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JUDICIAL ACTIVISM AND THE INTERPRETATION OF THE VOTING RIGHTS ACT

*Luis Fuentes-Rohwer**

INTRODUCTION

Talk of “judicial activism” is all the rage in modern American politics. On the eve of his nomination of Elena Kagan to replace Justice John Paul Stevens on the United States Supreme Court, President Barack Obama joined the debate and offered the following view:

Well, I mean, here’s what I will say. It used to be that the notion of an activist judge was somebody who ignored the will of Congress, ignored democratic processes, and tried to impose judicial solutions on problems instead of letting the process work itself through politically. And in the ’60s and ’70s, the feeling was, is that liberals were guilty of that kind of approach.

What you’re now seeing, I think, is a conservative jurisprudence that oftentimes makes the same error. And I think rather than a notion of judicial restraint we should apply both to liberals and conservative jurists, what you’re seeing is arguments about original intent and other legal theories that end up giving judges an awful lot of power; in fact, sometimes more power than duly-elected representatives.

And so I’m not looking at this particular judicial nomination through that prism alone, but I think it is important for us to understand that judicial—the concept of judicial restraint cuts both ways. And the core understanding of judicial restraint is, is that generally speaking, we should presume that the democratic processes and laws that are produced by the House and the Senate and state legislatures, et cetera, that the administrative process that goes with it is afforded some deference as long as core constitutional values are observed.¹

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¹ See Jamie Dupree, *Obama Meets the Press*, JAMIE DUPREE’S WASH. INSIDER (Apr. 28, 2010, 10:39 PM), http://blogs.ajc.com/jamie-dupree-washington-insider/2010/04/28/obama-meets-the-press/?cxntfid=blogs_jamie_dupree_washington_insider.

President Obama defined judicial activism as a lack of deference to the political branches.² Only when the political branches infringe upon “core constitutional values” are courts justified in overturning legislative outcomes. But this definition was not very helpful. Not only did President Obama fail to define what these core values are, but, more importantly, any attempt to define them is bound to end up in utter failure. This is the arena where the culture wars are played out.

President Obama’s trite description is unsurprising; “judicial activism” is a terribly misunderstood concept. It is most often used as a term of opprobrium, to signal disapproval with the outcome of a specific case. As generally understood today, the term is most often deployed by conservative politicians and commentators as part of a political strategy, not a serious argument, against the perceived excesses of liberal judges. The contrast is, of course, the conservative jurist as a paragon of judicial restraint. But again, these are labels, not arguments, and empty labels at that.

In recent years, scholars have begun to challenge this orthodoxy.³ These challenges take two general approaches. One approach is to sort through definitions of judicial activism and restraint while offering a new definition. These accounts implicitly challenge the conventional wisdom, which reserves the judicial activism label for liberal judges while equating judicial restraint with conservative judges. A second approach confronts the conventional wisdom head on, concluding that conservative and liberal judges cannot be easily catalogued under the activism/restraint rubric. Take, for example, President Obama’s definition of “restraint” as deference to the political branches.⁴ Neil Siegel persuasively argues that neither conservative nor liberal judges defer as a matter of course. Accordingly, the question is not why conservative judges generally defer while liberal judges do not, because this is a myth. Instead, the question to ask is why conservative and liberal judges decide to defer when they do.⁵

This Article addresses Siegel’s question as applied to the Voting Rights Act (Act). This is a statute with a very puzzling history.⁶ Consider first the constitutional question at the heart of the Act. From the moment the Court first decided the constitutionality of the Act in the

² See *id.*

³ See Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Neal S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

⁴ See Dupree, *supra* note 1.

⁵ See Siegel, *supra* note 3, at 584.

⁶ See Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697 (2009).

Katzenbach cases,⁷ it upheld the statute in the face of strong counterfactuals as well as recent legal precedent to the contrary. This posture of deference has continued through the various legal challenges to the Act.⁸ In contrast, the Court has interpreted the language of the Act dynamically, often in total disregard to the text of the law or the intent of Congress.⁹ This is an area of the law, in fact, that offers a stark example of judicial activism on steroids.¹⁰

The Roberts Court appears poised to unsettle this longstanding narrative. By all accounts, the Court has the constitutionality of the Act in its sights. It is only a matter of time before the conservative Justices strike down the special provisions of the Act.¹¹ In the recent case of *NAMUDNO v. Holder*, for example, even as it took great pains to avoid the constitutional challenge, the Court explained that the Act “raise[s] serious constitutional questions.”¹² It is hard to read the oral argument in *NAMUDNO* and not conclude similarly.¹³ One way to explain this move on the part of the Court is by invoking the post-racial storyline that has surfaced since the election of President Obama and which informs this Symposium. This is the argument that we now live in a post-racial world, a society where race no longer matters. Whether one agrees or not with this argument, the real question is one of epistemic authority; that is, which institution should decide whether we now live in a world where the Voting Rights Act is no longer needed? To ask this question, this Article ultimately argues, is to answer it. Put another way: Were the conservative Justices to strike down the special provisions of the Act, could such a move be understood as something other than judicial activism?

This question focuses needed attention on the activism/restraint debate as well as the difficult constitutional questions posed by the

⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 383 U.S. 641 (1966).

⁸ See *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 271 (1999).

⁹ See Fuentes-Rohwer, *supra* note 6.

¹⁰ See *id.*

¹¹ See David G. Savage, *Voting Rights Act Is Upheld*, L.A. TIMES, June 23, 2009, at 1, available at <http://articles.latimes.com/2009/jun/23/nation/na-court-voting23>.

¹² 129 S. Ct. 2504, 2513 (2009).

¹³ See, e.g., Transcript of Oral Argument at 31, *Nw. Austin Mun. Util. Dist. No. One (NAMUDNO) v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322), 2009 WL 1146055 (Roberts, C.J.) (“Well, let me focus on that historical aspect. Obviously no one doubts the history here and that the history was different. But at what point does that history seek—stop justifying action with respect to some jurisdictions but not with respect to others that show greater disparities?”); *id.* at 34 (Kennedy, J.) (“But yet—yet the Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments than the other. And does the United States take that position today?”); *id.* at 36 (Alito, J.) (“Wouldn’t you agree that there is some oddities in this coverage formula? Isn’t—is it not the case that in New York City the Bronx is covered and Brooklyn and Queens are not?”).

Voting Rights Act. These two reasons alone make this a question worth asking. This Article is more interested in a third reason: how this question helps contextualize arguments about a post-racial United States. Taken to their logical extreme, these arguments counsel for the dismantling of the civil rights movement and its “crown jewel”¹⁴—the Voting Rights Act. The question for the future is whether the Court is the proper institution to do so.

This Article has three parts. Part I considers the debate over the meaning of judicial activism. This Part argues that the best understanding of judicial activism focuses on the institutional aspects of the term. An “activist” court, in other words, is not necessarily a court that gets a case “wrong” in a Platonic sense. Rather, activism must be measured as part and parcel of the adjudicating court’s relationship with the political branches. Part II applies the lessons of the previous Part to the Voting Rights Act. This Part examines the Court’s historical handling of the statutory language as well as the constitutionality of the statute, and argues that under any metric, judicial activism is not reserved for liberal Justices. Part III concludes by briefly considering some important lessons for the future.

