STATUTORY INTERPRETATION, CONSTITUTIONAL LIMITS, AND THE DANGERS OF COLLABORATION: THE IRONIC CASE OF THE VOTING RIGHTS ACT

Luis Fuentes-Rohwer[*]

The Voting Rights Act of 1965 is widely known as the most effective civil rights statute in history. This is an expected distinction, as President Johnson asked for and ultimately signed the "goddamnedest toughest" legislation possible. But the President and the 89th Congress could not do this important work alone. They knew that the substantive provisions of the statute presented a difficult challenge to established constitutional norms and for this reason they offered a broad and expansive statutory canvass. In so doing, and as this Article argues, they implicitly enlisted the U.S. Supreme Court as a key player in the fight against voting discrimination. Unsure about the constitutional boundaries at issue, Congress and the administration left many things unsaid, wishing for the Court to extend the substantive provisions of the Act as far as constitutionally permissible. This account turns the conventional wisdom on its head. The Warren Court –widely considered a bastion of liberal policy-making and judicial activism – interpreted the statute precisely in accordance to congressional wishes. Yet this proved to be a risky strategy, for as soon as the Court's composition changed, so did its collective view of the statute. In other words, it is the Rehnquist Court who has demonstrated a penchant for judicial activism under the guise of strict constructionism. As Congress debates the upcoming extension of the Voting Rights Act in 2007, this is a condition of the Act to which Congress must close attention.

---

[*] Associate Professor of Law, Indiana University School of Law—Bloomington. Many thanks to Bill Popkin for our many conversations about the Voting Rights Act and statutory interpretation in general; to Guy Charles, Ken Dau-Schmidt and Ajay Mehrotra for pointed criticisms and comments on early drafts of this Essay; and to documents librarian Jennifer Bryan for her indefatigable assistance. This Article also benefited from presentations at the Law, Society and Culture workshop at Indiana University School of Law – Bloomington and the faculty at the University of Illinois College of Law.

"Bloody Sunday" had finally pushed the government into real and direct action. In response to the violence on the Pettus Bridge, which had been brought by the networks to living rooms across the country, President Johnson had had enough.[1] And he was quite emphatic in his directive: he wanted the Department of Justice to "prepare the 'goddamnedest toughest' voting-rights bill possible."[2] And the Department of Justice did exactly that, with a draft that ultimately became the Voting Rights Act of 1965. Among its many virtues, the Act adopted a trigger formula for determining which jurisdictions would be covered under the special provisions of the Act;[3] it provided for the appointment of federal examiners under certain conditions; and it bypassed the cumbersome and time-consuming judicial process in order to afford victims of discrimination effective access to the polls.[4]

Two features of the Act – its special provisions, which were due to expire on August 6, 1970 – were particularly effective. One was the aforementioned trigger formula, which automatically brought within the coverage of the Act any jurisdiction that used

---

[1] *See* TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68, at 67 (2006) ("[President Johnson] had a politician's respect for pressure, and very likely realized that the tide of reaction to Sunday's march was beyond push-button control.").

[2] Howell Raines, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 337 (1977) (interview with Nicholas Katzenbach, Attorney General during the Johnson Administration).

[3] 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* Voting Rights Act of 1965, S. 1564, 89th Cong. § 8 (1965).

[4] *See* Voting Rights Act of 1965, S. 1564, 89th Cong. (1965).

literacy tests and either its turnout rate for the 1964 presidential election or its registration rate on November 1, 1964 was below fifty percent.[5] The formula initially brought within the purview of the Act the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, as well as 26 counties in North Carolina. A second feature was the preclearance requirement. Under section 5, these covered jurisdictions must submit any proposed change in "voting qualifications or prerequisites to voting, or standard, practices, or procedures" to the Department of Justice – or they may seek a declaratory judgment in 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.[6]

To many critics of the Act, and particularly those within the jurisdictions that would bear the full force of its special provisions, the proposed legislation was *too* tough. These critics complained loudly and often that the legislation was unconstitutional, as beyond the authority of Congress to enact.[7] Yet criticism also came from unexpected quarters, most notably Solicitor General Cox. In a memorandum to the Attorney General, Cox argued that the formula for determining which jurisdictions were covered under the Act was simply irrational. To his mind, "[o]ne might equally well make the Act applicable to any State whose name begins with Vi or Mi or Lo or Al or Ge or So. Indeed," he continued, "since even this description covers Alaska as well as Alabama, it has exactly the same effect as the determinations now required to be made."[8]

---

[5] 42 U.S.C. §§ 1973-1973p (2004).

[6] *Id.*

[7] *See, e.g.*, Voting Rights Act: Hearings on S. 1564 Before the Senate Comm. on the Judiciary, 89th Cong. 57 (1965) [hereinafter *1965 Senate Hearings*] (Senator Ervin); Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong. 716 (1965) [hereinafter *1965 House Hearings*] (statement of Representative Long).

[8] Solicitor General Cox to the Attorney General 1 (March 23, 1965) (Justice Department Administrative History, Civil Rights, Lyndon B. Johnson Library). Interestingly, during the Senate hearings on March 24, 1965, Senator Ervin doubted whether everyone within the Department of Justice agreed with the Attorney General about the constitutionality of the Act. The Attorney General responded: "I can say that I have consulted on this with the top officials in the Department of Justice and they agree. I include on that the Solicitor General who has to argue the case." *1965 Senate Hearings*, *supra* note 4, at 91 (testimony of Attorney General Katzenbach); *see id.* at 140 (upon questioning by

In hindsight, it is beyond reason to have expected the Supreme Court to strike down this important statute. The Court put all doubts to rest in *Morgan*[9] and *South Carolina*,[10] but the story of the Act and its constitutional odyssey only began with these cases. To be sure, Congress and the administration went as far as they thought they could go; this was the "toughest" bill they deemed possible on both political and constitutional grounds. Yet it is also clear from the historical record that the drafters of the bill wanted to push the provisions of the statute as far as existing constitutional limits allowed. Put another way, Congress knew that it had the power to act; the real question was about how far the substantive coverage of the statute could go.

Enter the Supreme Court. From the moment the Court was asked to interpret the substantive provisions of the statute, it did so broadly and assertively.[11] This conduct has been subject to much criticism; namely, that the Court has played fast and loose with the statutory language and what it proclaims to be the intent of Congress. In other words, it is the conventional wisdom that the Court has filled out the contours of this broad and expansive statute not by the demands of traditional methods of statutory interpretation, but by what it determines to be sound public policy.[12] This criticism applies with particular poignancy to the

---

Senator Hart, the Attorney General remarked that the Solicitor General believed the bill to be constitutional, yet his opinion was not in written form).

[9] Katzenbach v. Morgan, 384 U.S. 641 (1966).

[10] South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[11] *See* Allen v. Board of Elections, 393 U.S. 544 (1969).

[12] *See* Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507 and Title IV of S. 2029 Before the Senate Subcomm on Const. Rts. of the Judiciary Committee, 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.") (Senator Ervin). For some of the cases, see Perkins v. Matthews, 400 U.S. 379 (1971); Georgia v. United States, 411 U.S. 526 (1973); Beer v. United States, 425 U.S. 130, 140 (1976); Reno v. Bossier Parrish School Board, 528 U.S. 320 (2000). For criticisms of the Court's approach in particular cases, see, for example, Holder v. Hall, 512 U.S. 874, 895-96 (1994) (Thomas, J., concurring); *id.* at 935 ("Not surprisingly, the legislative history relied upon in *Allen* also displayed the typical flaws that one might expect – it was hardly unequivocal."); *Allen*, 393 U.S. at 583, 585 (labeling *Allen* an "extremely broad construction of § 5," and complaining that "the Court has now construed § 5 to require a revolutionary innovation in American government") (Harlan, J., concurring in part and dissenting in part); Beer v. United States, 425 U.S. 130, 146 (1976) (contending that "the congressional purposes in § 5 are no longer served and the sacred

early treatment of the statute by the Warren Court and the early Burger Court.

