

# UNDERSTANDING THE PARADOXICAL CASE OF THE VOTING RIGHTS ACT

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*I have no basis for viewing [section 2] as constitutionally suspect and I don't. If an issue were to arise before the Supreme Court or before the Court of Appeals, if I head back there, I would consider that issue with an open mind in light of the arguments. I've got no basis for viewing it as constitutionally suspect today and I'm not aware that it's been challenged in that respect since it was enacted. It may have been, but as I say, I'm not aware of it.<sup>1</sup>*

*— John G. Roberts, Jr.*

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1. *Nomination of John G. Roberts, Jr., of Maryland, to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 317 (2005) (statement of John G. Roberts, Jr., nominee, Chief Justice of the Supreme Court of the United States).

*The starting point of the analysis [was] Supreme Court cases, and the new issue [was] presumptively decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the desirable result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it ought to mean.<sup>2</sup>*

— Antonin Scalia

## I. INTRODUCTION

The Voting Rights Act of 1965 is once again at the center of our long-standing debate over our historical commitment to the principle of political equality. This is a debate about both the scope of congressional power under the Reconstruction Amendments and contested substantive questions about how to best protect the right to vote.<sup>3</sup> These are two distinct, yet familiar, strands to students of politics and constitutional law.

On the question of congressional powers, commentators query the need for congressional findings, the congruence and proportionality of the statute vis-à-vis the perceived harm, and whether the statute under review seeks to remedy a constitutional violation (as opposed to defining the harm itself).<sup>4</sup> These are not new questions; they date back to the genesis of the Act, particularly the issue of findings. As Attorney General Katzenbach remarked in response to a question from Senator Ervin over the scope of congressional powers to “annul” any state law of its choosing: “I would think it is a terrible mistake, Senator, to think that Congress can just [enact appropriate legislation under the Fourteenth Amendment] without findings of some

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2. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 39 (Amy Gutmann ed., 1997).

3. See generally Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 *HOUS. L. REV.* 1 (2007); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174 (2007).

4. See Richard L. Hasen, *Congressional Power to Renew Preclearance Provisions, in THE FUTURE OF THE VOTING RIGHTS ACT* 81, 85-88 (David L. Epstein et al. eds., 2006). The cases that form the “New Federalism” jurisprudence include *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

kind . . . . We put those into the record.”<sup>5</sup> The issue of findings was also at the center of the debate among the Justices over the constitutionality of the Act.<sup>6</sup>

On the substantive debate at the heart of the modern Voting Rights Act, the questions are far more contested and elusive. For example, should Black and Latino communities demand the creation of majority-minority districts in order to ensure the election of representatives of their choice?<sup>7</sup> Or is it a more sensible strategy to insist on the creation of coalitional districts, where voters of color seek common ground with like-minded voters over their candidates of choice, or even influence districts, where voters of color play an important—yet not controlling—role in the election?<sup>8</sup> In specific reference to some of the most important aspects of the Voting Rights Act, this is a debate about how to best operationalize the original promise of the Act<sup>9</sup> and whether such promise remains relevant in light of changed—and clearly improved—circumstances.<sup>10</sup> Or, more succinctly: what is the best way to maximize the electoral power of voters of color?

Overwhelming congressional majorities recently took sides in this debate, with the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.<sup>11</sup> The results were both predictable and disappointing. Predictability stemmed from the debate over congressional powers, as members of Congress and myriad witnesses highlighted the need for detailed congressional findings in support of the extension, and dis-

5. *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 100 (1965) [hereinafter *1965 Senate Hearings*] (statement of Nicholas Katzenbach, Att’y Gen. of the United States).

6. See Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 104-15 (2007).

7. See generally DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS* (1999); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997).

8. See generally DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1997); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996).

9. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* (1993); ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987).

10. See Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 388-400 (2008); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 188-96 (2005).

11. Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended at 42 U.S.C. §§ 1973b-c (Supp. 2007)).

cussions often looked ahead to what the Roberts Court might do when confronted with a facial challenge to the constitutionality of the Act.<sup>12</sup> Disappointment followed from the resolution of the substantive questions, as Congress did not venture far from its old script, choosing only to extend the Act's coverage formula for another twenty-five years while correcting some Supreme Court interpretations of the Act it deemed contrary to its wishes for the statute.<sup>13</sup>

The next phase of this debate is now underway in both the blogosphere and the pages of the law reviews. These efforts are similarly predictable. In the face of a recently amended statute, legal scholars are busy doing what they have always done: making sense of the new language of the statute while also examining whether the work of Congress remains within established constitutional parameters. These are important questions in their own right and this Article does not intend to suggest otherwise. These are the micro-questions whose answers collectively give shape to the Act—the proverbial trees within a larger and much more important forest. The debate over the Act has largely focused on these questions.

But the Voting Rights Act is no ordinary statute, and to treat it as such is to miss the real lessons and insights of the Act. As enacted in 1965, the Act's sternest provisions—or what the Court termed “a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant”<sup>14</sup>—would expire after five years. This need for periodic reassessment and reauthorization has provided Congress with a built-in opportunity to examine the Court's interpretations of the statute. Per its own extensions, Congress has had four such opportunities to correct judicial interpretations or to amend the language of the Act to better reflect the needs and electoral problems of the present. In turn, the history of the Act provides scholars with fertile ground for examining the work of Congress and its interactions with the Supreme Court and the executive branch. These are the macro-questions—the forest itself. This is a far more important and intriguing feature of the debate over the Voting Rights Act. Before turning to questions of statutory interpretation and constitutional law, we must first tend to the first-order institutional question: what is the Court's disposition toward the Act and toward Congress and the executive branch? The existing scholarship neglects this question and fails to tap into the real insights of the Act

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12. See, e.g., *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 109th Cong. 5-6, 32 (2005).

13. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *On the Renewal of Section 5 of the VRA: Why Congress Failed Voters of Color*, in *MAKING EVERY VOTE COUNT: FEDERAL ELECTION LEGISLATION IN THE STATES* 37 (Andrew Rachlin ed., 2006).

14. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

and the distinct interaction between the Court, Congress, and the executive branch.<sup>15</sup>

For example, anyone who reads the debate over the constitutionality of the Act must come away with the impression that the question for the future is whether the Act comports any longer with the “congruence and proportionality” test established in *City of Boerne*.<sup>16</sup> In response to this question, leading voices in this debate parse through past opinions looking for relevant and seemingly controlling passages.<sup>17</sup> And yet, from the moment it first confronted the constitutionality of the Act in *South Carolina v. Katzenbach*,<sup>18</sup> the Court has blindly deferred to the work of Congress, unwilling to subject this important statute to any meaningful scrutiny.<sup>19</sup> The question for the future—I suggest this is the *only* question—is whether such deference will continue.<sup>20</sup> This is not a question that traditional tools of constitutional interpretation can answer.

In contrast, this posture of deference for questions of constitutional law differs greatly from the Court’s posture when interpreting the language of the statute. This is an area where the Court defers to no one, even when the text of the statute or the clear intent of Congress demands a different outcome.<sup>21</sup> In turn, Congress seldom responds to the

15. For an important exception, see J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667 (2008).

16. 521 U.S. 507, 533-36 (1997).

17. See, e.g., Karlan, *supra* note 3; Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51, 87-94 (2006); Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 354-57 (2006).

18. 383 U.S. 301 (1966).

19. See *Lopez v. Monterey County*, 525 U.S. 266, 283-84 (1999); *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970).

20. Fuentes-Rohwer, *supra* note 6, at 122.

21. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320 (2000); *Beer v. United States*, 425 U.S. 130, 139-41 (1976); *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507 and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 5 (1969) [hereinafter *1969 Senate Hearings*] (“This case [*Gaston County v. United States*, 395 U.S. 285 (1969)] is yet another example of the Court’s habit of redoing the work of Congress to conform with its own notions of desirable legislation.”) (statement of Sen. Ervin). For some of the cases, see *Bossier Parish II*, 528 U.S. at 320; *Beer*, 425 U.S. at 140; *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971).

For criticisms of the Court’s approach in particular cases, see, for example, *Holder v. Hall*, 512 U.S. 874, 895-97 (1994) (Thomas, J., concurring); *id.* at 935, in which Justice Thomas stated the following: “Not surprisingly, the legislative history relied upon in *Allen* also displayed the typical flaws that one might expect—it was hardly unequivocal”; *Beer*, 425 U.S. at 146 (Marshall, J., dissenting), in which Justice Marshall contended that “the congressional purposes in § 5 are no longer served and the sacred guarantees of the Fourteenth and Fifteenth Amendments emerge badly battered”; and *Allen v. State Board of Elections*, 393 U.S. 544, 583, 585 (1969) (Harlan, J., concurring in part and dissenting in part), in which Justice Harlan labeled *Allen* an “extremely broad construction of § 5,” and

Court's aggressive and adventurous interpretations of the Act. The times when Congress does respond demand an explanation.

The recent case of *NAMUDNO v. Holder*,<sup>22</sup> decided this past term, follows this established script. To the uncritical and ahistorical eye, this case reached a surprising result. But this would be a mistaken conclusion. This challenge to the constitutionality of the Voting Rights Act offered a vehicle to the conservative Justices on the Court to bring about the fall of the Act once and for all. Judging from the oral argument, they were poised to do exactly that.<sup>23</sup> It appeared that critics of the Act had finally secured five votes to strike down the statute. But this is something the Court has refused to do time and again, even at times when a majority seemed at hand. In the end, the Court dodged the constitutional question and decided the case on technical statutory grounds. On both accounts, the Justices placed themselves squarely within the history and tradition of the Act. On the constitutional question, the Court deferred to Congress as it has traditionally done; and on the statutory question, the Court offered a novel reading of the statutory language, grounded not on the text of the statute, the legislative history, or the intent or purpose of the legislature, but on its views of what the statute must mean. Again, there is nothing new there.

In the wake of *NAMUDNO*, scholars will continue to focus on the micro-questions surrounding the Voting Rights Act while ignoring what is far and away the most important aspect of the Court's handling of the statute: why is the Court uncharacteristically deferential to Congress on the question of congressional powers, yet unduly aggressive when interpreting the language of the statute? This is exactly backwards. How to explain it? The real lessons and insights of the Act and its tumultuous history are found within this as-of-yet unexamined paradox.

This Article examines this paradox in detail and offers two related conclusions. The first conclusion looks to the "living constitutionalism" debate and the role that the Court should play in updating the

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complained that "the Court has now construed § 5 to require a revolutionary innovation in American government."

22. 129 S. Ct. 2504 (2009).

23. See Adam Liptak, *Skepticism at Court on Validity of Vote Law*, N.Y. TIMES, Apr. 29, 2009, <http://www.nytimes.com/2009/04/30/us/30voting.html> ("A central provision of the Voting Rights Act of 1965, designed to protect minorities in states with a history of discrimination, is at substantial risk of being struck down as unconstitutional, judging from the questioning on Wednesday at the Supreme Court."); see also Posting of David Gans to Balkinization, *The Voting Rights Act, the Souter Vacancy, and the Future of the Supreme Court*, <http://balkin.blogspot.com/2009/05/voting-rights-act-souter-vacancy-and.html> (May 19, 2009, 15:45) ("Given the repeated hostile questioning by all the Court's conservatives – except Justice Thomas who was characteristically silent – many commentators expect that the Court will strike down the extension of the pre-clearance requirement.").

Constitution. Consider first the congressional debates in 1965 and the fact that Congress and the administration made clear throughout the hearings that they wished to take the substantive provisions of the Act as far as constitutionally permissible. The Warren Court understood the congressional intent behind the Act in this manner. Relatedly, this was also a time when the Court understood the Constitution as granting Congress wide latitude to tackle the difficult question of racial discrimination then gripping the nation. Taken together, these understandings explain the Court's expansive interpretations of the Act early on. The early cases were faithful expressions of congressional intent buttressed by an expansive understanding of constitutional power.

Beginning in the mid-1970s, the Court's interpretations of the statute narrowed considerably. The change in the doctrine cannot be explained by pointing to the intent of Congress, which remained consistent. Rather, this change can only be explained by the fact that constitutional meaning ebbs and flows with the times. This is not a static document by any means. More importantly, this argument underscores the view that, contrary to the conventional wisdom, living constitutionalism is not reserved for the liberal Justices.

Second, this Article concludes that the Court, in line with accounts of the Justices as strategic actors and "single-minded seekers of legal policy,"<sup>24</sup> has played the leading role in delineating the substantive contours of the Voting Rights Act. The Act has served as essentially a placeholder—a vague and forgiving statutory canvass susceptible to myriad interpretations—which in turn has afforded the Justices the means by which to interpret their policy views into the statute. And make no mistake, the Court has taken full advantage of this aspect of the statute, offering readings of the relevant language that span the spectrum of interpretation, from strict textualist applications of the law to dynamic interpretations that would make Bill Eskridge blush. The lesson is clear: we should stop treating the Act as no more than a paint-by-numbers exercise, as a technical and mechanical application of preexisting norms to new facts. The history of the Act in court is far more interesting than that.

This Article examines this history in five Parts. Part II offers a primer on the Voting Rights Act, its history and *raison d'être*. The goal for this Part is quite modest in that it only seeks to provide much needed context and grounding for the larger argument. Parts III and IV explore the paradox at the heart of the Act. Part III focuses on the constitutional questions at the heart of the Act, while Part IV examines the Court's interpretations of the statutory language.

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24. Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325 (1992).

Taken together, these Parts tell a story where the Supreme Court aggressively regulates the contours of the Act, while Congress plays a secondary role. Part V discusses the recent *NAMUDNO* decision and situates it within the history of the Act in Court. Finally, Part VI discusses the two central lessons of the history of the Voting Rights Act in court.

## II. THE VOTING RIGHTS ACT OF 1965: A PRIMER

The Voting Rights Act was the fourth attempt by the federal government to narrow the deep chasm between the guarantees at the heart of the Fifteenth Amendment and the reality on the ground, where “legalisms, stratagems, trickery, and coercion”<sup>25</sup> stood in the way of Black enfranchisement. The first three efforts, codified in the Civil Rights Act of 1957, 1960, and 1964, adopted what Attorney General Katzenbach termed “the alternative of litigation, of seeking solutions in our judicial system.”<sup>26</sup> But these efforts fell woefully short, as any judicial victories, secured after lengthy and expensive efforts in court, were ultimately “tarnished by evasion, obstruction, delay, and disrespect.”<sup>27</sup> As the Attorney General explained during his Senate testimony in 1965:

Our experience in the voting area has been this, that no matter what is decided by courts, no matter what is passed by Congress in this respect, every single place in some States, the only way you can get compliance is to litigate and then that is defended, it is defended up through every court procedure to the Supreme Court, no matter how clear and obvious the points, no matter how many times those same points have been decided, until you eventually get a decree.

Then the decree is examined carefully to see whether there is any way in which a certain practice not explicitly prohibited by the decree can be engaged in for the same discriminatory purposes.

When this is done, and you go back to court to get the judge to broaden the decree, his capacity and jurisdiction to do that is litigated, then that is taken on appeal and that is taken to the Supreme Court.

When you run out of these things, the legislature enacts a new test and that has to be litigated and appealed and go to the Supreme Court.<sup>28</sup>

A new approach was clearly needed, an approach that went “beyond the tortuous, often-ineffective pace of litigation.”<sup>29</sup> “What is

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25. *Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 1 (1965) [hereinafter *1965 House Hearings*] (statement of Chairman Emanuel Celler, Subcomm. No. 5 of the H. Comm. on the Judiciary).

26. *Id.* at 5 (statement of Nicholas Katzenbach, Att’y Gen. of the United States).

27. *Id.*

28. *1965 Senate Hearings*, *supra* note 5, at 41-42.

required,” Katzenbach told the House subcommittee, “is a systematic, automatic method to deal with discriminatory tests, with discriminatory testers, and with discriminatory threats.”<sup>30</sup> In a nutshell: some jurisdictions could not be trusted to design fair and nonracially discriminatory registration tests, nor could they be trusted to enforce any such tests fairly, and simply taking such jurisdictions to court proved insufficient. The answer would be the Voting Rights Act of 1965.<sup>31</sup>

Three features of the Act deserve particular mention. First, the Act provided for the appointment of federal examiners and registrars in order to ensure that eligible voters of color would be placed on the registration rolls and allowed to cast ballots.<sup>32</sup> These provisions, coupled with the Act’s suspension of literacy tests for any jurisdiction covered under the Act’s trigger formula, were responsible for the initial surge in voting registration across the South.

Second, the Act adopted the aforementioned trigger formula for determining which jurisdictions would be covered under the special provisions of the Act.<sup>33</sup> Under the formula, a jurisdiction would automatically fall within the coverage of the Act if it employed a literacy test and either its turnout rate for the 1964 presidential election or its registration rate on November 1, 1964, was below fifty percent.<sup>34</sup> The formula initially brought within the purview of the Act the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as twenty-six counties in North Carolina. Of note, this coverage formula would be due to expire in 1970 (after which time, the covered states and counties were free to reinstitute their literacy tests).

Third, section 5 of the Act—which soon became known as the heart of the Act<sup>35</sup>—required a covered jurisdiction to submit any pro-

29. *1965 House Hearings*, *supra* note 25, at 9.

30. *Id.*

31. Pub. L. No. 89-110, 79 Stat. 437 (1965).

32. *Id.* §§ 3, 8.

33. The special provisions of the bill were temporary in nature. Under section 4(b), a state would be covered under the Act if it used a literacy test as a prerequisite to vote and its voter registration on November 1, 1964, or its voter turnout rate on the 1964 Presidential election dipped below fifty percent. Those states caught under 4(b) of the Act would need to preclear any changes to their voting laws with a three judge District Court in the District of Columbia. *See id.* § 4.

34. *Id.* § 4(b).

35. *See Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before Subcomm. on Civil and Const. Rights*, 94th Cong. 40 (1975) [hereinafter *1975 House Hearings*] (statement of Chairman Flemming, U.S. Comm’n on Civil Rights) (contending that “[s]ection 5 of the Voting Rights Act . . . has become the centerpiece of the act”); *id.* at 629 (statement of Armand Derfner) (testifying that “section 5 is in a sense a fulcrum of the act”); U.S. COMM’N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER, in *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148,*

posed change in “voting qualification or prerequisite to voting, or standard, practice, or procedure” to the Department of Justice or U.S. District Court in the District of Columbia for a determination that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”<sup>36</sup> In other words, section 5 embodied the lack of trust that made the Act a necessity. The solution itself was nothing short of radical and unorthodox.

