

2012

## Faulkner's Voting Rights Act: The Sound and Fury of Section Five

Joel Heller

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### Recommended Citation

Heller, Joel (2012) "Faulkner's Voting Rights Act: The Sound and Fury of Section Five," *Hofstra Law Review*: Vol. 40: Iss. 4, Article 5.  
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol40/iss4/5>

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## FAULKNER'S VOTING RIGHTS ACT: THE SOUND AND FURY OF SECTION FIVE

Joel Heller\*

*In its most recent examination of the Voting Rights Act (the "VRA"), the Supreme Court told a story about the South. Although the Court ultimately did not rule on the continued constitutionality of section 5, the VRA provision that singles out certain jurisdictions with a history of racially discriminatory voting practices for additional regulation, its opinion expressed significant doubt that the measure was still justified. In this tale of progress and redemption, the Court concluded that "[t]hings have changed in the South."*

*One body of commentary that was not considered in this story was the region's literature. Yet many of these works, in particular the novels of William Faulkner, address some of the same thematic and sociological concerns that animate section 5. Specifically, Faulkner's novels explore the power of memory in the South and the ongoing influence of the past on present actions and attitudes. In his depiction of the burden of memory, Faulkner suggests a distinct role for section 5 that policymakers and commentators should consider in the debate over its continued necessity. Rather than punishing the sons for the sins of the fathers, the provision can be seen as targeting the independent concern of a past-haunted society and the uncertain results which the unchecked power of memory can produce in the present.*

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*This Article explores how Faulkner's novels can contribute to a better understanding of the role section 5 serves in the modern South and thus inform the debate over whether the law remains constitutional. In doing so, it also considers the role literature can play in legal analysis beyond the uses typically identified by the law and literature movement.*

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## I. INTRODUCTION

In *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO v. Holder*),<sup>1</sup> the U.S. Supreme Court told a story about the South. It was a tale of terror, triumph, redemption, and progress, encapsulated in the simple yet bold proclamation that “[t]hings have changed in the South.”<sup>2</sup> The occasion for the Court’s tale was a lawsuit by a small utility district in Travis County, Texas seeking to invalidate a major provision of the Voting Rights Act (the “VRA”),<sup>3</sup> a

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1. 557 U.S. 193 (2009).

2. *See id.* at 202.

3. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973b(a)–b(b) (2006)).

landmark legislative achievement of the civil rights movement.<sup>4</sup> The suit challenged section 5 of the VRA,<sup>5</sup> which requires certain designated jurisdictions, mostly in the Deep South, to submit any proposed change in voter qualifications or voting procedures to the federal government for approval before implementation.<sup>6</sup>

In order to identify which jurisdictions are covered by section 5, the VRA looks backward to the state of voting rights nearly five decades ago.<sup>7</sup> Against this statutory backdrop, the Texas district argued that conditions had sufficiently improved in the area of voting rights such that section 5 was no longer necessary to combat an existing problem, and thus was not a valid exercise of Congress's enforcement power under the Fifteenth Amendment.<sup>8</sup> The Supreme Court ultimately invoked the doctrine of constitutional avoidance and resolved the case on statutory grounds, but not before a flurry of amicus briefs and scholarly commentary weighed in on the issue.<sup>9</sup> A lengthy district court opinion and congressional hearings and findings further added to this voluminous record.<sup>10</sup> The District of Columbia Circuit subsequently upheld section 5 against a new constitutional challenge in *Shelby County v. Holder*,<sup>11</sup> a case widely expected to reach the Supreme Court.

These materials present historical, ideological, and statistical perspectives on the question of the continued necessity of section 5, with an especial focus on the South. They tell divergent stories about history, race, and voting. One potentially relevant body of commentary that was not considered, however, was the region's literature. Yet many of these works, in particular the novels of William Faulkner, address some of the

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4. *NAMUDNO v. Holder*, 557 U.S. at 200-01.

5. *Id.*

6. 42 U.S.C. § 1973c(a); see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-70 (1969) (interpreting section 5 of the VRA broadly to cover all changes by which "the power of a citizen's vote is affected").

7. 42 U.S.C. § 1973b(b). The details of the coverage formula are described below. See *infra* Part II.A.

8. Appellant's Brief at 38, 42-43, *NAMUDNO v. Holder*, 557 U.S. 193 (No. 08-322).

9. For a list of the twenty-six amicus briefs filed, see Northwest Austin Municipal Utility District Number One v. Gonzales, ELECTION L. @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/NorthwestAustinMunicipalUtilityDistrictNumberOnev.Gonzales.php> (last updated Sept. 10, 2010, 1:39 PM) [hereinafter ELECTION L. @ MORITZ].

10. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO v. Mukasey)*, 573 F. Supp. 2d 221 (D.D.C. 2008), *rev'd sub nom. NAMUDNO v. Holder*, 557 U.S. 193; see also Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 192 (2007) (describing the 2006 reauthorization of the VRA and noting that "Congress spent most of its time and effort assembling a record sufficient to justify the constitutionality of the law").

11. 679 F.3d 848 (D.C. Cir. 2012). As this Article went to press, the Supreme Court had considered the petition for certiorari in *Shelby County*, but had not yet announced whether it would hear the case.

same concerns as the VRA. Specifically, a prominent theme in Faulkner's work is the power of memory in the South and the ongoing influence of the past on contemporary actions and attitudes. Some of his characters, like Quentin Compson in *The Sound and the Fury*,<sup>12</sup> are haunted by past events to the extent that they cannot live in the present or comprehend a future. Others find themselves constantly telling and retelling the successes and failures of their predecessors, unable to escape those long shadows. In Jefferson, Mississippi, the fictional town in which Faulkner's novels are set, the burden of memory is powerful and ever present. These memories often deal with issues of race, and occasionally with voting.

Literature can serve as a probative tool for understanding and evaluating policy because it is often, like law, a response to social problems. Especially with a measure like section 5 that touches on such fundamental matters in American society as racial equality and voting rights, Congress and the courts should make every effort and consult every relevant source in order to understand fully the issues at stake. As a chronicler of the pre-VRA South that Congress was responding to when it enacted and reauthorized section 5, Faulkner could prove a valuable resource in this undertaking. Ignoring his examinations of the role of memory in this context risks losing out on the insights of a uniquely astute observer of Southern culture and psychology.<sup>13</sup>

The key question in *NAMUDNO v. Holder* was whether section 5 was still justified by "current needs" and necessary to combat an ongoing evil.<sup>14</sup> Such an inquiry requires the courts to discern exactly what evil is presented, and thus what role section 5 currently serves, a task for which Faulkner provides some guidance. Just as section 5 is a solution uniquely concerned with the past, Faulkner's novels show that the lingering power of the past is also part of the problem. Rather than punishing the sons for the sins of the fathers, section 5 can be seen as targeting the independent concern of a past-haunted society and the uncertain results which the unchecked power of memory can produce in the present. A post-VRA South may not be the same as a pre-VRA

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12. WILLIAM FAULKNER, *THE SOUND AND THE FURY* (David Minter ed., W.W. Norton & Co. 2d ed. 1994) (1929) [hereinafter *THE SOUND AND THE FURY*].

13. An initial caveat is warranted. The South, of course, is far from a monolithic place. To borrow a phrase from another great American author, it "contains multitudes." Walt Whitman, *Song of Myself* (1855). Indeed, the differences at times can be "measurable only in sidereal terms." W.J. CASH, *THE MIND OF THE SOUTH*, at xlvi (Vintage 1991) (1941). Nonetheless, much of the discourse concerning section 5 treats the South as if it were a single entity. In commenting on and contributing to this discourse, then, this Article at times adopts a similar attitude. The author recognizes the fallacy of this approach.

14. See *NAMUDNO v. Holder*, 557 U.S. at 203.

South, but it may present its own problems worth preventing. Whether the burden of memory and the uncertainty of its consequences are appropriate targets of legislation is an as yet unaddressed question in the conversation regarding the constitutionality of section 5. Yet by focusing on the extent to which “[t]hings have changed in the South,”<sup>15</sup> the Court ignored the possibility that, for some, “[t]he past is never dead. It’s not even past.”<sup>16</sup>

This Article explores how Faulkner’s novels can provide a more expansive understanding of the role section 5 can serve in the modern South. Part II discusses the history of the VRA, the mechanics of section 5 and its coverage formula, and the constitutional analysis of the provision from *South Carolina v. Katzenbach*<sup>17</sup> to *NAMUDNO v. Holder*. Part III explores the themes of history and memory in the novels of William Faulkner. Next, Part IV argues that, with their focus on the unyielding power of memory, they reframe the constitutional question and shed light on an aspect of the issue that has gone unaddressed. This Part also examines the role that literature like Faulkner’s can play in legal analysis, which is distinct from the contributions typically identified by the law and literature movement. A visit to Yoknapatawpha County may not provide an answer to the constitutionality of section 5, but it helps ensure that all dimensions of this important question are more fully understood.

## II. A HISTORY OF SECTION 5: OLD TIMES ARE NOT FORGOTTEN

### A. *The Legislative Background*

First enacted in 1965, the VRA was a response to an unremitting pattern of racial discrimination in voting in the century since the end of the Civil War. Despite the Fifteenth Amendment’s guarantee that the right to vote “shall not be denied or abridged . . . on account of race, color, or previous condition of solitude,”<sup>18</sup> states and localities had adopted a variety of facially neutral measures that either had the effect of disenfranchising black voters or were disparately administered based on the voter’s race.<sup>19</sup> The most common of these devices were poll taxes,

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15. *Id.* at 202.

16. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1950) [hereinafter *REQUIEM FOR A NUN*].

17. 383 U.S. 301 (1966).

