Compelling Friends: State Attorneys General as Amicus Curiae Before the Supreme Court,
NAMUDNO in Context

Those familiar with Supreme Court jurisprudence often speculate about what truly
influences the decision-making processes of Supreme Court Justices of the United States. Some
scholars, going a step further, have attempted to quantify the impact, if any, that amici or friend
of the court briefs have on the decision-making processes of Supreme Court Justices. To be sure,
it is not unusual for the Supreme Court to refer to an amicus brief in its official opinion.¹ Still,
how much of an impact these briefs have on the actual decision-making processes of the Justices
remains to be seen. Nevertheless, many scholars have noted a steady uptick in the number of
amici being filed before the Supreme Court over the years.² Empirical studies indicate that the
Supreme Court tends to rule in accordance with amicus briefs submitted by the Solicitor General
of the United States in a majority of the cases in which the Solicitor General files an amicus
brief.³ Another study found that the states also have a noteworthy influence on the Court.⁴

¹ See Ryan Juliano, Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court, 18 Cornell J.L. & Pol’y 541, 549 (2009) (discussing empirical studies by authors who “dubbed the Solicitor General the ‘king of the citation-frequency hill’ as the Court referred to the Solicitor General’s brief in just over 40 percent of the cases in which the Solicitor General appeared as an amicus curie between 1946 and 1995”).
² See Linda Sandstrom Simard, An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 Rev. Litig. 669, 671-72 (2008) (discussing the “tremendous surge in amicus activity over recent decades...during the last half of the twentieth century, the Supreme Court saw an astonishing 800% increase in the number of amicus filings on its docket); see also Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 33-34 (2004) (discussing the record 107 briefs that were filed in Grutter v. Bollinger and Gratz v. Bollinger and the impressive 33 briefs filed in Lawrence v. Texas).
³ Juliano, supra note 1, at 541 (“Between 2005 and 2007, the Court ruled in favor of the party supported by the Solicitor General in 89.06 percent of the cases decided on the merits”).
Studies such as these indicate that the amicus brief can be a powerful tool in the hands of government lawyers and interest groups alike. State Attorneys General (SAGs) have indeed embraced the amicus brief as a weapon in their legal arsenal. As chief legal officers of their states, SAGs are probably most known for representing state agencies, state officials and the public interest of their citizenry. However, SAGs play an increasing important role as amicus curie which should not be ignored. The amicus brief is often used by SAGs when their state has an interest in the outcome of a case and/or when their constituents stand to be affected by a decision in which their state is not a party. By submitting these briefs jointly or separately, the states can aid in shaping the policymaking decisions of the Court.

Through an examination of *NW Austin Municipal Utility District No. 1 v. Holder* (NAMUNDNO), a recent Supreme Court case in which six states (North Carolina, Arizona, California, Louisiana, Mississippi and New York) appear jointly as amicus curiae in support of Attorney General Holder and the constitutionality of Section 5 of the Voting Rights Act of 1965 (VRA), this paper will examine the impact and implications of this particularly unique amicus brief as well as the federalism concerns surrounding the brief, ultimately deducing what, if anything, this action on the part of the states indicates about the evolving role of the State Attorney General as amicus curiae. This paper does not attempt to present a comprehensive look at voting rights case law in general. Instead, it aims to illustrate the significance of amicus briefs

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4 Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 Kan. J.L. & Pub. Pol’y 17, 26 (2001) (citing data which showed that states prevailed 44.3% of the time as amicus during the 1960s, 47.2% of the time during the 1970s, 58.1% of the time in the 1980s and 45.2% of the time in the 1990s).

5 See Jason Lynch, *Federalism, Separation of Powers, and the Role of the State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev 2002-03 (2001) (discussing the role and powers of the SAG); *see also State of Rhode Island v. Lead Industries, Ass’n, Inc.*, 951 A.2d 428, 474 (R.I. 2008) (citing 7 Am.Jur.2d Attorney General §6 at 11(2007), “Under the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest...[he/she] may also intervene in all suits or proceedings which are of concern to the general public”); *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976) (“[T]he attorney general may typically exercise all such authority as the public interest requires”).
submitted by SAGs during two critically important historical moments within the context of voting rights law in particular. Specifically, this paper contextualizes NAMUDNO by highlighting the history of amicus participation in its most important predecessor, *South Carolina v. Katzenbach*, ultimately comparing and contrasting the impact of amicus briefs in the two most important voting rights cases argued before the Supreme Court to date. Both NAMUDNO and *Katzenbach* represent distinct, yet equally significant historical moments that were, in part, shaped by state participation in the amicus process.

**Amici and the Courts: A Brief History**

Amicus briefs are not a US phenomenon. In fact, amici submissions date back to ancient Rome.⁶ Adopted by the English under the common law, the amicus brief served as a friend of the court in that it provided impartial legal information and often supplemented a lack of expertise by the court.⁷ Today the friend of the court description seems less fitting since the amicus more often than not takes on an advocacy oriented role in support of a litigating party. The briefs have consequently been dubbed “friend of a party” by some who aim to articulate the modern day role of amici.⁸

The advocacy role taken on by amicus briefs has led some to dismiss them as mere interest group propaganda tools. Judge Richard Posner, for example, has argued that “amicus briefs filed in his court provide little or no assistance to judges because they largely duplicate the

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⁷ *Id*.

⁸ *Id*.
positions and arguments advanced by the parties.” Some regard the briefs as a “nuisance—imposing unwarranted burdens on judges and their staffs with few, if any, mitigating benefits.” Justice Scalia also notes the interest group lobbying behavior of amicus briefs when he refers to the “self-interested organizations” who submitted briefs in *Jaffee v. Redmond.* To be sure, the sentiments expressed by Judge Posner and Justice Scalia are quite harsh; however, they represent only one side of the debate surrounding amicus curiae. In “The Influence of Amicus Curiae Briefs on the Supreme Court,” Joseph Kearney and Thomas Merrill point out that “Attitudes within the legal community about the utility and impact of amicus briefs vary widely…the most common reaction among lawyers and judges is moderately supportive.”

