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FROM *BUSH V. GORE* TO *NAMUDNO*: A RESPONSE TO PROFESSOR AMAR

*Ellen D. Katz**

INTRODUCTION

In his Dunwoody Lecture, Professor Akhil Amar invites us to revisit the *Bush v. Gore* controversy and consider what went wrong.¹ This short essay responds to Professor Amar by taking up his invitation and looking at the decision through a seemingly improbable lens, the U.S. Supreme Court's decision last June in *Northwest Austin Municipal Utility District No. One (NAMUDNO) v. Holder*.² Among its many surprises, *NAMUDNO* helps illuminate the Court's fundamental error nine years ago.

Professor Amar forcefully argues that the mistrust with which the Justices in the *Bush v. Gore* majority viewed the Florida Supreme Court was both unjustified and disastrously consequential.³ What *NAMUDNO* helps us see is that such mistrust, be it mistaken or warranted, is not necessarily incompatible with a sound judicial response. *NAMUDNO* shows that the Court's most profound error in *Bush v. Gore* was not the premise from which the Justices began, though flawed it may have been, but rather where they went from there.⁴

CONNECTING *BUSH V. GORE* TO *NAMUDNO*

Facially, *Bush v. Gore* and *NAMUDNO* appear unrelated. *Bush v. Gore* famously closed down a court-ordered statewide recount in Florida and effectively ended the 2000 presidential election dispute.⁵ *NAMUDNO* sidestepped the question of congressional power to reauthorize § 5 of the Voting Rights Act (VRA)—a provision requiring jurisdictions with a history of discrimination in voting to obtain federal approval prior to changing any aspect of their voting law.⁶

The decisions involved distinct legal questions and institutional actors, and differences between the cases abound. *Bush v. Gore* and *NAMUDNO* are nevertheless linked in two important ways.

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1. Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009).

2. 129 S. Ct. 2504 (2009).

3. Amar, *supra* note 1, at 950–51, 961.

4. *See infra* notes 28–49 and accompanying text.

5. *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (per curiam).

6. *See* 42 U.S.C. § 1973c(a) (2006).

Fabricated Intent

In both *Bush v. Gore* and *NAMUDNO*, the Court said something that was patently false. The *Bush v. Gore* majority attributed to the Florida Supreme Court a statement the state court never made. *NAMUDNO*, for its part, said Congress meant to allow something it never intended to allow.

In *Bush v. Gore*, the false statement was the Court's assertion that "the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5 [.]"⁷ The *Bush v. Gore* majority offered this statement as explanation for its refusal to let the state court craft a remedy for the constitutional defect it identified in the Florida recount process.⁸ Remanding for remedial action was not possible, said the Court, because the Florida Supreme Court had already said that state law did not allow for such a remedy.⁹

The problem was that the Florida Supreme Court never made this statement. In fact, the Florida court had no occasion whatsoever to address whether the state's interest in participating voluntarily in one aspect of the federal system (i.e., the so-called "safe harbor") outweighed the competing interests underlying the recount. The Florida court had made a tangential reference to the federal system in an earlier opinion addressing a distinct point,¹⁰ but that reference hardly constituted an unequivocal statement of state law on point. The *Bush v. Gore* majority nevertheless said that it was an unequivocal statement, an assertion Larry Kramer vividly labeled "nothing less than a deliberate, bold-faced lie."¹¹

A similar charge might be lodged against the Court's holding in *NAMUDNO*. There, all nine Justices agreed that the VRA allowed the plaintiff to apply for a statutory exemption that Congress never authorized and never intended to allow.

The VRA allows a "political subdivision" to seek this exemption, known as bailout, but defines a "political subdivision" in terms that facially exclude the plaintiff in *NAMUDNO*. The Austin Water District was neither a county nor a state subdivision "which conducts

7. *Bush v. Gore*, 531 U.S. at 111.

8. *Id.*

9. *Id.*

10. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000) (citing 3 U.S.C. §§ 1–10 (2006), which govern the federal electoral process).

