Legislative Findings, Congressional Powers, and the Fntnre of the Voting Rights Act

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In enacting the Voting Rights Act of 1965, Congress sought to overcome decades of outright refusal to enforce the Fifteenth Amendment. The statute was considered "harsh" and "punitive" by critics, and the Supreme Court partially agreed, calling the legislation "stringent," "inventive," and "uncommon." Yet the Court ultimately sided with the national ruling coalition as represented by the administration and overwhelming congressional majorities. This Article examines the early internal debates over the constitutionality of the Act and concludes that the question of legislative findings played a key role. In particular, internal notes and memoranda from the Katzenbach cases reveal that Justice Brennan worried about the Court's use of legislative findings in upholding congressional enactments. This unease helps explain the different approaches taken by the Court in South Carolina v. Katzenbach *and* Katzenbach v. Morgan *to the question of congressional powers under the Rcconstruction Amendments. As we look ahead to future constitutional challenges to the Voting Rights Act and question whether the statute will meet the Court's newfound demands under its federalism revolution, this Article underscores Justice Brennan's implicit admonition: in the end, the question of legislative findings will be nothing more than a smokescreen, as this will be a debate about judicial attitudes and the Court's long-standing role as an integral member of the national ruling coalition.*

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INTRODUCTION

The Voting Rights Act of 1965[1] ("Act") was a radical proposal, designed to deal once and for all with a problem that had plagued the nation, and which Congress had attempted to solve various times before.[2] During the Senate hearings on the bill, for example, Attorney General Katzenbach explained that "[t]here comes a time when the facts are all in, the alternatives have been tried and found wanting, and time has run out. We stand at that point today."[3] As he offered to the House Committee, these previous attempts had relied on good faith enforcement of its provisions, whereas the new bill no longer did so, as "we are not going to be frustrated again by the long and tedious delays and resort to law as a delaying device."[4]

Undoubtedly, the proposed voting rights bill was no longer willing to cede ground to Southern mores and sensibilities. Under the trigger formula, a jurisdiction came under the purview of the Act if it employed a literacy test *and* either its turnout rate for the 1964 presidential election or its registration rate on November 1, 1964 was fifty percent or less. Hardly by coincidence, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and twenty-six counties in North Carolina came under the coverage formula, and were subject to section 5, the so-called preclearance requirement. In turn, these covered jurisdictions had to submit any proposed changes in "voting qualifications or prerequisites to voting, or standard, practice, or procedure" to a judge in the U.S. District Court for the District of Columbia for a determination that the changes did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color.[5]

The preclearance requirement garnered much derision. During the 1969 Senate hearings over the extension of the Act, for example, Senator Ervin complained that the "North Carolina Legislature should be required to come to Washington to the Attorney General's office, and bow and scrape and make obeisance before him and say 'Please allow this act of our legislature to go into effect.'"[6] During the House hearings of the same year, A.F. Summer, Mississippi's Attorney General, similarly argued: "Why keep

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1. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C.A. §§ 1973 to 1973bb-1 (West 2006)).

2. South Carolina v. Katzenbach, 383 U.S. 301, 313–15 (1966). *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957).

3. *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 8 (1965) [hereinafter *1965 Senate Hearings*] (testimony of Attorney General Katzenbach); *see South Carolina*, 383 U.S. at 313–15.

4. *Voting Rights: Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 67 (1965) [hereinafter *1965 House Hearings*].

5. 42 U.S.C.A. § 1973c(a) (West 2006).

6. *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2507, and Title IV of S. 2029 Before the Subcomm. on Const. Rights of the S. Comm. on the Judiciary*, 91st Cong. 201 (1969) [hereinafter *1969 Senate Hearings*].

the heel of your boot on our neck for another five years? When does confidence begin and suspicion end?"[7] To his mind, "Mississippi will dry up on the vine if this continues. We cannot housekeep in our own State with this law on the books."[8]

The critics also challenged the constitutionality of the Act. Yet in *South Carolina v. Katzenbach*,[9] the Court stepped aside and let the politics of the day run their course, even while conceding that "[t]his may have been an uncommon exercise of congressional power."[10] To the Court, the approach taken by Congress was demanded by the harsh realities of our voting rights history. As it explained, "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[11] Precisely for this reason, "the unsuccessful remedies which [Congress] had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."[12] Congress offered a detailed account of this history while debating the Act, and the Court took notice.[13] It is also clear that the Court considered the tenor of the times and the ongoing civil rights movement. Of the Justices, only Justice Black was unpersuaded. In dissent, he complained that this approach "create[s] the impression" that the covered jurisdictions "are little more than conquered provinces."[14]

But the 1960s have long passed and the present Court is quite different from the Warren Court. Today's Court is far more solicitous of theories of federalism and states' rights, far more likely—were it writing on a clean slate—to side with Justice Black than with Chief Justice Warren on the constitutionality of section 5. Within the last ten years, for example, the Court has stated that the preclearance requirement "imposes substantial 'federalism costs,'"[15] which have led the Court to interpret the Act in ways that do not "increase further" these "serious" costs.[16] In the meantime, the Court has unveiled its federalism revolution,[17] with *City of Boerne*[18] and *Garrett*[19] as

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7. *Id.* at 369; *see Voting Rights Act Extension: Hearings on H.R. 4249 and H.R. 5538 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 129 (1969) [hereinafter *1969 House Hearings*].

8. *1969 Senate Hearings*, *supra* note 6, at 381; *see also 1969 House Hearings*, *supra* note 7, at 130 ("If this act is continued, section 5, as interpreted by the Court, would prevent even regular housekeeping by the State.").

9. 383 U.S. 301 (1966).

10. *Id.* at 334.

11. *Id.* at 309.

12. *Id.*

13. *See id.* at 309–15.

14. *Id.* at 360 (Black, J., concurring and dissenting).

15. Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995)); *see also* City of Rome v. United States, 446 U.S. 156, 201 (1980) (Powell, J., dissenting) (arguing that "encroachment is especially troubling because it destroys local control of the means of self-government"); United States v. Bd. of Comm'rs, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (contending that the Act's encroachment on state sovereignty is "significant and undeniable").

16. Reno v. Bossier Parrish, 520 U.S. 471, 480 (1997).

17. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995).

leading exemplars of this recent move to curtail congressional authority under Section 5 of the Fourteenth Amendment.

Given these cases, the recent extension and amendments to the Voting Rights Act—named the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006[20]—will force the Court to face up to its past, to its tradition, and the force of its precedent. This is an intriguing story, pitting judicial doctrine in an inevitable collision against the Act in times of marked constitutional change. Taken to its logical conclusion, this argument places the Court in direct conflict with what I call "the House that Warren Built," long-standing precedents from the 1960s that until some years ago seemed safe as a central part of our constitutional tradition. Moreover, the Voting Rights Act is hardly a run-of-the-mill statute, but the most important and effective civil rights legislation in history. And so, the legal challenge to the renewed Voting Rights Act will appear to offer a "perfect storm" of sorts: a case where the Court must sort out its affinities for states' rights and the right to vote as measured against its distrust of racial categories and excessive congressional power. This important area is thus positioned as a showdown for the ages, a clash of principles between 1960s liberalism and 1990s conservatism. This may well be the true test of the federalism revolution of recent years.

On these terms, the inevitable constitutional challenge to the Voting Rights Act will be a straightforward question of doctrine and our ability to predict the future.[21] To focus on this question, however, would miss the central import of the Court's handling of the Act and its connection to both the federalism revolution and the political question doctrine more generally. This Article looks to this important past and reaches two related conclusions. On the question of judicial posture and the political question tradition, this Article concludes that the Court has implicitly treated the question of congressional powers to enact the Voting Rights Act the way it treats political questions writ large.[22] In other words, this has been a question of judicial will and the Court's disinclination to strike down this important statute. This accommodating approach dates back to the Court's initial foray in this area in the *Katzenbach* cases and offers a view of the Court as an important member of the national ruling coalition.[23]

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18. City of Boerne v. Flores, 521 U.S. 507 (1997).

19. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

20. Pub. L. No. 109-246, 120 Stat. 578.

21. *See, e.g.*, Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177 (2005); Victor Andres Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769 (2003).

22. *See* Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006) [hereinafter Fuentes-Rohwer, *Reconsidering*].

23. *See* 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); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 796 (1975). *See also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT & MINORITIES IN CONTEMPORARY AMERICA (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 16 n.72 (1996) ("[T]he Court strays relatively little from majoritarian impulses because the justices are embedded in majoritarian culture.").

On the question of the Act's constitutional standing in light of the federalism revolution, this Article also traces this question back to the early case law. The question under the federalism cases is whether Congress has developed an adequate factual record in support of the legislation under review. This is not a new concern. In his handwritten response to Chief Justice Warren's original draft of the *South Carolina v. Katzenbach* opinion, Justice Brennan worried that such a demand for findings was unnecessary and ultimately dangerous. While a reviewing Court could always agree that the proffered legislative findings meet with its approval, a future Court need not be so agreeable. To Justice Brennan, as his *Katzenbach v. Morgan* opinion amply displayed, findings should play no role in this inquiry at all.

Part I examines *South Carolina v. Katzenbach*[24] and *Katzenbach v. Morgan*[25] in order to nnderstand and contextualize the Court's approach to the Act. This Part analyzes the drafting of these opinions and their evolution from early drafts to publication. Two conclusions are worth noting. First, it is remarkable that the opinions in *South Carolina* and *Morgan* were a scant three months apart yet took different approaches to the questions presented. At the heart of their differences stood the issue of legislative findings, with Justice Brennan displaying an uncanny ability to predict the future and what the Court may do if disinclined to uphold a congressional enactment.