This Article turns the conventional wisdom on its head. It contends that the early history of the Act has played out precisely as Congress intended. 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."[13] The Attorney General repeated this position often. The broad contours of the Act were clear: to eliminate the "blight of racial discrimination in voting."[14] Some witnesses and members of Congress wished for the bill to assert far more directly the reach of the Act,[15] but the legislation ultimately failed to reflect these efforts. The language remained broad and expansive, which offered a willing interpreter the room to expand the scope of the statute as necessary.

From this record, this Article argues that Congress intended for the Court to extend the substantive provisions of the Act as far as constitutionally permissible. To be fair, direct evidence for this conclusion is scarce in the early legislative history, for Congress could not even be sure – although the Attorney General was very optimistic on this score[16] – whether the constitutionality of the Act would bear judicial scrutiny. 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. 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

---

guarantees of the Fourteenth and Fifteenth Amendments emerge badly battered") (Marshall, J., dissenting).

[13] *1965 House Hearings*, *supra* note 7, at 90.

[14] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

[15] *See, e.g.*, *1965 Senate Hearings*, *supra* note 7, at 192 (objecting to Senator Fong's suggestion to clarify the original section 9(a) of the Act).

[16] *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 remains the same, and I have confidence in the constitutionality of the bill.").

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.

Yet it has also has proven to be a risky strategy; while it is true that the Court understood its role as a conduit for congressional intent broadly defined and as understood early on, it is also fair to say that in more recent years, the Court has shown very little interest in remaining faithful to the intent of Congress.[17] Ironically, this has meant that the Court followed the intent of Congress in those very cases that are traditionally considered to be activist decisions, while the more recent Rehnquist Court decisions narrowing the scope of the statute have turned away from that original intent. Hence the irony: the Supreme Court's handling of the Voting Rights Act offers an inimitable example of judicial activism clothed in the fabric of strict constructionism.

This Article defends this reading of the congressional record and the Court's activism over the course of four parts. Part I examines the constitutional arguments made in defense of and against the Act. Of necessity, this Part looks with particular care to the Senate hearings, a setting that proved far more critical of the proposed legislation. Part II offers a short history of the Act and shows how Congress arrived at some of the critical language of the statute. This Part concludes that Congress had an ambitious agenda in mind, yet remained mindful that taking its proposal too far would run into constitutional difficulties.

Part III considers how these arguments fared in court and ultimately defends the Court and its broad readings of the statute. In this vein, this Part counsels against looking for evidence of legislative intent prior to the enactment of the relevant provisions. After all, Congress intended to go as far as the Court would allow it to go. Instead of looking for evidence of intent in the legislative history as traditionally understood, it stands to reason that congressional hearings coming on the heels of a judicial interpretation of the Act would offer a much better guide to the intent of Congress. This is a recurring theme in many of the congressional debates over extension of the Act, as Congress subsequently approves of – and even comes to expect – many of the broad readings of the provisions under review. In this vein, it is telling that Congress has seen fit to correct a judicial interpretation of the Act in only a few select instances.

---

[17] *See* Beer v. United States, 425 U.S. 130, 140 (1976); Reno v. Bossier Parrish School Board, 528 U.S. 320 (2000).

This Article concludes that the Supreme Court has played a unique role in this field. When interpreting the Voting Rights Act, Congress has wished for the Court to act assertively while offering broad readings of the relevant statutory language. But the Court has not always been a faithful interpreter of congressional intent broadly understood. In closing, Part IV examines the ebbs and flows of judicial review, and particularly the Court's seemingly inconsistent approach to interpreting the statute. More specifically, this Part contends that the Court behaves as we would expect it to behave, as a national policy-maker closely attuned to larger political trends. These perceived shifts are nothing more than reflections on a Court whose behavior is seldom out of step for long with trends in public opinion. Before concluding, this Part also examines some of the implications of this view, in particular reference to the looming reauthorization of the Act in 2007.

I. The Constitution in Congress: 1965

This first Part examines the constitutional debate surrounding the proposed voting rights bill. In particular, it highlights 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 never tired to cite past Supreme Court opinions in support of their positions. The sponsors of the bill were no different in this regard. As for the critics of the proposed legislation, they waged perhaps their strongest battle on the constitutionality of the bill. This was a constant theme in both the House and Senate hearings.

The Attorney General stated early in the hearings the administration's view that the proposed bill was a constitutional means of enforcing the commands of the 15th Amendment. In particular, he contended that the bill set up working categories under which it classified the states in accordance to the triggering formula, and "[g]iven a factual premise – as we have here – it is for Congress to set the boundaries. That is essentially a legislative function which the courts do not and cannot quibble about."[18] This was a basic question of constitutional authority, which he argued the 15th Amendment conferred upon Congress. This

[18] *1965 House Hearings, supra* note 7, at 14.

argument relied in part on recent judicial decisions,[19] a point that some critics of the legislation grudgingly conceded.[20]

In response, critics of the administration bill argued that the proposed legislation would "destroy" the Constitution[21] and would require "throwing the Constitution of your country out the window."[22] These arguments took many forms. One leading criticism of the bill contended that the Act was beyond the powers of Congress under section 2 of the fifteenth amendment.[23] A second criticism contended that the legislation was both a bill of attainder and an ex post fact law, in violation of Article I, section 9.[24] The Attorney General disagreed with both criticisms; on the

---

[19] *See, e.g., id.* at 112 ("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 ("I do not even consider this a close question because I think the people talking about it do not reckon with the fact that the Supreme Court has never in recent history questioned Congress judgment in this area.") (testimony of Joseph Rauh, counsel for the Leadership Conference on Civil Rights).

[20] *Id.* at 626 ("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 the Constitution.") (statement of Representative Dowdy).

[21] *1965 Senate Hearings, supra* note 7, at 77 (statement of Senator Ervin).

[22] *Id.* at 155 (Statement of Senator Eastland); *see id.* at 57 (making a constitutional argument against the bill while disagreeing with a recent Supreme Court case) (Senator Ervin); *id.* at 548 ("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.") (statement of Judge L. H. Perez, representing Governor John J. McKeithen of Louisiana); *id.* at 615 (arguing that the bill is unconstitutional) (statement of Paul Rodgers, Jr., Assistant Attorney General of Georgia). To be fair, supporters of the legislation also worried abut the constitutionality of the bill. *See, e.g., id.* at 140 (asking the Attorney General about the constitutionality of the bill and the Solicitor General's views) (statement of Senator Hart).

[23] *See, e.g.*, *id.* at 59, 60, 63.

[24] For example, Senator Ervin defined an ex post facto law as 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 testimony is sufficient to convict tan was then required." *Id.* at 63. Under this definition, the proposed bill is 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." *Id.* He similarly complained that the legislation amounted to a bill of attainder. *See, e.g.*, *id.* at 64-5:

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 so."[25] He also disagreed that this was either a bill of attainder or an ex post facto law, as the bill "is not a punishment."[26]

The critics also 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,"[27] Behind these general assertions of unconstitutionality sprinkled throughout the hearings, two basic grounds of disagreement emerged. One argument focused on the rights of states to set their voters' qualifications,[28] a position considerably strengthened by the Court's holding in *Lassiter v. Northampton Election Board*.[29] The Attorney General responded to this argument as follows:

> 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 of 15th Amendments, they stand undisturbed. But when State power is abused – as it is plainly in the

---

> Despite my respect for your opinion, I think this bill constitutes 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.