For jurisdictions subject to section 5, traditional burdens and presumptions were turned on their head; in essence, their laws were considered unconstitutional unless and until the jurisdictions proved otherwise. And the burden of proof on this important point was on the jurisdictions themselves, not the government. This was crucial, because the jurisdictions must ultimately prove a negative—that their changes neither had the purpose nor would they have the effect of denying or abridging the right to vote on account of race or color. Until they made this showing—that is, until they precleared their changes as demanded under section 5 of the Act—these select jurisdictions as covered under section 4 of the Act could not implement their voting changes.

### III. CONSTITUTIONAL LAW, CONGRESSIONAL POWERS, AND JUDICIAL DEFERENCE

From the time the Johnson administration introduced the voting rights bill in Congress, two questions took center stage. The first was the question of whether Congress had the power under section 2 of the Fifteenth Amendment to enact the Voting Rights Act. This question focused with particular care on the coverage formula and the preclearance requirement, as these aspects of the Act targeted specific jurisdictions in the South and, as such, evoked memories of Reconstruction. The second was the necessary question of statutory construction. For example, what qualifies as a “voting qualification or prerequisite to voting, or standard, practice, or procedure”<sup>37</sup> under section 5 of the Act? Also, how should one determine when a change does not have the purpose or effect of denying or abridging the right to vote on account of race or color? And further, is the purpose prong in any way related to the effect prong? Taken together, these questions would determine the effectiveness of the Act into the future, and as such they thrust the Supreme Court to the center of the debate. The Court’s handling of these questions, the topic of the next

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*H.R. 3247 and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 969, 988 (1975).

36. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 438 (1965).

35. *Id.*

two Parts, raises one of the most interesting and important paradoxes in modern constitutional law. But first, the next Section takes a look at the debate from the eyes of the critics of the bill in Congress.

#### A. *The Act in Congress: Three Questions*

The constitutional debate over the Voting Rights Act began as soon as the bill reached the appropriate House and Senate committees. And in these fora, the debate carried on as expected; critics of the Act marshaled all arguments, large and small, against the legislation. This was a real debate, and it highlighted the momentousness of this occasion and the degree to which the bill pushed awfully hard at myriad constitutional norms. The Constitution was in the minds of all the participants, many of whom often cited past Supreme Court opinions in support of their positions.<sup>38</sup> This is where critics of the legislation waged their strongest battle, over the constitutionality of the bill. The Senate hearings provided particularly fertile ground for these arguments, under the leadership of Senator Eastman of Mississippi and Senator Ervin of North Carolina.

Critics of the Act in Congress argued that the proposed legislation would “destroy” the Constitution<sup>39</sup> and would require “throwing the Constitution of your country out the window.”<sup>40</sup> “Nobody,” according to Judge Perez, representing the Governor of Louisiana, “is dumb enough not to understand that.”<sup>41</sup> These arguments took various forms.

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38. See, e.g., *1965 House Hearings*, *supra* note 25, at 112 (statement of Nicholas Katzenbach, Att’y Gen. of the United States) (“Congressman, an awful lot of our constitutional arguments were made, as I am sure you recall, with respect to the 1964 act. I think they were sincerely made and we were able to persuade nine justices of the Supreme Court as to our position and the constitutionality of that bill.”); see also *id.* at 385 (statement of Joseph Rauh, counsel for the Leadership Conference on Civil Rights) (“I do not even consider this a close question because I think the people who are talking about it do not reckon with the fact that the Supreme Court has never in recent history questioned Congress [sic] judgment in this area.”). Some critics of the legislation grudgingly conceded this point. See *id.* at 626 (statement of Rep. John Dowdy) (“Possibly in these days it is vain to advance constitutional questions, in view of the fact that the Supreme Court has assumed the power to amend the Constitution by judicial decree, and the Executive is here demanding that Congress amend it by legislative act, wholly ignoring the plain provisions of that Constitution . . .”).

39. *1965 Senate Hearings*, *supra* note 5, at 77 (statement of Sen. Ervin).

40. *Id.* at 155 (statement of Sen. James O. Eastland, Chairman, S. Comm. on the Judiciary); see *id.* at 57-63 (statement of Sen. Ervin) (making a constitutional argument against the bill while disagreeing with a recent Supreme Court case); *id.* at 548 (statement of Judge L.H. Perez, representing Gov. John J. McKeithen of La.) (“You are violating the Constitution and your sworn duty to uphold the Constitution, and the provisions are too plain and too clear. Nobody is dumb enough not to understand that.”); *id.* at 615 (statement of Paul Rodgers, Jr., Assistant Att’y Gen. of Ga.) (arguing that the bill is unconstitutional). To be fair, supporters of the legislation also worried about the constitutionality of the bill. See, e.g., *id.* at 140 (statement of Sen. Philip A. Hart) (asking the Attorney General about the constitutionality of the bill and the Solicitor General’s views).

41. *Id.* at 548.

### 1. *A Question of Congressional Powers*

A leading criticism attacked the classifications under the Act as an unreasonable exercise of congressional power under the Fifteenth Amendment.<sup>42</sup> This was a criticism of the coverage formula and the drafters' decision to draw its line of inclusion at fifty percent voting turnout or registration rates and the existence of a literacy test. Time and again, critics complained that the coverage formula was "a cock-eyed formula,"<sup>43</sup> "arbitrary,"<sup>44</sup> and lacking in "logic,"<sup>45</sup> "rhyme and reason."<sup>46</sup> The criticism had two components. First, some critics complained that the formula was overinclusive, as it covered some jurisdictions that were free of racial discrimination in voting<sup>47</sup> and could only be understood as an effort to punish the Southern states.<sup>48</sup> How could Congress justify the inclusion of Louisiana and some North Carolina counties under the Act, for example, when the state of Texas and some counties in New York, neither of which came within the purview of the trigger formula, had lower voting turnout rates during the 1964 presidential election?<sup>49</sup>

Second, and in the words of Representative Cramer: "What constitutional basis is there for that where the effect of it is obviously to strike down the State's constitutional rights to fix voter qualifica-

42. *See id.* at 139 (statement of Sen. Ervin) ("I have a high respect for your opinion, but that is about the most unreasonable classification ever made, in my judgment . . ."); *id.* at 50 (statement of Sen. Ervin) ("I have difficulty understanding why the Department of Justice would draw up such an unreasonable bill as this.").

43. *Id.* at 199, 234, 272, 283 (statement of Sen. Ervin).

44. *Id.* at 265 (statement of Att'y Bloch); *see id.* at 281 ("The inference it seeks to draw is purely arbitrary; there is no rational relation to the premise, even if it be a fact, and the ultimate fact in issue . . .").

45. *Id.* at 647 (statement of James J. Kilpatrick, Vice Chairman, Va. Comm. on Constitutional Gov't); *see id.* at 33 (statement of Sen. Ervin) ("So I say, Mr. Attorney General, that I do not think there is necessarily any logical connection between the assumption based on these percentages and the presumption that there was a violation of the 14th Amendment.").

46. *Id.* at 234 (statement of Sen. Ervin).

47. Senator Ervin made this point innumerable times with respect to the counties in North Carolina that would come under the coverage formula. *See, e.g., id.* at 769 ("I envy people sometimes who worry about sins far away from home because it acts as an opiate and blinds them to conditions existing on their own doorstep. It is a whole lot easier to try to reform people far away from home than it is to reform your own constituents.").

48. *See id.* at 564 (statement of Judge Perez) (labeling covered jurisdictions under the formula "conquered provinces"); *id.* at 625 (statement of Sen. John J. Sparkman) ("It is a harsh bill, designed to punish the South."); *id.* at 292 (statement of Att'y Bloch) (comparing the bill to a lynching of the states). Attorney General Katzenbach and Senator Dirksen responded that the formula was neutral on its face and applied to all fifty states. *See, e.g., id.* at 171 (statement of Sen. Dirksen) ("And it applies to all of the 50 States of the Union, where the right to vote is abridged or denied.").

49. *See id.* at 241. Chairman Eastland asked why Texas would not come under the coverage formula and whether that was done intentionally. *See id.* at 164 ("Was not one of your big hassles to plan to keep Texas out of this bill? Is that not the reason that you have this test or device in here, to keep Texas out?"). Senator Ervin brought up the comparison with Texas as well. *See id.* at 722.

tions in areas where no discrimination has been found to exist?”<sup>50</sup> This point had a great deal of force. Recall that under the trigger provision, a state or political subdivision would come under the purview of the Act if it made use of a literacy test *and* less than fifty percent of its voters were registered on November 1, 1964, or its voter turnout dipped under fifty percent for the 1964 Presidential election. Of necessity, this would mean that some jurisdictions that were free of discrimination would come under the provisions of the bill; that is, some jurisdictions would be deprived of their constitutional right to set voter qualifications.<sup>51</sup> And yet, if the Fifteenth Amendment proscribes racial discrimination in voting, and Congress is seeking to enforce this amendment by appropriate legislation, how could Congress designate as covered jurisdictions areas with no proven instances of such discrimination?

As a general matter, Attorney General Katzenbach offered that the proposed bill was a constitutional means of enforcing the commands of the Fifteenth Amendment. In response to the critique of the proposed coverage formula, he contended that the bill set up working categories under which it classified the states in accordance to the formula, and “[g]iven a valid factual premise—as we have it here—it is for Congress to set the boundaries. That is essentially a legislative function which the courts do not and cannot quibble about.”<sup>52</sup> This was a basic question of constitutional authority, which he argued the Fifteenth Amendment conferred upon Congress.

The Attorney General conceded that the states had a constitutional right to set their own voting qualifications as they saw fit. This was *Lassiter v. Northampton County Board of Elections*,<sup>53</sup> a case that critics of the legislation cited incessantly<sup>54</sup> and which explained that “[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised absent of course the discrimination which the Constitution con-

50. 1965 House Hearings, *supra* note 25, at 88.

51. See *id.* at 112 (statement of Rep. Ashmore) (“I am convinced that there is a serious question of States’ rights . . .”); *id.* at 601 (statement of Daniel McLeod, Att’y Gen. of S.C.) (“[Y]ou are infringing upon and usurping the State rights when you impose Federal determination of voting qualifications under the 15th amendment.”); *id.* at 755 (statement of Rep. Basil L. Whitener) (contending that the legislation is beyond constitutional authority, as the states have the right to set voter qualifications); 1965 Senate Hearings, *supra* note 5, at 309 (statement of Att’y Bloch) (branding the Act a “conspiracy to destroy our State laws for voter qualifications”); *id.* at 705 (statement of Robert Y. Button, Att’y Gen. of Va.) (complaining that the bill is a sham and “merely one step in a scheme for ultimate Federal control of the conduct of all State and local elections”).

52. 1965 House Hearings, *supra* note 25, at 14.

53. 360 U.S. 45 (1959).

54. See, e.g., 1965 House Hearings, *supra* note 25, at 113 (statement of Rep. Ashmore); 1965 Senate Hearings, *supra* note 5, at 208 (statement of Sen. Ervin).

demns.”<sup>55</sup> But *Lassiter* did not stop there, since, “[o]f course, a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.”<sup>56</sup> And so the Attorney General concluded:

The constitutional rule is clear: So long as State laws or practices erecting voting qualifications for non-Federal elections do not run afoul of the 14th or 15th amendments, they stand undisturbed. But when State power is abused—as it plainly is in the areas affected by the present bill—there is no magic in the words “voting qualification.”<sup>57</sup>

The right of states to set their voting qualifications was not absolute; it went only as far as the commands of the Fourteenth and Fifteenth Amendments began. A state may not violate these commands under the guise of erecting “voting qualification[s].”

This argument failed to respond to Congressman Cramer’s powerful constitutional objection to the inclusion of nondiscriminatory jurisdictions within the coverage of the Act. But the Attorney General felt quite confident on this score as well. As he explained, those areas free of discrimination within a larger discriminatory jurisdiction are exceptions and “cannot be used as a proper support for saying . . . you can’t regulate other units within the State or the State as a whole.”<sup>58</sup> After all, he argued elsewhere, “the fact that you are not cutting with absolute surgical skill and may pick up some other area is not of vital importance and is constitutionally irrelevant.”<sup>59</sup> On this point, he felt so confident about the administration’s course of action and the constitutionality of the bill that he did not “even see the constitutional difficulty.”<sup>60</sup> So long as Congress acted reasonably, the legislation would bear scrutiny. And to his mind, “all [the bill] is doing is taking reasonable and appropriate steps to enforce the 15th Amendment.”<sup>61</sup>

## 2. *A Question of Constitutional Proscriptions*

A second criticism contended that the legislation was both a bill of attainder and an ex post facto law, in violation of Article I, section 9.<sup>62</sup> According to Senator Ervin, an ex post facto law is a law that “imposes a punishment for an act which was not punishable at the time of commitment or imposes additional punishment to that prescribed or changes the rule of evidence by which less or different tes-

55. *Lassiter*, 360 U.S. at 50-51 (citations omitted).

56. *Id.* at 53.

57. *1965 House Hearings*, *supra* note 25, at 15.

58. *Id.*

59. *Id.* at 82.

60. *Id.* at 88.

61. *1965 Senate Hearings*, *supra* note 5, at 89.

62. *See id.* at 62-63.

timony is sufficient to convict than was then required.”<sup>63</sup> Under this definition, the proposed bill was an ex post facto law, since “a State or political subdivision was not subjected to the punishment of being deprived of their power to prescribe and administer literacy tests by the fact that less than 50 percent of their people of voting age failed to vote in the presidential election of 1964.”<sup>64</sup> Senator Ervin similarly argued that the proposed legislation was

a bill of attainder as it deprives the States, certain States and certain counties of certain States which are defined in terms by the act itself, and election officials in those States, and counties, of certain powers vested in the States and political subdivisions of the States. It does this without a judicial trial, and furthermore, it does this on the basis of a fact completed in the past.<sup>65</sup>

Attorney General Katzenbach disagreed with both criticisms. On the first, he argued that “where the Congress is given an express power to implement a provision of the Constitution it may adopt any reasonable and appropriate means for doing it.”<sup>66</sup> Attorney General Katzenbach also disagreed that this was either a bill of attainder or an ex post facto law, as the bill “is not a punishment.”<sup>67</sup>

### 3. *A Question of States’ Rights*

Finally, the critics took the banner of states’ rights and complained that “[y]ou would just as well wipe out your State lines if this theory of legislation is held constitutional.”<sup>68</sup> In other words, if Congress could enact such drastic measures into law, what couldn’t Congress do? Or as Senator Stennis complained, passage of the Act “sets a precedent for anything that anybody might want, a majority of the Congress or any President might want at any given time on any subject.”<sup>69</sup>

These were serious arguments against the constitutionality of the bill, raising difficult questions under existing law. At the end of three days of heavy questioning at the hands of Senator Ervin, Attorney General Katzenbach told the committee that he “ha[d] confidence in the constitutionality of the bill.”<sup>70</sup> Once the President signed the bill into law on August 6th, the national focus shifted to the Supreme

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63. *Id.*

64. *Id.*

65. *Id.* at 64-65.

66. *Id.* at 88; *see also id.* at 674 (statement of Thomas Watkins, representing the Gov. of Miss.).

67. *Id.* at 63.

68. *Id.* at 293 (statement of Att’y Bloch); *see id.* at 309 (statement of Judge Perez) (branding the Act a “conspiracy to destroy our State laws for voter qualification”).

69. *Id.* at 831.

70. *Id.* at 249.

Court and its imminent handling of these complex constitutional issues. The next Section shifts its focus to the Court as well.

### B. *The Act in Court*

The Supreme Court heard arguments on the constitutionality of the statute a scant five months after its passage, and it issued an opinion seven weeks later.<sup>71</sup> This was the last stand of critics of the bill, and they felt confident about their position. To some, “the bill [was] based on emotionalism and is shot through with weaknesses which . . . the Supreme Court could [not] possibly uphold”;<sup>72</sup> and others, while professing a “strong enough faith in the intellectual honesty of the members of that Court, . . . do not believe they would for 1 minute permit this unconstitutional act to be upheld.”<sup>73</sup> But some critics were not quite as optimistic. According to James Kilpatrick, then vice chairman of the Virginia Commission on Constitutional Government: “it is . . . unfortunate that members of the Supreme Court of the United States appeared—turned up to here [sic] the President’s message and appeared on the television cameras applauding. I think this is a violation of the separation of powers of the United States and creates imbalances.”<sup>74</sup>

This Section examines the history of the Voting Rights Act in court. This is a story replete with familiar themes. In fact, the most intriguing aspect of the Court’s handling of the Voting Rights Act is how the Justices continue to deploy the same arguments either in defense of or against the constitutionality of the Act. For the Court, this is a debate about judicial findings and the pursuit of legitimate state interests; in contrast, the dissenting Justices often decry the Court’s abdication of its long-established responsibility as constitutional interpreter. As we look to the future of the Act and the looming challenge to its constitutionality, the only question left is whether the Court will stick to its old script.

#### 1. *Findings, Rationality, and the Court as Partner: The Katzenbach Cases*

Think for a moment about the challenge facing the Justices as they debated the constitutionality of the Voting Rights Act. If the debate in Congress was any indication, this would not be an easy case. Congress and the administration pushed as hard as they could against established constitutional norms, and it was now up to the Court to determine whether they had pushed too hard. Were the

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71. *South Carolina v. Katzenbach*, 383 U.S. 301, 301 (1966).

72. *1965 Senate Hearings*, *supra* note 5, at 629 (statement of Sen. Sparkman).

73. *Id.* at 678 (statement of Thomas Watkins, representing the Gov. of Miss.).

74. *Id.* at 642.

Court inclined to strike down the Act as outside the powers of Congress, it had many arguments with which to do so. But the question for the Court was not whether the Act was beyond the powers of Congress; rather, the question was whether the Justices had the will to side against overwhelming congressional majorities and the national mood. This is not something that the Court does very often.<sup>75</sup>

In *South Carolina v. Katzenbach*,<sup>76</sup> the Court acknowledged that the Act established “stringent new remedies”<sup>77</sup> and that some of its provisions were “inventive”<sup>78</sup> and “uncommon.”<sup>79</sup> To suggest otherwise would be foolish. Yet the Court recognized that “exceptional conditions can justify legislative measures not otherwise appropriate.”<sup>80</sup> And further, Congress was not acting rashly and hastily, but rather it “explored with great care the problem of racial discrimination in voting.”<sup>81</sup>

Thus, on the record before it, the Court concluded that the means used by Congress were a legitimate, permissible response to the problem at hand.<sup>82</sup> “After enduring nearly a century of systematic resistance to the Fifteenth Amendment,” the Court explained in a moment of great candor, “Congress *might* well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>83</sup> Deference to Congress was the order of the day.