Regardless of how one feels about the role of amicus curiae, their impact cannot be devalued since they are often cited by the Court. Furthermore, studies indicate that these briefs have an impact whether or not it is actually admitted by the Justices. In “Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court,” Ryan Juliano found that “the party supported by the executive’s advocate won judgment nearly 90 percent of the time…[In fact,] the individual Justices consistently sided with the Solicitor

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10 *Id.* at 746.
11 *Id.*
12 See generally Juliano, *supra* note 1, at 543-548.
13 Kearney & Merrill, *supra* note 9, at 745.
14 *Id.* at 757; Juliano, *supra* note 1, at 557-58.
15 See Juliano, *supra* note 1, at 549-51, 564-65.
General...vot[ing] for the party supported by the Solicitor General more than half the time, and all but one of the Justices did so more than two thirds of the time.”\textsuperscript{16}

Admittedly, the Solicitor General is before the Supreme Court more frequently than the states. Nevertheless, the states are “important players before the nation’s high court.”\textsuperscript{17} In “State Litigation Strategies and Policymaking in the U.S. Supreme Court,” Jack McGuire points out that SAGs have increasingly used litigation in federal courts to create national policy.\textsuperscript{18} McGuire found that between 1960 and 1994 “states participated in an average of 22.1 [Supreme Court] cases per term or 16.9 percent.”\textsuperscript{19} There has been an increase in amicus submission by the states in recent years. In 1993, for example, the states participated in 45 percent of the cases decided by the Court.\textsuperscript{20} McGuire attributes much of the dramatic increase in amicus participation by the states to the National Association of Attorneys General (NAAG). He points out that “NAAG has shifted its focus and become proactive in coordinating and integrating state legal policymaking.”\textsuperscript{21} McGuire sees NAAG as a “centralizing mechanism for coordinating and improving state argumentation before the Court.”\textsuperscript{22} He goes on to talk about Amici Focus Groups created by NAAG in an effort to increase state amicus activity.\textsuperscript{23} “Focus Group members offer technical assistance to other states and routinely file amicus briefs supporting the

\textsuperscript{16} Id. at 564-65.
\textsuperscript{17} McGuire, supra note 4, at 17.
\textsuperscript{18} Id. (referring specifically to Microsoft antitrust litigation and tobacco litigation).
\textsuperscript{19} Id. at 20.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 22.
\textsuperscript{22} Id. at 23.
\textsuperscript{23} Id.
position of other states,” he explained.\textsuperscript{24} During the 1980s there was a shift from filing separate amicus briefs to a joint brief format in which states sign a single brief.\textsuperscript{25} There is disagreement about whether or not the Court has responded favorably to this shift in that some believe that the sheer number of briefs may have been more impactful on the Court as opposed to a single brief signed by multiple states.\textsuperscript{26} Whatever the case may be, amicus activity on the part of the states has increased tremendously. Furthermore, filing joint briefs has enabled NAAG to help persuade remaining states to sign on. McGuire quotes Simon Karis, an Assistant Attorney General from Ohio, who recalled a 1992 case in which 49 states signed a single amicus.\textsuperscript{27} Karis explained that “[o]ther states began to fear that they might stick out if they didn’t join.”\textsuperscript{28} So the joint amicus can serve as leverage in crucial cases. Ultimately, McGuire found that between 1960 and 1994 states “won an average of 51.8 percent of cases in which they filed briefs,” not an insignificant number by any means.\textsuperscript{29}

Perhaps the most compelling argument for amicus participation came from Justice Hugo Black whose “vision of the adversarial system allowed for extensive participation by amici-acknowledging that cases before the Court affect many people beyond the immediate parties.”\textsuperscript{30} Black’s visualized the Court as a “quasi-representative” body.\textsuperscript{31} In “Picking Friends from the Crowd: Amicus Participation as Political Symbolism,” Omari Scott Simmons contends that

\begin{itemize}
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id at 28.
\item \textsuperscript{27} Id. at 24.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id at 25.
\item \textsuperscript{30} Simmons, supra note 6, at 195.
\item \textsuperscript{31} Id.
\end{itemize}
“amicus curiae participation provides symbolic reassurance of the Court’s receptiveness to the norm of democratic inclusion.” From Simmons’ observation, one could argue that in a democratic society, amici are indispensable as they serve to reinforce the very notion of democracy. Simmons goes on to explain that the “routinization characteristic of modern amicus participation creates the impression, whether actual or perceived, that groups have the opportunity to weigh in on judicial decisions that have broad social and political ramifications…the Supreme Court and its decisions—with majority, concurring, and dissenting opinions along with supporting rationale, [arguably] deserve greater respect than pronouncements from other government branches whose procedures may appear more ad hoc…[and] less transparent.” It is within this vein that the amicus brief submitted by the states in NAMUDNO seems to fall. Whatever the actual or quantifiable impact of that brief on the Court, it stands as a politically symbolic tool that represents a strikingly new perspective on the part of “covered” states within the context of United States voting rights history. Before turning to the specifics of NAMUDNO, however, one should look to Katzenbach for context.

