THE FUTURE OF SECTION 2 OF THE VOTING RIGHTS ACT IN THE HANDS OF A CONSERVATIVE COURT

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This Essay argues that the future of the majority-minority district is in peril, as a conservative majority on the Court stands poised to strike down section 2 of the Voting Rights Act. When the Court takes up the constitutionality of Section 2, binding precedent will play a secondary role at best. Instead, the Justices' policy goals and ideological preferences—namely, their personal disdain for the use of race in public life—will guide the Court's conclusion. In this vein, Justice Kennedy holds the fate of the Act in his hands. To be clear, this Essay is not trying to prognosticate the future of the Act. Instead, it is far more intrigued by the many lessons that the fate of the Act offers about the Court as an institution; the Court's treatment of colored communities and their interests; and the role political attitudes play in guiding judicial behavior. As the Court continues to position itself at the center of many political controversies, these lessons gain greater urgency.

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INTRODUCTION

The majority-minority district is now an important feature of the landscape of American Democracy. Thanks to these districts, candidates of color have joined legislative chambers in record numbers despite the existence of racially polarized elections and the refusal of voters to cross racial lines. Put differently, "race-conscious redistricting and the creation of effective minority districts remain the basis upon which most African American and Latino officials gain election."[1]

In the hands of the Roberts Court, however, these districts might soon become quaint relics of an old and racist past. The arguments against these districts are familiar. To Justice Kennedy, for example, the creation of these districts hinged on "offensive and demeaning assumption[s]" about minority voters that led to noxious racial stereotyping.[2] Justice Thomas complained that these districts "exacerbate racial tensions."[3] Justice Scalia agreed that the jurisprudence in this area "continues to drift ever further from the [Voting Right] Act's purpose of ensuring minority voters equal electoral opportunities."[4] Chief Justice Roberts, in an opinion joined by Justice Alito, famously declared that majority-minority districting is all a "sordid business, this divvying us up by race."[5]

These criticisms underscore the tenuous future of the majority-minority district at the hands of a conservative Court. This is true both as a legal and a constitutional matter. The legal question is stated simply but is deceptively complex: Will the Supreme Court continue to interpret section 2 of the Voting Rights Act ("VRA" or "Act") to

1. David Lublin et al., *Has the Voting Rights Act Outlived its Usefulness? In a Word, "No,"* 34 LEGIS. STUD. Q. 525, 547 (2009).

2. Miller v. Johnson, 515 U.S. 900, 911–12 (1995).

3. Holder v. Hall, 512 U.S. 874, 907 (1994) (Thomas, J., concurring).

4. League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 512 (2006) (Scalia, J., concurring in part and dissenting in part).

5. *Id.* at 511 (Roberts, C.J., concurring in part and dissenting in part).

allow for the creation of majority-minority districts, or will changed realities lead to a narrower interpretation of the law?[6] The evidence on this point is decidedly mixed. Recent cases suggest that the Court is no longer inclined to read the statute in broad and dynamic ways,[7] yet the early opinions, namely *Thornburg v. Gingles*,[8] remain controlling law.

The constitutional question is similarly complex yet far more intriguing. Five Justices have strong reservations about the constitutionality not only of section 2 of the Act but also of its special provisions as well. To date, however, the Supreme Court has left open the question whether section 2 is a constitutional exercise of congressional power.[9] Not once has the Court subjected section 2 to rigorous judicial review, even in the face of very strong constitutional arguments. In the words of then-Justice Rehnquist, the Court's posture "is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government."[10] This judicial posture is curious at best and demands an explanation. This Essay argues that the Act is on a collision course with the Court's conservative majority and its views on the legitimate use of race and the proper scope of congressional power. Whether the Court ultimately strikes down the Voting Rights Act, or section 2 in particular, is a question only Justice Kennedy can answer. Of greater import are the many lessons that this question teaches us about the Court as an institution, the use of race by state actors, and the role political attitudes play in guiding judicial behavior. This Essay examines these lessons in five Parts.

Part I frames the evolution of section 2 from its modest beginnings in 1965 to the complex constitutional question it is today. As part of this inquiry, this Part analyzes one of the most important cases in the history of the Act—*City of Rome v. United States*.

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6. *See generally* Note, *The Future of Majority Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208 (2003) (exploring the ramifications of a move towards coalitional districts and away from majority-minority districts).

7. *See* Bartlett v. Strickland, 129 S. Ct. 1231 (2009).

8. Thornburg v. Gingles, 478 U.S. 30 (1986).

9. *See*, *e.g.*, Bush v. Vera, 517 U.S. 952, 992 (1996) ("We should allow States to assume the constitutionality of § 2 of the VRA, including the 1982 amendments."); Johnson v. De Grandy, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring in part and dissenting in part) ("It is important to emphasize that the precedents to which I refer, like today's decision, only construe the statute, and do not purport to assess its constitutional implications.").

10. City of Rome v. United States, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting).

Part II moves the story ahead to 1997 and *City of Boerne v. Flores*.[11] This Part takes seriously the idea that the Court grounds its decisions in law, not policy or the Justices' personal preferences, yet ultimately argues that the legal model will have little to say about the resolution of section 2's constitutional question. Instead, Part III argues that the Justices' ideologies will play a much larger role in determining the constitutionality of section 2. But ideology will not be the Justices only consideration. The Justices are strategic actors; thus resolution of this important question will hinge not only on their political attitudes but also on the existing political context.

Part IV examines the constitutionality of section 2 of the Act as an exercise in strategic judicial policymaking. This Part explains that the Court is best understood as a national policymaking institution that generally tracks existing public opinion. This understanding of the Court makes sense of the Court's early deferential posture to the constitutionality of the Act, a statute that was supported by strong national majorities in Congress and the nation at large. This Part also agrees with the view that the Court sides with the interests of racial minorities only when these interests converge with majoritarian interests. This argument also makes sense of the Court's handling of the Act. When originally understood as a law that opened the political process to all, the Act received wide support. In recent years, however, section 2 in particular has come to be viewed as an all-purpose anti-discrimination statute, no different than those affirmative action plans for which conservatives on the Court have very little patience. Going forward, the constitutionality of section 2 will hinge on whether Justice Kennedy concludes that the provision is now far removed from its original purposes. Of note, this will be a question of raw attitudes, of perceptions about the world, and not a question of law.

Finally, Part V considers the lessons of the Court's handling of the constitutionality of the Act to our understanding of the Supreme Court as an institution.

I. THE SETTING: SECTION 2 AS A CONSTITUTIONAL QUESTION

Section 2 of the Voting Rights Act of 1965 came about uneventfully, maybe even as an afterthought. Its original language was oddly familiar: "No voting qualification or prerequisite to voting, or

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

standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[12] On its face, it is clear that section 2 was only codifying the Fifteenth Amendment, and both the Attorney General and leading members of Congress said as much during the hearings in 1965.[13] This explains why there was little debate on this issue. For all the things that critics of the voting rights bill found objectionable, a codification of the Fifteenth Amendment was not among them.

This was the reason why section 2 lay dormant for many years, even in the midst of the Court's "reapportionment revolution." Not only did section 2 add nothing of consequence to the Fifteenth Amendment, but the Fourteenth Amendment offered the Court all the power it needed to develop its nascent voting rights jurisprudence. The promise of equality was really that powerful. The litigation concerning equal representation took two separate routes.

The Court first examined the question of vote dilution as a malapportionment question grounded in a strict conception of population equality within districts. As the Court explained in *Reynolds v. Sims*, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[14] Dilution cases thus forced the Court to struggle with a general definition of "fair representation." Perhaps too simplistically, the Court ultimately settled on a definition of fairness better known as "one person, one vote,"[15] a definition that Justice Stewart chided as an "uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic."[16] The lesson of these cases was clear: the Court's nascent equality doctrine would go as far as the Court's willingness to take on political problems would take it. This was a question of judicial will, plain and simple, a quest for fairness in elections for which legal arguments played a secondary role at best.[17]

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12. 42 U.S.C.A. § 1973(a) (West 2010).