I. HOW TO DEFINE JUDICIAL ACTIVISM

The concept of “judicial activism” is difficult to define with any precision. An activist court is a court unwilling to defer to legislative wishes, or a court that rewrites statutes or interprets constitutions in accordance with a judge’s own goals and policy preferences.¹⁵ This Part parses through the burgeoning scholarship on judicial activism and considers some of the leading definitions of the term. It then offers a definition of its own.

A leading definition of judicial activism posits a judge who allows her personal views to control the outcome of a case.¹⁶ This is an attractive way to define judicial activism because such a judge does not further the rule of law value at the heart of the judicial function, but instead thwarts it. Or, in the words of Senator Jeff Sessions, a leading Republican in the Senate Judiciary Committee, an activist judge is “a

¹⁴ Pres. Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm>; see Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1594 (2002) (describing the Act as the “crown jewel of the Second Reconstruction”).

¹⁵ See Marshall, *supra* note 3.

¹⁶ See, e.g., REPUBLICAN NAT’L COMM., 2008 REPUBLICAN PLATFORM 19 (2008), available at <http://www.docstoc.com/docs/2016567/The-2008-Republican-Platform> [hereinafter 2008 REPUBLICAN PLATFORM].

judge who allows their personal views to override their commitment to the law.”¹⁷ This definition also formed part of the 2008 Republican Party platform.¹⁸

This is one of the leading definitions of judicial activism for good reason. Any judge who allows her personal preferences to override her best reading of the law must be an activist judge. This Article does not adopt this definition for at least two reasons. First, one need not be a devout follower of the attitudinalist school to agree that political ideology infects judicial decision-making.¹⁹ A better argument views judges as strategic actors in pursuit of their preferred policy goals.²⁰ The strategic considerations involve ideology and the judges’ preferred reading of the law; yet they also include the judges’ assessment of the political branches and of public opinion. This is because a court too far ahead or behind of public opinion risks being ignored, or even defied.

Unsurprisingly, the strategic model knows no party or politics; liberal and conservative judges alike behave strategically. Thus, if activism is defined as a judge acting strategically in pursuit of her policy goals, then all judges are activist and the label is emptied of any helpful meaning. Activism, in that sense, means nothing.

Second, even if one accepts the view that not all judges pursue their preferred policy goals, it is still true that the “law” is far more indeterminate and elastic than the activism-as-personal-preferences definition allows. Particularly with respect to the types of cases that reach the United States Supreme Court, a sharp separation between the external legal constraints and the personal views of the Justices is simply difficult, if not downright impossible.²¹ The United States Constitution is far more indeterminate than that; its language is subject to more than one sensible interpretation. This is why both major political parties, the Democrats and the Republicans, are able to fashion constitutional visions that reflect the views and values of their members while simultaneously professing fidelity to the same document.²² This is also why a definition of judicial activism as a failure to adhere to the law ultimately fails. All too often, the contending sides cannot even agree on what the law in fact demands.

¹⁷ Kirk Victor, *Court’s in Session*, NAT’L J., May 23, 2009, at 57.

¹⁸ See 2008 REPUBLICAN PLATFORM, *supra* note 16, at 19.

¹⁹ The attitudinal model argues that the justices vote in accordance to their own ideological preferences. According to Professors Segal and Spaeth, for example, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).

²⁰ LEE EPSTEIN & JACK WALKER, *THE CHOICES JUSTICES MAKE* (1997).

²¹ See RICHARD A. POSNER, *HOW JUDGES THINK* 47 (2008).

²² See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

For a recent example, look no further than the *Citizens United*²³ case. For those who agree with the decision, including Republicans and business and conservative leaders, this is an act of judicial statesmanship of the first order, the upholding of First Amendment values in the face of an entrenched legislature.²⁴ To the critics, which include President Obama and Democrats, this is a clear example of conservative judicial activism, a case where the conservative majority on the Court boldly replaced legislative compromises with its own policy views about what the campaign finance landscape must look like.²⁵ How best to interpret *Citizens United*? Should the case be interpreted as an activist decision or as the proper exercise of judicial power? More importantly, the First Amendment, which requires that “Congress shall make no law . . . abridging the freedom of speech,” does not help formulate an answer to this question.²⁶

A second leading definition of judicial activism is that of a court refusing to properly defer to the political branches.²⁷ Based on this view, courts must defer as a matter of course, and any refusal to defer subjects the offending court to the charge of activism. This is true as a matter of both statutory and constitutional interpretation. When deciding whether a law does not exceed the powers of Congress as enumerated in the Constitution, for example, a default deference rule demands that the reviewing court allow the law to stand absent exigent circumstances. The recent federalism revolution offers an inimitable example of this point. The conventional wisdom post-1937 counsels for deference to Congress on the scope of the commerce power. Any retrenchment from this posture of deference is often understood as an example of judicial activism. Leading constitutional theorists often point to the practice of judicial review, particularly a court’s striking down of legislative enactments, as quintessentially activist.²⁸

In the context of statutory interpretation, a court is considered activist when it ignores the text of the statute under review, or when it disregards the intent of the enacting legislature. In the words of Judge Frank H. Easterbrook, an activist court “construe[s] the statute to do something other than what it says—something perhaps more congenial

²³ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

²⁴ See, e.g., Hans Von Spakovsky, *Citizens United v. FEC: A Landmark Decision in Favor of Free Speech*, *FOUNDRY* (Jan. 21, 2010, 7:34 PM), <http://blog.heritage.org/2010/01/21/citizens-united-v-fec-a-landmark-decision-in-favor-of-free-speech>.

²⁵ See, e.g., *President Obama on Citizens United: “Imagine the Power This Will Give Special Interests Over Politicians,”* *WHITE HOUSE BLOG* (July 26, 2010, 3:07 PM), <http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit>.

²⁶ U.S. CONST. amend. I.

²⁷ See, e.g., Dupree, *supra* note 1.

²⁸ See, e.g., RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 320 (1996).

to the judge's view of wise policy."²⁹ As this Article will explain, the Supreme Court's interpretations of the Voting Rights Act are best understood as doing exactly that. This is a fitting critique not only of the Warren Court, but also of the Rehnquist and Roberts Courts.

The problem with this second definition should be obvious. As aforementioned, to define judicial activism as the lack of deference to the political branches is to brand the Supreme Court as an activist institution. This is the reading often ascribed by critics to the Court's decisions in *Roe*³⁰ and *Kelo*.³¹ In contrast, these same critics hail *Heller*³² and *Parents Involved*³³ as legitimate intrusions into the workings of the political process. The problem is that a legitimate, neutral principle cannot be found to catalogue these opinions consistently. Rather, as Neil Siegel writes, "Republican deference rhetoric . . . reduces to the assertion that Republicans possess a substantive constitutional vision and want judges to express that vision."³⁴ There is nothing wrong with that, of course. The greater lesson is that deference rhetoric boils down to whose ox is being gored.

A third approach to defining judicial activism eschews any single definition and instead offers an index of activism. This is what Craig Green terms the "smorgasbord" approach.³⁵ Indices of activism include the failure to follow text, history, or judicial precedent; the readiness to exercise broad remedial powers; the willingness to issue "maximalist" holdings rather than "minimalist" ones; or, *inter alia*, a court's pursuit of partisan policies.³⁶ This is a useful approach when trying to compare activism across eras and between courts. It is not quite as helpful when trying to define judicial activism for its own sake, nor is it helpful as a larger, enduring definition. This is because this approach reinforces the perception that the term is in fact incoherent.³⁷ Unless we are careful, this approach also threatens to shift focus away from the concept of judicial activism as an institutional feature of judicial decisionmaking.³⁸

These definitions of judicial activism are helpful in that they focus attention on what courts actually do. If used properly, they also allow for comparisons within courts and between judicial eras. The problem, however, is that debates over judicial activism all too often fail to consider the courts as institutions within a separation of powers scheme

²⁹ Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1404 (2002).

³⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

³¹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

³² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

³³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

³⁴ Siegel, *supra* note 3, at 588.

³⁵ Green, *supra* note 3, at 1219.

³⁶ *See id.*

³⁷ *See id.* at 1220.

³⁸ *See Young, supra* note 3, at 1163.

across time. That is, an activist court is not simply a court that overrules precedent, overturns statutes, or refuses to consider the text or history of a particular constitutional provision. There will be times when doing these things, such as overruling precedent or statutes, will be necessary and might even qualify under the rubric of judicial restraint.³⁹ It is far too simple and ultimately unhelpful to equate judicial activism with aggressive review, and judicial restraint with deference to political branches. Instead, any definition of judicial activism and of restraint must take into account the courts' proper institutional role, and whether a court chooses to increase or decrease its authority vis-à-vis the political branches or other courts, past and future.⁴⁰

In saying this, it is important to underscore the fact that debates over a court's activism must shy away from generalities and instead examine its component parts.⁴¹ The debate should not be about deference in and of itself, but about how much authority a court chooses to allocate to itself as opposed to the political branches, the bureaucracy, or other courts. As we debate the different modes of interpretation—whether textualism, originalism, living constitutionalism, and the like—it is important to keep this conceptualization in mind. These various interpretive modes, standing alone, tell us nothing about a court and its alleged activism. Rather, it is imperative to think about how these modes are deployed by particular courts as a way to allocate constitutional authority. In making sense of a decision, context and historical setting must also play a role.

II. THE EVOLUTION OF THE VOTING RIGHTS ACT AS AN EXERCISE IN JUDICIAL ACTIVISM

Cries of judicial activism are often partisan attacks against particular courts or decisions. The Warren Court remains the epitome of judicial activism, the standard against which all subsequent courts are measured. This Article does not attempt to refute this orthodoxy, at least not directly. Rather, this Article examines the history of the Voting Rights Act in order to show that, at least in this particular area, the Warren Court hardly stands alone; every Court since, including the Roberts Court, has engaged in the same kind of activism when interpreting the language of the Act.⁴² This is true as a question of

³⁹ See Green, *supra* note 3, at 1227-30.

⁴⁰ See Young, *supra* note 3, at 1163.

⁴¹ See *id.*

⁴² This is to say, in other words, that these Courts are all subject to the charge of hypocrisy. See *id.* at 1173 (explaining that in order to support the charge of hypocrisy, "one would have to

constitutional powers or statutory interpretation, and this Part divides the discussion accordingly.

The first subpart considers the Court's handling of the constitutionality of the statute. At first blush, these cases appear to be perfect examples of judicial restraint. However, this is a far more interesting and complicated story. From the first time the Court addressed the constitutionality of the Act in *South Carolina v. Katzenbach*,⁴³ the Justices faced the question of how to allocate constitutional authority in this area. This was the question of legislative facts and the degree to which Congress must support its actions with actual findings on the record.⁴⁴ Although the Court concluded that the Act was indeed a constitutional exercise of congressional powers, it reached this conclusion only after explaining that the record proffered by Congress was sufficient to meet the constitutional test.⁴⁵ Ironically, Justice William J. Brennan took a different approach, arguing throughout the drafting process in *Katzenbach* that the Court should not weigh legislative facts at all.⁴⁶ Justice Brennan lost this argument, but if concerns over the upcoming challenge to the Act prove accurate, it appears he will be vindicated.⁴⁷

The second subpart appraises the Court's interpretations of the language of the Act. The conventional wisdom pins most of the blame for the aggressive expansions of the Act on the Warren Court.⁴⁸ But the conventional wisdom is wrong. Not only is the Warren Court hardly alone in interpreting the language of the Act creatively, but a persuasive case can be made that the Warren Court proved far more faithful to the wishes of Congress and the language of the statute than subsequent

show either that the Rehnquist Court is engaged in the same sorts of activism that characterized the Warren or Burger Courts, or that the kinds of activism that characterizes the current Court are as bad or worse on balance").

⁴³ 383 U.S. 301 (1966).

⁴⁴ See, e.g., William Z. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

⁴⁵ See *id.*

⁴⁶ See Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 108-09 (2007).

⁴⁷ This is because, in the words of Professors Post and Siegel, future courts could turn "hostile to ordinary forms of congressional fact finding, dismissive of the evidence Congress in fact gathered, and quick to demand new, resource-intensive, and counterproductive forms of inquiry." Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1, 16 (2003); see Fuentes-Rohwer, *supra* note 46, at 124-25.

⁴⁸ See *Holder v. Hall*, 512 U.S. 874, 892 (Thomas, J., dissenting) ("A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an 'undiluted' vote."); ABIGAIL THERNSTROM, *VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS* 47-72 (2009).

Courts.⁴⁹ This subpart makes two related points. First, it argues that the constitutionality of the Act has forced the Justices to think about how much they are willing to defer to the political branches on questions of policy and congressional powers. Ironically, while Justice Brennan so understood the question early on and was willing to defer in the mode of rationality review, the conservative Justices have not been quite so willing. Second, it contends that the Warren Court—and to some extent the Burger Court—was willing to engage in a colloquy with the political branches over the meaning of the Act. The Rehnquist Court broke with this posture.⁵⁰ The little evidence available about the Roberts Court suggests that it will likely side with the Rehnquist Court in its distrust of the political branches.

A. *The Constitutionality of the Act as a Question of Deference and Authority*

To consider the constitutionality of the Voting Rights Act is to immediately recognize the difficult constitutional questions it raises.⁵¹ Under section 4, the Act first brings select jurisdictions within its purview.⁵² These are known as covered jurisdictions. Once covered, these jurisdictions are then subject to the Act's special provisions, including the preclearance requirement. This means that these covered jurisdictions must preclear essentially any and all changes that affect their voting laws in any way.⁵³ These two provisions of the law raise many difficult constitutional issues.

Consider first the coverage formula. It was no secret back in 1965 that the worst voting rights violations were found in the Deep South, in Alabama, Mississippi, Georgia and Louisiana. These were the states with the worst examples of vote denial against their black residents, as seen both in the percentages of registered voters according to race as well as voting turnout.⁵⁴ These were also the states with the clearest

⁴⁹ See *infra* Part.II.B.2.

⁵⁰ See Fuentes-Rohwer, *supra* note 6, at 733.

⁵¹ This refers to the special temporary provisions of the Act, though in due course some of its other provisions—namely section 2—became quite difficult and contested as well.

⁵² Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973, 1973gg-8 (2006).

⁵³ More specifically, these covered jurisdictions must submit any proposed electoral changes to the Attorney General—or seek a declaratory judgment in the District Court for the District of Columbia—for a determination that the 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.” See *id.* §§ 1973a(c), 1973c(a).

⁵⁴ See U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 11-17 (1968), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf>.

anecdotal evidence.⁵⁵ Yet Congress could not simply single out these jurisdictions on the face of the statute. The question thus was: How could the federal government target its limited resources in constitutionally permissible ways?