[25] *Id.* at 88; see *id.* at 674 (statement of Thomas Watkins).

[26] *Id.* at 63.

[27] *Id.* at 293 (Statement of Attorney Bloch); *see id.* at 309 (branding the Act a "conspiracy to destroy our State laws for voter qualifications") (statement of Judge Perez).

[28] See *id.* at 112 ("I am convinced that there is a serious question of States' rights or National rights.") (testimony of Representative Ashmore); *id.* at 601 ("you are infringing upon and usurping States rights when you impose Federal determination of voting qualifications under the 15th Amendment.") (testimony of Daniel McLeod, Attorney General of South Carolina); *id.* at 755 (contending that the legislation is beyond constitutional authority, as the states have the right to set voter qualifications) (testimony of Representative Whitener).

[29] 360 U.S. 45 (1959). In *Lassiter*, the Court held that a state may impose literacy tests as voting qualifications so long as it does not apply them in discriminatory fashion. *See 1965 House Hearings*, *supra* note 7, at 113 (arguing that the bill is forcing the states to do something that the Court said they do not have to do) (testimony of Representative Ashmore).

> areas affected by the present bill – there is no magic in the words "voting qualifications."[30]

Put another way, the states' right to set their voting qualifications was not absolute; it went only as far as the commands of the 14th and 15th Amendment began. A state may not violate these commands under the guise of erecting "voting qualifications."

A related argument focused on the inevitable over-inclusive nature of the trigger formula. During a prolonged exchange with the Attorney General, for example, Representative Cramer argued: "What constitutional basis is there for that where the effect is obviously to strike down the States' constitutional rights to fix voter qualifications in areas where no discrimination has been found to exist?"[31] This point had a great deal of force. Recall that under the trigger provision of the bill, 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. And yet, if the 15th 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?

To the Attorney General, however, these areas of no 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."[32] 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."[33] 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 a constitutional difficulty."[34] So long as Congress acted reasonably, the legislation would bear scrutiny.

---

[30] *Id.* 15.
[31] *Id.* at 88.
[32] *Id.*
[33] *Id.* at 82.
[34] *Id.* at 88.

II. Shooting for the Stars and Settling on the Particulars

A. Advocacy and Stargazing

This last point, whether Congress acted reasonably, applied not only to the particular provisions of the 1965 Act, but also to the perceived need for a voting rights bill coming on the heels of the Civil Rights Act of 1964. The Attorney General confronted this issue often. In the words of Representative Kastenmeier, for example, "this committee and the Congress ought to be especially sensitive in passing a bill this year, not merely because of the obvious demand and need for it, but because we passed a bill in 1957, 1960, and in 1963-64."[35] The Attorney General answered that those prior efforts relied on the good faith of the states and local jurisdictions in enforcing the provisions of the law. The new Act, in contrast, would "no longer rely on good faith. . . . [W]e are not going to be frustrated again by the long and tedious delays and resort to law as a delaying device."[36] In other words, the administration was no longer willing to make use of traditional modes of adjudication. In light of earlier failures, a stronger yet more efficient approach was warranted.

Yet, to its credit, the administration also sent a clear message from the beginning of the hearings that the proposed bill went as far as the administration thought that any legislation could go in light of relevant constitutional proscriptions. "I have indicated repeatedly," the Attorney General conceded, "I am entirely sympathetic with doing so if we can find a constitutional means and a practical means of doing so. I confess that my ingenuity has floored in that regard."[37] And in response to a query from Senator Tydings, the Attorney General similarly explained: "[W]e were unable to draft a law where we could have the same objective criteria which we felt would stand up constitutionally and still cope with this kind of situation. . . . It wasn't done from a desire to

---

[35] *Id.* at 66; *see id.* at 112 (Representative Ashmore); *see also 1965 Senate Hearings*, *supra* note 7, at 105-08 (Senator Ervin); *id.* at 155 (Senator Eastland); *id.* at 668 ("I respectfully remind the committee that the bill was offered only 8 months after passage of title I of the Civil Rights Act of 1964 . . . . This, I submit respectfully, is much too short a time within which to determine whether this recently passed legislation is adequate.") (statement of Thomas Watkins).

[36] *1965 House Hearings*, *supra* note 7, at 67.

[37] *1965 Senate Hearings*, *supra* note 7, at 183.

permit any discrimination in voting, but merely because we couldn't devise a better law than this to deal with it."[38]

For this reason, Attorney General Katzenbach seemed willing at various times to let others try their hand at the problem. For example, in response to Representative Rodino's question whether he "believe[d] that this bill, with the provisions that have been written into it, [was] the surest way of guaranteeing that the right to vote will not be denied to any citizen regardless of race or color?,"[39] Katzenback responded: "If this committee can come up with a better way of doing it and a surer way of doing it, I am sure the administration would support that way of doing it. This is the best we have been able to accomplish."[40] Similarly, in response to Representative Cramer's contention about the inadequacy of the legislation's coverage, and particularly his question whether Katzenbach "would not object to any member of this committee making an exploration in that area," the Attorney General explained: "Anything that will be in this direction and make it constitutional, I am all for it."[41] He repeated this sentiment throughout his testimony in both hearings.[42] This willingness to consider different avenues of reform extended to the particular language of the statute.[43]

---

[38] *Id.* at 143; *see Id.* at 148 (explaining in response to a suggested change in the language of the statute that "I have reservations that that would be sound constitutionally").

[39] *Id.* at 49.

[40] *Id.*

[41] *Id.* at 70. Moments later, Cramer repeated his point that the legislation failed to offer sufficient coverage to areas in need. "As the President said in his message, with which I agree, that discrimination in every community in America, wherever it exists, must be stamped out relating to voting. The bill does not do it." *Id.* at 79. In response, the Attorney General repeated his position. "Most respectfully, Congressman, I believe the bill does it as well as we have been able to devise a system for doing it. Now, if there are better ways of doing it, as I said before, I would certainly be strongly in support of those." *Id.*; *see id.* at 146 ("But it wasn't drafted to exclude any areas where discrimination was practiced, it was just that we lacked the skill and ingenuity to find a formula that would accomplish that result. If the Senator has one, I would be happy to hear it.").

[42] *See, e.g., id.* at 90 ("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.").

[43] *See, e.g., id.* at 58 ("The intention, Mr. Chairman, is what I stated. Perhaps the Committee will want to clarify the language.") (Burke Marshall); *id.* at 63 ("If you can suggest, sir, language that makes it crystal clear what intimidation is, I would think that would represent a substantial improvement in the bill.") (Katzenbach); *Id.* at 85 ("Perhaps there is a better way of doing it,

Many members of Congress and prominent witnesses who spoke in support of the bill got the message. The House hearings figure prominently on this score, as they offered a rather amicable forum where the proposed bill received a warm and receptive welcome. This is a setting where the relevant actors could focus on the goal at hand and how best to accomplish it. During his testimony on March 24th, for example, Roy Wilkins, executive director of the NAACP, remarked: "All we want is that nothing shall be considered good enough until it has reached the limit of constitutional interpretation and of practical and pragmatic possibility that you mention."[44] Representative Lindsay similarly asked a few days earlier: "with this mood in the country and the willingness of the members to get through a voting rights bill, and I think it will be a large majority, too, by which it would go through, can't we try to do a little bit more?"[45] But Chairman Celler put it best, on the last day of the hearings and in reference to Joseph Rauh, Jr., counsel for the Leadership Conference on Civil Rights: "I have great respect for Mr. Rauh, but sometimes he is a stargazer, and that is a creditable term. But we must be practical."[46] Congress could only go so far.

Senator, but I am sure if we are in agreement as to what it is intended to say that with all of your skill we can find a way of saying that which satisfies you.").