13. *See, e.g.*, *Voting Rights: Hearings Before the S. Comm. on the Judiciary on S. 1564*, 89th Cong. 171 (1965) (statement of Sen. Dirksen) (arguing that section 2 "is a restatement, in effect, of the 15th Amendment").

14. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

15. Gray v. Sanders, 372 U.S. 368, 381 (1963).

16. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting).

17. *See* Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards,*

The second route followed directly from the first, yet proved far more complex and elusive. This thread of equality litigation focused on the question of minority vote dilution. If the right to vote could be denied when the state diluted the weight of a vote, it must also be the case that dilution would exist when the votes of black voters were rendered useless through the implementation of multimember districts. After all, to submerge black voters within a larger jurisdiction where they would never be able to win or even influence elections was akin to denying them the right to vote. The Court conceded as much the year after *Reynolds* in *Fortson v. Dorsey*: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[18] But to recognize the problem was not the same as offering a simple and manageable solution, in the mold of the "one person, one vote" principle. The constitutional test was understood differently by courts and commentators—from an intent test, to an effects test, to a totality of circumstances approach.[19] Then, in 1980, everything changed.

The case that changed everything was *City of Mobile v. Bolden*.[20] In an opinion authored by Justice Stewart, a plurality agreed that section 2 of the Voting Rights Act was a mere codification of the Fifteenth Amendment.[21] Section 2 thus added nothing of consequence to the guarantees of the Fifteenth Amendment. The plurality interpreted the Fifteenth Amendment quite narrowly, to protect only the formal right to register and vote, and not against vote dilution.[22] In turn, the plurality offered that the Fourteenth Amendment continued to protect against minority vote dilution, but only when plaintiffs could show that the challenged practices were adopted for racially discriminatory purposes.[23] This holding was "devastating," according to Armand Derfner, a leading civil rights lawyer.[24] The high factual

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Fair Representation, and the Necessary Question of Judicial Will, 14 CORNELL J.L. & PUB. POL'Y 423 (2005) (documenting the importance of judicial will to the outcome of voting rights cases).

18. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

19. White v. Regester, 412 US 755, 769 (1973); Whitcomb v. Chavis, 403 US 124, 158–60 (1971); Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973).

20. City of Mobile v. Bolden, 446 U.S. 55 (1980).

21. *Id.* at 60–61.

22. *Id.*

23. *Id.* at 66–70.

24. Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed. 1984).

threshold established by the intent standard essentially brought the adjudication of dilution cases to an end.[25]

Congress responded to the plurality's reading of section 2 in the 1982 Amendments to the Act.[26] Much has been said and written about what Congress in fact did and did not do.[27] For the purposes of this Essay, it is important to note only that Congress sought to overturn *City of Mobile*'s conclusion that section 2 of the Act, while codifying the Fifteenth Amendment, incorporated that Amendment's intent standard.[28] The evidence is quite clear on this point. Hence the question at the heart of this Essay: could Congress take on the Court and essentially overturn the *City of Mobile* decision?

One response to this question argues that Congress was well within its legitimate range of constitutional authority. After all, the 1982 Amendments were only overturning the Court's statutory conclusion about the proper meaning of section 2. While Congress may not supersede the Court's constitutional decisions, Congress can indeed correct those statutory decisions where the Court gets the interpretation of the statute wrong. This is precisely what Congress did. But to say that Congress may correct the Court's mistaken interpretations of a statute is not to say that Congress has the power to do so. For purposes of section 2 as amended in 1982, then, the question was whether Congress could use its power to enforce the Fifteenth Amendment to overturn the Court's holding in *City of Mobile*.

This Essay argues below that this is a far more difficult question than often acknowledged. Congress originally enacted the Voting Rights Act under its power to enforce the Fifteenth Amendment.[29] Taken literally, this means Congress had power to enforce whatever the Fifteenth Amendment means, that is, what the plurality in *City of Mobile* held that it means. This is clearly not an easy question to answer. To be sure, constitutional scholars spent a lot of time and energy in the late 1990s debating the boundaries of the remedial–substantive divide at the heart of Congress' enforcement powers. This

25. *Id*.

26. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973).

27. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 566–94 (3rd ed. 2007) (providing a sampling of critiques of the amendments).

28. S. REP. NO. 97-417, at 27 (1982), *reprinted in* 1982 U.S.S.C.A.N. 177, 205.

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

Essay does not engage this debate. The point is simply that a very good argument existed in 1982 against what Congress did. Were the Court inclined to strike down section 2 of the Act as Congress understood it post-1982, it had the means to do so. It only needed the requisite will to take on the political branches.

The notion that the Court might strike down the amended Act was not an idle worry, at least not in the early 1980s. To see this, one need only examine the evolution of the Voting Rights Act at the hands of the Warren and Burger Courts. In the early days, the Warren Court was clearly on the side of Congress and the Johnson administration. This is the best way to explain the *Katzenbach* cases, *Allen v. Virginia State Board of Elections*,[30] and *Gaston County v. United States*.[31] The 1968 election changed everything, and President Nixon soon molded the Supreme Court into a more conservative body. By the mid-1970s, the Court had clearly shifted to the right.[32] The Court was no longer on the side of the civil rights coalition that made passage of the Act possible. The demise of the Act appeared possible, even likely.

This was the setting on April 22, 1980, the day the Court decided *City of Mobile*.[33] Notably, this was also the day the Court decided *City of Rome v. United States*, a case challenging the constitutionality of the Voting Rights Act.[34] When considered together, these two cases set the Court on a collision course with the past both as an institutional question and as a matter of law. On the first, it was clear that the Court had shifted its posture about what the Act meant. While the early cases—from *Allen*[35] to *Perkins v. Matthews*[36] and *Georgia v. United States*[37]—were broad and creative interpretations of Congressional intent, the Burger Court settled on a narrower approach. The Burger Court's new Justices made clear that they would not acquiesce silently to the past,[38] and the views of some of the

30. Allen v. Va. State Bd. of Elections, 393 U.S. 544 (1969).

31. Gaston County v. United States, 395 U.S. 295 (1969).

32. *See generally* Beer v. United States, 425 U.S. 130 (1976) (adopting a narrow interpretation of section 5 of the Act); City of Richmond v. United States, 422 U.S. 358 (1975) (upholding land annexation under section 5 of the Act in the face of dilution of black voting strength).

33. City of Mobile v. Bolden, 446 U.S. 55 (1980).

34. City of Rome v. United States, 446 U.S. 156, 159 (1980).

35. *Allen*, 393 U.S. at 544.

36. Perkins v. Matthews , 400 U.S. 371 (1971).

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

38. *See, e.g.*, *Perkins*, 400 U.S. at 397 (Blackmun, J., concurring) ("Given the decision in

old Justices—namely Justice White[39]—were clearly evolving. *City of Mobile* fit squarely within that narrative.

This change in judicial posture on the part of the Court had a direct effect on the constitutionality of section 2. After all, if section 1 of the Fifteenth Amendment prohibited only intentional racial discrimination, as decided by the plurality in *City of Mobile*, could Congress now outlaw practices that have only a discriminatory effect under its power to enforce this Amendment? This was the question in *City of Rome*.[40] Would the Court look to the past and its deferential mode of review, as in the *Katzenbach* cases, or would it continue its recent retrenchment?

In an opinion authored by Justice Marshall, the Court looked to the past and adopted a deferential mode of review. The Court turned to *Katzenbach* and its holding that Congress could outlaw literacy tests that were not on their face discriminatory if they "perpetuate[] the effects of past discrimination."[41] The Court quoted from *Katzenbach*'s language referring to the enforcement powers as "a positive grant of legislative power,"[42] and *Oregon v. Mitchell*'s conclusion that Congress could outlaw literacy tests nationwide even if their implementation was devoid of any traces of purposeful discrimination.[43]

City of Rome was thus a watershed moment in the life of the Voting Rights Act. Much can be said for Justice Marshall's opinion, and it would be easy to defend it. But far more important than its actual holding is the fact that the Court simply chose the path of least resistance. Rather than engage the difficult arguments at the heart of the case, the Court chose instead to defer to its own past. Make no mistake, this was a decision the Court did not need to make. Powerful and persuasive counter arguments were readily available.