President Lyndon B. Johnson and his Administration answered with the “Coverage Formula.” Under this formula, states would come under the Act’s coverage if they employed a literacy test as part of their registration procedures and either their voter turnout for the 1964 presidential election *or* if their 1964 voter registration percentages fell under fifty percent.⁵⁶ This formula brought the expected jurisdictions under the Act’s coverage—those from the Deep South, as well as South Carolina, Virginia, and select counties in North Carolina. Once a state became a covered jurisdiction, the special provisions of the Act applied in full force. For example, becoming a covered jurisdiction meant that poll watchers and poll registrars were appointed by the federal government to aid local poll workers and registration officials, literacy tests were immediately suspended, and, most importantly, the jurisdiction was subject to the Act’s preclearance requirement.

Critics of the Act had little trouble critiquing the coverage formula.⁵⁷ On its face, the fifty percent threshold looked arbitrary. Why not forty-five percent or fifty-five percent? Also, critics questioned the use of a literacy test as a proxy for actual findings of discrimination, especially in light of some notable exceptions from coverage. In other words, it was hard to justify the exclusion of Texas—site of the White Primary cases—or some counties in New York that had lower registration rates or voter turnout in the 1964 election on the one hand, and the inclusion of Alaska, which did not have a similar history of racial discrimination, on the other. Interestingly, criticism of the arbitrariness of the formula came from friendly quarters as well. According to Attorney General Archibald Cox, for example, “[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, since even this description covers Alaska as well as Alabama, it has exactly the same effect as the determinations now required to be made.”⁵⁸

⁵⁵ See, e.g., DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* (1978).

⁵⁶ See *id.*; see also 42 U.S.C. § 1973b(9)(b).

⁵⁷ See, e.g., *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 199 (1965) (statement of Sen. Samuel Ervin) (complaining that the coverage formula was “a cockeyed formula”); see *id.* at 281 (statement of Charles Bloch, Esq., of Macon, GA) (“The inference it seeks to draw is purely arbitrary; there is no rational relation to the premise, even if it be a fact, and the ultimate fact in issue . . .”).

⁵⁸ Memorandum from Solicitor General Cox to the Attorney General 1 (Mar. 23, 1965) (Justice Department Administrative History, Civil Rights, Lyndon B. Johnson Library).

More damningly, critics argued that the formula covered some jurisdictions that were free of racial discrimination in voting.⁵⁹ This is true as a practical matter, because no formula can possibly cut with surgical precision among states that discriminated on the basis of race and states that did not. In fairness, the formula never pretended as much. But if the Fifteenth Amendment prohibits racial discrimination in voting, could Congress, while enforcing this Amendment, designate areas of the country that have never discriminated as covered jurisdictions?

The preclearance requirement raised similarly difficult questions. According to section 5 of the Act, covered jurisdictions must submit to the Department of Justice—or seek a declaratory judgment in federal district court in D.C.—any changes to their voting laws. In turn, the reviewing body must ensure that these changes were not made with the intent to discriminate on the basis of race, nor would they have a discriminatory effect.⁶⁰ The reasons for this provision were obvious. According to the Attorney General:

[A]bsent a provision of this kind, you leave it open to a State to devise, if it can, some new method of 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.⁶¹

In asking covered jurisdictions to preclear changes to their voting laws, the Congress and the Johnson Administration pushed very hard against established constitutional norms. This is not to suggest that these arguments were insurmountable, nor that the Act was unconstitutional either then or now. Instead, this Article argues the far more limited point: that these were difficult constitutional questions. This is true irrespective of how one feels about the Act in general.

⁵⁹ See *Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 88 (1965) [hereinafter *1965 House Hearings*] (statement of Rep. William Cramer) (“What constitutional basis is there for that where the effect of it is obviously to strike down the State’s constitutional rights to fix voter qualifications in areas where no discrimination has been found to exist?”).

⁶⁰ Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2006).

⁶¹ *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 172, 237 (1965) [hereinafter *1965 Senate Hearings*] (statement of Nicholas Katzenbach, Att’y Gen. of the United States) (“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 court decrees.”).

In the end, the Warren Court upheld the constitutionality of the Act in *South Carolina v. Katzenbach*.⁶² Far more important than the case itself was the debate that took place behind the scenes between “wily”⁶³ Justice Brennan and Chief Justice Warren.⁶⁴ This was the debate over legislative findings. In the original draft of the opinion, delivered on February 23, 1966, Chief Justice Warren underscored the length of the congressional hearings and the extent of the evidence that Congress put in the record.⁶⁵ This evidence led the Chief Justice to conclude that “an insidious and pervasive evil . . . ha[s] been perpetuated in certain parts of our country.”⁶⁶ The Voting Rights Act was an appropriate response to this evil.

Justice Brennan sided with Chief Justice Warren from the moment the first draft was penned.⁶⁷ But from his first response to this draft, Justice Brennan underscored some important concerns about the larger implications of the arguments at the heart of the draft. As he wrote in the margins, “[i]t seems to me one thing to summarize the facts put before the legislature, and another to do what the Chief seems to be up to in this [section]—accepting the Congressional findings *because* they correspond to our own.”⁶⁸ Later in the draft, Justice Brennan similarly asked, “Do we judge statutes by [the number] of witnesses[,] length of hearings[,] unanimity of vote? The Chief is judging the legislative product as if it were a judicial one.”⁶⁹ He concluded his comments of the first part of the draft by asking, “[a]re we reviewing the sections, any more than we are the adequacy of the hearings?”⁷⁰

Justice Brennan lost this argument in *South Carolina v. Katzenbach*. However, in due time—five weeks, to be exact—the Court came to appreciate the import of his position. The case that honed in on this importance was *Katzenbach v. Morgan*.⁷¹ In *Morgan*, the Court examined section 4(e) of the Voting Rights Act, which barred the denial

⁶² 383 U.S. 301.

⁶³ This is Heather Gerken’s characterization of Justice Brennan, in the context of election law and the partisan gerrymandering cases. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 512 (2004).

⁶⁴ See Fuentes-Rohwer, *supra* note 46, 106-10.

⁶⁵ Chief Justice Warren, Original Draft of *South Carolina v. Katzenbach* 1 (Feb. 23, 1966) (Brennan Papers, Library of Congress, Box I:132, folder 6) (on file with author); Circulation Sheet for *South Carolina v. Katzenbach* (Feb. 23, 1966) (Warren Papers, Library of Congress, Box 618, folder 2) (on file with author).

⁶⁶ *Katzenbach*, 383 U.S. at 309.

⁶⁷ Chief Justice Warren, Original Draft of *South Carolina v. Katzenbach* 25 (Feb. 23, 1966) (Warren Papers, Library of Congress, Box 618, folder 2).

⁶⁸ Chief Justice Warren, Original Draft of *South Carolina v. Katzenbach* 25 (Feb. 23, 1966) (Brennan Papers, Library of Congress, Box I:132, folder 6) (Justice Brennan’s handwritten notes on draft).

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 11.