18. U.S. CONST. amend. XV, § 1.

19. See, e.g., J. Morgan Kousser, *The Strange, Ironical Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 678-80 (2008). States crafted the list of crimes for which voters could be disenfranchised to include, for example, offenses for which blacks were thought to

literacy or understanding tests, and subjective “good character” requirements.<sup>20</sup> Structural practices like racial gerrymandering and the white primary likewise excluded black citizens from effective participation in the electoral process.<sup>21</sup> In addition, private citizens and public officials alike engaged in a campaign of terror and intimidation to prevent blacks from registering or voting.<sup>22</sup> As a result, registration and turnout rates among blacks in many Southern states were close to zero.<sup>23</sup>

These discriminatory practices were so engrained that any attempts at case-by-case federal enforcement of the Fifteenth Amendment proved ineffectual.<sup>24</sup> States swiftly circumvented federal action by enacting new provisions whenever existing ones were invalidated.<sup>25</sup> Some localities simply closed their registration offices rather than comply with federal mandates that would expand the voting rolls to include black citizens. In response to this pattern of intransigence and evasion, the federal government abandoned its reactive approach to voting discrimination in favor of the proactive VRA.<sup>26</sup>

In addition to certain generally applicable measures aimed at increasing minority representation, the VRA targeted jurisdictions with particularly egregious histories of discriminatory voting practices for additional regulation. First, section 4 banned the use in these

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be more likely than whites to be convicted. *Id.* at 679; *see also* *Hunter v. Underwood*, 471 U.S. 222, 223, 233 (1985) (striking down as violative of Equal Protection a provision of the Alabama constitution on these grounds). Stories abound in which registrars administering literacy or knowledge tests asked particularly difficult questions to black would-be voters or adopted stringent standards for what answers would be acceptable. *See, e.g.,* *South Carolina v. Katzenbach*, 383 U.S. 301, 312 & n.13 (1966) (describing a case in which a black voter was asked “to interpret the provision of the state constitution concerning ‘the rate of interest on the fund known as the Chickasaw School Fund’” (quoting *United States v. Duke*, 332 F.2d 759, 764 (5th Cir. 1964) (internal quotation marks omitted))). By contrast, white voters would often receive easy questions and accommodating standards. *See, e.g., id.* at 312 & n.12 (describing one case in which a white voter “satisfied the registrar of his ability to interpret the state constitution by writing, ‘FRDUM FOOF SPETGH’” (quoting *United States v. Louisiana*, 225 F. Supp. 353, 384 (E.D. La. 1963))).

20. *See, e.g., Katzenbach*, 383 U.S. at 312-13 (describing the use of these methods to disenfranchise would-be black voters); Kousser, *supra* note 19, at 679.

21. *See, e.g., Kousser, supra* note 19, at 679.

22. *See id.* at 678.

23. *See id.* at 678-80.

24. *See id.* at 680.

25. *See Katzenbach*, 383 U.S. at 335 (describing the practice of states “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees”); *Voting Rights Act of 1965: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 8 (1965) (statement of Nicholas Katzenbach, Att’y Gen. of the United States) (“Litigation on a case-by-case basis simply cannot do the job.”).

26. *See* 42 U.S.C. § 1973a (2006) (outlining the proactive procedure by which a court may retain jurisdiction of a State or political subdivision for a period of time to monitor potential unlawful voting qualifications, prerequisites, and other violations of the right to vote).

jurisdictions of any “test or device” used to deny the right to vote.<sup>27</sup> Second, section 5 mandated that these jurisdictions submit any proposed changes in their voting procedures either to the U.S. Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia for approval before implementation.<sup>28</sup> This preclearance requirement applied to any “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” that the jurisdiction sought to enact.<sup>29</sup> The provision did contain an escape mechanism, in which a covered jurisdiction can remove itself from covered status by meeting certain conditions and then instituting a “bailout suit.”<sup>30</sup>

The VRA provided that sections 4 and 5 applied to any state or political subdivision that (1) maintained a “test or device” as of 1964 and (2) had less than fifty percent registration or turnout rates among the voting-age population in that year’s presidential election.<sup>31</sup> With the exception of a few scattered counties,<sup>32</sup> the jurisdictions covered by this formula were exclusively in the South. Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered statewide, and about a third of the counties in North Carolina were covered.<sup>33</sup>

Although section 5 was initially intended to be a temporary measure, Congress reauthorized the entire Act, including section 5, in 1970, 1975, 1982, and 2006.<sup>34</sup> The scope of the coverage formula

27. *Id.* § 1973b(a)(1). The Act defined “test or device” as any requirement that a voter “(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.” *Id.* § 1973b(c).

28. *See id.* § 1973c(a).

29. *Id.* A subsequent Supreme Court decision interpreted this provision broadly to cover all changes that affect a citizen’s vote. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-70 (1969). Following *Allen*, changes that must be pre-cleared include not just voter requirements but also structural matters like legislative districts or at-large versus ward representation to procedural matters like polling locations.

30. In order to bail out, a jurisdiction must show that it has not used a forbidden test or device for the past ten years, has not been subject to a section 5 objection or other voting rights violation, and has “engaged in constructive efforts to eliminate intimidation and harassment” of voters. 42 U.S.C. § 1973b(a)(1). The federal government may reinstate covered status if any VRA violation occurs in the jurisdiction within the ten years following a successful bailout suit. *See id.* To date, only twenty-one jurisdictions, all but three of them in Virginia, have bailed out of section 5 coverage.

31. *Id.* § 1973b(b).

32. The original section 5 covered three counties in Arizona, one in Hawaii, and one in Idaho.

33. The covered counties in North Carolina are mostly located in the eastern part of the state. The mountainous western counties, a bastion of Union sentiment during the Civil War, were largely not subject to section 5.

34. *See Kousser, supra* note 19, at 670, 686, 705, 707.



changed slightly over the years, but the general concept remained intact. The 1975 amendments enlarged the definition of “test or device” to include the use of English-only voting materials in any jurisdiction in which more than five percent of the voting-age population belonged to a single-language minority.<sup>35</sup> One result of this amendment was the expansion of section 5 beyond the South and into places like Alaska, New York, and South Dakota. Among the states of the Old Confederacy not previously covered, the language minority provision brought section 5 coverage to Texas and to certain counties in Florida.

The first two rounds of amendments also updated the target date for section 5 coverage. The 1970 reauthorization used 1968 as a benchmark and the 1975 version used 1972.<sup>36</sup> Subsequent reauthorizations, most recently in 2006, have retained 1972.<sup>37</sup> As such, whether a jurisdiction is covered by section 5 in 2011 depends upon the status of its voting processes and participation rates nearly forty years ago.<sup>38</sup>

Despite the degree of geographic diversity brought to section 5 by the language minority amendments, the focus remains largely on the South. Indeed, only two of the eleven states of the Old Confederacy—Arkansas and Tennessee—are not covered in whole or in part by section 5. Perhaps unsurprisingly, then, efforts to challenge the constitutionality of section 5 have typically originated in Southern jurisdictions.

## *B. Constitutional Challenges: From Katzenbach to NAMUDNO*

### *1. South Carolina v. Katzenbach*

Within two months of Congress’s enactment of the VRA, South Carolina challenged the law as unconstitutional. The state extended the hours that polls were open on Election Day by an hour, a change for which it did not seek preclearance.<sup>39</sup> In *South Carolina v. Katzenbach*, the Supreme Court adopted the deferential standard that “Congress may use any rational means to effectuate the constitutional prohibition of

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35. *Id.* at 671 n.9.

36. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO v. Mukasey)*, 573 F. Supp. 2d 221, 227 (D.D.C. 2008), *rev’d sub nom* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO v. Holder)*, 557 U.S. 193 (2009).

37. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. § 1973 (2006)); *NAMUDNO v. Holder*, 557 U.S. at 200.

38. The decision not to amend the coverage formula faced criticism from both opponents of reauthorization and voting rights advocates. See *infra* note 61.

39. See *South Carolina v. Katzenbach*, 383 U.S. 301, 320 (1966).

racial discrimination in voting,” and upheld the Act as a valid exercise of Congress’s authority to enforce the Fifteenth Amendment.<sup>40</sup>

The Court described Congress’s exhaustive investigation into the problem of voting discrimination and its conclusion that such practices were a “pervasive evil,” “widespread and persistent,” and an “unremitting . . . defiance of the Constitution.”<sup>41</sup> During hearings on the Act, the Attorney General testified that registration rates among Southern blacks stood as low as 6.4 percent.<sup>42</sup> Moreover, voting-age whites were registered at a rate of fifty percentage points or more, higher than voting-age blacks.<sup>43</sup> Recent federal court decisions had consistently found discriminatory administration of voting qualifications, with would-be black voters given much more difficult literacy and understanding tests than their white counterparts.<sup>44</sup> Some election officials even resorted to physical violence to prevent black voters from registering.<sup>45</sup>

The Court also expressly deemed permissible the decision to limit the scope of section 5 to those “geographic areas where immediate action seemed necessary.”<sup>46</sup> As Congress had identified reliable evidence of racial discrimination in voting that “presently occurs” in those areas, the coverage formula was rational; the solution was “relevant to the problem.”<sup>47</sup> The Court was similarly untroubled by the potential overinclusiveness of the coverage formula and the fact that evidence of discrimination in some covered states was more isolated than in others. If tests or devices and low participation rates were present in those areas where discrimination was most prevalent, the Court held, then Congress’s decision to extend coverage to other areas where these factors were also present was reasonable.<sup>48</sup>

As such, the Court’s initial evaluation of section 5 focused largely on the presence of discrimination in the covered jurisdictions—an

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40. *Id.* at 324, 337. South Carolina had also argued that section 4 violated Due Process and the Bill of Attainder Clause, but the Court summarily rejected these arguments on the grounds that the protections of those two provisions extended only to individuals, not to states. *Id.* at 323-24.

41. *Id.* at 309, 328.

42. *See id.* at 313.

43. *Id.*

44. *Id.* at 312-13 & nn.11-13 (quoting *United States v. Duke*, 332 F.2d 759, 764 (5th Cir. 1964); *United States v. Louisiana*, 225 F. Supp. 353, 384 (D.C. La. 1963)).