Allen v. State Board of Elections, a case not cited by the District Court, I join in the judgment of reversal and in the order of remand.").

39. City of Richmond v. United States, 422 U.S. 358 (1975); *Georgia v. United States*, 411 U.S. at 542 (White, J., dissenting) (dissenting for the first time in cases interpreting the Voting Rights Act).

40. City of Rome v. United States, 446 U.S. 156, 173 (1980) ("We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect.").

41. *Id*. at 176.

42. *Id*.

43. *Id*. at 176–77.

The constitutional question at the heart of *City of Rome* was the same question at the heart of the constitutional debate over section 2. Once the Court held that a Fifteenth Amendment violation demanded a prior finding of purposeful racial discrimination, could Congress seek to enforce this Amendment by requiring only a finding of discriminatory effect? Put more forcefully, it may be argued that the 1982 Amendments to section 2 of the Act were a direct rebuke to the Court and its power—a moment in time when Congress asserted its power to interpret the Constitution alongside the Court. If one were inclined to histrionics, these Amendments might even be seen as challenging the canonical *Marbury v. Madison* and its assertion that it is "emphatically the province and duty of the judicial department to say what the law is."[44] It would be hard to believe that the Justices would not have something to say about that. But they have not. To this day, the Court has not addressed the constitutionality of the amended section 2.

One reason for this silence may be that section 5 of the Act—its preclearance provision—has proven to be far more controversial. In asking select states and local jurisdictions to preclear any and all changes to their voting laws, section 5 essentially places these jurisdictions in a status akin to a receivership. To critics, this bears an unmistakable resemblance to Reconstruction. Thus, if section 5 is deemed constitutional, certainly the far less controversial section 2, which simply sought to codify the Fifteenth Amendment, is constitutional as well. In recent years, however, one of the available counter-arguments finally garnered a Court majority, thus forcing us to reconsider the Court's silence on the constitutionality of section 2. The case was *City of Boerne v. Flores*.[45]

II. WHY THE LEGAL MODEL FAILS: *CITY OF BOERNE* AND ITS AFTERMATH

City of Boerne involved a direct confrontation between Congress and the Court. In *Employment Division v. Smith*, the Court held that neutral laws of general applicability could interfere with the free exercise of religion, subject to rational basis review; only laws that were not neutral and generally applicable were subject to strict

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
45. City of Boerne v. Flores, 521 U.S. 507 (1997).

scrutiny.[46] In direct response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act ("RFRA").[47] In so doing, Congress sought to overturn *Smith* and protect religious liberty in a way that the Court's prior decision had not.[48]

The Court struck RFRA down.[49] The Court held that the enforcement power at the heart of the Reconstruction Amendments is at its root a "remedial," not "substantive," power.[50] Not to be misunderstood, the Court offered that this power is "broad," and that Congress may "prohibit[] conduct which is not itself unconstitutional."[51] However, Congress was still not free to determine the meaning of constitutional rights.[52] This remained the work of the Court.[53] Congress may only prohibit constitutional conduct when seeking to "deter or remed[y] constitutional violations" as previously defined by the Court.[54] More specifically, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[55]

RFRA failed this test. To the Court, the statute "[was] so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[56] This conclusion required an empirical judgment on the part of the Court between the proportion of constitutional violations in the world at large and violations of the statute.[57] When the proportion of constitutional violations was large in relation to statutory violations, then the statute would be considered remedial and thus constitutional. This is another way of saying that the statute would survive judicial review when the Court determined that the proportion of constitutional violations targeted by the law was large. In contrast, when the Court determined that the proportion of such violations was small, the statute would then be considered

46. Employment Div. v. Smith, 494 U.S. 872 (1990).
47. *City of Boerne*, 521 U.S. at 512.
48. *Id.*
49. *Id.* at 511.
50. *Id.* at 517.
51. *Id.* at 518.
52. *Id.* at 518–19.
53. *Id.*
54. *Id.* at 518.
55. *Id.* at 520.
56. *Id.* at 532–533.
57. Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 746 (1998).

substantive. If few violations were deemed to exist, then Congress would be essentially changing the rules of the game to reach behavior that is not unconstitutional.[58]

The Court's conclusion raises myriad questions. For the purposes of this Essay, two related questions are particularly poignant. How does the Court know when a set of facts falls on one side of the divide or the other? How many cases does the Court need in order to decide that a set of facts will be enough to make a statute remedial or substantive?[59] Without question, these are essentially questions of degree, the kinds of questions that belong to the legislature, not the courts. But the majority in *City of Boerne* clearly thought otherwise.

The *City of Boerne* decision should have civil rights advocates on edge. Many federal "enforcement" statutes that go far beyond the judicial interpretation of the right that Congress sought to enforce remain on the books. The Voting Rights Act is one such statute.[60] To be sure, it might appear that the Voting Rights Act remains on safe constitutional ground. But this is only true if the Court decides to follow its longstanding precedents. The Court could also choose to accommodate section 2 within its new congruent and proportional standard.[61] It is hard to be optimistic, however, for three reasons.

First, as noted above, the constitutional question framed by the Court in *City of Boerne* is a question of empirical judgment. This is now a subjective inquiry about how much racial discrimination exists in voting procedures and policies. The point was easy to make in 1965, as the record was replete with evidence of racial discrimination. It remains to be seen whether Justice Kennedy and the new conservative majority will look to the current state of affairs and make a similar conclusion.

Second, it is important to note that the remedial–substantive distinction never garnered a majority of the Court until *City of Boerne*. Prior to *City of Boerne*, the distinction had only been made in isolated dissenting opinions. According to then-Justice Rehnquist, writing for himself and Justice Stewart in *City of Rome*, "[i]f the

58. *See id*. at 770.

59. *See id*. (observing that the difference between a substantive statute and a remedial one "depends on whether the Court thinks there are enough cases of unconstitutionality to justify dispensing with complete proof of unconstitutionality").

60. *Id*. at 747 n.19.

61. *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725 (1998).

enforcement power is construed as a 'remedial' grant of authority, it is this Court's duty to ensure that a challenged congressional Act does no more than 'enforce' the limitations on state power established in the Fourteenth and Fifteenth Amendments."[62] To hold otherwise, he suggested, would be to allow Congress to essentially amend the Constitution by statute.[63] Justice Harlan made a similar argument in his dissenting opinion in *Katzenbach v. Morgan*.[64]

These dissenting views commanded a majority within the Court for the first time in *City of Boerne*. Much can be said about this shift within the Court,[65] but far more important is the fact that the shift took place almost unannounced. The Court interpreted the relevant precedents either as consistent with its conclusion or else as irrelevant.[66] What the Court will do with the next case, it is impossible to say. But if *City of Boerne* serves as guide, it is hard to believe that the Voting Rights Act as amended in 1982 will survive this kind of judicial review.

Finally, while striking down RFRA as outside Congress' enforcement power, it is often noted that the Court offered the Voting Rights Act as an exemplary statute. The Court underscored often how RFRA was different in degree and kind from the VRA.[67] To supporters of the VRA, this is a very clear signal that the statute remains on safe ground. But this reading is far too charitable to Justice Kennedy's majority opinion in *City of Boerne*. Justice Kennedy did not posit the Act as an exemplary statute; rather, his use of the VRA was mainly a nod to section 5 of the Act and the congressional suspension of literacy tests nationwide.[68] Section 2 remained conspicuously absent from the discussion. One reason for this absence may be that section 5 is widely regarded as posing the strongest challenge to our constitutional commitment to principles of federalism and the division of power between the national government and the states.