A cursory reading of the Court’s opinion discloses an obvious affinity with the government’s position during the congressional hearings, a fact that the Court did not attempt to hide. The arguments

75. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957), reprinted in 50 EMORY L.J. 563 (2001); see also THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 230 (3rd ed. 2000); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 807 (1975).

76. 383 U.S. 301 (1966).

77. *Id.* at 308.

78. *Id.* at 327.

79. *Id.* at 334.

80. *Id.*

81. *Id.* at 308. The critics disagreed with this point, to be sure, and vehemently so. See *1965 Senate Hearings*, *supra* note 5, at 54 (statement of Sen. Ervin) (“Congress has rarely been called upon to enact a law which bears on its face the marks of having been written in such haste as this one.”); *id.* at 616 (statement of Paul Rodgers, Jr., Assistant Att’y General of State of Ga.) (“The bill was rather hazily drawn and I think it is obvious . . . .”); see also *1965 House Hearings*, *supra* note 25, at 623 (statement of former Rep. Watson) (“All of us know, Mr. Chairman, that the support of this measure is primarily the result of mass hysteria created and nurtured by the national press.”). While Senator Ervin repeated this complaint often, see *1965 Senate Hearings*, *supra* note 5, at 54, 235, 593, the Attorney General denied it. See *id.* at 54 (“It wasn’t written in all that haste. There were a lot of revisions that were made, as I think is true of almost every law that is enacted, that there are changes made in committee, changes made up to the last minute. Just because changes are made, just before the bill is reported, you don’t say that the bill was drafted in haste.”).

82. *South Carolina*, 383 U.S. at 334.

83. *Id.* at 328 (emphasis added).

were familiar ones. The coverage formula, and particularly its reliance on test and devices and turnout and registration rates, was rational on its face and as applied to the covered states. The use of test and devices needed little explanation, since these tests had a long and settled historical pedigree “as a tool for perpetrating the evil.”<sup>84</sup> The use of voter turnout rates was similarly “obvious” and legitimate, as widespread efforts to disenfranchise voters “must inevitably” lead to low voting rates.<sup>85</sup> The Court also was unimpressed by the fact that the formula did not include some jurisdictions for which evidence of voting discrimination exists. Congress need not handle all aspects of a problem in the same way, the Court explained, “so long as the distinctions drawn have some basis in practical experience.”<sup>86</sup> More tellingly for the Court, the record put together by Congress did not reveal *any* state or political subdivision exempted by the coverage formula yet guilty of racial discrimination through the use of tests and devices. While the critics complained that this confirmed the discriminatory nature of the formula as applied against the Southern states, the Court concluded that “[t]his fact confirms the rationality of the formula.”<sup>87</sup>

The Court disposed of any and all arguments similarly. For example, to the argument that the bailout provision was a nullity and imposed an impossible burden on the covered states, the Court offered the testimony of the Attorney General that the burden would be no more than the submission of affidavits from voting officials.<sup>88</sup> Similarly, the five-year suspension of literacy tests “was a legitimate response to the problem” evidenced by the record and “for which there is ample precedent in Fifteenth Amendment cases.”<sup>89</sup> As to the criticism that the role assigned to the District Court in D.C. under section 5 would amount to the authorization of advisory opinions in violation of Article III, it is not so. This is because a covered state wishing to amend its voting laws had a “controversy” with the federal government, and a court’s determination that the voting change in question complied with the Act was an appropriate judicial remedy.<sup>90</sup>

The ease with which the Court set aside the constitutional challenges posed by the Voting Rights Act should not be surprising. Congress was finally confronting a national disgrace, and the Court would not stand in the way of a solution. To the Court, the Act was

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84. *Id.* at 330.

85. *Id.*

86. *Id.* at 331 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955); *Ry. Express Agency v. New York*, 336 U.S. 106 (1949)).

87. *Id.*

88. *See id.* at 332.

89. *Id.* at 334.

90. *See id.* at 335.

well within past exercises of congressional powers. But the real story of the case is how willing the Justices were in giving Congress much-needed room to handle this problem. The Court did not only defer to Congress; to some, it abdicated. And, this would not be the last time.

If any doubt remained about the Court's posture of deference, a more difficult constitutional challenge lay in the wings. Section 4(e) of the Act provided that no person who has completed a sixth grade education in a school accredited by the commonwealth of Puerto Rico shall be denied the right to vote on account of an inability to read or write English.<sup>91</sup> This provision ran into direct conflict with the recent precedent established by *Lassiter v. Northampton County Board of Elections*,<sup>92</sup> a case decided a scant six years earlier, where the Court turned down a facial challenge to literacy tests. If *Lassiter* stood for the proposition that literacy tests were legitimate exercises of state authority absent the intent to discriminate on racial grounds, could Congress strike down a state literacy test devoid of any indicia of racial intent?

The Court answered this question in *Katzenbach v. Morgan*.<sup>93</sup> In an opinion authored by Justice Brennan, the Court explained that the question was not whether application of the literacy requirement violated the equal protection clause. Rather, the question in *Morgan* was whether section 4(e) was " 'appropriate legislation' to enforce the Equal Protection Clause."<sup>94</sup> The Court unsurprisingly concluded that it was, while asserting in a controversial footnote that "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."<sup>95</sup>

As in *South Carolina*, the story in *Morgan* was one of clear and unbridled deference to the wishes of Congress. To even call it low-level review would be misleading, for that implies that there was any review at all. There was not. Congress made all the needed weighing and balancing, answered all the questions, and reached all the needed conclusions. This was enough for the Court. The Justices were not interested in reviewing how Congress resolved these various questions; all it needed was to "perceive a basis upon which the Congress might resolve the conflict as it did."<sup>96</sup>

The *Morgan* case must be understood for what it was: a moment in time when the Court ceded some of its traditional power to define the substantive scope of the Constitution to Congress and its own

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91. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e)(2), 79 Stat. 437, 438 (1965).

92. 360 U.S. 45 (1959).

93. 384 U.S. 641 (1966).

94. *Id.* at 651.

95. *Id.* at 651 n.10.

96. *Id.* at 653.

power to enforce the Constitution. Under existing doctrine, that is, the state literacy test was neither irrational nor arbitrary, and thus constitutional; yet Congress declared it unconstitutional all the same, and by a mere “*ipse dixit*,” no less.<sup>97</sup> The Court did not even demand a factual record to support the congressional conclusion. This was a question, Justice Harlan complained in dissent, “for the judicial branch ultimately to determine.”<sup>98</sup> But the Court was not persuaded and happily ceded ground to Congress to carry on its important work. Or, as former Solicitor General Cox testified during the 1969 Senate hearings, *Morgan* was “a token of congressional supremacy.”<sup>99</sup>

## 2. *Too Much of a Good Thing: Literacy Tests and Oregon v. Mitchell*

This forgiving and deferential posture of the Court to the Act continued through the years. In *Oregon v. Mitchell*, for example, the Court unanimously upheld a five-year nationwide ban on literacy tests.<sup>100</sup> On its face, this ban posed a difficult question of constitutional law, maybe even an insurmountable one. It was one thing to ban literacy tests within jurisdictions guilty of racial discrimination, as supported by extensive congressional findings. (This was *South Carolina v. Katzenbach*.) It would be another to ban these literacy tests across all fifty states, in the absence of similar findings for all affected jurisdictions.

Yet the Court hardly flinched. Four Justices—Black, Stewart, Burger, and Blackmun—saw the problem of literacy and voting as a national problem and welcomed the nationwide extension as recognition of this fact.<sup>101</sup> Congressional findings fully supported this conclusion. As Justice Black explained, Congress had evidence that literacy tests had long been used to discriminate and disenfranchise voters.<sup>102</sup> Congress also had evidence of the history of discriminatory educational opportunities across the nation.<sup>103</sup> Justice Stewart similarly concluded that Congress had enough evidence from the 1965 hearings to reach this conclusion.<sup>104</sup>

The remaining Justices took a similarly deferential posture. For Justice Douglas, the Court in *Morgan* “traveled most of the distance

97. *Id.* at 671 (Harlan, J., dissenting).

98. *Id.* at 667.

99. *1969 Senate Hearings*, *supra* note 21, at 334.

100. *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970).

101. *See id.*; *see also id.* at 284 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., and Blackmun, J.).

102. *Id.* at 132 (majority opinion).

103. *Id.* at 133.

104. *Id.* at 284 (Stewart, J., concurring in part and dissenting in part).

needed to sustain this Act,”<sup>105</sup> and in light of the legislative history, “we certainly cannot say that the means used were inappropriate.”<sup>106</sup> Justice Harlan conceded that he might have preferred a less aggressive approach in this “delicate area,” yet “the choice which Congress made was within the range of the reasonable.”<sup>107</sup> And Justice Brennan, joined by Justices White and Marshall, concluded that “there is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote” to persons of color unable to pass these tests as a direct result of discriminatory educational systems.<sup>108</sup> Notably, Justice Brennan added that the legislative record “amply supported” this conclusion.<sup>109</sup>

Once again, a hard question was made easy by a Court that was only too willing to step out of the way. And so, after *Oregon*, only one question remained: did the power of Congress under the Fifteenth Amendment know any limits?

### 3. *The End of the Road? City of Rome*

Ten years later, in *City of Rome v. United States*,<sup>110</sup> Congress appeared to meet its match. This was the sternest challenge to the constitutionality of the Act since the *Katzenbach* cases. But the Court followed its now familiar script and upheld the constitutionality of the Act.<sup>111</sup> Two questions in particular deserved close attention.

First, if the onerous nature of the special provisions of the Act were partly justified as a temporary remedy to the problem, how to defend yet another extension of the Act, this time from 1975 to 1982? To the Court, this was not a difficult question. The Act had accomplished much in terms of both black registration and the election of black officials, yet Congress had concluded that such progress was “modest and spotty.”<sup>112</sup> As in previous years, Congress considered the existing need for the preclearance requirement in light of such progress.<sup>113</sup> The record reflected the requisite findings. And so the Court concluded: “When viewed [in historical context,] Congress’ considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of

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105. *Id.* at 145 (Douglas, J., dissenting).

106. *Id.* at 147.

107. *Id.* at 217 (Harlan, J., concurring in part and dissenting in part).

108. *Id.* at 235 (Brennan, J., dissenting, joined by White, J., and Marshall, J.).

109. *Id.* at 236.

110. 446 U.S. 156 (1980).

111. *Id.* at 187.

112. *Id.* at 181 (citing H.R. REP. NO. 94-196, at 7-11 (1975); S. REP. NO. 94-295, at 11-19 (1975)).

113. *See id.* (“Congress gave careful consideration to the propriety of readopting § 5’s preclearance requirement.”).

pervasive voting discrimination is both unsurprising and unassailable.”<sup>114</sup>

The second question posed a more difficult challenge. At the time of *South Carolina*, the Court had yet to settle on the meaning of the Fourteenth Amendment; or, more specifically, it had yet to determine whether the Equal Protection Clause prohibited both purposeful racial discrimination as well as state action that was discriminatory in effect. For this reason, the Court need not spend an inordinate amount of time in *South Carolina* discussing the intent/effect language of the Act (i.e., the Act’s prohibition on qualifications, standards, practices, or procedures that have the purpose and will have the effect of denying or abridging the right to vote on account of race or color) and whether such a standard remained within the scope of the Amendments. In *Washington v. Davis*,<sup>115</sup> however, the Court determined that a violation of the Equal Protection Clause demanded purposeful discrimination. By extension, in *City of Mobile v. Bolden*<sup>116</sup>—decided the same day as *City of Rome*—the Court incorporated a similar standard into the Fifteenth Amendment. These two cases demanded a reconsideration of the Court’s prior acquiescence to the statutory standard. Could Congress prohibit, under the preclearance requirement, state voting practices devoid of purposeful discrimination but only with a discriminatory effect?

Continuing with its prior deferential posture, a six-member majority answered this question affirmatively.<sup>117</sup> The holding rested on familiar cases—*South Carolina*, *Morgan*, and *Oregon*—which the Court read in helpful and forgiving ways. Curiously, the Court did not discuss the impact of *Washington v. Davis* to this area of the law. Instead, it explained that “Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.”<sup>118</sup> In other words, the incidence of coverage under section 4(b) of the Act—the very section at the heart of the constitutional challenge in 1965—was offered as the reason for subjecting these covered jurisdictions to a more expansive standard than demanded by the Fifteenth Amendment. As hard as it tried, the Court explained in a telling passage that it could “find no reason . . . to disturb Congress’ considered judgment.”<sup>119</sup>

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114. *Id.* at 182.

115. 426 U.S. 229 (1976).

116. 446 U.S. 55 (1980).

117. *City of Rome*, 446 U.S. at 157.

118. *Id.* at 177 (citation omitted).

119. *Id.* at 178.

I neither criticize nor praise the Court's posture in *City of Rome*. Of greater interest is the fact that the Court granted Congress what amounted to a free pass under the Reconstruction Amendments to solve the nation's racial ills as Congress saw fit. Or, as Justice Rehnquist remarked in his forceful dissent, offering both *Marbury v. Madison*<sup>120</sup> and *United States v. Nixon*<sup>121</sup> for support and echoing Justice Harlan's dissent in *Morgan*: "While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities."<sup>122</sup> He concluded that the Court's decision in that case, *City of Rome*, was "nothing less than a total abdication of that authority."<sup>123</sup>

#### 4. *The Act Meets the New Federalism: Monterey County*

This forgiving posture toward the constitutional status of the Act has not been affected by the recent federalism revolution. This is a key piece of evidence, for I can scarcely think of any other congressional enactment as intrusive as the Voting Rights Act into matters of state concern.<sup>124</sup> To be sure, the Court and Congress have acknowledged the federalism concerns raised by the Act. But the argument has yet to carry the day. In *South Carolina*, for example, the Court explained that matters within the power of the states are not insulated from federal judicial review when used to "circumvent[] a federally protected right,"<sup>125</sup> a conclusion it reiterated fifteen years later in *City of Rome*.<sup>126</sup>

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120. 5 U.S. (1 Cranch) 137 (1803).

121. 418 U.S. 683 (1974).

122. *City of Rome*, 446 U.S. at 207 (Rehnquist, J., dissenting).

123. *Id.*

124. See *Lopez v. Monterey County*, 525 U.S. 266, 293-94 (1999) (Thomas, J., dissenting) ("Section 5 is a unique requirement that exacts significant federalism costs, as we have recognized on more than one occasion. . . . The section's interference with state sovereignty is quite drastic. . . ." (citations omitted)); *Georgia v. United States*, 411 U.S. 526, 543 (1973) (White, J., dissenting) ("Although the constitutionality of § 5 has long since been upheld, it remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect." (citation omitted)); *Allen v. State Bd. of Elections*, 393 U.S. 544, 585 (1969) (Harlan, J., concurring in part and dissenting in part) ("For the Court has now construed § 5 to require a revolutionary innovation in American government that goes far beyond that which was accomplished by § 4."); *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring in part and dissenting in part) ("Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.").

125. *South Carolina*, 383 U.S. at 325.

126. *City of Rome*, 446 U.S. at 178-80.

Crucially, this argument has survived the recent case of *City of Boerne v. Flores*<sup>127</sup> and its substantial progeny.<sup>128</sup> According to leading voices within the law of democracy,<sup>129</sup> these cases place the Act in grave constitutional danger, as neither a congruent nor proportional remedy to the asserted constitutional harm. Commentators focus on the issue of findings and counsel Congress to develop a detailed and thorough record in support of the statute. But this is largely a distraction.<sup>130</sup> We have seen this issue before, in *South Carolina, Oregon*, and *City of Rome*. We also saw it in Justice Harlan's dissent in *Morgan*. And in case any doubt remained, the Court has been explicit about its posture toward the Act in *Lopez v. Monterey County*,<sup>131</sup> a case decided post-*Boerne*.

In *Monterey County*, the Court faced yet another difficult question raised by the Act: is a state law enacted by a noncovered state subject to preclearance when a covered county "seek[s] to administer" such law? In other words, must Monterey County seek preclearance of a law passed by the State of California, a noncovered jurisdiction, even though the county exercised no independent discretion in enacting the law? For an answer, the Court referred to the language of the statute, which read as follows: "[Federal preclearance is required] [w]henver a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."<sup>132</sup> The question in *Monterey County* focused on the meaning of the phrase "seek to administer." The Court concluded that this language signaled Congress's clear intention that all changes be precleared irrespective of any discretion exercised by the covered jurisdiction in enacting the law. As applied to the County of Monterey, this meant that the county must submit for preclearance a law from the State of California that the county played no role in enacting.

The implications of this position were not lost on the Court. To require Monterey County to preclear changes enacted by the State of California would turn California into a pseudo-covered state for purposes of section 5. Yet California did not have the history of discrimi-

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127. 521 U.S. 507 (1997).

128. *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

129. *See supra* note 10.

130. Fuentes-Rohwer, *supra* note 6.

131. 525 U.S. 266 (1999).

132. 42 U.S.C. § 1973c.

nation that would warrant statutory coverage under the Act. As a consequence, this reading of the statutory language might “tread on rights constitutionally reserved to the States.”<sup>133</sup> This is a considerable argument. Surely Congress could not subject innocent states to the drastic measures of section 5 due to the sins of local subdivisions within its jurisdiction. Could such an exertion of congressional power possibly survive the recent *Boerne* revolution?

In a word, yes. The Court’s response reads like a “who’s who” of voting rights law. Many big cases made an appearance, such as *South Carolina v. Katzenbach*,<sup>134</sup> *City of Rome v. United States*,<sup>135</sup> *Gaston County v. United States*,<sup>136</sup> *City of Boerne v. Flores*,<sup>137</sup> *Miller v. Johnson*,<sup>138</sup> and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.<sup>139</sup> This cast of characters told you everything you needed to know. There were two related issues. The first issue was also an obvious one, and this is exactly where the Court began: yes, the Act imposes “substantial ‘federalism costs,’ ”<sup>140</sup> yet the Reconstruction Amendments by their very nature intrude on matters “traditionally reserved to the States.”<sup>141</sup> In this sense *Monterey County* did not present a new question; this was a remake of *South Carolina* and *City of Rome*, precedents that the Court was not inclined to reconsider.<sup>142</sup>

The second issue struck at the heart of *Boerne* and its progeny: could section 5 reach the actions of noncovered states? That is, could Congress interfere with matters traditionally left to the states even when the requisite evidence of racial discrimination does not exist? The Court did not give this question its due, and that fact alone betrays the Court’s posture toward the constitutionality of the Act. This was an old story, and the Court was sticking to its old script.