Second, this Part disagrees with the view that the Court was turning away from *South Carolina* in *Morgan*. Rather, the different approaches to the question of legislative findings may be attributed to authorship and the perceived demands of the questions presented. In *South Carolina*, Chief Justice Warren had to contend with the constitutionality of the Act as a question of congressional powers, while in *Morgan*, Justice Brennan needed to focus instead on whether Congress would appear to supersede a prior judicial ruling. In other words, while Chief Justice Warren faced the South and its collective perceptions about the legislation, Justice Brennan faced the Court itself.

Part II interprets the Court's handling of the Act as part of a larger claim about the Court's role as a member of the national ruling coalition. This conclusion applies to the *Katzenbach* cases and holds true for subsequent challenges to the constitutionality of the Act. These are cases where doctrine and legislative materials offer limited counter-pressure to the difficult constitutional questions raised by the Act.[26] This is an argument for "voting rights exceptionalism" and the Court's disinclination through the years to strike down one of the most effective and important civil rights statutes in history. Of note, this argument is consonant with the more limited story of congressional powers offered by the recent federalism cases. At their core, both stories are about the role played by the question of legislative findings, first flagged by Justice Brennan in his notes to the first draft of the *South Carolina* opinion. More interestingly, this Part contends that these arguments share a common lineage grounded in the Court's historical treatment of political questions. In placing legislative findings at the heart of

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24. 383 U.S. 301 (1966).

25. 384 U.S. 641 (1966).

26. *Cf.* Luis Fuentes-Rohwer, Public Opinion, Judicial Review, and Shifting Majorities: The Ironic Case of the Voting Rights Act (Mar. 27, 2006) (unpublished manuscript on file with the Indiana Law Journal).

its constitutional inquiry, the Court implicitly turns this inquiry into a question of judicial attitudes and the Justices own views about the legislation under review.

This Article concludes that the Court will likely follow its familiar script and uphold the Voting Rights Act against any likely constitutional challenges. But this would hardly be news. In turning the constitutionality of the Act into a question of prudence and judicial will, the Court would be applying the clear lessons of the reapportionment revolution.[27]

1. REVISITING THE *KATZENBACH* CASES: LEGISLATIVE FINDINGS AND RATIONALITY REVIEW

> *Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting.*[28]

> *It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.*[29]

Looking at the Act and its preclearance provision, it is easy to see how its constitutionality seemed to hang in the balance. The critics scored many points with their relentless attacks on the bill. 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."[30]

And yet, in retrospect, it is difficult to imagine the Supreme Court striking down this important piece of legislation. This is not simply a descriptive point about the Warren Court and its concededly liberal bent on civil rights issues but, rather, a point about the Court and its role across history.[31] The *Katzenbach* cases[32] fit within this historical account, as the Court clearly deferred to the policy wishes of substantial congressional majorities. This Part examines the *Katzenbach* cases and concludes that *South Carolina v. Katzenbach* and *Katzenbach v. Morgan* took decidedly different approaches to the question of legislative findings. This Part explores the differences

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27. *See* Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J.L. & PUB. POL'Y 423 (2005). For an argument that the Court has been acutely conscious of its standing vis-à-vis Congress throughout its history, see generally CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006).

28. *South Carolina*, 383 U.S. at 308.

29. *Morgan*, 384 U.S. at 653.

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

31. *See* SPANN, *supra* note 23; Dahl, *supra* note 23, at 285; Funston, *supra* note 23, at 796; Klarman, *supra* note 23, at 16 n.72.

32. *Morgan*, 384 U.S. at 641; *South Carolina*, 383 U.S. at 301.

between the cases, and in so doing it grounds the modern debate over the constitutionality of the Act. This Part concludes that the concern over legislative findings was never far from the Justices' minds.

A. South Carolina*: Facts and Context*

South Carolina was undoubtedly a delicate case. Congress was aiming its considerable power at the Southern states, and in so doing invited references to Reconstruction and the oppressive use of federal power against recalcitrant states.[33] The Court seemed aware of the delicate nature of the proceedings, ridden as they were with "emotional overtones." For this reason, the Court took the curious step of emphasizing early in the opinion that the briefs and the debate during oral argument were "temperate, lawyerlike, and constructive."[34] Also, all states were asked to take part in the proceeding as friends of the Court; many states chose to participate in one way or another.[35]

The case was delicate for a second reason. Under section 5 of the Act, as well as for bailout purposes, Congress chose to bypass the judicial process in the affected states and forced the covered jurisdictions to file declaratory judgment actions in the District Court for the District of Columbia. This was a point of contention throughout the hearings. In an exchange with Senator Ervin, for example, Attorney General Katzenbach complained that the Department of Justice had won every case it had ever brought against discriminating jurisdictions, yet the relief had been unsatisfactory. To which the Senator replied, "Let's not say anything which will permit anyone to imply that the southern district and circuit court judges are as bad as the southern election officials."[36] James Kilpatrick, vice chairman of the Virginia Commission on Constitutional Government, criticized the provision on similar grounds: "It . . . has an entirely unwarranted reflection upon the integrity of U.S. district judges in the South. It is not deserved and I do not think the Congress ought to be involved in what is an insult to members of the judiciary."[37]

The Justices were well aware of this ticklish procedure and how it would be understood by southern judges. They knew they needed to address these concerns in some way. In the original draft of the opinion, Chief Justice Warren defended this choice of forum the following way:

> Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, as it has done in previous occasions. Designation of a neutral forum at the nation's capital assured that areas equally eligible for relief

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33. *1965 Senate Hearings*, *supra* note 3, at 321 ("I said it was worse than the Thaddeus Stevens legislation during Reconstruction, sir, and it is. It is the most nefarious—it is inconceivable that Americans would do that to Americans.") (statement of Judge Leander Perez).

34. *South Carolina*, 383 U.S. at 308.

35. *Id.* at 307–08.

36. *1965 Senate Hearings*, *supra* note 3, at 71.

37. *Id.* at 649.

> would be treated in substantially the same way, a result not otherwise likely in view of the highly controversial nature of the Act.[38]

This argument tracked very closely the reasons given by Congress and the administration for the provision.[39] Yet this reasoning hardly made the procedure any more palatable. Justice Brennan expressed these concerns to the Chief Justice three days after the first draft of the opinion circulated: "My concern was that some of the judges of the Fourth and Fifth Circuits might feel offended by reference to the congressional justification for selecting the District of Columbia forum."[40] Instead, "it is sufficient for our purposes to note the congressional choice was well within its power to designate courts in the allocation of federal judicial power."[41] The Court ultimately adopted this reasoning, explaining that Congress had adopted similar procedures before, and "the Act is no less reasonable in this respect."[42]

Notwithstanding its delicate nature, the case moved forward at a very fast clip. Recall that President Johnson signed the legislation into law on August 6, 1965. The Court expedited the case and heard oral arguments a scant five months later, on January 17 and 18.[43] Three weeks later, on February 8, Chief Justice Warren finished his draft of the opinion, which he circulated two weeks later, on February 23.[44] And within the next ten days, a majority of Justices joined the Chief Justice's opinion, with the exception of Justice Black, who circulated a dissent on March 4 and recirculated it on March 6.[45] The Court issued its opinion on March 7. Two features of the debate demand careful attention. First, how aggressively should the Court examine remedial congressional enactments pursuant to Congress's Section 5 power? And second, what are the limits to such power?

1. Supervising the Legislative Process

The question of congressional powers was in many ways a question of process. To the critics, the proposed legislation had been hastily drafted over a short period of time. According to Senator Ervin, for example, the proposed legislation was "written in . . .

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38. Chief Justice Warren, Original Draft of South Carolina v. Katzenbach 25 (Feb. 23, 1966) (Warren Papers, Library of Congress, Box 618, folder 2, copy on file with the Indiana Law Journal) (citations omitted).

39. *See 1965 House Hearings*, *supra* note 4, at 24; *1965 Senate Hearings*, *supra* note 3, at 72.

40. Memorandum from Justice Brennan to Chief Justice Warren, Supreme Court, 1 (Feb. 26, 1966) [hereinafter Brennan Memo] (Warren Papers, Library of Congress, Box 618, folder 2, copy on file with the Indiana Law Journal).

41. *Id.*

42. South Carolina v. Katzenbach, 383 U.S. 301, 332 (1966).

43. *Id.* at 301.

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

45. *See* Justice Black, Original Draft of Concurrence and Dissent in South Carolina v. Katzenbach (Mar. 4, 1966) (Warren Papers, Library of Congress, Box 618, folder 2, copy on file with the Indiana Law Journal).

haste,"[46] while Senator Rodgers complained that "[t]he bill was rather hazily drawn and I think it is obvious."[47] Consideration of the bill by the Senate would be subject to similar criticisms. The bill was referred to the Senate Judiciary Committee on March 22, with a mandate to report it back to the full Senate no later than April 9. The committee chairman, James Eastland of Mississippi, remarked that this time limitation would make it "impossible for the committee to take oral testimony from everyone, or even a substantial number of those who wished to be heard."[48] Senator Ervin similarly observed that "it is a tragic thing for the Senate to put a time limitation on the consideration of this bill by the committee."[49]

Attorney General Katzenbach disagreed with this characterization:

> It wasn't written in all that haste. There were a lot of revisions that were made, as I think is true of almost every law that is enacted, that there are changes made in committee, changes made up to the last minute. Just because changes are made, just before the bill is reported, you don't say that the bill was drafted in haste.[50]

Notably, the Supreme Court also disagreed. This was not legislation borne in haste; Congress had "explored with great care the problem of racial discrimination in voting"[51] and had documented "in considerable detail" its findings and conclusions with regards to the problem at hand.[52]

To be sure, the question of legislative findings took on a prominent role at the hands of the Chief Justice. He noted early in the opinion that Congress had debated the measure in hearings that lasted over nine days, and the debate on the floor of both chambers had taken approximately twenty-nine days.[53] The conclusion was inescapable: "an insidious and pervasive evil . . . had been perpetuated in certain parts of our country," and earlier attempts to deal with the problem had proven unsuccessful "and would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."[54] The legislation was clearly supported by this evidence[55] and by overwhelming congressional majorities.[56]

This use of the record was not universally received and raised some eyebrows within the Court. In a memo to the Chief Justice on February 26, Justice Brennan joined the Court's opinion and expressed his view that "this is really a fine opinion."[57]

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46. *1965 Senate Hearings*, *supra* note 3, at 54. Senator Ervin repeated this complaint often. *See id.* at 235, 593.