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62. City of Rome v. United States, 446 U.S. 156, 211 (1980) (Rehnquist, J., dissenting).
63. *Id*. at 210–11 (Rehnquist, J., dissenting).
64. Katzenbach v. Morgan, 384 U.S. 641, 688 (1966) (Harlan, J., dissenting).
65. *City of Boerne* was a shift, even though the Court's opinion (authored by Justice Kennedy) argued that its view on this question dated back to the founding. *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
66. *See* Laycock, *supra* note 57, at 748.
67. *City of Boerne*, 521 U.S. at 530.
68. *See id*. at 533.

The concerns regarding the constitutionality of section 2 engages the section 5 debate, but only at the periphery. Since the 1982 Amendments, section 2 must be understood as presenting a separation of powers question. This is a question about judicial review and constitutional authority to interpret the constitutional text. Of note, this happens to be the kind of question that engages the Court's attention quite readily. The Justices are not terribly interested in sharing the Court's self-appointed duty to interpret the constitutional text, especially of late.[69]

Once the Court focuses on the constitutionality of section 2, it will find arguments for striking it down close at hand. In his dissent to *City of Rome*, Justice Rehnquist offered the following argument:

> After our decision *City of Mobile* there is little doubt that Rome has not engaged in *constitutionally* prohibited conduct. I also do not believe that prohibition of these changes can genuinely be characterized as a remedial exercise of congressional enforcement power. Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution. This result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government.[70]

Justice Rehnquist supported his argument by citing to some of the Court's most important decisions on judicial power—*U.S. v. Nixon* and *Marbury v. Madison*. His dissent in *City of Rome* shows that the argument for striking down section 2 as unconstitutional would not be a difficult argument to make.

In the end, the Court may continue to assume the constitutionality of section 2 in perpetuity. Or perhaps the Court will finally subject section 2 to judicial review and conclude that the law fits comfortably within its established precedent. The arguments to find section 2 constitutionally permissible are available;[71] whether they are likely to prove persuasive to the Court is the subject of the next Part.

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69. *See generally* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

70. City of Rome v. United States, 446 U.S. 156, 210–11 (1980) (Rehnquist, J., dissenting).

71. *See* Karlan, *supra* note 61, at 731–41.

III. ATTITUDINALIST JUDGING AND STRATEGIC JUSTICE

It is an axiom of judicial decision-making that legal tools guide judicial opinions; legal arguments and binding precedents direct judges to the "correct" outcome. The law does all the heavy lifting and the Justices, like good Platonic Guardians, only need to discern what its teachings are. Most importantly, the Justices' ideologies and policy views play no role at all.

This view has a long and distinguished lineage. According to Chief Justice Marshall:

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.[72]

This is an argument for the role of law as central to the outcome of any case. The argument concedes that judicial discretion is unavoidable and even necessary. But even when discretion is necessary, a judge remains subservient to the law and nothing else. A judge must do what the Constitution or the legislature demands, always casting aside her preferred political outcomes.

In a nutshell, Marshall's position encapsulates the modern debate about judicial behavior. One side of the debate—the legal model—views judges as tightly bounded and constrained by the law, guided by nothing but what the law demands. As the late Chief Justice Burger once said, "Judges . . . rule on the basis of law, not public opinion, and they should be totally indifferent to the pressures of the times."[73] This is a view central to modern legal education, for it assumes that reasoning from specific principles will inexorably lead to a given result. Unsurprisingly, its cast of supporters is both distinguished and long: from Deans Langdell and Wechsler to federal judges and Justices alike.[74]

This is an intuitively attractive claim. The very nature of judicial

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72. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

73. CHUCK HENNING, THE WIT AND WISDOM OF POLITICS 107 (1992).

74. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997).

decision-making, and particularly the way in which judges go about doing their jobs, makes this claim almost self-evident. The argument is simply that judges are not free to answer legal questions any way they wish; rather, they are constrained by institutional structures designed to limit their available choices. One such constraint is the principle of *stare decisis*, the notion that judges must respect and adhere to existing legal authority unless they provide good reason for setting precedent aside.[75] Another important constraint is the nature of the judiciary. When deciding cases, judges must give reasons for their decisions,[76] and, in so doing, they must attempt to align their decisions with past law or explain why they diverge from it. Judges also must take cases as they come to them, and may not set their own agendas.

In response to this view, the attitudinal school contends that judges decide cases in accordance with their personal policy preferences. In the words of Harold Spaeth and Jeff Segal,

> the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the Justices. Simply put, Rehnquist votes the way he does because he is extremely conservative. Marshall voted the way he did because he is extremely liberal.[77]

The empirical evidence, while subject to deserved criticism,[78] is both robust and accurate.[79] Or in the words of Frank Cross, "political

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75. *See* Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 AM. J. POL. SCI. 1018, 1032–34 (1996) (concluding that *stare decisis* constrains the Supreme Court's decision-making); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1060–61 (1996) (presenting evidence that Supreme Court Justices vote to reaffirm precedents that conflict with their apparent policy preferences). *But see* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of* Stare Decisis *on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996) (presenting an empirical case that Supreme Court Justices are not influenced by precedent with which they disagree); Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and* Stare Decisis*: A Response*, 40 AM. J. POL. SCI. 1063, 1074–76 (1996) (contending that the evidence showing that the doctrine of *stare decisis* is a legal norm does not show that the Justices are influenced by precedent with which they disagree).

76. *See generally* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (1992); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (analyzing the logic behind judicial reasoning).

77. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 65 (2002).

78. *See, e.g.*, Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1749–52 (2003).

79. *See* ROBERT A. CARP & RONALD STIDHAM, THE JUDICIAL PROCESS IN AMERICA 362 (1996) (quoting Professor Spaeth) (explaining that the model is accurate "on more than 9 out of 10 predictions of judicial behavior")

scientists have produced abundant support for the attitudinal model, far more than legal scholars have mustered on behalf of more traditional legal models."[80] This body of work is extensive and holds an impressive list of adherents.[81]

The attitudinalist school is keenly aware—and dismissive—of the traditional legal model. As a general matter, these scholars conclude that the legal model, a model grounded on the strength of *stare decisis* and legal rules as guiding principles, has little effect on judicial behavior.[82] Put another way, legal precedent and doctrine play no role in judicial opinions. To be sure, a judge will often underscore the view that, while disagreeing with the particular opinion she is then authoring, the "law" leaves her little choice.[83] And other times, an opinion simply "won't write," so a judge will have to turn away from a conclusion she previously deemed correct.[84] These examples are exceptions, however, not the norm.[85] The law is so fluid and malleable that legal precedent often exists to support both sides of a case. Even when judges argue that their ideological preferences must play no role in the outcome of a case,[86] attitudinalists argue that it is hard to take these arguments at face value, as these words are often used to disguise the judges' personal preferences.[87]

These two models can be harmonized. In fact, the best way to understand judicial behavior is by recognizing that the Justices are single-minded pursuers of legal policy.[88] The claim is one of judges setting agendas and strategizing about securing their preferred outcomes.[89] The Justices consider various factors in determining the

80. Cross, *supra* note 74, at 254.

81. *See id.* at 275–79 (discussing leading examples of this work).

82. *See* Segal & Spaeth, *supra* note 75.

83. *See* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 315 (1990) (collecting cases).

84. Schauer, *supra* note 76, at 652.

85. *See* Cross, *supra* note 74, at 270–72 (discussing these examples and concomitant criticism).

86. *See, e.g.*, Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985) (making such an argument).

87. *See* Cross, *supra* note 74, at 271 (suggesting that protestations of disagreement with an outcome "may disguise the attitudinal end of the judges").

88. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–10 (1998) ("[Justices] are, in the opinion of many, 'single-minded seekers of legal policy.'").

89. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991) (addressing agenda setting within the Supreme Court); *see also* Lee Epstein et al., *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845 (1996) (presenting evidence that Justices are policy seekers, not issue creators); Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 40

outcome of a case, from existing law to their own policy preferences and the preferences of their fellow Justices.[90] They must also account for the existing political climate at the time of their decision and the positions of the relevant policy branches of government.[91] To be sure, there are times when the Justices will follow established precedents even if it is against their preferred positions. But it is also true that legal constraints last for as long as the Justices do not disagree with the outcome in question; when they disagree, legal constraints are easily overcome.[92]

Indeed, it is hard to see the Justices as anything but strategic policy-makers. This fact will affect the looming battle over the constitutionality of section 2 of the Act.

