

CIVIL RIGHTS UNDER FIRE: RECENT SUPREME COURT DECISIONS

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS FIRST SESSION

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THURSDAY, OCTOBER 8, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:31 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Watt, Scott, Johnson, Jackson Lee, Sensenbrenner, and Franks.

Staff present: (Majority) David Lachmann, Subcommittee Chief of Staff; LaShawn Warren, Counsel; and (Minority) Paul Taylor, Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will now come to order. I thank everyone for attending. I will now begin by recognizing myself for a 5-minute opening statement.

Today's hearing examines the recent Supreme Court decisions affecting the civil rights of all Americans. While the Court has its constitutionality prescribed role, Congress—and specifically this Subcommittee—do as well.

I want to make it clear from the outset that the purpose of this hearing is not to question the legitimacy of the Supreme Court's place in our system of checks and balances. Whether or not we consider a decision of the Court to be well considered or clearly erroneous, the rule of law demands that we have a vigorous and independent judiciary.

As Chief Justice Marshall wrote, "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule."

In Federalist 78, Alexander Hamilton explains the importance of this principle in a system of checks and balances: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing," unquote, from the Federalist Papers, a precursor of *Marbury v. Madison*.

For this reason, while I have disagreed with the Court on many occasions, I have always opposed efforts to attack the institution's legitimacy or its independence. Efforts, such as stripping the courts of their jurisdiction to decide constitutional questions or efforts through appropriations to block enforcement of specific decisions are an assault on the very rule of law and our constitutional system of government, the sorts that we saw in this Congress, although unsuccessful, thankfully, a few years ago.

So, for example, while I have watched in dismay as the Court struck down the Religious Freedom Restoration Act on what I believe to be an incorrect reading of section 5 of the 14th amendment and its recent discovery of an individual right to stockpile firearms in violation of the clearly expressed will of the electorate, I recognize that the Court is fulfilling its function.

I know some of my colleagues have questioned the Court's jurisprudence in areas of abortion and church-state relations, and the previous generation—many—in the previous generation thought the *Brown v. Board of Education* case was wrongly decided. Whatever side one is on in any of these issues, any call for massive resistance is misplaced and dangerous to our freedoms.

Nonetheless, it is appropriate to examine what the Court has done and what the effects of those decisions may have on our rights. Furthermore, it is absolutely correct for the Congress to respond to the Court's decisions by acting within our own constitutional sphere of authority.

It would be much simpler if there were a clear and easy reading of every law and the application of every constitutional provision. Calling balls and strikes is the job of umpires, but the justices have a more complicated task.

When many of our best minds disagree strongly on the meaning of the grand phrases in the Constitution, you need more than an umpire. No matter how often that ill-considered metaphor is repeated by senators or judicial nominees, it is simply false to assume that judges do not interpret or can avoid interpreting, for that matter, and that they are not informed in that process of interpretation by their knowledge, experience and reason. Judges are not simply umpires.

Earlier this year, with the enactment of the Lilly Ledbetter Fair Pay Act, Congress moved to correct the Court's misreading of a statute. And last year, I think it was, we moved to correct the Court's misreading of the Americans with Disabilities Act against the clear intent of Congress, and we solved that by passing another statute. That is an appropriate remedy.

On constitutional rulings, we have fewer options, but we do need to understand the direction the Court has given us and legislate accordingly. Where we believe the Court's rulings have gone too far afield, the Constitution provides the remedy of a constitutional amendment, albeit a very difficult remedy.

With that in mind, I look forward to the testimony of our distinguished panel of witnesses today. All three branches of government face some really difficult challenges in the years to come. Understanding those challenges is the first step in fulfilling our constitutional mandate.

With that, I yield back, and I will now recognize the distinguished Ranking Member of the Subcommittee, the gentleman from Wisconsin, for 5 minutes for an opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

During its last term, the Supreme Court was asked to strike down the 2006 reauthorization of the seminal Voting Rights Act, but it rejected that invitation, and I expect future challenges to that legislation will also fail as long as the Supreme Court continues to respect the role of Congress in enforcing the protections of the 14th amendment.

The Voting Rights Act of 1965 was amended or reauthorized in 1970, 1975, 1982, and 1992. And each time, it was amended and reauthorized on a strongly bipartisan basis. I am proud to have a leading hand in preserving and strengthening that essential tradition when the act was last reauthorized in 2006.

That overwhelmingly bipartisan legislation was propelled by the President—to the President's desk by the force of 13 hearings on the legislation held in the House alone. More were held in the Senate. As I said on the House floor during debate on the legislation at that time, that record constitutes one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 30 years I have been honored to serve as a Member of this body.

Indeed, the substantial volume of evidence compiled to justify reauthorizing the Voting Rights Act far exceeds the amount of evidence the Supreme Court has found adequate in other contexts in which Congress's power is less broad than its power to remedy discrimination.

To give just one example, in *Nevada Department of Resources v. Hibbs*, the Supreme Court relied only on the following sources in holding under—the Congress under the 14th amendment had the power to enact the Family and Medical Leave Act: a Senate report citation to a Bureau of Labor Statistics survey revealing gender disparities in the private sector provision of parenting leave; submissions from two sources at a hearing that stated that public-sector parental leave policies differ little from private-sector policies; and evidence that 15 states provided women up to 1 year of extended maternity leave, while only four states provide it for similarly extended paternity leave; and a House report's quotation of a study that found that failure to implement uniform standards for parenting leave would leave Federal employees open to discriminatory and possibly—open to discretionary and possibly unequal treatment.

In contrast, the record supporting the reauthorization of the Voting Rights Act assembled by this Committee alone consists of over 12,000 pages of testimony, documentary evidence and appendices from over 60 groups and individuals, including several Members of Congress. There is no right more fundamental than the right to vote. In a democracy, it is only the right to vote that can protect all the other rights. That right is so central to our system of government that it is protected by five separate amendments to the Constitution, including the 14th, 15th, 19th, 24th, and 26th amendment.

Through the preclearance process, the Voting Rights Act alone has done a wonderful job in helping clear discriminatory obstacles to voting before they have had the time to take root. But in the end, the evidence presented to Congress was overwhelming. While progress has been made, much still needs to be done, and the Voting Rights Act remains as necessary as ever to maintain that progress.

The few critics opposed to extending the Voting Rights Act claim that its very success was justification for its expiration. These critics miss the fundamental point. Without the Voting Rights Act, we cannot ensure that gains made by minorities in the past are not jeopardized in the future; nor can we prevent future abuses from occurring. Even in 2009, we have not overcome discrimination in voting.

As the House Judiciary Committee report on the legislation set out, under the preclearance provisions of the Voting Rights Act, more section 5 objections were lodged between 1982 and 2004 than were interposed between 1965 and 1982. And since 1982, DOJ has objected to more than 700 voting changes that have been determined to be discriminatory.

In *City of Rome v. U.S.*, the Supreme Court made clear that the Voting Rights Act extension was plainly constitutional, in light of the 75-year period of pervasive discrimination it was attempting to remedy. In that case, the Court held that statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination. And when one considers the full extent of voting discrimination in America, another 25 years of remedial measures appear as plainly appropriate, given the 95-year history of discrimination it is intended to combat.

Thank you, Mr. Chairman. And I look forward to our discussion here today.

Mr. NADLER. I thank the gentleman.

I will now recognize for an opening statement the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler and Chairman Emeritus Sensenbrenner.

I think this is a very important direction that the Constitution Committee is embarking on, reviewing the work of the courts, especially the Supreme Court, not from a point of view of whether your political ideology comports with theirs or not, but whether they are performing in accordance to the general set of directions and guidelines that we have established for ourselves to work in. I mean, that is what a democracy is about. We can change course, as we have historically here.

And so I want to commend Chairman Nadler for his very moderate approach to what our work job is here today.

We could be blasting the hell out of the court system, you know that? Because they have done some perfectly lousy work over the years, not just recently, but historically. I am in the process of putting something together on that.

But that wouldn't get us very far. What we are trying to do is improve the Court, not just criticize the Court. And I join with my colleague, Mel Watt, in commending Jim Sensenbrenner for his very important work in this respect.

As Chairman of the Committee and as a Member of the Committee for almost a couple decades now—and it is very—three decades now—God, your seniority is piling up here. You are one of the oldest Members in the Congress, as I figure it offhand.

Mr. NADLER. I think he means of service, not in chronology.

Mr. CONYERS. But it is important that we have Members of the Judiciary Committee that really see into the full extent of the role of us to the Supreme Court, especially—and that is why these witnesses become very important. And I want to praise the Committee again for the selection of the people that are before us, because this is what they do. They have been analyzing, thinking, writing, speaking about this for quite some time.

And we think there is a lot that can be done to improve the relationships between the Congress and the courts. As I was talking with Professor Derfner and his archivist wife earlier this morning, how do you tell when the Court is misinterpreting the plain intent of the Congress and running off in a direction of their own without any basis whatsoever? And then sometimes when they do have a basis, it is incorrect.

But they pull things out of thin air more frequently than even the legal community wants to admit to, much less citizens who have no way of going through hundreds of pages of dense legal discussion.

And so this is important. I haven't suggested to the Chairman and the Ranking Member yet that there ought to be yet another hearing, that this is not a one-hearing subject. There is a lot to go into. And there is a lot we can do, in terms of analyzing the work product of the judiciary. It was said earlier that, if they was some body, if there was some group that was over the Supreme Court, they would be reversed at least half the time.

And the response was, there is some group that is over the Supreme Court, and it is the Congress. And that is in the Judiciary Committee. The Appropriations Committee can't reverse the Supreme Court. The Congress can. The Education Committee can't. The Armed Services, Intelligence Committees can't. This is the peculiar responsibility that this Committee has in their relationship to the whole Federal court system. And so I am very proud of all the Members that serve here.

Mr. NADLER. I thank the gentleman.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing, which I will do only if there are votes on the floor.

We will now turn to our panel of witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided a Member is present when his or her turn arrives. Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I now introduce the distinguished panel of witnesses. Armand Derfner is a distinguished scholar in residence in constitutional law at the Charleston School of Law. He is a nationally renowned civil rights attorney who has argued and won five cases before the Supreme Court of the United States. He graduated from Princeton University in 1960 and received his J.D. at Yale Law School in 1963. He also clerked for the late David Bazelon, chief judge of the United States Court of Appeals for the District of Columbia.

Alderson—what? I am sorry. Aderson François is the supervising attorney at the Howard University School of Law Civil Rights Clinic. He also teaches civil procedure, legal methods, and Supreme Court jurisprudence. In his practice, Professor François has alternated between commercial litigation, pro bono death penalty representation, and civil rights policy analysis.

Before joining the Howard faculty in fall of 2005, Professor François taught at the NYU School of Law. He received a B.A. from NYU in 1988 and a J.D. from NYU School of Law, 1991, which makes him doubly commendable, since I represent NYU and since my son is currently a student there. He clerked for the late A. Leon Higginbotham, Jr., chief judge of the United States Court of Appeals for the Third Circuit.

Debo Adegbile—I hope I pronounced that right—is the director of litigation at the NAACP Legal Defense and Education Fund. He is a civil rights attorney who has argued cases before the Federal courts. Most recently, he successfully defended the recently reauthorized section 5 of the Voting Rights Act before the U.S. Supreme Court in *Northwest Austin Municipal Utility Number One v. Holder*. More on that later.

Before taking his current position as director of litigation, Mr. Adegbile served as the associate director of litigation and director of the political participation group with the NAACP LDF, Legal Defense Fund. Prior to joining the LDF, he was a litigation associate at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, where he litigated commercial and civil rights cases. Mr. Adegbile received his J.D. from New York University's School of Law 1994 and a B.A. from Connecticut College.

Dahlia Lithwick is a contributing editor at Newsweek and senior editor at Slate. She writes Supreme Court dispatches and jurisprudence and has covered the Microsoft trial and other legal issues for Slate. Ms. Lithwick received her J.D. in 1996 from Stanford University and a B.A. from Yale University in 1990. She clerked for Judge Procter Hug on the U.S. Court of Appeals for the Ninth Circuit.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then red when the 5 minutes are up.

We will start with Professor Derfner. You are recognized for 5 minutes, sir.

**TESTIMONY OF ARMAND DERFNER,
DERFNER ALTMAN & WILBORN**

Mr. DERFNER. Thank you very much, Mr. Chairman and Members of the Subcommittee. It is an honor to appear here today. And as I count back, I think that, in my career, this is the ninth time that I have appeared before this Subcommittee or a related Subcommittee of the House Judiciary Committee, and it is always a great event for me to come here, because I know that I am here to assist in the great work of this Subcommittee and doing the work of the Nation.

My topic today will focus on a specific area, that is, the Supreme Court's decisions in interpreting the laws of this Congress that deal with civil rights and civil liberties. And I will be addressing some of the Chairman's and other Members' concerns about those decisions.

There was not always such concern. There was once a time when the Supreme Court and Congress were in better sync. My first case before the Supreme Court was 40 years ago, the first major section 5 case under the Voting Rights Act, *Allen v. State Board of Elections*.

The Supreme Court in that case took note of the fact that the law had been passed to enforce the guarantees of the 15th amendment and make sure that those guarantees were effective. The court referred to that as a "laudable goal." The court called the statute a remedial statute which it was obligated to construe broadly in order to make sure that Congress's goals were effective. And because of that, the Court did give a broad interpretation of section 5, which has led to its use as a protection against voting discrimination since that time. Section 5 and the Voting Rights Act, in fact, helped to save this Nation.

Unfortunately, if that same case—

Mr. NADLER. Section 5 of the 14th amendment, you mean?

Mr. DERFNER. Section—well, section 5—this is section 5 of the Voting Rights Act—

Mr. NADLER. Or are you talking about section 5 of the Voting Rights Act?

Mr. DERFNER [continuing]. Which was passed pursuant to section 5 of the 14th amendment, and the 15th amendment, as well. Unfortunately, if that case were to come before the Supreme Court today, the odds are that it would be decided in a very different way, because today's Supreme Court takes a very different approach to the job of interpreting this Congress's laws, even though under the Constitution the Court's job in interpreting is to interpret what Congress had to say and what Congress passed.

The proof of the pudding is something I learned in looking—in preparing for this hearing which astounded me. In the past several years, Congress has had to go back no fewer than five times—and probably more—to correct Supreme Court decisions that misinterpreted Congress's statutes. And I have listed in my testimony 15 cases the Supreme Court has decided that Congress has had to correct. There are others that I haven't listed.

The five statutes were the Civil Rights Restoration Act of 1987, the Civil Rights Act of 1991, the Voting Rights Amendments of 2006, the ADA amendments of 2008, and most recently, the Lilly

Ledbetter Fair Pay Act of this year. In each of those cases, moreover, which were all passed by huge bipartisan margins, the Congress has felt compelled to put in the preamble findings and purposes that specifically say the Supreme Court got it wrong. We meant this. The Supreme Court did not interpret it that way.

It is astonishing to have a record like that, and it really is a sign to me—especially reading the cases—that the Supreme Court has been very much out of sync with its proper function of giving fair interpretation to Congress’s meaning.

And it is not over yet. There are cases now that I think Congress is considering. One case deals with the IDEA, *Arlington District v. Murphy*, as well as other cases.

I quoted a dialogue in my testimony in which one professor—two professors were talking, and one said, “You read that statute for all it might be worth rather than for the least it has to be worth, don’t you?” And that is a very telling thing, because I think what we see is that the Supreme Court has been reading Congress’s statutes for the least that they have to be worth as opposed to giving them a fair reading of what Congress intended.

If I had a piece of advice for Congress, I would say, “Keep on doing what you are doing. Keep on passing statutes when necessary to correct the misinterpretations. Keep on putting in the preambles those very specific references to what you have had to do.” And at some point, the message has to get across. In fact, it would not be a bad idea to write preambles that say, “This statute is a remedial one. We intend for it to be interpreted broadly to achieve our basic purposes.”

Thank you very much.

[The prepared statement of Mr. Derfner follows:]

PREPARED STATEMENT OF ARMAND DERFNER

STATEMENT OF

ARMAND DERFNER

Distinguished Scholar in Residence in Constitutional Law,
Charleston School of Law

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties of the
Committee on the Judiciary

United States House of Representatives

Hearing on:
Civil Rights Under Fire: Recent Supreme Court Decisions

Thursday, October 8, 2009

Good morning, Mr. Chairman and Members of the Subcommittee. It is an honor to appear before this Subcommittee and assist in the important work you are doing on behalf of our Nation.

I am Armand Derfner, of Charleston, South Carolina. I am a partner in the law firm of Derfner, Altman & Wilborn. I am also Distinguished Scholar in Residence in Constitutional Law, at the Charleston School of Law, where I currently teach Constitutional law.

I have been practicing in the fields of constitutional law, civil rights and civil liberties for nearly 50 years. During that time I have tried cases and argued appeals in many federal and state courts including the Supreme Court of the United States. I have taught, lectured and written about Constitutional Law, civil rights and civil liberties.

During my career, it has also been my pleasure to testify before this Subcommittee on various topics. Counting today, my best estimate is that I have testified before this Subcommittee and related subcommittees of the Committee on the Judiciary

nine times, going back to the days of Chairman Emanuel Celler. Chairman Nadler, Ranking Member Sensenbrenner, you and your colleagues on this Subcommittee are carrying on a proud tradition of service, and doing it superbly.

The title of today's hearings reflects a situation of great importance to the Nation, and I am grateful to this Subcommittee's for drawing attention to it.

The scheme of our Constitution is one of checks and balance, among the three branches of the federal government, between the federal government and the states, and, above all, between all these institutions and the people of the United States of America.

In that scheme, Congress exercises the legislative function: it makes the laws of the United States. The Supreme Court, along with lower courts, exercises the judicial function: it interprets the laws of the United States. Since *Marbury v. Madison*, the Supreme Court has also had the role of interpreting the Constitution.

The Supreme Court's interpretation of the Constitution is of great importance. Other witnesses will address issues of serious concern in the Court's constitutional decisions in the areas of civil rights and civil liberties, and I share that concern.

But my main focus today is the Court's decisions involving statutory interpretation of laws in the areas of civil rights and civil liberties.

It bears repeating: the legislative function in our National government is exercised by Congress. The judicial function in interpreting statutes is to carry out faithfully what Congress has said and done.

Every Justice says that in the area of statutory interpretation, Congress is the master. But how has the Supreme Court carried out its task?

I propose to look at this question by asking how you in Congress have assessed

the Court's performance in carrying out your laws and intentions. Specifically, I want to focus on instances where the Supreme Court has issued a decision giving its interpretation of a federal statute, and Congress has come back to pass an amendment or a new statute correcting the Supreme Court and restoring Congress' original meaning.

Of course, this happens from time to time, but with the current Supreme Court, in the area of civil rights, the sequence has been repeated so many times as to be astonishing. And in every case, the Supreme Court decision that Congress has had to overturn has been one that weakened the Congressional enactment. This unprecedented development properly leads Congress -- starting with this Subcommittee -- to question whether the Supreme Court is faithfully deferring to Congress and is fairly carrying out its assigned task under Article III, which is to interpret the meaning that *Congress* gave to these laws.

* * *

Before I turn to this examination, I would like to go back in history to illustrate a far different relationship between Congress and the Supreme Court. I argued my first case in the Supreme Court 40 years ago. It was *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the first case interpreting the landmark Section 5 of the Voting Rights Act.

It was a seminal case in American history. For a century, the Fifteenth Amendment's noble guarantee of equal voting rights without regard to race had been ignored in a group of states, and previous legislation to enforce it had been ineffective. Civil rights laws passed in the aftermath of the Fifteenth Amendment had been strangled by the Supreme Court of that day, and the long period of Jim Crow followed.

After a century of disfranchisement, Congress returned to the task and passed new civil rights laws to end disfranchisement, in 1957, 1960 and 1964. None of them worked. Finally, in 1965, in the aftermath of Bloody Sunday and the Selma-to-Montgomery March, Congress passed its most far-reaching law, the Voting Rights Act of 1965.

The Act was a quick success in ending the noxious literacy tests and poll taxes which had been the main engines of discrimination.

But we were soon confronted by new tactics, like racial gerrymandering, midnight moves of polling places and other tactics that came to be called vote dilution. These tactics were designed to make the new voters' votes meaningless even if the Act guaranteed their right to register and cast a ballot.

We believed that a critical section of the Act, Section 5, should block these tactics. Section 5 was included in the Act because previous history had shown Congress that new discriminatory tactics would likely replace those that had just been eliminated. To guard against this, Section 5 required states whose literacy tests had been outlawed to obtain "pre-clearance" of any voting changes before putting them into effect.

The problem was that the Voting Rights Act didn't specifically refer to vote dilution tactics, and because of that the lower courts interpreted the law narrowly and rejected our challenges. We said that was just the point – that Congress didn't know what the new tactics would be, but it knew they would come, and that Section 5 was designed to be a broad prophylactic against any new disfranchising tactic, no matter how novel or diabolically inventive.

That was the test facing the Supreme Court in the *Allen* case, and it was a test of how the Court would carry out its obligation to interpret the laws of Congress.

The Supreme Court of that day and in that case faithfully and fully lived up to its duty to respect Congress and interpret the law as Congress wrote it and meant it to be interpreted.

The Court began by observing that the Voting Rights Act “was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens,” and it referred to that purpose as Congress’ “laudable goal.” That was the lens through which the Supreme Court saw that law and that case.

The Supreme Court paid careful attention to the words, structure and meaning that Congress had given the law. The Court concluded that “we must reject the narrow construction that appellees would give Section 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations” that would discriminate. And “the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.” Drawing on Congress’ clear expression of purpose, reflected not only in the wording and structure of the Act but also in the massive legislative history, the Supreme Court concluded “we are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the Section 5 approval process.”

That decision was in complete accordance with one of the most fundamental rules of statutory interpretation, which provides that remedial statutes are to be interpreted broadly to secure their goals. The Voting Rights Act is clearly a remedial statute of the highest order, as, indeed, is the entire category of Congress’ anti-discrimination laws.

Looking back on our history, we know that the Voting Rights Act, and Section 5 of the Act, helped save this Nation. It is fashionable nowadays for everyone to agree that

Section 5 properly covered vote dilution tactics, and to agree that Section 5 as so interpreted has played a crucial role in our Nation's progress. That widespread view is held even by those who doubt whether Section 5 should still be in force – doubts, by the way, that Congress overwhelmingly rejected in 2006 when it extended Section 5.

But, and this is the reason I have dwelt on the *Allen* case, if today's modes of Supreme Court interpretation had been current 40 years ago, the *Allen* case would have been decided the opposite way, with tragic consequences for the United States.

The current mode of interpretation would very likely have adopted the narrow interpretation of the statute as not covering vote dilution schemes, because they were not specified in the law. The legislative history that gave the issues such sharp definition would have been insufficient or been ignored under today's approach that disdains looking at what Congress has said and done in the course of passing the law.

Indeed, the case might have been thrown out of court entirely on the grounds that Section 5 did not specify a "private right of action." What does this mean? Section 5, although it gave voters a "right" – the right not to be subjected to new voting laws that were discriminatory -- did not give them a "private right of action," which simply means that the law didn't specifically say they could bring their own lawsuit if they were denied that right.

The Supreme Court of 1968 dealt with that issue in accordance with longstanding precedent: it said "the achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." The longstanding precedent held there was an implied private right of action in statutes passed to protect a class of citizens, even if

there is not a specific authorization for a private lawsuit. The Court said that rule “is applicable here. The guarantee of Section 5 . . . might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.”

But this is ancient history. Today’s Supreme Court has outlawed the implied private right of action. Unless Congress specifically says in the statute that victims can sue, they can’t. Their only recourse is to hope that a government official or agency will decide to focus on their individual case.

So let us be happy – and relieved – that the Voting Rights Act – the great charter of freedom – came before the Supreme Court in a different day and age.

* * *

Since that day and age, the Supreme Court has steadily narrowed the protections of civil rights, both constitutional and statutory. Many scholars have addressed this development. One of the most powerful criticisms has come from Hon. John Noonan, of the Ninth U.S. Circuit Court of Appeals, a noted conservative scholar who was appointed to the bench by President Ronald Reagan. In a powerful book entitled *Narrowing the Nation’s Power*, Judge Noonan has taken sharp issue with the current Supreme Court’s interpretation of the 11th Amendment, an amendment that limits certain types of lawsuits against States. Based on that amendment, the current Supreme Court has done something no Supreme Court has ever done since the days of *Plessy v. Ferguson*, which is to hold a federal civil rights statute unconstitutional. Judge Noonan has shown that the Court’s history is wrong, its sense of federalism is wrong, and its doctrines are unsupportable. Other scholars, liberal and conservative alike, have also criticized the Court’s work in this area.

But we don't need to delve into the academic literature to see that the Court is overstepping its bounds when it comes to how it interprets statutes passed by Congress. In the view of Congress itself, the Court is plainly getting it wrong, repeatedly misinterpreting Congress' laws.

To start with the bottom line, Congress has passed statutes to correct Supreme Court interpretations of federal civil rights statutes no fewer than 5 times in recent years, and those corrective statutes have overturned more than a dozen Supreme Court cases. It is not my intention here to argue the details of the interpretation; the point is that you here in Congress were persuaded that the Supreme Court was getting it wrong.

We are all familiar with the most recent instance, passage earlier this year of the Lily Ledbetter Fair Pay Act, which corrected the Supreme Court's 2007 decision in *Lily Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), but that is only the latest entry in a long parade.

Here is a short list, which makes no pretense to be complete:

1. *Grove City College v. Bell*, 465 U.S. 555 (1984)
Overturned by the Civil Rights Restoration Act of 1987
2. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)
Overturned by the Civil Rights Act of 1991
3. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
Overturned by the Civil Rights Act of 1991
4. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)
Overturned by the Civil Rights Act of 1991
5. *Lorance v. AT&T, Technologies*, 490 U.S. 900 (1989)
Overturned by the Civil Rights Act of 1991
6. *Martin v. Wilks*, 490 U.S. 755 (1989)
Overturned by the Civil Rights Act of 1991

7. *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83 (1991)
Overturned by the Civil Rights Act of 1991
8. *E.E.O.C. v. Arabian American oil Co.*, 499 U.S. 244 (1991)
Overturned by the Civil Rights Act of 1991
9. *Reno v. Bossier Parrish School Board*, 528 U.S. 320 (2000)
Overturned by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King
Voting Rights Act Reauthorization and Amendments Act of 2006
10. *Georgia v. Ashcroft*, 539 U.S. 461 (2003)
Overturned by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King
Voting Rights Act Reauthorization and Amendments Act of 2006
11. *Sutton v. United Airlines, Inc.*, 527 U.S. 555 (1999)
Overturned by the Americans with Disabilities Act Amendments Act of
2008
12. *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999)
Overturned by the Americans with Disabilities Act Amendments Act of
2008
13. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)
Overturned by the Americans with Disabilities Act Amendments Act of
2008
14. *Toyota Motor Mfg, Inc. v. Williams*, 534 U.S. 184 (2002)
Overturned by the Americans with Disabilities Act Amendments Act of
2008
15. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007)
Overturned by the Lily Ledbetter Fair Pay Act of 2009

* * *

That is 15 cases in which Congress felt compelled to write a new law or
amendment to restore what it thought it had already done.

Nor has Congress acted silently. Increasingly, the new statutes have made plain
Congress' view of the Supreme Court's handiwork. Here is the record:

In the 2006 voting statute, Congress made the following finding:

“(6) The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress’ original intent in enacting the Voting Rights of 1965 and narrowed the protections afforded by section 5 of such Act.”