47. *Id.* at 616.

48. *Id.* at 4.

49. *Id.* at 6.

50. *Id.* at 54.

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

52. *Id.* at 309. *See also id.* at 329 ("Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act.").

53. *See id.* at 308–09.

54. *Id.* at 309.

55. *See, e.g.*, *id.* at 329 (explaining that Congress had "reliable evidence" for implementing the coverage formula).

56. *See id.* at 309.

57. Brennan Memo, *supra* note 40, at 2.

But his reaction to the first draft of the opinion, written on the margins of his circulated draft, told a remarkably different story. For example, he complained in response to the first part of the opinion that "[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."[58] Justice Brennan's response to the same paragraph and the Chief Justice's references to the process that led to the passage of the legislation were similarly critical: "Do we judge statutes by no. of witnesses[,] length of hearings[,] unanimity of vote? The Chief is judging the legislative product as if it were a judicial one."[59] His comment at the close of the first part of the draft encapsulates the heart of his criticism: "In several places, like this one, the Chief comes close to writing this as if it were an advisory opinion. I think this might be avoided. Are we reviewing the sections, any more than we are the adequacy of the hearings?"[60]

Justice Brennan's criticisms make sense when placed in doctrinal context. According to Chief Justice Warren's opinion, the question was whether Congress had exercised its Section 2 powers under the Fifteenth Amendment "in an appropriate manner with relation to the States."[61] Put affirmatively, the Court explained that Congress "may use any rational means" to enforce the Fifteenth Amendment.[62] This is a very flexible and forgiving standard, a view that the remaining part of the opinion did not disappoint. In upholding the Act in its entirety, the Court used a language of deference while writing about "legitimate responses," "appropriate means," and "permissible methods."[63]

The specific provisions of the Act fared similarly. For example, the Court deemed the coverage formula, the source of great derision by critics of the Act,[64] to be "rational in both practice and theory."[65] Similarly, the temporary suspension of literacy tests was "a legitimate response to the problem."[66] And the preclearance provision, while an "uncommon exercise of congressional power," was a "permissibly decisive" response to the problem at hand,[67] justified by "exceptional conditions."[68] In fairness, the Court

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58. Chief Justice Warren, Original Draft of South Carolina v. Katzenbach 25 (Feb. 23, 1966) (Brennan Papers, Library of Congress, Box I:132, folder 6, copy on file with the Indiana Law Journal) (Justice Brennan's handwritten notes on draft) (emphasis in original).

59. *Id.* at 3 (Justice Brennan's handwritten notes on draft).

60. *Id.* at 11 (Justice Brennan's handwritten notes on draft).

61. *South Carolina*, 383 U.S. at 324.

62. *Id.*

63. *Id.* at 328.

64. According to Representative Reinecke, the formula was "harshly arbitrary," *1965 House Hearings*, *supra* note 4, at 450, a sentiment that Senator Ervin expressed often. *See 1965 Senate Hearings*, *supra* note 3, at 33 ("I do not think there is necessarily any logical connection between the assumption based on these percentages and the presumption that there was a violation of the 14th Amendment."); *id.* at 272 (criticizing the coverage of the bill and branding the legislation a "cockeyed bill"); *id.* at 263 (complaining that the statutory test has no relation to the discrimination in registration); *see also id.* at 265 (contending that the triggering test is arbitrary) (statement of Charles Bloch, Esq., of Macon, GA).

65. *South Carolina*, 383 U.S. at 330.

66. *Id.* at 334.

67. *Id.* at 335.

68. *Id.*

conceded that the proposed legislation was "stringent,"[69] "inventive,"[70] and "uncommon,"[71] to be sure, but this was a measure of the problem at hand. Little else could be expected from a proposal designed to eradicate a problem that "has infected the electoral process in parts of our country for nearly a century."[72]

Justice Brennan was reacting to the Chief Justice's recital of legislative findings and his approval of the legislative process that gave birth to the law. Justice Brennan's point, far reaching and prescient in light of the doctrinal turn of recent years, was that the Chief Justice was addressing unnecessary issues. This was not a debate over legislative due process and whether Congress followed the proper procedures.[73] Rather, at issue were the demands of rational basis review. Justice Brennan was underscoring the fact that under rationality review, explicit congressional findings were not required. This had been true in the Commerce Clause context since at least 1937,[74] and Justice Brennan did not wish for the Court to establish such a requirement under the Reconstruction Amendments.[75] After all, if the legislation was constitutional because of the record in support of its passage, different minds could always disagree about the sufficiency of the available record. Or, put another way, future court majorities 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."[76] Ever so presciently, Justice Brennan wished to avoid this difficulty altogether.

In offering these findings, however, it is clear that Chief Justice Warren had different concerns. The perception among critics of the legislation was that the Act was punitive and discriminatory against the Southern states. In the words of Representative Waggoner, for example: "The bill recognizes no reluctance to discriminate against these Southern States and make them the whipping boys for the nation."[77] Senator Ervin similarly argued: "They blow hot and they blow cold, but they are always blowing at some Southern States, are they not?"[78] And Senator Sparkman complained

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69. *Id.* at 308.

70. *Id.* at 327.

71. *Id.* at 334.

72. *Id.* at 308.

73. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

74. *See* 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, 359–63 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 106 (2001); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 696, 701 (1996).

75. Justice Harlan, for one, so understood the Court's holding in *South Carolina*. *See* Katzenbach v. Morgan, 384 U.S. 641, 667 (1966) (Harlan, J., dissenting).

76. 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).

77. *1965 House Hearings*, *supra* note 4, at 709; *see id.* at 643 ("There are so many constitutional provisions violated in this thing here. It is directed at my part of the world and Alaska.") (statement of Rep. Rivers).

78. *1965 Senate Hearings*, *supra* note 3, at 298; *see id.* at 263 ("So the United States of America would be divided into two groups, the good and the bad, if you please.") (statement of Charles Bloch, Esq., of Macon, GA).

that "[i]t is a harsh bill, designed to punish the South."[79] The Chief Justice was aware of these criticisms and seemed to go out of his way to assure the country that the charges were unfounded. While it may have been true that findings were not a necessary feature of rational basis review as then understood, they were necessary *in this case*. According to the Court, Congress developed a detailed record of racial discrimination and the Act was a clear and legitimate response to these findings.

Without question, the Court offered very little resistance to an aggressive application of congressional powers. But context made all the difference in the world. This was the height of the civil rights movement, with the nation caught in the throes of "nearly a century of widespread resistance to the Fifteenth Amendment."[80] The Court clearly took notice and offered Congress a way to solve the pressing issues of the day.[81] In the words of Lucas Powe, "The Court was extending an offer to Congress to become a full partner in the Court's great tasks."[82] This was not the brand of skeptical review we have seen from recent Rehnquist Court opinions but, rather, an invitation to Congress to carry on its needed work as demanded by the conscience of the times.

2. Anticipating *Morgan*

This last point cannot be overstated. In its eagerness to give Congress its blessings, the original draft of the opinion appeared to open a gaping hole in the doctrinal canvass. Late in the draft, Chief Justice Warren offered the following: "Accordingly, Congress has even broader remedial powers than the courts to effectuate the constitutional prohibition against racial discrimination in voting."[83] Such is the sentiment of a Court in tune with congressional moods, a Court wishing to invite Congress to carry out its work with little judicial resistance.

And yet, some Justices could foresee the repercussions of this position. For example, Justice Brennan wrote in his draft of the opinion, "Are the implications of the underscored qualifications here [and] above ever examined?"[84] Justice Fortas similarly wrote in a memo to the Chief Justice, "I wonder if this adds enough to the argnment to offset the possibility that it may be used in unforeseeable ways to support arguments to narrow court orders."[85] In other words, it is one thing to invite Congress to expand

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79. *Id.* at 625.

80. *Id.* at 337.

81. *See* Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966) ("If the Congress follows the lead that the Court has provided, the last Term's opinions interpreting [Section] 5 will prove as important in bespeaking national legislative authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy.").

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

83. Chief Justice Warren, Original Draft of South Carolina v. Katzenbach 20 (Feb. 23, 1966) (Warren Papers, Library of Congress, Box 618, folder 2, copy on file with the Indiana Law Journal).

84. Chief Justice Warren, Original Draft of South Carolina v. Katzenbach 21 (Feb. 23, 1966) (Brennan Papers, Library of Congress, Box I:132, folder 6, copy on file with the Indiana Law Journal) (Justice Brennan's handwritten notes on draft).

85. Memorandum from Justice Fortas to Chief Justice Warren (Feb. 24, 1966) (Warren Papers, Library of Congress, Box 618, folder 2, copy on file with the Indiana Law Journal).

rights at a time when Congress and the Court could agree on the substance of many such rights; yet it would be quite another to extend such an invitation when the views of Congress and the Court are in tension.[86]

The Chief Justice heeded these concerns and the language was tightened considerably in the final draft. Accordingly, "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[87] How "full" these remedial powers were, and how far they would extend in a future case, the Court did not say. And so the question of whether Congress has "broader remedial powers than the courts" to enforce rights under the Reconstruction Amendments remained unanswered, but only for a short time.