⁷¹ 384 U.S. 641 (1966).

of the right to vote to any person who had completed a sixth grade education in an “American flag” school on account of failing to pass an English literacy test. The purpose of this section was to enfranchise the Puerto Rican population in New York City. It was also obvious that this section did not have the evidentiary support that the Court had highlighted in *Katzenbach*. Justice Brennan was concerned with whether the Court should strike down this section for lacking a strong evidentiary record, or any record at all, for that matter. Justice Harlan argued in dissent that such a strong evidentiary record was needed, citing *Katzenbach* for support.⁷² But the Court majority disagreed, concluding that it was up to Congress “to assess and weigh the various conflicting considerations.”⁷³ This was true deference to the legislative branches, on the recognition that Congress “brought a specially informed legislative competence.”⁷⁴

These cases help clarify why the question of deference tends to unnecessarily complicate matters. Both *Katzenbach* and *Morgan* can be understood as cases where the Court deferred to legislative judgments, but the cases could not be any more different from one another. In *Katzenbach*, the Court deferred only *after* agreeing that the record was sufficient to support the legislative judgment.⁷⁵ This is the type of deference that lasts only for as long as the Court wishes to intervene. In other words, the Court deferred while holding onto its authority. In contrast, the Court’s deference in *Morgan* was deference in the true sense of the term. This deference granted Congress a great deal of room to correct any perceived violations under the Reconstruction Amendments.⁷⁶ This was deference in the order of low-level rationality review, understood as a question of institutional competence.

The promise of *Morgan* ended the very next time the Court could invoke it.⁷⁷ Instead, the constitutionality of the Act has hinged on the judicial weighing of facts as applied to the real world as the Justices understand it. That is, following *Katzenbach*, the Court has chosen to remain at the center of the debate to decide whether the congressional record is sufficient to justify the existence of the Act.⁷⁸ Ironically, this

⁷² *Id.* at 667 (Harlan, J., dissenting) (contending that the holding in *South Carolina* hinged on the existence of a “voluminous legislative history”).

⁷³ *Id.* at 653 (majority opinion).

⁷⁴ *Id.* at 656.

⁷⁵ A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 329, 365 (2001).

⁷⁶ See Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966).

⁷⁷ See *Oregon v. Mitchell*, 400 U.S. 112 (1970); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 714 (1996).

⁷⁸ See *City of Rome v. United States*, 446 U.S. 156 (1980).

is the preferred approach of many of the conservative Justices, from Justice Marshall Harlan and Chief Justice William Rehnquist to Justice Potter Stewart and Justices Antonin Scalia and Clarence Thomas.⁷⁹ This is judicial activism understood as a question of constitutional authority and as a refusal to cede power to the political branches. This view is far more activist than the *Morgan* approach because in each subsequent constitutional challenge, the Justices must decide for themselves how much evidence is sufficient, and when the congressional findings are insufficient to support the constitutionality of the statute. Nobody, except the Justices, knows how much evidence is sufficient. Ironically, at least in this area, we find Justice Brennan, often derided as the epitome of judicial activism, as the epitome of judicial restraint.

B. *More of the Same: The Roberts Court Interprets the Voting Rights Act*

The previous subpart argued that the Court's apparent deference to Congress in upholding the constitutionality of the Act must be understood as an exercise in judicial activism. From the moment the Justices first confronted the constitutionality of the Act, they faced a choice: Would they fully defer to the congressional policies and subject the Act to low-level rationality review, or would they offer faux-deference and subject the Act to heightened rationality? This was a crucial choice and would determine how the Court would handle the constitutional question into the future. The Justices chose faux rationality and the chance to second-guess the choices of Congress.

This subpart similarly argues that the Court's interpretations of the statute must also be placed on the activist side of the continuum, contrary to conventional wisdom. In fact, this subpart argues that the conservative Justices interpret the Act as aggressively and creatively as the liberal Justices. This subpart offers two related arguments. First, every Court that has interpreted the language of the Act has done so creatively, sometimes even in disregard of the clear statutory language, the intent of Congress, or the purpose of the statute. Dynamic interpretation in this area is not reserved for the more liberal Justices.

Second, the Court's earlier interpretations of the statute were more faithful to the intent of Congress in combating racial discrimination in voting. With the Act, Congress and the Lyndon B. Johnson Administration initiated a colloquy with the Court about the scope of

⁷⁹ See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *City of Rome*, 446 U.S. at 207 (Rehnquist, J., dissenting); *Katzenbach*, 383 U.S. at 667 (Harlan, J., dissenting).

voting rights policy. Along the way, the policy branches sent clear signals that they would welcome fine-tuning, and sought to take the protections of the Act as far as constitutionally possible. The Warren Court welcomed this role. Beginning in the mid-1970s, however, the Court moved away from this approach. In this vein, this subpart contends that the conservative Justices may be understood as being far more activist in their interpretations of the Act than the liberal Justices. Based on a reading of the congressional record, this subpart argues that broad interpretations of the language of the Act are examples of restraint, while narrow statutory interpretations are examples of judicial activism.

1. Activism as “Creative Interpretation”

The first real lesson of the Court’s interpretations of the Act is that the Justices choose their interpretive tools selectively. The Justices are so selective, in fact, that sometimes even the language of the statute takes a back seat to the Justices’ personal views of voting rights policy.⁸⁰ This is true of the Warren Court’s initial foray into this area in *Allen v. State Board of Elections*⁸¹ and its companion cases, as well as the evolution of the Act as a whole. All subsequent Courts, including the Roberts Court, have interpreted the Act in this manner.⁸²

Allen symbolizes the Court’s historic interpretive approach to the Act. This is the standard by which all subsequent cases are measured. To conservative critics, this was where the Court began to turn away from the intent of Congress and the true purpose of the Act.⁸³ This Article instead argues that *Allen* was hardly an outlier. In fact, *Allen* conformed with congressional wishes as understood and debated in 1965. The case posed three procedural questions. First, did the Act create a private cause of action such that individual litigants may act as private Attorney Generals? The Court held that the Act created a private cause of action because to decide otherwise would mean that “[t]he achievement of the Act’s laudable goal could be severely hampered” and the promise of section 5 “might well prove an empty promise.”⁸⁴ The Court reached this conclusion on pragmatic grounds, fully cognizant of the limited resources of the Department of Justice.⁸⁵

⁸⁰ See Fuentes-Rohwer, *supra* note 46.

⁸¹ 393 U.S. 544 (1969).

⁸² See Fuentes-Rohwer, *supra* note 46.

⁸³ See THERNSTROM, *supra* note 48, at 32-34.

⁸⁴ *Allen*, 393 U.S. at 556.

⁸⁵ *Id.*

To conclude otherwise would have meant that the government would not get the help it needed in enforcing the new law.

Second, could these private litigants bring suits in federal courts other than the District Court in the District of Columbia? This question seemed foreclosed by the clear language of the statute. Under section 14(b), “[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [section 5 of the Act].”⁸⁶ But the Court had other ideas. After all, it was one thing to force states and political subdivisions to march down to the nation’s capital to defend their voting changes, and quite another to demand that private litigants do the same. If the Court seriously believed that the Attorney General needed help in enforcing the Act, then these private litigants required access to their local federal courts. The Court got out of this bind in the following way. First, it held that the language of the statute required states to file suit in the District of Columbia because these suits ultimately determined whether the state’s changes had the purpose or effect of discriminating on the basis of race. Second, since, the suits by private litigants had a different goal—to determine whether the voting change under review came under the purview of the statute at all—the Court concluded that private litigants may file these suits in their local federal courts.

Third, must these local suits be heard by three-judge courts? In answering this question, the Court turned neither to the language of the statute nor its legislative history. Instead, the Court offered the following insight: “[I]n light of the extraordinary nature of the Act in general, and the unique approval requirement of [section] 5, Congress intended that disputes involving the coverage of [section] 5 be determined by a district court of three judges.”⁸⁷ This is far from the stuff of traditional statutory construction.