IV. THE FUTURE OF SECTION 2

In his concurring opinion in *Georgia v. Ashcroft*, Justice Kennedy reminded his audience that "[r]ace cannot be the predominant factor in redistricting," and yet, "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."[93] This was unwelcome news for friends of the Voting Rights Act. Justices Thomas and Scalia have similarly remonstrated against the use of race in elections and the

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AM. POL. SCI. REV. 853 (1996) (arguing that Justices will shape the cases before the Court to further policy goals).

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

91. *See id.* at 330–33; *see also* Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a* Strategic *National Policy-Maker*, 50 EMORY L.J. 583, 585 (2001) ("We argue that, given the institutional constraints imposed on the Court, the Justices cannot effectuate their own policy and institutional goals without taking account of the goals and likely actions of the members of the other branches. When they are attentive to external actors, Justices find that the best way to have a long-term effect on the nature and content of the law is to adapt their decisions to the preferences of these others.").

92. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 73 (1984) ("Worst of all, occasionally the Court has skipped over difficult standing issues entirely in order to proceed directly to the merits of attractive cases."); *see also* Cross, *supra* note 74, at 265–275 (discussing the superficial constraints provided by the legal model); *see generally* Girardeau Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1424 (1995) ("When minority plaintiffs file programmatic challenges to widespread patterns of racial discrimination, the Court typically denies standing because the plaintiffs cannot demonstrate a sufficient likelihood of particularized gain resulting from a favorable judgment. Such a showing is required to establish a justiciable 'case' or 'controversy.' However, when nonminority plaintiffs file similar programmatic challenges to affirmative action programs, the Court typically grants standing, even though the plaintiffs are equally unable to demonstrate a high likelihood of particularized gain.").

93. Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring).

constitutionality of the VRA.[94] Justice Alito and the Chief Justice have a much smaller record, but their contributions to this debate are not encouraging for supporters of the Act.

The Voting Rights Act looks to be in serious trouble. Five votes are easily at hand to strike down the Act in its entirety. This Part considers the constitutionality of section 2 when in the hands of the conservative majority. The first section describes the Court as a national policymaker and as an institution that often tracks existing public opinion. This section further explains, however, that the Court seldom sides with the interests of racial minorities.[95] To be clear, this section does not take the view that racial justice will materialize only when the interests of middle and upper-middle class whites converge with the interests of people of color.[96] The claim is subtler. In looking to the available options, the Court often fails to see the very things that people of color recognize as central to the case. This point may be analogized to what some legal scholars have labeled as the "white transparency thesis."[97] Put a different way, public opinion splits along a racial divide and, not surprisingly, so does the Court. As a result, those moments when the Court appears to side with minority interests warrant an explanation.

The second section contends that the history of the Act follows a clear historical trend. Early in the life of the Act, the public at large understood the Act as a necessary yet temporary remedy to the obvious racial discrimination that existed in select jurisdictions. Once section 2 of the Act took center stage after the 1982 Amendments, the

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94. *See* League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 512 (2006) (Scalia, J., concurring in part and dissenting in part); Holder v. Hall, 512 U.S. 874, 907 (1994) (Thomas, J., concurring).

95. In the words of Randall Kennedy, for example:

> From the Civil War until the middle of this century, the Court upheld the constitutionality of laws and practices under which Negroes were reduced to second class citizenship. There have been occasions on which the Court has made crucial contributions to racial justice. But overall, and even during those brief but dramatic periods when the Court has demonstrated unusual solicitude for the rights of minorities, the Court's performance as a defender of those rights has been strikingly deficient.

Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1623 (1986).

96. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[T]he fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

97. *See, e.g.*, Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

purpose of the Act shifted in notable ways. Rather than remedial legislation, the statute took the form of an all-purpose anti-discrimination law, targeted no longer at the racial discrimination that led to the historic passage of the Act a generation before. This is where we find ourselves today.

Thus the question that now faces the Court: is section 2 of the Act a legitimate response to the problem of racial discrimination as experienced in the twenty-first century? In a move that will surprise no one, this final section argues that this issue—and the future of the Act—rests in the hands of Justice Kennedy, whose signals as of late are mixed at best.

1. Institutional Justice Across Time: Race and the Court

Consider first the role of an unelected, unaccountable judiciary in a mature Democracy. This debate has been dominated in the last generation by Alexander Bickel's conception of the "countermajoritarian difficulty."[98] Bickel wrote that

> when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. This, without mystic overtones, is what actually happens. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.[99]

Since Bickel's influential contribution, constitutional scholars have spent countless hours attempting to diffuse the "countermajoritarian" dilemma.[100] Yet this turns out to be a far less

98. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2nd ed. 1986); *see also* HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 55 (1958) ("Whatever the logical support for the theory [of judicial review], it cannot be found in the philosophy of democracy if by democracy we mean majority rule; whatever the practical justification, it cannot be found in the defense of fundamental rights against the assault of misguided or desperate majorities.").

99. BICKEL, *supra* note 98 at 16–17.

100. *See* Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845 (2001) (analyzing counter-majoritarian assumptions in the law); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1288 n.2 (1982) ("The 'counter-majoritarian difficulty' has spawned the central line of constitutional scholarship for the last thirty years."); Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 712 (1995) ("[R]esponding to the counter-majoritarian difficulty has been an important staple on the menu of constitutional theory since the appearance of Bickel's influential book."); Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921 (2001) ("[T]he

important question than originally presumed, for the Supreme Court seldom strays from majoritarian sentiments. The evidence on this point is overwhelming, and for good measure.[101] The appointment process ensures that the ideology of the Justices is never radically at odds with prevailing opinion.[102] But a difficulty indeed remains. For while majorities often get their way within the Court, communities of color seldom do.

The fact that racial minorities seldom win in the arena of American politics is a longstanding dilemma in American society. Begin with Alexis de Tocqueville, who recognized in 1835 that "[t]he most formidable evil threatening the future of the United States is the

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'counter-majoritarian difficulty' remains—some forty years after its christening—a central theme in constitutional scholarship. Indeed, one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today . . . ."); *see also* Croley, *supra* note 100, at 712 n.66 (documenting some of the many published acknowledgments to Bickel's influence).

101. The work by political scientists is quite consistent on this question. *See, e.g.*, David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985) ("[T]he judicial activism of the post-New Deal Supreme Court was in fact surprisingly consistent with majoritarian principles."); 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, 570 (2001) ("The fact is, then, that 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"); *see generally*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468 (1997); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61 (1995); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); James A. Stimson, Michael B. Mackuen, & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543 (1995). Legal scholars reach a similar conclusion. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 609 (1993) ("[C]ontrary to laments about the counter-majoritarian difficulty, even controversial judicial decisions often are majoritarian."); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 7 (1996) ("The Supreme Court does not play the strong counter-majoritarian role in defense of individual liberties that popular wisdom ascribes to it.").