45. *See, e.g., United States v. Mississippi*, 339 F.2d 679, 683 (5th Cir. 1964) (describing a scene in which a registrar “took a pistol out of a drawer and told Hardy to get out and, following him to the door, struck him in the head with the pistol”).

46. *Katzenbach*, 383 U.S. at 328.

47. *Id.* at 328-29.

48. *Id.* at 329-30.

existing and readily identifiable problem that Congress could choose how to combat.

## 2. *City of Rome v. United States*

Fourteen years later, and after Congress had twice reauthorized the VRA, the Supreme Court again considered the constitutionality of section 5 in *City of Rome v. United States*.<sup>49</sup> After the Attorney General refused to preclear several alterations to its electoral practices, the City of Rome, Georgia argued that changed circumstances since 1965 had rendered the provision outdated and thus no longer warranted as a means of enforcing the Fifteenth Amendment.<sup>50</sup> As in *Katzenbach*, the Court again found Congress's conclusion that section 5 was necessary to be rational.<sup>51</sup>

Examining the record Congress had compiled in deciding to reauthorize section 5, the Court emphasized three categories of evidence as strong support for the constitutional legitimacy of that decision.<sup>52</sup> First, significant disparities in registration rates still existed between the black and white voting-age populations in "at least several" covered jurisdictions.<sup>53</sup> Second, black elected officials only served in relatively minor positions, with none holding statewide office; the composition of state legislatures was also far from representative of the population.<sup>54</sup> Third, the Attorney General continued to object to changes submitted for preclearance by covered jurisdictions.<sup>55</sup>

Congress and the Court acknowledged that circumstances had improved since the VRA's original enactment in 1965.<sup>56</sup> Yet these three factors revealed that progress in combating racial discrimination in voting was "modest and spotty."<sup>57</sup> Thus, while reauthorization of section 5 served to "promote further amelioration of voting discrimination," it was also necessary to preserve the VRA's "limited and fragile" achievements and guard against a reversion to pre-VRA practices.<sup>58</sup> Faced with the evidence in the congressional record, the

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49. 446 U.S. 156, 159 (1980).

50. *Id.* at 159-61, 180. The blocked changes included majority-vote requirements for city commissioners, residency requirements for Board of Election members, and several annexations. *Id.* at 160-61.

51. *Id.* at 182.

52. *Id.* at 180-81.

53. *Id.* at 180.

54. *Id.* at 180-81.

55. *Id.* at 181.

56. *Id.* at 180.

57. *Id.* at 181 (internal quotation marks omitted).

58. *Id.* at 182 (internal quotation marks omitted).

Court declined to overturn the “considered determination” that the continued existence of section 5 served these multiple purposes.<sup>59</sup>

3. *Northwest Austin Municipal Utility District Number One v. Holder*

The path to the Court’s most recent consideration of section 5 began when a utility district in Travis County, Texas moved its polling location from a private residence to an elementary school library.<sup>60</sup> Like the City of Rome, the district in *NAMUDNO v. Mukasey* argued that section 5 no longer reflected modern circumstances and that its preclearance requirement was thus unconstitutional.<sup>61</sup> Since Congress had retained 1972 as the baseline year for determining coverage in its 2006 reauthorization, the formula was now based on practices that existed over thirty years ago. Indeed, the utility district had not yet been created in 1972.<sup>62</sup>

As the Supreme Court had in *Katzenbach* and *City of Rome*, the District Court’s decision in *NAMUDNO v. Mukasey* focused its analysis on the legislative record Congress had compiled in deciding whether to reauthorize the VRA for another twenty-five years. The court reasoned that, because the record Congress had amassed in 1975 supported a finding that section 5 was still necessary, the question was whether Congress’s 2006 findings were sufficiently different to warrant the opposite conclusion.<sup>63</sup> The court first looked to the three categories of evidence considered in *City of Rome*—registration rates, minority elected officials, and Attorney General objections—and determined that the 2006 evidence was largely the same.<sup>64</sup> Certain covered states still

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59. *Id.*

60. Plaintiff’s Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 8-9, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey* (*NAMUDNO v. Mukasey*), 573 F. Supp. 2d 221, 227 (D.D.C. 2008), *rev’d sub nom* *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO v. Holder*), 557 U.S. 193 (2009) (No. 06-CV-01384) [hereinafter Motion for Summary Judgment].

61. *NAMUDNO v. Mukasey*, 573 F. Supp. 2d at 230, 246; *see also* Motion for Summary Judgment, *supra* note 60, at 47-49 (“In 2006, Congress had no evidence that the type of gamesmanship described in *Katzenbach* was still rampant in those jurisdictions covered by the hoary § 4(b) coverage formula.”). This argument was opponents’ main line of attack during congressional debates over reauthorization. *See, e.g., Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2006) (statement of Edward Blum, Visiting Fellow, American Enterprise Institute); *see also* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL’Y 41, 42 (2007).

62. *See* Motion for Summary Judgment, *supra* note 60, at 5 (describing the district’s creation in the 1980s).

63. *NAMUDNO v. Mukasey*, 573 F. Supp. 2d at 246-47.

64. *Id.* at 247, 265-66.

had racial disparities in registration rates of between sixteen and twenty-four percent, the racial composition of many state legislatures still failed to reflect the state's population, and the Attorney General continued to object to proposed changes on the grounds that they were motivated by discriminatory intent.<sup>65</sup>

In addition to these three categories, the court also looked to the congressional findings regarding “‘more information request letters’ from the Attorney General, judicial preclearance suits, section 5 enforcement actions, section 2 litigation, appointment of federal election observers, and racially polarized voting.”<sup>66</sup> Each of these factors contributed to a conclusion that the record contained “‘extensive contemporary evidence of intentional discrimination.’”<sup>67</sup> The court also highlighted the record's evidence of the law's deterrent effect, which was not represented in the statistics of Attorney General objections or other enforcement actions.<sup>68</sup> Jurisdictions often simply chose not to enact potentially discriminatory changes, knowing they would not be precleared.

The court ruled that Congress had again identified sufficient evidence to render its decision to reauthorize the VRA rational and, thus, constitutional.<sup>69</sup> As in *City of Rome*, the court was concerned with the need to preserve past successes, combat current discrimination, and guard against future violations. Even in 2006, the House Report concluded, “‘attempts to discriminate persist and evolve.’”<sup>70</sup> In addition to identifying currently existing discriminatory practices, Congress had also reasonably concluded that “‘covered states ‘might try’ to evade the Act's remedies” without the proactive force of section 5.<sup>71</sup>

The provision thus served multiple purposes and combated multiple, related evils. The exact contours of those evils were not fully

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65. *Id.* at 247-49, 252.

66. *Id.* at 247.

67. *Id.* at 266.

68. *Id.* at 264-65.

69. *Id.* at 265-68. The Court ruled that the deferential “reasonableness” standard from *Katzenbach* continued to be the correct standard to apply, despite the Supreme Court's intervening decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that legislation enacted under the enforcement clause of the Fourteenth Amendment had to meet the stricter test of “congruence and proportionality” between the injury to be prevented and the means undertaken to do so. *NAMUDNO v. Mukasey*, 573 F. Supp. 2d at 241-46. Opponents of section 5 had argued that the *Boerne* standard should likewise apply to laws enacted under the Fifteenth Amendment. *Id.* at 268. For the sake of thoroughness, the district court determined that the 2006 reauthorization would also meet the *Boerne* “congruence and proportionality” test. *Id.* at 268-279.

70. *NAMUDNO v. Mukasey*, 573 F. Supp. 2d at 250 (quoting H.R. REP. NO. 109-478, at 21 (2006), reprinted in 2006 U.S.C.C.A.N 618, 631) (internal quotation marks omitted).

71. *Id.* at 268 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966)).

known, however. After forty-one years of regulation, “no one can know for sure what would happen if section 5 were allowed to expire.”<sup>72</sup> The consequences that could follow from a failure to reauthorize were thus unpredictable, but Congress’s evaluation of the risks was worthy of respect.

The case attracted significant attention. Commentary filled both academic journals and the popular press.<sup>73</sup> Once the Supreme Court granted certiorari, advocacy groups, politicians, and scholars filed dozens of amicus briefs in support of both sides and neither side.<sup>74</sup> The fact that the case was playing out against the backdrop of the election of the nation’s first black president added to the fascination.<sup>75</sup> The public awaited a profound statement on federalism, democracy, and race relations in twenty-first century America.

The Supreme Court announced its decision in *NAMUDNO v. Holder* one week before the end of the 2008 term.<sup>76</sup> Instead of the

72. *Id.* at 267.

73. See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007); Robert Barnes, *High Court to Weigh Relevance of Voting Law in Obama Era*, WASH. POST, Apr. 1, 2009, at A1; Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. TIMES, Apr. 28, 2009, at A16.

74. See ELECTION L. @ MORITZ, *supra* note 9; see, e.g., Brief for Nathaniel Persily et al. as Amici Curiae on Behalf of Neither Party, *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMDUNO v. Holder*), 557 U.S. 193 (2009) (No. 08-322). Amicus briefs supporting section 5 were filed by, among others, former Attorney General Nicholas Katzenbach, Congressman John Lewis, members of the Texas House of Representatives, and the states of Arizona, California, Louisiana, Mississippi, New York, and North Carolina. See ELECTION L. @ MORITZ, *supra* note 9. Briefs supporting the utility district were filed by, among others, Governor Sonny Perdue of Georgia and several libertarian policy organizations. See *id.*

75. Opponents of section 5 pointed to President Obama’s election as convincing evidence that the law was no longer necessary. Indeed, then-Senator Obama won three Southern states—Virginia, North Carolina, and Florida—covered in whole or part. A subsequent study found that racially polarized voting patterns in the 2008 election were not fundamentally different than in previous elections, however. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1387 (2010). And in fact, Senator Obama performed worse among white voters in several Southern states than had 2004 Democratic nominee John Kerry. *Id.* at 1413-14. The authors of the study recognized that racially polarized voting was not necessarily a relevant metric for section 5. See *id.* at 1387-88. However, the *NAMUDNO v. Mukasey* District Court did consider this factor in its decision to uphold the provision. See *NAMUDNO v. Mukasey*, 573 F. Supp. 2d at 263-64. Interestingly, Senator Obama quoted Faulkner in his March 2008 speech on the state of race relations in America. Senator Barack Obama, *A More Perfect Union* (Mar. 18, 2008), available at <http://blogs.wsj.com/washwire/2008/03/18/text-of-obamas-speech-a-more-perfect-union/tab/print/> (“Understanding this reality requires a reminder of how we arrived at this point. As William Faulkner once wrote, ‘The past isn’t dead and buried. In fact, it isn’t even past.’”). Actually, he misquoted Faulkner, who wrote in *Requiem for a Nun*, “The past is never dead, it is not even past.” See *REQUIEM FOR A NUN*, *supra* note 16, at 92.