**South Carolina v. Katzenbach: Amici and the VRA’s First Significant Historical Moment**

Heralded as one of the most important measures of the Civil Rights era, the Voting Rights Act of 1965 (VRA) was passed as temporary legislation under the authority of §2 of the 15th Amendment of the United States Constitution. Passed at a time when entrenched Jim

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32 *Id.* at 197.
33 *Id.* at 197-98.
34 See U.S. CONST. amend. XV, §§1, 2 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude…[and § 2 gives Congress the] “power to enforce this article by appropriate legislation”); *see also* Lopez v. Monterey County,
Crow discrimination prevented African-Americans from exercising the franchise, the VRA was seen as a last resort by Congress to right the centuries of wrongs that had been perpetuated against African Americans is the area of political participation. In “A Challenge to the Constitutionality of Section 5 of the Voting Rights Act,” Laughlin McDonald explains that:

Following the Civil War, the Southern states adopted a variety of measures to disenfranchise recently freed blacks. These measures included literacy and understanding tests for voting, poll taxes, felony disfranchisement laws, onerous residency requirements, cumbersome registration procedures, voter challenges and purges, the abolition of elected offices, discriminatory redistricting and apportionment schemes, the expulsion of elected blacks from office, and the adoption of primary elections in which only whites were allowed to vote. And when these technically legal measures failed to work or were thought insufficient, the states were more than willing to resort to fraud and violence to smother black political participation…35

McDonald’s description of the post Civil War climate in the South reveals the sort of uphill battle that Congress would have to fight in order to ensure equal treatment under the law for the recently freedmen (and freedwomen in certain contexts). Some members of the 39th Congress realized that only constitutional amendments would provide the sort of mechanism needed to ensure that African Americans were treated equally under the law.36 The Reconstruction Amendments (the 13th, 14th and 15th Amendments) were the result of much heated congressional deliberation.

The VRA’s constitutionality rests on whether or not it is an appropriate exercise of congressional authority under the enforcement provision of the 15th Amendment. Attorney General Nicholas Katzenbach testified before Congress about the ineffectiveness of previous


statutes in the area of voting—the Civil Rights Acts of 1957, 1960 and 1964 which depended upon case-by-case litigation which would take “terms of years” to achieve the sort of voter registration that was desired.\textsuperscript{37} Furthermore, Katzenbach explained that “even in those jurisdictions where judgment is finally won, local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the judgment.”\textsuperscript{38} The VRA was designed to effect rapid change and to safeguard against the implementation of new discriminatory techniques. It is then no surprise that Section 5 of the VRA becomes its most popular provision as it revealed the lack of trust that the federal government had for the covered jurisdictions.\textsuperscript{39} Section 5, also known as preclearance, prohibits “covered jurisdictions from making any changes to their voting procedures without first obtaining federal approval” from the Department of Justice or the D.C. District Court.\textsuperscript{40} Preclearance would ensure that the proposed change did “not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”\textsuperscript{41} Section 5 was at issue in both \textit{South Carolina v. Katzenbach} and NAMUDNO.

Two other provisions of the VRA deserve some attention. In “Understanding the Paradoxical Case of the Voting Rights Act” Luis Fuentes-Rohwer explain that:

First, the Act provided for the appointment of federal examiners and registrars in order to ensure that eligible voters of color would be placed on the registration rolls and allowed to cast ballots. These provisions, coupled with the Act’s suspension of literacy tests for any jurisdiction covered

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\item \textsuperscript{37} McDonald, \textit{supra} note 35, at 234.
\item \textsuperscript{38} \textit{Id}.
\item \textsuperscript{39} \textit{See generally} Luis Fuentes-Rohwer, \textit{Understanding the Paradoxical Case of the Voting Rights Act}, 36 Fla. St. U. L. Rev. 697, 704-706.
\item \textsuperscript{41} Fuentes-Rohwer, \textit{supra} note 39, at 706 (citing the Voting Rights Act of 1965).
\end{itemize}
under the Act's trigger formula, were responsible for the initial surge in voting registration across the South...Second, the Act adopted the...trigger formula for determining which jurisdictions would be covered under the special provisions of the Act. Under the formula, a jurisdiction would automatically fall within the coverage of the Act if it employed a literacy test and either its turnout rate for the 1964 presidential election or its registration rate on November 1, 1964, was below fifty percent.\textsuperscript{42}

At the time of the VRA’s enactment, the covered jurisdictions were: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, forty counties in North Carolina, and a handful of counties in Arizona, Hawaii and Idaho.\textsuperscript{43}

One of the first challenges to the constitutionality of the VRA was \textit{South Carolina v. Katzenbach}. To be sure, this case is important because of its holding that the VRA is an appropriate exercise of congressional authority under the 15\textsuperscript{th} Amendment. However, it is also significant because it is one of the few Voting Rights Cases argued before the Supreme Court that had a significant number of amicus briefs submitted by the states. The sheer number of briefs submitted by the states in this case was owing to the court’s invitation. The court writes:

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Recognizing that the questions presented were of urgent concern to the entire country, we invited all the States to participate in this proceeding as friends of the Court. A majority responded by submitting or joining in briefs on the merits, some supported South Carolina and others the Attorney General.\textsuperscript{44}
\end{quote}

Those who doubt the importance of amicus briefs should probably take note here. The VRA represented an unprecedented and unorthodox move on the part of Congress. The Supreme Court understood this and was seated in the middle of what would become a firestorm of litigation. They needed an answer and they needed help. Asking the states to weigh in was not just a common courtesy. They wanted to know where the states stood on this issue. Had all the

\textsuperscript{42} Id. at 705.

\textsuperscript{43} McDonald, supra note 35, at 235; see generally \textit{South Carolina v. Katzenbach}, 383 U.S. 301 (1966).

states sided with South Carolina against the constitutionality of the VRA, one can argue that the court would have found the VRA to be unconstitutional. The amici written in support of Attorney General Katzenbach outnumbered those in favor of South Carolina. The court even mentions this in its opinion by enumerating which states supported South Carolina and which states supported the Attorney General.\textsuperscript{45} Does this argument represent a simplistic understanding of Supreme Court Constitutional jurisprudence? Maybe so, but one would be naïve to think that the Court was not thinking about public opinion as it issued this monumental decision. Luis Fuentes-Rohwer argues in his article that “Were the Court inclined to strike down the Act as outside the powers of Congress, it had many arguments with which to do so. But the question for the Court was not whether the Act was beyond the powers of Congress; rather, the question was whether the Justices had the will to side against overwhelming congressional majorities and the national mood. This is not something that the Court does very often.”\textsuperscript{46} The majority of the states that weighed in were in favor of the constitutionality of the VRA. This indicated that SAGs, for the most part, saw the VRA and its provisions as being in the best interest of the public. Not surprisingly, the states that believed that the VRA was unconstitutional were those who were covered under the Act. Of note is the fact that Hawaii supported the constitutionality of the Act even though counties within the state were covered under the Act.

