Race-Conscious Remedial Measures in Voting Rights Litigation After *NAMUDNO* and *Ricci*

by Benjamin E. Griffith



The Voting Rights Act of 1965[1] (VRA) has long been considered the crown jewel of the civil rights movement. Most would agree that the benefits of the federal government's intrusion into the realm of state and local legislative policy outweigh the federalism costs, and, for over four decades, the VRA was seen as a bulwark against southern states' resistance to the government's efforts to enforce the Fifteenth Amendment of the United States Constitution.[2]

The VRA is a complex scheme of stringent remedies aimed at areas where voting discrimination had been most flagrant. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.[3] Section 2 of the Act operates nationwide and forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[4]

A year after the 1965 VRA was signed into law, the U.S. Supreme Court upheld its constitutionality in *South Carolina v. Katzenbach*.[5] Underlying the decision was a legislative record that thoroughly documented systemic voting discrimination. According to the Court, Congress exercised its authority under the Fifteenth Amendment in an "inventive manner" when it enacted the VRA, as the measure prescribed remedies for voting discrimination which went into effect without any need for prior adjudication.[6] The Court noted that Congress, after enduring nearly a century of systematic resistance to the Fifteenth Amendment, could well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims,[7] and that the Act's remedies were a legitimate and appropriate means of combating the evil. The Act intentionally confined these remedies to a small number of States and political subdivisions, which was seen by the Court as a permissible method of dealing with the problem – Congress had learned that substantial voting discrimination occurred in certain sections of the country, had no way of accurately forecasting whether the evil might spread elsewhere, and, in an acceptable legislative fashion, chose to limit its attention to the geographic areas where immediate action seemed necessary.[8]

Preclearance and Bailout

Of the several remedial measures the Act provides to address voting discrimination, Section 5's preclearance requirement is the most central and draconian. Section 5, as originally enacted and thereafter extended, prohibits a covered jurisdiction from changing its voting or election laws, policies, procedures, or practices, unless and until it first obtains preclearance. Enacted initially as a temporary remedy to an emergency situation, Section 5 effectively suspends, from enforcement, any new or changed voting regulations, redistricting plans, precinct changes, or other changes affecting voting, until federal authorities can review the changes and make a determination that their use or implementation will not perpetuate voting discrimination. This determination is usually made at the administrative level by way of a Section 5 submission to the U.S. Department of Justice, although a covered jurisdiction is free to seek judicial preclearance by filing a declaratory judgment action in the U.S. District Court for the District of Columbia and securing a favorable determination.[9]

In 1982, the VRA was amended[10] to allow covered jurisdictions to seek exemptions from Section 5 coverage through a process known as "bailout." This required a showing of sustained compliance with the VRA over a certain period of time. In 2006, Section 5 was reauthorized by Congress for another 25 years by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006[11] (VRARA). The legislative record before the House and Senate at that time disclosed many practices that had virtually disappeared and relied on decades-old voting data.[12] In the 2006 version, Section 4(a) provided for bailout. The 2006 amendments also provided this narrow definition in Section 14 (c) (2): "'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."[13]

NAMUDNO v. Holder

The Northwest Austin Municipal Utility District No. 1 (NAMUDNO), a utility district in Texas, had an elected five-member board that was responsible for its own elections, even though it did not register voters. Because it was located in a covered jurisdiction, NAMUDNO sought to change the location of its polling station from a less convenient location to a public garage. It felt this change in its election procedure was without discriminatory intent and sought a bailout under Section 4(a) to free it from Section 5's preclearance requirements; in the alternative, it argued that, if Section 5 applied so as to make it ineligible for bailout, Section 5 exceeded Congress' Fifteenth Amendment enforcement power. NAMUDNO based its challenge on the fact that the pervasive and systematic voting discrimination that existed in 1965 (and provided the basis for the VRA) no longer existed. However, a three-judge district court panel upheld the constitutionality of the 2006 VRA extension, and rejected NAMUDNO's bailout request on the ground that such relief was only available to counties and other political subunits that registered voters, and not entities that did not register their own voters.[14]

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On review, the U.S. Supreme Court Court reversed in part, finding that NAMUDNO was a political subdivision eligible to seek bailout and relief from the preclearance requirement in the VRARA.[15] Based on specific precedent, the structure of the VRA, and a broad reading of the bailout provision compelled by underlying constitutional concerns, the Court interpreted the Act as permitting all political subdivisions, including NAMUDNO, to seek to bail out from the preclearance requirements of Section 5.[16] It was enough for the Court that NAMUDNO was a "political subdivision" in the ordinary sense. Bailout would now be available to all political subdivisions, and covered state and local governmental entities would now be more likely to seek exemption from the draconian provisions of the Act.