76. *NAMUDNO v. Holder*, 557 U.S. 193.

harshly divided opinion many observers expected, Chief Justice Roberts's majority opinion was joined in full by seven other Justices.<sup>77</sup> Invoking the doctrine of constitutional avoidance, the Court did not answer the much-debated question of whether section 5 was still a valid means of enforcing the Fifteenth Amendment; instead, the Court ruled for the district on its alternative, statutory claim, holding that it could utilize the VRA's bailout procedures.<sup>78</sup>

Although it ultimately avoided ruling on the issue, the Court did express doubts about the constitutionality of section 5.<sup>79</sup> The opinion told a story imbued with the rhetoric of progress. The past decades had included "historic accomplishments" and "dramatic improvements" in which "barriers . . . have been eliminated."<sup>80</sup> The Court surveyed some favorable statistics and briefly touched on the three *City of Rome* categories, particularly the fact that registration and turnout rates now approached parity in some covered jurisdictions.<sup>81</sup> The continued validity of the provision in its current form raised serious constitutional questions when, as the Court boldly proclaimed, "[t]hings have changed in the South."<sup>82</sup>

Unlike in *City of Rome*, the Court now suggested that the preservation of past successes was not by itself a sufficient rationale for reauthorization; instead, section 5 "must be justified by current needs."<sup>83</sup> Based on the evidence presented by Congress and many of the amicus briefs, the current needs of 2006 appeared less compelling than those of 1965. With this emphasis on improved conditions, the Court also seemed less concerned with what would happen if section 5 was no longer in place.<sup>84</sup> Though the Court offered no conjecture as to the state of voting rights in a post-section 5 South, it was not as willing as the

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77. See *id.* at 212. In his dissent, Justice Thomas both rejected the Court's statutory argument and concluded that section 5 was indeed unconstitutional. *Id.* at 216 (Thomas, J., concurring in part and dissenting in part).

78. *Id.* at 204-06, 211 (majority opinion). As such, the Court also did not resolve the question of whether the *Boerne* or the *Katzenbach* standard should apply. *Id.* at 204.

79. See *id.* at 202.

80. *Id.* at 201.

81. See *id.*

82. *Id.* at 202. Critics charged that this vision of progress was naïve and simply incorrect. E.g., Ellen Katz, *Mission Accomplished?*, 117 YALE L.J. POCKET PART 142, 142-44 (2007), available at <http://yalelawjournal.org/images/pdfs/613.pdf>; cf. Kousser, *supra* note 19, at 677 (chronicling the difficult legislative and judicial journey of the VRA itself and criticizing the "triumphalist, foreshortened story of irrepressible, almost-unresisted success" that typically accompanies descriptions of the law). Interestingly, none of the Justices filed a concurring opinion challenging this characterization or highlighting any of the countervailing evidence presented by the government or amici.

83. See *NAMUDNO v. Holder*, 557 U.S. at 203.

84. See *id.* at 202.

district court to accept Congress's conclusions regarding the risk of future evasions. The Justices seemed to view the change in numbers as a reflection of a change in attitude such that section 5 had done its work and could be removed without consequence.<sup>85</sup>

Despite these misgivings, the Court left the constitutionality of section 5 an open question.<sup>86</sup> Commentators saw the Court's *NAMUDNO v. Holder* opinion as a signal to Congress that reevaluation was necessary to avoid invalidation.<sup>87</sup> After all, future lawsuits by jurisdictions ineligible for bailout would one day present the issue squarely, without the option of ruling on narrower statutory grounds. In advance of such a challenge, Congress would likely either need to reform the scope of the coverage formula or clarify more satisfactorily what purpose the law currently serves.<sup>88</sup> Congress did not heed the warning, however, and one such challenge, *Shelby County v. Holder*, is wending its way towards the Supreme Court.<sup>89</sup>

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85. See Kousser, *supra* note 19, at 768 (questioning whether the Court might take on the role of "supreme social psychologists" and find that "the hearts of the public and politicians are by now truly free of discriminatory desires").

86. *NAMUDNO v. Holder*, 557 U.S. at 211.

87. See, e.g., Richard Pildes, *A Warning to Congress*, N.Y. TIMES, (June 22, 2009), <http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/>. Rick Hasen has gone so far as to describe *NAMUDNO v. Holder* as an "anticipatory overruling" of section 5. Rick Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 782-84 (2012).

88. Congress's decision not to change the coverage formula was a prominent target of criticism. See, e.g., EDWARD BLUM & LAUREN CAMPBELL, AM. ENTER. INST., ASSESSMENT OF VOTING RIGHTS PROGRESS IN JURISDICTIONS COVERED UNDER SECTION FIVE OF THE VOTING RIGHTS ACT 3-8 (2006), available at [http://www.aei.org/files/2006/05/15/20060515\\_BlumCampbellreport.pdf](http://www.aei.org/files/2006/05/15/20060515_BlumCampbellreport.pdf) (comparing minority registration and turnout rates in covered and non-covered jurisdictions and concluding that the two were not significantly different to justify continued disparate treatment); Persily, *supra* note 10, at 208 (arguing that "it is difficult to defend a formula which, for example, . . . does not cover the counties in Ohio and Florida with the most notorious voting rights violations in recent elections"). Congress had previously rejected attempts to limit or expand section 5 coverage. In the 1975 debate, Georgia Senator Sam Nunn proposed extending section 5 nationwide. Kousser, *supra* note 19, at 705. In 2006, Congressman Charlie Norwood, also of Georgia, offered an amendment that would limit coverage to jurisdictions that either currently maintained a discriminatory practice or had less than fifty percent turnout in one of the last three presidential elections. *Id.* at 754 & n.548.

89. The U.S. Court of Appeals for the District of Columbia Circuit recently issued its opinion upholding section 5. *Shelby Cnty. v. Holder*, 679 F.3d 848, 853, 873 (D.C. Cir. 2012). *Shelby County, Alabama* was not eligible for bailout because its voting procedures had been subject to Attorney General objections within the past decade. *Id.* at 857. The court's reasoning largely tracks the *NAMUDNO v. Mukasey* district court opinion, crediting Congress's findings that racial discrimination in voting still existed and that the section 5 coverage formula, together with the bailout provision, continued to target the areas where such discrimination was concentrated. See *id.* at 866-70, 873-75.



Opponents question the use of history as a trigger for section 5 coverage.<sup>90</sup> By focusing on changes in the South, the Court's story suggests that Southerners are not inherently likely to discriminate today just because their parents or grandparents did four decades ago. Simply put, 2006 is not 1965. The Court's emphasis on this kind of progress is no doubt one way to gauge the current state of voting rights, even if the extent of that progress is debated. However, it is not necessarily the only way to read section 5 and the role it currently serves. Indeed, the role of section 5 in 2006 may be distinct from its role in 1965 or 1975. Just because it may not address the same evil does not mean it does not address *any* evil. Before the next challenge, and before removing the prophylactic section 5, policymakers must have a full understanding of the work it currently does. One way to do so is to consider a different kind of story.

### III. A TRIP TO YOKNAPATAWPHA COUNTY

*NAMUDNO v. Holder* tells one story about the South. But the South is full of stories. In his novels and short fiction, William Faulkner famously depicted the often turbulent lives of the citizens of fictional Yoknapatawpha County, Mississippi in the decades and generations after the Civil War. Although he purported to chronicle only his "little postage stamp of native soil" in Mississippi, Faulkner explored larger themes about human nature and the complexities of the mind.<sup>91</sup> Of particular interest was the burden of memory and the manner in which it shapes the present.<sup>92</sup>

In works such as *The Sound and the Fury*, *Flags in the Dust*,<sup>93</sup> *Light in August*,<sup>94</sup> and *Absalom, Absalom!*,<sup>95</sup> characters inhabit an acutely past-conscious world in which contemporary life is influenced and occasionally overshadowed by what has come before. In their

90. See, e.g., Plaintiff's Motion for Summary Judgment at 29-30, *Shelby Cnty. v. Holder*, 679 F.3d 848 (2012) (No. 1:10-00651) (criticizing section 5 as "a legislative conclusion that the citizens and elected officials of the covered jurisdictions have an incurable racial animus" and arguing that "[c]ongress is not entitled to blindly assume that racial attitudes from 45 years ago persist today").

91. See Interview with William Faulkner, in N.Y.C., N.Y. (Mid-winter 1956), available at *The Art of Fiction XII: William Faulkner*, PARIS REV. (Spring 1956), at 52.

92. Faulkner was not alone in this particular fascination. Poet and essayist Allen Tate wrote of the "peculiarly historical consciousness of the Southern writer," Allen Tate, *The Profession of Letters in the South*, 11 VA. Q. R. 161, 175 (1935), and described Southern writing as a "literature conscious of the past in the present," Allen Tate, *The New Provincialism: With an Epilogue on the Southern Novel*, 21 VA. Q. R. 262 (1945).