[44] *1965 House Hearings*, *supra* note 7, at 403.

[45] *Id.* at 109.

[46] *Id.* at 693. To which Mr. Rauh responded: "I admire you both (Congressmen Celler and Rogers) but representing the amalgamated stargazers I have something I would like to present to you." *Id.* at 694.

Chairman Celler repeated this admonition often. For example, and in response to a request by James Farmer, National Director of CORE, for an expansion of the reach of the bill, he explained:

> No bill may go far enough but you must consider that if you weight this bill down with too much, you may get into serious difficulty, and you may not get anything.
>
> You must remember that we must be pragmatic here in this committee, we must be very careful that we do not incur too many hostile votes on this bill. That must be remembered also by the general public as well as organizations like your own and we labor under considerable difficulties in that regard.

Id. at 686.

B. Tinkering with the Details: Procedures and Political Subdivisions

The message throughout the hearings was clear: Congress must go as far as politically and constitutionally possible. With this goal in mind, both houses of Congress kept tinkering with the language of the statute and the reach of its many provisions. The remaining of this Part discusses two particular provisions. First, many members of Congress pressed the Attorney General for clearer statutory guidance on the definition of the term "political subdivision." This was an important definition, for the reach of the original trigger provision under section 3 (a) of the bill,[47] as well as the preclearance provision under the original section 8,[48] extended to both states and "political subdivisions." During the House hearings, Representative McCulloch defined the phrase as "any school district, borough, township, county, or any other political subdivision within the meaning of the State law."[49] In response, the Attorney General narrowed the definition; "we are aiming at voter registration," he explained, "and I think the term 'political subdivision' is used here aimed primarily at the area in which the registration process takes place."[50] He then suggested that "[t]hat may be a point which should be clarified."[51]

Senator Ervin raised a similar query during the Senate hearings, and the Attorney General repeated his view that "we are talking about the area in which people are registered, the appropriate unit for registering."[52] In his view, "we are talking about no area smaller than a county or parish."[53] Yet on the language of the statute as then drafted, its reach seemed considerable; in North Carolina, for example, "every municipality is a political subdivision of the State, even every sanitary district is a subdivision of the State."[54] Hence, Senator Ervin deemed necessary to amend the bill, and the Attorney General concurred. "I think that might be done to define political subdivision here in the bill in that way. That is what I intended."[55]

---

[47] *See* Voting Rights Act of 1965, S. 1564, 89th Cong. § 3 (a) (1965).

[48] *See id.* at § 8.

[49] *1965 House Hearings*, *supra* note 7, at 51.

[50] *Id.*

[51] *Id.*

[52] *1965 Senate Hearings*, *supra* note 7, at 44.

[53] *Id.*

[54] *Id.* (Senator Ervin).

[55] *Id.*

In the end, both the Senate and House committees responded to these concerns during their executive sessions. The House bill included in section 14 (c)(2) the following definition: "The term political subdivision shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."[56] The Senate bill offered a substantially similar definition.[57]

Second, the original language of section 2 read as follows: "No voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color."[58] Senator Fong expressed concern that the bill did not define the word "procedure," and he was "afraid that there may be certain practices that you may not be able to include in the word 'procedure.'"[59] The Attorney General understood the term broadly, yet Senator Fong asked him whether, "[t]he way is now written, do you think there may be a possibility that the Court would hassle over the word 'procedure'?"[60] The Attorney General did not think so, yet allowed that language in the Civil Rights Act of 1964 used the terms "standards, practices, or procedures," and "[p]erhaps that would be broader than simply the word procedure and perhaps the committee might consider making that point clear."[61]

To be sure, and in response to a further question by the Senator, the Attorney General indicated that he was not opposed to expanding the word, as "it was intended to be all-inclusive of any kind of practice."[62] Senator Fong pressed on, and contrasted the way in which section 3(a) defined the terms "test or device" in some detail; "[b]ut you have not spelled out the word 'procedure. I think that the word 'procedure' should be spelled out a little bit more."[63] The Attorney General agreed,[64] and both the House and

---

[56] *To Enforce the Fifteenth Amendment to the Constitution of the United States: Unpublished Hearings on H.R. 6400 Before the House Comm. on Rules*, 89th Cong. 28 (1965) [hereinafter *House Unpublished Hearings*].

[57] *To Enforce the Fifteenth Amendment to the Constitution of the United States: Executive Session on S.R. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong. 5 (1965) [hereinafter *Senate Executive Session*].

[58] Voting Rights Act of 1965, S. 1564, 89th Cong. § 2 (1965).

[59] *1965 Senate Hearings*, *supra* note 7, at 191.

[60] *Id.*

[61] *Id.* at 191-92.

[62] *Id.* at 192.

[63] *Id.*

[64] *Id.* ("I think that is a good suggestion, Senator.").

the Senate committees ultimately concurred as well. Under the amended section 2 of the bill, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[65]

The lessons of this Part should be clear. As Senator Dirksen remarked on April 6, while the Senate committee met in executive session: "So I must say that a tremendous amount of work has gone into this proposal."[66] The draft of the bill then under consideration was at least the fifth version of the bill, and "[t]he reason for it," he explained, was that "as these suggestions came in on the course of the hearings, they had to evaluate them and see whether they should be seriously considered."[67] Congress was listening, and taking the voting rights bill and its provisions as far as possible, mindful of existing constitutional and political limits. The political limits were few, as Representative Lindsay underscored, for the bill had the support of substantial congressional majorities. As for the constitutional limits and the Attorney General's optimism, a legal challenge loomed in the horizon. The critics would not give up easily.

C. The Collaborative Approach

From these realities as Congress understood them, the solution was brilliant in its simplicity. Note first that Congress knew the extent of the problem and how difficult 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, for Congress was confident that it had the power under the 15th Amendment to do something about this problem. So the real question for Congress was, how far could the substantive provisions of the bill go?

In response, the administration offered a statute whose language remained broad in scope. Such broad language, coupled with a clear intent to push the statute as far as constitutionally permissible, offered the Supreme Court a conduit through which it may carry out the intent of Congress and the administration. And this intent was unmistakable: to fight the blight of racial

---

[65] *House Unpublished Hearings*, *supra* note 56, at 11; *see Senate Executive Session*, *supra* note 57, at 4.

[66] *Id.* at 3.

[67] *Id.*

discrimination and "to open the city of hope to all people of all races."[68] Hence, the Court may do its traditional job of statutory interpretation under unique circumstances, for it may legitimately interpret section 5 – and the Voting Rights Act in general – expansively, up to the limits of constitutional interpretation as the Court itself understood them.

This strategy might appear risky, to be sure, for it hinged on the Court and its willingness to go along. Yet this was the same Court whose members stood and clapped during Johnson's address, a fact hardly lost on critics of the bill. As James Kilpatrick, vice-chairman of the Virginia Commission on Constitutional Government and one of the more thoughtful critics of the bill, complained, "it is . . . unfortunate that member 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."[69] Former Representative Albert Watson similarly concluded: "Where else can we turn? We see the Supreme Court sitting on the House floor wildly applauding legislative recommendations. Can we expect impartial examination of these proposals by that body if they become law?"[70] Congress thus had a very good inkling that the Court would go along. The Court could be trusted to do its part in this important project.

Consider, for example, section 5 of the Act, its preclearance provision. On its terms, a covered "state or political subdivision" covered under section 4(b) of the Act must preclear any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." In turn, the Attorney General and/or the District Court must ensure that "such qualification, prerequisite, standard, practice, or procedure 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."[71]

The reasons for this provision were obvious. According to the Attorney General,

> absent a provision of this kind, you leave it upon a State to devise, if it can, some new method of

---

[68] Lyndon B. Johnson, *We Shall Overcome*, *in* SPEECHES OF THE AMERICAN PRESIDENTS 637, 641 (Janet Podell and Steven Anzovin eds., 1988).