However, to the relief of the civil rights community, the Court declined to deal with the more interesting issue of the validity of the Act, citing its "usual practice" of "avoid[ing] the unnecessary resolution of constitutional questions."[17] Once it found the district was eligible under the Act to seek bailout, the Court did not need to address the alternative argument raised by the applicant district. Nonetheless, the Court provided some insights into the constitutional question.

Reality, Then and Now

The political landscape in 2006 was different from that in 1965. While preclearance at the time of the VRA's enactment was a requirement that applied, for the most part, to southern states, it had a clear necessity and justification, and its constitutionality was, predictably, upheld. By 2008, the Nation had elected its first African-American President. The Court was called on to evaluate the constitutional efficacy of the 2006 reenactment as remedial legislation over four decades after the "Jim Crow" era ended, and the massive resistance by southern states to attempts to enforce the Fifteenth Amendment had ceased. The statutory provision before the Court was not a temporary remedy to an emergency situation, but a bipartisan legislative enactment to renew and extend the VRA, supported by a legislative history and record that exceeded 15,000 pages. Page counts notwithstanding, was there a strong basis in evidence to support this most recent extension of Section 5 as remedial legislation?

"Gravest and Most Delicate Duty"

Chief Justice Roberts, in a majority opinion joined by seven other Justices, set the tone. Passing judgment on a Congressional Act, he emphasized, was "the gravest and most delicate duty that this Court is called upon to perform."[18] The statutory bailout claim decided by the lower court was also properly before the Court, and was a sufficient vehicle for disposing of the entire case. While declaring that there was no need to address Section 5's constitutionality in the light of the fundamental changes that had taken place in the southern states in recent decades, the Court noted that the VRA differentiated between states "in ways that may no longer be justified."[19] Writing for the majority, Chief Justice John Roberts mused:

> In part due to the success of that legislation, we are now a very different nation…. The historic accomplishments of the Voting Rights Act are undeniable…. When it was first passed, unconstitutional discrimination was rampant and the 'registration of voting-age whites ran roughly 50 percentage points or more ahead' of black registration in many covered states.[20]

Justice Thomas was the lone dissent, favoring a declaration that Section 5 was unconstitutional. He said that "[p]unishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose."[21]

Success of Bailout: By the Numbers

Over 12,000 political jurisdictions are covered by Section 5. Since the bailout provision was inserted in the 1982 VRA amendments, a total of 17 jurisdictions have succeeded in bailing out. In expanding the availability of bailout, the majority in *NAMUDNO* reasoned that it was "unlikely that Congress intended the provision to have such limited effect."[22] A stark reminder came from Justice Clarence Thomas, who pointed out that:

> [a]ll 17 covered jurisdictions that have been awarded bailout are from Virginia, … and all 17 were represented by the same attorney – a former lawyer in the Voting Rights Section of the Department of Justice. … Whatever the reason for this anomaly, it only underscores how little relationship there is between the existence of bailout and the constitutionality of Section 5.[23]

That attorney, J. Gerald Hebert, was the former acting chief of the Civil Rights Division, and an expert in the volatile field of voting rights litigation. Hebert filed the first bailout action after *NAMUDNO* was handed down, being one brought on behalf of Kings Mountain, North Carolina.[24] Other governmental entities from covered jurisdictions around the country expressed interest in bailouts,[25] and the Voting Section of the Civil Rights Division of the U.S. Department of Justice may be anticipating a wave of bailout actions in the future. The Court's ruling suggests, at least implicitly, that besides NAMUDNO, other political units should encounter less difficulty in applying for bailout from Section 5's preclearance provisions.

A Reprieve?

Section 5 has been given a reprieve. However, the Court, speaking through eight Justices, has taken note of serious constitutional concerns posed by the provision. One may quickly identify these potential "building blocks" for the next constitutional challenge to Section 5:

- "The evil that Section 5 is meant to address may no longer be con-

centrated in the jurisdictions singled out for preclearance."[26]