102. Dahl, *supra* note 101, at 284–85; s*ee generally* GLENDON SCHUBERT, THE CONSTITUTIONAL POLITY (1970); Lawrence Baum, *Membership Change and Collective Voting in the United States Supreme Court*, 54 J. POL. 3 (1992); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 796 (1975); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994); Jeffrey A. Segal, *Measuring Change on the Supreme Court: Examining Alternative Models*, 29 AM. J. POL. SCI. 461 (1985). This leading view finds support among influential legal scholars as well. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 47 (Amy Gutmann ed., 1997) ("If the Courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that.").

presence of the blacks on their soil."[103] More than a century later, Gunnar Myrdal identified this racial problem as the "American Dilemma."[104] Presently, matters are not much better, at least in terms of public opinion. In the words of Don Kinder and Lynn Sanders, "[n]o doubt the most striking feature of public opinion on race is how emphatically black and white Americans disagree with each other."[105] This division is such, Kinder and Sanders argue, that "[t]he racial difference is a racial *divide*."[106] They conclude in language that casts serious doubt on the Court's understanding of the role of race in society:

> The huge and evidently persistent racial divide in opinion also amounts to a dramatic disconfirmation of the "liberal expectancy" so confidently issued from so many quarters not so long ago. From this perspective, racial and ethnic categories were about to become obsolete, irrelevant to any serious political analysis. The clear expectation was that "the kinds of features that divide one group from another would inevitably lose their weight and sharpness in modern and modernizing societies." It hasn't happened, of course, not in the United States, and not around the world, where we have seen a murderous eruption of conflict organized by ethnicity.
>
> The racial divide also makes trouble for pluralistic conceptions of American society, which portray citizens as pushed and pulled by many social forces, such that no single division has any special or lasting claim. Pluralists remind us that Americans are divided from one another by more than just race: by religion, ethnicity, class, religion, the organizations they join, and much more. In such social diversity lies enormous political significance. In the pluralist view, social factors, taken all together, "form a great web of crosscutting axes that divide and redivide the public," thereby inhibiting "the emergence of any single profound line of cleavage." Blacks and whites are socially diverse; they are subject to various crosscutting pressures—but this is not enough, evidently, to prevent race from emerging as a "single profound line of cleavage."[107]

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103. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 313 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966).

104. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

105. DONALD KINDER & LYNN SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 33 (1997).

106. *Id*. at 18.

107. *Id*. at 33–34; s*ee also* THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN

Note the repercussions of this conclusion for the previous argument about the influence of public opinion on the Court. To say that the Court is influenced by public opinion is only to say that the Court is influenced by *part* of the public. A wide swath of American society—the swath composed of persons of color—is clearly not as influential as the white public. If a chasm exists in public opinion, it is clear that the Court is only paying attention to part of the public. Seen through the prism of history, the Court seldom sides with the interests of people of color.[108]

Consider, for example, affirmative action cases. The crux of the debate is this: must race become a restricted social and political category, off-limits to policy makers and bureaucrats alike? In the words of a critic of affirmative action, for example, "one gets beyond racism by getting beyond it now; by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."[109] Conversely, affirmative action supporters share Justice Blackmun's view that in "order to get beyond racism, we must first take account of race."[110] Little room for compromise exists between these polar opposites: they represent two competing views of the world, and neither is more persuasive than the other.

The Court recognizes that not all uses of race are similarly damaging, that racial segregation is not the same as racial integration. The problem, however, is that it cannot readily distinguish between the two. Put differently, a constitutionally palpable, judicially recognizable difference does not exist between segregated schools in *Brown v. Board of Education*[111] and integrative efforts by the state to remedy perceived racial injustices in *City of Richmond v. J.A. Croson*

REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1991); *see generally* KEITH REEVES, VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES, AND RACIAL POLITICS IN AMERICA (1997).

108. *See e.g.,* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT & MINORITIES IN CONTEMPORARY AMERICA (1993); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 471 (1995) ("The Supreme Court's history indicates that legal theories are of far less importance than the political affiliation of the Justices of the Court in determining the outcome of the Supreme Court decisions concerning racial minorities.").

109. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979).

110. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

111. Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954).

Co.[112] It is in order to distinguish between the two that the Court deploys its classic test of "strict scrutiny" as applied to race-conscious measures:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[113]

In this telling passage, the Court acknowledges its own limitations and purports to develop the strict scrutiny test in direct response to these limitations. According to Justice O'Connor, for example, racial classifications "carry a danger of stigmatic harm," and "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[114] These are not constitutional arguments but policy ones, aimed at the costs and benefits of the programs in question.[115] Further, these arguments are made not in light of the Constitution, but in defense of a policy view independent of that document. More importantly, these arguments are not accepted, uncontroversial understandings of the Constitution, but arguments situated within a distinct ideological and political framework. These arguments prove persuasive for no better reason than the fact that five Justices accept them. This is raw attitudinalism, plain and simple.

The argument that a racial divide exists in American public opinion poses an immediate challenge. Those times when the Court sides with people of color are aberrations in need of an explanation.

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112. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

113. *Id.* at 493.

114. *Id*. This is a popular argument among critics of race conscious policy making. *See, e.g.*, THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 118 (1984) ("Among the insidious dangers are the undermining of minority and female self-confidence."); Alstyne, *supra* note 109, at 787 n.38 (arguing that affirmative action plans "unquestionably impose a racial stigma on those who benefit by them . . . .").

115. *See generally* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994).

Brown presents the paradigmatic example.[116] One answer to the Court's holding in *Brown* may point to the commands of the Fourteenth Amendment and its prescription against racial classifications.[117] Alternatively, one may attribute the holding to a deep change of heart in the part of the Court and its members, a desire to right wrongs, to "do justice."[118] This Essay subscribes to neither reading. Instead, it sides with those accounts of the case that look for explanations apart from the interests of people of color. For example, Derrick Bell attributed the *Brown* holding to what he termed the "interest convergence dilemma."[119] According to Bell, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[120] To his mind, the *Brown* opinion helped further the Cold War strategy of the times.[121] Others explained the decision in terms of foreign relations or a changing Southern society.[122] These accounts are neither mutually exclusive nor does one account extol itself above all others. The point is far more limited. Put simply, those moments in the Court's history when a majority sides with the apparent interests of racial minorities warrant an explanation.

Consider in this vein the *White Primary Cases*, long held to epitomize a view of the Court as crusader for racial justice. In *Nixon v.*

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116. Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954). One of my favorite cases, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), is much harder to explain when placed in institutional and historical context. This is not to say that explanations are unavailing, however. *See* Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 355 (1995) (explaining *Yick Wo* as a precursor to the Court's solicitude for private property in the twentieth century).

117. *See, e.g.*, Charles Black, *The Lawfulness of the Segregation Decision*, 69 YALE L.J. 421, 429 (1960) (arguing that the Fourteenth Amendment forbids the "disadvantaging of the Negro race by law.").

118. Michael Herz, *"Do Justice!" Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 140 (1996).

119. Bell, *supra* note 96, at 523. I must note Professor Bell's concession that "[r]acial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers." *Id.*

120. *Id.*

121. *See id.* at 524 ("[T]he decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples.").

122. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 68–98 (1988) (discussing racial politics in the international arena during and after World War II); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 14–75 (1994) (discussing the growth of black power in the context of World War II and the Cold War).

Herndon,[123] the Court examined a state statute providing that "in no event shall a Negro be eligible to participate in a Democratic Party's primary election held in the State of Texas." The answer to the Court was obvious.[124] This was a clear case of racial discrimination, and the Court struck it down accordingly, on Equal Protection grounds.[125] The state responded to the Court's ruling with a second statute, this time delegating to the political parties the "power to prescribe the qualifications of [their] own members."[126] The reason for this subsequent statute was clear, and the Court acted accordingly. In *Nixon v. Condon*, the Court explained that the parties had become, for all intents and purposes, "the organs of the state itself."[127] As a result, the Court concluded that the Fourteenth Amendment "lays a duty upon the Court to level by its judgments these barriers of color."[128] The Court struck down the amended statute. The state Democratic Party did not relent in its attempts to exclude Nixon, and blacks in general, from participating in primary elections. At first, the Court stepped aside and allowed the exclusions to stand on state action grounds.[129] Ultimately, however, the Court proved equal to the task. First in *Smith v. Allwright*,[130] and, within the next decade, in *Terry v. Adams*,[131] the Court held its ground against the Texas Democratic party and its racist design. Under the Equal Protection Clause, the Court upheld the right of black voters in Texas to take part in the state's electoral system.