And in the 2009 Lily Ledbetter law, Congress made these findings:

“(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.”

But it is in the 2008 ADA amendments that the reaction to the Supreme Court decisions was strongest. Here Congress made its views plain in both a set of Findings and a statement of Purposes:

Findings:

“(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress”

Purposes:

“(1) to carry out the ADA’s objectives of providing “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to

be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”;

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for “substantially limits”, and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis”

That is an astounding record. Moreover, these have not been partisan ventures. The corrective laws were all passed by overwhelming margins in both houses of Congress, with both Democratic and Republican majorities, and were signed by Presidents of both political parties.

* * *

I do not believe the list of 15 is the end of it. There are other Supreme Court cases that seem to be prime candidates for corrective legislation, and such legislation is already making progress through this House or the other body. I will not attempt to catalog them but will just name two.

One case is *Gross v. FBL Financial Services, Inc.*, decided on June 18, 2009, which restricted the ability to prove a case under the Age Discrimination in Employment Act (ADEA). This case is a clear illustration of the problem. A powerful dissent by Justice Stevens points out that the Court is reaching out to decide a question not

presented in the certiorari petition and not briefed by the parties. He then says “unfortunately, the majority’s inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress’ intent.” As Justice Stevens further explains, the most surprising thing about the majority’s opinion is its citation of the Civil Rights Act of 1991 to support the same misinterpretation the 1991 Act was designed to correct.

Ironically, the plaintiff in this case is reported to be a relative of the late Rep. H.R. Gross, a longtime Member of this House from Iowa. As conservative as Rep. Gross was, he was always protective of Congress’ legislative role.

The other case I want to cite is *Arlington District v. Murphy*, 548 U.S. 291 (2006), which barred recovery of expert witness fees in cases under the Individuals with Disabilities Education Act (IDEA). The irony here is that the Supreme Court based its restrictive holding partly on *West Va Univ. Hosp. v. Casey*, a case which Congress has already had to correct. See No. 7 in the list above.

* * *

Those who would claim that the Supreme Court is showing proper deference to Congress might advance several arguments – the Supreme Court just calls it as it sees it, or Congress should write better laws, or the intention of a later Congress says nothing about the meaning of a statute passed by an earlier Congress. Any of these arguments might conceivably explain one or a handful of instances. But 15? No, these theories will not do.

Finally, there is a more fundamental question of how a court should interpret statutes. Some people equate “strict construction” or “narrow” reading of statutes as the

most appropriate or deferential approach for a judge. But taking a narrow view of legislation is a very active, even aggressive approach. I believe it is a myth to say there is only one way to read a statute – as if it were a key that goes in a door only one way. Judges interpreting statutes make judgment calls and value choices. A so-called “strict construction,” rejecting anything not required by the words, is one such judgment call and value choice. I further believe a judgment call that excludes reliable indicators of legislative meaning is likely to produce poorer results, not better ones. It is like saying a black-and-white copy of a color photo is the real thing.

A famous law review article by Professor Henry Hart contained an imaginary dialogue that illustrates the complexity of interpretation. In that dialogue, one of the characters advanced a certain interpretation of a case, to which the other speaker responded, “you read that case for all it might be worth rather than the least it has to be worth, don’t you?”

Possible readings of a statute, like a case, can range along a continuum, from “for all it might be worth” to “the least it has to be worth.” The Supreme Court has been reading civil rights cases for “the least they have to be worth.”

That is plainly a value judgment, and I believe it is a deeply flawed value judgment that in fact *devalues* Congress’ laws. The pointed corrective legislation I have cited shows that Congress agrees.

Thank you for highlighting this problem in these extraordinarily important hearings.

Mr. NADLER. Thank you.
I now recognize Professor François for 5 minutes.

**TESTIMONY OF ADERSON BELLEGARDE FRANÇOIS, ASSO-
CIATE PROFESSOR OF LAW, HOWARD UNIVERSITY SCHOOL
OF LAW**

Mr. FRANÇOIS. Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify before you today.

The question I respectfully plan to address this morning is whether and to what extent the United States Supreme Court, under Justice Roberts, has kept or broken faith with the constitutional ideal and congressional mandates for respect for civil rights and human equality.

In preparing for the testimony today, I—and by “I,” I actually really mean my students in the clinic—analyzed every single civil rights decision that the Court has issued since the 2005 term, the first term when both Chief Justice Roberts and Justice Alito served a full term.

I do not propose to bore the Committee today with a full analysis of these cases. Rather, I wish to emphasize two main conclusions that it seems to me our analysis shows.

If the question that is posed to the Committee is to what extent the Supreme Court over the last four terms can be characterized as being anti-civil rights, the answer to me is twofold. It is both that the Court has been less anti-civil rights than some of us might fear, but also far more hostile to civil rights than many of us are willing to imagine.

By that, I mean this: Over the last 4 years, when interpreting statutory texts, with notable exception, the Supreme Court has been relatively solicitous toward civil rights plaintiffs than respectful of congressional intent. I do acknowledge that there are some notable exceptions: *Ledbetter* being one for example; *Ashcroft v. Iqbal* being another; *Gross* being yet another.

However, in the main, the record of the Court hasn’t been that fundamentally different from, say, that of Chief Justice Rehnquist, though it has been different than, obviously, under the Burger court and under the Warren court.

For example, the vast majority of cases, civil rights cases the Court decides, they do not decide it in the 5-4 split, but rather fairly unanimous decisions, 9-0, 7-2, 6-3. For example, in *United States v. Georgia*, a 2005 opinion authored by Justice Scalia, that held that Congress had validly abrogated the states’ 11th amendment immunity under the ADA in permitting a prisoner to sue under title II of the ADA.

That being said, it seems to me that the second conclusion that one can also draw from the Court’s jurisprudence over the last four terms is that, in contrast to when the Court is interpreting statutory text, when the Court is actually issuing constitutional rulings, the Court has adopted an interpretive stance toward federalism, the Equal Protection Clause, the commerce clause, the state action doctrine that have severely limited the ability of plaintiffs to recover in civil rights cases and also severely restricted Congress’s power to issue new civil rights legislation.

The few examples that I may cite are, for example, the parents concern versus the out-of-school district case during the 2006 term in which, for the first time, for the first time since *Brown*, the

Court adopted the view of equal protection, which if taken seriously would seriously hamper most institutions' ability to continue toward the goal of desegregation.

For another example, in the MUD case I am sure that my colleague, Debo Adegbile, will address in more detail, while the Court did uphold the constitutionality—or, I should say, the Court refrained from truly ruling on the constitutionality of section 5, there was certainly a tremendous amount of language in the Court's majority opinion by Justice Roberts that seriously question whether or not Voting Rights Act section 5 could withstand what Justice Roberts called a federalism cost.

And there are more examples that one can think of, including, for example, the Court's view on Congress's ability to abrogate the states' 11th amendment immunity. According to the Court's most recent doctrine, the only time Congress may do so is when Congress do so in the pursuit of an independent constitutional right, as opposed to Congress's own finding as to how to enforce the 14th amendment.

I will not presume to provide the Committee with advice on whether and how to counteract what many perceive as an unnecessarily cramped civil rights jurisprudence on the part of the Court under Justice Roberts. Certainly, insofar as the Court has sometimes given less than due deference to congressional intent interpreting statute, delivering quite a few decisions in the last four terms that could and have been corrected by legislative amendment.

We talked about Ledbetter. It seems to me it is also worthwhile to talk about *Gross*, an interpretation of the ADA that makes it far more difficult for litigants to recover. We also talk about *Ashcroft v. Iqbal*, a decision that has essentially eliminated supervisory liability under *Bivens* action.

However, as important as these legislative fixes may be for civil rights advocates and litigants, it does seem to me that the far more formidable challenge posed by the Court's jurisprudence over the last four terms is not so much its misinterpretation of statutory texts, but rather its adoption of a constitutional jurisprudence or federalism, 11th amendment, state action doctrine, commerce clause power, and equal protection enforcement clause that have severely limited the ability of this body to act and pass civil rights legislation.

While the doctrines of separation of powers and judicial review legitimately limit Congress's ability to revisit the Court—to revisit the Court's constitutional rulings, it nonetheless seems to me a worthwhile project for this Committee to consider investigating the ways in which it may begin to challenge the Court to reconsider its ruling on topics as crucial for the advancement of civil rights as federalism, equal protection, 11th amendment immunity, state action doctrine, and commerce clause power.

Thank you very much.

[The prepared statement of Mr. François follows:]

PREPARED STATEMENT OF ADERSON BELLEGARDE FRANÇOIS

WRITTEN TESTIMONY OF PROFESSOR ADERSON BELLEGARDE FRANÇOIS
 OF THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC
 BEFORE THE HOUSE JUDICIARY COMMITTEE
 OCTOBER 8, 2009

INTRODUCTION

Mr. Chairman and members of the Committee: Thank you for the opportunity to appear before you today. My name is Aderson Bellegarde François. I am a professor of constitutional law and director of the Civil Rights Clinic at Howard University School of Law. The Civil Rights Clinic at Howard University School of Law engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness, and political equality. The Clinic provides *pro bono* services to indigent, prisoner, and *pro se* clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality, unconstitutional prison conditions, *habeas corpus*, and unfair procedural barriers to the courts.

The question I respectfully plan to address in my testimony today is whether and how the United States Supreme Court under Chief Justice John Roberts has kept or broken faith with the constitutional ideal and congressional mandates of respect for civil and human rights and equality. In attempting to answer this question, the clinic¹ has analyzed, with few exceptions, every single civil rights decision the Court has issued beginning with the 2005 Term.² Our analysis shows that during the period from 2005 until the present, while the Court has certainly issued its share of decisions that can be fairly characterized as hostile to the advancement of civil rights and equality, it is probably premature to conclude that the Court has been—or will be—consistently anti civil rights. Rather, on the evidence of the last four terms, it may be more accurate to say that, when interpreting the Constitution, the Court has adopted an interpretive stance and jurisprudential philosophy on such constitutional subjects as federalism, Eleventh Amendment state sovereign immunity, the commerce clause, the state action doctrine, the enforcement provisions of the Reconstruction Amendments, that tend to both limit the rights of civil rights plaintiffs and curtail congressional power. However, when interpreting congressional statutes, the Court has been both more solicitous toward individuals seeking redress of violations of their civil rights and deferential to Congress, unless the Court determines – as it has done on key occasions – that a particular exercise of legislative power infringes upon the Court’s own judicial review prerogative to determine the ultimate meaning of the Constitutional. In this way, Chief Justice Roberts’

¹ The following student members of the clinic provided invaluable assistance in researching and drafting the analysis of the Court’s most four recent terms: Yasmin Gabriel, George Gardner, Dwayne Sam, Caren Short, and Natalie Wheatfall.

² For purposes of the analysis, the Clinic excluded Habeas Corpus and other criminal justice cases. While matters of criminal procedural justice do speak to the broader topic of human liberty and freedom, our analysis limited the definition of the term civil rights to the more or less fixed set of personal, political, and property individual liberty and equality interests that are constitutionally or legislatively protected from government and, at times, private interference.

tenure—at least so far—has not been that terribly different from that of the late Chief Justice Rehnquist. That is to say, the Court’s civil rights jurisprudence over the last four terms does not support the conclusion that, as an institution, the Court has taken a radically more hostile stance toward civil rights enforcement, though, of course, given the Supreme Court’s poor record in matters of civil rights over the last 20 years, the continuation of the Rehnquist Court jurisprudence under Justice Roberts has indeed left civil rights enforcement in a fragile and precarious position.

The discussion below proceeds in four parts. Part I summarizes the conclusions drawn from the analysis of the Court’s civil rights jurisprudence during its four most recent terms. Part II presents a brief analysis of each civil rights decision of the last four terms. Part III presents a selected preview of significant civil rights cases pending before the Court during its 2009-2010 term. Part IV concludes with a brief assessment of the challenges this Committee faces in addressing the Court’s civil rights jurisprudence.

I.

THE COURT’S CIVIL RIGHTS JURISPRUDENCE HAS BEEN DEFERENTIAL TO CONGRESSIONAL POWER AND SOLICITOUS TOWARD CIVIL RIGHTS PLAINTIFFS WHEN INTERPRETING STATUTORY TEXT BUT FAR LESS SO WHEN INTERPRETING CONSTITUTIONAL TEXT

In recent years, when analyzing the record of the Supreme Court in general and its civil rights jurisprudence in particular, commentators have often claimed that the Court is split along a 5-4 ideological axis, with Justice Anthony Kennedy serving as the pivot for determining whether the split favors the so-called conservative or liberal side of the split. According to that view, the Court ideological allies consist of Justices Chief Justice Roberts and Justices Scalia, Thomas, and Alito on one side, and Justices Stevens, Ginsburg, Breyer, and former Justice Souter on the other. While there is some truth to that statement, it is also true that in order to support the thesis of an irreconcilable ideological split, many scholars and other court observers have tended to focus rather selectively on a narrow set of decisions that command public attention. Thus, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Ledbetter v. Goodyear Tire & Rubber Co.* decided during the 2006 term, *District of Columbia v. Heller* during the 2007 term, and *Ricci v. DeStefano* and *Gross v. FBL Financial Services, Inc.* during the 2008 term were indeed all 5-4 decisions.

However, a complete statistical review of the Court’s decisions for each term shows that the notion that the Court is irredeemably split along a 5-4 ideological line is probably a little exaggerated. In the 2005 Term, there were eighty-one decisions. Of those, fifty-five or 79.7% were decided by a 6-3 margin or higher, including thirty-six, or 49%, unanimous decisions. By contrast, only while sixteen decisions, or 21.3%, were decided by a 5-4 or 5-3 margin. In the 2006 Term, the Court was somewhat more divided, but still showed a relatively high level of agreement. There were seventy-one decisions, including four *per curiam* opinions. Twenty-eight decisions, or 39.4%, were

unanimous. Forty-nine decisions, or 69%, were 6-3 or higher, while the number of 5-4 decisions stood at twenty-two or 31%. In the 2007 Term, the Court again showed a high level of agreement among the justices. There were seventy written decisions, including three *per curiam* opinions. Twenty-two decisions, or 30.55%, were unanimous, and twenty-four more were decided by votes of 8-1 or 7-2. So, forty-six out of the seventy decisions, or 63.88%, were unanimous or near-unanimous, while the number of 5-4 decisions in the 2007 Term was only twelve out of seventy, or 15.27%.

The relatively high level of agreement among the justices is also reflected in areas of civil rights jurisprudence where one would normally expect an ideological split. For example, during the 2005 term, in *United States v. Georgia*, in a decision written by Justice Scalia, the Court unanimously held that Congress had properly abrogated the states' Eleventh Amendment immunity in creating a private right of action under Title II of the Americans with Disabilities Act. During the 2006 term, in *Winkelman v. Parma City School District*, in a 7-2 decision, the Court held that a non-lawyer parent of a child with a disability may prosecute claims under the Individuals with Disabilities Education Act (IDEA), *pro se*, in federal court because the Act provided parents with independent, enforceable civil rights. During the 2007 term, in *CBOSS West, Inc. v. Humphries*, again in a 7-2 decision, the Court broadened the reach of §1981 to encompass employment retaliation claims. During the 2008 term, in *Fitzgerald v. Barnstable School Committee*, in a 6-3 decision, the Court held that a comparison of the substantive rights and protection guaranteed under Title IX and under the Equal Protection Clause supports the conclusion that Congress did not intend Title IX to preclude §1983 constitutional suits, and that Congress did not intend for Title IX to be the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.

This is not to say that the Court has not had its share of sharply divided decisions, particularly on such topics as privacy and abortion, race-based affirmative action remedies in employment, and voluntary race-based measures to achieve integration in public schools. Nor is it to say that the Court has not in recent terms issued its share of decisions that deserve close congressional scrutiny and eventual revision, including, among others, *Gross v. FBL Financial Services, Inc.*, and *Hein v. Freedom from Religion Foundation, Inc.* Rather, it is to say that the Court's civil rights jurisprudence cannot be fairly evaluated, for better or for worse, through the prism of the popularly-known ideological split. In civil rights questions involving interpretation of statutory text, the Court's traditional ideological split rarely holds up. Quite often, in decisions ranging from unanimous to 7-2 or 6-3 splits, the Court has shown a willingness to afford relief to civil rights plaintiffs while respecting congressional intent.

Unfortunately, in civil rights questions involving interpretation of constitutional text, the Court's ideological lines have hardened into the traditional 5-4 split, resulting in a civil rights jurisprudence that has 1) placed severe limits upon Congress' Commerce Clause power to enact civil rights legislation, 2) used federalism to shift civil rights enforcement to state courts, 3) reaffirmed a state action doctrine dating back to the post-reconstruction and Jim Crow era, and 4) expanded the reach of Eleventh Amendment state sovereign immunity to deny access to the courts to civil rights litigants.

Thus, unlike decisions such as *Ledbetter*, which Congress could—and did—easily fix with amendments to statutory text, the far more difficult and consequential challenge the Roberts Court has placed before this Committee and Congress comes to this: Is there a valid congressional corrective to the Court’s cramped constitutional—as opposed to statutory—civil rights jurisprudence?

II

ANALYSIS OF THE SUPREME COURT’S CIVIL RIGHTS DECISIONS FROM THE 2005 TERM TO THE 2008 TERM

2005-2006 TERM

Americans with Disabilities Act

In *United States v. Georgia* (9-0)³, the Court considered the question of “whether a disabled inmate in a state prison may sue the State for money damages under Title II of the Americans with Disabilities Act of 1990 (ADA).”⁴ The case centered around Tony Goodman, a paraplegic inmate in the Georgia prison system.⁵ Originally, Goodman filed a *pro se* complaint in the United States District Court for the Southern District of Georgia challenging the conditions of his confinement.⁶ He named as defendants the State of Georgia, the Georgia Department of Corrections, and several individual prison officials.⁷ He brought claims under Rev. Stat. § 1979, 42 U.S.C. § 1983, Title II of the ADA, and the Eighth Amendment to the United States Constitution.⁸ Specifically, Goodman alleged that:

[h]e was confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. On multiple occasions, he asserted, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and, on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services on account of his disability.⁹

³ 546 U.S. 151 (2006).

⁴ *Id.* at 153 (citations omitted).

⁵ *Id.* at 154.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 156.

The District Court dismissed Goodman's § 1983 claims as 'vague,' without allowing him an opportunity to amend his complaint.¹⁰ The District Court also dismissed his Title II claims against all individual defendants.¹¹ On appeal to the United States Court of Appeals for the Eleventh Circuit, the Court determined that the District Court had erred in dismissing all of Goodman's § 1983 claims and that Goodman "had alleged actual violations of the Eighth Amendment by state agents."¹² However, because the Eleventh Circuit did not address the sufficiency of Goodman's allegations under Title II, the United States Supreme Court granted certiorari to consider "whether Title II of the ADA validly abrogates state sovereign immunity with respect to the claims at issue here."¹³ Writing for the majority, Justice Scalia held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."¹⁴ Central to the Court's rationale is the notion that "Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights."¹⁵ However, the Court left unresolved the question of whether state officials could be sued for damages under the ADA based on claims that do not otherwise violate the Constitution, as no such claims were presented for consideration.

Individuals with Disabilities Education Act

In *Schaffer v. Weast (6-2)*¹⁶, the Court considered the question of who bears the burden of proof at an administrative hearing assessing the appropriateness of an Individualized Education Plan ("IEP"), under the Individuals with Disabilities Education Act (IDEA).¹⁷ The case concerned educational services due to petitioner Brian Schaffer under the IDEA.¹⁸ Brian suffered from learning disabilities and speech-language impairments.¹⁹ After the Montgomery County Public Schools System produced what the Schaffer's felt was an inadequate IEP, they enrolled Brian in a private school and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education.²⁰

After a three-day hearing, the administrative law judge ("ALJ") presiding over the case ruled in favor of the school district, holding that the parent bore the burden of persuasion.²¹ However, in a reversal of fortunes, the ALJ reconsidered the case, deemed the evidence truly in "equipoise," and ruled in favor of the parents.²² Thereafter, the Fourth Circuit vacated and remanded the appeal so that it could consider the burden of

¹⁰ *Id.* at 155.

¹¹ *Id.*

¹² *Id.* at 157.

¹³ *Id.* at 156.

¹⁴ *Id.* at 159.

¹⁵ *Id.*

¹⁶ 546 U.S. 49 (2005).

¹⁷ *Id.* at 56 (citations omitted).

¹⁸ *Id.* at 55.

¹⁹ *Id.* at 54.

²⁰ *Id.* at 54-55.

²¹ *Id.* at 55.

²² *Id.*

proof issue along with the merits on a later appeal.²³ The District Court reaffirmed its ruling that the school district has the burden of proof.²⁴ On appeal, a divided panel of the Fourth Circuit reversed.²⁵ The United States Supreme Court finally granted certiorari, to determine which party bears the burden of persuasion at an IEP hearing.²⁶

Writing for the majority, Justice O'Connor explained that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."²⁷ Central to the majority's holding is the longstanding jurisprudential notion that "plaintiffs bear the risk of failing to prove their claims."²⁸ Thus, while the holding in this case may serve to limit the ability of future civil rights litigants to recover, the rule applies with equal effect to school districts if they seek to challenge an IEP before an ALJ.

In *Arlington Central School District Board of Education v. Murphy (6-3)*²⁹, the Court considered the question of whether the provision of the Individuals with Disabilities Education Act (IDEA) that entitles prevailing plaintiffs to recover attorney's fees includes the right to recover the cost of expert witnesses.³⁰ Specifically, the Act provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act.³¹

In that case, the respondents, Pearl and Theodore Murphy of LaGrange, New York, sued the petitioner, Arlington Central School District, seeking to require them to pay for their child's private school tuition under IDEA. The Murphys were successful, and the decision in their favor was upheld on appeal.³² The Murphys then sued to require that the School District pay for the \$29,350 in experts' fees incurred during the course of the trial.³³ The District Court granted their request in part, reducing the maximum recovery to \$8,650.³⁴ The Court of Appeals for the Second Circuit affirmed, while acknowledging that other Circuits had taken the opposite view.³⁵ The United States Supreme Court granted certiorari to resolve the conflict among the Circuits with respect to whether Congress authorized the compensation of expert fees to prevailing parents in IDEA actions.³⁶

Writing for the majority, Justice Alito began with the proposition that the IDEA was enacted pursuant to the Spending Clause and therefore subject to the clear statement

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 56.

²⁷ *Id.* at 62.

²⁸ *Id.*

²⁹ 548 U.S. 291 (2006).

³⁰ *Id.* at 294.

³¹ 20 U.S.C.A. § 1415(i)(3)(B) (2005).

³² 548 U.S. at 294.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 295

rule.³⁷ He then found that the obligation to pay expert witness costs to a prevailing plaintiff was not clearly stated in the statute but that conversely, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants.³⁸ However, the majority's opinion drew a sharp rebuke from Justices Breyer, Stevens, and Souter who reasoned that the Act's participatory rights and procedural protections may be seriously diminished if parents are unable to obtain reimbursement for the costs of expert witnesses.³⁹ Additionally, the dissenters suggested that the majority's holding flew in the face of some strongly suggestive language in the conference report.

Religious Freedom Restoration Act

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV)*⁴⁰ (8-0), the Court considered the question of whether the federal Controlled Substances Act (CSA) violates the rights of a small Brazilian religious sect, under the Religious Freedom Restoration Act of 1993 (RFRA) to import a hallucinogenic tea used as a sacrament in religious ceremonies.⁴¹

More specifically, members of the respondent church *UDV*, received communion by drinking *hoasca*, a tea brewed from plants unique to the Amazon Rainforest that contains DMT, a hallucinogen regulated under Schedule I of the Controlled Substances Act.⁴² After U.S. Customs inspectors seized a *hoasca* shipment to the American UDV and threatened prosecution, the UDV filed a suit for declaratory and injunctive relief, alleging, *inter alia*, that applying the Controlled Substances Act to the UDV's sacramental *hoasca* use violates RFRA.⁴³ At trial, the District Court concluded held that "the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV's sincere religious exercise."⁴⁴ Accordingly, the court entered a preliminary injunction prohibiting the Government from enforcing the Controlled Substances Act with respect to the UDV's importation and use. The Government appealed the preliminary injunction and a panel of the Court of Appeals for the Tenth Circuit affirmed, as did a majority of the Circuit sitting en banc.⁴⁵

Chief Justice Roberts wrote the opinion for a unanimous Court of eight justices.⁴⁶ There, the Court held that the lower courts "did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*."⁴⁷ Central to the Court's reasoning is the fact that the RFRA was passed by Congress in direct response to the

³⁷ *Id.*

³⁸ *Id.* at 300.

³⁹ *Id.* at 313.

⁴⁰ 546 U.S. 418 (2006).

⁴¹ *Id.* (citations omitted).

⁴² *Id.* at 423.

⁴³ *Id.* at 425-26.

⁴⁴ *Id.* at 427.

⁴⁵ *Id.*

⁴⁶ *Id.* at 422.

⁴⁷ *Id.* at 439.

*Employment Div., Dept. of Human Resources of Ore. v. Smith*⁴⁸, in which the Court ruled that unemployment benefits could be denied to two Native Americans fired for using *peyote*.⁴⁹ Accordingly, the congressional exception for use of *peyote* undermined the Government's argument calling for uniform enforcement of the CSA.⁵⁰ Additionally, the Court held that the "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress," and that the CSA is amenable to judicially crafted exceptions.⁵¹

This case is significant because it adjudicated the question of whether the RFRA is constitutional as applied to the federal government. Notably, in *City of Boerne v. Flores*, the Court struck down the Act as applied to the states, on the grounds that Congress had overstepped its Fourteenth Amendment authority to proscribe state conduct.

Title VII of the 1964 Civil Rights Act

In *Ash v. Tyson Foods*⁵² (9-0), a unanimous Court ruled in a *per curiam* opinion, that the Eleventh circuit had improperly reversed a jury verdict for the plaintiffs in this employment discrimination case.⁵³ The facts giving rise to the claim were that two African-American Petitioners, Anthony Ash and John Hithon, superintendents at a poultry plant owned and operated by respondent Tyson Foods, Inc.,⁵⁴ applied for promotions to fill two open shift manager positions, but two white males were chosen instead.⁵⁵ Alleging that Tyson had discriminated on account of race, petitioners sued under 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964.⁵⁶

At the close of trial, the United States District Court for the Northern District of Alabama granted Tyson's motion for judgment as a matter of law pursuant to Rule 50(b) and, in the alternative, ordered a new trial as to both plaintiffs under Rule 50(c).⁵⁷ On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.⁵⁸ Specifically, the court found that the evidence pertaining to Ash was insufficient to show pretext and that the evidence pertaining to Hithon was enough to go to the jury.⁵⁹ However, on appeal to the United States Supreme Court, held that the Court the Court of Appeals erred in two respects. Accordingly, the Supreme Court vacated the lower court's judgment and remanded the case for further consideration.⁶⁰

⁴⁸ 494 U.S. 872 (1990).

⁴⁹ *Id.* at 424.

⁵⁰ *Id.* at 434.

⁵¹ *Id.*

⁵² 546 U.S. 454 (2006).

⁵³ *Id.* at 458.

⁵⁴ *Id.* at 455.

⁵⁵ *Id.*

⁵⁶ *Id.* (citations omitted).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 456.