11. Larry D. Kramer, *The Supreme Court in Politics*, in *THE UNFINISHED ELECTION OF 2000* 105, 149 (Jack N. Rakove ed., Basic Books 2001); see also David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 184, 204 (Cass R. Sunstein & Richard A. Epstein eds., University of Chicago Press 2001) [hereinafter *THE VOTE*] (concluding "that the [U.S. Supreme] Court 'trumped' the 'supposed lawlessness' of the Florida Supreme Court with [its own] lawlessness") (internal quotation marks added).

registration for voting” when the county does not.¹² The Court nevertheless concluded that the plaintiff was eligible for the exemption based on a contrived statutory construction that, as Rick Hasen pointed out, “virtually no lawyer thought was plausible.”¹³

Chief Justice Roberts seemed well aware of this. He acknowledged that the holding required the Court to take an “unusual” step and ignore an explicit statutory definition, and that circumstances existed in which the district court’s contrary holding of ineligibility “might well be correct.”¹⁴ The Chief Justice did not bother to address either the legislative history or a Justice Department regulation that directly contradicted what the Court read the 1982 VRA amendments to have accomplished.¹⁵ Instead, Chief Justice Roberts anemically posited that “[i]t is unlikely” Congress intended for the bailout provision to have an effect that was, in fact, well-documented and universally understood when Congress reauthorized the statute in 2006.¹⁶

The Court’s improbable ruling in *NAMUDNO*, much like its false statement in *Bush v. Gore*, invites speculation. Did Chief Justice Roberts “blink,” and shy away from striking down a resonant statute he believed to be unconstitutional?¹⁷ Or did he simply lack the votes to strike down a regime he wanted to invalidate?¹⁸ Did the so-called liberal Justices strategically sign on without comment to block invalidation of the VRA, or did they too harbor serious qualms about the statute’s validity?¹⁹

Needless to say, looking beyond the text of an opinion to decode hidden intent is a fraught enterprise. Recognizing that speculation is the best we can do, the next section suggests that the false statements in *Bush v. Gore* and *NAMUDNO* have a common source.

12. See 42 U.S.C. § 19731(c)(2) (2006).

13. See Initial Thoughts on *NAMUDNO*: Chief Justice Roberts Blinked, <http://electionlawblog.org/archives/013903.html> (June 22, 2009, 08:00 EST) [hereinafter Initial Thoughts].

14. *NAMUDNO*, 129 S. Ct. 2504, 2514 (2009).

15. See, e.g., H.R. REP. NO. 97-227, at 2 (1981) (“The standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek to bail out although the state itself may remain covered.”); S. REP. NO. 97-417, at 57 n.192 (1982) (“Towns and cities within counties may not bailout separately.”); Judicial Administration, 28 C.F.R. §§ 51.2, 51.5 (2008); Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987).

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

17. Initial Thoughts, *supra* note 13.

18. David G. Savage, *A Rare Week of Harmony on High Court*, L.A. TIMES, June 29, 2009, at A10, available at 2009 WLNR 12385782 (discussing this point).

19. *Id.*

Failed Deliberation

Animating the Court in both *Bush v. Gore* and *NAMUDNO* was the belief that the measures under challenge in both cases were the product of failed deliberation. This belief posits that the Florida Supreme Court ordered a recount and that Congress renewed the Voting Rights Act not as considered judgments but instead as unreflective means to advance raw political preferences. Both institutions were seen to have abandoned their obligation to deliberate prior to ordering the contested measures.

In *Bush v. Gore*, this belief originated in a series of strained statutory rulings issued by the Florida Supreme Court in the early weeks of the 2000 presidential election dispute.²⁰ These rulings gave rise to the belief that the state court was neither interested in nor engaged in the act of judging at all. To the Justices in the *Bush v. Gore* majority (and to other observers),²¹ the state court appeared to be fixated on handing the election to Vice President Gore.²² A given ruling might find legal support but that fact was beside the point. Intent mattered, and the Florida court—at least in the eyes of the *Bush v. Gore* majority—had the wrong intent.

Intent appears to have mattered in *NAMUDNO* as well. Here the Justices thought Congress had the wrong intent when it voted in 2006 to renew the VRA. This view posits that Congress saw the VRA as too sacrosanct to let lapse, and would have reauthorized the statute regardless of whether contemporary conditions justified it.²³ Congress, to be sure, amassed a detailed evidentiary record, but, the argument goes, that it did so not to guide its decision-making, but rather to justify a decision it had already made.

This view is a plausible one. The VRA has tremendous symbolic resonance, even while its specific terms remain largely obscure. With few exceptions,²⁴ members of Congress had little desire to seek reelection as someone who had voted against the VRA.²⁵ As Justice Scalia pointedly asked at oral argument, “[D]o you ever seriously

20. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1239–40 (Fla. 2000).

21. See, e.g., Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in *THE VOTE*, *supra* note 11, at 98, 101 (noting with disapproval that the Florida Supreme Court ruled for Gore each time).

22. See Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 194 & nn.64, 66 (2001).

23. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act and Noisy Statutory Interpretation* (draft).