[69] *1965 Senate hearings*, *supra* note 7, at 642.

[70] *1965 House Hearings*, *supra* note 7, at 623.

[71] 42 U.S.C. § 1973 (2004).

> preventing people from voting on grounds of race, and then go through the painfully long litigation process. . . . This is an attempt to prevent new laws which would frustrate the objectives of Congress here.[72]

More specifically, he argued elsewhere, "the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th Amendment by a State should also be subjected to judicial review."[73] This was thus an effort to extend the substantive coverage of the Act in ways that neither Congress nor the administration could foresee in 1965.

In order for the preclearance provision to perform this function, its language must remain broad and flexible. And the text of section 5 was clearly that, to the chagrin of some critics who complained that the language was *too* broad.[74] The implications of this choice were clear. Do not limit the language of the statute and concomitantly trust the Court to play an important part in extending the provisions of the statute as necessary, and "to the limits of constitutional interpretation."[75]

---

[72] *1965 Senate Hearings*, *supra* note 7, at 172; see *id.* at 237:

> 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.

See also South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966) ("Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kind for the sole purpose of perpetuating voting discrimination in the face of adverse federal decrees.").

[73] *Id.* at 237; see *id.*: "The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th Amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated."

[74] *See id.* at 622 ("Well, now, procedures for voting, that is an extremely broad term. . . . We certainly think that legislation should modify procedures in order to limit the scope. That is all this act is concerned with, anyway, so the language is way too broad.") (Rogers).

[75] *1965 House Hearings*, *supra* note 7, at 403 (remarks of Roy Wilkins).

far as the Constitution allows. In other words, enlist the Court as a partner in carrying out these important goals.

III. The Act in Court: A Voting Rights Colloquy

Almost as soon as the President signed the bill into law on August 6th, 1965, critics of the bill sought a judicial ruling on its constitutionality. And within a year, the Court issued its landmark decisions of *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*. Both cases sided with the government while sanctioning a very strong assertion of federal power. This Part examines the life of the Act in court. It concludes that the Court has dominated the debate over the substance of the Act and Congress has willingly acquiesced, with some notable exceptions. In turn, this dominance has meant that the substance of the Act has fluctuated with the moods of the Court; while the Court often interpreted the Act broadly and liberally, it has also done so in narrow fashion.

A. Mr. Katzenbach Goes to Washington: The Look of a Dahlian Court

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

---

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

[77] *Id.* at 308.

[78] *Id.* at 327.

[79] *Id.* at 334.

[80] *Id.*

[81] 383 U.S. 301, 308 (1966). The critics disagreed with this point, to be sure, and vehemently so. See 1965 Senate Hearing, *supra* note 7, at 54 ("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.") (Senator Ervin); *id.* at 616 ("The bill was rather hazily drawn and I think it is obvious") (Rodgers); *see also 1965 House Hearings*, *supra* note 7, at 623 ("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.") (statement of former Representative Watson). While Senator Ervin repeated this complaint often, *see id.* at 54, 235, 593, the Attorney General denied it. *See id.* at 54 ("It wasn't written in all that

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.[82] "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."[83] Deference to Congress was the order of the day.

Similarly, in *Morgan v. Katzenbach*,[84] the Court upheld Section 4 (e) of the Act, which 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. This provision ran into direct conflict with the recent precedent established by *Lassiter v. Northampton Election Board*,[85] a case decided a scant 6 years earlier, where the Court turned down a facial challenge to literacy tests. The Court in *Morgan* left this holding undisturbed, explaining 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 fifteenth amendment."[86] 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."[87] As in *South Carolina*, the Court was deferential to a fault, explaining that "[i]t is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[88] Testifying in front of the Senate during the 1969 hearings, former Solicitor General Cox referred to *Morgan* as "a token of congressional supremacy."[89]

One initial impression from these early cases is quite cynical; to wit, what could we possibly expect the Court to do instead?

---

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 328, 334.

[83] *Id.* at 328 (italics added).

[84] 384 U.S. 641 (1966).

[85] 360 U.S. 45 (1959).

[86] 384 U.S. 641, 651 (1966).

[87] *Id.* at 651 n.10.

[88] *Id.* at 653.

[89] *1969 Senate Hearings*, *supra* note 12, at 334.

While in the midst of the civil rights movement, the Court stepped aside and let the revolution in its midst run its course, and in so doing it became a partner in the making of civil rights law. According to Lucas Powe, for example,

> The Court was extending an offer to Congress to become a full partner in the Court's great tasks, just as Congress had become with the Civil Rights Act of 1964 and the Voting Rights Act of 1965. In making the offer the Court saw that its views and those of Congress were harmonious. Each was working as hard as it could to improve American life.[90]

This is an important point. I cannot underscore enough how strongly the critics felt about the unconstitutionality of the bill. To some, it was "based on emotionalism and is shot through with weaknesses which I do not believe the Supreme Court could possibly uphold;"[91] and others, while professing a "strong enough faith in the intellectual honesty of the members of that Court . . . would not believe they would for 1 minute permit this unconstitutional act to be upheld."[92] In making these claims, they were asking the Court to side against the policy views of a very strong national majority. Yet this is something the Court seldom does.

Robert Dahl early work is instructive on this point. As he concluded, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the law making majorities of the United States."[93] Or, put in terms more relevant to the voting rights decisions, the Court is, "[b]y itself . . .

---

[90] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 265 (2000).

[91] *1965 Senate Hearings*, *supra* note 7, at 629 ("I think this bill is) (Senator Sparkman).

[92] *Id.* at 678 (Watkins).

[93] 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* GLENDON SCHUBERT, JUDICIAL POLICY-MAKING: THE POLITICAL ROLE OF COURTS 13 (rev. ed. 1974) ("[T]he federal courts have always (and correctly) been perceived by party leaders as a major instrument for exercising control over the substantive content of public policy."); MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964)..

almost powerless to affect the course of national policy."[94] This is not to say that the Court plays no role at all, for it does; as Dahl explained, "at its best[,] the Court operates to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy."[95] It is telling that Dahl wrote this essay almost a decade before the great civil rights cases of the 1960's, for these cases epitomize his view of the Court. After *Morgan* and *South Carolina*, not only were Congress and the Attorney General vindicated, but far more importantly, the debate shifted ground in telling and quite important ways.

B. The Court Takes Charge: Interpreting Section 5

Once the Court issued its definitive rulings on the constitutionality of the Act, the debate shifted in notable ways. To

---

[94] Dahl, *supra* note 93, at 295; *see* LAWRENCE BAUM, THE SUPREME COURT 271-72 (5th ed. 1995) (arguing that, while the Court has considerable constitutional and political strength, its policymaking role is a limited one); Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?* 42 POL. RES. Q. 493, 503 (1989) (clarifying "the modern Supreme Court's limits as a policy-maker within the context of American politics").

This point provoked a long and persuasive response from Jonathan Casper. Jonathan Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976). According to Casper, the Court is a much more influential policy making player than Dahl suggests. According to Dahl, for example, "[a]cting solely by itself with no support from the President and Congress, the Court is almost powerless to affect the Court of national policy." Dahl, *supra*, at 293. For Dahl, winners are influential, losers are not. Yet, Casper argues, this measure of "influence" is inaccurate at best. Simply because the laissez faire policies of the Lochner court were eventually discarded, one cannot say that the Court was not influential. As he states, "[t]he notion of a 'winning' and a 'losing' policy when institutions clash imposes an artificial distinction that obscures a dynamic process in which even the 'losers' contribute importantly to outcomes that eventually emerge." Casper, *supra*, at 62. Under Dahl's framing, "*no* institution is really capable of the decisive role he argues." *See id.* at 61. In the end, Casper's argument agrees with Dahl's overarching conclusion that the Court is a policy-making institution. Their disagreement stems mainly over the question of influence.