To be sure, the Court answered all three questions in ways that furthered the Act’s remedial purposes while lessening the impact on private litigants to bring suits across the coverage area. There is no denying that the Court interpreted the Act broadly and helpfully, in accordance with the intent of Congress and the Executive. These were muscular and expansive interpretations of the statutory language. But to call these conclusions “activist” would miss the mark. The Court in *Allen* did not expand its power in relation to the political branches, nor did it in any way curtail the discretion of the political branches to accomplish whatever was needed. Rather, these conclusions understood the history that led to the birth of the Act, and the need to stay ahead of future changes by jurisdictions unwilling to passively acquiesce to the demands of the Fifteenth Amendment. In other words, and as this

⁸⁶ 42 U.S.C. § 19731 (2006).

⁸⁷ *Allen*, 393 U.S. at 556.

Article argues more explicitly below, the Court was clearly on the side of Congress and the Executive Branch. These conclusions cannot be understood any other way.

The same is true of *Allen*'s substantive question. Under section 5 of the Act, only a "voting qualification or prerequisite to voting, or a standard practice or procedure with respect to voting" must be submitted to the Attorney General.⁸⁸ This meant that the Court in *Allen* dealt with the issue of determining the substantive scope of section 5, that is, the types of changes that covered jurisdictions must submit to the Attorney General. A very good answer, offered by Justice Harlan in dissent, argued that this language referred only to voting registration laws and laws to determine how to count cast ballots.⁸⁹ But the majority disagreed, holding instead that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."⁹⁰ In the face of statutory language that explicitly referenced laws with which "voters could comply," the Court concluded instead that "all changes, no matter how small, be subjected to section 5 scrutiny."⁹¹ These changes thus included, *inter alia*, changes from districted to at-large elections and new procedures for casting write-in ballots. Under *Allen*, the reach of the Act was soon extended to reapportionment plans,⁹² annexations,⁹³ and changing locations of polling places.⁹⁴

This is the more criticized portion of the opinion. To Justice Thomas, for example, *Allen* "marked a fundamental shift in the focal point of the Act."⁹⁵ Abigail Thernstrom similarly wrote that "*Allen* marked a radical change in the meaning of the [A]ct: the majority opinion had found a Fourteenth Amendment right to protection from vote dilution in a statute that rested unequivocally on the Fifteenth Amendment."⁹⁶ Due to the holding in *Allen*, in other words, the Act evolved from a statute that ensured that blacks would be able to register and vote freely—"the first truly effective vehicle for southern black enfranchisement"—to "the means by which political power is redistributed among blacks, whites, and (since 1975) Hispanics."⁹⁷

These are important criticisms, but they are ultimately off the mark. It is easy to read *Allen* as a classic Warren Court opinion, activist

⁸⁸ 42 U.S.C. § 1973c.

⁸⁹ See *Allen*, 393 U.S. at 583 (Harlan, J., concurring in part and dissenting in part).

⁹⁰ *Id.* at 565.

⁹¹ *Id.* at 568.

⁹² See *Georgia v. United States*, 411 U.S. 526 (1973).

⁹³ See *Perkins v. Matthews*, 400 U.S. 379 (1971).

⁹⁴ See *id.*

⁹⁵ *Holder v. Hall*, 512 U.S. 874 (1994).

⁹⁶ ABIGAIL THERNSTROM, WHOSE VOTES COUNTS: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 25 (1987).

⁹⁷ *Id.* at 27.

in its approach and creative in its interpretation of the relevant legal materials. This Article interprets *Allen* differently. The case stood at a critical juncture in the life of the Act, a moment in time when the impact of the Act would either wane or continue into the foreseeable future. The Court thus faced an important choice: It could interpret the Act narrowly—in line with the traditional voting rights narrative—or it could choose instead to further the goals and purposes of the Eighty-Ninth Congress and the Johnson Administration. More importantly, the Court could interpret the Act as it did, knowing that Congress would review its work in the months ahead. If Congress disagreed with the Court’s conclusions, in other words, the Act’s five-year sunset provision provided a built-in review mechanism. This is why, all things considered, this Article does not interpret *Allen* as an activist decision. The Court was not overriding congressional policies through judicial fiat, nor did it place itself above Congress as voting rights policymaker. To be sure, the Court offered creative interpretations of the statutory language. But if that fact, standing alone, brands the Court activist, then the Warren Court hardly stands alone, or so argues the remainder of this subpart.

In *Beer v. United States*, for example, the Burger Court concluded that the “effects prong” of the preclearance requirement was a “retrogression” inquiry.⁹⁸ Under any traditional tool of statutory construction, this is nothing short of a creative and inventive conclusion. The language of the statute codified the purpose-effect distinction at the heart of equal protection law. This is not to say that Congress had clear ideas about the scope and reach of the effect prong of section 5, but rather, that Congress simply intended to codify whatever the Fifteenth Amendment required. Section 5 merely attempted to move the constitutional inquiry pre-enactment; that is, before new laws would go into effect, while shifting the burden of proof to the jurisdictions trying to amend their laws. More important for the purposes of this Article is the way in which the Justices reached this conclusion. Rather than try to interpret the language of the statute, or even glean Congress’s intent in enacting section 5 originally, the Court looked instead to a passage buried within the 1975 House Report.

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that “the standard [under section 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

⁹⁸ 425 U.S. 130, 139-42 (1976).

process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting”⁹⁹

This is where the retrogression standard came from, buried within a House Report and from a passage that the Court did not even offer in full. The deleted passage made all the difference. It read: “in view of the political, sociological, economic, and psychological circumstances within the community proposing the change.”¹⁰⁰ Read in full, the House Report appears to track the constitutional inquiry as then understood, in cases such as *Whitcomb v. Chavis* and *White v. Regester*.¹⁰¹ But the Court had other ideas, and neither the statutory text nor the intent of Congress would get in its way. This would not be the only time.¹⁰²

The Rehnquist Court was also very creative when interpreting the Voting Rights Act. Three cases figure prominently. The first is *Reno v. Bossier Parish School Board*.¹⁰³ In an opinion authored by Justice Sandra Day O’Connor, the Court held that a determination by the Attorney General that a proposed change violates section 2 of the Act is not a legitimate reason to deny preclearance under section 5.¹⁰⁴ In other words, a covered jurisdiction may in fact violate federal law and yet receive approval under the Act for its proposed change. This holding flew in the face of repeated statements from Congress and regulations from the Attorney General.¹⁰⁵ The majority looked instead to the holding in *Beer*, and its retrogression standard, as talismanic. So long as a proposed change does not worsen the interests of voters of color,¹⁰⁶ the Attorney General must preclear the change, even if it violates section 2.

The second case answered a question set aside in the preceding *Reno* case.¹⁰⁷ At issue this time was the meaning of the word “abridge” as found in the Fifteenth Amendment and codified in section 5.¹⁰⁸ In an

⁹⁹ *Id.* at 141 (alteration in the original) (emphasis added) (quoting H.R. Rep. No. 94-196, at 60 (1975)).

¹⁰⁰ *Id.*

¹⁰¹ See Fuentes-Rohwer, *supra* note 6, at 733.