24. See Carl Hulse, *Rebellion Stalls Extension of Voting Act*, N.Y. TIMES, June 22, 2006, at A23, available at 2006 WLNR 10749989 (noting that only a few House members did not support the bill).

25. See, e.g., Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES, July 21, 2006, at A16, available at 2006 WLNR 12545848.

expect Congress to vote against a re-extension of the Voting Rights Act?”²⁶

That reauthorization appeared fated, however, does not mean it was unwarranted. The sizeable record Congress amassed to support reauthorization contained considerable, albeit not unequivocal, evidence supporting the claim that § 5 of the VRA was still needed.²⁷ In other words, reauthorization might have been both warranted and preordained, just as the rulings issued by the Florida Supreme Court might have comported both with the law and a predisposition for a Gore victory. In both cases, a truly deliberative process might have yielded the very measures the decisionmakers selected. But, in the eyes of the Court, neither of the challenged measures had in fact emerged from such a process. Deliberation had failed and that failure required a judicial response.

JUDICIAL REVIEW OF FAILED DELIBERATION

Professor Amar’s remarks model one way a reviewing court might respond to failed deliberation. Specifically, a court might provide an insufficiently deliberative decision with its missing rationale. Professor Amar does this when he drafts the opinion he thinks the Florida Supreme Court should have issued.²⁸ Professor Amar posits that the Florida court’s rulings were legitimate because his draft opinion shows them to be “legally defensible.”²⁹

This approach bears a rough resemblance to what Justice Brennan did elsewhere in saying “[i]t is enough that we be able to perceive a basis upon which” the challenged decision might have been reached.³⁰ Writing for the Court in *Katzenbach v. Morgan*, Justice Brennan upheld congressional power to enact § 4(e) of the VRA of 1965.³¹ His opinion never accused Congress of failing to deliberate over the measure, and indeed seemed skeptical of Justice Harlan’s dissenting allusion to a failure of this sort.³² Regardless, Justice Brennan’s analysis made clear that failed deliberation would be of no consequence. So long as the

26. Transcript of Oral Argument at 51, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322).

27. *See, e.g.*, *NAMUDNO v. Mukasey*, 573 F. Supp. 2d 221, 247–66 (D.D.C. 2008) (discussing this evidence).

28. Amar, *supra* note 1, at 953–56.

29. Amar, *supra* note 1, at 955–56 (stating that the Florida Supreme Court “did the right legal things and for the right legal reasons”).

30. *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

31. *Id.* at 646–47.

32. *Compare id.* at 669 & n.9 (Harlan, J., dissenting) (noting that “[t]here is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon” and that there “were no committee hearings or reports referring to this section, which was introduced from the floor.”), *with id.* at 645 n.3 (majority opinion) (discussing legislative history to § 4(e)).

Justices could “perceive” a basis on which 4(e) might be needed, and craft their own argument, the statute was valid.³³

Much like Justice Brennan in *Morgan*, Professor Amar equates his ability to “perceive” a basis for the Florida court’s rulings with their legitimacy. He disputes the notion that the Florida court failed to deliberate precisely because the opinion he has drafted employs sound interpretive methods to reach the same results.³⁴ Professor Amar laments the fact that “[t]he Florida Justices never offered up such a crisp and cogent Article II explanation of their conduct in the 2000 election.”³⁵ Had they done so, Amar suggests, the legitimacy of the court’s conduct—and “the basic error” in claims to the contrary—“would have been clear for all to see.”³⁶

Perhaps the Justices on the U.S. Supreme Court would not have harbored the suspicions they held had the Florida Supreme Court issued the exemplary Amar opinion in the first instance. But to do so, the state court would have needed to anticipate federal issues that were obscure prior to the U.S. Supreme Court’s first per curiam opinion in the dispute. By the time the Florida court had the opportunity to address these issues on remand, the damage had been done. The *Bush v. Gore* majority no longer trusted the state court and, I suspect, nothing the Florida court could have said—including what Professor Amar says in his opinion—would have changed that.

In fact, the *Bush v. Gore* majority confronted versions of the explanation the Amar opinion offers—less crisp, less cogent perhaps, but comprehensible versions nevertheless. These Justices understood well that sound interpretative methods could have produced the very results reached by the Florida court. They, however, also believed that such methods had not in fact served as the state court’s guide.³⁷

To the majority in *Bush v. Gore*, actual intent mattered. Partisan bias for a preordained result was not judicial craft—and could not become craft simply by tacking on (even good) legal argument. The *Bush v. Gore* majority consequently had no interest in judicial review of the sort Professor Amar models, or even the more rigorous, “show your work” approach the Rehnquist Court had developed in *Morgan*’s stead.³⁸

What the Court did instead was to eliminate review entirely. The *Bush v. Gore* majority equated a failure of deliberation with an abdication of responsibility, and viewed it as cause to step into the shoes

33. *Id.* at 653.