[95] Dahl, *supra* note 93, at 295. This claim of judicial legitimacy has an impressive number of respected followers. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 29 (2nd ed. 1986) (acknowledging his reliance on Black's "most suggestive and perceptive argument" that the Court plays a legitimizing role); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WISC. L. REV. 790 (1973).

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."[96] But by and large, this was a lost battle and a waste of energy, as the debate clearly shifted to the substantive provisions of the Act. And on this score, the Court clearly led the way.

The first case was *Allen v. State Board of Elections*.[97] In *Allen*, the Court examined section 5 of the Act and offered a broad and expansive reading of the Act. As 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 the right to vote because of their race."[98] This clear intention, coupled with the "weight of the legislative history,"[99] led the Court to conclude that Congress intended that "all changes, no matter how small, be subjected to sec. 5 scrutiny."[100]

Similarly, in *Gaston County v. United States*,[101] 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 purposes or with the effect of denying or abridging the right to vote on account of race or color."[102] Gaston County wished to make such a showing in federal court. But the District Court denied it relief, for it concluded 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

---

[96] *1969 Senate Hearings*, *supra* note 12, at 175; 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.").

[97] 393 U.S. 544 (1969).

[98] *Id.* at 565.

[99] *Id.* at 569.

[100] *Id.* at 568.

[101] 395 U.S. 285 (1969).

[102] *See* Voting Rights Act of 1965, 89th Cong. § 4(a) (1965).

denying the right to vote as a consequence of the jurisdiction's history of segregated and inferior schools.[103]

Critics and supporters alike agreed that these cases offered broad interpretations of the Act.[104] Unsurprisingly, the critics went further, complaining that these decisions went beyond the intent of the Congress. According to A. F. Summer, Mississippi's Attorney General, the 1965 Congress "never imagin[ed] the lengths to which the courts would enlarge the application of the act to include within its purview any State or local enactments."[105] Senator Ervin similarly complained that "[t]he Court has rewritten the Voting Rights Act and made meaningless the release provisions of section 4."[106]

At first blush, these criticisms appear right on target. But the Voting Rights Act is not a traditional statute, and the role of the Court in this area has been nothing short of unorthodox. 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*

---

[103] *See Gaston County*, 395 U.S. at 293.

[104] *See* Voting Rights Act Extension: Hearings on H.R. 4249 and H.R. 5538 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong. 62 (1969) [hereinafter *1969 House Hearings*] ("The Department apparently took a somewhat narrow view of the scope of section 5. Their position, however, was expanded in the Supreme Court, where they filed an amicus brief in the *Allen* case. And the Supreme Court interpreted section 5 very broadly in the *Allen* case." (Glickstein); *Id*. at 83 ("Most recently, the Supreme Court, in *Allen* v. *State Board of Education,* has arbitrarily ruled that States covered by the act cannot take any action, whatever the intent, which diminishes the effectiveness of Negro voting rights. This, again, has nothing to do with discrimination.") (Jack McGann, Liberty Lobby)

[105] *1969 House Hearings*, *supra* note 104, at 130; *see id*. ("Several decisions, notably *Allen v. State Board of Elections* . . . have interpreted section 5 in a manner which Congress could hardly have contemplated.") (A. F. Summer); *1969 Senate Hearings*, *supra* note 12, at 369.

[106] *1969 Senate Hearings*, *supra* note 12, at 5; The Enforcement of the Voting Rights Act: Hearings Before Civil Rts. Oversight Subcomm. of the House Comm. on the Judiciary, 92nd Cong. 71 (1971) [hereinafter *1971 House Hearings*] (complaining that "in the *Perkins* case, I don't think anyone, certainly not the Attorney General of the United States nor us, anticipated that the expansion of a city's limits would be included under those things that had to be submitted under the act") (A. F. Sumner).

> *Board of Elections*, decided by the Supreme Court on March 3, 1969, is the portent of change.[107]

Here was the House minority leader and a leading voice during the 1965 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.[108] Far more tellingly, he remarked that thanks to *Allen*, "at long last after 4 years section 5 will become effective."[109]

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. And clearly, talk of overturning these decisions was also close to non-existent. 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.[110]

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

---

[107] *Id.* at 4.

[108] *Id.* at 270 ("Section 5 must not be repealed or emasculated. The past four 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.").

[109] *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 12, 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.*

[110] See, in this vein, Justice Thomas' intriguing concurrence in *Holder*. *See Holder v. Hall*, 512 U.S. 874, 929 (1994) (conceding that Congress had interpreted section 5 expansively in *Allen* "and Congress has reenacted § 5 subsequent to our decisions adopting that expansive interpretation") (Thomas, J., concurring).

offered unqualified support for the Court and its interpretations of the Act.[111] 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 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."[112] 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."[113]

For my purposes, the most interesting and perhaps most important testimony was that of Representative David Satterfield, a fellow 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. Thus, as he wrote:

> 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

---

[111] 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. 641 (1975) [hereinafter *1975 House Hearings*] ("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."). (Armand Derfner); *id.* at 717 ("I do not want to leave the impression that the court, in the *Allen* case, enunciated something which the Congress did not intend.") (Parker).

[112] *Id.* at 581.

[113] *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.").

> 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.[114]

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."[115] To which Representative Don Edwards, the chair of the subcommittee, responded: "Well, we will address that point."[116]

But they didn't. Representative Satterfield issued his request on March 21, and the committee published its report approximately six weeks later, on May 8.[117] And curiously, not a word was written on this issue. Instead, the Report extended an approving nod towards the Court and its interpretations of the Act, as it cited both *Allen* and *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."[118] 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 its craftsmanship of the Act. So long, that is, as the Court was willing to do the heavy lifting.

C. Shifting Ground and the Beauty of Counting to Five: Beer's *Turn,* Georgia's Twists *and the* Bossiers

All too soon, however, the honeymoon came to an end. With *Beer v. United States*,[119] decided a year after the 1975 extension of the Act, the Court began an apparent retreat from its earlier, expansive interpretations of the Act. And in subsequent years, the Court continued to display a penchant for interpreting the Act in

---

[114] *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").

[115] *Id.*

[116] *Id.*

[117] *See* H.R. Rep. No. 94-196 (1975).

[118] *Id.* at 9.

[119] 425 U.S. 130 (1976).

narrow fashion. This last section examines three such instances: *Beer* and *Reno v. Bossier Parish School Board*,[120] which adhere to the script of narrow interpretations of the Act; and *Georgia v. Ashcroft*,[121] a case that appears to turn away from this narrow approach, and in so doing brings the doctrine full circle, to the time of *Allen* and *Gaston County*.

1. *Beer* and the Standards of Preclearance

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? 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 he Act establishes the full and firm allegiance of its own objectives with the goals of the [Fifteenth] Amendment."[122] In using "parallel language," 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,[123] with section 5 acting as a prophylactic. The fact that Congress said precious little about the particular standard that would govern section 5 inquiries is telling, particularly since section 5 had

---

[120] 520 U.S. 471 (1997); 528 U.S. 320 (2000).

[121] *See* Miller v. Johnson, 515 U.S. 900 (1995); Georgia v. Ashcroft, 539 U.S. 461 (2003).

[122] 374 F. Supp. 363, 382 (D.C. Cir. 1974).