B. Morgan*: Ratchets and Enforcing Rights*

It would take five weeks to answer, to be exact. In *Katzenbach v. Morgan*, the Court examined section 4(e) of the Act, whereby a person who had completed a sixth-grade education in an "American-flag" school where the language of instruction was not English may not be denied the right to vote on account of failing to pass an English literacy test.[88] This provision appeared to come in direct conflict with *Lassiter v. Northampton Election Board*,[89] where the Court upheld the per se constitutionality of literacy tests. And so the Court faced the question left open in *South Carolina*: how far do Congress's remedial powers under the Reconstruction Amendments extend? Or, "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under Section 5 of the Fourteenth Amendment?"[90]

In keeping with the tenor of the times and the *South Carolina* opinion, the Court answered this question in the affirmative. Yet *Morgan* went farther than *South Carolina*, as it allowed Congress to "enforce" its own political vision of a violation of the Fourteenth Amendment irrespective of the Court's prior holdings on the question. *Morgan's* posture was markedly different, due in great measure to arguments made by Justice Harlan in dissent. One disagreement centered on the need for legislative findings, another on the appropriate standard of review and the role of the Court in matters of constitutional interpretation.

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86. To Professors Post and Siegel, this argument was a non-starter, since "[t]he Court can still hold unconstitutional any exercise of Section 5 power that it believes violates a Section 1 right, in the same way that it can hold unconstitutional any exercise of Commerce Clause power that it believes violates a Section 1 right." Post and Siegel, *supra* note 76, at 40. And yet, Chief Justice Warren removed the objecting language from his draft, and the Court then addressed the point head on in *Morgan* without advancing Post and Siegel's argument. This suggests that the Court "was not yet in full command of the implications of its own doctrine." *Id.*

87. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

88. 384 U.S. 641 (1966).

89. 360 U.S. 45 (1959).

90. Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).

1. Rationality and Legislative Findings

The question in *Morgan* was the classic question of structure: how far do congressional powers extend under Section 5 of the Fourteenth Amendment? To the Court, this question dated back to the ratification debate and the intent of the drafters of the Amendment. On this view, the drafters had simply sought to accord Congress the same powers already granted by the Necessary and Proper Clause—in the first draft of the opinion, in fact, Justice Brennan wrote that "[Section] 5 is merely a specific counterpart of the Necessary and Proper Clause."[91] And so, after dispensing with the obligatory cites to *McCulloch v. Maryland*[92] and *Ex Parte Virginia*,[93] the Court explained that Section 5 "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[94] Or, in the classic language of *McCulloch*, the constitutional question broke down into three separate inquiries: whether section 4(e) was "appropriate legislation" to enforce the Fourteenth Amendment, whether it was "plainly adapted to that end," and whether it was in accord with "the letter and spirit of the Constitution."[95]

These questions offered the Court nary a challenge. On the first, "[t]here can be no doubt" that section 4(e) was "appropriate legislation" to enforce the Fourteenth Amendment. After all, the enactment "*may* be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government."[96] The second question proved no more difficult. The Court explained that the nullification of the New York literacy requirement as applied to Puerto Ricans would result in enhanced political power, which will in turn "be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."[97] Tellingly, the Court further explained that "[i]t was for Congress, as the branch that made that judgment, to assess and weigh the various conflicting considerations."[98] The role for the Court was limited indeed: "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[99] This conclusion held true if focused instead on section 4(e) as eliminating an invidious voting qualification, as Congress brought a "specially informed legislative competence" to this question and it was its "prerogative to weigh these competing considerations."[100]

On the third question, the argument was that limiting section 4(e) to those educated in American-flag schools worked an invidious discrimination on those Puerto Ricans residing in New York yet educated elsewhere. The Court turned this challenge aside as

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91. Justice Brennan, Original Draft of Katzenbach v. Morgan 4 (Brennan Papers, Library of Congress, Box I:132, folder 5, copy on file with the Indiana Law Journal).

92. 17 U.S. (4 Wheat.) 316 (1819).

93. 100 U.S. 339 (1879).

94. *Morgan*, 384 U.S. at 651.

95. *See id.* (citing *McCulloch*, 17 U.S. (4 Wheat.) at 321).

96. *Id.* at 652 (emphasis added).

97. *Id.*

98. *Id.* at 653.

99. *Id.*

100. *Id.* at 656.

well, concluding that Congress need not "strike at all evils at the same time;"[101] rather, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[102] More specifically, the choice to limit section 4(e) as Congress did "*may* . . . reflect Congress['s] greater familiarity with the quality of instruction in American flag schools, a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,"[103] or the explicit endorsement of past congressional policies. Deference was the order of the day.

This was a curious conclusion, particularly in light of the formidable obstacle posed by the *Lassiter* case. Yet, to the Justices, *Morgan* was an easy case. For Justice White, for example, this was simply "a congressional definition of 'equal protection;'"[104] while Chief Justice Warren contended that "Congress need not make findings if it can justify its conduct on any rational basis,"[105] a position with which Justice Fortas agreed.[106] Justice Douglas disagreed with the Chief Justice and would have reversed even in the absence of a statute,[107] as he argued in his dissent in *Cardona v. Power*,[108] and Justice Black was "happy to agree to this historic opinion which for the first time gives [Section] 5 of the Fourteenth Amendment the *full* scope [he thought] it was *intended* to have."[109] During conference, Justice Stewart "ha[d] difficulty finding it is 'appropriate' because it is non-discriminating so far as race is concerned," and according to Justice Douglas's conference notes, he "ha[d] trouble but would try to reverse."[110] Only Justice Harlan was prepared to affirm the lower court opinion, as he contended that "Congress can't define what is equal protection."[111]

The case proved so easy, in fact, that the Court did not bother with any mention of legislative findings. After all, "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations."[112] The Court took this point quite far, explaining that: "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[113] One may explain this relaxed posture in two ways. First, and as Justice Harlan pointed out in dissent, "[t]here is

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101. *Id.* at 657 (citing Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935)).

102. *Id.* (citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955)).

103. *Id.* at 657–58 (emphasis added)..

104. Justice Douglas, Notes from Katzenbach v. Morgan Conference 2 (Apr. 22, 1966) (Douglas Papers, Library of Congress, Box 1372, copy on file with the Indiana Law Journal).

105. *Id.* at 1.

106. *Id.* at 2.

107. *Id.* at 1.

108. 384 U.S. 672, 675 (1966).

109. Justice Black, Note to Justice Brennan (May 23, 1966) (Brennan Papers, Library of Congress, Box I:143, folder 5, case file nos. 847 and 877, copy on file with the Indiana Law Journal) (emphasis in original).

110. Douglas, *supra* note 104. Justice Stewart ultimately joined Justice Harlan's dissent, but only after its third circulation, on June 10, three days before the opinion was published. Justice Harlan, 5th Draft of Katzenbach v. Morgan 1 (Brennan Papers, Library of Congress, Box I:143, copy on file with the Indiana Law Journal) (circulated June 10, 1966).

111. Harlan, *supra* note 110.

112. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

113. *Id.*

simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns."[114] On this view, to require findings in this case must necessarily lead to invalidating the challenged provision, as Congress had not proffered any such findings. Second, it may be said that the Court was simply clarifying its signals in *South Carolina* about the need for findings in support of legislation. To those who understood the *South Carolina* case as establishing a rigid requirement for legislative findings,[115] the *Morgan* opinion was clearly indicating otherwise.

To my mind, the way to explain *Morgan* is neither by pointing to a lack of standards nor by turning away from anything the Court might have said in *South Carolina*. Rather, *Morgan* revisited the debate begun in the draft of the *South Carolina* opinion between Justice Brennan and the Chief Justice. Justice Brennan in *Morgan* was simply situating the case within the doctrine as he understood it. Findings played no role in this argument.

2. Institutional Competence and the Famed Ratchet

The second disagreement appeared more difficult to overcome. In the first circulated draft of his dissenting opinion, Justice Harlan complained that the Court was abrogating its own powers at the expense of Congress. To his mind, once the Court upheld the literacy test in *Lassiter*, Congress could no longer decide otherwise absent a showing of discrimination. Otherwise, he argued:

> I do not see why Congress should not be able as well to exercise its [Section] 5 "discretion" in the other direction by enacting statutes cutting down on equal protection and due process decisions of this Court which it deems not in accord with social or political realities and unduly restrictive upon the authority of the States.[116]

Justice Brennan anticipated this argument from the time he penned his first draft of the opinion. He closed this draft the following way:

> One last observation is necessary. The dissent will suggest that our holding as to the scope of [Section] 5 power may mean that Congress has power to exercise discretion in the other direction, and enact statutes which in effect dilute equal protection and due process decisions of this Court. We emphatically hold that [Section] 5, as we today construe it, does not grant Congress any such power. Section 5 is limited to adapting [sic] measures to enforce the guarantees of the Amendment. Section 5 grants Congress no power to restrict, abrogate or dilute these guarantees.[117]

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114. *Id.* at 669 (1966) (Harlan, J., dissenting).

115. *See id.* at 667 (Harlan, J., dissenting) (contending that the holding in *South Carolina* hinged on the existence of a "voluminous legislative history"); Bryant & Simeone, *supra* note 74, at 365.

116. Justice Harlan's dissent, Katzenbach v. Morgan 10 (June 8, 1966) (Brennan Papers, Library of Congress, Box I:143, folder 6, copy on file with the Indiana Law Journal).

117. Justice Brennan, Original draft of Katzenbach v. Morgan 9 (Brennan Papers, Library of

Curiously, this language disappeared from the draft by the time it circulated on May 20. Justice Harlan had voiced his minority position during conference on April 22 and apparently waited for Justice Brennan's draft before penning his own dissent, or even deciding what to do. Once Brennan's draft circulated, Harlan informed the Justices on May 23 that he would circulate a dissent "[i]n due course."[118] The dissent finally circulated on June 8, and Justice Brennan immediately responded with an amended draft, which reintroduced the aforementioned language as part of footnote ten.[119]

This exchange and Justice Brennan's ultimate resolution demonstrate how far the Court was willing to go in upholding civil rights legislation. Under *Morgan*, Congress is granted great latitude to improvise and further the cause of equality. Put another way:

> For the future the decision logically permits the generalization that Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other [F]ourteenth [A]mendment rights.[120]

This hope proved short lived, as the Court soon turned away from this broad reading of congressional powers in *Oregon v. Mitchell*.[121] The "one-way ratchet" argument only proved useful in one case and is now a relic of the past. This raises important questions at the heart of the next Part: how did the Court respond to subsequent challenges to the Voting Rights Act? Did it demonstrate a similar disinclination to confront the difficult arguments posed by the Act? And is the so-called federalism revolution likely to affect this forgiving posture?