93. WILLIAM FAULKNER, *FLAGS IN THE DUST* (Douglas Day ed., Random House 1973) (1929) [hereinafter *FLAGS IN THE DUST*].

94. WILLIAM FAULKNER, *LIGHT IN AUGUST* (1932) [hereinafter *LIGHT IN AUGUST*].

95. WILLIAM FAULKNER, *ABSALOM, ABSALOM!* (1936) [hereinafter *ABSALOM, ABSALOM!*].

depictions of characters besieged by the power of memory, these novels contain astute insights into the role the past plays in contemporary life. They raise questions about how people respond to long ago events in which they had no personal involvement. In the South, such questions necessarily involve issues of race, including in the context of voting.<sup>96</sup>

This Part explores how, unlike the Supreme Court, Faulkner examined the power of memory in the psychology of the South. It provides an overview of how this theme is treated in several of Faulkner's novels, from a young man whose obsession with the past prevents him from living in the present to a family living in the shadows of prior generations to the granddaughter of a murdered carpetbagger who views the trials of her life as punishment for the sins of her race. As described more fully in Part IV, this overview suggests how Faulkner can inform the debate over the constitutionality of section 5 of the VRA. Section 5 cannot stand as a present solution to old problems, but an obsession with the past is a distinct concern from the past itself. Even following years of progress since the worst instances of discriminatory voting practices, the memory of the old system remains; even when "[t]hings have changed,"<sup>97</sup> the South still remembers how things used to be. Just because the past is gone does not mean it is forgotten. And it might not even be gone.

#### A. The Sound and the Fury: *Quentin's Obsession with the Past*

*The Sound and the Fury* is, in part, a novel about time.<sup>98</sup> Quentin Compson, the young protagonist of the novel's second section, is obsessed with the past and consequently strives to escape the passage of time. His fixation stems not from anything he did, however, but from the actions of his beloved sister, Caddy. Quentin is scarred by the memory of the unmarried Caddy's sexual promiscuity, with lost chastity often viewed as a stand-in for the larger process of deterioration of the mores and societal structures of the Old South.

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96. Faulkner often wrote about issues of race in a more sincere and critical manner than many of his contemporaries. Nonetheless, Faulkner's exploration of the burden of memory is largely confined to white Southerners. The power of the past for black Southerners is, of course, a critical aspect of the identity of the contemporary South and is relevant to the debate over section 5. To the extent Faulkner's observations do not apply, however, it is largely beyond the scope of this Article.

97. See Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO v. Holder*), 557 U.S. 193, 202 (2009).

98. See CLEANTH BROOKS, *Man, Time, and Eternity*, in WILLIAM FAULKNER: THE YOKNAPATAWPHA COUNTRY 327-331 (1963) (describing the relationship of each of the novel's four protagonists to a different concept of time).

The opening passage of Quentin's section immediately reveals his obsession.<sup>99</sup> Upon awaking on a June morning in his Harvard dormitory, Quentin takes two actions to avoid learning what time it is and thus to avoid even acknowledging the passage of time. He places his watch face-down on the dresser and then turns his back to the window so as not to be able to guess the hour by the position of the sash's shadow on the curtains.<sup>100</sup> Shortly afterward, he breaks the watch, smashing the glass and twisting off the two hands.<sup>101</sup>

To Quentin, the passage of time is a violence. A watch is a "mausoleum of all hope and desire," and "Christ was not crucified: he was worn away by a minute clicking of little wheels."<sup>102</sup> He wishes to freeze time, or to remove himself from it. By escaping time, he can restore a prelapsarian past in which Caddy is pure and proper order is maintained.

Despite the pain that the memories of his sister's actions cause him, Quentin cannot stop himself from thinking about them. Throughout the section, his mind flitters between past and present, often conflating and confusing the two. Conversations from months and years ago are interspersed within the narrative of the day. The temporal setting sometimes switches from one to the other in the middle of a paragraph or even a sentence. At one point, a scene that begins with Quentin and three classmates flows into a lengthy remembrance of several conversations with Caddy as well as a scuffle between Quentin and one of his sister's paramours.<sup>103</sup> Only at the end of this memory is it revealed that Quentin has gotten into a fight with one of his classmates in the present day.<sup>104</sup> The past not only interferes with, but wholly overpowers, the present with Quentin reliving the prior fight even as he engages in the current one.

Quentin's obsession with the past leads him to reject the possibility of a future. Progress is not only impossible, but inconceivable. Jean-Paul Sartre likened Faulkner's characters to people facing backwards in a moving car, able only to see what has already passed; the present is blurred and the future unseen and unseeable.<sup>105</sup> Quentin remains haunted

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99. See *THE SOUND AND THE FURY*, *supra* note 12, at 49.

100. *Id.*

101. *Id.* at 51.

102. *Id.* at 48-49. These two statements were originally made, almost certainly sardonically, by Quentin's father. But Quentin repeats them, and imbues them with a sincerity likely unintended by Mr. Compson.

103. See *id.* at 94-104.

104. *Id.* at 104. Notably, Quentin fares no better in his fight with Gerald Bland than in the earlier struggle with Dalton Ames.

105. Jean-Paul Sartre, *On The Sound and the Fury: Time in the Works of Faulkner*, in

by the events of the past, even as he is removed temporally and spatially from them, and is unable to fully inhabit the present. His suicide ultimately completes his rejection of the future.<sup>106</sup> As Quentin prepares for this final attempt to escape the passage of time, he remembers to leave his broken watch behind before leaving his dormitory room for the bridge above the Charles River.<sup>107</sup>

### B. Flags in the Dust: *Confusing the Unborn with the Dead*

Like Quentin Compson, the Sartoris family of *Flags in the Dust* inhabits a world in which the past looms ever large.<sup>108</sup> While Quentin looks back in horror, however, the townspeople of Jefferson tell and retell the tales of John Sartoris, a colonel in the Confederate Army, with honor and longing reverence. And unlike Caddy's relatively recent indiscretions, the events that continue to so captivate the Sartorises occurred decades ago, in the previous century.

Old Bayard Sartoris, the family patriarch, spends most of his days listening to other old-timers tell stories about the wartime exploits of his father. His own life's endeavors receive scant mention, let alone the experiences of the next two generations. Young Bayard (Old Bayard's grandson) has just returned from the Great War in Europe, an experience his family and neighbors barely seem to acknowledge. The characters seem to find satisfaction only in the long-ago triumphs of their predecessors, fueling the ongoing process of telling and retelling. The present is ever in the shadow of the past. Indeed, by constantly repeating these stories, the storyteller allows the past to displace the present; he preserves the image of the long-gone hero "in the vacuum of his own abnegated self."<sup>109</sup>

The Colonel Sartoris stories involve outsmarting Union troops, stealing horses, and, in one particularly striking tale, violently thwarting the efforts of the newly enfranchised black citizens of Jefferson to vote. One of the old men in town reverently describes to Old Bayard how his father stood in the doorway of the polling place one day in 1872 as two

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FAULKNER: A COLLECTION OF CRITICAL ESSAYS 87, 89 (Robert Penn Warren ed., 1966). Sartre's essay also describes a man like Quentin as "a creature bereft of possibilities and explicable only in terms of what he has been." *Id.* at 93. Similarly, he regards *The Sound and the Fury* as a novel in which "everything has already happened." *Id.* at 89.

106. *Id.* at 91.

107. *See id.* at 113.

108. *See generally* FLAGS IN THE DUST, *supra* note 93. Like many of Faulkner's characters, the Sartoris family appears in multiple works, including *The Unvanquished* and the short story *There Was a Queen*. *See* WILLIAM FAULKNER, THE UNVANQUISHED (1934); WILLIAM FAULKNER, *There Was a Queen*, in COLLECTED STORIES OF WILLIAM FAULKNER 727 (1934).

109. *See* FLAGS IN THE DUST, *supra* note 93, at 224.

white carpetbaggers from Missouri led a group of black men to vote.<sup>110</sup> Once the two men leave, Colonel Sartoris stands by the ballot box and tauntingly invites the black men to cast their votes.<sup>111</sup> As the crowd disperses without voting, he fires a few parting shots from his pistol and takes the ballot box with him.<sup>112</sup> The colonel proceeds to the boardinghouse where the Missourians are staying and, following a polite conversation with the proprietor, shoots and kills the two men.<sup>113</sup> The storyteller reflects that he envies the murdered men, since they had the honor of being killed by a man like Colonel Sartoris.<sup>114</sup>

The past not only overshadows the present, it infiltrates and affects it. A shared attitude of reckless pride and even a particular gesture has “repeated itself generation after generation with a fateful fidelity” among the Sartoris men.<sup>115</sup> Names are consistently recycled across generations. Colonel John Sartoris had a son named Bayard, who has two grandsons named John and Bayard.<sup>116</sup> When Young Bayard’s wife becomes pregnant, his great-great Aunt Jenny immediately begins referring to the child as John. In this way, the old Aunt “confus[es] the unborn with the dead.”<sup>117</sup>

Yet when Young Bayard’s newborn son receives a name other than John or Bayard, Jenny dismisses the possibility that a new name can affect a change in character.<sup>118</sup> The outward change is not indicative of the more fundamental shift that would be required for the next generation to truly follow a different path than its predecessors. As long as the child has Sartoris blood, this latter kind of progress is impossible.

### C. Light in August: *The Past as Curse*

The tale of Colonel Sartoris and the carpetbaggers appears again in *Light in August*, told there by Joanna Burden, the granddaughter and sister of the two murdered men.<sup>119</sup> In this telling of the story, the power of memory is expressly bound up with the history of racial strife in the

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110. *Id.* at 224.

111. *Id.*

112. *Id.*

113. *Id.* at 224-25.

114. *Id.* at 225.

115. *See id.* at 365.

116. In *The Sound and the Fury*, such repetition of names occurs across genders as well as generations. Caddy Compson’s daughter is named Quentin, after her late uncle. *See THE SOUND AND THE FURY*, *supra* note 12, at 158.

117. *FLAGS IN THE DUST*, *supra* note 93, at 351.

118. *See id.* at 370 (“‘Do you think,’ Miss Jenny insisted, ‘that because his name is Benbow he’ll be any less a Sartoris and a scoundrel and a fool?’”).