¹⁰² See *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (concluding for the first time that section 2 of the Voting Rights Act incorporates the intent standard of the Fifteenth Amendment); *United States v. Bd. of Comm’rs*, 435 U.S. 110 (1978) (concluding that a municipality is a “political subdivision” under the Voting Rights Act even though the Act explicitly defines “political subdivisions” as entities that register voters, and the municipality in this case did not); *Dougherty Cnty. Bd. of Educ. v. White*, 439 U.S. 32 (1978) (holding that a rule requiring employees to take an unpaid leave of absence when running for public office is a “standard, practice, or procedure with respect to voting” subject to the preclearance requirement of the Voting Rights Act).

¹⁰³ *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471 (1997).

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* at 483-85; see also Fuentes-Rohwer, *supra* note 6, at 237-38.

¹⁰⁶ See *Beer v. United States*, 425 U.S. 130 (1976).

¹⁰⁷ *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320 (2000).

¹⁰⁸ *Id.* at 333-34.

opinion authored by Justice Antonin Scalia, the Court repeated its earlier stance that the preclearance requirement is essentially a retrogression inquiry.¹⁰⁹ This meant that plans that were enacted with the proven intention to discriminate against voters of color had to be precleared so long as these plans were not retrogressive. This was not terribly persuasive,¹¹⁰ but that hardly mattered. As Justice David Souter wrote in dissent,

The Court has never held (save in *Beer*) that the concept of voting abridgment covers only retrogressive dilution, and any such reading of the Fifteenth Amendment would be outlandish. The Amendment contains no textual limitation on abridgment, and when it was adopted, the newly emancipated citizens would have obtained practically nothing from a mere guarantee that their electoral power would not be further reduced.¹¹¹

This is another way of saying that the Court majority had its own plans in mind, and neither the text of the statute nor the intent of Congress offered any meaningful resistance.

The third case is *Georgia v. Ashcroft*.¹¹² In this case, the Court held that retrogression under section 5 of the Act may not be based solely on the ability of voters of color to elect their candidates of choice. Rather, the inquiry must be far broader and include a host of factors and circumstances, including “the ability of minority 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.”¹¹³ This holding is not borne by the language of the statute nor the legislative history; crucially, it is not even supported by the Court’s own precedents. The holding makes sense only as a policymaking decision on the part of the five-member majority. This is their preferred view of the statute and, in particular, the preclearance inquiry. If this is not creative statutory interpretation, nothing is.

The Roberts Court offers the final piece of this picture. Unsurprisingly, as described in this Part, recent interpretations of the Act place this Court firmly within the story of creative interpretation. *League of United Latin American Citizens v. Perry*¹¹⁴ and *Bartlett v. Strickland*¹¹⁵ are but two recent examples. This subpart offers a third: *NAMUDNO v. Holder*.¹¹⁶ *NAMUDNO* was the latest challenge to the constitutionality of the Act. Pundits and scholars almost unanimously

¹⁰⁹ *Id.* at 337-42.

¹¹⁰ See Fuentes-Rohwer, *supra* note 6, at 737-39.

¹¹¹ *Bossier Parish II*, 528 U.S. at 360.

¹¹² 539 U.S. 461 (2003).

¹¹³ *Id.* at 479.

¹¹⁴ 548 U.S. 399 (2006).

¹¹⁵ 129 S. Ct. 1231 (2009).

¹¹⁶ 129 S. Ct. 2504 (2009).

agreed that the Court would finally strike down the Act. Instead, the Court disposed of the challenge, quite surprisingly, on statutory grounds and under its avoidance doctrine. It did so the following way: Under the terms of the statute, only states and political subdivisions may apply for bailout.¹¹⁷ The jurisdiction in question, the Northwest Austin Municipal Utility District Number One, was neither a state nor a political subdivision under the clear terms of the statute. Yet the Court explained that the terms of the statute may not be considered in isolation, or apart from prior case law. To the Court, “specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision.”¹¹⁸ This is another way of saying that the text of the statute was no match to the strategic concerns of the Justices. One can only speculate as to the reasoning behind this holding. What is known for sure is that the text of the statute, the legislative history, and even the congressional intent of the Act in general and the bailout provision in particular, counseled for a different result.¹¹⁹ But again, the Court had other plans.

If judicial activism is understood as judicial policymaking and creative statutory interpretation, the Act makes clear that the activist label cannot be reserved for the Warren Court alone. In fact, as the next subpart argues, it was the Warren Court that came closest to furthering the original goals of the statute.

2. Narrow Interpretation as Activism

A second lesson of the Court’s interpretation of the Voting Rights Act is that the script flips squarely on its head: The Warren Court, long considered a bastion of judicial activism and policymaking, was far more faithful to the intent of Congress and the purposes of the statute than subsequent Courts. In fact, if there is any story to tell here, it is that the conservative Justices are far more activist than the liberal Justices in overriding congressional wishes.

The argument begins with the congressional hearings in 1965. Throughout these hearings, the Johnson Administration sent a clear message that the proposed bill went as far as it thought that any legislation could go in light of relevant constitutional proscriptions. “I have indicated repeatedly,” the Attorney General conceded in response to a suggestion from the committee, “I am entirely sympathetic with doing so if we can find a constitutional means and a practical means of

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 2514.

¹¹⁹ *See Fuentes-Rohwer, supra* note 46.

doing so. I confess that my ingenuity has floored in that regard.”¹²⁰ And in response to a query from Senator Joseph Tydings, the Attorney General similarly explained that the Administration was

unable to draft a law where we could have the same objective criteria which [they] felt would stand up constitutionally and still cope with this kind of situation. . . . It wasn’t done from a desire to permit any discrimination in voting, but merely because we couldn’t devise a better law than this to deal with it.¹²¹

For this reason, Attorney General Peter Nicholas Katzenbach seemed willing at various times to let others try their hand at the problem. For example, in response to Representative Peter Rodino’s question as to 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,”¹²² Katzenbach replied, “[i]f 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.”¹²³ Similarly, in response to Representative William Cramer’s contention about the inadequacy of the legislation’s coverage, and particularly his question about whether Katzenbach “would not object to any member of this committee making an exploration in that area,” the Attorney General explained, “[a]nything that will be in this direction and make it constitutional, I am all for it.”¹²⁴ He repeated this sentiment throughout his testimony in both the House and the Senate hearings.¹²⁵ This willingness to consider different avenues of reform extended to the particular language of the statute.¹²⁶

¹²⁰ 1965 Senate Hearings, *supra* note 61, at 183.

¹²¹ *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”).

¹²² *Id.* at 49.

¹²³ *Id.*

¹²⁴ *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.”).

¹²⁵ *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.”).

¹²⁶ *See, e.g., id.* at 58 (Burke Marshall) (“The intention, Mr. Chairman, is what I stated. Perhaps the Committee will want to clarify the language.”); *id.* at 63 (Katzenbach) (“If you can

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 was a setting in which the relevant actors could focus on the goal at hand and how best to accomplish it. During his testimony on March 24, 1965, for example, Executive Director of the NAACP Roy Wilkins stated, “[a]ll 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.”¹²⁷ Representative John Lindsay similarly asked a few days earlier: “[W]ith 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?”¹²⁸ But Chairman Emmanuel Celler put it best; on the last day of the hearings and in reference to Joseph Rauh, Jr., then-counsel for the Leadership Conference on Civil Rights, he stated, “I have great respect for Mr. Rauh, but sometimes he is a stargazer, and that is a creditable term. But we must be practical.”¹²⁹ Congress could only go so far.