The first error identified by the Court was that the Eleventh Circuit dismissed the significance of the fact that a plant manager referred to one of the plaintiffs as “boy.”⁶¹ While conceding that the term is not always probative of racial animus, the Court rejected the notion that it is never probative of bias standing alone.⁶² Second, the Eleventh Circuit held that a discrimination plaintiff seeking to establish that an employer’s race-neutral explanation for a challenged hiring decision is pretextual must show that “the disparity on qualifications [between the plaintiff and the person selected for the job] is so apparent as to virtually jump off the page and slap you in the face.”⁶³ The Court summarily rejected that standard as “unhelpful and imprecise.”⁶⁴

In *Arbaugh v. Y & H Corporation*⁶⁵ (8-0), the Court considered the question of “whether the numerical qualification contained in Title VII’s definition of “employer” affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief.”⁶⁶

In that case, Petitioner Arbaugh sued her former employer, respondent Y & H Corporation (“Y & H”), in Federal District Court, alleging sexual harassment in violation of Title VII and averring related state-law claims.⁶⁷ The case was tried to a jury, which returned a \$40,000 verdict in Arbaugh’s favor.⁶⁸ Two weeks after the court entered judgment on that verdict, Y & H moved to dismiss the entire action for want of federal subject-matter jurisdiction, asserting, for the first time, that it had fewer than 15 employees on its payroll and therefore was not amenable to suit under Title VII.⁶⁹ Although the district court recognized that granting the motion would be “unfair and a waste of judicial resources,” the District Court, citing Federal Rule 12(h)(3), considered itself duty-bound to do so because it believed the 15-or-more-employees requirement to be jurisdictional.⁷⁰ Accordingly, the court vacated its prior judgment and dismissed Arbaugh’s Title VII claim with prejudice and her state-law claims without prejudice. On appeal, the Fifth Circuit affirmed the ruling, based on its precedent holding that “unless the employee-numerosity requirement is met, federal-court subject-matter jurisdiction does not exist.”⁷¹

The United States Supreme Court granted certiorari to “resolve conflicting opinions in Courts of Appeals on the question whether Title VII’s employee-numerosity requirement, 42 U.S.C. § 2000e(b), is jurisdictional or simply an element of a plaintiff’s claim for relief.”⁷² Writing for the majority, Justice Ginsburg, along with seven other Justices unanimously reversed the Fifth Circuit’s decision, holding that the threshold

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 456-57.

⁶⁴ *Id.*

⁶⁵ 546 U.S. 500 (2006).

⁶⁶ *Id.* at 503.

⁶⁷ *Id.* at 503-04.

⁶⁸ *Id.* at 504.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 509.

⁷² *Id.*

number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.⁷³ The Court's holding underscores the importance of judicial economy and insures that civil rights litigants are afforded a measure of fairness throughout the litigation process.

In *Burlington Northern and Santa Fe Railway Co. v. White*⁷⁴ (9-0), the Court considered the question of 1) whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace; and 2) how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.⁷⁵

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), and its anti-retaliation provision forbids "discriminat[ion] against" an employee or job applicant who, *inter alia*, has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation, § 2000e-3(a).⁷⁶ In this case, the Respondent, White, the only woman in her department, operated the forklift at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railway Co. ("Burlington").⁷⁷ After she complained to Burlington officials, her immediate supervisor, Bill Joiner was disciplined for sexual harassment.⁷⁸ However, White was removed from forklift duty to standard track laborer tasks.⁷⁹ In response to this, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that the reassignment was unlawful gender discrimination and retaliation for her complaint about Joiner.⁸⁰ Following a disagreement with her immediate supervisor, White was suspended without pay for insubordination.⁸¹ However, internal grievances procedures later revealed that White had not been insubordinate.⁸² Thereafter, Burlington reinstated her, and awarded her backpay for the 37 days she was suspended.⁸³ White subsequently filed another EEOC complaint as a result of the suspension.⁸⁴ After exhausting her administrative remedies, White filed suit against Burlington in federal court, asserting that Burlington's actions were tantamount to unlawful retaliation under title VII.⁸⁵

At trial, a jury found in White's favor and awarded her \$43,000 in compensatory damages.⁸⁶ On appeal, the Sixth Circuit, sitting en banc, affirmed the lower court's

⁷³ *Id.* at 516.

⁷⁴ 548 U.S. 53 (2006).

⁷⁵ *Id.* at 61.

⁷⁶ *Id.* at 56.

⁷⁷ *Id.* at 57.

⁷⁸ *Id.* at 58.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 59.

⁸⁵ *Id.*

⁸⁶ *Id.*

ruling but differed as to the proper standards to apply.⁸⁷ Given the court's ambivalence and the existing Circuit split, the Supreme Court granted Certiorari to resolve the issue.⁸⁸ In an opinion written by Justice Breyer, eight members of the Court held that the appropriate test for judging retaliation under Title VII is whether a reasonable employee under the circumstances would be deterred from reporting discrimination.⁸⁹ In refusing to adopt the narrower standards adopted by the Fifth and Eighth Circuits, the Court strengthened the ability of a civil rights litigant to recover damages. To be sure, in a separate concurrence, Justice Alito took a narrower view, arguing that the retaliation must be employment related in order to violate Title VII.⁹⁰

42 U.S.C. § 1981

In *Domino's Pizza, Inc. v. McDonald*⁹¹ (8-0), the Court considered the question of "whether a plaintiff who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship, may bring suit under Rev. Stat. § 1977, 42 U.S.C. § 1981."⁹²

In this case, respondent McDonald, a black man, was the sole shareholder and president of JWM Investments, Inc. ("JWM").⁹³ McDonald brought suit against petitioners (collectively Domino's) under 42 U.S.C. § 1981, alleging, *inter alia*, that JWM and Domino's had entered into several contracts, that Domino's had broken those contracts because of "racial animus toward McDonald, and that the breach had harmed McDonald personally by causing him to suffer monetary damages and damages for pain and suffering, emotional distress, and humiliation."⁹⁴ At trial, the District Court granted Domino's motion to dismiss on the ground that "McDonald could bring no § 1981 claim against Domino's because McDonald was party to no contract with Domino's."⁹⁵ On appeal, the Ninth Circuit reversed, acknowledging that while an "injury suffered only by the corporation" would not permit a shareholder to bring a § 1981 action, when there are injuries distinct from those of the corporation, "a nonparty like McDonald may nonetheless sue under § 1981."⁹⁶ The Court of Appeals acknowledged that its holding was a departure from that of other Circuits, and the Supreme Court granted certiorari to resolve this burgeoning Circuit split.⁹⁷

Writing for the majority, Justice Scalia and seven other Justices unanimously held that that 42 U.S.C. § 1981 only applies to those who have enforceable rights under the contract.⁹⁸ As Justice Scalia explained for the Court, § 1981 protects the rights to make

⁸⁷ *Id.*

⁸⁸ *Id.* at 60.

⁸⁹ *Id.* at 68.

⁹⁰ *Id.* at 79.

⁹¹ 546 U.S. 470 (2006).

⁹² *Id.* at 472.

⁹³ *Id.*

⁹⁴ *Id.* at 473.

⁹⁵ *Id.* at 474.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 476.

and enforce contracts and therefore extends only to those who have rights under the contract. In this case, the plaintiff was acting as an agent for the corporation.⁹⁹ In his capacity as an agent, he was not personally liable for any breach of the contract and could not legally claim any benefit under it.¹⁰⁰ In reaching its holding, the Court effectively placed limits on a civil litigants ability to recover damages on behalf of his principal.

Voting Rights Act of 1965

In *LULAC v. Perry*¹⁰¹ (5-4), the Court considered a series of challenges to a mid decade redrawing of congressional lines by the Texas State Legislature. Specifically, the Court considered the question of “whether it was unconstitutional for Texas to replace a lawful districting plan ‘in the middle of a decade, for the sole purpose of maximizing partisan advantage.’”¹⁰²

In that case, the Republican-dominated Texas legislature devised a new set of congressional districts to increase Texas Republicans’ representation in Congress.¹⁰³ As part of the plan, a majority-Latino district in southwestern Texas, District 23, was redrawn to include more Republican Anglo voters and exclude Democratic Latino.¹⁰⁴ Although the plan reduced the number of Latinos in District 23, it placed additional Latino voters in the nearby District 25, which contained another community of Latino voters.¹⁰⁵ Critics of the plan averred that it was unconstitutional and violated section II the Voting Rights Act because it diluted racial minority voting strength and was designed to produce a partisan advantage.¹⁰⁶

By a 7-2 vote, the Court first ruled that the redistricting plan was not unconstitutional as a partisan gerrymander even though it was undertaken for the “sole purpose” of increasing Republican representation. A majority of the Court agreed that partisan gerrymander claims are not “justiciable,” but for the third time in three decades the Court was unable to agree on any judicially manageable standards. By separate 5-4 majorities, the Court then upheld a vote dilution claim under § 2 of the Voting Rights Act raised by Latino voters in a redrawn district outside Houston, but rejected a § 2 claim raised by African-American voters in a redrawn district outside Dallas.

Federalism

In *Gonzalez v. Oregon*¹⁰⁷ (6-3), the Court considered the question of “whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 475.

¹⁰¹ 548 U.S. 399 (2006).

¹⁰² *Id.* at 456.

¹⁰³ *Id.* at 411-13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 427.

¹⁰⁷ 546 U.S. 243 (2006).

from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure.”¹⁰⁸

In 1994, Oregon became the first State to legalize assisted suicide by enacting the Oregon Death With Dignity Act (ODWDA).¹⁰⁹ However, “the drugs Oregon physicians prescribe under ODWDA are regulated under a federal statute, the Controlled Substances Act (CSA or Act).”¹¹⁰ In 2001, an Interpretive Rule issued by the Attorney General determined that “using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA.”¹¹¹

Writing for the majority, Justice Kennedy ruled that the Attorney General had exceeded his authority under the federal Controlled Substances Act (CSA) by threatening to suspend the federal license of any doctor who prescribed narcotic drugs as part of a physician-assisted suicide under Oregon’s Death With Dignity Act.¹¹² The Court rejected the Attorney General’s assertion that the CSA “delegates to a single Executive officer to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality.”¹¹³

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§ 1988—Attorney’s Fees

In *Sole v. Wyner*¹¹⁴ (9-0), the Court addressed the question of whether a plaintiff who secures a preliminary injunction after an abbreviated hearing, but later is denied a permanent injunction at a dispositive adjudication on the merits, qualifies as a “prevailing party” that may obtain attorney fees under § 1988(b). The plaintiff desired to organize an anti-war protest that included a group of people forming a peace symbol, while nude, on a Florida beach. The beach, however, had a Bathing Suit Rule that required all attendees’ genitals be covered. The plaintiff filed for a preliminary injunction two days before the demonstration. The District Court granted the temporary relief, with the understanding that the demonstration would take place behind a cloth barrier, which would cover the demonstration for those who might be offended by the nudity. The demonstration was held the next day, but the participants ignored the screen and used other parts of the beach in the nude after the demonstration.

The plaintiff returned to court, hoping to obtain a permanent injunction against the Bathing Suit Rule in order that she may hold another nude demonstration the following year at the same beach. This time, noting that the plaintiff’s group had ignored

¹⁰⁸ *Id.* at 248.

¹⁰⁹ *Id.* at 249 (citations omitted).

¹¹⁰ *Id.* at 249 (citations omitted).

¹¹¹ *Id.*

¹¹² *Id.* at 274-75.

¹¹³ *Id.* at 273.

¹¹⁴ 551 U.S. 74 (2007).

the barrier in the previous demonstration, the District Court granted summary judgment to the defendant, reasoning that the beach's rule was no more restrictive than it needed to be to protect the visiting experiences of others at the beach. The Supreme Court held that the plaintiff was not a prevailing party, because she had not achieved an "enduring change in the legal relationship" between her and the state officials she sued.¹¹⁵ The court noted, in addition, that although the plaintiff obtained a judgment that allowed her to complete the demonstration, she did not obtain the ultimate relief she sought—a judgment that the state officials had denied her the right to engage in constitutionally protected speech. Justice Ginsburg wrote the opinion for a unanimous Court.

Individuals with Disabilities Education Act (IDEA)

In *Winkelman v. Parma City School District*¹¹⁶ (7-2), the Court addressed whether a non-lawyer parent of a child with a disability may prosecute claims under the Individuals with Disabilities Education Act (IDEA), *pro se*, in federal court. The plaintiffs were parents of a child with autism and were covered by the IDEA. They disagreed with the placement of their son in a public elementary school, arguing that it was a violation of the IDEA's requirement that the school district provide him with a "free and appropriate public education."¹¹⁷ The Court held that the parents could sue under the IDEA, because the Act provided parents with independent, enforceable rights to do so. Justice Scalia, joined by Justice Thomas, concurred and dissented in part in the judgment. While Justice Scalia would have held that parents have the right to sue *pro se* under the IDEA, he specified that he would not so hold "when they seek a judicial determination that their child's free appropriate public education (of FAPE) is substantively inadequate."¹¹⁸

Title VII of the Civil Rights Act of 1964

In *Ledbetter v. Goodyear Tire & Rubber Co.*¹¹⁹ (5-4), the Court addressed whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 for illegal pay discrimination when the disparate pay is received in the statutory limitations period, but is the result of intentionally discriminatory pay decisions made outside the limitations period. The plaintiff, Lilly Ledbetter, produced evidence at trial that during the course of her employment, she received poor evaluations because of her sex and that such discriminatory evaluations caused her to receive, over the period of almost 20 years, considerably lower paychecks relative to her male colleagues. She argued that discriminatory acts that occurred prior to the charging period were given effect by each paycheck during the charging period. Rejecting Ledbetter's claim, the Court reasoned that the only act of intentional discrimination occurred with the initial pay-setting decision, and that intent could not be imputed to the subsequent paychecks, which only reflected the initial decision and were not in themselves performed with bias or discriminatory motive.

¹¹⁵ *Id.* at 86.

¹¹⁶ 550 U.S. 516 (2007).

¹¹⁷ *Id.* at 520.

¹¹⁸ *Id.* at 535-36.

¹¹⁹ 550 U.S. 618 (2007).

Right to Privacy—Abortion

In *Gonzales v. Carhart*¹²⁰ (5-4), the Court took up the question of whether the Partial-Birth Abortion Ban Act of 2003 was unconstitutional on its face. The Act imposed criminal sanctions for the performance of what is called an “intact dilation & evacuation” or “intact D & E” procedure. Essentially, intact D & E is an abortion procedure performed sometime after a woman’s first three months of pregnancy—that is, in the second trimester. The procedure seeks to remove the fetus whole, as opposed to the standard D & E procedure, which removes the fetus in parts. The plaintiffs in the case claimed that the Act was void for vagueness, imposed an undue burden on a woman because of its overbreadth, and that it was invalid on its face for not providing an exception for a woman’s health.

In upholding the constitutionality of the Act, the Court reasoned that doctors had a “reasonable opportunity,”¹²¹ to know what is prohibited by the Act and that the Act was not too broad, because it clearly prohibited a doctor from intentionally performing only the “intact D & E” procedure and not the D & E procedure in which the fetus is removed in parts. Second, the Court held that to the extent that the Act allows a commonly used and generally accepted procedure, the standard D & E procedure, the Act did not impose an undue burden on a woman’s abortion right. Finally, based on the premise that “the Court retains an independent constitutional duty to review [Congress’s] factual findings where constitutional rights are at stake,” the Court held that “the Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.”¹²²

First Amendment

In *Morse v. Frederick*¹²³ (6-3), the Court addressed whether a school principal violates the First Amendment when she confiscates a student’s banner, which apparently promotes illegal drug use at an off-campus, school sponsored-event. When the Olympic Torch Relay passed through Juneau, Alaska, students at Juneau-Douglas High School were allowed to watch from the sidewalk as the relay passed by their school. As torchbearers passed by, the plaintiff unfurled a banner, which read, “BONG HiTS 4 JESUS.”¹²⁴ Believing that the message promoted illegal drug use, the school principal immediately confiscated the banner and suspended the student responsible for it. In holding that the principal’s actions did not violate the First Amendment, the court reasoned that the “special characteristics” of the school environment and the governmental interest in stopping student drug abuse, “allows schools to restrict student expression they reasonably regard as promoting illegal drug use.”¹²⁵

¹²⁰ 550 U.S. 124 (2007).

¹²¹ *Id.* at 149.

¹²² *Id.* at 165, 166-67.

¹²³ 551 U.S. 393 (2007).

¹²⁴ *Id.* at 397.

¹²⁵ *Id.* at 408.

First Amendment—Standing

In *Hein v. Freedom from Religion Foundation, Inc.*¹²⁶ (5-4), the Court considered whether an organization could bring a taxpayer suit to challenge “faith-based initiatives,” which were funded by general Executive Branch appropriations, as a violation of the Establishment Clause. The plaintiffs, members of an organization opposed to government endorsement of religion, claimed that the White House Office of Faith-Based and Community Initiatives violated the Establishment Clause by “organizing conferences at which faith-based organizations . . . ‘are singled out as being particularly worthy of federal funding.’”¹²⁷ Under the Court’s 1968 decision in *Flast v. Cohen*, the Court held that taxpayers have standing to challenge the use of federal funds in a way that allegedly violates the Establishment Clause.

In that case, however, Justice Alito—who announced the judgment of the court and wrote for a three-justice plurality—stated that the plaintiffs did not have standing as taxpayers, because Congress did not specifically authorize the funds used for the “faith-based initiatives.” Observing as critical the fact that the initiatives were funded by “general Executive Branch appropriations,”¹²⁸ the plurality reasoned that the expenditures resulted from executive discretion, not congressional action. Thus, the plurality rejected what they saw as an invitation to question the wisdom of Executive action. A four-Justice dissent, authored by Justice Souter, equated the Establishment Clause with a “right to conscience,” which a taxpayer may invoke whenever the Government, whether the Congress or the Executive, uses identifiable sums of tax money for religious purposes. Thus, the Dissent viewed the plaintiff’s suit not as an extension of the holding in *Flast*, but an application of it.

Fourth Amendment

In *Scott v. Harris*¹²⁹ (8-1), the Court addressed whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist by ramming the car from behind, when the motorist’s flight may endanger the public. During a high-speed chase, the defendant officer, in attempting to stop the plaintiff, rammed the back of the plaintiff’s vehicle. As a result, the plaintiff lost control of the vehicle, crashed, and sustained injuries that rendered him a quadriplegic. The Court held that, under the Fourth Amendment, the officer’s actions were “objectively reasonable,” and thus did not violate the Fourth Amendment.¹³⁰ The Court reasoned that the officer’s interest in protecting the public from the reckless driving of the plaintiff, outweighed the danger posed to the plaintiff by ramming the back of his car. Only Justice Stevens dissented from the judgment.

¹²⁶ 551 U.S. 587 (2007).

¹²⁷ *Id.* at 595.

¹²⁸ *Id.* at 593.

¹²⁹ 550 U.S. 372 (2007).

¹³⁰ *Id.* at 381.

In *Brendlin v. California*¹³¹ (9-0), the Court addressed whether, in the context of a traffic stop, a passenger in a car is “seized” within the meaning of the Fourth Amendment and may therefore challenge the constitutionality of the stop. Early one morning, the police officer pulled over a car. Upon asking the driver for her license, the officer noticed that a passenger, the petitioner here, dropped out of parole supervision. After confirming that the petitioner had an outstanding warrant, the officer arrested the petitioner and eventually found drug paraphernalia on him. The petitioner later moved to suppress the results of the search, but the California Supreme Court denied his ability to do so, because he was a passenger in the car and could not rightfully claim that he was seized as a result of the officer stopping the driver. The Court vacated the California court’s judgment, holding that the petitioner was seized within the meaning of the Fourth Amendment, because the officer performed the stop “without adequate justification” and “any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”¹³² the Court addressed whether, in the context of a traffic stop, a passenger in a car is

In *Wallace v. Kato*¹³³ (7-2), the Court addressed the issue of when the statute of limitations begins to run against a plaintiff’s § 1983 claim seeking damages for an unlawful arrest in violation the Fourth Amendment. Two days after a murder, the Chicago police detained the plaintiff and transported him to the police station for questioning, which lasted several hours. As a result of the interrogation, the plaintiff signed a confession regarding the murder; however, the charges against the plaintiff were dropped after several years of litigation. Less than one year after the charges were dropped, the plaintiff commenced a § 1983 claim for an unlawful arrest, based on the fact that the officers detained and questioned him without a warrant for his arrest.

The Court began by noting that ruling on a case such as this required looking to the common law of torts, and the Court determined that his claim was most analogous to one for false imprisonment. Accordingly, the Court held that the statute of limitations began to run against the plaintiff when his false imprisonment ended. The Court reasoned that since false imprisonment consists of “detention without legal process,” the false imprisonment ends when legal process begins—in this case, when the plaintiff appeared before a magistrate and was arraigned on charges.¹³⁴ Also using state law as a guide for the limitations period for a false imprisonment claim, in this case two years, the court noted that his claim was well beyond the limitations period and held that his § 1983 claim was time barred.

In *Los Angeles County, California v. Rettele*¹³⁵ (9-0) the Court considered whether officers, executing a search warrant, act reasonably within the meaning of the Fourth Amendment, when they enter a home and briefly detain persons that clearly do not match the description of the suspects for which the officers are looking. The

¹³¹ 551 U.S. 249 (2007).

¹³² *Brendlin*, 551 U.S. at 257.

¹³³ 549 U.S. 384 (2007).

¹³⁴ *Id.* at 389.

¹³⁵ 550 U.S. 609 (2007).

defendants were Los Angeles County sheriffs who obtained a search warrant to search two houses for three African American suspects in a fraud and identity-theft crime ring. One of the houses, however, had been sold to the plaintiff, and he had moved in with his girlfriend and her son three months prior to the execution of the warrant. On the morning the warrant was executed, seven officers entered the plaintiff's home with guns drawn, ordered the plaintiffs out of bed, and made them stand nude for several minutes—even though the plaintiffs were Caucasian and not the African American suspects. After completing a search of the house, the officers apologized and left within fifteen minutes of arriving.

In a *per curiam* opinion, the Court held that the police officers acted reasonably while executing the search warrant. The Court reasoned that, although it was clear that the plaintiffs were not the suspects, officers executing a search warrant “may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.”¹³⁶ The Court also noted that the detention was not prolonged, and thus did not render the search unreasonable. Justice Stevens wrote a concurring opinion, in which Justice Ginsburg joined, to indicate that he found it unnecessary to decide the constitutional question and would find that the defendants were entitled to qualified immunity.

Fourth Amendment—Bivens Action

In *Wilkie v. Robbins*¹³⁷ (7-2), the Court addressed whether a commercial landowner could maintain a *Bivens* action against employees of the Bureau of Land Management (BLM) for alleged extortion in an attempt to compel the owner to grant an easement to the BLM. The plaintiff was the owner of a commercial guest resort spanning about 40 miles of mostly contiguous land. The land surrounded a place that the Court describes as a “place of great natural beauty” and, in order to provide public access to it, the BLM sought to gain an easement over a portion of the plaintiff's land.¹³⁸ When the plaintiff refused, BLM employees, allegedly in order to get the plaintiff to grant the easement, engaged in a series of activities, including unfavorable agency actions, charges brought against him, and even tort-like conduct, which the plaintiff claimed violated his Fourth and Fifth Amendment rights.

The Court held that a *Bivens* action was not available to him, because he had administrative and judicial remedies “for vindicating virtually all of his complaints.” In addition, the Court noted that the Government “may stand firm on its rights and use its power to protect public property interests.”¹³⁹ Finally, the Court expressed its concern about creating a new *Bivens* remedy, but invited Congress to make the decision. Thus, the Court stated: “We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. ‘Congress is in a far better position than a court to

¹³⁶ *Id.* at 614.

¹³⁷ 551 U.S. 537 (2007).

¹³⁸ *Id.* at 542.

¹³⁹ *Id.* at 557.

evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.”¹⁴⁰

Fifth Amendment—Due Process (Punitive Damages)

In *Phillip Morris v. Williams*¹⁴¹ (5-4), the Court addressed whether, consistent with the Due Process Clause, a jury may award punitive damages based, in part, on its desire to punish the defendant for harming persons not before the court. The plaintiff was a widow of a heavy smoker and, upon success in the underlying suit for her husband’s death, received approximately \$800,000 in compensatory damages and \$79 million in punitive damages. Phillip Morris then sought certiorari, claiming that the state courts unconstitutionally permitted it to be punished for harming nonparty victims. A five-justice majority of the court—including Justices Breyer, Roberts, Alito, Kennedy, and Souter—held that the purpose of a punitive damages award is to punish unlawful conduct and to deter its repetition. Thus, a jury may consider harm visited upon nonparties, only to the extent necessary to gauge the reprehensibility of the defendant’s conduct.

A punitive damages award based directly on harm to nonparties, however, lacks adequate notice to the defendant, promotes uncertainty in the calculation of the award, and risks arbitrariness—which together endanger fundamental due process concerns. Accordingly, a punitive damages award designed to punish the defendant for harm to parties not before the court constitutes a taking of property from the defendant without due process. Justices Stevens, Thomas, and Ginsburg authored separate dissenting opinions. Justice Ginsburg’s dissent, joined by Justices Scalia and Thomas, argued that no evidence was introduced at trial or charge delivered to the jury that was inconsistent with the purpose of considering harm to nonparties for the purpose of determining the reprehensibility of Phillip Morris’ conduct.

Fourteenth Amendment—Equal Protection

In *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁴² (5-4), the Court addressed whether two school districts’ student assignment plans, which endeavored to make the schools reflect the racial makeup of the district overall, violated the Equal Protection Clause of the Fourteenth Amendment. In an effort to address the effects of racially identifiable housing patterns, the Seattle school district used race as one of three tiebreakers to place students in high schools that too many incoming ninth graders have selected as their first choice. If the school was not within ten percent of the district’s overall white/nonwhite ratio, the district used race to bring the school within racial balance. The Seattle school district sought to facilitate this racial integration although it never operated a school system that was racially segregated by law. The Jefferson County school district, which had operated a racially segregated school system but eventually achieved unitary status, used a student assignment plan that aspired to keep nonmagnet elementary schools to a minimum of 15 percent black enrollment and a maximum of 50 percent black enrollment.

¹⁴⁰ *Id.* at 562.

¹⁴¹ 549 U.S. 346 (2007).

¹⁴² 551 U.S. 701 (2007).

Based on these assignment plans, plaintiffs from both school districts were unable to enroll at their first-choice school. A majority of the Court held that the assignment plans did not pass strict scrutiny; that is, the plans did not demonstrate a compelling state interest in remedying a history of segregation or using race as a decisive factor in student selection. Moreover, the plans were not narrowly tailored, because the plans were directed toward only racial balance. Despite the court's judgment, Justice Kennedy's concurring opinion created a five-justice majority that approved the consideration of race in certain limited circumstances to encourage a diverse student body.

2007-2008 TERM

Equal Protection

In *Egquist v. Oregon Dept. of Agriculture*¹⁴³ (6-3), the question presented to the Court was whether a public employee can claim that her equal protection rights had been violated because she was arbitrarily treated differently from similarly situated coworkers without claiming membership to a protected class. The plaintiff public employee was denied a promotion and was subsequently terminated. The plaintiff claimed that these adverse employment actions were "without any rational basis and solely for arbitrary, vindictive or malicious reasons."¹⁴⁴ At the district court, the jury found that the plaintiff had been terminated for irrational reasons and that her Fourteenth Amendment Equal Protection rights had been violated. The Ninth Circuit reversed the jury's decision, stating that while the "class of one" under the Equal Protection Clause had been recognized by the Court against a government in its legislative capacity by *Village of Willowbrook v. Olech*¹⁴⁵, recognizing the "class-of-one" against a government as an employer "would lead to undue interference in state employment practices."¹⁴⁶ The Supreme Court affirmed the circuit court's decision. The Court held that while a plaintiff can sustain an equal protection claim without alleged class based discrimination, this does not apply to government employers because it compromises the public employers ability to exercise discretion in its termination decisions.