119. *LIGHT IN AUGUST*, *supra* note 94, at 248-54.

South. Rather than a vehicle for the lasting glory of one individual, the incident becomes evidence of an inescapable collective curse.

Ms. Burden recounts a visit to her brother and grandfather's gravesite as a young girl in which her father commands her to remember their fate.<sup>120</sup> Yet he attributes their death not to the acts of one man, but to a divine curse on the white race for its treatment of the black race.<sup>121</sup> The aptly named Mr. Burden preaches the inescapable shackles of fate, determined long ago in retribution for the depravity of long ago sinners.<sup>122</sup> Although their motivation for trying to help freedmen vote was to progress beyond a hateful and violent past, even the Burden men were not immune from "the white race's doom and curse for its sins."<sup>123</sup>

Not just a source of punishment, the past is a force that shapes worldviews and informs social interactions in the present. Neither the young Joanna nor "every white child that ever was born and that ever will be born" can escape it, even once race relations had externally improved.<sup>124</sup> As a member of a family of abolitionists and a generation further removed from the Civil War, Joanna had not previously given much thought to issues of race; she viewed the black citizens of Jefferson as other inhabitants of the world. After listening to her father, however, Joanna began to see blacks not as fellow people but as representing "a shadow in which I live, we lived, all white people."<sup>125</sup> Even if no longer sinners, they remain aware of the sin. The passage of time does not bring absolution, and progress is no means of atonement. The Burdens certainly do not idealize or seek to restore the past, but neither do they try to fight it; they simply acknowledge it as a force that forever dictates their worldview and guides their fate.

#### D. *Absalom, Absalom!:* *Stubborn Back-Looking Ghosts*

In *Absalom, Absalom!*, Quentin and his college roommate Shreve spend the novel attempting to construct the story of Thomas Sutpen, a mysterious figure in Jefferson's past.<sup>126</sup> Shreve, the outsider, consistently has difficulty separating the story of one man from the history of the entire region. In his mind, each Southerner shares a collective historical

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120. *Id.* at 252-53.

121. *Id.*

122. *See id.* at 253.

123. *Id.* at 252.

124. *Id.*

125. *Id.* at 253.

126. *See generally* ABSALOM, ABSALOM!, *supra* note 95. Even among Faulkner novels, *Absalom, Absalom!* is enormously and excitingly complex; its treatment here is admittedly and necessarily cursory.

experience that supplants individual identity. Not even the passage of time can slow this process of conflation. He questions Quentin about a society in which “forever more as long as your children’s children produce children you wont be anything but a descendant of a long line of colonels killed in Pickett’s charge.”<sup>127</sup> Quentin notices this phenomenon in his own life, as well. He recognizes that he comes from a land that has been “dead since 1865” and is now “filled with stubborn back-looking ghosts.”<sup>128</sup> Quentin sees himself as “still too young to deserve yet to be a ghost but nevertheless having to be one,” even as he prepares to leave Mississippi for Harvard.<sup>129</sup>

Sutpen remains so fascinating to the citizens of Jefferson because, unlike them, he has no past.<sup>130</sup> He arrived one day (from somewhere outside the South, of course), without family or history, intent on designing his own world and shaping his own legacy.<sup>131</sup> Since he is not of the South, he is not bound by its memories or punished by its curse. When his design ultimately fails, Sutpen sees the failures not as the “sins of the father come home to roost,” but as “just a mistake” in his own calculations.<sup>132</sup>

The native Southerners, by contrast, remain prisoners of the past. For example, two characters in the Sutpen story are identified as octoroons, meaning they are one-eighth black. Even this small fraction leads to concerns of “miscegenation” when Charles Bon, one of the two characters, courts Sutpen’s daughter.<sup>133</sup> This focus on racial lineage reflects a historical phenomenon in which one’s social and legal status could be dictated by the existence of a single black ancestor even three or four generations back.<sup>134</sup> The “one-drop rule,” in both common law and statutory forms, formed the basis for racial classification, both during and after legalized slavery.<sup>135</sup> By referencing this concept,

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127. *Id.* at 289.

128. *Id.* at 4, 7.

129. *Id.* at 4.

130. *See id.* at 7 (describing “that Sunday morning in June in 1833 when he first rode into town out of no discernible past”).

131. At least in Quentin and Shreve’s version of the story, Sutpen was raised in the mountainous region of Virginia that seceded from the rest of the state and became West Virginia in 1863 in order to remain in the Union. *See id.* at 179.

132. *Id.* at 215.

133. *Id.* at 215, 284-85.

134. *See, e.g.,* Daniel Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule 1600–1860*, 91 MINN. L. REV. 592, 604 (2007) (describing an eighteenth-century regime in which, “[d]epending on the state, anyone with at least one-quarter, one-eighth, or one-sixteenth ‘black blood’ was legally black”).

135. *Id.* at 604-07.

Faulkner showed that the fascination with the past that burdened individuals was also built into the larger structures of Southern society.

#### IV. LAW, LITERATURE, AND THE BURDEN OF SOUTHERN MEMORY

As seen in the stories of Quentin Compson, the Sartoris family, Joanna Burden, and others, memory is a powerful force in Faulkner's South. Yet does all this talk of *The Sound and the Fury* signify nothing? Or does a tour through Yoknapatawpha County shed light on the issue of the constitutionality of section 5? This Part explores how Faulkner's focus on the power of memory could inform the debate over section 5 by suggesting an as-yet unaddressed role that the provision may presently serve.<sup>136</sup> It also considers more generally the role that literature can serve in legal analysis.<sup>137</sup>

##### A. Faulkner's Section 5

In his depictions of how the past and memories of it continue to shape current attitudes and actions, Faulkner addressed some of the same thematic and sociological concerns that animate section 5. By retaining 1972 as the triggering date for section 5 coverage, Congress expressed the opinion that what happened in the past was relevant to the state of voting rights in the present. Moreover, Faulkner grappled with these issue against the backdrop of the pre-VRA South that Congress was responding to when it enacted and reauthorized section 5.

Yet in its narrative of progress in *NAMUDNO v. Holder*, the Supreme Court ignored the ongoing burden of memory that Faulkner portrays so powerfully. Even as it instructed Congress that it must identify "current needs" justifying the continued existence of section 5, the Court may thus have overlooked one such need.<sup>138</sup> Just as section 5 is a solution uniquely concerned with the past, Faulkner's novels show that a concern with the past may also be part of the problem it addresses. Although section 5 may be less necessary than it once was to combat intentional racial discrimination, it may thus serve an additional, distinct purpose today as a counter to the weight of memory.

Viewed in this light, section 5 does not punish the sons for the sins of the father, but keeps in check the uncertain consequences of a current ongoing consciousness of those sins.<sup>139</sup> Jurisdictions are selected for

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136. See *infra* Part IV.A.

137. See *infra* Part IV.B.

138. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO v. Holder)*, 557 U.S. 193, 203 (2009).

139. In his dissent, Justice Thomas forcefully argues that "punishment for long past sins is not



coverage not necessarily under a recidivist theory that discrimination is more likely to occur there, but because the memories there are most stark. Whether a concern for such consequences is an appropriate target of federal legislation is an intriguing question that has so far been absent in the debate over section 5.

If the memory of past acts and conditions influences current attitudes and actions in the contemporary South as it does in Faulkner's novels, then policymakers should consider the consequences of that influence when determining the future of section 5. Along with the *City of Rome* factors and other statistical evidence, the power of memory is another factor to consider when speculating as to the state of voting rights in a post-section 5 South. By highlighting the power of the past, Faulkner ironically helps refocus the debate over section 5 to the future—specifically, how past-conscious policymakers will react once that provision is no longer an obstacle.

The Yoknapatawpha experience suggests several possible scenarios that could follow the expiration or invalidation of section 5 in the contemporary South. A full-scale reversion to pre-1965 practices, which would have to be combated piecemeal under other provisions of the VRA, is unlikely. Colonel Sartoris is no longer waiting at the gate. Nonetheless, the influence of memory could affect voting rights in the South in more subtle ways.

Out of shame or aggravation stemming from reminders of the era of rampant discrimination, policymakers may try to escape this past by refusing to acknowledge that problems still exist. Without being forced to address the issue by the preclearance process, either by defending a policy before the federal government or preemptively adjusting it to avoid an objection, they may ignore or otherwise overlook the possibility that the policy may result in an abridgment of the right to vote based on race. Like Quentin, they refuse to believe that they “deserve . . . to be a ghost.”<sup>140</sup>

This scenario is more likely if the potential abridgement does not take the form of an explicit denial of access to the ballot box but instead stems from structural choices like the location of polling sites (the issue in *NAMUDNO v. Holder*), or a practice that dilutes the value of a vote, such as redistricting or annexation. Likewise, the discriminatory impact of facially neutral policies such as photo identification requirements or felon disenfranchisement laws would be easier to ignore or explain

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a legitimate basis” for imposing the burdens of section 5. *Id.* at 226 (Thomas, J., concurring in part and dissenting in part).

140. ABSALOM, ABSALOM!, *supra* note 95, at 4.

away. In any of these instances, the instinct would be to ascribe any disparate effects to seemingly non-racial factors like ballot security or partisan politics so as to avoid the accusation of a return to the discriminatory past.

This reaction could also be encouraged by authoritative proclamations that “[t]hings have changed,”<sup>141</sup> which provide cover for the decision to ignore potential consequences of new policies. Indeed, the stridently defensive tone of some of the parties and amici in *NAMUDNO v. Holder* and *Shelby County* suggest that this scenario is possible. A preoccupation with the past obscures any focus on the realities of the present. Without an honest evaluation of a new voting policy’s effects by the enacting policymakers or preclearance review under section 5, equal voting rights may suffer; abridgements would go unacknowledged and thus unaddressed.