These cases provide examples of the Court protecting discrete and insular minorities. Much can be said for this view in the abstract, though it soon runs into difficult objections. If one takes the view that the Court had set out to protect the interests of people of color, how can the initial disposition of the *Brown* case be explained? Initially, a majority of the Court sided against the plaintiffs in *Brown*. Only after the appointment of Chief Justice Warren and a second oral argument did the Court unanimously side with the plaintiffs.[132] A view of the Court as racial crusader prior to the advent of the Warren Court is

123. Nixon v. Herndon, 273 U.S. 536, 540 (1927).
124. *Id.* (explaining that "the answer does not seem . . . open to a doubt")
125. *Id.* at 541.
126. Nixon v. Condon, 286 U.S. 73, 82 (1932).
127. *Id.* at 88.
128. *Id.* at 89.
129. Grovey v. Townsend, 295 U.S. 45, 52–53 (1935).
130. Smith v. Allwright, 321 U.S. 649, 664 (1944).
131. Terry v. Adams, 345 U.S. 461, 469–70 (1953).
132. *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 162–63 (1982).

implausible.[133]

An alternative explanation of the *White Primary Cases* is more attractive. Rather than seeing the Court as a defender of racial minorities' rights, these cases are better understood as voting rights cases, not about racial discrimination. In other words, the Court in these cases was simply moving towards the eventual view of the right to vote as fundamental.[134] Further, and especially concerning the *White Primary Cases*, one may posit a very persuasive account of the Court's actions under the lock-up theory.[135] According to this theory, the Court is clearing the channels of political representation.[136] This account thus views the question as one of democratic politics, not race.

2. Individual Justice: Race and Attitudes

This understanding of the *White Primary Cases* helps make sense of the Court's historical deference to the constitutionality of the Voting Rights Act. The issue has been about the rights of minority communities, to be sure, but more than that, about the right to vote and the clearing of channels of representation.[137] In its early days, public opinion sided squarely with the adoption of the VRA and, as expected, so did the Court.

But things might be taking a turn for the worse in two ways. It is likely that public opinion is no longer on the side of the Act, at least when deployed in furtherance of majority-minority districts. It is also true that, at least in the eyes of some Justices, the jurisprudence under

133. This is not to say that the Warren Court stands alone in an institutional vacuum, for the Vinson Court had begun to plant uncertain and tentative seeds in cases decided in the late 1940s. *See* Sweatt v. Painter, 339 U.S. 629 (1950) (granting relief for the plaintiffs yet refusing to rule on the continuing constitutionality of Plessy's separate-but-equal holding); Shelley v. Kraemer, 334 U.S. 1 (1948) (declaring that state enforced restrictive covenants violate the Fourteenth Amendment). Rather, it is to say that the Court began its decisive, if pragmatic, march against racial injustice under the aegis of the Warren Court.

134. *See* ISSACHAROFF, ET AL., *supra* note 27, at 95.

135. Sam Issacharoff and Rick Pildes borrow the notion of lock-ups from the corporate governance context, which they describe as "a variety of devices that constrain the effectiveness of the voting power of shareholders by entrenching the incumbent position of firm management." Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN L. REV. 643, 648 (1998) .

136. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Issacharoff & Pildes, *supra* note 135, at 652–68. (analyzing the *White Primary Cases* as an example of the Supreme Court unlocking the channels of political representation).

137. With apologies to Dean Ely. *See* ELY, *supra* note 136 at 105–36 (devoting a chapter to the concept of courts "clearing the channels of political change").

section 2 of the Act has ceased to worry about the Act's original purpose of ensuring equal electoral opportunities for voters of color.[138] Instead, critics now consider section 2 to be an all-purpose anti-discrimination provision, no different from much derided affirmative action plans. Within the Court, the conservative Justices have made clear their doubts about the statute.

The shift in perception can be traced the early 1990s. By this time, blacks and Latinos were both registering and voting without much impediment. The Act had been quite successful in ridding the political process of the kind of discrimination that led to its passage in 1965. Rather than protect voters of color from the vicissitudes of the political process, the charge could be leveled that section 2 of the Act became yet another means through which partisans could rig the political process for partisan gain. This is not to say that the Act had outlived its usefulness, but to explain the growing reservations among the Court and commentators about the need for the Act. Indeed, the *Shaw* cases[139] make sense in this vein, when understood as a series of cases concerning politics and not race. Once blacks and Latinos joined the political community in vast numbers, the manipulation of the Act for political gain became a real concern, or, in fairness, the use of race as political tool and not as a response to existing racial discrimination became a concern. Justice Thomas' concurring opinion in *Holder v. Hall*[140] makes precisely this point, a sentiment with which Justice Scalia agrees. Justice Kennedy's majority opinion in *Miller v. Johnson*[141] may be understood similarly.

It is clear that five Justices on the Court have strong reservations about the use of race in general and the modern uses of section 2 of the Act in particular. It remains to be seen whether the Court will take the next step and strike down the Act as an illegitimate exercise of Congressional power.

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138. *See* League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 512 (2006) (Scalia, J., concurring in part and dissenting in part) ("[T]he Court's jurisprudence continues to drift ever further from the Act's purpose of ensuring minority voters equal opportunities.").

139. Shaw v. Reno, 509 U.S. 630 (1993).

140. Holder v. Hall, 512 U.S. 874, 893–94 (1994) (Thomas, J., concurring) (discussing how the Voting Rights Act has been turned into something different than what it was designed for).

141. Miller v. Johnson, 515 U.S. 900 (1995) (holding that Georgia's redistricting plan violated the Equal Protection Clause).

3. The Swing Vote: Justice Kennedy

It is no secret that the future of the Act rests in the hands of Justice Kennedy. It is also true that his record on race questions is not encouraging,[142] nor is his particular record on VRA cases. Think only of his *Miller v. Johnson* and *Presley v. Etowah County Commission*[143] opinions for support. From the moment Justice Kennedy joined the Court, he has consistently cast his vote against the interests of racial minorities. Consequently, the future of the Act appears bleak indeed.

But Justice Kennedy has also authored some opinions, such as *League of United Latin American Citizens (LULAC) v. Perry*,[144] and even *Bartlett v. Strickland*,[145] that seem out of character for him. These opinions offer a glimmer of hope for supporters of the VRA. Consider first the Texas gerrymandering case, *LULAC*. In *LULAC*, the Court examined the notorious DeLay gerrymander,[146] the mid-decade redistricting plan designed to align the state congressional districts more closely with the partisan composition of Texas.[147] *LULAC* is significant for its vote dilution discussion, and particularly its conclusion that the Texas plan violated the section 2 rights of Latino voters in the state. According to Justice Kennedy, in an opinion joined by the four liberal Justices, the state violated the rights of Latinos within a district when it removed some Latinos and placed them in a neighboring district because otherwise they would soon gain the right to select a majority of their choice.[148] In Kennedy's words, "the State took away [the Latinos'] opportunity because they were about to exercise it."[149] Notably, this was the first time that plaintiffs of color prevailed in a vote dilution claim in the Supreme Court.[150] *LULAC* is the case in which the Chief Justice remarked that

142. Consider his concurring opinion in *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701 (2007), for a recent example, or his dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

143. Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).

144. League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399 (2006).

145. Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (holding that section 2 of the Act did not protect the right to coalition districts).

146. The DeLay gerrymander is named after former House of Representatives Majority Leader Tom DeLay, who was a key figure in the 2003 redistricting of Texas' congressional districts. *See, e.g.*, Peter Slover & Robert T. Garrett, *Republicans Savoring New Congressional Map: Final OK May Come Today, Democrats Promise Lawsuit*, DALLAS MORNING NEWS, Oct. 10, 2003, at A1 (describing the central role DeLay played in the redistricting).

147. *LULAC*, 548 U.S. at 412–13.

148. *Id*. at 438–43.

149. *Id*. at 440.