- "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."[27]
- "[T]he racial gap in voter registration and turnout is lower in the States originally covered by Section 5 than it is nationwide."[28]
- "[T]he evidence that is in the record suggests that there is more similarity than difference [between covered and non-covered areas of the United States]."[29]
- While the parties did not agree on on the standard or test to apply in deciding whether Congress exceeded its Fifteenth Amendment enforcement power in extending the Section 5 preclearance requirements, the Act's "preclearance requirements and its coverage formula raise serious constitutional questions under either test."[30]
- "[T]he Act imposes current burdens and must be justified by current needs."[31]
- "The Act also differentiates between the States in ways that may no longer be justified."[32]
- "Many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [VRA] have been eliminated."[33]
- "Things have changed in the the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[34]
- "[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[35]
- "[T]he registration gap between white and black voters is in single digits in the covered states; in some of those states, blacks now register and vote at higher rates than whites."[36]
- "Some of the conditions that we we relied upon in upholding this statutory scheme in [*South Carolina v. Katzenbach*] and [*City of Rome v. United States*] have unquestionably improved."[37]

Ricci and Race Discrimination

In a *Washington Post* editorial, David Broder interpreted *NAMUDNO* and a second Supreme Court case, *Ricci v. DeStefano*, as having the implicit message that "racial discrimination is no longer as big a problem as we once thought."[38]

In *Ricci v. DeStefano*,[39] the Court ruled in favor of the plaintiff firefighters, who had successfully completed the City of New Haven's promotional tests only to have the City refuse to certify the test results. The City had found that Caucasian candidates significantly outperformed African-American and Latino candidates on the exams. It subsequently refused to certify the results out of a perceived fear that the City would be exposed to liability based on facially neutral promotion and hiring policies that had a racially disparate impact. In the firefighters' ensuing lawsuit under Title VII of the Civil Rights Act of 1964, the district court ruled in favor of the employer.[40] The U.S. Court of Appeals for the Second Circuit affirmed in a one-paragraph unpublished order, holding that the City's alleged fear of an adverse impact claim – based only on the fact that the examination results yielded a racial disparity – was a legitimate reason for its decision not to certify the exams.[41]

In a 5-4 ruling, the Supreme Court reversed, concluding that the City's rejection of the test results violated Title VII. Under Title VII, an employer was required to have a "strong basis in evidence" to believe that it would be subjected to disparate-impact liability in the event it failed to take race-conscious, discriminatory action before it could engage in intentional discrimination for the avowed purpose of either avoiding or remedying an unintentional disparate impact.[42] In doing so, the Court

> clarifie[d] how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.[43]

The City of New Haven could not meet the "strong basis in evidence" test and, as a consequence, the Court took the unusual step of granting summary judgment for the plaintiff firefighters.[44]

On the impact of these two cases, David Broder observed that both *NAMUDNO* and *Ricci* had a common link: "the assumption or assertion that this society has largely healed itself and does not need the race-conscious remedies that the previous generation of politicians thought necessary."[45]

Conclusion

It has been said that snow and adolescence are the only problems that disappear if you ignore them long enough. Our highest Court has shown that the problem of Section 5's constitutionality can be ignored for a season, but it will not disappear, and its constitutional underpinnings will be tested at some point in the future.

This much is clear: In *NAMUDNO*, Chief Justice John Roberts signaled that he thinks time has run out on the remedy that Congress concocted in 1965 to overcome the historical pattern of denying racial minorities access to the ballot box in much of the South, and no sitting Justice disagreed with him on that point. One may dispute the continuing damage that segregation has done to this country, and debate the continuing need for race-conscious remedies in 2009 and beyond, but *NAMUDNO* appears to be the "canary in the coal mine" for the continued viability of such remedial policies as the law of the land.

Our Nation has turned a corner since the enactment of the Voting Rights Act of 1965, which reflected Congress' firm intention to rid the

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Qualified Immunity

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32. *Id.*
33. *Id.* The Court added that there would also be difficulties when a court held that a defendant committed a constitutional violation but that the violation was not clearly established, as "the [successful] defendant may face a difficult situation… [the] right to appeal the adverse holding on the constitutional question may be contested." *Id.*
34. *Id.* at 821.
35. *Id.*
36. 515 U.S. 304, 314 (1995) ("a fact-related legal inquiry").
37. *Pearson*, 129 S. Ct. at 820.
38. Asserting the defense in a motion to dismiss does not waive the right to assert the defense again in a motion for summary judgment. Behrens v. Pelletier, 516 U.S. 299, 308 (1996).
39. Elder v. Holloway, 510 U.S. 510, 516 (1994) ("a question of law, not one of 'legal facts'").
40. 129 S. Ct. 1937, 1947 (2009) (citing *Johnson*, 515 U.S. 304, 314 (1995)).
41. Fed. R. Civ. P. 8(a)(2).
42. 129 S. Ct. at 1949; Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
43. 129 S. Ct. at 1949.
44. *Id.*
45. *Id.*
46. *Id.* (emphasis added).
47. *Id.*
48. *Id.*
49. *See* Fed. R. Civ. P. 12; Fed. R. Civ. P. 7; Crawford-El v. Britton, 523 U.S. 574, 597 (1998) (describing dispositive motions and holding that a trial court is obligated to "exercise its discretion in a way that protects the substance of the qualified immunity defense").
50. *Pearson*, 129 S. Ct. at 820-21, discussing the Court's concern over the possibility that constitutional issues may get resolved on less than complete records.
51. *See* Leong, Nancy, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. Law Rev. (2009).
52. *See* Hannon, Kendall. W., *Much Ado About* Twombly*? A Study on the Impact* of Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev.1811 (2008). **ML**

