, he writes, “[t]he most one can say in defense of the formula is that it is the best of the politically feasible alternatives or that changing the formula would sufficiently disrupt settled expectations . . . ” 111 Nonetheless, Persily believed the law would weather constitutional challenge, writing that the VRA “lies squarely in the core” of congressional power to enforce civil rights and noting, quite presciently, that “the Court might interpret the law to avoid constitutional difficulty.” 112 Aware of the political landscape facing the VRA—both in Congress and before the Court—Persily’s reading accounts for legislative and judicial inaction.

Even disagreeing with the substance of Congress’s renewal, Richard Pildes proceeds from the premise that some form of the VRA continues to be required. He does not argue for federalism-based limits on the VRA, charging Congress instead with “political abdication” in its unwillingness to revamp the VRA, avoidance behavior he deems comparable to institutional aggrandizement. 113 That this characterization speaks in terms of avoidance is telling, though Pildes anticipates a different response from the Court, one that is “deliberation-prodding . . . to press Congress into accepting the responsibility it avoided in the 2006 renewal process.” 114 More willing to accept that a Court acting in good faith can positively redirect congressional focus, Pildes views the Court as less subject to the pressures of the VRA.

Addressing this interplay between the Court and Congress, commentators differ markedly on the question of good faith and motive. Often, belief that there is room for the Court to act tracks a belief in the Court’s good faith effort. Thus, Professor Ellen Katz rests on an institutional conception of the opinion, viewing NAMUDNO not as an instance where Roberts and his colleagues “blinked,” but rather as “calculated, shrewd, and (given what he believes about the statute) institutionally smart.” 115 But Katz’s account of the Court’s motivation is derived not simply from recognition of the statute’s salience, political or otherwise; instead, she believes it reflects Roberts’s institutional

111 Id. at 208.
112 Id. at 252–53.
113 Pildes, supra note 96, at 148, 152.
114 Id. at 148–49.
preference that Congress act. Indeed, Katz believes the opinion “prompt[s] Congress to reconsider Section 5,” a position she repeats in follow-up to the actual opinion when she writes that “the NAMUDNO Court was careful to preserve a space for a congressional response. The Court structured its opinion to encourage, to prod, and—almost certainly—to require Congress to act.” This assessment rests significant control in the Court: it can—and, depending on one’s read of NAMUDNO, does—command Congress to act. It also assumes room for Congress to act, a necessary corollary to its command that it do so. More critical of Congress’s legislative effort—which she believes reflected a process of “failed deliberation” in which “Congress renewed the Voting Rights Act not as considered judgments but instead as unreflective means to advance raw political preferences”—Katz thus does not perceive any usurpation of congressional initiative. As a result, the Court “saw that failure as reason to assume the role of the institution under review,” but only partially, and it did not act to repeal Congress’s legislation. Viewing the VRA as amendable, this view allows a court acting legislatively—or possibly, politically—to direct Congress to behave similarly.

Where Katz views the Court’s action positively, Professor Richard Hasen presents various alternate readings of the NAMUDNO decision. His work proceeds from the premise that the NAMUDNO Court’s use of the avoidance canon resulted in an implausible interpretation of the bailout eligibility question. Offering three possible explanations for this avoidance, Hasen canvasses the possible relationships to Congress, examining the Court’s possible motivation. Under the theory of “fruitful dialogue,” the Court chose to remand the VRA to Congress, causing the Court “to jettison its usual rules of statutory interpretation” and return legislation to Congress to try once more. This view fits well with Katz’s theory of cooperative branches working together on a statute that can be meaningfully amended. Nonetheless, Hasen does not necessarily accept this explanation for the decision and proceeds to consider other possibilities. The “political legitimacy” theory, by contrast, explains the Court’s action as a desire to avoid deciding a highly salient issue

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116 Id. (explaining her belief that Roberts “recognize[d] that striking it down is both a big deal and something he would rather the Court not have to do”).
118 Id. at 994.
119 Id. at 999.
120 Hasen, supra note 7.
121 Id. at 215 (noting this action “despite the strong negative views of some members of the Court on the underlying constitutional question”).
122 Id. at 217 (“Though the fruitful dialogue theory sounds plausible, it is not clear that it explains the actual thinking of the Justices.”).
given potential harm to the Court’s legitimacy.\textsuperscript{123} The anticipated political harm is not from Congress but from the public since the legitimacy of the VRA is determined by the degree of public entrenchment the statute enjoys. To avoid veering too far from this public acceptance, the Court must admit, at least in part, that the statute is fixed and important enough that the Court’s overruling of it would be self-harming.