[123] *See* Beer v. United States, 425 U.S. 130, 148 (1976) (contending that "it is questionable whether the 'purpose and effect' language states anything more than the constitutional standard") (Marshall, J., dissenting); *id.* (Explaining that section 5 cases "make clear" that the effects inquiry "is essentially the constitutional inquiry").

become by 1975 the "centerpiece of the Act."[124] If the standard were anything 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.[125] 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.[126] 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."[127] Rather, plaintiffs must "press vigorously . . . for all that is their due, but . . . no more."[128] 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."[129]

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."[130] 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 court concluded that the districting plan would unjustifiably dilute the black vote in New Orleans. And "[s]urely the Fifteenth Amendment . . .

---

[124] *1975 House Hearings*, *supra* note 111, at 40 (testimony of Hon. Arthur Fleming, Chairman, U.S. Commission on Civil Rights).

[125] *See Beer*, 374 F. Supp. at 374-75.

[126] *See id.* at 383.

[127] *Id.* at 389.

[128] *Id.* at 390.

[129] Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before Subcomm. on Const. Rights of the Senate Comm. on the Judiciary, 94th Cong. 125 (1975) [hereinafter *1975 Senate Hearings*]

[130] *Beer*, 374 F. Supp. at 388.

discountenances the abridgment evident in this case."[131] Under the factors of *Zimmer v. McKeithen*[132] and recent vote dilution case law,[133] the court further concluded that the plan would unjustifiably dilute the potential black voting strength in the city.[134] Finally, the court also concluded that the city had not justified its use of two at-large seats.

In an opinion authored by Justice Stewart, the U.S. Supreme Court reversed.[135] Over a scant nine-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"? The Court began its analysis by pointing out that this inquiry is not a constitutional inquiry but a question of statutory interpretation.[136] This meant, of course, that the legislative history of the Act and the intent of Congress were controlling. Then, after offering a smattering of quotes and cites 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 s 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 . . . ."[137]

From this passage, the Court spun out the following standard: "the purpose of s 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."[138] On this view,

---

[131] *Id.* at 393.

[132] 485 F. 2d 1297 (5th Cir. 1972).

[133] *See Beer*, 374 F. Supp. at 384-85.

[134] *See id.* at 393-99.

[135] *See* Beer v. United States, 425 U.S. 130 (1976).

[136] See *id.* at 139.

[137] *Id.* at 141 (citing H.R. Rep. No. 91- 397, at 60 (1975)) (emphasis added).

[138] *Id.*

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 s 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."[139] Unless, that is, the plan violates the Fifteenth Amendment.[140]

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.[141] 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.

When the Court writes that Congress "explicitly stated" its understanding of the preclearance standard as one of retrogression, it is thus hard to take even its language at face value. 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

---

[139] *Id.*

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

[141] *Id.* at 146 (Marshall, J., dissenting) (contending that the Court's conclusion "finds no support in the language of the statute and disservices the legislative purposes behind s 5").

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."[142]

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."[143] 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."[144] On its 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."[145] So here is the relevant passage, in full:

> When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard (under s 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."[146]

---

[142] Enforcement of the Voting Rights Act of 1965 in Mississippi: A Report of the Civil Rights Oversight Subcomm., 92nd Cong. 14 (1972) [hereinafter *1972 House Report*].

[143] *Id.*

[144] *Id.* at 14-15.

[145] *Id.* at 14-15.

[146] *Id.* at 141 (citing H.R. Rep. No. 91- 397, at 60 (1975)) (emphasis added).

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 would not stand in its way, or even the fact that the litigants themselves did not think to argue for the standard in their briefs as the Court ultimately understood it.

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' 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 ninety-fourth 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.[147] 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 needn't worry about being right. And as for reading the statute narrowly, it is also clear that this wouldn't be the last time.

2. *Bossier Parish* and the Triumph of Retrogression

The 1990's proved fertile ground for litigants challenging the limits of the Act. This was a time when many covered jurisdictions had a very difficult time securing preclearance for their districting plans, thus offering the Court myriad opportunities to leave its lasting imprint on the preclearance requirement. The attempt by the Bossier Parish School Board to redraw its district lines to comport with the equipopulation standard proved no exception. The Board's 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

[147] *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Rethinking Section 5 of the Voting Rights Act*, *in* THE FUTURE OF THE VOTING RIGHTS ACT (Epstein et al., eds., forthcoming 2006).

2."[148] On appeal, the lower court precleared the plan,[149] 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.

a. Uncoupling Section 2 from Section 5

In *Reno v. Bossier Parish School Board*,[150] the Court answered the first question in the negative. 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."[151] This would mean that "for all intent and purposes" the standard of section 2 would replace the standard under 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."[152]

This was 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 15th Amendment,[153] 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 15th Amendment in ways that Congress could not foresee in 1965. Or as Armand Derfner 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."[154] As enacted in

---

[148] *See* Reno v. Bossier Parish School Board, 520 U.S. 471, 476 (1997) (citing 28 C.F.R. § 51.55(b)(2).

[149] *See* Bossier Parish School Board v. Reno, 907 F. Supp. 434 (D.D.C. 1995).

[150] 520 U.S. 471 (1997).

[151] *Id*. at 477.

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

[153] *See* To Enforce the Fifteenth Amendment to the Constitution of the United States: Senate Unpublished Hearing on S. 1564, 89th Cong., Vol. I, 4 (1965).

[154] The Enforcement of the Voting Rights Act: Hearings Before Civil Rts. Oversight Subcomm. of the House Comm. on the Judiciary, 92nd Cong. 255 (1971) [hereinafter *1971 House Hearings*].

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 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*,[155] 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, this 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*. Namely, it would shift the preclearance inquiry from non-retrogression to vote dilution and call into question the *Beer* non-retrogression 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 counseled against a grant of preclearance for electoral changes that would ultimately violate Section 2.[156]

---

[155] 446 U.S. 52 (1980).

[156] *See Bossier Parish*, 520 U.S. at 483-85.

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.[157] 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 15th Amendment but, rather, a tool of public policy and the yardstick for what a proper structure of representation would look like.[158] 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 1960's and the Court's forgiving interpretations of congressional power. Under *Katzenbach v. Morgan*,[159] for example, the Court allowed Congress the 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' 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.[160]

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

---

[157] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 917-18 (1995); Johnson v. Miller, 864 F.Supp. 1354 (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. This goal dominated the creation of the third Georgia submission."); Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001).

[158] *See* Holder v. Hall, 512 U.S. 874 (1994) (Thomas, J., concurring).

[159] 384 U.S. 641 (1966).

[160] *See Bossier Parish*, 520 U.S. at 481-82.

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. 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."[161] 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."[162] But the Court was not interested in such technical matters. Its questionable adoption of the retrogression standard in *Beer* ruled the day.

b. Turning the Act on its Head: Preclearing Discrimination

And two years later, in *Bossier Parish II*,[163] it ruled the day again. The question this time was whether the Department of Justice must preclear a redistricting plan enacted with discriminatory but non-retrogressive 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.[164] After *Bossier Parish*, 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".[165] 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."[166] 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

---

[161] S.R. Rep. No. 97-417, at 12 n. 31 (1982) (cited in *Bossier Parish*, 520 U.S. at 505-05 (Stevens, J., dissenting)).

[162] Voting Rights Act: Proposed Section 5 Regulations: Report 5 (1986).

[163] 528 U.S. 320 (2000).

[164] *See id.* at 328.

[165] *Id.* at 360 (Souter, J., dissenting).

[166] 42 U.S.C. § 1973(c).

a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."[167] Thus, following *Beer*, retrogression would become the hallmark of the preclearance inquiry.

This is an outlandish conclusion because it does not even pretend to comport with the structure of the statute and the intent of Congress. 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."[168] 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."[169] 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.[170]

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 refute this central premise of the Act.