The Court began, as it must, with *South Carolina* and its holding that Congress may seek to protect against both discriminatory animus and neutral state action that leads to harmful effects.<sup>143</sup> Congress could even choose to protect discriminatory practices with only a discriminatory effect; this was *City of Rome*. This was precisely how the Court understood the challenge in *Monterey County*, so there was nothing new to say. Congress could designate jurisdictions for

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133. *Monterey County*, 525 U.S. at 282.

134. 383 U.S. 301 (1966).

135. 446 U.S. 156 (1980).

136. 395 U.S. 285 (1969).

137. 521 U.S. 507 (1997).

138. 515 U.S. 900 (1995).

139. 430 U.S. 144 (1977).

140. *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (citing *Miller*, 515 U.S. at 926).

141. *Id.* at 282-83 (quoting *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

142. *See id.* at 283.

143. *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966)).

coverage under the Act, and Congress could also reach state actions that are only discriminatory in nature. As a consequence, the Court concluded that Congress could require preclearance of state laws before they took effect on a covered county. The Court's word choice was quite revealing: "[s]ection 5, as we interpret it today, burdens state law only to the extent that that law affects voting in jurisdictions properly designated for coverage."<sup>144</sup> And, in case any doubt remained, the Court offered what it took to be its trump card: until the 1970 Amendments extended the ban on literacy tests nationwide, the Act suspended literacy tests within covered counties even though these tests had been enacted by noncovered states. This was *Gaston County*.<sup>145</sup> Again, there was nothing new.

*Monterey County* was a difficult case, or at least it should have been. The ease with which the Court situated these challenging facts within the Act's revered holdings betrays the Court's posture toward the statute in general. In this vein, the Court's conclusion was nothing short of fanciful: "In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."<sup>146</sup> Whether one agreed or disagreed with the Court's conclusion, one must agree that the Court did not give the constitutional question at the heart of this case its due.<sup>147</sup> It is hard not to read *Monterey County* as an instance of a court trying too hard to reach a desired conclusion.

Notably, *Monterey County* is not an outlying case in a world where the Court keeps Congress in close check as it exercises its powers under the Reconstruction Amendments. The opposite is true. From the time the Court first upheld the constitutionality of the Act in the *Katzenbach* cases, its posture has been deferential and forgiving. The contemporary debate over the constitutionality of the recently amended Act does not account for this history, and it instead presumes an aggressive Court. But make no mistake, once this debate returns to the Court, the real question will not be one of legislative findings and whether the Act is remedial in nature. The only question will be whether the Court chooses to follow its traditional script.

#### IV. STATUTORY INTERPRETATION AS DYNAMIC POLICY-MAKING

Once the Court issued its definitive rulings on the constitutionality of the Act in the *Katzenbach* cases, the debate shifted in notable

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144. *Id.* at 284.

145. *Id.* (citing *Gaston County v. United States*, 395 U.S. 285, 287 (1969)).

146. *Id.* at 284-85.

147. *See id.* at 293-97 (Thomas, J., dissenting).

ways. To be sure, some critics refused to accept the Court's arguments. Prominent among these critics was Senator Sam Ervin, who by 1969 had assumed the chairmanship of the Subcommittee on Constitutional Rights of the Judiciary Committee. During the 1969 hearings over amendments and extensions to the Act, for example, he remarked: "the Voting Rights Act is unconstitutional in every respect notwithstanding what the Supreme Court said."<sup>148</sup> But this was a lost battle and a waste of energy, as the debate shifted to the substantive provisions of the Act. And on this score, the Court clearly led the way.

This Part examines the Court's handling of the language of the Act. And the lesson is unmistakable: from the time of the Court's initial intervention in this area, the language of the statute and the intent of Congress have been no match for the Justices' boundless imaginations. Section IV.A discusses the early cases, when the Court expanded the reach of the statute in ways that surprised even Congress. Section IV.B offers *Beer v. United States*,<sup>149</sup> a case that signaled an end to the Court's expansive readings of the statutory language. Section IV.C moves ahead a generation, to the *Bossier Parish* cases.<sup>150</sup> As in *Beer*, these cases exemplify the Justices' idiosyncratic and debatable readings of the Act under the guise of effectuating the intent of Congress. Section IV.D closes with *Georgia v. Ashcroft*,<sup>151</sup> an opinion that figured prominently in the 2006 debates in Congress. The *Georgia* and *Bossier Parish* cases are important as one of the few moments in the history of the Act when Congress corrected a judicial interpretation of the statute. For my purposes, these cases are notable not for what they say as much as for what they led to: in light of the Court's penchant for interpretive creativity throughout the life of the Act, what explains the congressional reactions to these cases?

#### A. The Early Cases

The Court's early handling of the Act's language follows a predictable pattern. From the moment the Court first engaged these materials in *Allen v. State Board of Elections*,<sup>152</sup> its readings have been creative and generous constructions of the language of the statute and the intent of Congress. The Court led the way and molded the broad and forgiving statutory language to its liking, and Congress

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148. 1969 Senate Hearings, *supra* note 21, at 175 (statement of Sen. Ervin); *see id.* at 357 ("I don't consider that *Katzenbach v. Morgan* is constitutional. . . . I also don't think *South Carolina v. Katzenbach* is constitutional. . . .").

149. 425 U.S. 130 (1976).

150. *See Bossier Parish II*, 528 U.S. 320 (2000); *Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)*, 520 U.S. 471 (1997).

151. 539 U.S. 461 (2003).

152. 393 U.S. 544 (1969).

willingly acquiesced. This conclusion holds true even at times when the language of the statute appeared to offer a contrary outcome.

In order to make sense of the Court's early interpretations of the statute, one must first make sense of the goals that Congress and the administration were pursuing with the Act. For evidence of these goals, I turn to the House subcommittee hearings.

The hearings began on March 18, 1965, a scant three days after President Johnson delivered his voting rights address to a joint session of Congress. From the time Chairman Celler called the meeting to order, the goal of the new legislation became clear. As the chairman explained during his opening statement: "The time is here for action. This committee will consider a strong bill that will guarantee to Negroes the inalienable right to vote, and to safeguard that vote as guaranteed by the Constitution."<sup>153</sup> The bill was a direct response to the assortment of vote denial practices then in effect—"[t]he legalisms, stratagems, trickery, and coercion"<sup>154</sup>—that kept a majority of voters of color from exercising their right to vote. Or, in the words of Congressman McCulloch: "[T]he untrammelled right of qualified citizens to vote is the very cornerstone of representative government. That right has been denied to many people in this country under color of law, and otherwise, too long. The time has come when such denial must cease . . . ."<sup>155</sup>

The goal of the Act, in other words, was to remove discriminatory tests and devices that denied otherwise qualified blacks of their right to vote. Time and again, Attorney General Katzenbach made precisely this point in the context of defending the aggressive nature of the new bill. Early on during his testimony, for example, he stated that the bill sought to "translate [the government's good] intentions into ballots."<sup>156</sup> Moments later, he explained the bill as follows:

It is designed to deal with the two principal means of frustrating the 15th amendment: the use of onerous, vague, unfair tests and devices enacted for the purpose of disenfranchising Negroes, and the discriminatory administration of these and other kinds of registration requirements. The bill accomplishes its objectives first, by outlawing the use of these tests under certain circumstances, and second, by providing for registration by Federal officials where necessary to ensure the fair administration of the registration system.<sup>157</sup>

The Attorney General repeated this point throughout his testimony. "Our concern today," he told the subcommittee, "is to en-

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153. 1965 *House Hearings*, *supra* note 25, at 1 (statement of Chairman Emanuel Celler, Subcomm. No. 5 of H. Comm. on the Judiciary).

154. *Id.*

155. *Id.* at 2.

156. *Id.* at 9.

157. *Id.*

large representative government, to solicit the consent of all the governed, to increase the number of citizens who can vote.”<sup>158</sup> Moments later, he explained that “the whole bill really is aimed at getting people registered.”<sup>159</sup>

This position was met with some criticism from members of Congress who wished for the legislation to go further. For example, Congressman Corman asked whether the bill could attempt to deal with other important questions, such as the issue of qualifications for running for public office.<sup>160</sup> After all, what would be the point of allowing blacks to register and vote if they could not run for office or, at the very least, vote for their candidates of choice? In an oft-cited passage, Assistant Attorney General Burke Marshall responded: “The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill.”<sup>161</sup>

There should be little question about the primary goals of the proposed bill. The political process across the South was a broken process, and the bill aimed to fix it. In the face of mass disenfranchisement, the bill sought to (1) allow voters to register and (2) make sure they were allowed to vote. Hence the suspension of literacy tests, the need for poll watchers and federal registrars, and the preclearance requirement. The text of section 5 is particularly instructive in uncovering the goals of the statute. Recall that under this section, a covered jurisdiction may not seek to implement a voting change until preclearing it with the Department of Justice or the United States District Court for the District of Columbia. Yet before gaining preclearance for a voting change, “no person shall be denied the right to vote for failure to comply with”<sup>162</sup> any such change. This must mean that section 5 was intended to reach only those changes with which prospective voters could comply.<sup>163</sup> Until such changes were precleared, a prospective voter must be allowed to vote.

And then came, three years later, *Allen v. State Board of Elections*.<sup>164</sup> *Allen* stood at a crucial moment in the Act’s history and would decide its impact into the future. The case is important not only for the needed changes it brought to the preclearance process, but also because it signaled the Court’s willingness to dialogue with Con-

158. *Id.* at 19.

159. *Id.* at 21.

160. *Id.* at 74.

161. *Id.*

162. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 438 (1965).

163. Justice Harlan made precisely this claim in his dissent in *Allen v. State Bd. of Elections*, 393 U.S. 544, 587 (1969) (Harlan, J., concurring in part and dissenting in part) (emphasis omitted).

164. 393 U.S. 544 (1969).

gress in keeping the Act abreast of modern circumstances. Take first the three procedural questions presented in the case: May a private litigant bring a declaratory judgment action to determine whether a voting change falls under section 5 of the Act? If so, must these private litigants bring their suits in the District of Columbia District Court? And, did Congress intend for these suits to be heard before three-judge courts? These questions ranged in difficulty, and the statute provided varying degrees of support.

The Court's answers to these questions are not nearly as important as the evidentiary support offered by the Court. On the first question, for example, the Court conceded that the statute was silent on this issue, yet it ultimately concluded that private litigants may bring these declaratory judgment suits.<sup>165</sup> To decide otherwise would mean that "[t]he achievement of the Act's laudable goal could be severely hampered"<sup>166</sup> and the promise of section 5 "might well prove an empty promise."<sup>167</sup> In short, the promise of the Act could not be left at the hands of the limited staff and resources of the Office of the Attorney General.<sup>168</sup> The government needed help in enforcing the new law.

On the second question, the Court faced a more daunting challenge. According to section 14(b) of the Act, "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act . . ."<sup>169</sup> This language strongly suggested that these private suits must be brought in "the District Court for the District of Columbia." But the Court had different ideas in mind. According to *Allen*, the language of section 14(b) applied only to suits brought by the state under section 5, because these were suits where the state sought an adjudication that the voting change did not have the purpose and will not have the effect of denying the right to vote on account of race or color.<sup>170</sup> When a private litigant brings suit, however, a court must only determine whether the enactment in question falls under the purview of section 5. This distinction—or what the Court referred to as "the magnitude of these two issues"<sup>171</sup>—meant that litigants may bring their private suits in their local district courts.

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165. *Id.* at 554-55.

166. *Id.* at 556.

167. *Id.* at 557.

168. *See id.* at 556.

169. *Id.* at 557-58 (alterations in original) (quoting 42 U.S.C. § 1973l(b) (1964 & Supp. I 1965)).

170. *Id.* at 558-60.

171. *Id.* at 559.

The Court answered the third question similarly. Instead of a close reading of the statutory language or a careful analysis of legislative materials, the Court offered the following: “in light of the extraordinary nature of the Act in general, and the unique approval requirement of § 5, Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.”<sup>172</sup>

The substantive question at the heart of the *Allen* case occupied much of the Court’s time, and for good measure. This was the main attraction—the question that would determine the Act’s impact to the future. As codified under section 5 of the Act, what was a “voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting”?<sup>173</sup> One answer, pressed forcefully by Justice Harlan in dissent, argued that this language referred only to laws by which voters registered to vote and had their ballots counted.<sup>174</sup> If looking to the intent of the 89th Congress and the Johnson administration, and as I argued previously, I think this is the right answer. But the Court rejected this argument. Instead, the Court explained, “[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”<sup>175</sup> This clear intention, coupled with the “weight of the legislative history,”<sup>176</sup> led the Court to conclude that Congress intended that “all changes, no matter how small, be subjected to § 5 scrutiny.”<sup>177</sup> Examples include the following: changes from districted to at-large elections;<sup>178</sup> changes from election to appointment of county officials;<sup>179</sup> new procedures for casting write-in ballots;<sup>180</sup> and changes to the requirements for independent candidates who choose to run in general elections.<sup>181</sup> The reach of *Allen* was subsequently extended to reapportionment plans;<sup>182</sup> annexations,<sup>183</sup> and, *inter alia*, changing locations of polling places.<sup>184</sup>

This conclusion ran up against some difficult textual challenges. In particular, how to square the Court’s expansive interpretation of the scope of section 5 in the face of the statutory language directing the preclearance requirement towards changes with which persons

172. *Id.* at 563.

173. *Id.* (citing 42 U.S.C. § 1973c (1964 & Supp. I 1965)).

174. *See id.* at 583 (Harlan, J., concurring in part and dissenting in part).

175. *Id.* at 565.

176. *Id.* at 569.

177. *Id.* at 568.

178. *Id.* at 550.

179. *Id.* at 550-51.

180. *Id.* at 552.

181. *Id.* at 551.

182. *Georgia v. United States*, 411 U.S. 526 (1973).

183. *Perkins v. Matthews*, 400 U.S. 379 (1971).

184. *Id.*

could “comply”?<sup>185</sup> The Solicitor General admitted that this provision was inconsistent with the Court’s interpretation of the Act, yet offered that it resulted from congressional oversight.<sup>186</sup> The Court simply ignored it.<sup>187</sup>

The Court’s creative handling of the language of the statute continued through the years. In *Gaston County v. United States*,<sup>188</sup> the Court offered a similarly expansive interpretation of section 4(a) of the Act. Under this section, a covered jurisdiction wishing to reinstate its suspended test or device must show that “no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”<sup>189</sup> Gaston County wished to make such a showing in federal court. But the district court denied it relief, concluding that the county’s history of segregated and unequal education would mean that the literacy test would have the effect of discriminating against blacks. While underscoring its view that this was not a *per se* rule, and in an opinion authored by Justice Harlan, the Supreme Court agreed. Under section 4(a) of the Act, in other words, a reviewing court may consider whether a literacy test would have the effect of denying the right to vote as a consequence of the jurisdiction’s history of segregated and inferior schools.<sup>190</sup>

In saying this, my point is not to suggest that the Court was wrong to decide *Allen* and *Gaston County* as it did. Rather, my point is only to underscore the obvious: the *Allen* decision, while necessary from a real-world view, was neither preordained nor demanded by the statutory materials. In fact, it may be said that Congress, in failing once again to anticipate the Southern response to the Act, did not make the Court’s response any easier. But the Court was up to the task.

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185. *Allen*, 393 U.S. at 587 (Harlan, J., concurring in part and dissenting in part).

186. *Id.*

187. This conclusion led to further complications. Namely, would a town that does not conduct voting registration be subject to section 5 preclearance? And is a board of education a political subdivision under the Act? The answer to both questions was clear to the Johnson administration and the 89th Congress. Yet, in keeping with the logical extensions of the *Allen* decision, the Court answered both questions affirmatively, first in *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 117-35 (1977), and the next year, in *Dougherty County Board of Education v. White*, 439 U.S. 32, 43-47 (1978).

188. 395 U.S. 285 (1969).

189. *Id.* at 287 (citing Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (1965)).

190. *Id.* at 293.

*B. The Standards of Preclearance and the Search for  
Congressional Intent: On the Birth of Retrogression*

All too soon, however, the honeymoon came to an end. With *City of Richmond v. United States*<sup>191</sup> and *Beer v. United States*,<sup>192</sup> the Court began an apparent retreat from its earlier, expansive interpretations of the Act. The *Beer* opinion is particularly instructive for how the Court made use of the available congressional materials and reached a conclusion that is, to put it charitably, debatable at best. This Section focuses its attention on *Beer* as yet another example of an aggressive Court doing what it wants with the open-ended and forgiving language of the Voting Rights Act.

The question at the heart of the *Beer* litigation appeared to be a relatively simple one: in applying section 5 of the Act, under what standard must the district court or the Attorney General assess whether a districting plan has the effect of denying or abridging the right to vote on racial grounds?<sup>193</sup> Upon inspection, however, this question proved to be anything but simple, perhaps unnecessarily so. After all, as the district court recognized in an opinion authored by Judge Spottswood Robinson, III, “[t]he legislative history of the Act establishes the full and firm allegiance of its own objectives with the goals of the [Fifteenth] Amendment.”<sup>194</sup> In using “parallel language,”<sup>195</sup> Congress signaled its intention to enforce the dictates of the Fifteenth Amendment without resorting to the traditionally time-consuming judicial process.

In other words, it stands to reason that Congress simply wished to shift the constitutional inquiry both temporally and institutionally to the Attorney General or the district court, before changes in the law took place, while also shifting the burden of proof and placing it on the states and political subdivisions. The standard under section 5 review would thus be the same standard under the Fifteenth Amendment,<sup>196</sup> with section 5 acting as a prophylactic. The fact that Congress said little about the particular standard that would govern section 5 inquiries is telling, particularly since section 5 had become by 1975 the “centerpiece” of the Act.<sup>197</sup> If the standard were anything

191. 422 U.S. 358 (1975).

192. 425 U.S. 130 (1976).

193. *Id.* at 130.

194. *Beer v. United States*, 374 F. Supp. 363, 382 (D.D.C. 1974).

195. *Id.*

196. *See Beer v. United States*, 425 U.S. 130, 148 (1976) (Marshall, J., dissenting) (contending that “it is questionable whether the ‘purpose and effect’ language states anything more than the constitutional standard”); *id.* at 146 (explaining that section 5 cases “make clear” that the effects inquiry “is essentially the constitutional inquiry”).

197. 1975 *House Hearings*, *supra* note 35, at 40 (statement of Arthur Fleming, Chairman, U.S. Commission on Civil Rights).

other than what common sense would appear to dictate, surely Congress would have made its intentions far more explicit.