\textit{Katzenbach} represents one of the most important historical moments in the VRA’s history. Had the court struck down this Act, the VRA would have died before it had a chance to

\textsuperscript{45} Katzenbach, 383 U.S. at 307-308 (pointing out that Alabama, Georgia, Louisiana, Mississippi and Virginia supported South Carolina, while California, Illinois and Massachusetts joined by Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin were in support of the Attorney General).

\textsuperscript{46} Fuentes-Rohwer, supra note 39, at 712-713.
do anything. The promise of equality in exercising the franchise would have been indefinitely
delayed. By lending their support, the states who sent in briefs in support of VRA’s
constitutionality may have shown that the federalism and states’ rights concerns were not as
significant as some deemed them to be since these states were in support of the Act. We will
revisit the federalism concern sparked by the VRA later.

Let us explore briefly some of the arguments put forth by the states. Alabama, Georgia,
Louisiana, Mississippi and Virginia all put forth similar arguments as to why they believed the
VRA to be unconstitutional. The Attorney General of Georgia contended, in part, that:

The Act is Unconstitutional as Being in Violation of Article I, Section 2, and the Seventeenth
Amendment. Section 4 of the Act, in purporting to suspend the literacy and other tests imposed as
a prerequisite to voting or registering to vote in certain states is unconstitutional because there is
no delegation of power in the Constitution to support it, and because such provision also violates
Article I, Section 2, and the Seventeenth Amendment, which declare that electors in federal
elections shall have the qualifications requisite for the most numerous branch of the state
legislatures. 47

Louisiana argued, in part, that:

The Tenth Amendment reserving all powers to the States not delegated to the Federal
Government is violated by the Voting Rights Act because each State has the constitutional right
to determine the qualifications of voters, and it may exercise this right to impose a literacy test
which does not discriminate based on race, color, or previous condition of servitude… the mere
fact that less than 50 per centum of a State’s adults were registered or voted does not show that a
literacy test it imposes was used to engage in racial discrimination. 48

Special Counsel for the State of Alabama explained that:

When Alabama (and some nineteen other States) requires that a voter be able to read and write, it
is exercising an inherent right of sovereignty that has never been delegated to the Federal
Government, and Congress may not substitute its own beliefs and standards. 49

Mississippi contended that:

47 Brief on Behalf of the State of Georgia as Amicus Curie, 1965 WL 115335 (U.S.) (for opinion see 383 U.S. 301).
48 Amicus Curiae Brief in Behalf of the State of Louisiana, 1965 WL 115340 (U.S.) (for opinion see 383 U.S. 301).
49 Amicus Curiae Brief of the State of Alabama, 1965 WL 115338 (U.S.) (for opinion see 383 U.S. 301).
There is no such thing as suspended sovereignty. If the power to suspend exists it can be exercised to suspend for 100 years as easily as for five. It can suspend the entire range of qualifications as easily as it can suspend one. Insofar as South Carolina's sovereignty is concerned, there is no difference between the power to suspend and the power to destroy her voter laws.  

Lastly, on the part of South Carolina, Virginia maintained that “there is no valid rational connection between “literacy tests, light voting, and discrimination.”

In support of the VRA’s constitutionality, the Attorney General of Massachusetts joined by the SAGs of Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin argued that “Congress has power to enact appropriate legislation precluding the states from denying the right to vote on the basis of color...Although a state has power to determine the qualifications for voting, such power may not be used to violate the Fourteenth and Fifteenth Amendments...Congress has the power to enforce a Negro citizen's constitutional voting rights by “appropriate legislation.” In tandem, Illinois argued that:

The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. However, these state conditions or standards may not be discriminatory nor may they contravene any constitutional restriction. Hence, when state power is abused, as here shown, subject to judicial declaration otherwise, that power is subject to Federal action by Congress as well as by the courts under the Fifteenth Amendment.

California’s Attorney General at the time, Thomas Lynch, made a novel argument in the sense that he claimed to be concerned with the voting rights of residents of California who leave the state and settle in other states as well as migrants to California who would not be politically

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50 Brief for the State of Mississippi, Amicus Curiae, 1965 WL 115342 (U.S.) (for opinion see 383 U.S. 301).
51 Brief on Behalf of the Commonwealth of Virginia Amicus Curiae, 1965 WL 115339 (U.S.) (for opinion see 383 U.S. 301).
52 Brief of the Attorney General of Massachusetts, Amicus Curiae, 1996 WL 100404 (U.S.) (for opinion see 383 U.S. 301).
53 Brief of the State of Illinois as Amicus Curiae, 1965 WL 115337 (U.S.) (for opinion see 383 U.S. 301).
savvy due to an inability to exercise the franchise in other states. Specifically, the California AG wrote:

She [California] seeks assurance that no state erect or maintain barriers which unfairly abridge the right to vote, for such barriers leave individuals new to California inexperienced and apathetic in their political participation, the most important aspect of which is the exercise of the vote. Equally, California is anxious that none of her citizens lose political rights when they emigrate, for surely no man should be subjected to the possibility of a stripping of constitutional guarantees simply because circumstances lead him to live elsewhere. 54

In true AG fashion, Lynch maintained that he was looking out for the best interest of his citizenry. As stated before, the fact that many states supported the constitutionality of the VRA as early as 1965-1966 (the time of the challenge in Katzenbach) was significant in the Court’s decision to uphold the Act.