Fourth Amendment

In *Virginia v. Moore*¹⁴⁷ (9-0), the question presented to the Court was whether a police officer violated the Fourth Amendment by conducting a search subsequent to an arrest that was illegal, but based on probable cause. Police officers arrested the defendant for driving with a suspended license. While the officers had probable cause to believe the defendant was driving on a suspended license, the arrest itself was illegal insofar as the police were authorized to only issue a summons to the driver with a suspended license. Subsequent to the arrest, the police searched the defendant and found 16 grams of crack

¹⁴³ 128 S. Ct. 2146 (2008).

¹⁴⁴ *Egquist v. Oregon Dept. of Agriculture*, 128 S.Ct. 2146, 2149 (2008).

¹⁴⁵ 528 U.S. 562 (2000).

¹⁴⁶ *Id.* at 2150.

¹⁴⁷ 128 S. Ct. 1598 (2008).

cocaine and \$516 on his person. The defendant was charged with possession of cocaine with intent to distribute. The state trial court convicted the defendant of this charge. The appellate court reversed the conviction based on a violation of the Fourth Amendment, however, the appellate court, sitting en banc, upheld the conviction. The state Supreme Court reversed the en banc decision, stating that because the police should have issued the defendant a citation, and the Fourth Amendment does not allow for searches based on a citation, the search was unlawful. The Supreme Court reversed the state supreme court's decision. The Court held that an arrest need not be lawful to satisfy the requirements of the Fourth Amendment and that even if an arrest violates state law, if it is supported by probable cause any subsequent search comports with the Constitution.

Second Amendment

In *District of Columbia v. Heller*¹⁴⁸ (5-4), the question presented to the Court was whether the District of Columbia's ban on handguns in the home violates the Second Amendment. In this case, the District of Columbia had enacted a law that made it illegal to carry unregistered firearms and prohibited the registration of hand guns. The law also required that guns be unloaded and disassembled at all times or be bound by a trigger lock. The plaintiff gun owner sought to register a handgun he intended to keep in his home and was refused registration. The plaintiff filed suit claiming the DC law violated his rights under the Second Amendment. The District Court dismissed the plaintiff's complaint. The Circuit Court reversed the trial court's decision, stating that a law that bans an individual from using a firearm for the purposes of self defense in the home violates the Second Amendment.

The Supreme Court affirmed the Circuit Court decision. The Court held that (1) regardless of the prefatory clause of the Second Amendment ("a well regulated Militia, being necessary to the security of a free state...") an individual has a right to possess a firearm for legal purposes, such as sport or self defense; (2) states continue to have the discretion to regulate the possession of firearms, but states cannot ban firearms entirely; and (3) the DC handgun law violated the Second Amendment because it completely banned the use of handguns rather than just restricting and regulating the possession of handguns.

Voting Rights

In *Crawford v. Marion County Election Board*¹⁴⁹ (6-3), the Court considered the question of whether a state statute that requires voters possess a government issued ID in order to vote at the polls violates the constitutional right to vote. The district court granted the defendant county summary judgment because, after discovery, the court ruled that there was insufficient evidence that the law compromised the right to vote on its face. The Seventh Circuit affirmed, stating that the law did not rise to the strict standard of scrutiny employed for facially violative statutes.

¹⁴⁸ 128 S. Ct. 2783 (2008).

¹⁴⁹ 128 S. Ct. 1610 (2008).

The Supreme Court affirmed the Circuit Court's decision in a plurality opinion. According to the opinion written by Justice Stevens, joined by Justices Kennedy and Roberts, a state law that burdens any particular class of voters must be justified by relevant and legitimate state interests. The plurality opinion held that the interest in deterring voter fraud was legitimate enough to burden voters who do not have a government issued ID. This opinion also held that the burden of submitting the required paperwork and posing for a photograph does not qualify as a substantial burden on the right of individuals to vote.

The dissent, written by Justice Souter and joined by Justice Ginsburg, reasoned that a balancing of interests test should be employed in deciding whether a law that restricts the right to vote should be imposed. The dissent also stated that any interests of the state in restricting the right to vote, no matter how legitimate, must be supported by evidence illustrating the actual effect that the restriction will have in serving the state's interest. Based on these standards, the dissent would have found that the state law in question violates the constitutionally protected right to vote.

Age Discrimination in Employment Act

In *Federal Express Corporation v. Holowecki*¹⁵⁰ (7-2), the question presented to the Court was whether the Form 283 Intake Questionnaire submitted to the EEOC constitutes a "charge" for the purposes of § 626(d) of the ADEA. The plaintiff claimed that her employer discriminated against her and other employees over 40 on the basis of their age. The plaintiff filed the Form 283 along with an affidavit to support her claim of age discrimination. The plaintiff and other employees subsequently filed suit against their employer under the ADEA alleging age discrimination. The defendant employer moved to dismiss the case, arguing that the plaintiff had not filed the "charge" necessary under § 626(d) of the statute to file an ADEA claim. The district court found in favor of the defendant and dismissed the case. The circuit court reversed the trial court decision.

The Supreme Court held that, in accordance with EEOC internal directives, a submission is considered a "charge" under the statute when it can be reasonably construed that the filing is a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and employee. The Court went on to state that because the EEOC considered the plaintiff's Form 283 and affidavit sufficient to be considered a charge under its own policy, the Court must defer to the agency's determination.

In *Gomez-Perez v. Potter*¹⁵¹ (6-3), the question presented to the Court was whether retaliation is prohibited under § 633a(a) of the ADEA. The plaintiff, an United States postal employee, filed an administrative equal employment opportunity complaint for age discrimination after she was denied a transfer to a different post office. Subsequent to her filing the complaint, the plaintiff allegedly experienced retaliatory behavior from her coworkers and supervisors. The plaintiff brought a suit against the

¹⁵⁰ 128 S. Ct. 1147 (2008).

¹⁵¹ 128 S. Ct. 1931 (2008).

Post Office for retaliation under § 633(a)(a) of the ADEA, which applies to the conduct of federal employers.

The district court granted the defendant's motion for summary judgment. The First Circuit affirmed the district court's decision, holding that this provision of the ADEA does not cover retaliation claims. The Supreme Court reversed the circuit court decision, holding that because parallel language in other civil rights statutes such as § 1982 and Title IX has been interpreted to include retaliation claims, the ADEA must be similarly interpreted.

In *Meacham v. Knolls Atomic Power Laboratory*¹⁵² (7-1), the question presented was whether an employer defendant against a disparate impact ADEA claim must not only produce evidence of reasonable factors other than age, but also persuade the fact-finder of their merit. Plaintiff brought an ADEA claim against the defendant employers, claiming that the criteria with which the employer justified its termination decision to reduce its workforce had a disparate impact on employees over the age of 40 (30 of the 31 employees terminated were over 40). The case went to trial and the jury found in favor of the plaintiff because the employer was not able to satisfy the "business necessity" standard to defend its termination criteria. The circuit court initially affirmed the decision, but later vacated the judgment and remanded the case because it held that a reasonableness standard should have been applied and the plaintiff bears the burden to persuade the fact-finder that the employer's conduct was unreasonable.

The Supreme Court reversed the circuit court decision. The Court held that the defendant has the burden to produce evidence of reasonable factors other than age and also to persuade the court of the merit of these factors. The Court stated that within the structure of the statute, the reasonable factors other than age are considered an affirmative defense and as such the defendant must persuade the court that they are valid to avoid liability.

In *Kentucky Retirement Systems v. EEOC*¹⁵³ (5-4), the question presented was whether a retirement system that allows individuals who become disabled to add the years they could have worked if not for the disability up to age 55 violates the ADEA when individuals who become disabled over 55 are not credited years they could have worked but for their disability. The state retirement plan in question allowed employees in hazardous positions to be credited years of work up to age 55 if they were rendered unable to because of a disability if the years they are credited did not exceed the years they actually worked. The years were credited up to 55 because that was when police officers in this jurisdiction reached pension status. The claimant police officer became disabled after reaching the age of 55 and was unable to receive credit for years he could have possibly worked in the future. The EEOC filed suit on the claimant's behalf. The district court found in favor of the defendant employer. The Sixth Circuit reversed the district court's decision, hearing the case en banc.

¹⁵² 128 S. Ct. 2395 (2008).

¹⁵³ 128 S. Ct. 2361 (2008).

The Supreme Court held that this retirement system did not violate the ADEA because the differentiation is not based on age, but on pension status. The Court went on to state that in situations in which pension status is used as a proxy of age, there could be an ADEA violation, however, that was not the case here.

Section 1981

In *CBOS West, Inc. v. Humphries*¹⁵⁴ (7-2), the question presented to the Court was whether § 1981 encompasses employment retaliation claims. The plaintiff claimed that he was dismissed by his employer because of racial bias and because he complained about the dismissal of another black employee. The plaintiff filed suit, alleging that his former employer violated his § 1981 equal rights to make and enforce contracts. The district court granted the defendant's motion for summary judgment. The Seventh Circuit affirmed the district court's decision on the plaintiff's racial bias claim, but reversed and remanded the district court's decision regarding the retaliation claim.

The Supreme Court held that § 1981 does encompass employment retaliation claims. In so holding, the Court reasoned that because §§ 1981 and 1982 are interpreted similarly, and § 1982 encompasses claims of retaliation, § 1981 must also encompass retaliation. The Court also pointed out that in *Patterson v. McLean Credit Union*, the Court struck down the application of § 1981 during the period after the initial formation of a contract, which would be the time during which retaliation would occur. However, because Congress superseded this decision in the Civil Rights Act of 1991, § 1981 currently applied to conduct occurring after the formation of the contract and the statute does in fact apply to retaliation claims.

2008-09 TERM

Individuals with Disabilities Education Act

*Forest Grove School District v. T.A. (6-3)*¹⁵⁵ required the Court to interpret the Individuals with Disabilities Education Act (IDEA), which provides that states receiving federal funding must make a free appropriate public education (FAPE) available to all children with disabilities living in the state.¹⁵⁶ The Court had held in prior decisions that “when a public school fails to provide a FAPE and a child’s parents place the child in an appropriate private school without the school district’s consent, a court may require the district to reimburse the parents for the cost of the private education.”¹⁵⁷ The issue in *Forest Grove* was whether the IDEA “categorically prohibit[s] reimbursement for

¹⁵⁴ 128 S. Ct. 1951 (2008).

¹⁵⁵ 129 S. Ct. 2484 (2009).

¹⁵⁶ *Id.* at 2487 (citing 20 U.S.C.A. § 1412(a)(1)(A) (2005)).

¹⁵⁷ *Id.* at 2488 (citing *School Comm. of Burlington v. Dep’t. of Ed. of Massachusetts*, 471 U.S. 359, 370 (1985)).

private-education costs if a child has not ‘previously received special education and related services under the authority of a public agency.’¹⁵⁸

Respondent T.A. attended public school in the Forest Grove School District from kindergarten through his junior year in high school.¹⁵⁹ After T.A.’s problems paying attention in class worsened, his mother requested counseling, and the school conducted cognitive testing of T.A.¹⁶⁰ The school psychologist concluded that T.A. did not require any further testing and did not qualify for special-education services.¹⁶¹ T.A.’s parents sought private professional advice and T.A. was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and a number of other learning disabilities.¹⁶² T.A.’s parents enrolled him in private school that specialized in students with special needs and gave the School District notice of T.A.’s placement.¹⁶³ A team including a school psychologist determined that T.A. did not satisfy IDEA’s disability criteria “because his ADHD did not have a sufficiently significant adverse impact on his educational performance.”¹⁶⁴ At an administrative due process hearing, the hearing officer determined that T.A.’s ADHD did have an adverse effect on his educational performance and ordered the School District to reimburse T.A.’s parents for the cost of the private-school tuition.¹⁶⁵

The Supreme Court, in a 6-3 decision, held “that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.”¹⁶⁶

Title IX

Fitzgerald v. Barnstable School Committee (9-0)¹⁶⁷ involved peer-on-peer sexual harassment and presented the question of “whether Title IX of the Education Amendments of 1972 precludes an action under 42 U.S.C. § 1983, alleging unconstitutional gender discrimination in schools.”¹⁶⁸ The Fitzgerald’s daughter told her parents that a male classmate was harassing her on the school bus.¹⁶⁹ The Fitzgerald’s alerted school officials, but the school officials concluded there was not enough evidence to warrant school discipline.¹⁷⁰ The Fitzgerald’s subsequently drove their daughter to

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2489.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2496.

¹⁶⁷ 129 S. Ct. 788 (2009).

¹⁶⁸ 129 S. Ct. at 792 (internal citations omitted).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The local police department also conducted an investigation, but found insufficient evidence to bring charges against the boy.

school, but she still reported harassment.¹⁷¹ The school took no action.¹⁷² The Fitzgerald's filed suit against the School Committee alleging violations of Title IX, 42 U.S.C. § 1983, and state law.¹⁷³ The District Court dismissed the § 1983 and state law claims, and granted the school committee's motion for summary judgment on the Title IX claim.¹⁷⁴

On appeal, the First Circuit affirmed the District Court, finding, as to the Title IX claim, that the school committee's response to the reported harassment was "objectively reasonable."¹⁷⁵ As to the § 1983 claim, the First Circuit held that Title IX was "sufficiently comprehensive to preclude use of § 1983 to advance statutory claims based on Title IX itself."¹⁷⁶ The Supreme Court reversed the First Circuit in a unanimous decision, holding that "§ 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."¹⁷⁷ The Court concluded that "[a] comparison of the substantive rights and protection guaranteed under Title IX and under the Equal Protection Clause [supports] the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way, we cannot agree . . . that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."¹⁷⁸

Title VII

Crawford v. Metropolitan Government of Nashville & Davidson County (9-0)¹⁷⁹ involved Title VII's prohibition against "retaliation by employers against employees who report workplace race or gender discrimination[]" and presented the question of "whether this protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation."¹⁸⁰

In 2002, the respondent County began investigating rumors of sexual harassment by School District employee Gene Hughes.¹⁸¹ During its investigation, it approached petitioner Crawford and two other employees to ask if they had witnessed inappropriate behavior by Hughes.¹⁸² Crawford and the other two employees did report several instances of sexually harassing behavior by Hughes.¹⁸³ The County took no action

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 793.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (citing *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 179 (2007)).

¹⁷⁷ *Id.* at 797.

¹⁷⁸ *Id.* at 796.

¹⁷⁹ 129 S. Ct. 846 (2009).

¹⁸⁰ *Id.* at 849.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

against Hughes, but fired Crawford and the other two accusers after the investigation.¹⁸⁴ Crawford claimed the County was retaliating against her report of Hughes' behavior and filed a Title VII suit.¹⁸⁵

The Supreme Court unanimously held that responding to questions pursuant to an employer's investigation of sexual harassment is covered by the opposition clause of Title VII, which makes it "unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter."¹⁸⁶ The Court held that Crawford's communication to the investigator that Hughes had engaged in sexually obnoxious behavior constitutes her opposition to the activity.¹⁸⁷ Therefore, she is protected by Title VII and her case against the County should proceed.¹⁸⁸

Ricci v. DeStefano (5-4)¹⁸⁹ began as a lawsuit against the City of New Haven, Connecticut and some of its officials for failing to certify examination results that would have determined promotions in the fire department.¹⁹⁰ After the examination results showed that no African-American firefighters would be promoted, and out of genuine fear of a Title VII lawsuit, the City determined that it would not certify the test results.¹⁹¹ Those white and Hispanic firefighters who would have been promoted alleged that the City discriminated against them based on their race, in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment.¹⁹² The City defended its action by arguing that if they had used the test results, they would have faced liability under Title VII for "adopting a practice that had a disparate impact on the minority firefighters."¹⁹³

The Court faced the question of "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."¹⁹⁴ The Court, in a 5-4 opinion, adopted the "strong basis in evidence" standard, which states that "certain government actions to remedy past racial discrimination—actions that are themselves based on race—[comply with Title VII] only where there is a 'strong basis in evidence' that the remedial actions were necessary."¹⁹⁵ The Court insisted that applying this standard to Title VII "gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."¹⁹⁶ Justice Scalia's concurring opinion expressed his view that the constitutionality of the disparate

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 42 U.S.C.A. § 2000c-3 (1972).

¹⁸⁷ *Id.* at 850-51.

¹⁸⁸ *Id.* at 853.

¹⁸⁹ 129 S. Ct. 2658 (2009).

¹⁹⁰ *Id.* at 2664.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2674.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2676.

impact provisions of Title VII would need to be determined eventually, and he indicated that they “sweep too broadly.”¹⁹⁷

Justice Ginsburg—writing for Justices Stevens, Souter, and Breyer—dissented, arguing that “context matters.”¹⁹⁸ She explained that fire departments across the country have pervasively discriminated against minorities.¹⁹⁹ “It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities.”²⁰⁰ She argued that the majority’s decision ignores the intent of Congress when it “formally codified the disparate-impact component of Title VII.”²⁰¹ Furthermore, the disparate-impact and disparate-treatment provisions of Title VII must not be at odds with one another.²⁰² It was Congress’ intent that employers that reject “selection criteria operating to the disadvantage of minority groups . . . due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination ‘because of’ race. A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict.”²⁰³

Pregnancy Discrimination Act

AT&T Corp. v. Hulteen (7-2)²⁰⁴ involved four women who worked at AT&T and took pregnancy leave before the Pregnancy Discrimination Act (PDA) became law in 1978.²⁰⁵ This case presented the question of “whether an employer necessarily violates the PDA when it pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA, that gave less retirement credit for pregnancy leave than for medical leave generally.”²⁰⁶ The women who took pregnancy leave received smaller pensions than those who took short-term disability leave during the same period. The Court held, in a 7-2 decision, that the PDA does not apply retroactively.²⁰⁷

Section 706(e)(2) prohibits “a seniority system that has been adopted for an intentionally discriminatory purpose . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system”²⁰⁸ Since AT&T’s system was not discriminatory on its face or intentionally discriminatory when adopted, it does not violate Title VII to calculate pensions based on its parameters.²⁰⁹

¹⁹⁷ *Id.* at 2682.

¹⁹⁸ *Id.* at 2689 (Ginsburg, J., dissenting) (quoting *Gutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

¹⁹⁹ *Id.* at 2690 (Ginsburg, J., dissenting).

²⁰⁰ *Id.* (Ginsburg, J., dissenting).

²⁰¹ *Id.* at 2698 (Ginsburg, J., dissenting).

²⁰² *Id.* at 2699 (Ginsburg, J., dissenting).

²⁰³ *Id.* (Ginsburg, J., dissenting).

²⁰⁴ 129 S. Ct. 1962 (2009).

²⁰⁵ *Id.* at 1967.

²⁰⁶ 129 S. Ct. at 1966.

²⁰⁷ *Id.* at 1971.

²⁰⁸ *Id.* at 1972.

²⁰⁹ *Id.*

Justice Ginsburg, joined by Justice Breyer, dissented by arguing that Congress' intent in passing the PDA was to make it clear "that discrimination based on pregnancy *is* discrimination against women."²¹⁰ Justice Ginsburg emphasized that the PDA does not apply retroactively, however it "does protect women, from and after 1979 . . . against repetition or continuation of pregnancy-based disadvantageous treatment."²¹¹ She held that "AT&T committed a current violation of Title VII when, post-PDA, it did not totally discontinue reliance upon a pension calculation premised on the notion that pregnancy-based classifications display no gender bias."²¹²

Age Discrimination in Employment Act

14 Penn Plaza LLC v. Pyett (5-4)²¹³ presented the question of whether a provision in a Collective Bargaining Agreement (CBA) that required union members to submit all employment discrimination claims to binding arbitration was enforceable, and whether employees subject to the CBA lose their statutory right to bring a discrimination claim in court.²¹⁴ Respondents were night-watchmen in a New York City office building who were replaced with licensed security guards from a security services contractor, assigned to "less desirable positions," and received lower wages.²¹⁵ Respondents, who were members of the Service Employees International Union, Local 32BJ ("Union"), asked the Union to file grievances on their behalf alleging, among other things, they had been reassigned because of age.²¹⁶ When the grievance process failed to obtain relief, the Union requested arbitration pursuant to the CBA.²¹⁷ After the initial arbitration hearing, the Union withdrew respondents claims of age discrimination because it had consented to the contract for new security personnel and felt that it could not "legitimately object to respondents' reassignments as discriminatory."²¹⁸

Respondents then filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their rights under the Age Discrimination in Employment Act of 1967 (ADEA).²¹⁹ After the EEOC notified each respondent of his right to sue, respondents filed suit against petitioners in the United States District Court for the Southern District of New York alleging violations of the ADEA and state and local anti-discrimination laws.²²⁰ The District Court denied petitioners' motion to compel arbitration upon precedent holding that even a clear waiver of a right to litigate certain statutory claims in a judicial forum is unenforceable.²²¹ The Court of Appeals for the Second Circuit affirmed the District Court's decision, citing the

²¹⁰ *Id.* at 1975 (Ginsburg, J., dissenting).

²¹¹ *Id.* (Ginsburg, J., dissenting).

²¹² *Id.* (Ginsburg, J., dissenting).

²¹³ 129 S. Ct. 1456 (2009).

²¹⁴ *Id.* at 1461, 1476.

²¹⁵ *Id.* at 1461-62.

²¹⁶ *Id.*

²¹⁷ *Id.* The CBA was reached between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB). *Id.* at 1461.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 1462-63.

Supreme Court's decision in *Alexander v. Gardner-Denver Co.*²²², which held that "a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress."²²³

The Supreme Court reversed the Second Circuit, holding that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."²²⁴ The Court, in a 5-4 decision, held that "Congress has chosen to allow arbitration of ADEA claims" because the National Labor Relations Act (NLRA) granted unions "statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA."²²⁵

The four dissenting Justices found that the Court's "preference for arbitration . . . leads it to disregard [the Court's] precedent."²²⁶ The dissent emphasized that in *Gardner-Denver*, the Court examined the text and purposes of Title VII of the Civil Rights Act of 1965 and "held that a clause of a collective-bargaining agreement (CBA) requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims."²²⁷ Furthermore, the *Gardner-Denver* Court unanimously held that Title VII rights cannot be waived by the collective-bargaining process, because the collective-bargaining process is meant to protect the collective economic benefits of union members; Title VII, on the other hand, concerns an individual's right to equal employment opportunities.²²⁸ Since the ADEA was derived from Title VII, the analysis in *Gardner-Denver*, the dissent argued, should have been applied in this case. By allowing CBAs to require statutory claims of discrimination be resolved in arbitration, the Court's decision will "thwart the will of Congress in enacting civil rights protections. They undermine the protection of civil rights by preventing victims from getting to court or using the leverage of a potential court claim to obtain appropriate relief."²²⁹

Gross v. FBL Financial Services, Inc. (5-4)²³⁰ involved 54-year-old Jack Gross who worked for a financial company for thirty years when he was reassigned from the position of "claims administration director" to the position of "claims project director."²³¹ He considered this a demotion because his former job responsibilities were reallocated to a younger woman.²³² Gross filed suit alleging that his reassignment violated the ADEA. He presented "evidence suggesting that his reassignment was based at least in part on his

²²² 415 U.S. 36 (1974).

²²³ *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 92 n.3 (2007) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974)).

²²⁴ 129 S. Ct. at 1474.

²²⁵ *Id.* at 1466.

²²⁶ *Id.* at 1475 (Stevens, J., dissenting).

²²⁷ *Id.* (Stevens, J., dissenting) (citing *Gardner-Denver*, 415 U.S. at 51).

²²⁸ *Id.* at 1477 (Souter, J., dissenting).

²²⁹ ALLIANCE FOR JUSTICE, ALLIANCE FOR JUSTICE SUPREME COURT REVIEW: ANALYSIS OF THE 2008-2009 TERM 4 (2009).

²³⁰ 129 S. Ct. 2343 (2009).

²³¹ *Id.* at 2347.

²³² *Id.* at 2347-48.

age.”²³³ The defendant company claimed that its decision was part of a “corporate restructuring.”²³⁴ The District Court judge instructed the jury to find for Gross if they found that “age was a motivating factor” in the company’s decision.²³⁵ On appeal, the Court of Appeals for the Eighth Circuit overturned the District Court’s instructions because such instructions require that the plaintiff present “direct evidence” that age was a substantial factor in the employment decision.²³⁶ Since Gross conceded that he did not present direct evidence of discrimination, the Eighth Circuit held that the jury “should have been instructed only to determine whether Gross had carried his burden of prov[ing] that age was the determining factor in FBL’s employment action.”²³⁷

The Supreme Court, in a 5-4 decision, acknowledged that this case presented the question of “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA).”²³⁸ However, the Court answered a broader question: “whether the burden of persuasion *ever* shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.”²³⁹ The ADEA “makes it unlawful for an employer to discriminate against any employee *because of* that individual’s age.”²⁴⁰ The narrow question facing the Court was the interpretation of the words “because of” in the text of the ADEA.²⁴¹ The Court held that “a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.”²⁴² The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”²⁴³

The four dissenting Justices criticized “the majority’s . . . utter disregard of our precedent and Congress’ intent.”²⁴⁴ The majority interpreted the words “because of” in the ADEA as meaning “but for” when previous decisions by the Court have interpreted “because of” to mean that the employee’s age, race, gender, or other protected classification was a “substantial” or “motivating” factor in the adverse employment decision.²⁴⁵ The dissent also criticized the majority’s distinction between Title VII and the ADEA. Previous decisions have established that the “relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII’s language apply with equal force in the context of age discrimination”²⁴⁶ This

²³³ *Id.* at 2347.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 2347-48.

²³⁷ *Id.* at 2348 (internal quotations omitted).

²³⁸ *Id.* at 2346.

²³⁹ *Id.* at 2348.

²⁴⁰ *Id.* at 2353 (citing 29 U.S.C.A. § 623 (2008)).

²⁴¹ *Id.* at 2350.

²⁴² *Id.* at 2352.

²⁴³ *Id.* at 2353.

²⁴⁴ *Id.* at 2354 (Stevens, J., dissenting).

²⁴⁵ *Id.* (Stevens, J., dissenting).

²⁴⁶ *Id.* (Stevens, J., dissenting) (internal quotations omitted).

tougher standard makes it “considerably more difficult for victims of age discrimination to prevail in court.”²⁴⁷

Voting Rights Act

Bartlett v. Strickland (5-4)²⁴⁸ required the Court to interpret § 2 of the Voting Rights Act of 1965 to determine “whether the statute can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority’s candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn.”²⁴⁹

This case involved a state representative district in North Carolina.²⁵⁰ District 18 was drawn in 1991 to include portions of four counties, including Pender County, to create a district with a majority African-American voting-age population pursuant to the Voting Rights Act.²⁵¹ After the 2000 census, the African-American voting-age population in District 18 fell below fifty percent.²⁵² North Carolina’s “Whole County Provision” requires that district be drawn to keep counties whole when possible; however, state election law requirements may be superseded by federal law.²⁵³ In order to trigger § 2 liability, a minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district.”²⁵⁴ The question in this case became whether this “requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district.”²⁵⁵

The Court held, in a 5-4 decision, that a crossover district—“one in which minority voters make up less than a majority of the voting-age population. . . . [and] the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.”²⁵⁶—is not required by § 2.²⁵⁷ Therefore, only districts that would constitute a numerical majority of minority voting-age population is required by the Voting Rights Act.²⁵⁸

Justice Souter—writing for Justices Stevens, Ginsburg, and Breyer—dissented, arguing that the majority incorrectly interpreted § 2 when it held that “only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity to elect

²⁴⁷ ALLIANCE FOR JUSTICE, *supra* note 229, at 4.