34. Amar, *supra* note 1, at 954.

35. Amar, *supra* note 1, at 955.

36. Amar, *supra* note 1, at 953–54.

37. *See, e.g.*, Strauss, *supra* note 11, at 204 (questioning whether the Supreme Court Justices’ view of the Florida Supreme Court was correct).

38. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

of the Florida Supreme Court. These Justices decided the case as if they themselves were members of the state court, and decreed (albeit through false attribution) that Florida law allowed no remedy for the constitutionally defective recount.³⁹ In so doing, they wholly eliminated the state court's decision-making power.

Scores of commentators have explained why this was a very bad idea.⁴⁰ The Court in *NAMUDNO* nevertheless seemed poised to follow this approach with regard to Congress. The district court in *NAMUDNO* had already issued an opinion much like Professor Amar's in that it labored to provide the strongest possible defense for the decision under review. Judge Tatel's lengthy opinion for the unanimous panel carefully parsed the congressional record for every shred of supporting evidence and developed a legal argument to justify the 2006 reauthorization.⁴¹

The Justices in *NAMUDNO*, however, were not interested in this approach. At oral argument, many of the Justices seemed indifferent to Congress's judgment that the VRA remained necessary. Question after question asked not whether Congress had the power to make the judgment it did, but rather whether reauthorization itself was a good idea. Justice Scalia pointedly revealed this stance when he scoffed at the notion that Congress had considered the claim that bailout was ineffective. "The question," he said, "is whether [the claim is] right, not whether Congress rejected it."⁴²

Ultimately, the Court voted to supplant Congress's judgment, but not in the manner many expected. Rather than throw out the statute, the Justices simply rewrote it. The revision, which may prove to be a good one,⁴³ was propelled by the belief that someone had to do something. Congress had been unwilling to engage in the necessary deliberation over the statute's reach. The Justices accordingly believed they needed to step up and step into Congress's shoes and act in its stead.⁴⁴

39. See *Bush v. Gore*, 531 U.S. 98, 110–11 (2000); *supra* notes 7–9 and accompanying text.

40. See, e.g., Kramer, *supra* note 11, at 148–49; Strauss, *supra* note 11, at 185–86; Ward Farnsworth, "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness, 86 MINN. L. REV. 227, 252 (2001) ("A preemptive strike against possible further transgressions by the state court . . . is an extraordinary measure. . . . The Supreme Court would have done better to act as the referee of referees.").

41. See generally *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008).

42. See Transcript of Oral Argument, *supra* note 26, at 37.

43. If they apply, small jurisdictions like the *NAMUDNO* plaintiff should be able to obtain the exemption more readily than larger units like counties and states, which must show not only their compliance with the bailout criteria, but the compliance of all their jurisdictional subunits. See, e.g., Posting of J. Gerald Hebert to Campaign Legal Center Blog, http://www.clcblog.org/blog_item-76.html (Oct. 5, 2006). Enabling eligible jurisdictions to bailout would calibrate the statute's regulatory reach, channel resources to those places that most need them, and thereby make the regime less vulnerable in a future legal challenge.

44. See *supra* notes 23–25 and accompanying text.

NAMUDNO resembles the *Bush v. Gore* majority's response to failed deliberation except for one crucial fact. The *NAMUDNO* Court carefully preserved a realm for congressional action. The Court assumed a legislative role, but occupied it only briefly, coupling its statutory revision with language meant to prod Congress to act more deliberatively in the future.

Chief Justice Roberts' opinion manages to avoid striking down the statute while nevertheless displacing the district court's broad opinion and, along the way, making clear how he (and I believe, a solid majority⁴⁵ of the Court) would resolve the constitutional question. Before invoking the doctrine of constitutional avoidance, the Chief Justice relentlessly piles up reason after reason why the 2006 reauthorization is constitutionally infirm.⁴⁶ The opinion notably mentions no serious counterarguments, citing instead only to boilerplate language that Congress is a coequal branch and to the fact the district court thought the statute was just fine.⁴⁷

All this language is technically dicta, but it might be better understood as the operative holding—one that strikes down the statute but stays the order until the next case in which the question is presented. In other words, *NAMUDNO* remands the VRA to Congress with a time limit and a warning. It puts Congress on notice that the Court will scrap the statute in the next case, unless something significant about the statutory regime will have changed by then.