The district court in *Beer* understood its task under section 5 along these lines. To its credit, the district court conducted a nuanced and fact-intensive inquiry, which highlighted the clear and long-standing role played by race in the political and cultural life of New Orleans.<sup>198</sup> The court then looked to the doctrinal structure provided by the Supreme Court's reapportionment cases and analogized its "abridgment" inquiry under the Act to the Supreme Court's vote dilution inquiry.<sup>199</sup> In making this move, the court made clear that "the question before us is not whether New Orleans must confer upon its black citizens every political advantage that a redistricting plan conceivably could offer."<sup>200</sup> Rather, plaintiffs must "press vigorously . . . for all that is their due, but . . . no more."<sup>201</sup> Or, as former Attorney General Katzenbach argued during the 1975 Senate hearings, "[w]hile blacks have made important gains, these gains do not reflect the political power of their numbers were there no discrimination."<sup>202</sup>

The inquiry was essentially an inquiry of unconstitutional vote dilution as commonly understood. Such an inquiry demands a comparison between an optimal state of affairs and the challenged circumstances. In this vein, the court explained that "the relevant comparison is between the results which the minority is constitutionally free to command and the results which the plan leaves the minority able to achieve."<sup>203</sup> Put another way, the comparison was between theoretical results free of any dilutive influence and the actual results under the challenged districting plan. On the facts, the district court concluded that the districting plan would unjustifiably dilute the black vote in New Orleans and that "[s]urely the Fifteenth Amendment . . . discourages the abridgment evident in this case."<sup>204</sup> Under the factors of *Zimmer v. McKeithen*<sup>205</sup> and recent vote dilution case law,<sup>206</sup> the court further concluded that the plan would unjustifiably dilute the potential black voting strength in the city.<sup>207</sup> Finally, the court

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198. See *Beer*, 374 F. Supp. at 374-75.

199. See *id.* at 383.

200. *Id.* at 389.

201. *Id.* at 390.

202. *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 125 (1975).

203. *Beer*, 374 F. Supp. at 388.

204. *Id.* at 393.

205. 485 F. 2d 1297 (5th Cir. 1973).

206. See *Beer*, 374 F. Supp. at 384-85.

207. See *id.* at 393-99.

concluded also that the city had not justified its use of two at-large seats.<sup>208</sup>

In an opinion authored by Justice Stewart, the U.S. Supreme Court reversed.<sup>209</sup> Over a scant twelve-page opinion, the Court managed to turn what could be a difficult issue—if the lower court opinion is any indication—into a simplistic one. The question was the same: when does a districting plan have “the effect of denying or abridging the right to vote on account of race or color”?<sup>210</sup> The Court began its analysis by pointing out that this inquiry is not a constitutional inquiry; rather, it is a question of statutory interpretation.<sup>211</sup> This meant, of course, that the Act’s legislative history and Congress’s intent were controlling. Then, after offering a smattering of quotes and citations from past opinions and congressional reports, the Court shifted its gaze to the 1975 House Report. In particular, the Court focused on the following passage:

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that “the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting . . . .”<sup>212</sup>

From this passage, the Court created the following standard: “the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>213</sup> On this view, a section 5 inquiry would focus on the retrogressive effect of the plan under review and whether people of color were worse off than under the baseline as established by the previous plan. Yet, almost in passing, the Court offered what seemed an important addendum: even if a plan is ameliorative in nature, it “cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.”<sup>214</sup> That is, unless the plan violates the Fifteenth Amendment.<sup>215</sup>

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208. *See id.* at 402.

209. *Beer v. United States*, 425 U.S. 130 (1976).

210. *Id.* at 132.

211. *Id.* at 139.

212. *Id.* at 141 (quoting H.R. REP. NO. 94-196, at 60 (1975)) (alteration in original) (emphasis added).

213. *Id.*

214. *Id.*

215. Keeping with its newfound posture of narrow interpretations of the Act, the Court managed to even restrict this seemingly straightforward and logical reading of the law. In *Bossier Parish II*, the Court remarked: “it is entirely clear that the statement in *Beer* was pure dictum: The Government had made no contention that the proposed reapportionment

Under this standard, the Court looked to the previous plan, enacted in 1961, and compared it to the plan under review. Under the 1961 plan, people of color did not have any majorities in any of the districts; yet, under the reviewed 1971 plan, they would have one and maybe two such districts. From these facts, the Court concluded that the reviewed plan did not violate the effects prong of the preclearance requirement.

This is a questionable conclusion; at best, and as Justice Marshall underscored in dissent, it is a contested reading of the legislative history and the statutory language.<sup>216</sup> One searches in vain for support through the congressional hearings. The House hearings in 1975 never mentioned the concept of retrogression as the standard under which to measure the effects inquiry under section 5, and neither did the 1971 House hearings by the Civil Rights Oversight Subcommittee, from which the 1975 House Report drew its retrogression language.

To be sure, the Court wrote that Congress “explicitly stated” its understanding of the preclearance standard as one of retrogression. But that is simply untrue. Here is what Congress explicitly did: in the spring of 1971, it held hearings on “The Enforcement and Administration of the Voting Rights Act,” during which myriad references to section 5 were offered. Tellingly, none of these references made use of the retrogression language. In January 1972, this same committee issued a report, “Enforcement of the Voting Rights Act of 1965 in Mississippi,” where it recommended that the Department of Justice step up its preclearance responsibilities, “particularly where the change would have a substantial impact on the voting rights of many people.”<sup>217</sup>

As for the preclearance standard, the Report explained that it “is not fully satisfied by an indication that the administration of the change affecting voting will be impartial or neutral.”<sup>218</sup> Only then did the Report go on to state the language later borrowed by the 1975 Report and ultimately by the Court majority in *Beer*: the standard is whether the ability of people of color to participate in the political process and elect the representatives of their choice is “augmented, diminished, or not affected by the change affecting voting.”<sup>219</sup> On its

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at issue was unconstitutional. And though we have quoted the dictum in subsequent cases, we have never actually applied it to deny preclearance.” 528 U.S. 320, 338 (2000) (citation omitted).

216. *Beer*, 425 U.S. at 146 (Marshall, J., dissenting) (contending that the Court’s conclusion “finds no support in the language of the statute and disserves the legislative purposes behind § 5”).

217. STAFF OF SUBCOMM. ON CIVIL RIGHTS OVERSIGHT (SUBCOMM. NO. 4) OF THE H. COMM. ON THE JUDICIARY, 92ND CONG., REPORT ON ENFORCEMENT OF THE VOTING RIGHTS ACT OF 1965 IN MISSISSIPPI 14 (Comm. Print 1972).

218. *Id.*

219. *Id.* at 14-15.

face, it is not altogether clear how the *Beer* majority arrives at the retrogression standard from this paragraph taken as a whole. And it gets better, for the majority left out the best part. Right after the ellipses, the Court didn't think necessary to keep the following passage: "in view of the political, sociological, economic, and psychological circumstances within the community proposing the change."<sup>220</sup> So here is the relevant passage, in full:

[The] standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting *in view of the political, sociological, economic, and psychological circumstances within the community proposing the change.*<sup>221</sup>

With the added language, the passage might be said to offer support for the lower court's opinion in *Beer*, not the Court majority. But the Court seemed intent in narrowing the scope of the preclearance inquiry, and contrary legislative history—or even the fact that the litigants themselves did not think to argue for the standard as the Court ultimately understood it in their briefs—would not stand in its way.

*Beer* is also remarkable for the way in which the district court's analysis of the substantial meaning of section 5 differed from that of the Supreme Court. Judge Robinson's opinion is expansive, nuanced, and arguably more faithful to Congress's expansive views of the purpose behind the Act than Justice Stewart's narrow opinion for the Court. During the 1975 debates over extension of the Act, for example, the 94th Congress explicitly recognized that questions of representation and political fairness are difficult questions, and the question of discrimination in the political process was then a question of vote dilution.<sup>222</sup> In this vein, it is clear that Congress in 1975 would side with Judge Robinson's opinion over Justice Stewart's. But that is one beauty of having five votes on the Court—one need not worry about being right. And, as for reading the statute narrowly, this would not be the last time.

### C. *Retrogression to the End: The Bossier Parish Cases*

Move the story ahead a generation, to the attempt by the Bossier Parish School Board to redraw its new district lines. The Board's

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220. *Id.* at 15.

221. *Id.* at 14-15 (emphasis added).

222. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 38, 46-49 (David L. Epstein et al. eds., 2006).

plan, modeled after a previously approved plan, was denied preclearance by the Department of Justice because a plan presented to the Board by the NAACP had been able to create two majority black districts, whereas the submitted plan had none. More specifically, the Attorney General had objected to the Board's plan because, as required by its own regulations, she must withhold preclearance when "necessary to prevent a clear violation of amended Section 2."<sup>223</sup> On appeal, the lower court precleared the plan,<sup>224</sup> and the Supreme Court ultimately faced two separate questions: whether a violation of section 2 demands a denial of preclearance under section 5; and whether the Attorney General must preclear a plan enacted with discriminatory but nonretrogressive purpose. The following Sections examine the Court's answers to these questions. As before, these cases are instructive for how the Court reaches its conclusions. This is aggressive and creative statutory interpretation with a vengeance.

### 1. *Uncoupling Section 2 from Section 5*

In *Reno v. Bossier Parish School Board (Bossier Parish I)*, the Court answered the first question—whether a section 2 violation demands a denial of preclearance under section 5—in the negative.<sup>225</sup> To the Court, making a violation of section 2 a basis for denying preclearance under section 5 would mean that the Department of Justice "would routinely attempt to avail themselves of this new reason for denying preclearance."<sup>226</sup> This would mean that "for all intent and purposes"<sup>227</sup> the standard of section 2 would replace the standard of section 5, and the retrogression inquiry would be replaced by a vote dilution inquiry. The Court soundly rejected this position, for it contradicted existing doctrine and further increased the "serious federalism costs already implicated by § 5."<sup>228</sup>

This is a debatable conclusion, for it elevates the retrogression inquiry above the structure of the Act and the intent of Congress. On the first point, it is clear that section 2 was intended as a restatement of the Fifteenth Amendment<sup>229</sup> and the bill as a whole was aimed at enforcing the same Amendment. In turn, section 5 was intended to prevent states from violating the Fifteenth Amendment in ways that Congress could not foresee in 1965. Or as Armand Derfner

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223. See *Bossier Parish I*, 520 U.S. 471, 476 (1997) (quoting 42 U.S.C. § 1973).

224. *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434 (D.D.C. 1995).

225. *Bossier Parish I*, 520 U.S. at 474 (1997).

226. *Id.* at 477 (internal quotation marks omitted).

227. *Id.*

228. *Id.* at 480 (citing *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

229. See *To Enforce the Fifteenth Amendment to the Constitution of the United States: Report of Proceedings of Senate Unpublished Hearing on S. 1564 Before the Comm. on the Judiciary*, 89th Cong. Vol. I, 4 (1965).

explained during the 1971 Hearings, “Section 5 was a look down the road to prevent, in advance, stratagems whose nature was unknown but which Congress knew would be forthcoming when literacy tests were abolished.”<sup>230</sup> As enacted in 1965, then, it must be the case that section 5 would incorporate section 2, for the crux of the preclearance requirement was preventing future violations of the Fifteenth Amendment as codified under section 2. Put another way, section 5 was not concerned with the applicable standards under section 2 as much as with the enactment of electoral provisions that would violate the Fifteenth Amendment. And, so long as section 2 was a restatement of the Fifteenth Amendment, section 5 would by definition incorporate section 2. This argument has not only the legislative record on its side, but logic—and perhaps experience—as well.

In fairness, the 1982 Amendments might be understood as altering this reading of the Act. Yet, in fact, the congressional reaction to *City of Mobile* does not affect the larger argument. It is worth noting, first and foremost, that Congress was responding to yet another narrow reading of the statutory language; in *City of Mobile v. Bolden*,<sup>231</sup> the Court understood section 2 as Congress had understood it: as a restatement of the Fifteenth Amendment. This meant, as the Court underscored, that the standard under section 2 would be one of discriminatory intent, rather than the more flexible and forgiving standard of discriminatory effect. Congress soon altered this reading of section 2 in 1982, uncoupling the statutory requirement from its constitutional anchor and requiring a finding of discriminatory effect instead.

To the Court, the 1982 Amendment made all the difference in the world. On their original rendition, the target of sections 2 and 5 was the same: racial discrimination in voting, both in the present and into the future. In amending the Act, however, section 2 ceased to simply restate the constitutional standard as the Court understood it. This had grave repercussions for the section 5 inquiry and the argument that section 5 incorporated a section 2 inquiry, according to the Court in *Bossier Parish I*. Namely, it would shift the preclearance inquiry from nonretrogression to vote dilution and call into question the *Beer* nonretrogression standard. It would also raise the already serious “federalism costs” exacted by section 5 and in so doing might push the Act to the brink of unconstitutionality. Tellingly, the Court also remained unimpressed by the Attorney General’s regulations, which interpreted section 5 as requiring a denial of preclearance if in violation of section 2, and by considerations of public policy, which

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230. *The Enforcement of the Voting Rights Act: Hearings Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92d Cong. 255 (1971).

231. 446 U.S. 55 (1980).

counseled against a grant of preclearance for electoral changes that would ultimately violate section 2.<sup>232</sup>

These arguments must be read in the context of the times and the Court's dissatisfaction with the Department of Justice's handling of its preclearance responsibilities.<sup>233</sup> To the Court, the Department of Justice had pushed its reading of the Act—a reading that the Court understood as one of maximizing majority-minority districts—too far and ultimately rendered the resulting state actions unconstitutional. Hence, section 2 had ceased to be a measure of the Fifteenth Amendment. Instead, it had become a tool of public policy and the yardstick for what a proper structure of representation would look like.<sup>234</sup> On this view, it is easy and perhaps unavoidable to conclude that section 5 does not incorporate section 2.

It must be noted, however, how this posture comes in direct tension with the classic voting rights decisions of the 1960s and the Court's forgiving interpretations of congressional power. Under *Katzenbach v. Morgan*,<sup>235</sup> for example, the Court allowed Congress room to interpret rights under the Fourteenth Amendment beyond what the Court itself would recognize. Such an argument under the *Morgan* power would mean that Congress could interpret the Fifteenth Amendment under section 2 of the Act more expansively than the Court allowed in *City of Mobile*. On this view, section 5 would still incorporate section 2 under Congress's reading of a constitutional violation under the Amendment. But the Court was not interested in this argument. Once Congress offered a different reading of the Amendment through section 2 of the Act, section 5 could no longer be used to enforce section 2 into the future.<sup>236</sup>

Regardless of one's stance about the Court's views on congressional power, it is also intriguing how the Court spends so little time—if any—sorting through the legislative materials and how selective the Court chooses to be when doing so. In this vein, recall how in *Beer* the Court was much too willing to ground the doctrine on its debatable reading of the House report. Yet, in *Bossier Parish*, the Court proved unwilling to accept language from the House and Senate Reports that, according to Justice Stevens and anyone willing to engage the Reports at all, unequivocally expressed a congressional intent to incorporate section 2 within the preclearance dictates of section 5.

232. See *Bossier Parish I*, 520 U.S. at 483-85.

233. See, e.g., *Miller*, 515 U.S. at 917-18; *Johnson v. Miller*, 864 F. Supp. 1354, 1366 (S.D. Ga. 1994) (contending that by the third round of submissions from Georgia to the Department of Justice, “[i]t was now clear to the General Assembly that preclearance would not be forthcoming without adopting this *raison d’être* of the max-black proposals” and that “[t]his goal dominated the creation of the third Georgia submission” (citation omitted)).

234. See *Holder v. Hall*, 512 U.S. 874, 891-93 (1994) (Thomas, J., concurring).

235. 384 U.S. 641 (1966).

236. See *Bossier Parish I*, 520 U.S. at 481-82.

According to the Senate Report, for example, “[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.”<sup>237</sup> In a subsequent report four years later, a House subcommittee similarly concluded that “it is a proper interpretation of the legislative history of the 1982 amendments to use section 2 standards in the course of making section 5 determinations.”<sup>238</sup> But the Court was not interested in such technical matters. Its questionable adoption of the retrogression standard in *Beer* ruled the day.

## 2. *Turning the Act on its Head: Preclearing Discrimination*

And two years later, in *Bossier Parish II*,<sup>239</sup> the retrogression standard ruled the day again. The question this time was whether the Department of Justice must preclear a redistricting plan enacted with discriminatory but nonretrogressive purpose. Unsurprisingly, the Court also answered this question in narrow fashion, construing the language of the statute as requiring a denial of preclearance under the purpose prong of section 5 only for retrogressive dilution.<sup>240</sup> After *Bossier Parish II*, the retrogression standard would apply not only to the discriminatory effects inquiry, but to the question of discriminatory purpose as well.

The best that can be said for this reading of the statute is that it was “outlandish.”<sup>241</sup> The Court began by looking to the relevant language, under which a covered jurisdiction must show that its proposed change “‘does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.’”<sup>242</sup> From this language, the argument was disarmingly simple: if the effect prong of the statute required a retrogression inquiry, the Court concluded that it must interpret the purpose prong similarly since, “[a]s we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.”<sup>243</sup> Thus, following *Beer*, retrogression would become the hallmark of the preclearance inquiry.

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237. S. REP. NO. 97-417, at 12 n.31 (1982) (cited in *Bossier Parish I*, 520 U.S. at 505-06 (Stevens, J., dissenting)).

238. STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE H. COMM. ON THE JUDICIARY, 99TH CONG., REPORT ON VOTING RIGHTS ACT: PROPOSED SECTION 5 REGULATIONS 5 (Comm. Print 1986).

239. 528 U.S. 320 (2000).

240. *See id.* at 328.

241. *Id.* at 360 (Souter, J., dissenting).

242. *Id.* at 328 (majority opinion) (quoting 42 U.S.C. § 1973c (1965)).

243. *Id.* at 329.

This is an outlandish conclusion because it does not even pretend to comport with the statute's structure and Congress's intent. The reason for including a preclearance requirement, according to Attorney General Katzenbach, was to subject "the State which had been discriminating in the past . . . to some kind of limitations as to any new legislation that it might propose."<sup>244</sup> Or, as he explained during the Senate hearings, the preclearance requirement "is an attempt to prevent new laws which would frustrate the objectives of Congress here."<sup>245</sup> During his testimony in front of the House subcommittee, Joseph Rauh explained the need for the preclearance requirement as follows:

You are about, I take it, to pass legislation to remedy previous discrimination. All you are saying here is, "We are not going to permit new evasive devices, we are going to freeze the situation as it is today unless new tests have been brought to court and found to be nondiscriminatory."