Employment Law Rulings

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6. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).
7. 129 S. Ct. 2658, 2674 (2009).
8. *Id.* at 2673.
9. *Id.* at 2681.
10. *Id.* at 2678-79.
11. 29 U.S.C. § 621 *et seq.* (West 2009).
12. 129 S. Ct. 2343 (2009).
13. *Id.* at 2347.
14. Gross v. FBL Fin. Group, Inc., No. 4:04-CV-60209-TJS, 2006 WL 6151670 at * 13 (S.D. Iowa June 23, 2006).
15. 526 F.3d 356 (8th Cir. 2008).
16. 129 S. Ct. at 2350.
17. *Id.* at 2351.
18. 129 S. Ct. 846 (2009).
19. 42 U.S.C. § 2000e-3(a) (West 2009).
20. Crawford v. Metro. Gov't, No. 3:03-0996, 2005 WL 6011557 (M.D. Tenn. Jan. 06, 2005).
21. 211 Fed. Appx. 373 (6th Cir. 2006).
22. 129 S. Ct. at 851.
23. *Id.*
24. *Id.* at 853.
25. *Id.* at 854.
26. 42 U.S.C. § 2000e(k) (West 2009). The PDA was an amendment to Title VII and took effect on April 29, 1979.
27. AT & T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).
28. Pub. L. 111-2, § 3(A), 123 Stat. 5-6.
29. 129 S. Ct. 1456 (2009).
30. *Id.* at 1465.
31. 129 S. Ct. 1093 (2009).
32. Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 WL 3241745 (D. Idaho Nov. 23, 2005).
33. 504 F.3d 1053 (9th Cir 2007).
34. 129 S. Ct. at 1095.
35. 129 S. Ct. 798 (2009).
36. Locke v. Karass, 425 F. Supp.2d 137 (D. Me. 2006), *aff'd*, 498 F.3d 49 (1st Cir. 2007).
37. *Id.* at 806 (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)). **ML**

Voting Rights Litigation

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country of racial discrimination in voting. Tremendous progress in race relations has been made as a result of an increasingly accessible electoral process, and facilitated the the Act's subsequent revisions and extensions. That racial progress is palpable. Even to the gloomiest of observers, the glass of equal electoral and political opportunity is now more than half full. We have learned how to pull, haul, and trade in the marketplace of political competition. We have witnessed the transformation of *E Pluribus Unum* from a nice-sounding phrase to a political reality.

We are indeed a better country as a result.

Notes

1. 42 U.S.C. § 1973 to 1973aa-6 (West 2009).
2. U.S. Const. amend. XV.
3. South Carolina v. Katzenbach, 383 U.S. 301, 314, 328 (1966).
4. 42 U.S.C. § 1973(a) (West 2009).
5. 383 U.S. 301(1966).
6. *Id.* at 327-28.
7. *Id.* at 328.
8. *Id.*
9. For more information, *see About Section 5 of the Voting Rights Act*, U.S. Department of Justice, Civil Rights Division, at http://www.justice.gov/crt/voting/sec_5/about.php.
10. Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (1982).
11. Pub. L 109–246, 120 Stat. 577 (2006).
12. As pointed out by the Supreme Court, the Act "retained 1972 as the last baseline year for triggering coverage under § 5." Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S.Ct. 2504, 2510 (2009).
13. *Id.*
14. 573 F. Supp. 2d 221 (S.D. Tex. 2008).
15. 129 S. Ct. at 2516.
16. *Id.* at 2515-16.
17. *Id.* at 2508.
18. *Id.* at 2513, citing *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927).
19. *Id.* at 2512.
20. *Id.* at 2517.
21. *Id.* at 2525.
22. *Id.* at 2516.
23. *Id.* at 2519 n 1.
24. *First Local Government Seeks Voting Rights Bailout Post Supreme Court Ruling,* The BLT: The Blog of Legal