Some change may emerge from *NAMUDNO*'s statutory amendment,⁴⁸ but that change is unlikely to be enough to satisfy the Court. And it remains to be seen whether Congress will engage in the

45. At argument, Justice Kennedy voiced considerable skepticism about the VRA's regional burdens, and has previously questioned both the VRA's reliance on race-based measures and the scope of congressional power to enforce civil rights generally. See Transcript of Oral Argument, *supra* note 26, at 22; see also *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244–45 (2009); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 744–59 (2003) (Kennedy, J., dissenting). For their part, the so-called liberal Justices, offered no sustained defense of the statute during argument, and have previously questioned its continued importance. See, e.g., *Riley v. Kennedy*, 128 S. Ct. 1970, 1987 (2008) (Stevens, J., dissenting).

46. *NAMUDNO*, 129 S. Ct. at 2511–12 (citations omitted) (noting the “substantial ‘federalism costs’” § 5 exacts, its broad application to all electoral changes “however innocuous,” the fact that “[t]hings have changed in the South,” that the racial gap in voter registration and turnout rates is diminished and in places nonexistent, that minority candidates hold elected office “at unprecedented levels,” that “[b]latantly discriminatory evasions of federal decrees are rare,” the dated character of the coverage formula, its weak relation to current conditions, and the fact that the distinct burdens imposed on covered jurisdictions “may no longer” be warranted).

47. *Id.* at 2513 (citations omitted).

48. See *First Local Government Seeks Voting Rights Bailout Post Supreme Court Ruling*, <http://legaltimes.typepad.com/blt/2009/08/first-local-government-seeks-voting-rights-bailout-post-supreme-court-ruling.html> (Aug. 4, 2009).

deliberation *NAMUDNO* effectively mandates.⁴⁹ What is clear is that the Court did not follow *Bush v. Gore* all the way. After stepping in, the Court stepped back again. It gave Congress the opportunity to act in response to what *NAMUDNO* says.

The decision accordingly accomplished what I had hoped it would: namely, the Court found a way to send the statute back to Congress for deliberation.⁵⁰ The mechanism for accomplishing this is unexpected, to be sure. *NAMUDNO*'s stern warning promises invalidation but buys time with a statutory revision that looks ominously like what the Court did in *Bush v. Gore*. The Court nevertheless recognized that revision or retention of a statute like the VRA is a job best left to Congress. *NAMUDNO* wisely focused on getting Congress to do its job, rather than doing that job itself.

CONCLUSION

NAMUDNO's unexpected holding was greeted with considerable praise.⁵¹ *Bush v. Gore*'s was not. This difference in reception helps crystallize what went wrong in *Bush v. Gore*. Both decisions identified a failure of deliberation and both saw that failure as reason to assume the role of the institution under review. But while the *Bush v. Gore* majority assumed that role in its entirety, 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.

Failed deliberation, to be sure, is not easily diagnosed, and the prospect of a false positive might itself be sufficient reason to avoid the inquiry entirely. Professor Amar's remarks lend support for this view and indeed model what may well be a preferable form of review.

49. Insofar as Congress wants the § 5 regime to continue in roughly its current state, it should do (at least) two things. First, it should instruct the Department of Justice to identify jurisdictions eligible for bailout, actively encourage them to apply, and support such applications once filed. Second, Congress should bolster the comparative case the Court has now made clear is needed for § 5 to survive scrutiny. While the existing congressional record contains comparative evidence, see Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, (A. Henderson, ed., 2007), Congress should collect additional, more localized evidence addressing the extent to which the obstacles minority voters confront in covered jurisdictions are distinct from the ones they face elsewhere. *NAMUDNO* strongly suggests that § 5's validity rests on evidence of this sort, and that the statute's prophylactic effect is not sufficient to prove the point. See *NAMUDNO*, at 2512; Transcript of Oral Argument, *supra* note 26, at 22, 28, 30, 31, 34–36, 48–49.

50. Ellen D. Katz, Opinion, *Voting Rights Act § 5: Leave It Up to Congress*, 31 NAT'L L. J. Apr. 13, 2009.

51. See, e.g., Stuart Taylor, *Judicial Statesmanship on Voting Rights*, http://www.nationaljournal.com/njmagazine/print_friendly.php?ID=or_20090624_4339 (June 27, 2009).

NAMUDNO, however, makes clear that failed deliberation may be diagnosed without necessary ill effect and potentially to productive end. Congress may ultimately squander the opportunity *NAMUDNO* provides. The Court was nevertheless wise to have provided it.