NAMUDNO and the Birth of a New Historical Moment in Voting Rights: The Case in Full

Opponents of the VRA now contend that its provisions are no longer necessary since the Act has seemingly succeed in stomping out voter discrimination. For example, the utility district at issue in NAMUDNO, “in its brief opposing the motions to affirm filed by the Solicitor General and the intervenors, argued that the election of Barack Obama as the nation's first African-American president reflects a “deep-rooted societal change” that undermines the continued need for Section 5.” 55 In his article, “A Challenge to the Constitutionality of Section 5 of the Voting Right Act,” Laughlin McDonald points out that although the 2008 election of President Barack Obama evidences an improvement in race relations, voting continues to be polarized along racial lines. 56 He writes: “Of the nine southern states covered in whole or in part

54 Brief of the State of California as Amicus Curiae, 1966 WL 100405 (U.S.) (for opinion see 383 U.S. 301).
55 McDonald, supra note 35, at 261.
56 Id. at 261-262.
by Section 5, six went for McCain: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas. The average white vote for Obama was only 18%.°57 He goes on to argue that the election of President Obama should not invalidate the Congressional finding that Section 5 is still necessary.°58 The VRA has been reauthorized on four separate occasions—in 1970, 1975, 1982 and 2006.°59 Prior to each reauthorization, Congress held numerous hearings and conducted in-depth examinations as to whether or not Section 5 should be renewed.°60 In each instance, Congress has chosen to renew Section 5. Currently nine states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia) and one or more political subdivision in seven states (California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota) are covered under Section 5.°61 Some VRA critics contend that the preclearance requirement carries with it a stigma of shame and should consequently be done away with. Nevertheless, in the most recent 2006 reauthorization of the VRA, Congress found that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”°62 Congress’s findings were apparently not far-fetched since in 2006, the very year of the reauthorization, the Supreme Court “invalidated Texas’s attempt to redraw a congressional

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°57 Id. at 262.
°58 Id.
°59 Brief for Intervenor-Appellees Texas State Conference of NAACP Branches, et al., 2009 WL 740765 (U.S.), at 7-9 (for opinion see 129 S.Ct. 2504).
°60 Id.
°61 Brief for Intervenor-Appellees, supra note 59, at 5-6.
°62 Id. at 9-10.
district resulting in Latino vote dilution.”\textsuperscript{63} The Court in \textit{LULAC v. Perry} noted that the redistricting plan “bears the mark of intentional discrimination that could give rise to an equal protection violation.”\textsuperscript{64} Additionally, in an amicus brief, Members of the Texas House of Representatives argue that “Section 5 continues to have a strong deterrent effect in Texas.”\textsuperscript{65} They explain that “[s]ince 1982, Texas has had the largest number of Section 5 submissions withdrawn by jurisdictions after the DOJ objected.”\textsuperscript{66} To these Members the “frequency of Section 5’s use in Texas as compared to other covered jurisdictions” reveals how pertinent the measure actually is to the perpetuation of fair voting standards in the State.\textsuperscript{67} These Members of the Texas House also talk about specific instances of discrimination that continue to be reported in Texas. For example, they note that “[h]ousing discrimination is so entrenched in some communities that the U.S. Department of Housing and Urban Development (HUD) has assumed control of certain public housing authorities within the state, and law enforcement patterns in many Texas towns continue to reflect racial antagonism.”\textsuperscript{68} It is within this context that the NAMUDNO case is brought.

At issue in NAMUDNO was the constitutionality of the recent reauthorization of Section 5 as well as the “bailout” provision added by Congress in 1982 in order to enable a state or political subdivision to “bailout” of Section 5 coverage by establishing that it satisfies certain criteria. Northwest Austin Municipal Utility District Number One (MUD), a district in Texas’s

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\item\textsuperscript{63} Brief of Members of the Texas House of Representatives as Amici Curiae in Support of Appellees, 2009 WL 796300 (U.S.) at 3-4 (citing \textit{LULAC v. Perry}, 548 U.S. 399 (2006)) (for opinion see 129 S.Ct. 2504).
\item\textsuperscript{64} \textit{LULAC}, 548 U.S. at 440.
\item\textsuperscript{65} Brief of Members of the Texas House of Representatives, \textit{supra} note 63, at 15.
\item\textsuperscript{66} \textit{Id}.
\item\textsuperscript{67} \textit{Id} at 4.
\end{enumerate}
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Travis County, argued that it qualified for bailout and, in the alternative, it argued that Section 5 reauthorization was an unconstitutional extension of congressional power as granted under §2 of the 15th Amendment.\textsuperscript{69} As of 2000 MUD had a population of 3,500, only a combined seven percent of which was African-American and Latino.\textsuperscript{70} It is governed by an elected five-member board whose members serve four year terms.\textsuperscript{71} Since MUD’s creation in 1986 it has made “eight submissions for administrative preclearance under Section 5, stretching over an 18-year span from 1986-2004…the annualized cost to the MUD…was $223.”\textsuperscript{72}

MUD’s attorney, Gregory S. Coleman argued that:

Section 5 of the Voting Rights Act strikes at the heart of federalism, injecting the federal government directly into the state and local legislative process. As reenacted…[the Act] imposes a federal veto on jurisdictions selected based on 40-year-old data and extends it well into the twenty-first century, locking in place the legislative judgments of the 1960s, rather than reflecting any fresh analysis of where §5’s extraordinary remedy might be needed today.\textsuperscript{73}

Coleman goes on to argue that the district qualifies for bailout as a political subdivision and that “§5 exceeded Congress’s power to enforce the Fourteenth and Fifteenth Amendments… [since] Congress did not, and could not, show that the ‘exceptional conditions’ that ‘can justify legislative measures not otherwise appropriate,’ \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 334 (1966), continue to obtain, justifying the perpetuation of federal preclearance.”\textsuperscript{74}

Conversely, the Solicitor General argued that:

[VRA’s] “direct result” has been “[s]ignificant progress in eliminating first generation barriers experienced by minority voters”…Yet “vestiges of discrimination in voting continue to exist[,] as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process…continued evidence of racially polarized voting in each of

\textsuperscript{69} Appellant’s Reply Brief, 2009 WL 1028471 (U.S.) at 9 (for opinion see 129 S.Ct. 2504).