I would say this provision is simply self-defense of Congress. The States you are now seeking to prevent from discriminating—this is a way of preventing those States from finding a new method of discrimination. I think this is a necessary part of the self-defense of the bill you are about to enact.<sup>246</sup>

If section 5 stood for anything at all in the eyes of the 89th Congress, it would be the view that the Attorney General must not preclear electoral changes that discriminated on the basis of race. Nothing that Congress did during the debates of 1969, 1975, or 1982 refutes this central premise of the Act.

Yet to the Court, "this is simply an untenable construction of the text."<sup>247</sup> Not only is the Court's reading of the Act necessitated by the language of the statute, the Court argues, but a contrary reading of the purpose prong as reaching nonretrogressive vote dilution practices "would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality."<sup>248</sup> And this might really be the crux of the matter, irrespective of any congressional intent. Had Congress really intended to reach nonretrogressive state actions through the purpose prong of section 5, the Court suggests that this would be unconstitutional.

To be as charitable as possible, the Court's position simply makes no sense. Why couldn't Congress determine that a purpose inquiry could precede the implementation of a statute in covered jurisdic-

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244. 1965 House Hearings, *supra* note 25, at 60.

245. 1965 Senate Hearings, *supra* note 5, at 172.

246. 1965 House Hearings, *supra* note 25, at 399.

247. *Bossier Parish II*, 528 U.S. at 329.

248. *Id.* at 336 (citation omitted).

tions? The Court does not say. For support, it cites *Miller v. Johnson*'s admonition that the Department of Justice's maximization policy extends beyond the reach of the statute and is in direct tension with constitutional norms.<sup>249</sup> But this hardly offers any persuasive support. And further, the retrogression standard was not a concession to any "substantial federalism costs,"<sup>250</sup> but rather a simple matter of statutory interpretation and legislative intent. To suggest that the adoption of any standard other than retrogression would render the Act unconstitutional is a baffling proposition, and the Court does not spend any time defending this claim.

In the end, the Court offered a lawyerly brief, full of technical arguments and distinguished cases. If a precedent seemed to stand in its way, its conclusion would be "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation,"<sup>251</sup> or the case would "involve[] an unusual fact pattern,"<sup>252</sup> or contrary language would be "pure dictum."<sup>253</sup> Such is the beauty of a Court majority and a willingness to reach a particular outcome; counter arguments and contrary cases seldom offer enough resistance.

#### D. *The Last Straw?: Georgia v. Ashcroft*

If *Beer* and the *Bossier Parish* cases show the beauty of counting to five, a recent case, *Georgia v. Ashcroft*,<sup>254</sup> shows a different kind of beauty: if one waits long enough, legal doctrine is likely to come full circle. In *Georgia*, the Court offered its latest examination of the retrogression standard. This time around, the standard took on a loose yet nuanced—and some might say worthless<sup>255</sup>—persona. The doctrinal terrain prior to *Georgia* bears repeating: a voting change that discriminates against voters of color must be precleared if nonretrogressive.<sup>256</sup> In fact, the retrogression inquiry does not involve how unconstitutional the challenged plan may be; it only involves whether the plan "preserves 'current minority voting strength.'"<sup>257</sup> The Court in *Bossier Parish II* reached this conclusion on its idiosyncratic

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249. *See id.* (citing *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995)).

250. *See id.*

251. *Id.* at 330 (referring to *City of Richmond v. United States*, 422 U.S. 358 (1975)).

252. *Id.* at 339 (referring to *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987)).

253. *Id.* at 338 (referring to language in *Beer v. United States*, 425 U.S. 130 (1976)).

254. 539 U.S. 461 (2003).

255. *See, e.g.*, Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 36 (2004) (complaining that the Supreme Court seemed poised to "gut[] section 5" in *Georgia v. Ashcroft*).

256. *See Bossier Parish II*, 528 U.S. at 341.

257. *Georgia*, 539 U.S. at 477 (quoting *City of Lockhart v. United States*, 460 U.S. 125, 134 n.10 (1983)).

reading of the statutory language.<sup>258</sup> Had the Court focused on the legislative history, the result would have been different.

Be that as it may, *Georgia* is important for the way in which the Court can be understood as connecting the inquiry back to the concerns raised by Congress a generation before. Consider first the inquiry as the Court understood it: to determine what an “ ‘effective exercise of the electoral franchise’ ”<sup>259</sup> means. To the Court, this inquiry “depend[ed] on an examination of all the relevant circumstances, such as the ability of voters to elect their candidate of choice, the extent of the minority group’s opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan.”<sup>260</sup> This was a totality of circumstances inquiry, the Court explained, and a flexible and forgiving inquiry to boot. No one factor would be determinative and, in specific reference to districting plans, jurisdictions would retain much flexibility in choosing which theory of representation to reflect in their plans.<sup>261</sup>

One way to read the *Georgia* case is, as Justice Souter read it, as leaving nothing of the preclearance inquiry as Congress must have envisioned it.<sup>262</sup> Consider in this vein the words of Attorney General Katzenbach during the Senate hearings on the need for preclearance:

It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th Amendment, that kind of law should be covered, too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality.<sup>263</sup>

If this is in fact what the Johnson administration and the 89th Congress had in mind for the preclearance inquiry, then clearly there is very little left of it. Under modern doctrine, the courts must preclear even those plans that are found to discriminate against people of color; and under *Georgia*, reviewing courts must read the facts flexibly and forgivingly, making a finding of retrogression even more un-

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258. *Bossier Parish II*, 528 U.S. at 328-33.

259. *Georgia*, 539 U.S. at 479.

260. *Id.*

261. *See id.* at 482.

262. *See id.* at 495 (Souter, J., dissenting).

263. *1965 Senate Hearings*, *supra* note 5, at 237.

likely than originally presumed. Under the law as it now stands, few plans will fail to gain preclearance.

Yet *Georgia* has a silver lining as well. Recall that in *Allen*, the Court offered an expansive view of the right to vote and the coverage of the Act, recasting the preclearance inquiry as *inter alia* a dilution inquiry. And in *Beer*, the lower court similarly offered a broader view of the political culture of New Orleans, which made a finding of racial discrimination in voting more likely. *Georgia* takes us back to these cases, if obliquely so, and to the 1975 congressional hearings. The issue then was one of political power and full and effective participation in the political process. These are the same issues that permeate *Georgia's* majority opinion.

I do not wish to be misunderstood, however; I agree with Justice Souter's dissent that this view of retrogression empties section 5 of any remaining substantive content. Looking back to the early congressional debates and the clear goals of the Act, and when thinking about the ways in which political actors used both the preclearance requirement and the Fourteenth Amendment for political purposes as seen in the 1990s in North Carolina,<sup>264</sup> Texas,<sup>265</sup> and Georgia,<sup>266</sup> to name a few leading examples, this might not be such a bad thing after all. The policy choices seem clear: exalting *Beer* and its retrogression inquiry as the standard of choice or expanding the preclearance inquiry under Section 5 and thus affording political actors more discretion to accommodate any and all relevant districting factors as needed. When all the evidence is in, I have a hard time faulting the Court for following the latter approach.

#### V. HEEDING THE LESSONS OF HISTORY: *NAMUDNO* AS A CASE STUDY

The history of the Voting Rights Act is thus a story of deference to Congress on questions of constitutional law and aggressive and creative interpretations of the language of the statute. The statute remains an exercise of congressional powers, but the Court holds the final word on what the terms of the statute might mean, often in complete disregard of anything Congress might have possibly intended. The recent amendments and extension of the Voting Rights Act threatened to break free from this story. The case was *NAMUDO v. Holder*. But in the end, it was only more of the same.

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264. See, e.g., *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234 (2001); *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541 (1999); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

265. See, e.g., *Abrams v. Johnson*, 521 U.S. 74 (1997); *Miller v. Johnson*, 515 U.S. 900 (1995).

266. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996).

*A. More of the Same: Deference*

Days after President Bush signed the proposed bill into law, Northwest Austin Municipal Utility District Number One (“NAMUDNO”) challenged the constitutionality of this newest extension of the Act in federal district court.<sup>267</sup> The arguments were familiar ones. For example, NAMUDNO complained that the preclearance requirements as applied to the district were “disproportionate to the original conditions that caused Texas to be covered by § 5,”<sup>268</sup> over-inclusive,<sup>269</sup> a punishment that was both incongruous and irrational,<sup>270</sup> a “badge of shame”<sup>271</sup> on covered jurisdictions, “costly and burdensome,”<sup>272</sup> and “a burdensome imposition on the sovereign rights of political subdivisions in covered jurisdictions.”<sup>273</sup> While saying this, NAMUDNO recognized that the Court had upheld the constitutionality of the Act numerous times. But at the time of these challenges, “the conditions justifying preclearance were still very recent.”<sup>274</sup> Continuation of the preclearance requirement a generation later was thus “both arbitrary and irrational . . . and, worse, under the same coverage formula established in a bygone era.”<sup>275</sup> “Times have changed,” NAMUDNO concluded, “and § 5 should now be struck down as unconstitutional, either on its face, or as applied to the district.”<sup>276</sup>

The three-judge panel rejected these arguments and unanimously upheld the constitutionality of the Act. The constitutional arguments were the main attraction and they occupied the majority of the court’s attention. The court first settled on *South Carolina v. Katzenbach* and its rationality test—as opposed to *City of Boerne’s* congruence and proportionality test—as the proper standard for evaluating the work of Congress.<sup>277</sup> Consequently, the court spent the bulk of the opinion answering the following questions:

how do the nature and magnitude of the racial discrimination in voting revealed in the 2006 legislative record compare to the conditions documented by Congress in 1975, and is the 2006 record suf-

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267. See Plaintiff’s Complaint at 1, *NAMUDNO v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (No. 1:06-cv-01384).

268. *Id.* at 5.

269. See *id.* at 6.

270. See *id.*

271. *Id.*

272. *Id.* at 7.

273. *Id.* at 6.

274. *Id.*

275. *Id.*

276. *Id.* In its amended complaint, the District argued instead that “§ 5 cannot now be constitutionally applied to the district.” Plaintiff’s First Amended Complaint at 6, *NAMUDNO*, 573 F. Supp. 2d 221 (No. 1:06-cv-01384).

277. *NAMUDNO*, 573 F. Supp. 2d at 241-46.

ficiently comparable to the 1975 record for us to conclude that Congress again acted rationally when it extended section 5 for another twenty-five years?<sup>278</sup>

Put another way: has the Act accomplished the ends it sought to accomplish or does the need for these “stringent”<sup>279</sup> and “inventive”<sup>280</sup> measures still exist?

The court answered these questions by looking to the same evidentiary sources accepted by the Supreme Court in *City of Rome*: racial disparities in registration, number of minority elected officials, and preclearance objections.<sup>281</sup> In addition, the *NAMUDNO* court also considered the following: “more information request” letters from the Attorney General, judicial preclearance suits, section 5 enforcement actions, section 2 litigation, appointment of federal election observers, the existence of racially polarized voting, and evidence of section 5’s deterrent effect.<sup>282</sup> Taken as a whole, this evidence, coupled with the deference owed Congress under the *Katzenbach* standard, led the court to conclude the following:

[W]e see no constitutional basis for rejecting Congress’s considered judgment that “[d]espite the substantial progress that has been made, the evidence before the Committee resembles the evidence before Congress in 1965 and the evidence that was present again in 1970, 1975, [and] 1982”—evidence the Supreme Court twice found sufficient to justify section 5.<sup>283</sup>

The panel’s opinion in *NAMUDNO* was well-crafted, thorough, and fair on both the law and the facts. It also took for granted the one question that scholars and commentators must confront head on: will the Supreme Court approach the work of Congress in 2006 with the same deference and humility that it approached analogous work in *South Carolina* and *City of Rome*? The *NAMUDNO* panel certainly thought so. It remained to be seen whether the Court would continue to treat the work of Congress with the same deference.

For a telling example, consider what I took to be the most important question for both the panel and for the Supreme Court on appeal. Aside from a vocal critical minority, few disputed the extreme nature of the problem as it existed in 1965, the “exceptional conditions” that justified such an “uncommon exercise of Congressional power.”<sup>284</sup> Moving the story ahead forty-one years, this must mean,

278. *Id.* at 247.

279. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

280. *Id.* at 327.

281. *See NAMUDNO*, 573 F. Supp. 2d at 247-54.

282. *See id.* at 247, 254-65.

283. *Id.* at 266-67 (alterations in original) (quoting H.R. REP. NO. 109-478, at 6 (2006)).

284. *South Carolina*, 383 U.S. at 334.

according to the plaintiffs in *NAMUDNO*, that “Congress could not permissibly [extend section 5] with no showing that [the] extraordinary conditions [of 1965] persist in modern times.”<sup>285</sup> To the plaintiffs, such evidence does not exist; but instead, as they point out, the complete opposite is true: Congress offered numerous examples that “negate the existence of extraordinary circumstances like those existing in 1965.”<sup>286</sup> These included the following: for seven covered states, blacks registered at a higher rate than the national average;<sup>287</sup> in Texas, a higher registration rate for blacks (68.4) than for whites (61.5); in California, Georgia, Mississippi, North Carolina, and Texas, a higher registration and turnout rate for blacks than for whites in the 2004 election;<sup>288</sup> and significant increases in the numbers of Black elected officials, both nationally and in the six states originally covered under the Act.<sup>289</sup>

Supporters of the Act must concede the force of this argument. If the Act was justified on the strength of “exceptional conditions,” how much leeway would Congress be granted to extend the legislation once these conditions begin to decline? To the *NAMUDNO* panel, however, this was an argument that it could easily dispose of: “in *City of Rome*, while acknowledging minority political progress since 1965, the Court still accepted Congress’s judgment that extension of section 5’s preclearance requirement was ‘necessary . . . to promote further amelioration of voting discrimination.’”<sup>290</sup> But this might be too easy. Consider the original argument from *City of Rome* in full:

It must not be forgotten that in 1965, 95 years after ratification of the Fifteenth Amendment extended the right to vote to all citizens regardless of race or color, Congress found that racial discrimination in voting was an “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” In adopting the Voting Rights Act, Congress sought to remedy this century of obstruction by shifting “the advantage of time and inertia from the perpetrators of the evil to its victims.” Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the “limited and fragile” achievements of the Act and to promote further amelioration of voting discrimination. When viewed in this light, Congress’ considered determination that at least another 7 years of statutory remedies

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285. Plaintiffs’ Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 47, *NAMUDNO*, 573 F. Supp. 2d 221 (No. 1:06-cv-01384) (citing *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 n.6 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)).

286. *Id.*

287. *Id.* (quoting S. REP. NO. 109-295, at 8 (2006)).

288. *Id.* (quoting S. REP. NO. 109-295, at 8).

289. *Id.* (quoting H.R. REP. NO. 109-478, at 18).

290. *NAMUDNO*, 573 F. Supp. 2d 221, 246 (quoting *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (alteration in original) (emphasis added)).

were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.<sup>291</sup>

In 1980, the Court could write that seven more years of coverage were justified in light of ninety-five years of evasion. Also, the achievements in 1975 were considered “limited and fragile,”<sup>292</sup> and further amelioration of voting discrimination was needed. The question for today is not whether *City of Rome* already decided this issue, but rather, how much evidence the Court would need in order to uphold the Act as a constitutional exercise of congressional powers. *City of Rome* only decided that in 1975, Congress could rationally reach such a determination on the facts then in existence. Whether the modern Court would similarly decide this question on the facts as they exist today was an entirely different question. The real question in *NAMUDNO*—to my mind the only question—was whether the Roberts Court would approach the constitutionality of the Act in a similarly deferential and modest posture.

The early signals from the Court were not promising. At oral argument, the conservative Justices made clear their misgivings about the constitutionality of the Act. Commentators generally assumed that the Act was in trouble.<sup>293</sup>

But as could be predicted by the history of the Act, the Court evaded the constitutional question altogether.<sup>294</sup> To be sure, the Court took the time to remind us about all the things that place the constitutionality of the Act in peril. For example: things have improved;<sup>295</sup> the Act departs radically from the “fundamental principle of equal sovereignty” among the states;<sup>296</sup> the federalism concerns;<sup>297</sup> and the fact that the rationality of the coverage formula has not changed for over thirty years.<sup>298</sup> Mindful of all these things, the Court offered a reassuring note to those who count on the Justices to protect us from overreaching majorities: the Court was evading the constitutional question, but this did not mean that the Court was shrinking from carrying out its traditional duties.<sup>299</sup> Instead, the Court was only invoking its constitutional avoidance doctrine, which

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291. *City of Rome*, 446 U.S. at 181-82 (citations omitted).

292. *Id.* at 182.

293. See *supra* note 23 and accompanying text.

294. *NAMUDNO v. Holder*, 129 S. Ct. 2504, 2508 (2009).

295. *Id.* at 2511-12.

296. *Id.* at 2512.

297. *Id.*

298. *Id.*

299. *Id.* at 2513.

counsels against deciding cases on constitutional grounds when there is “some other ground upon which to dispose of the case.”<sup>300</sup>

*NAMUDNO* would appear to be an uneventful, run-of-the-mill case. This is partially true. Yet *NAMUDNO* is a case of far greater import, and its real story lies elsewhere. At the heart of the case is not the fact that the Court avoided the constitutional inquiry, but how it strained the text of the statute and the intent of Congress in order to reach its desired conclusion. In other words, the real story of *NAMUDNO* is how far the Court was willing to go to do, in the end, what it has always done. The next Section situates the case within the larger history of the Act.

### B. *On the Art of Reading Statutes to Reach a Desired Result*

The Utility District pressed two alternative arguments to the Court.<sup>301</sup> The first, and the big prize, sought a ruling on the constitutionality of the Voting Rights Act. Commentators and pundits alike braced for the worst, but the Court refused to take that step, siding instead with the District on its second argument: that under the bailout provisions of the Act, the District should be allowed to break free from the demands of the statute once and for all.<sup>302</sup> This was a surprising conclusion to many. For example, a news account of the oral argument explained the questioning as follows:

Gregory S. Coleman, a lawyer for the district, began his argument with a relatively modest request — that the district be allowed to “bail out” of Section 5 coverage.

But the possibility of a ruling on that or another narrow ground did not seem to attract much interest from the justices.<sup>303</sup>

The moment we had all been waiting for was finally here, the main attraction. We would know once and for all whether the federalism revolution had enough traction to bring down the crown jewel of the civil rights movement. The conventional wisdom posited the Justices as intent on striking down the Act once and for all.