II. THE ACT IN CONTEXT: CLASH OF REVOLUTIONS?

> *It is now apparent that the United States is in the midst of a constitutional revolution. For the most part, it is a quiet revolution.*[122]

> *[I]t looks like they have got some kind of a computer where when you talk about voting rights for blacks, you press a certain button, out comes the text of the speech which is to be given. The speech of course is that this is an invasion of States' rights. This will prevent the good relationship between the whites and*

Congress, Box 1:143, folder 5, copy on file with the Indiana Law Journal) (Justice Brennan's handwritten notes on draft).

118. Memorandum from Justice Harlan to the Conference, New York Voting Cases 1 (May 23, 1966) (Warren Papers, Library of Congress, Box 531, folder 5, case file nos. 673, 847, and 877, copy on file with the Indiana Law Journal).

119. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966); Justice Brennan, Draft of Katzenbach v. Morgan 10 (June 8, 1966) (Brennan Papers, Library of Congress, Box 1:143, folder 5, case file no. 847 and 877, copy on file with the Indiana Law Journal) (Justice Brennan's handwritten notes on draft).

120. Cox, *supra* note 1, at 107.

121. Oregon v. Mitchell, 400 U.S. 112 (1970); *see* Frickey, *supra* note 74, at 714.

122. Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1601 (2002).

> *blacks from continuing. The Founding Fathers guaranteed the States the right to be sovereign.*[123]

South Carolina and *Morgan* can only be understood in reference to the times and their place in the history of the civil rights movement. Political leaders of the time made use of the palpable moral outrage felt across the nation in enacting a very strong voting rights bill into law. The Voting Rights Act required a very special set of social and political conditions. The Court clearly took notice and gave way to the needs and sentiments of the times. More importantly, the Court has displayed a similar posture in subsequent challenges to the Act. This story offers a consistent picture of what I term "voting rights exceptionalism" and the Court's almost unfettered deference to Congress under circumstances that warrant, at the very least, an argument.

Yet, with apologies to Bob Dylan, the times have clearly changed and the past might no longer prove helpful. This argument takes us back to 1995 and the *Lopez* decision, where the Court struck down a federal statute as beyond the powers of Congress under the Commerce Clause.[124] *Lopez* was soon followed by *Seminole Tribe*,[125] *City of Boerne*,[126] *Morrison*,[127] *Kimel*,[128] and *Garrett*,[129] cases that collectively show a deep judicial sensitivity to federalism concerns and the rights of states to conduct their own affairs free of federal intrusion. These cases form the basis for what is commonly known as the federalism revolution.[130] While the import and scope of these decisions remains elusive and contested,[131] it is unassailably true that the Court has shown a remarkable concern over questions of states' rights and federalism in general.

Under this lens, the recent extension of the Act would appear to stand very little chance at the hands of a Court majority. Without question, the Voting Rights Act pushes very hard against any existing limits on congressional powers. Its import may be charitably categorized as onerous, for it deprives a covered jurisdiction of the right to enact laws that may fall under the purview of the Act. In essence, the Act requires a covered jurisdiction to come to the federal government and seek approval for any

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123. *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. 50 (1975) (statement of Clarence Mitchell, Dir. for the Wash. Bureau, NAACP).

124. United States v. Lopez, 514 U.S. 549 (1995).

125. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

126. City of Boerne v. Flores, 521 U.S. 507 (1997).

127. United States v. Morrison, 529 U.S. 598 (2000).

128. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

129. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

130. *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 71; Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1135 (2000); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

131. *See* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 249–78 (2005); JESSE H. CHOPER & JOHN C. YOO, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006).

changes in its voting laws. The Act thus compromises the sovereignty of the covered jurisdictions in severe, perhaps inimitable ways.[132]

Congress was fully aware of the radical nature of its proposal. This accounts for the ten-year shelf life of the coverage formula, which was ultimately reduced in the final bill to five years. As Representative Don Edwards, the subcommittee chairman during the 1975 House hearings, explained:

> The act that was the result of this frustration was a radical bill. It was bent on results without delay. It was also designed to be temporary. After a few years of harsh measures, the practices of a lifetime would be reversed and special federal protection would no longer be necessary.[133]

The recent extension of the Act pushes as hard as any legislation can push against the federalism revolution of recent vintage. During the 1982 debates, for example, many members of Congress and the administration pointed to the temporary nature of the Act as partial proof of the constitutionality of the statute in light of the grave federalism costs it exacts. And in *City of Boerne*, the Court once again pointed to the temporary nature of the law in defense of its constitutionality.[134] How could the preclearance provision possibly survive the recent federalism revolution?

This Part responds to this question in two ways. The first section examines the evolution of the Court's assessment of the constitutionality of the Act. This has been a deferential posture, which places the Court within a scholarly tradition that views the Court as seldom out of step with public opinion as reflected in enacted legislation. The second section conjectures whether this posture will be influenced by the recent federalism cases. This section orients these cases to the *Katzenbach* cases and their progeny and concludes inter alia that the question of legislative findings is ultimately a question of judicial will. The question, then, will not be whether the federalism cases will swallow up the Voting Rights Act but, rather, whether the Court ultimately chooses to take this step.

A. Lessons from the Past: South Carolina *and* Morgan

The lessons of the *Katzenbach* cases boil down to this: in the face of a national disgrace, the Court sent Congress a clear signal that the path of reform was clear and open ended. The Court would not get in the way of the civil rights revolution, even under circumstances—as seen in *Morgan*—that seemed, at best, unorthodox.[135]

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132. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 336 (2d ed. 1988) (asserting that the Voting Rights Act is "probably the most radical piece of civil rights legislation since Reconstruction").

133. *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, 94th Cong. 887 (1975) [hereinafter *1975 House Hearings*].

134. *See* City of Boerne v. Flores, 521 U.S. 507, 533 (1997).

135. *See* Rebecca E. Zietlow, Letting Politics Make Law: The Judicial Restraint of the Warren Court 20-25 (situating the *Katzenbach* cases within a restraintist account of the Warren Court) (Dec. 12, 2006) (unpublished manuscript on file with the Indiana Law Journal).

This conclusion places the Court and its handling of the Act in distinct company. As Robert Dahl concluded in an important early essay, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[136] There will be glitches, of course, and majorities will sometimes have to try harder and persist in their quest for the enactment of their policy preferences in the face of a recalcitrant Court. These moments will mainly arise during transitional periods, when the old majority is declining and a new majority is rising in its place. This conclusion follows by definition, as elected officials reflect the policy-making evolution, while judicial life tenure ensures that federal judges do not.[137]

Decades later, Richard Funston similarly concluded that:

> [I]t is not merely that during critical periods of partisan realignment the Court is more likely to declare recently enacted federal legislation unconstitutional than at other times, but that during realigning periods this is the very sort of congressional legislation which is most likely to be nullified by the Court! [138]

As part of the old coalition, the Court is able to carry on its policy-making agenda until the new majority gets a chance to appoint its own judicial officers. More to the point, all recent legislation enacted by the new majority is more likely to be struck down by the Court than all other statutes. Surely, the Constitution does not change from one period to the next, but policies, some leading bureaucrats, and politicians do. That the Court is more willing to interfere with recent legislation by new majorities

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136. 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).

137. On this last point, Dahl provided little evidence but "apparently arrive[s] at [it] impressionistically on the basis of logical deduction." Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 796 (1975).

138. *Id.* at 806. David Adamany provides a similar assessment in the context of the Court's legitimating capacity:

> May not this more modest legitimacy of the Supreme Court, then, cast it in realigning election periods as the reef upon which the vessel of reform is shattered? In the early stages of each new electoral coalition party majorities tend to be inflated. Spurred by the ideological zeal common among those long out of power and by the national crisis, these large majorities move toward sweeping reform. But the Supreme Court, because of its composition and its checking power, stands in the way or seems to. Finally the new coalition's leadership, often its most reformist wing and usually the Executive, concludes that it must curb the Court.
>
> It is at this moment that the Court's legitimacy is important, for elements of the coalition's elected elite and of its electoral base now hold back in reverence to a constitutional institution, whose actions and functions they may or may not fully understand or approve. The coalition is thus divided over an issue of constitutional structure; the energies, resources, and zeal of the reformist wing of the coalition are diverted to that struggle; the leadership's hold over the loosely joined alliance is weakened; and the momentum for substantive policy change is slowed or stopped.

David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 844–45 (1973).

tells us a great deal about the Court and its role as part of the policy-making governing coalition. Funston thus agreed with Dahl that the Court, while a national policy-making institution, is an integral member of the governing national majority. Or, put in Mr. Dooley's more colloquial terms, "no matther whether th' constitution follows th' flag or not, th' supreme coort follows th' illiction returns."[139]

In a recent essay, Mark Tushnet offered an important variation of this conclusion. He began by identifying a puzzle: if the Court is part of the national political order as Dahl and Funston suggest, how do we explain the institution of judicial review and the power to set the Court in direct conflict with governing majorities? Or, as he wrote, "[h]ow can we understand judicial review as part of a stable political system?"[140] In response, Tushnet offered a view of the Court as a collaborative institution, able to stand against some parts of the political order while at the same time collaborating with others. This collaboration had both geographic and temporal components. On the former, the Court could collaborate with its national partners against state and local actors; on the latter, Tushnet implicitly tracked the Dahl-Funston thesis and explained that the Court could side with present ruling coalitions and against compromises from prior political orders. Both components are supported by the Court's handling of the Voting Rights Act and its various extensions.