²⁴⁸ 129 S. Ct. 1231 (2009).

²⁴⁹ *Id.* at 1238.

²⁵⁰ *Id.* at 1239.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

²⁵⁵ 129 S. Ct. at 1241.

²⁵⁶ *Id.* at 1242.

²⁵⁷ *Id.* at 1243.

²⁵⁸ *Id.*

representatives of their choice.”²⁵⁹ Souter argued that “minority populations under 50% routinely elect representatives of their choice.” Furthermore, the “effects of the plurality’s unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the Act. If districts with minority populations under 50% can never count as minority-opportunity districts . . . , states will be required under the plurality’s rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation.”²⁶⁰

Northwest Austin Municipal Utility District No. 1 v. Holder (8-1)²⁶¹ involved a challenge to § 5 of the Voting Rights Act of 1965 (VRA). Northwest Austin Municipal Utility District No. 1 is a small utility district in Texas that is a “covered jurisdiction” under § 5 of the VRA. Covered jurisdictions are required to submit any changes in election procedures to federal authorities before they can go into effect.²⁶² The district filed suit to “bailout” of § 5 coverage.²⁶³ Alternatively, the district challenged the constitutionality of § 5 itself.²⁶⁴

The narrow question in that case concerned what type of jurisdictions could attempt to bailout of § 5 coverage.²⁶⁵ Under § 5, only states and “political subdivisions” are allowed to seek bailout.²⁶⁶ The Court decided to avoid the question of § 5’s constitutionality, and instead decided to address the district’s ability to seek bailout.²⁶⁷ It held, in an 8-1 decision, that the district was eligible to seek bailout of § 5 coverage.²⁶⁸

Justice Thomas’ dissent argued that § 5 is unconstitutional.²⁶⁹ He insisted that when Congress reauthorized § 5 in 2006, it lacked “sufficient evidence that the covered jurisdiction currently engage in the type of discrimination that underlay the enactment of § 5 undermines any basis for retaining it.”²⁷⁰ Although he was the sole dissenter, Justice Thomas’ opinion bears watching as it is likely the position a majority of the Court would take when faced with the constitutionality of § 5 in a future case.²⁷¹

Equal Educational Opportunities Act

Horne v. Flores (5-4)²⁷² involved a lawsuit against the State of Arizona on behalf of several English Language Learner (ELL) students that began in 1992, which claimed

²⁵⁹ *Id.* at 1250 (Souter, J., dissenting) (internal quotations omitted).

²⁶⁰ *Id.* (Souter, J., dissenting) (internal quotations omitted).

²⁶¹ 129 S. Ct. 2504 (2009).

²⁶² *Id.* at 2508.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 2510.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 2512-13.

²⁶⁸ *Id.* at 2516.

²⁶⁹ *Id.* at 2527 (Thomas, J., dissenting).

²⁷⁰ *Id.* at 2525 (Thomas, J., dissenting).

²⁷¹ See ALLIANCE FOR JUSTICE, *supra* note 229, at 3-4.

²⁷² 129 S. Ct. 2579 (2009).

that the State was violating the Equal Educational Opportunities Act of 1974 (EEOA) by failing “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”²⁷³ The District Court found that the State was violating the EEOA because the funding allocated to ELL students was “arbitrary and not related to the actual funding needed to cover the costs of ELL instruction”²⁷⁴ The District Court ordered the State to properly fund the state’s ELL programs, but the State failed to comply.²⁷⁵ The District Court imposed fines for every day the State failed to comply with the order.²⁷⁶ In March 2006, after accumulating over \$20 million in fines, the State passed HB 2064, which was designed to create funding solutions to the lack of ELL funding.²⁷⁷ The District Court determined that HB 2064 was fatally flawed and did not create effective ELL programs.²⁷⁸ The District Court denied the State’s claim that “changed circumstances rendered continued enforcement of the original declaratory judgment order inequitable.”²⁷⁹

The Supreme Court faced the question of “whether the *objective* of the District Court’s 2000 declaratory judgment order—i.e., satisfaction of the EEOA’s ‘appropriate action’ standard—has been achieved.”²⁸⁰ The Court held that the District Court incorrectly focused on whether the State had complied with its 2000 order instead of determining whether the State had complied with the EEOA through other means.²⁸¹ In her dissenting opinion, Justice Ginsburg wrote that the Court’s opinion “risks denying schoolchildren the English-learning instruction necessary ‘to overcome language barriers that impede’ their ‘equal participation.’”²⁸²

Federal Preemption of State Law

In *Cuomo v. Clearing House Assn., L.L.C.*²⁸³, New York Attorney General Eliot Spitzer sent requests to several banks requesting certain non-public information about their lending practices in order to determine if they had violated the State’s fair-lending laws.²⁸⁴ The federal Office of the Comptroller of the Currency (Comptroller) and the Clearing House Association, a banking trade group, sued to enjoin the request for information, alleging “that the Comptroller’s regulation promulgated under the National Bank Act prohibits that form of state law enforcement against national banks.”²⁸⁵ The Comptroller’s regulation prohibited States from exercising “visitorial powers with respect

²⁷³ *Id.* at 2588 (quoting 20 U.S.C.A. § 1703(f) (1974)).

²⁷⁴ *Flors v. Arizona*, 172 F. Supp. 2d 1225, 1239 (2000).

²⁷⁵ *Id.* at 2590.

²⁷⁶ *Id.* at 2590.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* The District Court did not address the State’s claim of changed circumstances in the original case.

On appeal, the Ninth Circuit remanded to the District Court for an evidentiary hearing to determine whether the State’s claim of changed circumstances warranted relief. *Id.*

²⁸⁰ *Id.* at 2595 (emphasis added).

²⁸¹ *Id.* at 2598.

²⁸² *Id.* at 2608 (Ginsburg, J., dissenting) (quoting 20 U.S.C. § 1703(f) (1974)).

²⁸³ 129 S. Ct. 2710 (2009).

²⁸⁴ *Id.* at 2714.

²⁸⁵ *Id.*

to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions”²⁸⁶ The Supreme Court faced the question of “whether the Comptroller’s regulation purporting to pre-empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act.”²⁸⁷

In a 5-4 decision, the Court held that the Comptroller’s regulation does not comport with the National Bank Act because a state’s “visitation” rights are “quite separate from the power to enforce the law.”²⁸⁸ States can enforce their own fair lending and consumer protection laws against national banks.²⁸⁹ In the majority opinion, Justice Scalia—writing for Justices Souter, Breyer, Stevens, and Ginsburg—found that in instances where state and federal law do not explicitly conflict, states are free to enforce their civil rights laws in court according to their law enforcement power.²⁹⁰ Otherwise, “[t]he bark remains, but the bite does not.”²⁹¹

III

PREVIEW OF THE 2009-2010 UNITED STATES SUPREME COURT TERM

Free Expression

In *Citizens United v. Federal Election Commission*²⁹², the Court will take up the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibits corporations from using general treasury funds to finance “electioneering communications”—defined as “any broadcast, cable, or satellite communication which refers to a clearly identified candidates for federal office”—within 60 days of a general election or within 30 days of a primary election. The plaintiff, Citizens United, a nonprofit membership corporation that seeks to promote traditional American values, produced “Hillary,” a 90-minute documentary presenting a negative view of Hillary Clinton’s record as First Lady of the United States and United States Senator. The precise question before the Court is whether the BCRA prohibited Citizens United from making “Hillary” available to subscribers to Video on Demand, a cable television service, within 30 days of a presidential primary in which Senator Clinton was a candidate.

*United States v. Stevens*²⁹³, takes up the constitutionality of 18 U.S.C. § 48 (1999), which makes it a crime to create, sell or possess a depiction of animal cruelty defined as a “visual or auditory depiction . . . in which a living animal is intentionally

²⁸⁶ *Id.* at 2715.

²⁸⁷ *Id.* at 2714-15.

²⁸⁸ *Id.* at 2716.

²⁸⁹ *Id.* at 2720-21.

²⁹⁰ *Id.* at 2717.

²⁹¹ *Id.* at 2718.

²⁹² 530 F. Supp. 2d 274 (D.D.C. 2008).

²⁹³ 533 F.3d 218 (3d Cir. 2008).

maimed, mutilated, tortured, wounded, or killed” with “the intention of placing that depiction in interstate or foreign commerce for commercial gain.”²⁹⁴ The conduct depicted must be “illegal under Federal law or the law of the State in which the creation, sale or possession takes place.” Depictions that have “serious religious, political, scientific, educational, journalistic, historical, or artistic value” are exempted from the prohibition.²⁹⁵

First Amendment Establishment of Religion

*Salazar v. Buono*²⁹⁶: In 1934, the Veterans of Foreign Wars (VFW) erected a wooden cross on land in southeastern California then under the authority of the federal Bureau of Land Management (BLM). A plaque identified the cross as a memorial to “the Dead of All Wars.” The land is now part of the Mojave National Park Preserve. The cross has been replaced several times by private parties and the original plaque has disappeared. The current cross is made of 4-inch diameter metal pipe painted white, and is between 5 and 8 feet high. In 1999, the Park Service indicated intention to remove the cross, designated the cross as a “national memorial” honoring veterans of World War I, and ordered the Secretary of the Interior to install a replica of the original plaque. In suit brought by Buono, a regular visitor to the Preserve, the District Court held that the presence of the cross violated the Establishment Clause. It enjoined the government from displaying the cross at the site. The government covered the cross with a plywood box and appealed. While the appeal was pending, Congress, in 2004, enacted legislation ordering the Secretary to transfer title to the acre in which the cross is located to the VFW, in exchange for 5 privately-owned acres elsewhere in the Preserve, donated by friends of the cross. The Secretary was ordered by Congress to continue to carry out his responsibilities over the transferred acre, and the acre is to revert to the United States if no longer maintained as a war memorial. The Court will consider whether Buono has standing to sue and if so, whether the government must be enjoined from implementing the 2004 legislation.

Attorney’s Fees

In *Kenny A. v. Perdue*²⁹⁷, a class of parents brought suit under § 1983 against state and local agencies alleging that the foster child services of two Georgia counties were inadequate. The plaintiffs succeeded in obtaining injunctive and other relief through mediation. The District Court awarded attorney’s fees using a lodestar consisting of reasonable rate multiplied by time spent on the case. The court then added an upward adjustment to the award based on the excellent performance of the attorneys and the extraordinary results they achieved for their clients. The Eleventh Circuit affirmed the award in a split decision, finding that the District Court had not abused its discretion in the fee and bonus calculation. However, in a portion of the decision not joined by other members of the panel, the author of the opinion provided a roadmap for invalidating any upward adjustments based on quality of performance and results

²⁹⁴ 18 U.S.C.A. § 48 (a), (c)(1) (1999).

²⁹⁵ *Id.* at § 48 (b).

²⁹⁶ 502 F.3d 1069 (9th Cir. 2007).

²⁹⁷ 547 F.3d 1319 (11th Cir. 2008).

obtained. Thus the question before the Court is whether Congress intended to permit upward adjustments in fee-shifting statutes.

Employment Discrimination

*Lewis v. City of Chicago Police Department*²⁹⁸, involves fair access to courts for employees who seek to vindicate their rights under Title VII of the Civil Rights Act of 1964. In 2005, a federal trial court found that the City violated Title VII by using a firefighter hiring exam that illegally discriminated against the Lewis plaintiffs. The Court of Appeals for the Seventh Circuit reversed the trial court's judgment on the grounds that the applicants filed their claims with the Equal Employment Opportunity Commission (EEOC) too late.

Second Amendment

In *McDonald v. Chicago*²⁹⁹, barely a year after deciding *District of Columbia v. Heller*³⁰⁰, the Court again takes up the Second Amendment in a challenge to Chicago's 27-year-old ban on handgun sales within the city limits. The 2008 *Heller* decision, in which the Court struck down a ban on handguns and automatic weapons in Washington, D.C., marked the first time the Supreme Court acknowledged an individual right to bear arms.

Cruel and Unusual Punishment

In *Graham v. Florida*³⁰¹, and *Sullivan v. Florida*³⁰², the Court will take up the question of whether it constitutes cruel and unusual punishment to impose a life sentence upon juveniles for offenses such as sexual battery, burglary and assault.

CONCLUSION

I will not presume to provide the Committee with advice on whether and how to counteract what it may perceive as an overly ideological or unnecessarily cramped civil rights jurisprudence on the part of the Roberts Court. Certainly, insofar as the Court has sometimes given less than due deference to congressional intent in interpreting civil rights statutes, there remain quite a few decisions in the last four terms that could and perhaps deserve to be corrected by legislative amendments. However, as important as these legislative fixes may be to civil rights advocates and litigants, it does seem to me that the far more formidable challenge posed by the Court's jurisprudence over the last four terms is not so much its misinterpretation of statutory text but rather its adoption of a constitutional jurisprudence of federalism, Eleventh Amendment Immunity, state action

²⁹⁸ 428 F. Supp. 2d 783 (N.D. Ill. 2008).

²⁹⁹ 2008 WL 2741216 (N.D. Ill. July 7, 2008).

³⁰⁰ 128 S. Ct. 2783 (2008).

³⁰¹ 982 So.2d 43 (Fla. Dist. Ct. App. 2008).

³⁰² 987 So.2d 83, No. 1D07-6433 (Fla. Dist. Ct. App. June 17, 2008) (unpublished table decision).

doctrine, commerce clause power, and equal protection enforcement clause that has severely limited Congress' ability to devise and enact civil rights legislation. While the doctrines of separation of powers and judicial review legitimately limit Congress' ability to revisit the Court's constitutional rulings, it nonetheless seems to me worthwhile for this Committee to consider investigating the ways in which it may begin to challenge the Court to reconsider its rulings on topics as crucial to the advancement of civil rights as federalism, Eleventh Amendment Immunity, state action doctrine, commerce clause power, and equal protection enforcement clause.

Mr. Chairman and members of the Committee thank you for the opportunity to address the Committee and I look forward to assisting the Committee in its continuing work on this important topic.

Aderson Bellegarde François
Assistant Professor of Law and Director of the Civil Rights Clinic
Howard University School of Law

Mr. NADLER. Thank you, sir.
I will now recognize Professor Adegbile for 5 minutes.

**TESTIMONY OF DEBO P. ADEGBILE, NAACP LEGAL DEFENSE
AND EDUCATION FUND, INC.**

Mr. ADEGBILE. Thank you, Mr. Chairman.

Mr. NADLER. If I mispronounce that, forgive me.

Mr. ADEGBILE. Thank you, Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner. It is a great pleasure to be with you this morning.

Today, I will address myself to the recent Supreme Court case involving the constitutionality of section 5, an essential provision with which this Committee is at least as familiar as am I. I will touch very briefly on three points.

First, I believe it is necessary to consider both the lower court opinion in the Northwest Austin case and the Supreme Court opinion in order to get a full picture of Congress's considered judgment in 2006. I will elaborate on why.

Second, the constitutionality of section 5 reauthorizations have never before turned upon a strict comparison of voting discrimination in covered and non-covered jurisdictions. This question, however, was a key focus of the Supreme Court during oral argument. And, of course, Congress did, in fact, consider this question during reauthorization.

However, the litigants in the case did not focus on it in the briefs. And I want to speak to that issue a little bit so we can have a clearer understanding of exactly what Congress did on that question.

Finally—and I think this is very important, whatever one's view is of the constitutionality of section 5—and particularly before the ruling in the MUD case, that opinion needs to be modified by the Supreme Court's re-interpretation of the bailout provision, which in my view substantially alleviates some of the constitutional concerns which certain justices and other commentators have expressed.

Returning to my first point, the principal distinction between the lower court decision and the Supreme Court decision is that the lower court began with a close and careful study of the voluminous record assembled by Congress. The lower court considered the 16,000 pages, 90 witnesses, 21 hearings, and 10 months of congressional legislative time.

In so doing, the Court noted that Congress found progress in the area of voting, but also demonstrated convincingly that, unfortunately, minority voters remain exposed to threats to their right to vote. Those threats are real and not imagined, and Congress documented that very carefully.

The lower court on this substantial record, in my view, properly deferred to Congress's policy judgment that section 5 continues to be necessary. In contrast, the Supreme Court appeared to focus almost exclusively on the progress without also focusing on the ongoing discrimination, which Congress examined. This freed the Supreme Court to delve into policy questions and re-examine the congressional judgment in a way that did not paint a full picture of the record assembled by this body, nor, in my view, did it give full credit to the Court's own precedents in this important area.

Congress has an important and constitutionally sanctioned role in this area, and it must be respected by the Court, even in cir-

cumstances where the Court would fashion a different statute if it was authorized and called upon to do so.

In particular, I will now turn to this question of the comparison of covered and non-covered jurisdictions. As I mentioned, this was not a special focus of the briefs in part because the Supreme Court had already decided this issue in a number of previous cases.

Nevertheless, Congress did examine this question. In particular, as this body is aware, there was an elaborate study of all of the section 2 cases that happened nationwide. Section 2, of course, in contrast to section 5, covers the whole country. And so, by looking at section 2, we have some metric about voting discrimination throughout the lands.

What that study found is that 50 percent of the successful section 2 cases happen in covered jurisdictions, 57 percent. And that is particularly significant because only a quarter of the Nation's population lives in those jurisdictions.

It is made even more significant by the fact that those rulings since 1982 happened even as powerful section 5 was in place, so there were 600 objections in section 5 covered jurisdictions which dislodged some of the discrimination that would have been litigated about in the section 2 context. This is very serious evidence, and it was evidence that was before this Congress.

Finally, on the bailout question, the specific point here is that the way the Supreme Court has interpreted the bailout statute. That, of course, is the piece of the Voting Rights Act that allows jurisdictions that can demonstrate what is effectively a clean bill of health in the area of voting discrimination can exempt themselves from the necessity of having to submit their voting changes.

What the Court did in the case, seemingly in contrast to what Congress had intended, was to allow every single covered jurisdiction to be eligible to apply for bailout. What this means is that, if jurisdictions, in fact, feel burdened by the statute—a notion of questionable reality—then they are able to come forward and seek bailout to be exempted from the statute.

I think that Congress should carefully see what happens with this new interpretation of the bailout statute. But by any measure, it alleviates some of the constitutional tension which appeared to concern the Court.

Thank you.

[The prepared statement of Mr. Adegbile follows:]

PREPARED STATEMENT OF DEBO P. ADEGBILE



Testimony of Debo P. Adegbile

Director of Litigation of the NAACP Legal Defense and

Educational Fund, Inc.

Civil Rights Under Fire: Recent Supreme Court Decisions

United States House of Representatives

Subcommittee on the Constitution, Civil Rights and Civil Liberties

October 8, 2009

Introduction

Good morning Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee. I am Debo Adegbile, Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc. (LDF). I represented the Intervenors in oral argument before the United States Supreme Court in the recent case concerning the constitutionality of Section 5 of the Voting Rights Act, *Northwest Austin Municipal Utility District No. 1 v. Holder* (“*NWAMUDNO*”).¹ I am grateful for the opportunity to testify before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties regarding Section 5.

Today, my testimony is divided into three parts. Initially, I will comment on the constitutionality of Congress’s 2006 reauthorization of Section 5 of the VRA against the backdrop of established Supreme Court jurisprudence. Next, I very briefly address the record before Congress concerning the selection of jurisdictions for Section 5’s preclearance requirements based upon the evidence and nature of continuing discrimination in those jurisdictions as compared to non-covered jurisdictions. Finally, I reflect on some of the questions raised by the Supreme Court in the *NWAMUDNO*. Notwithstanding the *dicta* in Chief Justice Roberts’ opinion questioning the constitutionality of Section 5, the Court’s own precedents and the record assembled by Congress establish the validity of the provision.

¹ 129 S. Ct. 2504 (2009).

I.

Congress's Reauthorization of Section 5 of the Voting Rights Act

When Congress reauthorized the expiring provisions of the Voting Rights Act in 2006, it did so against the backdrop of four precedents of the Supreme Court upholding the constitutionality of Section 5: *South Carolina v. Katzenbach*,² *Georgia v. United States*,³ *City of Rome v. United States*,⁴ and *Lopez v. Monterey County*.⁵ These cases, which spanned four decades, amount to a resounding judgment of the Court that Section 5 is within the sphere of Congress's legitimate constitutional authority to address well-documented and persisting obstacles to equal voting opportunity. Indeed, *Katzenbach* is considered a seminal precedent on Congressional enforcement powers more broadly. As this Committee knows very well, in 2005-2006, Congress again took a great deal of care in assessing the nature of continuing voting discrimination since 1982. In so doing Congress noted progress and Section 5's effectiveness in blocking and deterring voting discrimination, as well as the very real and persisting threats to minority voting rights in covered jurisdictions. Many of these threats to minority voters are reminiscent of the discrimination identified during earlier Congressional reauthorizations. Thus, the record revealed both progress and serious continuing problems which threaten the realization of the full promise of the Reconstruction Amendments. Congress reconciled this evidence by drawing upon its expressly granted powers under those Amendments to extend the protections of the right to vote. Given the Court's consistent and appropriate endorsement of Section 5's constitutionality, it was entirely reasonable for Congress to

² 383 U.S. 301, 337 (1966).

³ 411 U.S. 526, 534-535 (1973).

⁴ 446 U.S. 156, 177-178 (1980).

⁵ 525 U.S. 266, 282-285 (1999).

reauthorize this part of the Voting Rights Act three years ago with the understanding and expectation that the Supreme Court would respect this carefully exercised legislative judgment. As Justice Kennedy has stated, “When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.”⁶

In some recent cases such as *City of Boerne v. Flores*,⁷ the Court has articulated a novel judicial doctrine concerning limitations on Congressional authority under the enforcement provisions of the Fourteenth Amendment. But in reauthorizing Section 5, Congress acted reasonably and respected the constitutional balance embodied in the Reconstruction Amendments and reflected in *Boerne*. Initially, it is worth noting that, in *Boerne* itself as well as the line of cases that followed, the Court has always pointed to Section 5 of the Voting Rights Act as an exemplar of an appropriate exercise by Congress of its powers to enforce the Constitution’s express prohibition against racial discrimination in voting.⁸ Moreover, the *Boerne* line of cases all arose in a context different from that of the Voting Rights Act reauthorization: in circumstance involving the issue whether a *new* legislative act improperly extends beyond Congressional authority under the Constitution. In contrast, in 2006, Congress made a policy judgment about whether the *continuation* of a remedy held four times by the Supreme Court as

⁶ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). See also *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (“Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.”).

⁷ 521 U.S. 507 (1997).

⁸ *Id.* at 532-23.

within its well-established power to act against voting discrimination was justified, and opted to stay the course because of the foundational importance of the right to vote and the nature and effects of voting discrimination which Congress sought to block and deter.

Thus, the issue at that time was not the Constitutional question of whether Congress has the authority to reauthorize the expiring provisions of the Voting Rights Act, a question that had already been answered conclusively by the Court on several occasions. Rather, the question was whether Congress *should* do so. And, as this Subcommittee is aware, Congress decided to reauthorize Section 5 only after an exhaustive review of a voluminous record documenting continuing voting discrimination in the covered jurisdictions since the last VRA reauthorization in 1982. That record included testimony from over 90 witnesses, totaling over 16,000 pages, presented at a combined 21 hearings spanning over 10 months. The evidence showed that Section 5 prevented more than 600 discriminatory voting changes since the last reauthorization – 60 percent of which involved intentional discrimination. Moreover, the evidence led Congress to the reasonable conclusion that, despite the progress that we have witnessed over the last 45 years, the goal of guaranteeing equal access to the ballot for all citizens regardless of race or ethnicity was not yet complete, and that reauthorization of Section 5 was a necessary step to combat continuing voting discrimination in the covered jurisdictions. By any measure, the record assembled by Congress compares very favorably with those deemed sufficient by the Court to support other remedial legislation enacted pursuant to Fourteenth Amendment powers.

The Supreme Court's ruling in *NWAMUDNO* modified a longstanding interpretation of the statute by interpreting Section 4(a) of the Act in a manner seemingly

contrary to its text, which now provide *all* covered jurisdictions, including political subunits like the District, with the option of seeking bailout. Whatever one's calculus was about the constitutional tensions associated with Section 5 before the Court's *NWAMUDNO* decision, those tensions are substantially reduced now that every covered jurisdiction is eligible to seek bailout, and has the incentive to do so if it believes that Section 5 compliance is unduly burdensome. Further bailouts would narrow the reach of the statute, whereas an absence of such efforts would further undermine the undocumented assertion that Section 5 is particularly onerous. The response of the covered jurisdictions to the new interpretation of the bailout provision could be instructive, but the broader availability of the remedy is itself relevant to the federalism question.

Of course, protecting the voting rights of all citizens under the Reconstruction Amendments is no ordinary policy matter. As the Supreme Court has recognized, Congressional power is at its zenith when Congress enacts legislation to protect the fundamental rights of members of classes protected against discrimination by the Court's application of heightened levels of constitutional scrutiny. Section 5 was enacted and reauthorized pursuant to Congress's remedial powers under the Fourteenth and Fifteenth Amendments, which, along with the Thirteenth Amendment, were aimed at recasting American notions of freedom, human dignity, equality, citizenship, and democracy. To accomplish that goal – and to preserve the Union itself – the Reconstruction Amendments reallocated power between the federal government and the states, establishing new constitutional imperatives that were intended to extirpate the old racially discriminatory order in spite of the attachment many states and citizens had to it.

But the Reconstruction Amendments do not merely declare that certain practices are unconstitutional; rather, they expressly grant Congress broad authority to remedy constitutional violations and to ensure that such violations do not occur in the future.⁹ The Court has stated that the Framers of the Reconstruction Amendments “indicated that Congress was to be chiefly responsible for implementing the rights created [therein] Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”¹⁰ Consequently, the Reconstruction Amendments necessarily limit state sovereignty and grant Congress the power to combat racial discrimination by means that may not be permissible in other contexts.¹¹

The Court, however, has acknowledged that Section 5 imposes certain “federalism costs.”¹² And yet, even after *Boerne* was decided, the Supreme Court did not shrink from the longstanding reading of the Reconstruction Amendments.¹³ As the Constitution expressly delegates this authority to Congress, it is not Congress’s mere prerogative, but rather its *obligation* to engage in legislative judgments that at times

⁹ See *Boerne*, 521 U.S. at 518 (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States”).

¹⁰ *Katzenbach*, 383 U.S. at 325-26.

¹¹ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (“[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. . . . There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States”) (internal citations and quotation marks omitted).

¹² *Lopez*, 525 U.S. at 282 (citation and internal quotation marks omitted).