Yet to the Court, "this is simply an untenable construction of the text."[171] Not only is the Court's reading of the Act necessitated

---

[167] *Bossier Parish II*, 528 U.S. at 329.

[168] *1965 House Hearing*, *supra* note 7, at 60 (Attorney General Katzenbach).

[169] *1965 Senate Hearing*, *supra* note 7, at 172.

[170] *1965 House Hearing*, *supra* note 7, at 399.

[171] *Bossier Parish II*, 528 U.S. at 329.

by the language of the statute, the Court argues, but a contrary reading of the purpose prong as reaching non-retrogressive 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."[172] And this might really be the crux of the matter, irrespective of any congressional intent. Had Congress really intended to reach non-retrogressive 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 jurisdictions? 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.[173] But this hardly offers any persuasive support. And further, the retrogression standard was not a concession to any "serious federalism costs," 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. To be sure, the Court does not spend any time defending this claim.

In the end, the Court offered a lawyerly brief, chock 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;"[174] or the case would "involve an unusual fact pattern,"[175] or contrary language would be "pure dictum."[176] 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.

---

[172] *Id.* at 336.

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

[174] *Id.* at 330 (referring to Richmond v. United States, 422 U.S. 358 (1975)).

[175] *Id.* at 339 (referring to Pleasant Grove v. United States, 479 U.S. 462 (1987)).

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

3. Georgia's Misadventures Come to an End: *Georgia v. Ashcroft*

If *Beer* and the *Bossier Parish* cases show the beauty of counting to five, a recent case, *Georgia v. Ashcroft*,[177] 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 – persona.[178] The doctrinal terrain prior to *Georgia* bears repeating: a voting change that discriminates against voters of color must be precleared if non-retrogressive.[179] In fact, the retrogression inquiry cares little about how unconstitutional the challenged plan may be; it only cares about whether the plan "preserves 'current minority voting strength.'"[180] The Court in *Bossier Parish* reached this conclusion on the strength of the statutory language,[181] and for good measure; 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"[182] 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."[183] 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.[184]

---

[177] 539 U.S. 461 (2003).

[178] *See* Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004).

[179] *See* Reno v. Bossier Parish School Bd., 528 U.S. 320, 341 (2000).

[180] *Georgia*, 539 U.S. at 477 (citing City of Lockhart v. United States, 460 U.S. 125, 134 n.10 (1983)).

[181] *Bossier Parrish*, 528 U.S. at 328-33.

[182] *Georgia*, 539 U.S. at 479.

[183] *Id.*

[184] *See id*. at 482.

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. 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.[185]

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 unlikely than originally presumed. Under the law as it now stands, it is clear that very few plans will be fail to gain preclearance.

Yet, for my purposes, *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 an expansive account of political life in 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

[185] *1965 Senate Hearings*, *supra* note 7, at 237.

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 five of any remaining substantive content. Looking back to the early congressional debates and the clear goals of the Act, and when thinking about the misadventures in the redistricting terrain during the 1990's in North Carolina, Texas, and Georgia, to name a few leading examples, it is not clear whether this is such a bad thing after all.

IV. Conclusion: The Ebbs and Flows in Voting Rights Law, and Looking Ahead to Reauthorization

The previous Part offered a simple and straightforward lesson: the substance of the Act has ebbed and flowed in accordance with the Court's composition and its predetermined notions of congressional powers and the natural reach of the Act. In the early years, the Court stepped aside and offered a broad reading of congressional powers and the reach of the Act. This posture was in synch with the legislative history and congressional wishes; in light of the many uncertainties surrounding the Act and its constitutionality, Congress drafted a statute in broad and forgiving language. The Court in the early years of the Act followed the congressional script and behaved in true Dahlian fashion, as a member of the national policy-making coalition. The Court could have stood in the way of Congress and civil rights, to be sure, but it seldom does so, and the mid-1960's were not an exception to this rule.

The election of President Nixon's election in 1968 marked a period of retrenchment on civil rights. This changing posture is reflected during the 1969 reauthorization debates in Congress. These hearings saw Attorney General Mitchell speak on behalf of the administration and defend its push to expand the reach of the Act nationwide. The Attorney General disputed this characterization, of course; as he repeated numerous times during his testimony, the administration's position should not be interpreted as a retrenchment on the promise, but simply as a way by which to apply the tenets of the Act on a fairer basis. But many members of Congress remained unpersuaded. To them, the administration was simply following through on its Southern Strategy, a promise to the Southern states to turn back on the goals of the Voting Rights Act.

Congress did not agree with the administration on this key issue of coverage and extended the Act for another five years virtually unchanged. But supporters of the administration's goals would not have to wait long. In the case of *Beer v. United States*, and in true Dahlian fashion, a Supreme Court majority – with 3 new Nixon appointees in tow – began to restrict the scope of the Act through narrow interpretations of the statutory language. It mattered little that neither the text nor the legislative history offered much support for these new and unforgiving interpretations of the statute. This was to be expected, as the national mood had clearly shifted ten years after conditions had proven to be ideal for passage of a strong voting rights bill.

To be sure, the pendulum swung again towards broad interpretations of the statute; the case of *Gingles v. Thornburg*, for example, may be considered one such instance, and *U.S. v. Board Of Commissioners of Sheffield, Alabama*,[186] decided in 1978, is clearly another. In the 1990's, the pendulum swung back with a vengeance; in case after case, from *Presley v. Etowah County*[187] to *Shaw v. Reno*[188] and *Miller v. Johnson*[189] to the *Bossier Parish* cases, the Court once again interpreted the statutory language in narrow fashion. As the Court adjusts to its new membership and looks ahead to the coming reauthorization battles, and if its behavior is any indication, the national mood is clearly against expansive, intrusive interpretations of the Act.

This development has been nothing short of ironic. Public discourse is often filled with talk of strict constructionism and judicial activism. The debate often fails to cross party and ideological labels, with so-called strict constructionists often found right of center and those who believe in the notion of a living Constitution found to the left. In recent days, for example, Justice Scalia referred to those who refer to the Constitution as a living document as "idiots."[190] Yet, as this Article argues, the life of the Voting Rights Act in Court has turned this orthodoxy on its head. Congress clearly wished for the Court to expand the scope of the Act aggressively, to the limits of constitutional interpretation, and the Court in the early years did precisely that.

---

[186] 435 U.S. 110 (1978).

[187] 502 U.S. 491 (1992).

[188] 509 U. S. 630 (1993).

[189] 515 U.S. 500 (1995).

[190] *Scalia Raps 'Living Constitution'*, http://www.cbsnews.com/stories/2006/02/14/supremecourt/main1315619.shtml (last visited March 2, 2006) ("You would have to be an idiot to believe that. The Constitution is not a living organism, it is a legal document.")

But these early examples proved to be exceptions rather than a matter of course, and soon enough Congress could no longer count on the Court to carry out its statutory purposes.

As we look to 2007 and the looming reauthorization battle, it is clear that Congress must be clear in its intentions. Whatever Congress wants done, it must explicitly state as part of the congressional record and the language of the statute. Otherwise, and if the life of the Act is any indication, Congress must be content with the likely possibility that the Court will read the resulting congressional handiwork narrowly. To be sure, and if the *Bossier Parrish* cases are any indication, it may be said that Congress does not stand a chance, as the Court will do with the statute whatever it decides to do. Nothing less can be expected from an institution that seldom deviates from the national mood and larger trends in public opinion. And yet, at least if it wishes to have a clear say during the early years of a reauthorized Act, it should be amply clear that Congress must say what it means and mean what it says. For, if Congress leaves it up to the Court, it might not like the results it gets.