Without question, the Court behaved as a member of the national ruling coalition and collaborated with Congress and the Johnson administration in the fight against racial discrimination in voting. The evidence on this point is both internal and external.[141] The internal evidence comes in the form of doctrine and a professed adherence to precedent, which both opinions clearly display. The *Morgan* case is particularly forceful here, as it may be said that the *Morgan* power was *sui generis* and came into existence only due to the exigencies of the case, only to be thrown into the dustbin of history by the next term. Taken together, the *Katzenbach* cases highlight what this section terms "voting rights exceptionalism." Their leading theme is one of deference to congressional judgments in an area of the law where Congress brings both its special competence to the questions presented, "and special reasons to limit the powers of the states."[142]

The external evidence is also very strong. To many critics of the Act, it remained an open question whether the Court would ultimately examine the legislation impartially, as it would any other congressional enactment. During the House hearings, for example, former Representative Albert Watson complained: "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

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139. FINLEY PETER DUNNE, *The Supreme Court's Decisions*, *in* MR. DOOLEY'S OPINIONS 21, 26 (1901).

140. Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 117 (Ronald Kahn & Ken I. Kersch eds., 2006).

141. For the debate over internal/external explanations in particular reference to Justice Roberts's "switch in time," see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

142. EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., joined by Powell, J., Rehnquist, J., and O'Connor, J., dissenting).

body if they become law?"[143] They made this point often, and for apparent good measure.[144] More damningly, the critics further complained that some members of the Court had met with members of the administration in order to advise the drafters of the law on whether the proposal would meet with the Court's approval.[145] On this view, the challenge to the Act did not stand a chance at the hands of a Court majority hell-bent on rubber-stamping the policy measures of the ruling elite.

The temporal aspect of the collaboration thesis also finds much support in the case law and is strengthened by the sunset provision of the Act. The theory is quite straightforward: as a collaborative institution, the Court will side with the present ruling coalition and against compromises from the old order. In the Voting Rights Act context, we would thus expect the Court to strike down the Act once the present ruling coalition ceases to support it. Yet the Act is a peculiar piece of legislation in that its sunset provision demands a continuous public expression of support. Thanks to this expiration date, then, we know that the Act holds much support from a diverse coalition and has been supported by almost every administration since its inception. If history is any guide, the Court will side with the Act and the national coalitions that embraced it.

We also know, however, that the federalism revolution has gained important adherents within the White House, as both Presidents Nixon and Reagan spoke of a return to a New Federalism and devolution to state authority.[146] And so the question would appear to focus not on the aftermath of the inevitable collision between principles of federalism on the one had and race and voting on the other but, rather, on whether the federalism revival has any traction among ruling elites and the coalitions to which they belong. Note that this is precisely the question faced by Congress during the recent amendment and extension of the Act. If any such clash of revolutions ever existed, the ruling majority has clearly taken sides with the Act and against the New Federalism. The Court's handling of the Act has reflected this reality and there is nothing to suggest that the Court will not follow a similar path in the future.

Consider *City of Boerne*, where the Court offered the 1965 Act—not its various amendments—as an exemplary use of the Section 5 power.[147] *City of Boerne* is telling for how it glosses over much of the short history of the Act. For example, the Court did not have much to say about section 4(e) of the Act, upheld in *Katzenbach v.*

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143. *1965 House Hearings*, *supra* note 4, at 623. On the day after President Johnson's address to the nation, Justice Douglas sent a note to the White House, telling the President that the address had been "absolutely superb . . . the best ever." William O. Douglas to Lyndon B. Johnson, 16 March 1965, LBJ Library, Busby Papers, Box 3, *quoted in* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 108 (1978).

144. 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 members of the Supreme Court of the United States appeared—turned up to here [sic] the President's message and appeared on the television cameras applauding. I think this is a violation of the separation of powers of the United States and creates imbalances." *1965 Senate Hearings*, *supra* note 3, at 642.

145. *See id.*

146. Timothy Zick, *Are the States Sovereign?*, 83 WASH U. L.Q. 229, 298 (2005).

147. City of Boerne v. Flores, 521 U.S. 507 (1997).

Morgan,[148] or *Oregon v. Mitchell*, which upheld a nationwide literacy test ban on jurisdictions not covered under the Act,[149] other than to suggest that neither case stood for the view that Congress had "a substantive, non-remedial power."[150] The Court did acknowledge a reading of *Morgan* that would appear to afford Congress the power to enact legislation that expands Fourteenth Amendment rights, yet did not give this argument its due, explaining that "[t]his is not a necessary interpretation, however, or even the best one."[151]

Similarly, the Court said precious little about *City of Rome*, a case where the Court refused to "disturb Congress['s] considered judgment"[152] as codified under the Act, nor did it mention *Mississippi Republican Executive Committee v. Brooks*,[153] which upheld the 1982 Amendments, at all. These cases raised difficult issues under the newly-minted proportional and congruent standard, yet the Court did not offer a clear and persuasive explanation about how these cases fit under the Court's doctrine.[154] About *City of Rome*, for example, the Court wrote that the covered jurisdictions could avoid the challenged provision under certain conditions, and it also lapsed in seven years. Lest one get the impression that the constitutional test required "termination dates, geographic restrictions or egregious predicates,"[155] the Court made clear that this was not so. Rather, the point of these limitations is that they "tend to ensure Congress['s] means are proportionate to ends legitimate under [Section] 5."[156] The Court's silence on *Brooks* is particularly telling about a future challenge to the Act, as Congress had explicitly responded to the Court's conclusion in *City of Mobile* as applied to section 2 of the Act and essentially overturned an earlier ruling. If the Court had nothing to say after the 1982 Amendments to the Act, there is little to suggest that the Court will have anything to say in response to the 2006 Amendments, which were similarly responding to past rulings.

Further proof of the collaborative thesis is found in *Lopez v. Monterey County*,[157] a case decided two years after *City of Boerne*. In *Monterey County*, the Court once again upheld the constitutionality of the Act while concluding that a non-covered state must seek preclearance of a law before implementing it on a covered jurisdiction. In light of *City of Boerne* and the federalism revolution in our midst, this result was mildly surprising.[158] But to the Court, this challenge was old news, hardly worth the time to engage the arguments seriously. For example, the Court began by noting its long-standing precedents (that is, *South Carolina*; *City of Rome*) for the proposition that congressional powers can intrude into areas traditionally reserved for the states. After

148. 384 U.S. 641 (1966).
149. 400 U.S. 112 (1970).
150. *City of Boerne*, 521 U.S. at 527.
151. *Id.* at 527–28.
152. City of Rome v. United States, 446 U.S. 156, 178 (1980).
153. 469 U.S. 1002 (1984) (mem.).
154. Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 748–52 (1998).
155. *City of Boerne*, 521 U.S. at 533.
156. *Id.*
157. 525 U.S. 266 (1999).
158. *See* Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001).

further noting that the result in the case is required by the statutory text and federal regulations, the Court came back to the refrain that this is old news, the outcome decided long ago. "In short," the Court concluded, "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes."[159]

The conclusion is inescapable: the Court has not tried very hard to subject the Voting Rights Act to probing constitutional scrutiny. In response, it may be that the Court simply accords Congress far more latitude when legislating about race than when legislating in related areas.[160] Or else, it may be that the Court has not felt the need to strike down the Act, or even consider its constitutionality all that seriously, because it has chosen the parallel tack of interpreting the Act as narrowly as possible.[161]

These arguments boil down to the question of judicial will. Whether Congress has more evidentiary latitude to regulate protected categories, or as a question of constitutional interpretation, the Court's posture is one of clear deference to the policy choices of the national ruling coalition. This approach to the Act is neither new nor surprising, for it places the Court squarely within its political question tradition. More specifically, the Court is within the prudential strand of the doctrine, "an area where the Court has historically masked its political judgments under the veneer of law and principled decision making."[162] This has been true from the moment the Court decided the *Katzenbach* cases and has continued throughout the life of the Act. But make no mistake: this has been a choice, no different from the choice to remove the judiciary from the political gerrymandering arena, [163] to decide presidential elections, [164] or to strike down majority minority districts under the guise of equal protection. [165]

And so, for the future, the question remains the same: whether the Court will continue to demonstrate a deferential and collaborative posture towards the Act. Put another way, the question is whether the so-called federalism revolution will alter the Court's handling of the constitutionality of the Act.

B. Tracking the New Federalism: Findings

The federalism revolution began in earnest in 1995, with *United States v. Lopez*,[166] blossomed two years later, with *City of Boerne v. Flores*,[167] and may be said to have

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159. Lopez v. Monterey County, 525 U.S. 266, 284–85 (1999); *see* Bush v. Vera, 517 U.S. 952, 991–92 (1996) (O'Connor, J., concurring) (contending that the 1982 Amendments to the Act are entitled to a presumption of constitutionality).

160. Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 68–70 (1995).

161. *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997), *and*, 528 U.S. 320 (2000).

162. Fuentes-Rohwer, *Reconsidering*, *supra* note 22, at 1949.

163. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).

164. *See* Bush v. Gore, 531 U.S. 98 (2000).

165. *See* Shaw v. Reno, 509 U.S. 630 (1993).

166. 514 U.S. 549 (1995).

167. 521 U.S. 507 (1997).

reached its zenith four years after that in *Board of Trustees of the University of Alabama v. Garrett*.[168] Taken together, these cases offer three related insights on the question of congressional powers generally, and as applied to the Voting Rights Act in particular. This Section concludes that the federalism cases will not alter the question of congressional powers. In the end, and as Justice Brennan worried in the *Katzenbach* cases, the fate of the Act will remain a question of judicial will.

1. Legislative Findings

The first insight is the recurring issue of legislative findings. Recall in this vein the debate between Chief Justice Warren and Justice Brennan over the need for findings. Justice Brennan worried about the future and the ways in which the Court's holdings could be interpreted. The Court need not say more than necessary. Chief Justice Warren worried instead about the perceptions surrounding the Act, which explained the central role that findings appeared to play in his *South Carolina* opinion.