Instead, the Court stuck to its old script. That it set aside the constitutional issue for another day should not be surprising; anyone paying attention to the history of the Act could have surmised as much. The surprising move appears to be in the execution: put as charitably as possible, the Court interpreted the bailout language in question to the limits of plausible statutory construction, far beyond anything the text said or Congress might have intended. The Court wanted to be rid of this case, and eight Justices agreed on a way to do

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300. *Id.*

301. *Id.* at 2508.

302. *Id.* at 2516.

303. Liptak, *supra* note 23.

so. In so doing, this aspect of *NAMUDNO* also fits squarely within the history of the Act.

The bailout question did not appear difficult. In order for the District to be able to apply for bailout, it must be considered either a state or a political subdivision under the Act.<sup>304</sup> The District was clearly not a state, so the case hinged on whether the District could be considered a “political subdivision covered ‘as a separate unit.’”<sup>305</sup> Under the terms of the statute, a political subdivision is “‘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.’”<sup>306</sup> On these terms, the lower court in *NAMUDNO* concluded that the District could not be considered a political subdivision under the Act and thus denied its request to bailout.<sup>307</sup> That court based this decision on the language of the statute, the legislative history, and established regulations from the Attorney General.<sup>308</sup>

In light of these arguments, commentators believed that the bailout argument would not go far.<sup>309</sup> They were wrong—and by a wide margin. In its 8-1 opinion, the Court sided with the District on its statutory claim, concluding that the District may in fact pursue the bailout option.<sup>310</sup> Tellingly, the Court did not discuss the textual argument offered by the lower court, nor did it look to the legislative history of the regulations by the Attorney General. These materials strongly suggested that the District could not bail out, as only states or political subdivisions (as the term is defined by section 14(c)(2) of the statute) could do so. But these were only minor inconveniences, which the Court easily cast aside. Instead, the Court looked to dicta from a prior case, as well as “the structure of the Voting Rights Act” and the “underlying constitutional concerns,” all of which together “compel a broader reading” of the statute.<sup>311</sup>

I could offer a detailed examination of the Court’s construction of the bailout provision in *NAMUDNO*, but to do so would be to mislead the reader. Consider in this vein the following analysis by Justice Scalia and compare it with the Court’s opinion not only in *NAMUDNO* but in just about every case where the Court has interpreted the language of the Act:

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304. *NAMUDNO*, 129 S. Ct. at 2513.

305. *Id.*

306. *Id.* at 2514 (quoting 42 U.S.C. § 1973l(e)(2)).

307. *NAMUNDO v. Mukasey*, 573 F. Supp. 221, 234-35 (D.D.C. 2008).

308. *Id.* at 231-35.

309. See Adam Liptak, *Justices Retain Oversight by U.S. on Voting*, N.Y. TIMES, June 23, 2009, at A1 (citing scholars who concluded that the bailout argument was “improbable” and implausible), available at <http://www.nytimes.com/2009/06/23/us/23scotus.html>.

310. *NAMUDNO*, 129 S. Ct. at 2508.

311. *Id.* at 2514.

The starting point of the analysis [was] Supreme Court cases, and the new issue [was] presumptively decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.<sup>312</sup>

Justice Scalia has in mind constitutional cases, but the logic applies with equal force to statutory cases as well. In fact, it fits almost perfectly. That the author of the preceding passage is none other than Justice Scalia makes the argument particularly poignant and deliciously ironic.

The real lesson of *NAMUDNO* lies precisely here. The details of the case are ultimately unimportant. Of far greater import is the fact that this case fits squarely within a tradition of deference to Congress on constitutional questions and creative decisionmaking on questions of statutory interpretation. This case is thus a replay of the *Katzenbach* cases and *Bossier Parrish*, *Beer*, *City of Rome*, and *Monterey County*. To focus too much attention on the interpretive questions at the heart of the case is to miss the real lessons of the Voting Rights Act in court. It is to these lessons that the next Part turns.

## VI. MAKING SENSE OF THE ACT

In the aftermath of the *NAMUDNO* case, election law scholars will find much to write about and criticize from the decision. Undoubtedly, they will be right. But in focusing too much attention on the case, they will miss the larger lessons and insights of the evolution of the Voting Rights Act. This Part focuses on these lessons and insights. More specifically, it examines the paradox at the heart of the Supreme Court's handling of the Voting Rights Act.

Consider first the role of the federal courts in our constitutional universe. For questions of constitutional law, the courts are guardians of the document, its text, and its spirit. The standard citation is Chief Justice Marshall's *Marbury* opinion and in particular the following oft-cited passage: "It is emphatically the province and duty of the judicial department to fay [sic] what the law is."<sup>313</sup> As a matter of

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312. SCALIA, *supra* note 2, at 39 (emphasis added).

313. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Curiously enough, the Court in *Miller v. Johnson* supported this position the following way:

*United States v. Nixon*, 418 U.S. 683 (1974) (judicial power cannot be shared with Executive Branch); *Marbury v. Madison*, 5 U.S. 1 Cranch [sic] 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to

first principles, they need not defer to anyone, and their conclusions are not subject to any kind of review.

To be sure, this view of the federal judiciary has been the subject of criticism and important counter-stories from the time of the founding; this is an old debate,<sup>314</sup> and I do not mean to suggest otherwise. But this is a debate with a clear winner: the judiciary has the sole authority to interpret and defend the Constitution. Judicial supremacy—“the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone”<sup>315</sup>—has “become the norm.”<sup>316</sup>

In contrast, statutes clearly belong to the legislatures, and the role of the courts in interpreting these texts is far more circumscribed and narrow. Here, the courts must seek to understand the text as its authors understood it, with an eye toward carrying out the wishes—the intent, perhaps?—of the authoring body. Whether a textualist,<sup>317</sup> an intentionalist,<sup>318</sup> a purposivist,<sup>319</sup> or even a dynamic in-

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say what the law is”); cf. [sic] *Baker v. Carr*, 369 U.S. 186, 211 (1962) (Supreme Court is “ultimate interpreter of the Constitution”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“permanent and indispensable feature of our constitutional system” is that “the federal judiciary is supreme in the exposition of the law of the Constitution”).

*Miller v. Johnson*, 515 U.S. 900, 922-23 (1995).

314. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). For recent accounts that allocate interpretive responsibilities to other branches, see, for example, Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004), and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

315. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 125 (2004).

316. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 964 (2004); see Rachael E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302 (2002) (arguing that “the unmistakable trend is toward a view that all constitutional questions are matters for independent judicial interpretation and that Congress has no special institutional advantage in answering aspects of particular questions” and that “[t]he Court has therefore become increasingly immodest when it comes to deciding how constitutional interpretive power should be allocated”). For a response, see Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).

317. See SCALIA, *supra* note 2, at 23; Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

318. See Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 33-39 (1985); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

terpretivist,<sup>320</sup> a judge engaged in legislative interpretation must try to remain faithful—or at least pretend to be—to the legislative work product. Unlike constitutional interpretation where the document belongs to the Court, statutes ultimately belong to the legislature. Statutory interpretation is an arena where legislatures reign supreme.<sup>321</sup>

The history of the Voting Rights Act turns this familiar script on its head. This is an area where questions of constitutional law meet little resistance from the Justices, yet questions of statutory interpretation meet an aggressive and creative Court. With the recent extension and amendments to the Voting Rights Act in 2006,<sup>322</sup> this paradox takes on renewed interest. This Part considers this puzzle in two Sections. The first Section understands the paradox as an exercise in living constitutionalism. In case any doubts remained, this Section argues that progressive scholars and jurists do not have a monopoly on “activist” jurisprudence.

The second Section examines and tries to make sense of the few congressional responses to the Court’s creative interpretations of the statute. As the Court gives Congress a free pass to enact and extend the Act into the unforeseeable future, yet rewrites the text of the Act to its liking, how to explain the inconsistent congressional responses? Insights from positive political theory help frame an answer yet only deepen the puzzle. Before concluding, I offer a theory of my own.

#### *A. Explaining the Paradox as an Exercise in Living Constitutionalism*

One answer to the paradox at the heart of the Voting Rights Act lies implicit within the larger debate in constitutional law over the concept of judicial supremacy. When the Court subjects the Act to barely any scrutiny at all, it would appear that it offers Congress a free pass in this most sensitive area. But as the Court gives with one hand, it takes with the other. This is because Congress can never be

319. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William A. Eskridge, Jr. & Phillip P. Frickey eds., 1994); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-51 (1986).

320. See William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that statutes “should—like the Constitution and the common law—be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context”).

321. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989) (“It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy.”).

322. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended at 42 U.S.C. §§ 1973b-c (West Supp. 2007)).

sure that the Court will give its words their intended meaning. In other words, the Act means whatever the Court says it means, irrespective of congressional intent or even the language of the statute. Seen this way, the story of the Act in Court is but an installment of the larger story of the Court as judicially supreme. In fact, it is even better. It is one thing to tell Congress and the President where the limits of their powers are. It is quite another to do the work of the policy branches for them—this is judicial activism on steroids.

This Section explores with greater depth a second answer. This is a story where Congress accepts the role of the Court as constitutional interpreter and which portrays the Constitution as a living document. It is also a story that turns the conventional wisdom on its head.

Begin with the debate in Congress in 1965. Note first that Congress knew the extent of the problem and how difficult it was to tailor an effective solution, as seen by its previous efforts in 1957, 1960, and 1964. Note also that as far as Congress was concerned, this was not a question of unavailability of power, because Congress was confident that it had the power under the Fifteenth Amendment to do something about this problem. So the real question for Congress was how far the substantive provisions of the bill could go.

Out of concern for overstepping constitutional bounds, the administration and members of Congress drafted a broad statute, short on specifics and as far-reaching as they deemed constitutionally possible. In response to a question from Representative Cramer, for example, Attorney General Katzenbach explained: “If the Congressman can suggest an effective means that covers everything that is covered by this act and can cover other areas and still be constitutional, I am sure that the administration would be most happy to consider that. We don’t want discrimination anywhere.”<sup>323</sup> The Attorney General repeated this position often. The broad contours of the Act were clear: to eliminate the “blight of racial discrimination in voting.”<sup>324</sup> Some witnesses and members of Congress wished for the bill to assert far more directly the reach of the Act,<sup>325</sup> but the legislation ultimately failed to reflect these efforts. The language remained broad and expansive, which offered a willing interpreter room to expand the scope of the statute as necessary.

More tellingly, the language offered the Court the means through which to interpret section 5—and the Voting Rights Act in general—expansively, up to the constitutional limits as the Court itself understood them. This is precisely what Congress intended: to tackle

323. *1965 House Hearings*, *supra* note 25, at 90.

324. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

325. *See, e.g., 1965 Senate Hearings*, *supra* note 5, at 192 (objecting to Senator Fong’s suggestion to clarify the original section 9(a) of the Act).

the problem aggressively, decisively, yet within traditional constitutional limits. This is a constitutional partnership in its truest sense, with Congress, the executive branch, and the Court working together in furthering voting rights policy. This is also a story of institutional trust. Congress implicitly ceded to the Court some policy-making authority, trusting that the Court would further the work of Congress, rather than thwart it.

To be fair, direct evidence for this conclusion is scarce in the early legislative history, for Congress could not even be sure whether the constitutionality of the Act would bear judicial scrutiny—although Attorney General Katzenbach was very optimistic on this score.<sup>326</sup> But Congress and the administration did make clear, time and again, that they wished to take the substantive provisions of the Act as far as constitutionally possible. After three recent attempts had failed to deliver much change, they wished to attack the problem as aggressively and decisively as the Constitution permitted. The Court could thus interpret the Act as broadly as it wished, confident in the view that Congress would support its interpretation. Ironically, the temporary nature of the special provisions of the Act proved helpful on this score, as Congress had many opportunities to comment on—and demonstrate approval for—the Court's handiwork. Hence, the strategy played out across decades and the various extensions of the Act.

The congressional response to *Allen* is particularly instructive. Consider, for example, the words of Representative McCulloch, offered during the 1969 hearings:

Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement. I hope that the case of *Allen v. State Board of Elections*, decided by the Supreme Court on March 3, 1969, is the portent of change.<sup>327</sup>

Representative McCulloch was the House minority leader and a leading voice during the 1969 debates exhorting the federal government to do more while looking to *Allen* for approval. Clearly, the minority leader understood section 5 as a broad and necessary provision.<sup>328</sup>

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326. *See id.* at 249 (“I think if anything [his opinion about the constitutionality of the bill] has been strengthened, Senator, because under such rigorous and learned cross examination as I have had on this point, my convictions remain the same, and I have confidence in the constitutionality of the bill.”).

327. *Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 4 (1969).

328. *Id.* at 270 (“Section 5 must not be repealed or emasculated. The past 4 years have proved that there are hundreds of ways to discriminate. Section 4 deals with literacy tests or devices. Section 5 deals with all of the rest . . .”).

Far more tellingly, he remarked that thanks to *Allen*, “at long last after 4 years section 5 will become effective.”<sup>329</sup>

Representative McCulloch was hardly alone. Important in this regard is the way in which members of Congress referred to *Allen* and *Gaston County* during the 1969 hearings. Aside from critics such as Senator Ervin, who pointed to these cases as further proof that the sunset provisions of the Act should be allowed to expire, supporters of the Act referred to these decisions as part and parcel of the new statutory regime. More crucially, supporters of the Act made arguments and staked positions during the 1969 hearings that made use of *Allen* and *Gaston County* as both accepted and crucial components of the legislation. It is also important for this argument that talk of overturning these decisions was close to nonexistent. That Congress held scheduled hearings so close to these decisions yet chose not to overturn them speaks volumes about the way in which Congress understood and ultimately accepted these cases as consonant with the mission of the Act.<sup>330</sup>

During the 1975 hearings, the debate over the Court’s expansive interpretations of the Act was both subdued and altogether different. As in previous hearings, some witnesses offered unqualified support for the Court and its interpretations of the Act.<sup>331</sup> There were also criticisms, of course, but by this time the critics were far more focused and pointed in their choice of targets. They knew that fighting the Act or their judicial interpretations on the merits would prove hopeless. They still criticized the Court, to be sure, but while doing so, they also asked Congress for guidance and much-needed clarity in the field. This muddiness was a problem, argued Daniel McLeod, South Carolina’s Attorney General, because “it is very difficult and a

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329. *Id.* at 271. The Civil Rights Commission took a similar view. A Staff memorandum dated July 8, 1969 argued that “until the *Allen* decision, referred to previously, it had been unclear whether Section 5 applied to all election law changes in the covered States, or only to those changes which dealt with voting and registration.” *1969 Senate Hearings, supra* note 21, at 52. “Because the Court has now made clear that Section 5 has a very wide scope,” the memo continued, “States can now be expected to submit more statutes for approval.” *Id.*

330. See *Georgia v. United States*, 411 U.S. 526, 533 (1973) (“Had Congress disagreed with the interpretation of s 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of s 5.” (footnote omitted)). See also Justice Thomas’ intriguing concurrence in *Holder v. Hall*, 512 U.S. 874, 929 (1994) (Thomas, J., concurring) (conceding that Congress had interpreted section 5 expansively in *Allen* “and Congress has reenacted § 5 subsequent to our decisions adopting that expansive interpretation”).

331. See, e.g., *1975 House Hearings, supra* note 35, at 641 (statement of Armand Derfner) (“The significance of section 5 did not become apparent until 1969, when the Supreme Court in *Allen v. State Board of Elections* clearly stated that this section covers changes that dilute black citizens’ votes as well as simpler devices of disenfranchisement.”); *id.* at 717 (statement of Parker) (“I do not want to leave the impression that the court, in the *Allen* case, enunciated something which the Congress did not intend.”).

very onerous burden with the uncertainties brought into the picture by reason of the application of the act to know which acts should be submitted.”<sup>332</sup> In this vein, Stone Barefield, a state representative from Mississippi, similarly complained that the courts have interpreted the Act far beyond the intent of Congress and “so that I, as a legislator, and so that other legislators in the affected States will know, pleased [sic] write into the Voting Rights Act by definition what Congress intends to cover by standard practice and procedure[.]”<sup>333</sup>

For my purposes, the most interesting and perhaps most important testimony was that of Representative David Satterfield, a congressman from the Commonwealth of Virginia. He clearly took issue with the courts and their interpretations and applications of the statute. Yet Congress was not powerless in the face of a runaway judicial system, he complained, for these were largely questions of statutory interpretation. And so he argued:

I consider it unfortunate that the act has been construed by the courts to mean what they say it means. I believe it is time now for Congress, by specific amendments to make clear its position and its precise objectives, especially with regard to those court decisions which have interpreted the act. There is an opportunity now, which should be seized, for Congress to make it clear whether it agrees with court interpretations and where it does not to make clear what it does mean to say by this act. I hope this committee will render special attention to this opportunity.<sup>334</sup>

Minutes later, he repeated his request: “Frankly, I have difficulty in finding in this act or the act’s legislative history the basis on which the courts are making that decision. It would be my hope that this subcommittee will address that point.”<sup>335</sup> To which Representative Don Edwards, the chair of the subcommittee, responded, “Well, we will address that point.”<sup>336</sup>

But they didn’t. Representative Satterfield issued his request on March 21st, and the committee published its report approximately six weeks later, on May 8th.<sup>337</sup> And curiously, not a word was written on this issue. Instead, the report extended an approving nod toward the Court and its interpretations of the Act, as it cited both *Allen* and

332. *Id.* at 581.

333. *Id.* at 707; *see id.* at 714 (“And that is why I have asked this committee to seriously consider defining these standards, the practices and procedures that we are dealing with.”).

334. *Id.* at 730; *see id.* at 737 (explaining that the crux of the matter for him was “whether or not the decisions of the courts, which to my mind have converted the objective of this act from one to guarantee that there not be a denial of the right to vote, and not to abridge the right to vote, to an enlargement to say that you can not dilute the effectiveness of that vote”).

335. *Id.*

336. *Id.*

337. *See* H.R. REP. NO. 94-196 (1975).

*Perkins* while explaining that around the time of the 1970 amendments to the Act, the Court “gave broad interpretations to the scope of section 5.”<sup>338</sup> It is clear that the House was fully aware of the Court’s broad interpretations of the statute yet uninterested in cabining them. So long as their views were in harmony, Congress need not pay careful attention to the Court’s interpretations of the Act, no matter how inventive or creative these might be.