¹³ See *id.* at 283-85 (“We have specifically upheld the constitutionality of §5 of the Act against a challenge that this provision usurps powers reserved to the States. . . . Recognizing that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions, we find no merit in the claim that Congress lacks Fifteenth Amendment authority to require federal approval before the implementation of a state law that may have just such an effect in a covered county. . . . In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burden the Act imposes”).

vigorously employ its constitutional authority. As the Court itself has explained, “when Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”¹⁴

Not only did the Reconstruction Amendments vest broad authority in Congress, but the actual burdens imposed by Section 5 on the covered jurisdictions are outweighed by its substantial benefits. For instance, as discovery in the recent Section 5 case revealed, the District spent an average of \$233.00 a year on Section 5 compliance, and had delegated most of its election-related obligations to Travis County. Significantly, Travis County, which has greater Section 5 obligations, because of the number of political subunits contained within its boundaries, intervened to *defend* the constitutionality of Section 5 in *NWAMUDNO*.

As Congress learned during the reauthorization process, many election officials in the covered jurisdictions view Section 5 as a tool that enhances the integrity of the political process and helps avoid litigation. Significantly, six covered states – including North Carolina, Arizona, California, Louisiana, Mississippi, and New York, filed a brief in support of the constitutionality and administrability of Section 5.¹⁵ As the Attorney Generals of those States explained in their brief, “[t]he Amici States do not believe the requirements of Section 5 to be burdensome or onerous. Rather, our experience

¹⁴ *Boerne*, 521 U.S. at 535. See also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (stating that “[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process,” warranting deference by courts to Congress’s “predictive judgments.”).

¹⁵ See Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York, as Amici Curiae in Support of Appellee, *NAMUDNO*, 129 S. Ct. 2504 (2009).

demonstrates that the preclearance requirements of Section 5 do not impose undue costs or delays on covered jurisdictions.”¹⁶

The fact that these States, many of which have very well-documented histories of voting discrimination, have come to appreciate the important role that Section 5 plays in ensuring compliance with the Constitution makes a powerful statement about the ways in which this statute points toward progress. Indeed, Section 5 helps our nation to become “a more perfect union”. Additionally, during the reauthorization, numerous organizations representing the interests of local and state governments – including the Council of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors – filed a statement of unqualified support for Section 5’s renewal.¹⁷ In contrast to these expressions of support, of the covered jurisdictions, only the Governor of Georgia filed a brief in support of the appellant in the *NWAMUDNO* case.¹⁸ In sum, concerns about the administrative costs imposed by Section 5 at once elevate the burden and underestimate the benefits of the statute. Congress, and not insignificantly, the covered jurisdictions themselves have made an entirely different calculation.

¹⁶ *Id.* at 5.

¹⁷ See 152 Cong. Rec. H5143-02 (daily ed. July 13, 2006).

¹⁸ See Brief for Georgia Governor Sonny Perdue, as Amicus Curiae in Support of Appellant, *NAMUDNO*, 129 S. Ct. 2504 (2009).

II.

Evidence Supporting Section 5 Coverage

The record considered by Congress in 2006 led it to conclude that there are persistent, and significant differences between the covered as opposed to non-covered jurisdictions, such that it was reasonable for Congress to maintain the existing geographic scope of Section 5 coverage. As an initial matter, although a strict comparison of voting discrimination in covered and non-covered jurisdictions has not been the touchstone of Section 5's earlier legal challenges to Section 5 reauthorizations, and was not the primary focus of the legal defense in *NWAMUNDO*, the Court, and Justice Kennedy in particular,¹⁹ gave special emphasis to this issue. While it is fair to say that during the reauthorization debate Congress did not devote an equal amount of its energy to investigating evidence of voting discrimination in each of the 50 states, it made a broad and instructive assessment of comparative circumstances with respect to voting obstacles in covered versus non-covered jurisdictions. The record before Congress demonstrated that, in spite of progress, there is a continuing pattern of problems in the covered jurisdictions to which Section 5 addresses itself.

Perhaps the principal way in which Congress compared voting discrimination in the covered and non-covered jurisdictions was by looking at lawsuits brought under Section 2 of the Voting Rights Act, which applies nationwide. Since 1982, most successful Section 2 lawsuits – a total of 57 percent – were brought in covered

¹⁹ Indeed, during the oral argument Justice Kennedy observed that Section 2 had proven inadequate to address the problem of voting discrimination in the covered jurisdictions, and that voting discrimination persists. See *NWAMUNDO*, 129 S. Ct. 2504 (2009), Oral Argument Tr. at 48, lines 3-7 (JUSTICE KENNEDY: "I think that's absolutely right. Section 2 cases are very expensive. They are very long. They are very inefficient. I think this section 5 preclearance device has -- has shown -- has been shown to be very very successful"). The coverage decision was his principal focus. *Id.* at 48, 55-56.

jurisdictions, even though such jurisdictions hold less than one-quarter of the country's total population.²⁰ Rates of success also differed between covered and non-covered jurisdictions, with covered jurisdictions losing Section 2 cases at twice the rate of non-covered jurisdictions. These statistics are significant because without the more than 600 objections and other deterred changes in covered jurisdictions, this imbalance between the covered and non-covered jurisdictions would have been even more stark.

Another important metric is racially polarized voting, which also persists in covered jurisdictions. Racially polarized voting is generally found where there is unconstitutional discrimination against minority voters, such as the drawing of election district lines that fragment minority populations, in order to dilute minority voting strength and prevent minority voters from electing their candidates of choice. Indeed, polarized voting is a necessary precondition for that common form of discrimination, which has been recognized in many Section 2 lawsuits. Congress heard evidence of racially polarized voting in the covered jurisdictions, including testimony that the “degree of racially polarized voting in the South is increasing, not decreasing.”²¹ Congress therefore concluded that “continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the [Act’s] continued protection.”²² More recently, in an *amicus* brief documenting post-enactment racially polarized voting filed before the Court in *NADMU/DNO*, Professors Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III, underscored Congress’s finding by documenting considerable evidence of

²⁰ See *March 8, 2006 Hearing Vol. 1* at 125-26, 202-04.

²¹ H.R. REP. NO. 109-478, at 34 (2006) (citation omitted).

²² 2006 Amendments § 2(b)(3), 120 Stat. at 577.

persistent racially polarized voting in the covered jurisdictions, even in the recent 2008 elections, with significant differences when compared to non-covered jurisdictions.²³ Exacerbating this backdrop of racially polarized voting, campaigns in covered jurisdictions have often been marked by racial appeals. In one recent race in South Carolina, for instance, Congress heard testimony that a white candidate published his black opponent's photograph in campaign literature, but intentionally darkened the image; such appeals are unfortunately still routinely employed in some covered jurisdictions.²⁴

Moreover, the record before Congress demonstrated numerous repetitious violators of minority voting rights in the covered jurisdictions,²⁵ and there can be little doubt that the number of violations would have been even higher in the absence of Section 5. Although violations of the Voting Rights Act also occur in non-covered jurisdictions, in most cases, such incidents tend to be more episodic, or “one-off” events, unlike the persistent and adaptive forms of discrimination occurring with more frequency in the covered jurisdictions. A few examples compiled in the 2006 congressional record – though far from exhaustive – are illustrative of this particular point.

The first is Waller County, Texas, and its treatment of students from historically Black Prairie View A&M. The Court had ruled in the late 1970s that students at the college could vote in county elections; nevertheless, throughout the 1990's and early

²³ See Brief for Nathaniel Persily, *et al.*, as Amici Curiae in Support of Neither Party, *NAMUDNO*, 129 S. Ct. 2504 (2009).

²⁴ See, e.g., *October 20, 2005 Hearing* at 84-85; *May 9, 2008 Hearing* at 44.

²⁵ The brief filed in *NAMUDNO* by the NAACP Legal Defense and Educational Fund, Inc., and MALDEF, *et al.* provides a non-exhaustive sample of more than six dozen circumstances in which covered jurisdictions had repetitious voting violations where Section 5 or some combination of Sections 2 and 5 were required to block voting discrimination.

2000's, local officials indicted students and threatened them with prosecution for voting.²⁶ In 2004, the County changed the date of its elections to a time when students would be on break, and did not preclear this change in accordance with Section 5. Ultimately, the County only abandoned these efforts after the local NAACP brought a Section 5 enforcement action.²⁷ As this lengthy history demonstrates, incidents of voting discrimination in Waller County, rather than episodic one-off occurrences, have been persistent and adaptive.

A second example is the City of Seguin. Between 1978 and 1993, plaintiffs filed three separate successful lawsuits to challenge Seguin's malapportioned, multi-member, or otherwise dilutive districting plans.²⁸ A settlement in 1993 led to the creation of single member districts, but after the 2000 census revealed that Latinos had become a majority in five of the eight city council districts, Seguin dismantled a Latino-majority district in order to block Latinos from electing a majority of council members. After the Attorney General indicated that preclearance would be unlikely, Seguin withdrew its proposal but promptly closed the candidate filing window to prevent Latino candidates from competing. This change was not submitted for preclearance, but was ultimately blocked by a successful Section 5 enforcement suit.

Third, the City of Freeport has a similar history of voting rights violations. Until 1990, the City elected its city council members in at-large elections by a plurality vote, but when the first and only Latino-preferred candidate was elected by a slim plurality, the

²⁶ See J.S. App. 90, 92; *March 8, 2006 Hearing*, at 185-86.

²⁷ See J.S. App. 92; *March 8, 2006 Hearing*, at 185-86.

²⁸ See Texas Report, at 36-37.

City responded by enacting a majority-vote requirement.²⁹ After the Department of Justice objected, the City settled a separate Section 2 case and agreed to adopt single-member districts, but after 2002 drew another retrogression objection for attempting to reinstitute at-large elections.

These are not isolated incidents, but rather part of a pattern of repeat offenses in the covered jurisdictions. The State of Texas, from which the above examples have been drawn, was subject to 105 Section 5 objections interposed the Department of Justice between the 1982 reauthorization and 2004.³⁰ During this period, an additional 60 submissions from Texas jurisdictions were either withdrawn in response to a Request for More Information or denied judicial preclearance.³¹ Additionally, more than 150 Section 2 suits were resolved in favor of minority voters in Texas, leading 142 jurisdictions to alter discriminatory voting practices.³² Finally, Texas' redistricting plans for its House of Representatives have drawn Section 5 objections after each decennial census since the State was covered in 1975.³³

Although I have used Texas to illustrate the persistent nature of voting discrimination in the covered jurisdictions because the latest constitutional challenge involved a municipal utility district in that state, Texas is not alone. The Congressional record also contains evidence that in Louisiana, for instance, 11 parishes had repeat problems since the last VRA reauthorization, having submitted multiple voting changes that drew objections. In Mississippi in 1997, Section 5 prevented the institution of a new

²⁹ See *October 25, 2005 Hearing*, at 2291-92; 2528-30.

³⁰ See J.S.App. 68, 71.

³¹ See *id.* at 87, 90.

³² Texas Report, at 34.

³³ See *October 25, 2005 Hearing*, at 2177-80, 2319-23, 2518-23.

iteration of a Jim-Crow era dual registration system that had been invalidated only years earlier.³⁴ Dallas County, Alabama, where Selma is located, drew three separate objections during the 1990s for retrogressive redistricting plans that appeared motivated by an attempt to limit Black electoral success.³⁵ Jenkins County, Georgia drew multiple objections, first for delaying election in majority-Black district that would allow Blacks to elect a majority of council members, and second, for moving polling place to a remote and predominately white location outside of City.³⁶ And Spartanburg County, South Carolina engaged in multiple attempts throughout the 1990s to abolish elections to its County Board of Education after plaintiffs in a Section 2 case had obtained a consent decree requiring the creation of single-member voting districts.³⁷

These patterns of discrimination illustrate that Congress acted reasonably in determining the continuing need for Section 5 in the covered jurisdictions. One could, of course, disagree with Congress's fact-finding conclusions and predictive judgments, but such disagreements with the policy judgments do not undermine Section 5's constitutionality. And indeed, the limitations placed by Congress on the geographic reach of Section 5 Court as a factor weighing in favor of the constitutionality of have been viewed by the the provision.³⁸

³⁴ See J.S. App. 78-79.

³⁵ See *October 25, 2005 (History) Hearing*, at 388-90, 397-401.

³⁶ See *March 8, 2006 Hearing*, at 1524 n.120.

³⁷ See *id.* at 2041-43, 2049-52.

³⁸ *Boerne*, 521 U.S. at 532-33 (observing that the provisions of the Voting Rights Act that have withstood constitutional challenge “were confined to those regions of the country where voting discrimination had been most flagrant, and affected a discrete class of state laws, i.e., voting laws,” and stating that such “geographic restrictions . . . tend to ensure that Congress’s means are proportion to ends legitimate”).

III.

Questions Raised During Oral Argument in *NWAMUDNO*

In light of the strong record supporting the reauthorization of Section 5, support in Congress was overwhelming, with votes of 98 to 0 in the Senate and 390 to 33 in the House. During oral argument in the *NWAMUDNO* case, however, there was a suggestion that this tremendous support in Congress somehow undermined the Act's constitutionality. Justice Scalia indicated that he viewed the broad support for reauthorization of the Voting Rights Act with some suspicion, noting that the ancient Jewish court, the Sanhedrin, apparently followed a rule that if the death penalty were pronounced unanimously, it was presumptively invalid. The idea implicit in that observation was that the level of agreement within Congress on a certain piece of legislation should act as a barometer of that legislation's presumed validity, with greater support in Congress warranting heightened suspicion by the Court. But it would, in fact, be just as easy and more consistent with the record to interpret the final vote in Congress on reauthorization of Section 5 as a statement regarding the core importance of the Voting Rights Act, of its practical effects in vindicating the principles of the Reconstruction Amendments, and as a recognition that earlier lesser legislative responses had failed.

Contrary to the colloquy during oral argument, any rule that suggests that a legislative determination should be set aside based on the level of support in favor of that legislation could hardly amount to a workable judicial rule. As Americans, we follow the Supreme Court's decisions, whether they are rendered nine to zero or five to four, and so

too does the United States Congress rightly expect its legislation to be effectuated, whether passed unanimously or by a bare majority.

The members of the Court asked many questions about the continuing need for Section 5 itself and about the wisdom of the approach for selecting covered jurisdictions.³⁹ But in so doing, the Court somewhat unexpectedly appeared to be revisiting policy judgments typically left to the discretion of the Congress, rather than confronting legal questions regarding the constitutionality of Section 5.

Of course, separation of powers questions do not always lend themselves to bright lines, but the concern here is that the Court now risks entering the dangerous terrain about which Justice Scalia warned in an earlier federalism case, where he counseled that the Court should be wary of utilizing a standard under which the Court “must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of government.”⁴⁰

Conclusion

In conclusion, while there has been remarkable progress over the last 45 years in the area of voting, that progress was due in large measure to the success of the Voting Rights Act, and specifically, Section 5. It was not until passage of the Voting Rights Act that our nation began to make good on a century-old promise that the right to vote shall

³⁹ In *Katzenbach, Rome, and Lopez*, the Court rejected challenges to the selection of jurisdictions for Section 5 coverage. See 383 U.S. at 337 (1966); 446 U.S. at 177-178; 525 U.S. at 282-285.

⁴⁰ *Tennessee v. Lane*, 541 U.S. 509, 557-58 (2004) (Scalia, J., dissenting).

not be abridged or denied on account of race. It is not an overstatement to say that, absent Section 5, significant backsliding with respect to the right to vote would occur for minority voters in the covered jurisdictions, and nothing in our collective history, the Constitution, or common sense requires Congress to sit idly by while rights are violated. Indeed, the Congressional oath summons this body to vindicate the promises of the Reconstruction Amendments and the right to vote.

Mr. NADLER. Thank you.

And a final witness we will hear from is Ms. Lithwick. I recognize you for 5 minutes.

**TESTIMONY OF DAHLIA LITHWICK, SENIOR EDITOR,
SLATE MAGAZINE**

Ms. LITHWICK. Thank you, Mr. Chairman. Thank you, Mr. Chairman and Members of the Subcommittee. And thank you for this opportunity to speak to you today.

I want to be clear that I am not here as a constitutional scholar or practitioner like my colleagues. I am just here as a reporter who has been covering the Supreme Court for 10 years and trying to tell people why, even though the Court is mysterious, it really, really matters.

But I also want to be clear that the views that I express here today are my own and not those of Slate or Newsweek.

I think it is no longer a matter of any real scholarly dispute that the current U.S. Supreme Court has worked hard in some ways to roll back what some conservatives have seen as the worst excesses of the Warren court era, from affirmative action to expanded rights for criminal defendants to expansive views of the right to vote that we have talked about today. And at times, this rolling back has been done boldly and unequivocally, as in the Seattle schools case, the parents case that Professor François talked about.

But I want to point out that more frequently it happens very undramatically in a series of feints and legal pirouettes, such as the voting rights case that we just talked about from last summer.

And the most intriguing part to me as a journalist of all this is that, whether you are for or against this trend at the Supreme Court, nobody seems to know about it. It seems to have utterly escaped our notice as Americans that there is a profound difference between the Roberts Court and the Rehnquist Court.

And most of us still think that we live in Sandra Day O'Connor's America, despite the fact that her visions of affirmative action, abortion, church-state separation, and elections law have been eroded quite substantially in a very short time. Justice O'Connor herself made this point in a speech in Williamsburg this weekend when she talked about how the current court has "dismantled" her rulings in a few short years.

I think as a Nation we have just completely missed out on the truth that the change from Samuel Alito to O'Connor really made a difference—I am sorry, from O'Connor to Alito.

As an initial matter, I also want to be clear that the language of judicial activism versus restraint is almost utterly unhelpful in discussing the Roberts or any other Court. I think it is political and not legal shorthand for "I just don't like the outcome in a case."

My colleague, Stuart Taylor, observed correctly, I think, in a column in the *National Journal* last year that every single member of the Supreme Court is an activist. And by any of the approximately six empirical measures of judicial activism—from overruling enacted acts of Congress, short-circuiting ones own precedents, overreaching to address issues not briefed in the case—the Roberts Court is clearly as activist as its predecessors.

I want to suggest here today that the reason that the public has not caught on to the very dramatic shift of the high court has happened very, very—for three very clear reasons. And I think the first has to do with a really intriguing intramural split on the Court's conservative wing.

There is no real debate that the Court is more politically conservative than it has been in decades. This will, I think, come some day to be seen as the most fundamental legacy of the Bush era.

A 2008 study by Professor Richard Posner—who sits on the Seventh Circuit Court of Appeals—and William Landes at the University of Chicago demonstrated empirically that four of the five most conservative justices to sit on the Supreme Court since 1937 are sitting there now. And Justice Anthony Kennedy, the Court's swing voter, ranked 10th using his empirical methodology.

But to me, what is interesting is that there is a deep division between the conservative bloc on the Court, and it has much less to do with vision than approach. Justices Antonin Scalia and Clarence Thomas are advocating for bold, clear, swift changes to the law; Chief Justice John Roberts and Sam Alito have been inclined to move incrementally, quietly kicking old precedents, tests, and assumptions to the curb, but never explicitly renouncing them.

So Scalia and Thomas would overturn old cases; Roberts and Alito want to step around them. Where Scalia and Thomas urge striking down acts of Congress, Roberts and Alito chip away at them.

Even Justice Scalia himself in a concurrence in the Wisconsin Right to Life case derided his conservative brethren's unwillingness to just overturn old precedent as "faux judicial restraint."

There is a second factor that contributes to the fact that the steady erosion of civil rights by the Court has gone undetected. In addition toward this trend toward overruling precedent by stealth, the Court has made dramatic changes without any drama by chipping away at the access to courts. Be it through the doctrines of standing or ripeness, by doing away with facial complaints, by subtly shifting the burden of proof on plaintiffs, it is harder and harder for victims of injustice to get the protections that this Congress seeks to protect them from. And just yesterday, the Court heard a rather remarkable case that really calls into question standing doctrine for establishment clause cases.

Now, nobody is going to say that a change in standing doctrine is going to make front-page headlines, but it sure makes it hard to get into a courtroom. And so from environmental protections to worker protections to civil rights legislation, the Congress's guarantees of equal justice can only be as robust as your ability to get into a courtroom. And I think the Roberts court makes that harder every year. It never makes the headlines.

The final factor I want to touch on just briefly is that my colleagues and I are very much to blame in the media for not pointing out what is really happened in the last few years of the Roberts court because we are so focused on the next *Brown* and the next *Miranda*. The cases that don't happen that way become too hard to explain.

I just want to conclude by saying that, when the Court changes a law, shifts a burden, limits a test, increases standing require-

ments, it is changing the law as surely as it would be doing if it handed down another *Brown* or another *Roe*. And so for scholars, advocates, litigators, anyone concerned about the erosion of civil rights at the Court, there needs to be a redoubled effort to think about why this is happening and think about why the public is missing it.

With the prospect of one, possibly two new vacancies at the Supreme Court in the coming years, I think the time to look at these issues is now. Thank you so much for allowing me to speak to you. I hope I can answer your questions.

[The prepared statement of Ms. Lithwick follows:]

PREPARED STATEMENT OF DAHLIA LITHWICK

Testimony of
Dahlia Lithwick
Senior Legal Correspondent, *Slate*
October 8, 2009

House of Representatives Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Civil Rights Under Fire: Recent Supreme Court Decisions

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to address this Committee. I am not here as a constitutional scholar but as a journalist who has been closely watching the US Supreme Court for ten years. I want to be clear that the views expressed here this morning reflect only my own opinions and not those of either *Slate* or *Newsweek* magazines, where I am, respectively, a Senior Editor and Contributing Editor.

It is no longer a matter of any real scholarly dispute that the current US Supreme Court has worked hard to roll back what some conservatives have long seen as the worst excesses of the Warren Court Era -- from affirmative action to expanded rights for criminal defendants to a more expansive view of the right to vote. At times, this rolling back of Warren Court precedent has been done boldly and unequivocally -- as was the case in the Seattle schools voluntary integration case in 2007. But more frequently it has happened through a series of feints and legal pirouettes -- such as last summer's warning shot to Congress about the constitutionality of Section 5 of the Voting Rights Act.

And the most intriguing part of all this action at the High Court? Whether one is for it or against it, heartened or appalled by it, nobody seems to recognize that it is happening. It seems to have escaped our notice that there is indeed a profound difference between the Rehnquist Court and the Roberts Court. Most of us still believe we're living in Sandra Day O'Connor's America, despite the fact that her vision of affirmative action, abortion, church/state separation, and election law has been eroded in a very short time. Justice O'Connor herself pointed out in a speech in Williamsburg last weekend that that her own rulings have been "dismantled" in the handful of years since she left the bench.

As a country we have almost completely missed out on the truth that the substitution of Justice Samuel Alito for O'Connor has changed everything.

As an initial matter, I want to be clear that the language of judicial "activism" versus "restraint" is almost altogether unhelpful in discussing the Roberts or any other supreme court. Judicial activism is political -- and

not legal -- shorthand for “I don’t like this outcome.” My conservative colleague Stuart Taylor correctly observed in a column in *The National Journal* last year that every single member of the Supreme Court is an “activist.” And by any of the approximately six allegedly empirical measures of judicial activism – be it overruling duly enacted acts of Congress; short circuiting its own precedents; or overreaching to address issues not properly briefed or argued in a given case – the Roberts Court is clearly as activist as any of its predecessors.

Whether you opt to celebrate or bemoan the Supreme Court’s new shift to the political right, ultimately rests entirely on your view of the outcomes. Opponents of affirmative action, the so-called “wall of separation” between church and state and the criminal rights revolution of the Warren Court will say the Roberts Court is merely engaging in some much needed course-correction. Those who worry about voting rights, defendant’s rights and equal access to justice will say the current court is on a crusade to undo hard-won civil liberties. The fact that we can’t get past this sort of ends-driven political framing is unfortunate, because it reduces the conversation about the role of the court in this system of constitutional government to a fight over outcomes, rather than methodology or first principles.

I’d like to suggest here today that the reason nobody has cottoned on to the very dramatic shift at the high court is that it has happened almost imperceptibly. I think at least three factors have contributed to this phenomenon. The first has to do with a subtle intramural split on the court’s conservative wing.

There is no real debate that the Court is now more politically conservative than it has been in decades. This, I suspect, will someday come to be seen as, the most fundamental legacy of the George W. Bush era. A 2008 study by Prof. Richard Posner -- who sits on the Seventh Circuit Court of Appeals -- and William Landes, at the University of Chicago, showed empirically that four of the five most conservative justices to serve on the Supreme Court since Franklin Roosevelt, including Roberts and Alito, are on the current bench. Justice Anthony Kennedy, the court’s famous “swing voter” was ranked tenth using Posner’s methodology.

But there is a deep division between the court's conservatives and it has to do less with vision than approach: Justices Antonin Scalia and Clarence Thomas advocate for bold clear and swift changes to the legal landscape. While Chief Justice John Roberts and Justice Samuel Alito have been inclined to move more incrementally; quietly kicking old precedents, tests, and assumptions to the curb, without explicitly renouncing them. So where Scalia and Thomas would overturn old cases, Roberts and Alito have often stepped over or around them. Where Scalia and Thomas have urged striking down legislative acts, Roberts and Alito have subtly chipped away at them.

This likely has less to do with ideology than proximity to one's own confirmation hearing. The newer justices, having just recently promised fidelity to *stare decisis* will doubtless opt to go slowly. This is practical incrementalism versus intellectual coherence. But how it's happening should not obscure the fact that it is happening. Whether cases are expressly overruled, or simply rendered irrelevant, the legal landscape is changing and changing quickly. In the *New York Review of Books*, Ronald Dworkin accused the justices of "remaking constitutional law by overruling, most often by stealth." And Justice Antonin Scalia himself, in his concurrence in the Wisconsin Right to Life case, derided his conservative brethren's unwillingness to flat-out do away with bad precedent as "faux judicial restraint."

There is a second factor contributing to the fact that the steady erosion of civil rights by the court has gone largely undetected. In addition to the trend toward overruling precedent by stealth, the court has been able to make dramatic changes without even a modicum of drama by chipping away at our access to the courts. Be it through the doctrines of constitutional "standing" or "ripeness," by virtually doing away with facial constitutional challenges, or by subtly shifting the burden of proof on plaintiffs – it is becoming materially harder for victims of any sort of injustice or discrimination to access the very protections this congress has enacted. Just yesterday the court heard a remarkable establishment clause case that may well end up changing the standing requirements for anyone seeking to challenge religious displays on public lands. Now a change in the standing requirements rarely makes the morning headlines. But it sure

makes it harder to get into a courtroom. And from environmental protections to worker protections, to civil rights legislation, Congressional guarantees of equal justice are only as robust as a citizen's power to march into a courtroom. That doorway gets narrower every year.

The third and final factor that contributes to the invisible nature of the changes at the Supreme Court can be laid at the doorstep of people like me and my colleagues in the media who sometimes focus on big cases and big drama at the court, rather than the subtle trends. In our quest to find the next *Miranda* or *Roe* we don't always pay enough attention to the big picture. Often lost in all the drama of the Sotomayor coverage this past summer, was why the court mattered at all.

And so one should hardly be surprised by the fact that the unraveling of the civil rights revolution has almost completely escaped public notice. A Gallup poll conducted early last month showed the highest approval ratings for the Supreme Court in a decade: Sixty-one percent of Americans approve and only 28% disapprove of the job the Supreme Court is doing. Just one year ago, in September of 2008, the Roberts Court had record low approval ratings with 50% of Americans approving of its performance and 39% disapproving.

According to that same poll, fifty percent of Americans currently believe the court is neither too liberal nor too conservative; up from 43 percent last year. And perhaps the most interesting aspect of these new numbers is that the dramatic spike in public approval for the Roberts Court came from Democrats. As of last month, the majority of Democrats (59%) now say the court is about right in its ideological makeup, up from 34% in 2008. These numbers may tell us a lot about how democrats feel about the President and his choice of Sonia Sotomayor to fill David Souter's seat. But they do not correlate to the reality of what has gone on at the court itself.