Times, http://legaltimes.typepad.com/blt/2009/08/first-local-government-seeks-voting-rights-bailout-bailout-post-supreme-court-ruling.html.
25. Others echoed the prediction that the number of bailout suits would increase at the local government level. "By widening the escape hatch for localities in its extraordinary ruling, the Supreme Court may have launched a town-by-town movement that may release localities that have chafed for years under the law's strict rules; every time a covered jurisdiction wanted to move a polling place from one school to another, it needed Justice Department approval. Now, if they can show they've been adhering to the law for 10 years, they're home free." Tony Mauro, *Can the Voting Rights Act Survive Another Challenge?* National Law Journal, June 29, 2009, accessible at http://www.nlj.com.
26. 129 S. Ct. at 2512.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 2512-13.
31. *Id.* at 2512.
32. *Id.*
33. *Id.* at 2511, citing H.R.Rep. No. 109-478, p. 12 (2006).
34. *Id.*
35. *Id.* at 2512.
36. *Id.* at 2511.
37. *Id.*
38. David S. Broder, *For Obama, Court Cases that Matter*, Washington Post, July 02, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103024_pf.html.
39. 129 S. Ct. 2658 (2009).
40. Ricci v. DeStefano, 554 F. Supp.2d 142 (D. Conn. 2006).
41. 530 F.3d 87 (2d Cir. 2008).
42. 129 S.Ct. at 2664-65.
43. *Id.* at 2681.
44. *Id.* at 2664-65.
45. David S. Broder, *supra* note 38. ML

Federal

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viewpoint of states and localities. The brief will argue that there is no clear statement in SORNA that Congress intended such a broad preemption of state sex offender law and administration, that SORNA imposes expensive unfunded mandates on states and localities, and that SORNA violates important federalism principles.

Notes

1. Carr v. United States, 551 F.3d 578 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3610 (U.S. Sept. 30, 2009) (No. 08-1301).
2. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 249-109, 120 Stat. 590 (2006).
3. This includes, but not limited to, national databases, law enforcement, all jurisdictions where the sex offender resides or is an employee/student, any school in each area where the sex offender resides, social service entities, and any volunteer organizations in which contact with minors may occur.
4. Justice Policy Institute, *What will It Cost States to Comply with the Sex Offender Registration and Notification Act*, at http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf. *See also*, Virginia Department of Planning and Budget, 2008 Fiscal Impact Statement, (Richmond, VA: Department of Planning and Budget, 2008).
5. Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8891 (Feb. 28, 2007).
6. The final guidelines were released in June 2008. Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030 (July 2, 2008).
7. U.S. v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009).
8. *Id.* at 979.
9. U.S. v. Cain, 583 F.3d 408 (6th Cir. 2009); U.S. v. Hatcher, 560 F.3d 222 (4th Cir. 2009).
10. Edward Byrne Memorial Justice Assistant Grant Program, 42 U.S.C. § 3750 (2006). ML

Supreme Court

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absent "unusual circumstances," a sale of real property was an effective way for a public body to end its inappropriate endorsement of religion. What made it more interesting was that, according to one source, "the preserve [was] riddled with private inholdings," being an estimated 1,000 private landowners with 1,800 plots of land.

The Supreme Court agreed to hear the appeal and, apart from the issue of standing, must decide when a message ceases to be a government message, and whether the Ninth Circuit erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands. During the October 07 oral argument, the issue of whether the cross was an impermissible display on government land was not before the Court. Instead, the Court focused on the legal issues associated with the injunctions before dealing with the merits, with Chief Justice Roberts asking one of the most relevant questions: "I'm just kind of curious, why is this cross put up – you know, in the middle of nowhere?"(The answer was that the man who originally put up the cross was apparently a miner and homesteader when the land was owned by the Bureau of Land Management). Counsel for Frank Buono, the individual challenging the government action, maintained that the "totality of the circumstances," including "the government's asserted purpose to make sure that the cross remains up, the government's favoritism of the same parties," and its retention of the reversionary interest, added up to a continuing government endorsement of religion and an Establishment Clause violation.

The Court's decision is pending. ML

Inside Canada

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constraints, and represented a bona fide exercise of discretion. That policy did not differentiate between sidewalks and sidewalks that had been repaired, and there was no reason to hold the City to a different standard of inspection and maintenance for just the sites that had been worked on and restored by a contractor. Even if the policy did not apply, there was no evidence that the City had been negligent. Although there was a "small difference in elevation" that may have been a "minimal hazard," "[a] municipality cannot provide a perfectly smooth surface on its sidewalks. Such a standard would be inordi-

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