150. Guy-Uriel E. Charles, *Race, Redistricting and Representation,* 68 OHIO ST. L.J. 1185,

dividing voters by race is a "sordid business."[151]

Justice Kennedy wrote an opinion on the section 2 question that looks out of character for him because he took the side of Latino voters in the face of a very strong counter-factual interpretation available to him. That is to say, Justice Kennedy not only needed to reinterpret the facts as provided by the district court, but he also needed to argue that these findings were clearly erroneous. Justice Kennedy did exactly that, leading to the query raised by Chief Justice Roberts in dissent: "[w]hatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity."[152] Guy Charles is right on this point: Justice Kennedy is clearly bothered by the rank partisanship of the plan under review, and his opinion may be read as an attempt to force the state to try again.[153] Therefore, *LULAC* might not be as hopeful to supporters of the Voting Rights Act as generally presumed, for it fits the larger narrative offered earlier about those rare moments when the Court sides with minority interest. This might not be a race case after all, but a case about politics.

For what might be a more helpful example of Justice Kennedy's evolving views on race, look no further than *Bartlett v. Strickland*.[154] In *Bartlett*, the Court examined the creation of a majority black district by the state in order to comply with section 2 of the Act.[155] At issue was a state constitutional provision that prohibited the splitting of county lines in the creation of district lines unless demanded by federal law. The state argued that section 2 demanded the creation of the majority black district.[156] The Supreme Court, in an opinion authored by Justice Kennedy, disagreed.

The facts in *Bartlett* are not as significant as Kennedy's rousing conclusion that "racial discrimination and racially polarized voting are not ancient history."[157] In his view, "[m]uch remains to be done to ensure that citizens of all races have equal opportunity."[158] Curiously, these were exactly the arguments made by supporters of the Act

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1187 (2007).

151. *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part).
152. *Id*.
153. *See* Charles, *supra* note 150, at 1196.
154. Bartlett v. Strickland, 129 S. Ct. 1231 (2009).
155. *Id*.
156. *Id*. at 1239.
157. *Id.* at 1249.
158. *Id*.

during the 2006 extension debates. As you read these passages in their proper context, it is not clear where Justice Kennedy finds support for his assertions. He simply writes them, so they must be true. Such is the beauty of attitudinalist jurisprudence. Regardless, what is important is simply that his views may be evolving with time. Nobody said that being the swing Justice would be easy.

V. LESSONS FOR THE FUTURE

This final Part highlights three of the most important lessons of the history of the Voting Rights Act at the hands of the Supreme Court. The first lesson might be the most important: the Supreme Court is an activist institution and the Justices are "single-minded seekers of legal policy."[159] In this regard, conservative Justices are no different from liberal Justices. More pointedly, it is clear that the Justices' policy preferences provide the best framework for understanding the Court's interpretations of the Act.[160] If the past is indicative of what is to come, the answer to the constitutional question at the heart of section 2 will not be determined by law as commonly understood, but rather, the way the Justices have always done it: in accordance with the individual policy preferences of the Justices in the majority.

The second lesson follows directly from the first. In the aftermath of *City of Boerne*, scholars took to the law reviews to defend the constitutionality of the Act under the newly-minted "congruence and proportionality" test.[161] They also counseled Congress during the extension debates in order to ensure that the next constitutional challenge would meet the Court's exacting standard of review. This is a sensible approach and easy to understand. If the legal model is to have any traction anywhere, it would be in law schools and law reviews. But to make these arguments is to misunderstand how the Court will decide the next case. When the Supreme Court takes up the constitutionality of the Act, the legal model will play a secondary role at best. The Justices might write that the statute is not congruent, or disproportional; or maybe Justice Kennedy will decide otherwise. The larger point is that the question will not involve a paint-by-

159. George & Epstein, *supra* note 90, at 325.

160. *See* Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 699, 703 (2009) (arguing that the Court has interpreted the Voting Rights Act strategically in order to reflect the Justices' policy preferences).

161. City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

numbers exercise on the part of the Justices. It will be far from that.

The third lesson highlights the role of the Supreme Court in American politics. For all the "alarums and excursions" that followed Professor Bickel's elegant critique of the Court,[162] it turns out that the Justices are far more attuned to public opinion than the countermajoritarian argument presumes. This argument opens up two final questions. The first ought to be obvious: while the Court often sides with the interests of popular majorities, it seldom sides with the interests of colored communities. As a consequence, those moments when the Justices side with the interests of racial minorities demand an explanation. Ths is the best way to understand thee history of the Act in Court. Early on, the Act had the full support of the American public, as expressed by overwhelming congressional majorities. As the goals of the Act evolve away from its original goals, it remains to be seen whether the Court will continue to uphold the law as a legitimate exercise of congressional power.

The second question highlights the role of the swing Justice. The argument that the Court is in step with public opinion implies that all Justices are similarly cognizant and responsive to the public, but this is simply not true.[163] Public opinion "has direct effects on the attitudes and behaviors of individual [J]ustices."[164] But the story is far more complex. Michael Link explains:

> [T]he sociopolitical environment in which the Supreme Court operates is a dynamic one, one in which mass and elite opinions are assumed to play an important, direct role in shaping judicial outcomes, if only at the margins. Shifts in the positions of only a few justices can have a significant impact in determining the outcome of a particular case or more importantly the direction in which the Court moves over time in some issue area.[165]

To say that the Court is affected by public opinion is only to say that some Justices are so affected. Unsurprisingly, researchers also find that public opinion has a more pronounced impact on the

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162. Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 54 (1962).

163. *See* William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 196 (1996) (concluding that a majority of the Justices analyzed in their study "show no discernible responsiveness to the public").

164. *Id.*; *see* Mishler & Sheehan, *supra* note 101.

165. Link, *supra* note 101, at 66.

moderate Justices,[166] and that public opinion plays a larger role on a "reasonably balanced" Court.[167]

This is where Justice O'Connor often found herself during the last stages of her tenure on the Court, and helps explains her apparent change of heart in myriad cases, including most notably her evolution from a majority opinion in *Croson*[168] to her majority in the *Grutter*[169] case. This is also where Justice Kennedy finds himself today. In this vein, Adam Cohen wrote four years ago that as Justice Kennedy was then taking his place as swing Justice, "there are signs that his views are evolving."[170] For support, Cohen offered Kennedy's reversal of his own position on the death penalty for juveniles, as well as his increasing advocacy for taking into account international law. Cohen attributed this seeming evolution to the fact that Kennedy "cares about what people think."[171] Addressing specifically the power and influence of the swing Justice, Cohen also wondered "how Justice Kennedy will be changed by his vastly expanded influence" and whether he would inherit Justice O'Connor's "mantle of concern."[172]

When we read Justice Kennedy's opinion in *Bartlett*, we must understand it as coming from his position as swing Justice on a balanced court. If the Court strikes down the Voting Rights Act, it will be through the pen of Justice Kennedy. As his views on this important issue continue to evolve, it may be the case that the Act is on safe ground after all.

CONCLUSION

The future of the majority-minority district is tenuous at best, its fate resting in the hands of a conservative majority on the Court. When the Court decides to confront the constitutional question, the attitudinal preferences of the conservative majority will decide the issue. This is another way of saying that the future of the law rests in

166. Mishler & Sheehan, *supra* note 163, at 197.

167. Mishler & Sheehan, *supra* note 101, at 98.

168. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

169. Grutter v. Bollinger 539 U.S. 306 (2003).

170. Adam Cohen, *Anthony Kennedy Is Ready for His Close-Up*, N.Y. TIMES, April 3, 2006, at A16, *available at* http://www.nytimes.com/2006/04/03/opinion/03mon4.html.

171. *Id*.

172. *Id*. For an example, Cohen offered the following: "It is one thing to argue in dissent that campaign finance laws violate the First Amendment. It is quite another to cast the vote that prevents a nation weary of lobbying scandals from trying to clean up its elections." *Id.* To which I can only say, nobody's perfect.

the hands of Justice Kennedy—the Court's swing vote. The question for the future is whether his vision of equality remains grounded in a colorblind ideal; or whether, as his more recent opinions suggest, he is committed to developing a vision of equality far more accommodating of the difficulties inherent in the creation of representative institutions.[173]

173. For a sampling of these difficulties, *see* Justice Frankfurter's dissent in Baker v. Carr, 369 U.S. 186, 323 (1962):

> Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.