Alternatively, policymakers in the South who are cognizant of the long history of racial strife and inequality may see discriminatory effects of voting practices as inevitable. Inequality was the status quo in the area of voting rights for much longer than equality. The result here would be the same as with ignoring these effects. Without the “unnatural” barrier of section 5 in place to block this otherwise unavoidable result, officials may see little reason to confront the issue when enacting a new policy. If the result is perceived as inescapable, like the everlasting shadow in which Joanna Burden lives, policymakers are less likely to try to avoid it. Instead of the preclearance process, the practice in question could be debated through litigation under other VRA provisions or the Equal Protection Clause if conditions grew sufficiently intolerable. Under this scenario, discriminatory practices would remain in place longer, if they were challenged at all; indeed, the drawbacks of such a piecemeal approach was a strong rationale behind the original enactment of section 5.<sup>142</sup>

Another possibility is that selection of new voting practices may be influenced by memories of a pre-VRA system. Although the vast majority of officials in covered jurisdictions surely do not harbor nostalgia for the days of intentional discrimination, they may think back to a past (almost certainly before they were in office) in which the federal government did not interfere with local control of voting policies. Like Colonel Sartoris, local control serves as a revered symbol of past glory.

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141. See *NAMUDNO v. Holder*, 557 U.S. at 202.

142. See *supra* Part II.A.

They would certainly not be the first to make this association. Justice Hugo Black, a New Deal liberal and Alabama native, compared section 5 to Reconstruction in a series of concurring or dissenting opinions in VRA cases.<sup>143</sup> He criticized the provision as “reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did” and famously bemoaned that “I had thought that the whole Nation had long since repented of the application of this ‘conquered province’ concept.”<sup>144</sup> For Justice Black, the power of the past led him to view the new law in the light of old grievances, the latest chapter in an ongoing affront to Southern sovereignty.<sup>145</sup> The concept of local control was idealized, like a monument, stripped of the shameful consequences to which it had lead.

Free of the obstacle of preclearance, contemporary officials could seek to restore a sense of ownership over the system by enacting locally popular practices with less concern for whether that may have discriminatory results or may ultimately be challenged. Transfixed by the memory of local control, they may disregard its negative elements in a manner reminiscent of the old man in *Flags in the Dust* who envies the murdered carpetbaggers who, having been killed by Colonel Sartoris, were forever associated with him. Combined with the natural tendency to establish policies that increase one’s own political power, these changes could have a detrimental effect on equal voting rights,<sup>146</sup> especially under circumstances in which race and party tend to correlate, as they do in the South.<sup>147</sup>

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143. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 595 (1969) (Black, J., dissenting); *South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966) (Black, J., concurring in part and dissenting in part).

144. *Allen*, 393 U.S. at 595; see also *Katzenbach*, 383 U.S. at 359 (Black, J., concurring in part and dissenting in part) (criticizing section 5 for requiring state or local jurisdictions wishing to enact laws to “first send[] their officials hundreds of miles away to beg federal authorities to approve them”).

145. See *Allen*, 393 U.S. at 595.

146. Kousser, *supra* note 19, at 773-74 (observing that voting laws with discriminatory effects are often “more a matter of power than of prejudice” and pithily noting that “Bull Connor may be dead, but Tom DeLay is not”).

147. See *Hunt v. Cromartie*, 526 U.S. 541, 549-50 (1999); see also Pamela Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 314-20 (1997) (describing the correlation between race and partisanship in the South). Especially in the aftermath of the 2010 elections, congressional delegations from Southern states subject to section 5 in whole or in part tend to consist of white Republicans and black Democrats. In the 112th Congress, the 118 members of the House of Representatives from the nine states of the Old Confederacy subject to section 5 consisted of eighty-two white or Hispanic Republicans, seventeen black Democrats, seventeen white or Hispanic Democrats, and two black Republicans. See *Congressional Demographics: Ethnicity*, U.S. CONGRESS, <http://congress.org/congressorg/directory/demographics.tt?catid=ethnic> (last visited Nov. 5, 2012). No white Democrat represents Louisiana,

These actions would stem not from a current desire to discriminate based on race, but in part from a desire to restore a lost system of local control. Like Quentin, they seek the return of a purer past. Inequality in voting rights may be the consequence of this restoration of what is perceived as the natural order. As Congress has made clear, however, practices with a racially discriminatory effect on voting violate the VRA regardless of intent.<sup>148</sup>

In addition to the influence of memory on policymakers, the legacy of discrimination may continue to foster distrust of the system by previously victimized groups and their allies.<sup>149</sup> The lack of faith engendered by an illegitimate system is likely to survive the illegitimacy itself. Joanna Burden, the granddaughter and sister of the men killed by Colonel Sartoris, lives by herself and rarely interacts with the other citizens of Jefferson.<sup>150</sup> The burden of memory may thus discourage participation in civic life even when official barriers to such participation no longer exist. By contrast, the continued existence of section 5 signals that the rights of these groups are still considered.

One possibility that cuts the other way is that shame over the memories of discrimination could lead to rigorous self-policing that renders section 5 unnecessary. Although Quentin reacted to his obsession with the horrors of the past by attempting to stop the passage of time, others might seek to accelerate it. Contemporary Southern officials may respond to the weight of the past by taking actions to repudiate it. Awareness of the past encourages efforts to avoid repeating its sins.

Ultimately, Faulkner does not provide a certain answer as to how an occupation with the past would influence voting policy in a post-section 5 South. Nonetheless, he raises the idea that it is a relevant consideration. The value of his work for this debate lies in getting policymakers to consider the possibilities and expand their understanding of the issues at stake.

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Mississippi, Alabama, or South Carolina in the House. *See id.*

148. When the Court ruled in *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980), that a claim under the VRA required a showing of discriminatory intent, Congress responded by amending the Act to clarify that a voting practice violates the VRA if it “results” in abridgment of the right to vote on account of race. *See* 42 U.S.C. § 1973 (2006).

149. *Cf.* Richard Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 25, 35-36 (2007) (discussing the lack of confidence of certain voters in a system that singles them out for harsh treatment).

150. *See* LIGHT IN AUGUST, *supra* note 94, at 233.

### B. Law and Literature

Scholars have long considered the interplay between law and literature.<sup>151</sup> Much of the scholarship in this field focuses on works of literature that expressly address legal subjects, from depictions of trials in Shakespeare to critiques of the criminal justice system in works like *Native Son*.<sup>152</sup> Unsurprisingly, texts such as Kafka's *The Trial*<sup>153</sup> and Melville's *Billy Budd*<sup>154</sup> receive much attention. Similarly, commentators frequently discuss the possibilities and failures of literature as works of legal philosophy; they focus on novels or stories which address such theoretical issues as justice, equality, formalism, and discretion, even if not in the context of the legal system.<sup>155</sup> Other scholars argue that the study of literature contributes to a lawyer's moral edification by, for example, presenting sympathetic portraits of marginalized or otherwise unfamiliar groups.<sup>156</sup> Another school within the movement conceives of law as literature, studying the rhetoric of judicial opinions or using literary theory as a model for interpretation of legal texts and documents.<sup>157</sup>

Faulkner's contributions to the debate over the constitutionality of section 5 show that the role literature can serve in legal analysis extends beyond the purposes generally identified by the law and literature movement, however. Despite the occasional appearance of town lawyer Gavin Stevens, most of Faulkner's work is not literature about law.<sup>158</sup> He does not write about the Fifteenth Amendment or other legal responses to the issue of voting discrimination. Nor does the main value of his work for the debate over section 5 stem from its ability to enable judges or legislators to identify with the past-conscious Southerner. Instead, his novels are relevant to an analysis of section 5 because they chronicle the

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151. See, e.g., RICHARD POSNER, LAW AND LITERATURE (3d ed. 2002); THE LAW AS LITERATURE (Ephraim London ed., Simon and Schuster 1960); James Boyd White, *What Can a Lawyer Learn from Literature?* 102 HARV. L. REV. 2014 (1989) (reviewing RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988)). With the exception of some of the essays in Mississippi College School of Law's 1983 symposium, *The Law and Southern Literature*, Faulkner has "been strangely neglected in the field." William Page & Robert Weisberg, *Forward: The Law and Southern Literature*, 4 MISS. C. L. REV. 165, 166 (1984).

152. RICHARD WRIGHT, *NATIVE SON* (1940).

153. FRANZ KAFKA, *THE TRIAL* (1925).

154. HERMAN MELVILLE, *BILLY BUDD, SAILOR: (AN INSIDE NARRATIVE)* (Harrison Hayford & Merton M. Sealts, Jr. eds., Univ. Chi. Press 1962).

155. See POSNER, *supra* note 151, at 93-121.

156. See, e.g., MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 90-99 (1995).

157. See Posner, *supra* note 151, at 209-11.

158. For an exploration of Faulkner's depiction of the law and legal practice, see Morris Wolff, *Faulkner's Knowledge of the Law*, 4 MISS. C. L. REV. 245 (1984).

very world the law was targeting and, as described in the previous Section, they address a related social concern in a way that helps inform its purpose.

Literature can serve as a probative tool for evaluating legislation because it, like law, is often a response to social problems. Like the policymaker, the novelist considers how people may react to certain conditions; this knowledge helps shape the former's decision whether or how to regulate those conditions. The novelist's perspective can be valuable to the legislator because they are both engaging in a similar exercise. As William Page has noted, scholars may "compare[] literary and legal responses to a social question as a way to broaden the perspectives of both fields."<sup>159</sup>

Moreover, law does not stem fully formed from the state, but is shaped by reference to external social forces. Even positive law is an expression of and response to societal needs and norms. To this end, Congress holds hearings and collects evidence before enacting legislation. Since the filing of the famous "Brandeis brief,"<sup>160</sup> many judges consider similar information when evaluating the purposes and meaning of such laws. As such, other voices aside from the state and non-state actors in the public policy field are relevant for an evaluation of policy.<sup>161</sup> Even if they are not writing about a particular law itself, novelists who write about the issues that led to that law or the setting in which the need for it arose can provide a valuable perspective on the purpose it is meant to serve and its success in doing so.<sup>162</sup>

Among his other criticisms of the law and literature movement, Judge Richard Posner emphasizes that literature is, of course, literary rather than documentary and is thus generally not a realistic depiction of the world.<sup>163</sup> Unless the work is explicitly didactic in purpose, authors

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159. William Page, *The Practice of Law and Literature*, 39 VAND. L. REV. 391, 393 (1986) (reviewing ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE LAWYER AS PROTAGONIST IN MODERN FICTION* (1984); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984)).