\textsuperscript{70} Brief for Appellee Travis County, 2009 WL 740766 (U.S.) at 3 (for opinion see 129 S.Ct. 2504).

\textsuperscript{71} Id.

\textsuperscript{72} Id. at 4.

\textsuperscript{73} Appellant’s Reply Brief, \textit{supra} note 69, at vii.

\textsuperscript{74} Id. at 3-9.
the jurisdictions covered demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the” VRA.75

The Solicitor General further pointed out that the Supreme Court has upheld the constitutionality of Section 5 on four separate occasions.76 As for the bailout provision, the Solicitor General contended that MUD did not qualify for bailout because it did not fall within the statutory definition of “political subdivision.”77 Since Section 4(a) permitted only states or political subdivisions to bailout, MUD was seemingly out of luck according to the statute’s plain meaning.

NAMUDNO represented a new historical moment for the VRA since Katzenbach. For the first time onlookers were not able to predict what the Court’s decision would be. This was not like the period of relative ease that existed post-Katzenbach—a period in which many were certain that the High Court would not invalidate Section 5. Once again, in the context of NAMUDNO, amici filed on behalf of the states would become important. However, this time, it would be different. This time, covered states would be arguing in favor of Section 5’s constitutionality. Even Mississippi who had argued vigorously for the invalidation of Section 5 on more than one occasion switched sides. (Mississippi had also filed an amicus arguing the unconstitutionality of the VRA in City of Rome v. United States, 446 U.S. 156 (1980).) Many scholars of constitutional law expected the Court to rule on Section 5’s constitutionality since MUD was not a “political subdivision” within the plain meaning of the statute. “It appeared that at least five Justices would rule that Congress had not sufficiently justified its continued imposition of preclearance on covered jurisdictions,” Joshua Douglas writes in “The Significance

75 Brief for the Federal Appelle, 2009 WL 819480 (U.S.) at 1-2 (for opinion see 129 S.Ct. 2504).
76 Id. at 6 (referring to Lopez v. Monterey County, City of Rome v. United States, Georgia v. United States, South Carolina v. Katzenbach).
77 Id. at 9.
of the Shift Toward As-Applied Challenges in Election Law.” To the shock of many, the Court avoided the constitutional question altogether, choosing instead to extend the statutory definition of “political subdivision” beyond the statute’s plain meaning. Justice Roberts, delivering the opinion of the Court, writes:

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions.

Douglas explains that by “fashioning a narrow ruling that provided dicta on the constitutional problems with the law but resolved the case through statutory construction, the Court avoided striking down a bastion of the civil rights movement while…providing Congress with a chance to fix the possible constitutional defects.” According to Douglas, NAMUDNO “affirms the Court’s reluctance to invalidate an election law on its face.” Interestingly, the Court refers to the dozens of “ardent briefs” submitted on the issue. The majority of briefs filed in the case were in favor of Section 5 constitutionality. One could argue that amicus participation made the difference yet again.

Election law experts contend that the VRA and “its coverage formula in particular, is freighted with political baggage and has been nearly impossible to alter—hence the reason the VRA was renewed in 2006 without even partial recognition of dramatic changes in the 25-year interim.” Some people argue that without “substantial prodding by the Court, Congress will likely never muster the political resolve to tackle the constitutionally suspect portions of the

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78 Douglass, supra note 40, at 695.
79 Id.
81 Id. at 697.
82 Id.
VRA.™ From the Court’s actions in NAMUDNO it seems like only a matter of time before they will be forced to address the constitutionality of Section 5. In a November 2009 publication, the Harvard Law Review Association contended that:

The NAMUDNO opinion is consequently a chameleon of sorts. On the one hand, it is a highly minimalist opinion in that it adopts a position that does little to alter the status quo, appeals to a broad spectrum of political views, and at least appears to cede responsibility for policymaking to the appropriate decisionmaker. On the other hand, the opinion, in failing to account for the politics behind voting rights reform, seems to entrust the Court, and not Congress, with the ultimate determination concerning the VRA’s reach.85

The States’ Unique Position as Amicus Curiae in NAMUDNO: What about Federalism?

In submitting their brief in support of US Attorney General, Eric Holder, the SAGs of six states (North Carolina, Arizona, California, Louisiana, Mississippi and New York) did not repeat arguments that were already set forth in the appellee briefs. Instead, the SAGs, spurred on by Roy Cooper, Attorney General of North Carolina, wanted to give a fresh perspective from their states’ experiences as jurisdictions covered under Section 5 of the VRA. The brief explained that the “[a]mici States represent over half of the minority population residing within the States impacted by Section 5.”86 Having had decades of experience with Section 5’s preclearance requests, the amici states contended that they had a “direct and practical understanding of the costs and benefits of Section 5, including the impact that Section 5 has on our dual system of

84 Id. at 370.
85 Id. at 370-71.
86 Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al., 2009 WL 815239 (U.S.), at 1 (for opinion see 129 S.Ct. 2504).
sovereignty.” One has to admit that arguments coming from covered jurisdictions should carry much weight in the NAMUDNO context.