Now move the story ahead, from the *City of Mobile* decision in 1980 and the wrongful redistricting cases of the 1990s to *Bossier Parish* and *Georgia v. Ashcroft*. These cases appear to break with the story of the Act presented here of a Congress wishing for the Court to interpret the Act broadly—to the constitutional limit—and of a Court willing to do exactly that. These cases narrowed the previous interpretations of the statute to varying degrees. The break began in the mid-1970s, with *City of Richmond v. United States* and *Beer v. United States*. After these cases, the partnership between the Court and the political branches—and the broad judicial interpretations of the Act—largely ended. How to understand this shift?

For an answer, go back to my reading of the early history of the Act. In these cases, from *Katzenbach* and *Morgan* to *Allen* and *Gaston County*, the Court takes its cues from Congress and extends the scope of the Act to the outer reaches of the law, as far as the Constitution permits. One way to understand the shift in posture only requires a different reading of the constitutional boundaries as then understood by the Court. In other words, it only requires a view of the Constitution as a changing and evolving document. This is a view, more precisely yet, of a “living Constitution.”

According to Justice Scalia, the argument proceeds as follows: “The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society.”<sup>339</sup> The “living Constitution” argument is an argument for the Constitution as a changing and flexible document, adaptable to changing times and circumstances. This is an argument that places the Justices at the center of this change, able to discern it and willing to interpret the Constitution in ways that accommodate it.

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338. *Id.* at 9.

339. SCALIA, *supra* note 2, at 38; see Melissa McNamara, *Scalia Raps ‘Living Constitution,’* CBS NEWS.COM, Feb. 14, 2006, <http://www.cbsnews.com/stories/2006/02/14/supremecourt/main1315619.shtml> (“That’s the argument of flexibility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break.’ ‘But you would have to be an idiot to believe that.’ Scalia said. ‘The Constitution is not a living organism; it is a legal document. It says something and doesn’t say other things.’”).

To Justice Scalia, however, change and flexibility must come from sources outside the Court: “If you think aficionados of a living Constitution want to bring you flexibility, think again . . . You think the death penalty is a good idea? Persuade your fellow citizens to adopt it. You want a right to abortion? Persuade your fellow citizens and enact it. That’s flexibility.”<sup>340</sup> In other words, the Constitution does not change outside the amendment process and it is not up to the Justices to adapt it as their policy views see fit.

But life is never quite so simple. The Voting Rights Act offers an apt example. One way to understand the early cases, from *Katzenbach* and *Morgan* to *Allen* and *Gaston County*, is precisely as I suggested earlier: the Court takes its cues from Congress and extends the scope of the Act to the outer reaches of the law, as far as the Constitution permits. Beginning with the *City of Richmond*<sup>341</sup> decision in 1975, the Court’s readings are much less constricted and inflexible. This posture continues throughout the life of the Act. *Beer* and the *Bossier Parish* cases serve as bookends.

To give the Court its due, it may be said that the Court is still faithful to the original congressional directive; that is, the Court is still interpreting the Act to the outer reaches of the Constitution. It just so happens that these outer limits are far narrower than they might have been. Or as the Court wrote in *Bossier Parish II*: to interpret section 5 of the Act as appellants contend “would also exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5’s constitutionality.”<sup>342</sup> As I suggested earlier, the conclusion that section 5 does not reach discriminatory yet nonretrogressive dilutive purposes would be unthinkable for the Warren Court, or, worse yet, for the 89th Congress, or the 91st Congress, or the 94th Congress. But this is not the same Constitution that we are expounding. One way to understand the Court’s narrow interpretations of the Act is to recognize that the Constitution changes and the Court’s interpretations have necessarily changed with it. That is to say, the Constitution might be alive after all, even for the conservative justices.

### B. On the Look of a Strategic Court

The Court’s interpretations of the Act raise a second puzzle. It stands to reason that if the Justices wish for their preferred policies to endure, they must take into account the preferences of other insti-

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340. *Scalia Slams “Living Constitution” Theory*, ASSOCIATED PRESS, Mar. 14, 2005, <http://www.foxnews.com/story/0,2933,150428,00.html>.

341. *City of Richmond v. United States*, 422 U.S. 358 (1975).

342. *Bossier Parish II*, 528 U.S. 320, 336 (2000) (citing *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999); *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995)).

tutions. This proposition is particularly important for questions of statutory interpretation, where the risk of congressional override is at its highest. But the evolution of the Voting Rights Act appears to defy this theory. From the time the Court first interpreted the language of the statute in *Allen*, its decisions have been eclectic and creative implementations of the intent of Congress and the language of the statute. These interpretations do not appear to follow a discernible pattern in terms of congressional response; while some holdings have met much resistance from Congress, others have not. This final Section examines this relationship.

The theory itself is easily stated, in the form of a game between Congress, the Court, the President, and congressional committees, acting within a range of policy choices.<sup>343</sup> The Court begins the game by identifying its preferred policy position. It then considers the range of policy alternatives that might be acceptable to Congress and the President. When the Court's identified position is outside this range, it presumes that its preferred position risks reversal from Congress and the President. The Court seeks to avoid this override by shifting its preferred position within the range acceptable to Congress and the President.

The civil rights era, from 1967 to 1990, provides a strong example of this model.<sup>344</sup> From 1966 to 1971, the Court was to the left of Congress on civil rights questions.<sup>345</sup> The relevant committees—labor and judiciary—were to the right of the Court but to the left of Congress as a whole.<sup>346</sup> On this configuration, the Court was truly independent and did not need to fear a congressional override, because both the President and the committees supported the views of the Court.<sup>347</sup> Any legislation trying to overrule the Court had little chance of becoming law, because the congressional committees would not bring such legislation to the floor, and if this hurdle were overcome, the President stood ready to veto it.<sup>348</sup>

This is a way to understand *Allen v. State Board of Elections*, a case that offered a very aggressive application of the work of Congress and particularly Section 5. *Allen* had its share of critics. But

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343. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Supreme Court Statutory Interpretation*]; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Playing the Game*]; John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); John Ferejohn & Barry R. Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992).

344. See Eskridge, *Supreme Court Statutory Interpretation*, *supra* note 343, at 391-97.

345. *Id.* at 391-92.

346. *Id.*

347. *Id.*

348. See *id.*

the picture that emerges from the 1969 hearings is that of a thankful Congress, happy to see the Court interpret the statutes in ways that Congress could not even foresee in 1965. Committee members were on the side of the Court, and the full Congress followed the committee's lead, extending the statute for another five years while refusing to take on the Court's expansive interpretations.<sup>349</sup> Following *Allen*, the Court extended its teachings aggressively, with the apparent blessings of Congress in 1970.

The period between 1972 and 1986 witnessed a marked change in the game.<sup>350</sup> New appointments to the Court in 1975, 1981, and 1986 moved the Court sharply to the right at a time when Congress was moving to the left.<sup>351</sup> According to Professor Eskridge, this shift should lead to a policy tension between Congress and the Court, as the Court would no longer enjoy the protection of supportive congressional committees.<sup>352</sup> The Court must predict where the current congressional preferences carefully lie; a misstep could lead to an immediate override.

The model only partially explains the Voting Rights Act cases. The Court's move to the right is clear enough; it began in 1975 with *City of Richmond*. But the tension predicted by the model never surfaced, as the congressional response remained muted. The Court remained in charge of delineating the contours of the statute while Congress happily acquiesced.

The next case, *Beer v. United States*,<sup>353</sup> might have appeared to change all of this. The timeline raises a few skeptical eyebrows. The case was first argued on March 26, 1975,<sup>354</sup> at which time Congress was debating whether to extend the Act once more. The Court set the case for reargument, which took place on November 12th.<sup>355</sup> In so doing, the Court's decision came after the President signed the bill on August 6th.<sup>356</sup> The Court ultimately decided the case on March 30, 1976, at which time the retrogression standard first surfaced. Notably, the 94th Congress did not take on the Court and any of its aggressive interpretations, choosing instead to extend the Act for seven years while adding the language provisions to the statute. The retrogression standard remained law as consonant with the intent of Congress. It remains so to this day.

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349. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

350. See Eskridge, *Playing the Game*, *supra* note 343, at 623-25.

351. See *id.* at 624.

352. See *id.* at 625.

353. 425 U.S. 130 (1976).

354. *Id.* at 130.

355. *Id.*

356. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat 400 (1975).

There is much to criticize about the *Beer* decision, and I did so previously. For my purposes here, it is notable that Congress did not take on the Court and its narrow interpretations of the Act. The tension predicted by the model never surfaced. To be fair, the *City of Richmond* was argued in April and decided in June, giving Congress very little time to respond to the Court. The 1975 hearings were winding down and Congress had more pressing matters to attend. In contrast, we should expect some kind of response after *Beer*, a decision where the Court radically altered the law. But Congress did no such thing. Thus begging the question: after *Beer*, how could the Court view itself as anything but safe from congressional override? If *Beer* did not provoke a response from Congress during the 1982 debates, what would?

Four years later, Congress gave us an answer. In 1980, the Court decided *City of Mobile v. Bolden*,<sup>357</sup> which concluded that Section 2 of the Act incorporated the constitutional intent standard.<sup>358</sup> This case marked a watershed in the history of the Act, as Congress overturned this holding when extending the Act for another twenty-five years in 1982.<sup>359</sup> This override is hard to explain in light of what came before. To Professor Eskridge, the override fits the game as he describes it: after 1972, increased tension between a right-of-center Court and a more liberal Congress led to increased overrides from Congress.<sup>360</sup> But how to explain a lack of an override, or even a debate in Congress, over the *Beer* holding, but an override of *City of Mobile* at a time when, as Eskridge points out, a more conservative Presidency offered the Court more leeway to reach conservative results?<sup>361</sup>

Deepening the puzzle, it is notable that after *City of Mobile*, the Court did not alter its approach to the statute in any way, continuing to interpret the statute the way it always had: creatively, even dynamically. Yet Congress proved uninterested once again. Whether it was *Thornburg v. Gingles*,<sup>362</sup> where the Court interpreted the newly amended Section 2 as concomitant with the intent of Congress;<sup>363</sup> *Presley v. Etowah County Commission*,<sup>364</sup> where the Court offered a narrow interpretation of the scope of Section 5; or *Bossier Parrish I*, where the Court uncoupled section 2 of the Act from the Section 5 re-

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357. 446 U.S. 55 (1980).

358. See *supra* note 231 and accompanying text (discussing *City of Mobile*).

359. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

360. See Eskridge, *Supreme Court Statutory Interpretation*, *supra* note 343, at 393.

361. See *id.* at 396.

362. 478 U.S. 30 (1986).

363. *Id.* at 48 n.15.

364. 502 U.S. 491 (1992).

troggression inquiry,<sup>365</sup> Congress did not take on the Court in any way. It simply did not care.

A final twist to this story came at the close of the decade and the beginning of the next, when the Court decided *both Bossier Parish II*<sup>366</sup> and *Georgia v. Ashcroft*.<sup>367</sup> If the past held to form, the Court had nothing to worry about and Congress would leave both opinions undisturbed. Instead, Congress overrode both decisions during its most recent extension of the Act in 2006.<sup>368</sup>

This short history raises important questions about the Court and its interactions with Congress and the President. The remainder of this Section focuses on one question in particular: how to explain these responses to the Court's work, in light of those moments when Congress chooses not to respond? This important question deserves more time and attention than I can give it here. This Section sketches an answer.

The story of the Voting Rights Act is a story of social movements and interest group politics, of evolution and gradual change, and of the Court as a member of the national policy-making coalition. It is a story of congressional power and federalism, of race and resistance, of voting and trust. Ultimately, it is a story where national majorities get their way.

The Voting Rights Act was the fourth attempt within eight years to address the problem of race and voting in select jurisdictions. In light of these prior efforts, the Act and its extreme and radical provisions can only make sense as a byproduct of the civil rights movement, as a result of Bloody Sunday and the resulting press coverage.<sup>369</sup> It was time.

Once the expected challenge to the constitutionality of the Act reached the Court on direct appeal, the institution responded as a member of the national coalition would be expected to respond. The Court in the *Katzenbach* cases deferred to Congress and the executive branch, and in so doing, it signaled its willingness to do its part in solving the problem of racial discrimination in voting. *Katzenbach v. Morgan* is particularly instructive, as existing law offered no match for the Court's willingness to offer Congress what amounted to

365. *Bossier Parrish I*, 520 U.S. 471 (1997); see *supra* notes 225-36 and accompanying text (discussing *Parish I*).

366. 528 U.S. 320 (2000); see *supra* notes 239-53 and accompanying text (discussing *Parish II*).

367. 539 U.S. 461 (2003); see *supra* notes 254-66 and accompanying text (discussing *Georgia v. Ashcroft*).

368. 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, 580-81 (2006) (codified as amended at 42 U.S.C. §§ 1973b-c (West Supp. 2007)).

369. See DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978).

a free pass in this area. *Allen* and its progeny offer further proof for this thesis. As the problems changed and the affected jurisdictions adapted, the Court was up to the task, filling the needed statutory gaps and expanding the Act as needed. And Congress was only too happy for the help.

New appointments by the Nixon administration began to turn the tide, so that by 1975 the Court for the first time interpreted the language of the statute narrowly. This was the *City of Richmond* case. It was also *Beer* and *City of Mobile*. Once this shift took place, absent a few outliers, the Court was no longer doing the work of Congress. The 1960s coalition was no longer in charge, and the Court's interpretations of the Act reflected this change. With a new coalition in place, the question then was whether the Act would remain a constitutional exercise of congressional powers under the Fifteenth Amendment. The congressional debates in 1982 and 2006 must be understood in this context.

Once the Court broke away from the original, expansive promise of the Act, the congressional responses to the Court are nothing more than clear substantive disagreements about policy. In other words, these responses are nothing but a display of Congress asserting its will in matters of statutory interpretation. But more tellingly, this is a story of interest group politics and the role played by the civil rights lobby in support of the Act.<sup>370</sup> The early years of the Act saw the Court on the side of the coalition, and so the debates were subdued and altogether different. There was no need to respond to the Court and its interpretations. Once the Court shifted ground and moved away from its earlier self, the coalition responded in kind the first time it had the chance—in 1982. The same dynamic occurred in 2006.

In order to make sense of the Act, then, we must take the longer view. The Court has offered creative and even radical interpretations of the language of the statute from the moment it first confronted the Act in the late 1960s. Congressional responses, in the form of override legislation, have only surfaced sporadically—namely, in 1982 and 2006. This is hardly a coincidence. One of the main shortcomings of the theory of congressional overrides is the difficulties that inhere in enacting new legislation to override the Court. The structural barriers are many and well known:

“Since Congress itself is constrained by the Executive Branch and since institutional features of Congress such as its bicameral structure, the committee system, and even the subcommittee sys-

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370. See generally Dianne M. Pinderhughes, *Black Interest Groups and the 1982 Extension of the Voting Rights Act*, in *BLACKS AND THE AMERICAN POLITICAL SYSTEM* 203 (Huey L. Perry & Wayne Parent eds., 1995).

tem, make it difficult for Congress to overturn a Supreme Court decision, legislative constraints provide the judiciary with a great deal of discretion. Because of the difficulty in forecasting electoral returns and in anticipating congressional action and because of the extensive set of veto points that exists in the legislative policy-making process, Supreme Court justices need not always alter their behavior in anticipation of a congressional response.”<sup>371</sup>

To this list we may add both transaction and opportunity costs.<sup>372</sup> Passing legislation to override judicial decisions takes time away from other activities that more directly benefit reelection efforts. Also, enacting override legislation must take the place of enacting other types of legislation with higher salience among one’s constituents. Taken together, these barriers and costs suggest that the risk of override legislation will be quite low.

The Voting Rights Act overcomes this low risk of override through the sunset provision. Originally enacted as recognition of the radical nature of its special provisions and as a way to force Congress to revisit the need for these special provisions in the near future, the Act originally included a five-year limit on its coverage formula. This meant that Congress must return to this question in 1970 and consider whether the gains during this period warranted letting the Act expire. One way to read the congressional debates in 2006 and the extension of the Act for another twenty-five years sees Congress as not yet satisfied that the voting rights gains of the last forty-one years warrant expiration of the coverage formula. This is a decision that Congress has made at select points in the history of the Act—in 1970, 1975, 1982, and 2006. This means that the sunset provision has offered Congress not only a way to review its own work at set intervals, but to review the work of the Court as well. It is hardly coincidental that Congress has chosen to override select judicial interpretations in 1982 and 2006 and that these decisions came a few years before the sunset hearings were set to begin. More importantly, these sunset hearings offer all interested groups and coalitions a built-in opportunity to come to Congress and press for their preferred interpretations.

Assuming my argument is correct, a final question immediately arises. On the same day that the Court decided *City of Mobile*, it also decided *City of Rome*, which upheld the constitutionality of the Act. By this time, the Court had long split with the coalition that gave life

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371. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1452 (2001) (quoting FORREST MALTZMAN ET AL., STRATEGY AND JUDICIAL CHOICE: NEW INSTITUTIONALIST APPROACHES TO SUPREME COURT DECISION-MAKING, IN SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 43, 48-49 (Cornell W. Clayton & Howard Gillman eds., 1999)).

372. See Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 31 (1997).

to the Act. If this story is correct, the constitutionality of the Act hung on the balance, and the judicial deference of old would surely give way to far more aggressive review. But *City of Rome* continued with the posture of deference. How to explain this case in light of the Court's clear turn away from the goals of the Act? The answer lies within the chambers of Justices Blackmun and Stevens and Chief Justice Burger. They cast the crucial votes between the shift in the mid-1970s and 1980. The Chief Justice's vote is particularly curious, because his record in civil rights cases was not terribly strong on the side of civil rights plaintiffs, nor did he shift gradually with time, as did Justices Blackmun and Stevens. A tentative answer is that the Chief Justice, while willing to tinker with the minutiae of voting rights law, proved unwilling to undo the most effective civil rights statute in history. It would not be said that the Burger Court struck down the Voting Rights Act. It remains to be seen whether Chief Justice Roberts will respond similarly.

## VII. CONCLUSION

The Voting Rights Act, the crown jewel of the civil rights movement, is once again at the center of the debate over the political rights of voters of color. This is a debate about both the powers of Congress under the Reconstruction Amendments and the substantive voting rights of voters of color. Scholars are presently engaged in both strands of this debate. But as this Article argues, their efforts are ultimately misplaced. The Voting Rights Act is much too important, and the Court's rulings far too intriguing and paradoxical, to treat this case law as we treat all others. Rather than focus on the doctrinal nuances of both the statute and the Reconstruction Amendments, we must focus instead on the Court as a strategic institution and the Justices as "single-minded seekers of legal policy."<sup>373</sup> This is the only way, or so this Article argues, to make sense of the history of the Act.

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373. George & Epstein, *supra* note 24, at 324.