160. Future-Justice Brandeis is often credited with the introduction of social science and other extra-legal authority into legal argument, rather than relying solely on legal theory, most famously as part of his brief submitted to the Court in *Muller v. Oregon*, 208 U.S. 412 (1908).

161. Cf. Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 26, 42 (1983) (encouraging reliance on "interpretive communities" outside of the state to determine the meaning of law).

162. This is not, of course, the only purpose of literature. As James Boyd White has argued, literature is not confined to the presentation of fact or proposition, but can rather engage the reader in a search for meaning; it invites rather than compels, and is "not propositional, but experiential." White, *supra* note 151, at 2018. In this sense, the value of literature lies as much in the telling as in what is told. *Id.* at 2018-20, 2028.

163. See POSNER, *supra* note 151, at 166-67, 320-21.

shape narratives so as to make them interesting or engaging and choices regarding content and theme primarily serve that end. In the case of section 5, however, the issues faced by Quentin Compson and others are hardly confined to the realm of fiction. Historians and sociologists have similarly identified and addressed the impact of memory and the past in the South. C. Vann Woodward famously described the “burden of Southern history” as a prominent aspect of Southern cultural and intellectual identity, for example.<sup>164</sup> He argued that the South had never fully participated and continued not to share in the American legend of progress and success, due to the accumulated memories of failure and defeat.<sup>165</sup> Woodward further posited that the South had a unique awareness of history, and especially of its darker elements; the region has long been defined and distinguished by its faults, even if individual Southerners deplored them.<sup>166</sup>

Current events likewise continue to spotlight the powerful and powerfully contested role of the past in the contemporary South. The proper way to commemorate historical events is a frequent source of controversy; recent years have brought disputes over the appropriateness of Confederate History Month in Virginia and Secession Balls in South Carolina, for example.<sup>167</sup> Such debates undermine any argument that the burden of memory is simply a literary trope intended to entertain readers. They likewise show that the power of the past is not itself a thing of the past.

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164. C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 15-22 (1960). For a Woodward-influenced take on section 5, see Kousser, *supra* note 19, at 674-77.

165. WOODWARD, *supra* note 164, at 18-19. Interestingly, Professor Woodward testified before Congress in favor of the 1982 reauthorization of the VRA, where he warned that “history can move backward.” *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University).

166. WOODWARD, *supra* note 164, at 4-5. Woodward entreated historians to acknowledge the role of “poets, playwrights, and novelists—particularly the novelists” in examining what the past means and to recognize the “vital relations between the crafts.” *Id.* at 27.

167. See Laura Bly, *Charleston’s Secession Ball a Contentious Start to Civil War’s 150th Anniversary*, USA TODAY, Dec. 20, 2010, at 4D; Anita Kumar & Rosalind Helderma, *McDonnell Revives Storm Over Va.’s Confederate Past*, WASH. POST, Apr. 7, 2010, at A1. The image of the Confederate flag has likewise long been a significant public debate in Southern states. See, e.g., Jeffrey Gettleman, *An Old Battle Flag Helps Bring Down a Governor*, N.Y. TIMES, Nov. 7, 2002, at B2 (describing how changing Georgia’s state flag contributed to Governor Roy Barnes’s defeat in 2002); see also *Barr v. Lafon*, 538 F.3d 554, 577 (6th Cir. 2008) (rejecting a Tennessee high school student’s constitutional challenge to his school district’s ban on Confederate flag imagery). The song “Dixie” raises similar controversy. See, e.g., Craig Timberg, *Rehnquist’s Inclusion of ‘Dixie’ Strikes a Sour Note at Meeting*, WASH. POST, July 22, 1999, at A1 (describing an annual sing-along led by Chief Justice Rehnquist at the Fourth Circuit Judicial Conference that included “Dixie,” among other standards).

Not all literature will assist in an understanding of the law, of course. In addition to the relevance of the themes he addressed to the debate over section 5, Faulkner's cultural context and artistic mission make his work uniquely suited to this purpose. Faulkner adopted as his most frequent subjects both the world around him and the life of the mind. In the role of novelist as chronicler, he based his fictional world in part on observations of his own world, to the extent that some of the citizens of Oxford expressed concern that his characters were portraits of themselves. Indeed, a Mississippi state historical marker near Faulkner's gravesite proudly describes his work as "stories about his people."<sup>168</sup> And the world which Faulkner observed and wrote about was the pre-VRA South that Congress was responding to when it enacted and reauthorized section 5. As such, his writing is part of the statutory context and a source of information almost akin to a newspaper report or judicial opinion from the era.

Yet Faulkner's literature also has a unique value in its status as literature. Unbound by a strict fidelity to fact, fiction can experiment and extrapolate in a way that provides insight into human nature. As a modernist, for example, Faulkner explored the psychological mysteries of the mind, including the thought processes by which people respond to traumatic events. Perhaps unique among the means of chronicling human experience, fiction can portray the "complicated laws that govern the inner world of a human being" in the context of "specific social situations."<sup>169</sup> And indeed, literature can also serve a profoundly predictive role, with its ability to depict "things such as might happen" rather than simply "what happened."<sup>170</sup> As discussed above, Faulkner's examination of the power of memory can contribute to the debate over what will happen to voting rights in a post-section 5 South and thus inform Congress's "predictive judgment" as to the law's necessity going forward.<sup>171</sup> By recognizing that "the past is never dead" and acknowledging its ongoing influence on present conduct, Faulkner encourages policymakers to consider whether the past-focused section 5 is uniquely suited to a past-conscious society.<sup>172</sup>

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168. *Historic Markers: William Faulkner*, OXFORD-LAFAYETTE COUNTY HERITAGE FOUNDATION, <http://www.oxfordheritage.org/markerWilliamFaulkner.asp> (last visited Nov. 5, 2012).

169. NUSSBAUM, *supra* note 156, at 7, 24.

170. *Id.* at 5 (internal quotation marks omitted).

171. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO v. Mukasey)*, 573 F. Supp. 2d 221, 267 (2008), *rev'd sub nom. Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO v. Holder)*, 557 U.S. 193 (2009).

172. REQUIEM FOR A NUN, *supra* note 16, at 92.



## V. CONCLUSION

In the course of addressing (though ultimately failing to resolve) the question of the continued constitutionality of section 5 of the Voting Rights Act, the Supreme Court told a story about the South. In its tale of progress and redemption, the Court described the region's journey away from the horrors of Jim Crow at the ballot box and ultimately concluded that "[t]hings have changed in the South."<sup>173</sup> As such, Congress's decision to reauthorize section 5 for another twenty-five years largely as is, including the retention of 1972 as the baseline year for triggering coverage, raised constitutional concerns. Legislation that responds to past needs and old evils may well be beyond Congress's authority under the Fifteenth Amendment.

Other storytellers present a different narrative, however. Southern literature, and in particular the novels of William Faulkner, depict an acutely past-conscious society in which the power of memory is ever present. Whether as an object of disdain or reverence, the past continues to affect present actions and attitudes. In works such as *The Sound and the Fury*, *Flags in the Dust*, *Light in August*, and *Absalom, Absalom!*, the characters' lives are shaped by long ago actions in which they had no personal involvement.

Unlike pre-VRA levels of discriminatory practices, the burden of memory is a present phenomenon. As a check on the uncertain consequences of this phenomenon, section 5 may thus address "current needs," as the Court noted that it must.<sup>174</sup> Under this theory of section 5, a covered jurisdiction is subject to the preclearance requirement not as punishment for past sins or because future discrimination is most likely to occur there, but because the memory of those sins is most stark. Whether this function is an appropriate role for federal legislation is an aspect of the constitutional issue that policymakers and commentators have not yet fully addressed. Moreover, the burden of memory has particular relevance to the question of what will happen following the expiration or invalidation of section 5. Faulkner suggests the possibility that, without the obstacle of preclearance, the power of the past could lead to actions with a deleterious effect on voting rights.

Literature can serve as a tool for evaluating law because the two are both means of addressing or responding to social problems. Not all literature can serve this role, nor should it be the only source that policymakers should consider. It should not be ignored, however, especially when it addresses the same social issues as the legislation

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173. *NAMUDNO v. Holder*, 557 U.S. at 202.

174. *Id.* at 203.

being considered by legislators or reviewed by courts. Faulkner is particularly well suited to this purpose, as an author who wrote about both the world around him and the complex workings of the human mind. Faulkner's story no more applies to every corner of the South than does Chief Justice Roberts's, of course, but it contributes to the overall picture that policymakers should consider when addressing the continued need for a provision like section 5.

Ultimately, Faulkner does not provide an answer for the thorny question of whether conditions in the South still justify section 5 as a constitutional matter. Perhaps courts would hold that responding to the burden of memory is not a reasonable exercise of congressional power. Conversely, they could defer to a finding that too many ghosts yet remain even forty or fifty years after the official death of Jim Crow. By highlighting the power of memory, Faulkner's novels present it as a relevant aspect of the issue and help ensure that all dimensions of the question are considered in this debate.

Even if the need to check the burden of memory justified the 2006 reauthorization of section 5, considerations may be different in 2031 when Congress must again decide whether to renew the VRA. Although the past may never be past for Quentin Compson, the Sartoris family, or Joanna Burden, perhaps memory fades more readily outside of Yoknapatawpha County. Even if the past is never dead, a future may yet be possible. To this end, reauthorization allows time for another generation in which non-discrimination is the status quo and new memories are created. These memories may in turn influence the actions and attitudes of generations to come, in the area of voting rights and beyond.

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