If we can accept the proposition that Chief Justice John Roberts has, to quote my colleague Jeffrey Toobin, "in every major case since he became the nation's seventeenth Chief Justice . . . sided with the prosecution over

the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff,” and put aside the question of whether that is good or bad, the more interesting question remains: How is it possible that such a dramatic shift at the court has escaped the notice of ordinary Americans? And how can it have escaped the notice of Democrats, who are now more satisfied with the court than they have been in decades?

Summing up the 2006 Term in an opinion (in the Seattle schools case) read from the bench, Justice Breyer famously said “It is not often in the law that so few have so quickly changed so much.” So why has the American people noticed so little?

To be sure, public opinion polling often tells us very little about what Americans really know about the Supreme Court. The court is so utterly mystified in its doings that should hardly surprise us. As has long been the case, Americans feel very strongly about the court, even when they know little about what it actually does. A recent poll conducted for C-Span revealed that while nearly nine in ten American voters (88%) agree that the Court has an impact on their everyday lives -- only half (49%) could name even a single Supreme Court case. Democrats may be feeling bullish about the high court simply because they spent the summer witnessing the Sonia Sotomayor confirmation. Republicans may well believe, as do Scalia and Thomas, that the court isn’t tacking right swiftly enough.

Just last term, the high Court decided an unremarkable age discrimination case, *Gross v. FBL Financial*. Despite the fact that the issue before the court was a narrow one, the Supreme Court reached out and rewrote basic civil rights laws, overturned established precedent, and made it harder for workers facing age discrimination to enforce their rights. The decision was neither humble, nor minimalist, nor deferential to the elected branches of government. But it, like so many other such decisions, went almost completely under the public opinion radar.

When the court changes a law, shifts a burden, limits a test, increases standing requirements, or claims to be limiting itself to the narrow facts of

a case, as it functionally reverses a precedent, it is changing the law as surely as decisions in *Miranda*, *Roe*, or *Brown* changed the law. Some Americans may be happy about that fact and some may be dismayed. But they should at least be aware that it is happening.

For scholars, advocates, and litigators concerned about the erosion of civil rights at the high court, there needs to be a redoubled effort to explain to the public what the court does and why it matters. The media needs to do a better job highlighting the subterranean shifts at the court and pointing out broad trends that will only grow more marked. And, with the prospect of one and maybe even two new vacancies at the Supreme Court in the coming years, the time to address these issues is now. Thank you so much for allowing me to talk to you this morning, and I look forward to answering any questions you may have.

Mr. NADLER. Thank you very much.

And we will begin the questioning by recognizing myself for 5 minutes of questioning.

Mr. Derfner, in your written testimony, you say, "The long-standing precedent held there was an implied private right of action in statutes passed to protect a class of citizens, even if there is not a specific authorization for a private lawsuit. The court said that rule is applicable here. The guarantee of section 5 might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition," from an earlier decision.

But this is ancient history. Today's Supreme Court has outlawed the implied private right of action. Unless Congress specifically says in a statute that victims can sue, they can't. Your only recourse is to hope that a government official or agency will decide to focus on the individual case, and this is symptomatic of what Ms. Lithwick said a moment ago by changing the standing and rightness doctrines, by shifting the burden of proof, by doing away with facial challenges, by making it harder for people to get into court, we have made it very difficult for plaintiffs to assert and protect their constitutional rights.

Could Congress change this by passing a general statute that says, in the absence of specific language to the contrary, there is always an implied private right of action to protect statutory constitutional rights? Could we fix that?

Mr. DERFNER. I think that could be very constructive. The court, again, would get to interpret that, and the question is whether a court interpreting a statute passed next year would apply fully what the Congress this year said about a broad right of action, but I think that would be a very constructive and good idea.

Mr. NADLER. We couldn't say that, with respect to all existing statutes, there is an implied right of action going forward?

Mr. DERFNER. That might be a little broad if you said all existing statutes, but I think if you did it by categories—and I will give you one comparison. For a long time, there were questions about the statute of limitations. A lot of statutes don't specifically have that.

And the Court fumbled around for a number of years trying to figure out how to do that, and then Congress, about 1990, I think, passed a catchall and said, for all Federal statutes from here on that don't have a specific statute of limitations, it is 4 years. And I think that might be a good model for the kind of private right of action statute.

Mr. NADLER. Thank you.

Professor François, you noted the empirical distinction that you have catalogues—I suppose would be the word—between statutory interpretation where the Court in large decisions—9-0, 7-2—has generally been less dismissive of the clear intent of Congress as opposed to in civil rights cases, as opposed to constitutional cases, where I think you said, in a series of 5-4—basically 5-4 rulings, the Court has gone much farther afield.

One might characterize it—I would be interested in your observation—one might characterize it as saying that maybe there are some people on the Court who think that where Congress can correct them, they would better be a little careful, but where Congress

can't correct them, except by constitutional amendment, which is very difficult, they can be more disrespectful of the clear intent and of precedent and substituted their own predilections.

Would that be a fair characterization?

Mr. FRANÇOIS. I suppose that one might characterize it this way. I think, though, that one encouraging sign in the Court's jurisprudence is that, as Professor Derfner just pointed out, when Congress passes as such, to the extent that Congress makes its intent very, very clear, then they are a fair chance that the Court will uphold the statute. What Congress can no longer count on is for the Court to look at its intent and imply any sort of right of action or the remedies.

So I do believe, though, that in the absence of statutory text, the Court constitutional jurisprudence, when it comes to civil rights—and one can choose any one of the areas that I have just mentioned—it does indicate a certain hostility toward civil rights in general.

Mr. NADLER. Okay. Thank you.

Let me ask one question, and I am not sure who to direct this to. In the Northwest Austin Municipal Utility District case, beyond the narrow ruling permitting that district to bailouts in the coverage of section 5, the Court included language in the opinion that appears to raise serious concerns of the continued constitutional viability of section 5.

Do you think the Supreme Court was sending a message to Congress, "You'd better do something about section 5 before we declare it unconstitutional"? Are they sending us a message? And what are your concerns about future voter rights cases in light of this decision?

And let me make it a little more complicated. Starting with the Boerne case—Boerne—City of Boerne—maybe not starting, but certainly in that case, and certainly in these cases, the—and a series of other cases—the Court has indicated that Congress has to have a record to justify its policy judgments.

Why is that a concern of the Court? Why should the Court be concerned whether the Congress is intelligent or well based or not well based in its policy judgments? The electorate should be concerned, but why is that a constitutional concern of the Court? And why should it affect the constitutionality of what we do, whether we have considered all the factors or not? Maybe that should affect our elections and our intelligence, but why is the constitutionality of what we do affected by whether we have done it based on a lot of facts and a lot of study or not?

So there are really two questions. One, is the Supreme Court sending us a message on section 5 that we had better heed and do something about it, if we could figure out what to do? And, two, the second question I just asked. Who wants to do that?

Mr. ADEGBILE. Perhaps I will start. I think it is fair to say that every decision of the Supreme Court sends some signal when they are interpreting a statute of Congress. The signals can be more direct or indirect.

I think it was somewhat unexpected that so much of the opinion focused on a question that the Court was not deciding. That was not expected as we read the decision. But it is also fair to say—

Mr. NADLER. Which question? Namely the——

Mr. ADEGBILE. On the constitutional question. So the Court essentially did not reach the constitutional question, but spends the first 11 pages of its 17-page majority talking about the constitutional question. We call that dicta in ordinary circumstances——

Mr. NADLER. And the question is, is that sending us a message?

Mr. ADEGBILE. Exactly. Yes. You know, why was there so much focus on the dicta on a question that they were not reaching?

I think it is fair to say that the Constitution in this area, under the 4th amendment and 15th amendment, calls for a conversation between Congress and the Supreme Court. Both bodies have a role, but it is important to note that Congress has expressed powers in this area, expressed powers that have been recognized in a whole host of decisions in the voting area and in other contexts, and even in the Boerne decision, on this question of Congress doing its homework and what the record looks like.

There is a not-often-quoted line in Boerne that says that the analysis in ordinary circumstances does not properly begin with what the record looks like, but it begins with, who is the body that is constitutionally appointed to decide? People don't talk about that line in Justice Kennedy's opinion, but I think that that is the important——Congress has a role in making sure that all citizens can vote unfettered. That is the duty that Congress has.

And it would be remarkable for the Supreme Court, particularly after the history of the Supreme Court having struck down voting laws and having seen the country walk backward after those laws were struck down—and I think Chairmen Sensenbrenner and Conyers filed a brief on this topic in the Supreme Court case—it would be extraordinary for the Court not to take heed of that important history and step over the line into second-guessing the policy judgment.

But, obviously, the Supreme Court continues to have some difficulty with the way in which Congress is discharging its responsibility. That, to me, does not suggest that Congress should cut and run. But, of course, it is up to this body how it proceeds.

Mr. NADLER. I thank you. My time is expired. Although I would like to pursue this, my time is expired.

I now recognize the distinguished Ranking Member of the Committee for 5 minutes.

Mr. SENSENBRENNER. Well, thank you very much, Mr. Chairman. I am going to pursue this.

As Chairman, I put together the hearings and the construct on how to assemble the legislative record to justify the reauthorization in 2006. I think it is fair to say that the Court did not rule section 5 unconstitutional, but section 5 is hanging on by a thread now.

And what we did on a bipartisan basis is we started back looking at the Katzenbach case, which uphold the 1965 Voting Rights Act law, where they basically deferred to Congress in making a finding that article I, section 4 of the Constitution could be overridden because there was such an overwhelming showing of discrimination when the Voting Rights Act was passed, and they went to the legislative record and looked at that.

Well, the legislative record was extensive in 1965. But in terms of the volume, it paled in comparison to what was done in 2005 and

2006, with 12,000 pages, 13 hearings, 60 witnesses, lots of submissions from the witnesses and from other concerned members of the public.

Now, you know, if the Katzenbach construct—which was directly in point in 1965—isn’t any good any more, as the Court seems to hint, what do we need to do?

And I guess the corollary to this is that the abhorrence of the extension—only 33 in the House and none in the Senate—said, well, section 5 signals out some states and doesn’t single out others. My answer to that is that is based on the record of discrimination.

And they also say that section 5 is unfair to voters, especially minority voters. And the whole purpose of what was done in 2005 and 2006 in this very Subcommittee was to protect the right of minority voters not only to have themselves registered to vote and to allow themselves access to the polling place, but to have their votes counted and to be cast effectively so that they weren’t wasted.

So I guess I would like to ask the witnesses, what do we need to do to fix this? Because I don’t have an answer.

Mr. DERFNER. I will just agree with what I think Mr. Adegbile said. I think Congress has done its job. I think the Subcommittee has, in effect, let a little air in.

In the area of the bailout. That may have been one area where it was somewhat difficult because many jurisdictions were not eligible. Now, under the Supreme Court’s interpretation, every jurisdiction is eligible, so if somebody thinks they ought not to have to be subject to the act, they have an—

Mr. SENSENBRENNER. But, Professor Derfner, one of the complaints that we heard with eligible jurisdiction is that they didn’t want to spend the money to try to get out from underneath the Voting Rights Act. And that was a legislative decision based upon the board or the city council or the county commissioner to decide how to spend the taxpayers’ money. And they must have decided that it wasn’t a good use of the taxpayers’ money. So how do we override that decision?

Mr. DERFNER. I don’t think you have to override that, because it really isn’t very extensive. There have been a number of jurisdictions that have bailed out. The Supreme Court, in effect, gave a commercial in one of its footnotes to a lawyer who has been active. A number of other jurisdictions have made inquiries. It is not very expensive at all if you are really eligible. So I think Congress, frankly, ought to sit tight.

Mr. SENSENBRENNER. Anybody else want to try this one?

Mr. ADEGBILE. It is a difficult question. It is always a difficult question to determine how you persuade a justice that may be sitting in the middle of the Court about what the proper legislative course is.

Mr. SENSENBRENNER. But if you would yield to me, give them too much to read?

Mr. ADEGBILE. Indeed, that is a fair question, also, except I think that it was broken down in various contexts in the brief and others. LDF’s brief in the case pointed to more than six dozen examples not only of discrimination, but of repetitious violations in the same place to show that section 5 is still necessary.

I think that Congress did its job. And I think that Justice Scalia's opinion in *Lane*, where he cautions that the Boerne test is a flabby test that invites the Supreme Court to come regularly in conflict with the legislative branch is something that the Court should revisit.

There is a record here of ongoing discrimination. And whether or not Congress can fashion a different approach is something that we will have to consider.

Mr. SENSENBRENNER. I thank you for your input on that. I haven't lost any sleep at night based upon how the Court did interpret section 5 and what we did. You know, I do think we did our job. Maybe we overdid it.

My time is up, and I yield back.

Mr. DERFNER. I think you did your job superbly.

Mr. NADLER. Thank you, on behalf of all of us.

I now yield 5 minutes to the distinguished Chairman of the full Committee, Mr. Conyers.

Excuse me, to the gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you. Thank you. Thank you, Mr. Chairman.

And just following up on the gentleman from Wisconsin, when you have a constitutional remedy, the remedy has to be narrowly tailored. And the selection of the states to be covered, on that basis, the states got covered the old-fashioned way: They earned it.

And it seems to me that if we did not have the selected covered states based on some rationale that they earned it starting off and they can get out if they no longer deserve it would put even more jeopardy on section 5, because it would not be narrowly tailored.

Let me go into another area on discrimination cases. We cured the problem of the paycheck rule. The Supreme Court decided that the states that had had the paycheck rule, where the discrimination—the 180-day discrimination clock starts every time you issue a paycheck, as opposed to the absolutely absurd idea that if you can get past the 180 days, a group can come in and say, "We have been discriminated against," and an employer could say, "Oh, yeah, we have been doing it for years. Get on back to work."

We cured that with statute. Are there other burdens of proof or statutory areas where we might be able to help things with statutory changes?

Mr. FRANÇOIS. I think there are a couple of areas, some that have already—some decisions that have already been issued and others that are potentially coming down the road.

There are two that I mention. One involves the age—the ADA against age discrimination where the Court decided that, in *Gross*, in order to make a mixed-motive case, the plaintiff has to meet the burden of but-for age discrimination would have occurred. It is an extraordinarily high burden to meet. And if the burden is transferred from the age field into other areas, it is going to make it even more difficult to civil rights litigants.

The other case that I think deserves worthwhile attention is obviously the one from last term involving *Ashcroft v. Iqbal*, where the Court essentially, even though they didn't have to, just from the procedural posture of the case, simply eliminated in one fell swoop the supervisor liability in *Bivens* action.

Mr. SCOTT. Say it again?

Mr. FRANÇOIS. Its supervisor liability. In other words, if the agent commits a constitutional violation, is it the case that the supervisor might be liable if, in fact, they are new or should have known about it? And the Court essentially said no.

The third area that hasn't occurred yet, but I think is worthwhile to pay close attention to is actually a case that will be argued before the Supreme Court a week from today, *Kenny A. v. Perdue*, which will determine the standard for awarding attorney's fees in civil rights litigation.

The narrow question before the Court is whether or not a judge has discretion to grant an uphold adjustment to an attorney's fee based on the extraordinary work and results the attorney has achieved for his or her client. The 11th Circuit said yes, but one of the judges who wrote the majority opinion essentially wrote a roadmap to the Supreme Court for how to say no.

And even though most of us didn't expect that the Court would have granted cert, the Court granted cert. And they have every reason to believe that the Court will say no, which will have a tremendous impact on every single fee-shifting statute for civil rights lawyers, which, again, will have a very big impact on civil rights litigation in this country.

Mr. SCOTT. Did somebody else want to comment on other things we may have—

Mr. DERFNER. Let me just add a little—I agree 100 percent with Professor François. And the interesting thing on that is that the Court seems to be backtracking even where it has already decided. In the issue of the attorney's fees, Justice Powell wrote an opinion in the early 1980's that specifically said there can be an upward adjustment for exceptional performance and exceptional results. So if Justice Powell and other conservative justices of that time believed that, then for this court to backtrack even from that point is very significant.

And I would add one case of very—of great significance that the Congress might consider, and that is a case called *Sandoval*. *Sandoval* is a case a number of years ago in which the Supreme Court cut back or eliminated the ability to have a cause of action for a violation of a Federal regulation. And that has had a very significant effect in cutting back the ability for Congress to enforce its laws.

Mr. SCOTT. Thank you. My time is expired.

Mr. NADLER. The gentleman's time is expired.

I will just inform the panel that we are working on legislative remedies to *Iqbal* and *Gross* as we speak.

The gentleman from Arizona, Mr. Franks, is recognized.

Mr. FRANKS. Well, thank you, Mr. Chairman.

I thank all of you for being here today.

Mr. Adegbile, I know that your statement focuses on the VRA reauthorization, but the hearing topic today—and, indeed, the discussion—has been significantly more broad than that than just the voting issues. And I want to focus on this disparate impact theory for a moment. It has come under fire in recent years, as you know, and some even think the theory is wrong on principle and even should be discarded. And I admit to having some of my own ambivalence and misgivings and doubts.

I realize the disparate impact theory is traditionally applied in employment law, but it has also been found to be pervasive or persuasive by liberal members of the Supreme Court when policy harms a particular group in other areas, such as when a state administrator driver's license exam is given in English only.

So I want to throw out some facts here. And it is going to be on a—certainly a different topic here, but I would like to ask you to listen carefully for the disparate impact aspect, even if the issue itself is rather awkward.

Some African-American groups have pointed out to me and other Members of Congress that the Federal Government's subsidization of abortion has disparate impact on the Black community. And their evidence is essentially as follows.

An estimated 80 percent of abortion clinics are located in Black or minority neighborhoods. According to the Alan Guttmacher Institute—that is, of course, the research arm for Planned Parenthood, the Nation's largest abortion provider—approximately 50 percent of all Black unborn children are aborted, as compared to 20 percent of White babies.

And that means that 25 percent of the Black population—or 1 in 4—is missing because they were aborted. And that creates a smaller population and certainly lessens the political power, the voting power of African-Americans.

And, of course, they also cite the ill effects of abortion and the disparate impact on Black women because it is now, as you know, well established in dozens of studies worldwide that abortion is strongly linked to extreme preterm birth in subsequent pregnancies. After just one elective abortion, a woman is 2 to 12 times more likely to have an extreme preterm birth, and her baby is 129 times more likely to have cerebral palsy than a full-term baby.

And, of course, since the higher abortion rate for Black unborn children, it also equates to about four to five times the rate of extreme preterm for Black women and White women. And they are never given this information.

And I know I have said enough about the evidence here. Getting to the disparate impact issue, the clinics that place themselves in the Black community that do these abortions are heavily subsidized by the Federal Government with taxpayer dollars. And many of these clinics were founded by the old American Eugenics Society. Some of these clinics were caught on tape taking money earmarked for Black babies abortion only, in other words, that they could only earmark this money to abort a Black child by racist donors. And after this expose, the Federal Government continued to increase its support of these clinics the following year.

Now, my civil rights advocates argue very simply: Is the disparate impact theory applicable here, where we are talking not necessarily about the denial of a benefit, say, on hiring or a promotion to a job, but the infliction of a harm, where some surmise that the disproportionate harm of abortion in the Black community has even been intentional on some people's parts?

Is there a disproportionate or disparate impact here on the Black community? And why or why not?

Mr. ADEGBILE. I, of course, have not studied those specific facts that you have laid out. My understanding of the disparate impact

standard is that it is a statutorily created approach in a number of different statutes. We see it in title VII. We see the effects test, which is similar, in section 5 of the Voting Rights Act.

And in circumstances where Congress has recognized that there is a history of discrimination and that it is difficult to prove intentional discrimination, even though it may be happening because discriminators have become more sophisticated in their approach, then Congress has found that, in certain circumstances, disparate impact can play a very important role. And indeed, as I suggest, that has been the tradition in those two statutes that I have described.

How it would work in this particular context, I don't think that I am informed to say.

Mr. FRANKS. Okay. I don't want to ask anything above anyone's pay grade here, but—well, Mr. Chairman, I would just suggest that—

Mr. NADLER. The gentleman's time is expired.

Mr. FRANKS. Thank you, sir.

Mr. NADLER. Do you want to finish your statement?

Mr. FRANÇOIS. I would just suggest that approximately 50 percent of the Black community being aborted is a disproportionate and disparate impact. And I hope that it is considered by the Committee in the future.

Mr. NADLER. Thank you.

The gentleman from Georgia is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

How can the legislature improve upon the confirmation process for Federal judges, particularly U.S. Supreme Court justices, all of the Federal judges whom, by the way, have lifetime tenure? How can we make sure that they do not deceive and lie during the confirmation process about their true intentions?

Mr. DERFNER. I think, in the olden days, judges weren't questioned or nominees weren't questioned. And when Felix Frankfurter was nominated, he said, "I am too busy teaching class," so he didn't come to a hearing.

I don't know that there is any way to do that. What I would suggest is possibly a different answer to your question, which is one of the things that the President is very interested in, and that is more diversity on the bench. What we have now are increasingly people who have worked only in the executive branch or people who are law professors or appellate court justices coming only from district courts.

And I think the President has talked about greater diversity. And that would, among other things, open up the hearings, as well as diversify the bench.

Mr. JOHNSON. Anyone else have an opinion on that question?

Ms. LITHWICK. I would suggest, at this point, one should think in terms of damage control more than improving it, because I think the process is so toxic that it is bad for everybody. It has become a process that I don't think reflects well on the people asking the questions. I don't think it reflects well on the person answering the questions. And I think that Americans come away from it with a very distorted sense of what justices do.

And one suggestion is, I think, 4 days of that is just too much. And three rounds of questioning, when one asks the same question again and again, is too much, so things like very much limiting how much testimony there is.

I don't think there is any way to force nominees to say more than they absolutely have to say to get confirmed. I do think one thing is to change the conversation entirely. And whether you do that by having folks who don't come off the bench, so you are not scrutinizing their cases, the minute you are in a situation where you are scrutinizing their cases, they can say, "Well, I can't speak about something that is about to come before me. I can't speak about something that I have already done. And I can't speak about a hypothetical. But I can talk about the weather."

And then you get 4 days of that. So I think that, if you can change the conversation, that would require real ingenuity and imagination.

But the other thing I think I would say is that the conversation that happens around confirmation hearings would be much improved, I think, if we could think through as a country what it is we want and value in justices in ways that are less—forgive me, but shallow than the conversation we are having now.

And so it seems that if we could really talk in very aspirational ways about what the Court does and why it matters, what justices do, talking about an approach to the law rather than fixating on one or two or three cases, or one or two gotcha moments, I think the whole system would be absolutely enriched.

And even if you didn't get tremendously illuminating answers, I think that you would get answers that are at least interesting and thoughtful, rather than answers that are simply evasive.

Mr. JOHNSON. Let me ask this question, because certainly President Obama set forth criteria that I certainly agree with. During the Bush years, we heard things like judges who are strict constructionist and judges who are judicial activist. Judicial activist judges were to be—they were not held in high esteem, whereas the strict constructionist, which I would say is probably evidenced mostly by Scalia and his worthy companion, you know, they would represent the strict construction philosophy.

Have we kind of shifted directions—or not shifted directions, but shifted positions with the new Roberts Court?

Mr. DERFNER. I don't know what strict construction is, because no matter how you construe something, you have got value judgments. You make choices. And the notion—for example, if you strictly construe a statute of Congress and you say, "I am going to take only the words, and I am going to leave out the legislative history," or what Chief Justice Warren in the *Allen* case caused the "laudable goal," well, you are cutting out half of what Congress told you to pay attention to. If that is strict construction, I think that is going to get it wrong.

So strict construction is a value judgment like any other. And it is useless to pretend that you don't make value judgments when you interpret statutes or the Constitution.

Mr. NADLER. The gentleman's time is expired.

The gentlelady from Texas is recognized.

Ms. JACKSON LEE. Mr. Chairman, thank you very much for holding this hearing.

And let me express my appreciation for the witnesses who are here and my outright dismay for where we are today.

I respect the three branches of government and respect the independence of the Supreme Court. That is why we adhere to that constitutional premise of three branches of government and pride ourselves in having a working solution.

We have not stormed the Supreme Court to physically remove any justices because we disagree. We have respected decisions of which we have agreed and disagreed.

I think one of the most shocking experiences that I have had in my lifetime, besides a litany of civil rights cases pre-Warren Court, was, of course, the 2000 decision in *Bush v. Gore*, which I felt was a complete aversion to a conservative court. And now it looks as if this is penetrating our whole system of government.

So let me just pose these three cases. And if you can—as many people as we can get to, to quickly comment. And you may have commented on these already.

The *Ricci v. DeStefano* case, those of us who support our good friends in law enforcement and fire departments and appreciate their service, we do know that, across America, there are these departments that are monolithic in diversity, both in terms of women and in terms of race.

The decision to overturn the decision that was led by then-Judge Sotomayor, if you would comment on where we are in those kinds of cases and the undermining of the title VII cases. Age discrimination, *Gross v. FBL Financial Services*, had the—it seemingly had the burden of proving that age was the but-for for the cause of the employment decision.

And then, lastly, equal protection, the school desegregation case, *Community Schools v. Seattle School District*, the Court struck down voluntary school integration plans. In some of our communities, that includes the issue of magnet schools and other ways of exchanging students to make sure that we are diverse.

Let me yield to you and just quickly say, where are we with that kind of dismantling from age to title VII and to equal protection? Will we start with the first witness here? I am sorry.

Mr. DERFNER. You have picked out on some very interesting cases. And I will just say a couple of things.

The *Ricci* case, it was an unfortunate combination of situations. But I—one of the things the *Ricci* case did was basically to undermine a case called *Griggs v. Duke Power Company*, which was written by Chief Justice Burger, back in the day when Chief Justice Burger was thought of as the most conservative justice we had had in a long time.

Chief Justice Burger recognized the reality of the time and set up a standard in which it was a meaningful opportunity to prove discrimination. And what *Ricci* winds up with, what *Ricci* winds up with is—I am not going to deal with the doctrines, which are pretty complicated—what *Ricci* winds up with is that the fundamental way to choose a firefighter is by a written paper-and-pencil test.

I guarantee you that all of us here at this table and all of you up on the panel could pass those tests and could be at the head

of that list. And, God forbid, if New Haven or anybody else hired us as firefighters. A paper-and-pencil test, which is what that case sort of—

Ms. JACKSON LEE. May I get the others to quickly jump in? Our time is going. I know the Chairman and I both have to—can you jump in? And you can pick any case and if you would just add, do we need a legislative fix? Are we now going to have to have a process of legislatively overturning the Supreme Court? If you could quickly—next witness?

Mr. FRANÇOIS. I did mention earlier—

Ms. JACKSON LEE. Turn your—

Mr. FRANÇOIS. I did mention earlier that, in fact, we do need a fix for *Gross*. With respect to the other two cases that you mentioned, I would suggest that even though they cover very different areas, they should be sort of together, *Ricci* and the *Seattle School District* cases, because at the bottom of these cases lies not with a legislative problem, but rather the view of equal protection that the Court has adopted that essentially says the meaning of equal protection is pure race neutrality.

The reason why this is a fundamentally important argument is because that was precisely the argument that—subsequent to *Brown*, that had it been accepted would never have resulted in desegregation.

So both *Ricci* and the *Seattle School District* case are less susceptible, really, in my view to, let's say, fixes, because they really are evidence of—

Ms. JACKSON LEE. Subject to legislative fixes?