The amici states argue that gains made under the VRA are “susceptible to being lost if this Court were to strike down Section 5.” The amici states seem to scoff at the Appellant’s argument that Section 5 is “a significant affront to the sovereignty of the States.” The brief refers to the appellant’s argument as being shrouded by a “guise of federalism” which rings “hollow.” They go to great lengths to show that Section 5 is in fact not a significant affront to state sovereignty, arguing instead that “any such intrusion is slight.” As covered jurisdictions their experience has been that the “preclearance requirements of Section 5 do not impose undue costs or delays.” They argue that “the United States Department of Justice went to great lengths to ensure that the submission procedures would not burden States.” In fact, the process is “painless and routine for States.” They even celebrate the “excellent working relationship” that the DOJ has with local election official in covered jurisdictions. The General Counsel for the North Carolina Board of Elections even testified before Congress about the routine administrative nature of Section 5 preclearance. Moreover, the states point out that a covered jurisdiction has the flexibility of adopting “any election change that does not have discriminatory

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87 Id.
88 Id. at 4.
89 Id.
90 Id.
91 Id. at 5.
92 Id.
93 Id. at 6.
94 Id. at 8.
95 Id. at 7.
96 Id. at 11.
effect or discriminatory purpose.”\textsuperscript{97} This statement definitely served to silence the arguments of opponents since few people would argue that a state should be entitled to put discriminatory election changes into effect.

In essence, the amici states were arguing that the DOJ is a friend rather than an obstacle to progress on the part of the states. The amicus made it seem like states should embrace preclearance since no state should be attempting to put discriminatory election law changes into place in any event. The brief takes on a practical tone, admittedly, ignoring arguments of principle which would say that states should have the right to police themselves regardless of the “burden-less” ease with which the federal oversight is carried out. The appellant’s notion that Section 5 “imposes a scarlet letter on residents of covered jurisdictions” is dismissed by the amici states since “[f]ew people, other than judges, scholars, and public officials, are even aware of which jurisdictions are covered...[and since] designation as a covered jurisdiction is neither punitive nor inescapable.”\textsuperscript{98} Again, the brief does at times trivialize controversial yet seemingly valid arguments espoused by the appellant, possibly the intention of the brief writers.

Interestingly, the amici states turn the appellant’s argument on its face by pointing out a number of benefits to Section 5 coverage. Section 5 encourages the “input of minority voters at an early stage of a state’s efforts to change its election practices and procedures.”\textsuperscript{99} Since the preclearance submission “must include a statement of ‘the anticipated effect of the change on members of racial or language minority groups’...covered jurisdictions almost universally consult with minority voters before making an election law change.”\textsuperscript{100} Also, in covered

\textsuperscript{97} Id. at 12.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 13.
\textsuperscript{100} Id.
jurisdictions election officials usually get input from minority voters prior to moving a polling place.\textsuperscript{101} Some may dismiss this as trivial, however, the amicus conveys that this is an important step away from less glorious days in which polling places were moved from “a building that is known and readily accessible by minorities to a building operated by a fraternal organization with a history of segregation,” for example.\textsuperscript{102} To be sure, some would regard this as special treatment; however, the amicus points out that such minority involvement aids in weeding out changes that would have a discriminatory effect very early in the process.\textsuperscript{103} Furthermore, the inclusion of minority voters in the process reduces the chances of conflict arising after the final enactment of an election law change.\textsuperscript{104} The amici states seemingly made the argument that covered states are actually better off than non-covered states since Section 5 fosters dialogue, strengthening communities in the process.\textsuperscript{105}

Additionally, Section 5 can aid in shielding covered jurisdictions from claims of discrimination. Succeeding under Section 5 is regarded as a “stamp of approval” and the DOJ’s review system is regarded as a “rarity in our federal system” that should be “viewed in a positive light,” especially since the “preclearance process helps States to prevent costly Section 2 litigation.”\textsuperscript{106} Thus, preclearance actually saves covered jurisdictions money since it significantly diminishes litigation.\textsuperscript{107} After reading this brief, non-covered jurisdictions seem to be the ones losing out.

\textsuperscript{101} \textit{id.} at 14.
\textsuperscript{102} \textit{id.} at 14 n.4.
\textsuperscript{103} \textit{id.} at 13.
\textsuperscript{104} \textit{id.}
\textsuperscript{105} \textit{id.} at 14.
\textsuperscript{106} \textit{id.} at 15-16.
\textsuperscript{107} \textit{id.} at 16.
Being more acquainted with covered states seeking to challenge the validity of Section 5, one can easily be taken aback by the amici states’ appeal to the Court to uphold the constitutionality of the 2006 Reauthorization of the VRA and by their brash dismissal of the argument that Section 5 constitutes an undue intrusion on state sovereignty. The boldness of such a statement is not completely understood outside of the context of a federalism discussion. Consequently, a diversion into the intricacies of federalism is warranted.

Federalism Concerns

The federalism discussion surrounding the actions of SAGs usually relate to the latter’s participation in constitutional litigation or multistate actions with national consequences. Some critics believe that “multistate cases impermissibly increase the power of state attorneys general in violation of principles of federalism and separation of powers.”¹⁰⁸ In “The Federalism Challenges of Impact Litigation by State and Local Government Actors,” Claire McCusker argues that the high level of SAG involvement in Supreme Court litigation has consequences that are at odds with the “democracy-enhancing values fostered by federalism.”¹⁰⁹ Thus, SAGs being accused of overreaching into federal government territory is pretty typical. However, in NAMUDNO, the federalism debate is quite different since the SAGs actually argue for federal intrusion into state activity, specifically for the continued constitutionality of Section 5. Was this a wise move? After all, they seem to be acknowledging the weakness of the state in this area. In “The Scope of National Power Vis—Vis the States: The Dispensability of Judicial Review,”

¹⁰⁸ Lynch, supra note 5, at 1999.
Jesse Choper explains that “Federalism has been a central element of the American polity from the nation’s inception to the present day…[and that] the Constitution and its amendments concern the distribution of governmental authority between the nation and its component states.”\textsuperscript{110} In other words, federalism is a fundamental tenet of what it means to be American, explaining why politicians and legal theorists have grappled with the notion since the inception of the republic.