Justice Brennan's concerns were prescient. In *Lopez*, the Court underscored the fact that Congress need not include legislative findings as part of its legislation.[169] Yet the Court did explain that findings would help it "evaluate the legislative judgment" that the activity in question substantially affects interstate commerce, especially during those times when such an effect is not "visible to the naked eye."[170] In *City of Boerne*, the Court similarly pointed to the legislative record as lacking support for the legislation under review.[171] And *Garrett* took this concern over findings much farther, explaining that the legislative record in support of the Americans with Disabilities Act "simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[172] The Court conceded that the record had some examples involving state discrimination against the disabled, but "these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which [Section] 5 legislation must be based."[173]

Justice Brennan's concerns proved prophetic for a second and far more important reason. The Voting Rights Act has become the hallmark of civil rights legislation, and the early voting rights cases have followed suit as the epitome of congressional action and legislative findings. In *City of Boerne*, for example, the Court nodded approvingly to the Voting Rights Act and "the record which confronted Congress and the Judiciary,"[174] as opposed to the lack of a record in support of the Religious Freedom Restoration Act of 1993[175] (RFRA). *Garrett* similarly offered that the contrast between the evidence in support of the Voting Rights Act and the evidence in support of the Americans with Disabilities Act was "stark."[176] Tellingly, the Court pointed approvingly to some of the language in *South Carolina* to which Justice Brennan

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168. 531 U.S. 356 (2001).
169. *Lopez*, 514 U.S. at 562–63.
170. *Id.* at 563.
171. *City of Boerne*, 521 U.S. at 530.
172. *Garrett*, 531 U.S. at 368.
173. *Id.* at 370.
174. *City of Boerne*, 521 U.S. at 530.
175. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).
176. *Garrett*, 531 U.S. at 374.

objected—where the Court noted that "[b]efore enacting the measure, Congress explored with great care the problem of racial discrimination in voting."[177] Clearly, Justice Brennan's fears have come to pass.

The more recent *Nevada Department of Human Resources v. Hibbs*[178] and *Tennessee v. Lane*,[179] cases where the Court upheld congressional exercises of its Section 5 power, support this conclusion. In *Hibbs*, the Court examined the Family and Medical Leave Act of 1993,[180] a federal statute that entitles some employees to a maximum of twelve weeks of unpaid leave for any of a number of reasons and creates a private right of action against states that violate rights established under the statute. Two aspects of the opinion are worth noting. First, the Court underscored that Congress was aiming its considerable powers at the problem of gender discrimination. Such discriminations are subject to heightened scrutiny review under the Fourteenth Amendment in its self-executing sense, which means that the states must justify such discriminations only by identifying the important state interests they seek to further.[181] Given heightened scrutiny, it is thus easier for Congress to show unconstitutional discrimination.

This argument suggests that the Voting Rights Act is on safe constitutional ground: as racial classifications are subject to strict scrutiny review and are presumptively unconstitutional, most of the behavior targeted by the Act violates the Fourteenth Amendment and Congress has an easier time seeking to remedy such activities. The Court offered as much in *Hibbs*.[182]

And yet, to turn to the second important aspect of the case, the rest of the opinion betrayed this cautious optimism and placed *Hibbs* in line with the Court's body of work dating back to the *Katzenbach* cases. In suggesting an easier path for Congress when enacting statutes in contexts that require heightened judicial scrutiny, the Court also made clear that its review of congressional statutes will hinge on the state of the evidence proffered by Congress. In *Hibbs*, for example, the Court concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic [Section] 5 legislation."[183] Tellingly, Justice Kennedy took issue with this conclusion, noting that "[t]he evidence [of gender discrimination] must be far more specific, however, than a simple recitation of a general history of employment discrimination against women."[184] To the Court, "the extent and specificity" of congressional findings in support of the Act was enough; to the dissenting Justices, however, "simply noting the problem is not a substitute for evidence which identifies some real discrimination that family leave rules are designed to prevent."[185]

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

178. 538 U.S. 721 (2003).

179. 541 U.S. 509 (2004).

180. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C. & 29 U.S.C.).

181. *Hibbs*, 538 U.S. at 736.

182. *Id.*

183. *Id.* at 735.

184. *Id.* at 746 (Kennedy, J., dissenting).

185. *Id.*

The same dynamic played out in *Lane*. To the majority, the "sheer volume of evidence . . . justif[ied] Congress['s] exercise of its prophylactic power."[186] In fact, this record "far exceeds the record of *Hibbs*."[187] Yet, to the dissent, "the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons."[188]

These debates take us back to Justice Brennan and the *Katzenbach* cases. It is bad enough that a reviewing court will uphold a statute or strike it down in accordance with its view of the accompanying legislative record. Worse yet, the record only appears to play a peripheral role in the case, as one's perception of the congressional handiwork is not empirically verifiable. Rather, the outcome will likely hinge on one's view of the issue and the questions presented. For example, how to explain the late Chief Justice Rehnquist's opinion for the Court in *Hibbs* and his reading of the legislative record in support of the statute?[189] In contrast, how to explain his dissent in *Lane*? This was precisely the problem that Justice Brennan wished to avoid in his correspondence with Chief Justice Warren.

Unsurprisingly, this argument for legislative findings in the voting rights context is not new. In 1975, for example, Armand Derfner, then representing the Lawyers' Committee for Civil Rights Under Law, maintained that Congress had secured evidence in 1965 and after, so he thought that "Congress under the [Fifteenth] [A]mendment is not required to seek new evidence in order to justify continued enforcement of the [Fifteenth] [A]mendment."[190] Kenneth Klee, the subcommittee's associate counsel, retorted that "surely there is some time period when Congress needs new facts and cannot just look back."[191] Derfner answered in response, "I don't think Congress could now ask a 50-year extension of a particular piece of legislation unless it found it was likely inherently to create discrimination."[192] Recent accounts have made similar claims about this need for new evidence.[193] It may be that the time to look back has passed. As the exchange between Derfner and Klee underscores, however, this is a question of degree. As this Section argues, it will also be a question of judicial will and the Justices' willingness to uphold this important statute. Whether new findings are needed, and how much will satisfy the Court, remains to be seen.

2. Congruence, Proportionality, and the Voting Rights Act as Model Legislation

The second insight looks to *City of Boerne* and its new standard for examining exercises of congressional power under Section 5 of the Fourteenth Amendment. In

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186. Tennessee v. Lane, 541 U.S. 509, 528 (2004).

187. *Id.* at 511.

188. *Id.* at 541 (Rehnquist, J., dissenting).

189. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 17–24 (2003); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1871 (2006); Joan C. Williams, Hibbs *as a Federalism Case;* Hibbs *as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 365 (2004).

190. *1975 House Hearings*, *supra* note 133, at 637.

191. *Id.*

192. *Id.*

193. *See* Hasen, *supra* note 21.

Boerne, the Court struck down the RFRA as beyond congressional powers under the Fourteenth Amendment. To the Court, an important distinction exists between legislation that is remedial in nature—and thus constitutional under the Section 5 power—and legislation that seeks to exact a substantive change in the applicable law. This is not always an easy distinction to draw. More particularly, the Court explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[194] To the Court, the congruence prong demands a close fit—or congruence—between the unconstitutional conduct that the statute wishes to combat and the means used by Congress to fulfill those ends. The proportionality prong looks instead to the problem Congress seeks to address and demands that the means used by Congress be in proportion to these perceived problems. Put another way, the number of cases that violate the Constitution must be commensurate to the cases that violate the statute. In the end, an absence of "congruence and proportionality" means that the legislation crosses the line from remedial to substantive.

RFRA failed this exacting test. According to the Court, Congress did not even attempt to document the harm that the statute sought to correct, and, moreover, the statute was so broad and sweeping that "it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[195] The conclusion was thus inescapable that RFRA was not remedial legislation but an attempt by Congress to alter the substantive contours of the Fourteenth Amendment. And this, the Court explained, Congress may not do.

In contrast, the Court offered the Voting Rights Act of 1965 as an instance when Congress acted within proper constitutional parameters. The Court offered the following reasons: the Act bad been confined to particular regions of the country where the discrimination was more acute; it affected only voting laws, and not an amalgam of state regulations; it included a bailout provision; and it had a termination date.[196] Also, the evidence against which Congress was reacting was overwhelming and "unique among modern legislation under the Enforcement Clauses."[197] The Court made clear that when acting under its Section 5 power, Congress need not always include "termination dates, geographic restrictions, or egregious predicates."[198] Rather, these limitations helped ensure that the means used by Congress are proportional to the legitimate ends sought by the legislation.

Those familiar with the Act and its history might find this exaltation by the Court rather odd, as few of the conditions to which the Court alluded have come to pass. To begin, the Act applied quite explicitly to the South, and it is also fair to say that this was the intention of those who drafted its provisions. Yet the coverage formula also enveloped Alaska in 1965, and in subsequent years many other states and political subdivisions outside of the South have come within the purview of the Act's coverage.[199] Recall in this vein Solicitor General Cox's admonition about the irrational

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194. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

195. *Id.* at 532.

196. *See id.* at 532–33.

197. *See* Laycock, *supra* note 154, at 748.

198. *City of Boerne*, 521 U.S. at 533.

199. For example, after originally bailing out in the late 1960s, Alaska once again came within the coverage of the Act in 1975. Texas and Arizona were also added to the list of covered

nature of the coverage formula.[200] Further, the bailout provision has proven to be nonexistent for any jurisdiction seeking to remove itself from coverage.[201] Also, while the Act encompasses changes "with respect to voting," the Supreme Court has interpreted this language expansively, to include, inter alia, annexations and personnel decisions.[202] It is also difficult to make much sense of the Act's termination date, in light of its various extensions.