The third and final explanation proceeds from the second, though the Court under this view does not avoid out of legitimacy concerns but out of more proactive and strategic “political calculus.”\textsuperscript{124} Hasen is clear that this allows the Court to “soften public and Congressional resistance to the Court’s movement of the law in a direction that the Court prefers as a matter of policy.”\textsuperscript{125} A court acting like this does not abide the theories in Part II; the Court’s hesitation is not borne out of any respect for the statute, but merely involves a question of “timing” in how to best dismantle an important piece of legislation.\textsuperscript{126} The Court under this view acts alone, clearly aware that it acts against public sentiment. More overtly political, this reading entirely dispenses with Congress’s role, assuming as it does that the statute is non-salvageable. This last explanation ascribes the most nefarious motivation to the Court, or what Hasen terms his “least charitable reading.”\textsuperscript{127} Though Hasen admits one cannot glean the Court’s actual motivation, he believes the Court’s use of avoidance and anti-avoidance tools, “[w]hether intended or not . . . allows the Court to control the speed and intensity of constitutional and policy change.”\textsuperscript{128} In the context of \textit{NAMUDNO}, avoidance tools may also serve to stay a decision on which the Court is uncertain.

A final viewpoint focuses less on motivation and more on effect. In the \textit{Harvard Law Review}’s November analysis of the 2008 term, \textit{NAMUDNO} is described as a “largely status quo-preserving decision offer[ing] Congress little incentive to alter its current practice of political avoidance in the voting rights arena.”\textsuperscript{129} Viewing the decision merely as a postponement of the “constitutional showdown,” the review contends that the result of \textit{NAMUDNO} leaves the Court administering Congress’s enforcement powers.\textsuperscript{130} Though appearing to be minimalist in its avoidance of the constitutional question, \textit{NAMUDNO} in fact reaches a “strongly

\textsuperscript{123} \textit{Id.} at 218.
\textsuperscript{124} \textit{Id.} at 219.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.} at 183.
\textsuperscript{128} \textit{Id.} at 184.
\textsuperscript{130} \textit{Id.} at 370 (describing “a world in which the Court, not Congress, decides how best to enforce Section 2 of the Fifteenth Amendment”).
maximalist result,” in that it “more likely elevates, not diminishes, the future role of the Court in shaping the VRA’s reach . . . .” In the interplay between Congress and the Court, this perspective views the Court practically—if not intentionally—assuming the leading role in managing the VRA, potentially militating against the Part II theories that view the statute as more impregnable, shielded from aggressive review and management, or at least jointly overseen by the Court and Congress.

CONCLUSION

This Note argues that the result in NAMUDNO is explainable at least partially by the theories of Professors Ackerman, Balkin, Eskridge, and Ferejohn, all of which justify preserving the VRA for reasons that ultimately gain credence in the various characterizations of the NAMUDNO Court. Though the Court’s action may have credited these theories, it did so only to a point. Indeed, the Court seems to have internalized only one part of these theories—that the VRA is a statute with special status and force, which perhaps inhibited the Court from adopting a more activist stance. In contrast, the NAMUDNO decision seems least allegiant to the theories’ posited relationship of the Court to Congress. Under affirmative arguments, the VRA derives its extra force from a legitimating function born of a more popular and broader-ranging set of actors than the Court alone. But commentators have questioned what relationship the Court envisions with Congress concerning the VRA. Read as an instance of good-faith prodding or “fruitful dialogue” by the Court, the NAMUDNO decision is more fully consistent with the theories’ views of continual and collaborative deliberation over important legislation. Ascribed more strategic motivation, however, the NAMUDNO Court may be seen to curtail Congress’s role, in what would be a stark departure from the dynamic these theories envisage. That said, in preserving the VRA and preclearance requirements, even absent a strong working relationship with Congress, the Court may be seen to focus on and elevate the text itself, no longer as concerned with the process underlying it.

NAMUDNO provided insight into the Roberts Court’s treatment of Section 5. Notably, that case study is now over. On November 3, 2009, the District Court for the District of Columbia entered a consent judgment exempting Northwest Austin Municipal Utility District Number One from Section 5’s preclearance requirements. Thus, less than five months after the Supreme Court made the District eligible for bailout, the District secured it, effectively ending its litigation over the VRA. As part of the consent decree, the constitutional question was

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131 Id. at 362.
dismissed without prejudice. The question of whether the Court will accept any part of the affirmative arguments when the question next presents itself remains equally open.

133 Id.