The real question, then, was how far Congress could go while remaining within legitimate constitutional limits. This is how this Article interprets the debate in Congress, and this is also how it interprets the final product, codified as section 5 of the Act. The language of the Act was broad and even somewhat vague, yet its purpose was clear: to fight the blight of racial discrimination and “to open the city of hope to all people of all races.”¹³⁰ This meant that the Court could interpret this language to the limits of constitutional law while remaining firmly within the intent of Congress and the Johnson

suggest, sir, language that makes it crystal clear what intimidation is, I would think that would represent a substantial improvement in the bill.”); *id.* at 85 (“Perhaps there is a better way of doing it, 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.”).

¹²⁷ 1965 House Hearings, *supra* note 61, at 403.

¹²⁸ *Id.* at 109.

¹²⁹ *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 [sic], 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.

¹³⁰ Lyndon B. Johnson, *We Shall Overcome*, in SPEECHES OF THE AMERICAN PRESIDENTS 637, 641 (Janet Podell & Steven Anzovin eds., 1988).

Administration. In other words, the Court could be as aggressive with this language as it needed to be, knowing that it had the full support of the political branches. Only the Constitution offered any limits on the Court.

This is precisely what the Warren Court did in *Allen* and in *Gaston County v. United States*.¹³¹ Particularly in *Allen*, the Court read the language of the Act broadly and, in so doing, opened itself to the accusation of activism. But the criticism is misplaced. Not only was the Court following Congress's lead, but Congress also approved of the Court's interpretations, and did so explicitly, that same year. During the 1969 extension hearings in the House, for example, Congressman William McCulloch explained:

Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement. I hope that the case of *Allen v. State Board of Elections*, decided by the Supreme Court on March 3, 1969, is the portent of change.¹³²

This is a remarkable statement from a member of Congress, expressing hope that a judicial ruling, rather than legislative amendments, would bring about the needed change. The Senate hearings similarly demonstrate how members of Congress welcomed, sometimes explicitly, sometimes not, the *Allen* ruling.¹³³

This is also why this subpart argues that the Court's change in posture beginning in 1975 was inconsistent with congressional wishes. Beginning with *City of Richmond* and *Beer*, the Supreme Court began a clear departure from its prior interpretations of the Act. More interesting for our purposes is how the Court decides these cases under the guise of statutory interpretation while paying little attention to the intent of Congress or the purposes of the statute. This is true even in cases such as *Beer*, when the Court professes to be doing exactly that: discerning the intent of Congress. At the very least, these cases are no different in their creative interpretations of the law. At worst, they are in direct tension with congressional wishes as stated in 1965 and by subsequent Congresses.

A useful way to understand the dynamic between Congress and the Court is to analogize the relationship to a dialogue between the branches about the proper direction of voting rights policy. This is an apt analogy because it focuses attention on the preeminent role played by Congress in enacting laws and its interaction with the Court as interpreter of the Constitution. The reading of the legislative history of the Act offered here posits Congress as encouraging this dialogue. In

¹³¹ 395 U.S. 285 (1969).

¹³² 1965 House Hearings, *supra* note 59, at 4.

¹³³ See, e.g., 1965 Senate Hearings, *supra* note 61, at 132.

turn, the cases amply demonstrate that the Justices are not similarly disposed to engage in this dialogue. At the very least, the cases make clear that talk of activism is simply off-base and empty. Activism is in the eye of the beholder.

CONCLUSION—A POST-RACIAL SOCIETY?

Nobody likes a judicial activist. A judicial activist is a judge who allows his personal preferences to callously trump legislative enactments. The charge is most often associated with liberal judges, with the Warren Court serving as the exemplar. But the charge is misplaced and open to the charge of hypocrisy. If the example of the Voting Rights Act serves as guide, the conservative Justices are no strangers to creative statutory interpretation. The three recently filed cases—*LaRoque v. Holder*,¹³⁴ *Shelby County v. Holder*,¹³⁵ and *Georgia v. Holder*¹³⁶—further suggest that the Act is on life support. This Article offers no predictions about what the Court will do. Instead, it applies the lessons of the Court's handling of the Act to the future. Three lessons stand out.

The first lesson looks back to the first time the Court addressed the constitutionality of the Act, in the *Katzenbach* cases. The debate at the time was over the need for Congress to document the abuses it wished to correct before employing its enforcement power under the Reconstruction Amendments. Justice Brennan wisely recognized the real issue in the cases: How much deference should the Court afford Congress? In other words, should the Court defer only when Congress put forth a record that satisfied the Justices? Or should the Court defer to Congress irrespective of the strength of the record, so long as the Justices could see a reasonable connection between the ends in question and the means that Congress chose to implement? Justice Brennan took the latter course. But the Court as a whole did not. This is the first lesson of this history: The term “judicial activism” must be used carefully and in context. Otherwise, the term is prone to mislead and obfuscate.

The second lesson follows the first. To read the complaints in the three recent challenges to the Act is to appreciate how the findings

¹³⁴ Complaint, *LaRoque v. Holder* (D.D.C. 2010) (No. 1:10-cv-00561), available at http://www.cir-usa.org/legal_docs/laroque_v_holder_cmpl.pdf.

¹³⁵ Complaint, *Shelby Cnty. v. Holder* (D.D.C. 2010) (No. 1:10-cv-00651), available at http://www.lawyerscommittee.org/admin/voting_rights/documents/files/Shelby-Co.-v.-Holder-Complaint.pdf.

¹³⁶ Complaint, *Georgia v. Holder* (D.D.C. 2010) (No. 1:10-cv-01062), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Georgia-Complaint-6-21-10_000.pdf.

question stands at the heart of these challenges. The argument that the legislative record is not sufficient to support the recent extension of the Act pervades these filings. In essence, these challenges are asking the Court to second-guess the substantial congressional record and the judgment of members of Congress that the Act is still an appropriate means of enforcing the Fifteenth Amendment. Whatever one's view is of Chief Justice Marshall's adage in *Marbury v. Madison* that it is the duty of the Supreme Court "to say what the law is," these challenges face a difficult epistemological hurdle. How would the Court know when the evidence is enough? It is one thing to say that Congress must adduce evidence to support its judgment, and clearly Congress did as much in 2006. It is quite another, however, to attempt to judge that evidence in order to determine whether the evidence meets with the Justices' approval. Those who support these recent challenges bear the heavy burden of justifying this judicial intrusion into the work of Congress and the second-guessing of its judgment. This is no small thing. Herein lies the second lesson: If the striking down of the Voting Rights Act is not judicial activism, then the term has ceased to do any practical work, if it ever did.

The third lesson similarly follows the second. As the theme of this Symposium suggests, some analysts contend that we are now living in a post-racial society. For evidence, they offer the election of our first African American President, Barack Obama. The argument is disarmingly simple: In a world where President Obama can become president, the Voting Rights Act is no longer needed to protect minority voters from racial discrimination. This argument can be similarly applied to the Civil Rights Act and most other statutes of that era. To be sure, that is a debatable proposition, and reasonable people can disagree. This is the final lesson of the story told by this Article. It may very well be true that we are now in a post-racial moment, a condition under which these laws are no longer necessary. The question for the future, however, is about institutional competence. Is the question whether we now live in a post-racial world better left to our policy-making bodies, or is this a question that we should leave to five Justices on the U.S. Supreme Court? Put another way, if the Supreme Court can decide this question, then there is essentially little it cannot do.