Thus, the conclusion is inescapable that the Act is model legislation under the enforcement clauses only because the Court wishes for it to be so. As such, the question for the future is not whether the Act as amended in 2006 is proportional and congruent but, rather, whether the Act will be subject to a similarly warm reception at the hands of the Roberts Court. The strongest version of this argument looks to the sunset provision of the Act and is the subject of the next section; to wit, has the passage of time affected the constitutionality of the statute?

3. The Pressures of Time

The third insight focuses on the temporary nature of the special provisions. This appears to be the toughest hurdle for the Act to overcome. In the Court's view, the special provisions of the Act were legitimate and permissive responses to a difficult and long-lasting problem. For constitutional purposes, however, the Court only decided in *South Carolina* that it was reasonable to draw this difficult line at five years. But how far could this line extend? Attorney General Katzenbach recognized this point early on during the Senate debates: "When you are talking in terms of particular years . . . it is almost impossible to say 14 years is reasonable, 14 years and 1 day is unreasonable, because you get into these gradations."[203] The context of Katzenbach's comment was how far back the legislation may look for episodes of discrimination in order to keep a particular jurisdiction within the Act's coverage, yet the sentiment equally applies to the sunset provision of the Act. The Attorney General remarked that ninety-five years would be too long, while ten years was clearly reasonable; and while twenty years would be "probable,"[204] forty years would be "quite unreasonable."[205]

The various extensions of the Act must be understood in this context. The initial five-year window was a reasonable response, as were subsequent five- and seven-year extensions.[206] It must be the case that a constitutional limit exists someplace, especially

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jurisdictions in 1975. Counties in California, New York, Florida, and South Dakota were added to the list after the extensions in 1970 and 1976, as were townships in Michigan and New Hampshire. *See* U.S. Department of Justice, Civil Rights Division, Voting Section Home Page: Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited March 1, 2006).

200. Cox, *supra* note 30, at 1.

201. For a discussion of the bailout formula and its application since 1965, see Michael P. McDonald, *Who's Covered? Coverage Formula and Bailout*, *in* THE FUTURE OF THE VOTING RIGHTS ACT 255 (David Epstein et al. eds., 2006).

202. *See* Perkins v. Matthews, 400 U.S. 379 (1971); Dougherty County v. White, 439 U.S. 32 (1978).

203. *1965 Senate Hearings*, *supra* note 3, at 84.

204. *Id.* at 83.

205. *Id.* at 84.

206. *See* City of Rome v. United States, 446 U.S. 156 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970).

in light of the exacting federalism costs imposed by the Act. But it is also true that the Court has shown a remarkable willingness to afford Congress much leeway in this area, explaining in *City of Rome* that "Congress['s] considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable."[207] Two years later, and under the same "considered determination," Congress extended the Act twenty-five years, bringing the grand total up to forty-two years. Surely Congress must be pushing against the constitutional limit after the last extension of the Act. Would another twenty-five year extension survive a constitutional challenge?

During the 1969 hearings, A. F. Summer, Mississippi's Attorney General, argned in this vein that "if there does not come a time when you can say this is the end then it may as well be in perpetuity."[208] And during the 1975 hearings, M. Caldwell Butler, a member of the subcommittee, asked whether the net effect of these extensions "is to say that as long as the time limit keeps getting extended and eludes us, it is impossible for a state which came under that triggering device to get out from under it?"[209] In response to this question, Stone Barefield, a member of the Mississippi House of Representatives, labeled the Act "a law in perpetuity as far as we are concerned."[210] Representative Butler added: "Now do you have any doubts about the ability under the U.S. Constitution of the Congress to impose this, or use this triggering device as it becomes more remote from the present time? Does it ever become unconstitutional?"[211] This question will be at the forefront of a renewed challenge to further extensions to the special provisions of the Act.

The 1982 debates offered further evidence of the general concerns over the temporal aspects of the Act. In the House, the bill out of committee proposed to extend the Act "in perpetuity," subject to a bail-out provision for eovered jurisdictions.[212] Representatives Hyde and Lungren disagreed with this choice on constitutional grounds while offering as one of the Court's central reasons for upholding the Act "the belief that the 1965 departure from historical tenets of federalism was only 'temporary.'"[213] During the Senate hearings, Senator Hatch similarly offered the temporary nature of the Act as one of the reasons for its constitutionality,[214] as did Attorney General William French Smith.[215] The Senate report similarly concluded that

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207. 446 U.S. at 182.

208. *1969 House Hearings*, *supra* note 7, at 141.

209. *1975 House Hearings*, *supra* note 133, at 711.

210. *Id.*

211. *Id.*

212. H. REP. No. 97-227, at 2 (1981).

213. *See id.* at 57 (Supplemental Views of Rep. Henry J. Hyde and Rep. Dan Lungren).

214. *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and S. 3112 Before Subcomm. on Const. of the H. Comm. on the Judiciary*, 97th Cong. 1085 (1982) [hereinafter *1982 Senate Hearings*]. He also contended that the Act had been upheld "subject to a recognition that such a requirement was permissible only to address the 'exceptional' conditions then existing in the South." *Id.*; *see also* S. REP. NO. 97-417, at 166 (1982).

215. The Attorney General offered three reasons: its temporary nature; the finding that the covered jurisdictions "had been found by Congress to have violated their constitutional obligations"; and the fact that the covered jurisdictions could ultimately bail out. *See 1982 Senate Hearings*, *supra* note 214, at 69.

"[t]he constitutional foundation of the Voting Rights Act rested in large part upon its temporary and remedial nature."[216] In light of the recent 25-year extension of the Act, this argument promises to come back in full force.

If the recent "federalism revolution" serves as a useful guide, extensions to the Voting Rights Act should face a stiff constitutional test. Regardless of how much evidence Congress can collate, or whether the Act meets the recently developed congruence and proportionality test, the Court will face a challenge to the Act from a far different posture than it faced in 1965 and 1980. This time around, the Court will have to face questions over whether Congress ean implement such "stringent" and "uncommon" methods against covered jurisdictions indefinitely. Put a different way: would the Act be a reasonable response to the problem of racial discrimination had the trigger formula and the preclearance requirement been extended sixty-seven years from their inception?

But in faimess to the Act and its various extensions, this is not what Congress has done. The coverage of the Act upon covered jurisdictions grew incrementally, a small step at a time. It may be said that the 1982 Amendments went too far, too fast in extending the life of the Act for twenty-five years, especially in comparison to the previous three extensions put together, when Congress extended the Act a mere seventeen years. Yet the point is still the same: Congress moved only as fast as it deemed necessary, weighing the problem as then understood and the solution as then deemed proper. In 1965 and 1970, Congress could determine that the special provisions of the Act must only extend for five years, yet in 1975 they must extend seven years, in order to cover the 1980 redistricting round. And in 1982, Congress had a seventeen-year history from which to determine that twenty-five years was a necessary extension. In extending the Act to the year 2032, the 109th Congress may be understood—if charitably so—to have made a similar determination.

This argument is analogous to a position taken by the Supreme Court in a related context. In *Grutter v. Bollinger*,[217] the Court upheld a race-conscious admissions program against a facial attack on equal protection grounds. More importantly for present purposes, the Court admonished that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[218] As in the Voting Rights Act context, this temporal target suggests that a university may not extend its race conscious policies indeterminately; or at least, that the Court will not condone them in perpetuity. This is simply a window, a target for the Court and policy-makers. And just as educators must periodically revisit the question, so has Congress with reference to the Act. Thus, so long as *Grutter* remains good law, judicial consistency demands a similar outcome in the Voting Rights Act context.

CONCLUSION

Scholars of real revolutions would be amused by the Rehnquist Court's federalism revolution. Not a single central feature of the New Deal's regulatory regime was overturned in that revolution, nor were central elements of the Great Society's programs displaced. The federalism revolution snipped off some stray excesses in

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216. S. REP. NO. 97-417, at 166 (1982).
217. 539 U.S. 306 (2003).
218. *Id.* at 343.

> *Congress's actions and suggested that perhaps the Great Society's rights revolution had gone too far. It did little to rein in that revolution, though.*[219]

The Voting Rights Act of 1965 spawned a new era of voting rights law while exacting significant federalism costs on the jurisdictions covered by its triggering formula. In the early case law interpreting the Act, the Supreme Court upheld the law and interpreted its provisions broadly. Yet, as Congress has gradually extended the sunset provisions of the Act, the justifications for the Act have evolved from those then existing in 1965. In this way, the Court will face a far different piece of legislation than it faced in 1965. For the next challenge, the Court will have to face up to the permanency question: with all the extensions up to this point, the Act has basically become a permanent piece of legislation. Would a permanent preclearance provision, whereby covered jurisdictions must submit their electoral laws to the Attorney General in perpetuity, and with a barely existent bailout provision to boot, pass constitutional muster?

If the federalism revolution has any traction whatsoever, the answer to this question must be no. Federal statutes can hardly be any more intrusive into areas of state sovereignty than this one. And so the stage appears to be set for a clash between 1960's liberalism and the federalism revolution of more recent years. On its face, this appears to be a clash for the ages, a test of wills between Congress and its vision of good public policy coming in direct tension with the Court's federalism revolution.

Yet such a collision might not take place after all. As this Article contends, the constitutionality of the Act of 1965, is really a question about the Court's appetite for taking on one of the crown jewels of the civil rights movement and a piece of legislation recently reauthorized by substantial congressional majorities. This is not a new question by any means; as this Article argues, the question of legislative findings and judicial deference dates back to the genesis of the Act and the Court's early decisions on its constitutionality. This relaxed and forgiving posture has held steady through the years and has not been affected by the recent federalism revolution. On the strength of this history, this Article concludes that the question for the future is ultimately a question of judicial attitudes and whether the Court can muster the will to strike down the most effective civil rights statute in history.

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219. TUSHNET, *supra* note 131, at 277 (2005) (emphasis omitted).