Mr. FRANÇOIS. Yes—

Ms. JACKSON LEE. Let me get the next gentleman before the light.

Mr. ADEGBILE. I agree—

Ms. JACKSON LEE. All right.

Mr. ADEGBILE [continuing]. That the idea of equal protection, as—that measures to address discrimination should not be equivalent to—made equivalent the idea of discrimination itself. And it is noteworthy that in the parents involved case, Louisville had long been under a desegregation order and decided of its own volition that voluntary desegregation was the way to go after a long experience of de jure desegregation.

Mr. NADLER. Thank you. The gentlewoman's time is expired.

We have 1 minute and 30 seconds remaining in a 15-minute vote, which means about 3 minutes. The Committee will have to stand in recess. There are five votes on the floor, 4-or 5-minute votes after this one finishes.

So probably we will reconvene right after the votes, probably in about half an hour. We will have a second round of questioning at that time. I thank the witnesses and everyone else.

And the Committee will now stand in recess.

[Recess.]

Mr. CONYERS. [Presiding.] The Committee will come to order.

And I thank the witnesses for their indulgence. The floor action lasted longer than any of us expected.

Could we continue our conversation? What I would like you to be able to put on the record, to the extent that you would like to, is

your reactions to each other's comments, I mean, because all four of you come from perfectly different points of experience and knowledge and persuasion. And so what I would like to do is, in the friendliest way that we do things in Judiciary Committee, have a candid conversation about each other's points of view.

You don't all have to start at the same time. You don't have to start with Mr. Derfner first, Ms. Lithwick. As a matter of fact, you would probably be the best one to start off.

Ms. LITHWICK. Then I shall. Thank you very much.

I think that one unifying theme here is that there has been a tendency to chip away, whether explicitly or implicitly, at civil rights in the last two terms. And I think it might be worth at least putting on the record the notion that every year a case comes down that shocks all of us in the media, we didn't know Lilly Ledbetter was going to become Lilly Ledbetter until 6 months after there was a blowback, a public blowback. We didn't know the Kelo case was going to be the Kelo case. We didn't know that *Gross* was going to be *Gross*.

And I think one thing that is useful to say here, at least in connecting what my colleagues on the panel have said and what I have said, is that I think the Supreme Court is exquisitely sensitive to public opinion. I think that it is exquisitely sensitive to the moments when it is perceived as making a mistake.

Mr. CONYERS. We have never noticed that before.

Ms. LITHWICK. Well, I watched oral argument in the Redding case, in the strip-search case last year. And if you walked out of that case after oral argument, it was 7-2, I think, for the school district. And a few things happened. A few people wrote strongly. There was an enormous public outcry. And I think that it profoundly shaped the way that the decision ultimately came down.

So I just think it is important to connect out what we are saying here on this panel to the question of, how is it that a case becomes important to the American public? How do we get a Lilly Ledbetter? How do we get a *Gross*? And I think that piece of it is really critical, because I think the Court is more sensitive than we would expect to doing something that is later perceived as having really truly wronged a plaintiff.

Mr. CONYERS. But you are the one that has raised the question more specifically than anyone else here today about the inadequacy of the media, in terms of bringing to the attention of the general public the importance and significance of what the Court does.

Ms. LITHWICK. I agree. And I am here to say mea culpa, but I am also here to say I think that these cases surprised the media, too. I think the media was surprised by the outcry over Ledbetter. I think the media was surprised by the outcry after Kelo. And so the question is, why are we following that conversation and not—it?

Mr. CONYERS. Well, I am surprised that you are surprised, but so what? I mean, what has that got to do with how we make the Court better and more sensitive to our relationship? And what about these three male witnesses that came here with you this morning? You were going to—you were going to tell me what you agreed with about what they said and any reservations you might have had.

Ms. LITHWICK. What I agree with about what they said?

Mr. CONYERS. Yes. And any reservations you might have had about what they said.

Ms. LITHWICK. I agree absolutely with the notion that Congress is creating records that are fundamentally sound and for the Court to question the record is ultimately the Court's problem, I think.

And I agree with—I very much agree with the idea that they have all put forward, that this is happening in large ways and in small ways, but it is absolutely happening.

Mr. CONYERS. Well, I mean, look, as far as males and females are concerned, this is an unbalanced panel. This is an opportunity that is important for you to give some free advice to your panelists.

Ms. LITHWICK. Well, if I was going to give free advice about gender, which I only do at home to my husband, I would say that I think that the conversation around gender that we had over Justice Sotomayor and the need for gender balance on the Court was one of the most impoverished national conversations we have ever had. And I thought it happened in stereotypes and clichés. I thought it was really pernicious and it played to the worst of the ways we talk about gender.

I think that it is clear that we need gender balance, not just at the Supreme Court, but in every level of the judiciary. I am not advising my colleagues here. I think they probably feel the same way. But I do think that, for the next two rounds of vacancies of the Court, if we are going to talk about race and gender as a country, we need to do it in ways that transcend the just horrible stereotypes that were kicked up over this confirmation hearing.

Mr. CONYERS. Well, unfortunately, it rebuilt the level that we are actually at.

Ms. LITHWICK. Yes and no. My own—

Mr. CONYERS. Oh, you think we are really better than that?

Ms. LITHWICK. I think that a lot of us are better than that. I think that in some ways that was a race to the bottom.

I will tell you this, purely anecdotally. I sat through the Sotomayor confirmation hearings. And what I saw happening in front of me, the conversation about whether she is a bully judge, the conversation about whether she is too rude to lawyers that was so fraught with gender overtones, and then I would turn behind me and see the line of people trying to get into the chamber, and it was a line of people of all colors and all races and all genders. And that was the future. And they were there because they were so excited to see a Hispanic woman on the Court.

And it seemed to me that, as a purely aspirational matter, that visual of the room behind me filled volumes.

Mr. CONYERS. Well, Trent Franks, I would have been one of those excited people at the Court that day myself, except now I have learned that she is far more conservative on some matters than I—that I didn't know about when I was busy being excited about her nomination and confirmation.

Mr. FRANKS. From your lips to God's ears, Mr. Chairman.

Mr. CONYERS. And now I am saying, "She did? She ruled like that?" But, hey, nobody is perfect.

Mr. ADEGBILE. I guess I will say a word about the importance of these civil rights decisions and, in particular, one of the things that

concerns me a bit about the Supreme Court's handling of some of these cases.

The question at the end of the day is, how have we achieved the progress that we have made? But it doesn't stop there, because part of the question is, how can we continue on the path of progress? And that is a very important second question, and I believe that was the question that this body asked itself in 2006 when it reauthorized the Voting Rights Act.

It took note of the progress that we had made, and that progress is undeniable. The chief justice himself, in the decision in the MUD case, wrote the historic accomplishments of the VRA are undeniable.

But I think that there is another lesson that history offers to us. It gives a gift. And the gift that history gives us is it provides us with the ability not to repeat some of the most troubling chapters if we study it.

I am not here today to say that the United States is going to turn back to Jim Crow. But in light of the record that this body established on the Voting Rights Act, it is clear that we have not uprooted all of the entrenched discrimination in the covered jurisdictions.

Mr. CONYERS. And we are making it more difficult to move forward.

Mr. ADEGBILE. And that, I think, at the end of the day, is the important question: Why would Congress, in the face of continuing discrimination, why would we read the Constitution to require Congress to stand down?

There is nothing in the Constitution that says that Congress's enforcement powers have an expiration date. If there are continuing problems, my view is that the Constitution allows Congress to continue to act to address them. There can be serious discussions about how Congress approaches its—discharging its duty, but on the record that Congress assembled of repetitious violations that were concentrated in particular parts of the country, with greater frequency and intensity than other parts of the country, I think that it is a reasonable judgment and a constitutionally sound one for Congress to stay the course.

And so the idea that we would over-commit to our progress without taking note of the challenges that still exist, I think, is really telling half a story. And that is why I think it is so important for the Constitution to continue to be a conversation in which both the Congress and the Supreme Court and, of course, the executive, everybody has a role to play.

And the thing about the Voting Rights Act is that, for many generations, the three branches of government have come together with a unique understanding of how it has charted us on a path toward progress. And it would be my hope that, in future cases, the Court would not shrink from that important commitment.

Mr. CONYERS. Mr. François?

Mr. FRANÇOIS. Thank you, Mr. Chairman.

One overarching theme that have run through this proceeding this morning is the idea of what sort of record Congress places before the Court and what standard is the Court going to use in evaluating the adequacy of that record.

I do agree with my colleagues who have commented that Congress has done a superb job over the years in—and placing a record before the Court. But the one thing that I also would bring to your attention for the record is a different point, but somewhat related.

When one looks at these civil rights cases—*South Carolina v. Katzenbach*, for example, with respect to the VRA—going all the way to, say, *Tennessee v. Lane*, regarding the ADA, many of the findings that the Court relied upon and gave a great deal of credibility to were findings that actually came out of the United States Civil Rights Commission.

For example, in *Tennessee v. Lane*, the Court relied almost exclusively on a 1983 study by the commission having to do with access for disabled individuals. However, what has occurred over the last 3 years is that it is virtually impossible for Congress or the Court to actually go to that agency, which as obscure as it may be to some actually has a great deal to do with establishing records with civil rights, because the agency has essentially stopped functioning.

Now, I will concede that I have a bias, because I actually served as the lead agency reviewer during the Obama transition team in looking at the agency and making recommendations for it. But what is very disconcerting, I think, deserves some measure of attention from the Committee is that, if the Committee were to decide, for example, that new civil rights legislation were needed with respect to women or gays and lesbians, with respect to sexual orientation discrimination or gender identity discrimination, it virtually would be impossible nowadays to go to the commission for such findings, where essentially for close to—beginning in 1954, this is precisely the place where you used to go.

And I think, if, in fact, much of the discussion today is going to be based on the idea that—to borrow my colleague's analogy, that the Court now requires Congress to do its homework, but also grades it not on a pass-fail basis, but on A, B, C, D, and you have to get an A for the Court to uphold your statute, then it does a disservice to all of us who are interested in civil rights for us to completely lose that one part of the government that, in fact, is supposed to be doing our homework for us, namely the Commission on Civil Rights.

Mr. CONYERS. Is EEOC the period you referred to during the chairmanship of Mary Frances Berry?

Mr. FRANÇOIS. The civil rights commission—yes, during the chairmanship of Chairman Mary Frances Berry, in—there were some problems with the commission, but it still continued to function. As I said before, *Tennessee v. Lane*, which was decided recently, was based on a 1983 report from the commission.

But it is fair to say, without singling out anyone, that in the last at least 10 years, if not more, the agency has stopped producing this sort of report.

Mr. CONYERS. Professor Derfner?

Mr. DERFNER. This has been an extraordinary hearing. I have learned a lot myself from my colleagues and from the Committee Members. I think the important thing that I take away after all of this is that Congress is still in the business of enforcing civil rights. And that is important, and it is different from the last time many years ago that we had a situation like this.

In the 1860's and 1870's, after the 13th, 14th and 15th amendments were passed, Congress passed a series of civil rights and enforcement acts. The Supreme Court struck them down starting in 1876 and then going on increasingly and kept on doing it.

By the time the Supreme Court started doing that, Congress's will to come back was gone. And so when the Supreme Court—

Mr. CONYERS. What about the Compromise of 1877?

Mr. DERFNER. Exactly. Well, the Supreme Court started striking laws down even before the Compromise, but you are right. The Compromise began it, and then Congress didn't pass any more civil rights laws. Congress did not respond to the Supreme Court's negative decisions at that time. Then we went to Jim Crow, disenfranchisement, violence, fraud, lynching, et cetera, I mean, the sorriest chapter of our history.

We have something very different now, because Congress got back into the business of passing civil rights laws in 1957, then 1960, 1964, 1965, and Congress has stayed in that business. Not only has it seen that the job is not done; it has recognized that more people need the help.

While race is our Nation's most serious problem—it has always been—we also need to deal with issues of gender, of handicap, of age, of sexual orientation, of nationality, a whole range of things. Congress has stayed in the business. And as the Supreme Court has turned back over the years from the days when the Court was in sync with Congress, Congress has stayed on the job. That, to me, is an incredibly important thing.

It is the one thing that gives us hope that we will come through this and we will get back to a time—we will get back to a time when the Court will be in sync. Because make no mistake about it: The fact that Congress, the political branch, stays in the game and stays in the business shows us that that is where the Nation is. And it is the Supreme Court, frankly and sadly, that I think is out of step with the Nation. And that can't go on very long. Congress has shown the determination. It is exciting that it does so.

And I also look back—let me just say one last thing, and I will stop—the way I see it, this country has had three new births of freedom. President Lincoln talked about a new birth of freedom when he gave the Gettysburg Address. We had a birth of freedom when we had the Revolution, and then we killed it with a Constitution that institutionalized and protected slavery. We had a new birth of freedom in the Civil War and Emancipation and then Reconstruction, and that was killed by people who were determined that we would not have equality.

Starting with the early days of the civil rights movement, *Brown v. Board of Education*, the work of Thurgood Marshall, the work of Mr. Houston, and Judge Hasty, the first Federal circuit judge who was Black. It is really our third try at bringing freedom and equality to this Nation. And the fact that Congress has stayed on the job, both parties, year after year, is the most encouraging and hopeful sign that I have ever seen.

Mr. CONYERS. Before I turn this over to my colleague, Trent Franks of Arizona, Ms. Lithwick, did you have a comment to make on this?

Ms. LITHWICK. I couldn't improve on what Professor Derfner just said if I tried.

Mr. CONYERS. Trent?

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, the main reason I came back was just to give you the opportunity to put those things on the record you wanted to, so I don't have any questions.

But I guess I would be remiss if I didn't just express the fact that I was touched by Mr. Derfner's remarks. And, you know, sometimes I guess we forget that America was built on a—kind of a different premise than other nations. You know, other nations often sought to put individuals or certain people in charge of things, and we did a new experiment that we would take away government's power and we would empower the individual, because we held the truth that all of us were God's children and deserve to be—have our lives protected, our freedom protected, and our property, and, you know, the pursuit of our dreams.

And I know that there is a great deal of differences on this Committee over how to do that sometimes. And I realize that it takes society a while to develop certain ideas. And I am reminded that there was a time when Congress outlawed petitions—for a period of 8 years, outlawed petitions against slavery. In other words, we didn't want to even be lobbied on that issue, because that was a set deal. In other words—we decided, by God, we are going to have slavery, and that was it, and we weren't going to listen to any of these wacko abolitionists.

And I know sometimes I frustrate this Committee by my constant return to what I believe the civil rights issue of the day is, and that is the protection of unborn children, because I believe that, you know, the same court that said Dred Scott was not a human being said that the unborn was not a human being. And it took time for us to develop in a different way.

But by the grace of God, we did. And Congress played a big role in that. Congress was the first body to say that we are going to have civil rights, finally woke up and said—you know, the people woke up. And the Courts struck those early ones down. We forget. You know, they struck those early civil rights laws down.

Finally, the Court woke up and joined the rest of us and said, okay, we are wrong. And we finally put aside this tragedy of slavery. And the issue that I mentioned today—again, I know that it frustrates people. I don't mean to do it to frustrate. I am a likable guy. I just don't seem like it sometimes, you know?

But it is true today that the most basic civil right of all is the right to live. Without that, the others don't really have a lot of meaning.

And today, one of the disparate realities is that half of all Black children—half of all Black children—are killed by abortion on demand. And I don't know if I am the only one in this room that that hits me as hard as it does, but I just think that is one of the most tragic realities that we could face when we talk about civil rights.

Mr. CONYERS. Do you have a reference for that statistic?

Mr. FRANKS. Sure, Planned Parenthood, Alan Guttmacher Institute. That is their statistics.

Mr. CONYERS. Okay.

Mr. FRANKS. I hope you check it out. I hope you say, "Listen"—I hope you come back to this Committee and say, "You know, that guy is a lunatic. We can prove it." I pray that the Chairman—I challenge the Chairman to—I say that not to challenge you, but just to—that these are sincere perspectives.

And I am just hoping that the day comes when Congress and the people of the United States will finally say, you know what? No matter whether you are Black or you are White or you are rich or you are poor or you are unborn or you are—or you are not or you are weak or strong, no matter who you are, you are part of the human family, and we are going to get together and we are going to protect each other in these brief days of life—

Mr. CONYERS [continuing]. Jurisdiction to hold hearings on this subject matter.

Mr. FRANKS. Well, I have a bill, Mr. Chairman. It simply is called the Prenatal Nondiscrimination Act. And it simply says that you cannot discriminate against an unborn child by subjecting them to an abortion on the basis of race or sex. That is what it does.

Mr. CONYERS. Well, why don't you get a hearing on it?

Mr. FRANKS. Would you give me a hearing on it?

Mr. CONYERS. Well, I haven't heard of it before just now.

Mr. FRANKS. Well, I guess I would sincerely if you—if you are open to giving me a hearing on it, I would love to present it. And regardless of what the Committee does with it, just helping it be understood I think would be something that maybe the generation will have a panel there and they will say, "You know what? There was a long time ago when we were taking the lives of half of all Black children, and we decided that wasn't the way to go, and we changed it. And, sure, we had disagreements over it, but we changed it."

And I would welcome the opportunity for a hearing like that. Would you be open to that, Mr. Chairman?

Mr. CONYERS. Could I see the bill first?

Mr. FRANKS. Absolutely. I will bring you the bill, Mr. Chairman.

Mr. CONYERS. Well, I can look it up, now that you have told me about it.

Mr. FRANKS. Okay. It is the Prenatal Nondiscrimination Act. We have forwarded it to your office before.

Mr. CONYERS. What is the bill number?

Mr. FRANKS. I think—I apologize. I don't remember the bill number, but we will get it.

Mr. CONYERS. Oh, that is all right. Don't worry about it.

Mr. FRANKS. But in any case, I just want to thank the panel here and thank the Chairman. The Chairman is a gentleman. And forgive me for the—sort of the—I don't know what it was, the—just the discussion, but I appreciate all of you, because I believe that one thing we hold in common in this room is that we really do desire to see the imago dei, the image of God, in every human being respected and protected. And I just hope we figure out who we all are.

Thank you, sir.

Mr. CONYERS. Thank you very much.

The distinguished gentleman from North Carolina, Mel Watt?

Mr. WATT. Thank you, Mr. Chairman.

I know that I have come in on the end of the hearing, and I will be brief, because I know that some of the witnesses have a deadline for being out of here. And as do I.

I was fortunate to be here for the opening statements and came back for several different reasons and just got one added to me, so let me add my response to Mr. Franks first.

It seems to me that those who make so much protestation about the unborn would have a lot more credibility if they paid half as much attention to those who are out here walking around and protecting their rights, would add to the credibility that you have for those that I haven't seen.

I see these people every day being discriminated against. And I guess I have more immediacy about that. That is not why I came back, obviously, because I didn't know what Mr. Franks was going to say.

I came back for actually five other reasons, number one, to express my tremendous thanks to Mr. Sensenbrenner for the content of his opening statement and for the tremendous work that he did to help us reauthorize the Voting Rights Act extension.

Number two, to thank Mr. Adegbile—I always have to concentrate on the pronunciation of his name—for the tremendous job he did in defending our congressional record that we developed in the United States Supreme Court, and since that extension has been under attack, and to encourage him in the process to keep moving forward on that front.

And to say that my initial reaction when I heard about this hearing was that I was somewhat reluctant, because I thought we were going to just beat up on the Court, and having sat through multiple terms in which the other side was in control of this Committee and seen that happen, I didn't think that was a very constructive way to approach this.

But this has turned out to be a very constructive series of witnesses, and the testimony and the questioning, I think, has been constructive to the extent that I have heard it.

Two substantive issues, now that I have gotten all of that out of the way, the protocol stuff. And I apologize if somebody has already addressed this. I was struck by what Ms. Lithwick had to say in her testimony. And I am wondering what kinds of things we might be able to do legislatively to deal with this whole attack on standing and the prerogatives of the Court versus—I mean, are there some substantive things that we can be doing?

We thought we were doing the right things by developing, what, a 16,000-page record to substantiate the need for the extension of the Voting Rights Act, because that is what the Court had told us. They didn't say we required 16,000 pages. There is a big disparity as some people—as Mr. Sensenbrenner, I think, said in his opening statement—about what is required by the Supreme Court.

But we understood the imperative that we had to have hearings and make a record that this was an extraordinary kind of statute that required legislative findings and continuing discrimination. And we did it in methodical, painstaking hearings and record-building.

And I was with the Chairman and the Ranking Member when they went to the Senate side and dumped our whole record into the Senate record so that we could supplement their record. We did that because we thought the Senate hadn't done enough to build their own record, and we thought sharing our record with them would be seen by the Supreme Court as a salutary thing. And to have ourselves second-guessed—but that obviously is not enough.

What can we do on the standing thing, Debo, Professors? What can we do on—because I think, you know, if they won't let people in the court, and the district courts have started to just dismiss a bunch of cases before they even—you know, you almost got to prove your case in your pleadings now, I understand, before you can even survive a motion to dismiss. Is there something we can do legislatively to address that?

Mr. ADEGBILE. The congressman has raised a very important question about whether the courts remain open for business for civil rights plaintiffs and others who have legitimate grievances that traditionally we have been able to resolve through a deliberative process of litigation, which does not presume a result, but requires parties to conduct careful investigation and avail themselves of discovery and then meet burdens that have been proscribed by statute and, in some cases, by the Court, to prevail.

There are a number of circumstances, some of which have been described today, where there are answers that are, in my view, subject to some legislative response. One of the issues in play in the recent *Iqbal* decision, in addition to the important *Bivens* point of which my colleague here, Aderson François, spoke, is the question of the pleading standard that you have alluded to.

For a long time, plaintiffs were allowed to come forward making allegations, and they were allowed to have an opportunity to test those allegations through discovery. To say—

Mr. WATT. I won't have you belabor that. I apologized upfront, because I hadn't heard the testimony. I will go back and read the record. Apparently you all have addressed this.

Let me raise my final point with you, Debo. I actually think that—I mean, the Court in the MUD case sidestepped this issue and kicked it down the road. Maybe we will get some new justices, which I think is our ultimate answer here.

But I am as troubled—more troubled—as much troubled by the earlier case in the voting rights area, because once again, we had been led to believe that this being a transitional remedy, the Voting Rights Act, that these kind of transition districts that didn't require 50 percent minorities to have any recognition under the Voting Rights Act was an important step, it seemed to us, toward exactly what the Supreme Court had said was desirable.

You know, for the Court to go back now and say that we only protect you if you have got 50 percent-plus 1 minorities seems to me to be a substantial departure from that whole line of jurisprudence. Am I misreading this? Help me feel better, if you can, but don't—I mean, tell me the truth.

Mr. ADEGBILE. I will try and discharge my oath to tell you the truth. The case that the congressman is referring to is *Bartlett v. Strickland*. It was an interpretation of section 2 of the Voting Rights Act. In that case, the Supreme Court answered a question

that it had dodged in four or five earlier cases about whether or not a claim could lie or a defense could be asserted with the creation of a minority opportunity district when the population was below 50 percent.

The court found that—answered that question in the negative, that it must be 50 percent or more in order to be cognizable under section 2 of the Voting Rights Act.

And I think the significance operates in two contexts. One is the claims that can be brought in—following the next redistricting cycle, where there are opportunities, because of crossover voting, for minority groups to combine with White voters to elect candidates of choice in circumstances where polarized voting persists.

But the context of the North Carolina case presents the more significant question, I feel, and that is the circumstance of what is going to happen in the legislative process of existing opportunity districts that are below 50 percent, and may—and now have less protection after this ruling, and may be diluted in the legislative process. Those voters may be spread out in ways—

Mr. WATT. Such as the congressional district that I represent, which I thought the Supreme Court had represented to me was a desirable kind of district, because I represent majority Whites, and the percentage of minorities in my district were designed to make it possible for voters to elect somebody of choice in a polarized situation that is not as polarized as some other parts of the state.

But now I have got to have a 50 percent minority district to get it recognized under the Voting Rights Act? That seems to me to be so counterproductive to the whole purposes that we were moving towards.

Mr. ADEGBILE. The congressman is absolutely right, that there—that one would think that part of where we are trying to go with all of these voting remedies is that polarization levels decline and that we are able to have voters of all races vote based on the merits of the candidates and not pull the lever based on a candidate's race, which is part of the problem and part of the reason why we have voting rights protections.

I would say that there are a cluster of important issues to think about with the section 2 decision. The first is that, in section 5 covered jurisdictions, there is additional protection against both dilution—because the retrogression standard should protect those jurisdictions. There are many jurisdictions that are not section 5 covered. Indeed, most of them are not section 5 covered. So how that plays out is an open question.

Additionally, I think the thing that the Court was struggling with is an administrable rule about, once you decide that 50 percent majority-minority is not the cutoff, what is the guidance that could be offered to the lower courts about what is the range in which it is reasonable to bring a claim or assert a defense, where you have a coalition—

Mr. WATT. Could that be a legislative thing or—

Mr. ADEGBILE. I think it deserves legislative study.

Mr. WATT. Okay. All right.

Mr. ADEGBILE. And if Congress can fashion a rule that makes sense, then I think it should be acted upon. The court has—in the LULAC case—said that influence districts—and here I distinguish

influence districts from an opportunity districts, the districts at issue in the Bartlett case—an influence district is where the minority population is so low that really they are never going to be able to elect—come close to electing a candidate of choice. The amount of crossover would overwhelm the amount of the minority population such that the majority population would be picking the candidate and the minority population would just be acting in conformity with the majority preference.

But in this mid range, where there is a substantial minority population, I think that there is something to study, but I think the Court was a little bit uneasy about what the workable standard would be. And an answer to that question would need to be formulated prior to any legislative enactment.

Mr. WATT. Mr. Chairman, I will pick his brain privately about what that legislative response might be. And I won't burden the rest of the panel or the Members with it or the staff.

But I appreciate the Chairman having a very constructive hearing, I think. And I certainly appreciate all of the witnesses being here. And I apologize for not being able to be here the entire time. We are dealing with an issue that is near and dear to the Chairman's heart in the Financial Services Committee, the whole interchange fee question that the Chairman tried to deal with in this Committee last term we are now having hearings about in Financial Services, so I have been kind of pulled in two directions today.

I yield back.

Mr. CONYERS. Thank you.

Professor Derfner, did you want to close down this conversation?

Mr. DERFNER. I guess I would add to what Debo said. I think there are some legislative things that can be done. There is an old Supreme—not old—there is a Supreme Court case from back in the 1960's that says Congress can create standing by creating rights in the statutes it passes. That has never been overruled, although maybe it will happen soon.

And I think that, in general, Congress has the opportunity to do things. It has done a lot of things. The things it has done has been very—it has done have been very salutary. And I think Congress should just keep on working the way it has been working, dedicated itself to the things it has dedicated itself to, and we will come through.

Mr. CONYERS. Customarily, we let the lady panelist get the last word, gentlemen.

Ms. LITHWICK. I would just very much thank the Committee for all the tireless work it has done in this area and really second Professor Derfner's comments, which are I think that the mere fact that Congress is not just in the game, but very, very much in the game is really, I think, the light at the end of this tunnel. Thank you so much for hearing us today.

Mr. CONYERS. We thank you all for your time. And we are going to study this record carefully. And if you have any writings or additional comments you would like to submit, please do.

Thank you all very much.

[Whereupon, at 12:25 p.m., the Subcommittee was adjourned.]