McCusker discusses some of the most common justifications for federalism in her article. She groups the justifications into two categories “the diversity theory” and the “self-governance theory.”\textsuperscript{111} Under the diversity theory the main benefit is that “in areas where there is no unified federal policy or legislation, states in a federal system are free to legislate and make policy independently…this…freedom has the virtue of allowing creative policy proposals to be tested…and tailored to the individual preferences and situations of citizens in different locales.”\textsuperscript{112} This theory ignores the fact that certain populations within a locale may be unable or ill equipped to voice their opinions, leading to glitches in what would otherwise be a utopian like system. Under the self-governance theory “federalism…encourages democratic participation in governance through the exercise and growth of strong state political institutions…enhanc[ing] the opportunity of all citizens to participate in representative government.”\textsuperscript{113} Again, this benefit of federalism, within the framework of United States history, seems to be a utopian vision that is actually, paradoxically, incapable of coming to fruition without federal government regulation.

\begin{footnotesize}
\begin{enumerate}
  \item McCusker, \textit{supra} note 109, at 1560.
  \item Id.
  \item Id. at 1561.
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\end{footnotesize}
Hence Choper’s point that “one of the principle purposes behind the abandoning the Articles of Confederation and the adoption of the Constitution…was to ensure a workable central government.”\textsuperscript{114} The United States cannot sustain a workable government if the political process is in shambles due to discriminatory election laws. Consequently, one could argue that the SAGs in the amici states were actually arguing in favor of upholding federalism since the very notion of legitimate government would crumble should the states be allowed to evade preclearance prior to the task of the VRA being successfully completed. The national government that resulted from the Constitution was one of limited powers; however, “it was given sufficient power to cope with problems that states separately were incompetent to resolve.”\textsuperscript{115} This may be justification enough for the position held by the SAGs in the amici states.

In fact, much of the opposition to actions such as filing an amicus brief in support of the constitutionality of Section 5 is sparked by fear of what appears to be the unchecked expansive powers of an independent state official. In other words, many critics fear the expansive freedom that SAGs have in bringing cases or filing briefs of national import. For example, McCusker basically argues in her article that SAGs have too much power to file amicus briefs in attempts to influence the Court.\textsuperscript{116} She goes on to express her concern that State Attorneys General offices will be “captured” by special interest groups. She writes, “While there is no evidence that such capture occurred here, it would generally be possible for an interest group, having installed one of its members as state solicitor general, to use that position to circumvent normal rules and understandings governing the filing of amicus briefs…Capture of the office of state solicitor

\textsuperscript{114} Choper, supra note 110, at 1555.
\textsuperscript{115} Id.
\textsuperscript{116} McCusker, supra note 109, at 1563.
general or state attorney general could allow for automatic filing of amicus briefs by ideological parties whose briefs might otherwise be screened out by the parties.”

McCusker’s conspiracy argument goes on to address the fact that an interest group, if successful in capturing an office, could “throw the full weight of their state’s name behind a brief written to advance their ideological agenda.”

The fact that people fear such an outcome indicates that SAG amicus briefs are totally important. They do carry the weight of their state and that is what makes the actions on the part of the SAGs in the amici States of NAMUDNO so strikingly impressive. The SAGs chose to speak out in the interest of justice. McCusker would style this as state actors adopting the “model of public interest law firms,” which she cautions against.

But, this begs the question: what does looking out for the public interest mean? SAGs are charged with the duty to do just that. Should they recoil in the face of criticism such as that of McCusker, they would be abdicating a fundamental duty of their office. McCusker calls for “self-imposed or statutory procedural requirements about the cases in which state and local attorneys can become involved” in. Again, this is in an effort to limit the seemingly expansive powers of the SAGs. In a moment of clarity, McCusker realizes that such an action would not be “without cost.”

“...In light of this risk,” she writes, “any steps taken to remedy the federalism problems engendered by overactivity on the part of state and local attorneys would have to be taken gingerly, with proper

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117 Id. at 1563-64.
118 Id. at 1564.
119 Id. at 1568.
120 Id. at 1569.
121 Id. at 1570.
respect for the potential damage to the federal system that could be incurred either through overactivity or underactivity on the part of state actors.”

**Conclusion**

The SAGs of the amici states, in essence, put aside compelling state sovereignty arguments to support a federal provision that they believe to be in the best interest of their states and their citizenry. One could argue that this is actually federalism at its best since the states are willingly supporting this federal oversight. However, the intriguing question remains as to whether or not this amounts to the states ceding their power to the federal government. An encroachment is still an encroachment regardless of whether or not it is welcomed. This may seem like an extreme argument. However, the fact that the Court in NAMUDNO refused to address the constitutionality of the preclearance provision indicates that the constitutionality of Section 5 is in serious jeopardy. It may have been politically easier for the Court to continue on in the direction of its previous line of cases by upholding the constitutionality of Section 5. The fact that they refused to reaffirm their previous statements about Section 5’s constitutionality is revealing. Even this newfound and bold stance on the part of covered jurisdictions by their SAGs may be inadequate in the wake of continued constitutional challenges to Section 5’s validity. Nevertheless, the amicus brief submitted by the SAGs indicate that the public interest is at the heart of their actions. At two critically important historical moments in the life of the Voting Right Act, states’ amicus participation has made a difference in upholding the constitutionality of the Act or keeping its invalidation at bay. This argument should make skeptics of the amicus think twice before turning up their noses too quickly. When Supreme

122 *Id.*
Court justices seem to be caught between a rock and a hard place, amicus briefs could make a difference in gauging public opinion. In NAMUDNO, the brief reaffirmed the notion that SAGs have a responsibility to look out for the public interest of their citizenry even when that stance may seem to be in opposition to traditionally held notions of state sovereignty. Furthermore, the relationship between the federal and state governments, as articulated by Woodrow Wilson, “cannot…be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.” Thus, only time will tell whether the actions of the SAGs have impaired or furthered the values of federalism as this generation is only beginning to gain a handle on the concept. More importantly, however, because of the VRA a generation of voters who would otherwise have been forced to observe the political process from the sidelines has been able to exercise the franchise. That fact alone exemplifies the constitutional spirit embodied in the VRA.

123 Choper, supra note 110, at 1555.