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SETTING CONGRESS UP TO FAIL

MARGARET B. KWOKA*

Introduction

Justice Ginsburg's recent public comments decrying the current court as the most activist in history defined judicial activism as "readiness to overturn legislation."¹ As an example of this type of activism, she explicitly referenced the Court's decision to overturn a key portion of the Voting Rights Act of 1965 in *Shelby County v. Holder*.² And as her dissent in that case revealed, she believes the majority opinion failed to give Congress the deference due a co-equal branch of government.³

Interestingly, though, the majority and dissent talk past one another in their analyses of the central issue in the case: whether the record amassed by Congress justified the coverage formula used to determine which jurisdictions would be subject to the VRA's requirement that any changes to voting procedures be "pre-cleared" with the Justice Department. While Justice Ginsburg's dissent details the voluminous and compelling accounts of racial discrimination in voting procedures in districts covered by the preclearance requirement, the majority, as she rightly points out, fails to engage the legislative record.⁴ Rather, the Court's opinion dismissed the utility of the legislative record on the grounds that it was not used to create the coverage formula, but rather to justify it after the fact.⁵

The *Shelby County* decision is the latest iteration of a dangerous trend in judicial review of legislation. The Court has increasingly required Congress to meet procedural standards akin to those required of administrative agencies promulgating rules, in particular by measuring legislation against the record Congress created.⁶ *Shelby County* takes this trend one step further by discounting the record before Congress because it was created as a justification after the coverage formula had been chosen,

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¹ Adam Liptak, *Court Is 'One of Most Activist' Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24 2013, at A1.

² *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013).

³ *Shelby Cnty.*, 133 S.Ct. 2612, 2625 (2013) (Ginsburg J., dissenting).

⁴ *Id.* at 2644.

⁵ *Shelby Cnty.*, 133 S.Ct. at 2629.

⁶ See generally William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 136-43, 160-61 (2001).

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rather than having been used to decide what the coverage formula would be.⁷ The Court's refusal to consider post-hoc rationalizations is akin to adopting for Congress a foundational administrative review doctrine known as the *Chenery* principle.⁸ As this essay will explain, however, this requirement sets Congress up to fail. Congress lacks the institutional design or competency to create the kind of record the Court now demands, and that demand ignores the reality of the legislative process.

Distinguishing Legislative From Administrative Records

The judiciary is well versed in reviewing records. In the most familiar scenario, courts engage in appellate style review of adjudicatory records. Primarily, appellate courts review records created by trial courts. Those records consist of a memorialization of all evidence and argumentation received by the court, and thus is the whole universe of material considered in reaching a decision. Similarly, when administrative agencies engage in adjudications, the agency produces a record of the proceedings.⁹ That record is subject to review by the judiciary.

Processes that end in lawmaking, however, do not inherently produce a "record" of the same variety. Nonetheless, courts must still review laws, whether they are enacted by Congress or administratively adopted in the form of regulations. In the administrative law context, judicial review of regulations has included a review of the record relied on by the agency, and agency practice accommodates the need for record creation. Notice-and-comment rulemaking, the most prevalent form of regulation, results in a record of public comments, agency proposals, and a typically in-depth explanatory justification of the final rule.¹⁰ While the "record" in a rulemaking process may not be as easily defined as an adjudicatory record, judicial review of that record to determine if the final rule is adequately justified is entirely possible. Moreover, under the *Chenery* principle, the agency may only defend the final rule on the grounds that it offered

⁷ *Shelby Cnty.*, 133 S.Ct. at 2628.

⁸ The *Chenery* principle comes from *SEC v. Chenery Corporation*, which held that agency actions challenged in court must stand or fall on the justifications offered by the agency at the time the decision was made, rather than any post-hoc rationalizations. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

⁹ The type of record produced may depend on the nature of the proceedings, but the requirement that the courts review the administrative record has been applied to formal and informal proceedings alike. See 5 U.S.C. § 706 (detailing that courts must "review the whole record or those parts of it cited by a party"); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (applying the record review requirement to informal proceedings).

¹⁰ 5 U.S.C. § 553(c) (requiring a "concise general statement of [the] basis and purpose" to accompany each final rule); 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4, at 596 (5th ed. 2010) (explaining that "[t]he courts have replaced the statutory adjectives, 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic'").

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contemporaneously with its decision, rather than relying on extra-record reasons.¹¹

Reviewing a record for adequacy in the administrative law context, including limiting the review to the confines of the record, is justified on several grounds. Administrative agencies are designed to exercise technical, scientific, and policy expertise and to investigate problems fully before reaching a final policy decision. A record requirement ensures that the agency's investigation is memorialized and that the agency is basing its decision on the exercise of its expertise.¹² Moreover, in the administrative law context, the ultimate decision-maker (e.g., an agency director) can collect the materials that constitute the record. Record review is thus not only possible, but also furthers the judiciary's proper role of overseeing agency actions to ensure they reflect a proper exercise of the power delegated to them by Congress.

The idea of a record in the context of federal legislation has been properly questioned as an incoherent or even impossible concept.¹³ Lawmakers do not memorialize all of the facts or factors that are weighed in their decisions. Legislators meet with lobbyists, policy groups, and constituents for input, as well as having their own staffers conduct research and make recommendations. This legislative process inherently occurs in large part off the record.¹⁴ The actual materials influencing 535 individual decision-makers (or some subset of them who affirmatively vote on any piece of legislation) are not only unknown, but likely unknowable. A record similar to the record created in a trial simply is not available.

Moreover, imposing a record requirement risks “transform[ing] Congress into a type of administrative agency subject to the control of the superintending judiciary.”¹⁵ Congress simply wouldn't be able to engage in the type of compromise or political maneuvering inherent in the legislative process if it were subject to a the same kind of record requirement as are agencies. While committee reports, floor statements, and hearing transcripts may appear to create a sort of legislative record, they do not represent the sort of comprehensive supporting material relied upon to come to a final

¹¹ *Chenery Corp.*, 318 U.S. at 87.

¹² A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Statutes*, 86 CORNELL L. REV. 328, 371-72 (2001).

¹³ Buzbee & Schapiro, *supra* note 6, at 91.

¹⁴ Bryant & Simeone, *supra* note 12, at 385-86.

¹⁵ Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 739 (1996). Krent further argues that, like stringent record review in the administrative context, requiring legislative records imposes costs on the legislature and injects the judiciary into the policymaking process.

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position that can be found in a record created by an agency engaged in rulemaking. Moreover, federal statutes may reflect policy choices that are ideological and political, not policies grounded exclusively in an investigation of only objective facts.¹⁶ Accordingly, a court should not treat a legislative record as reviewable in the same way as other record review.

Shelby County's Impossible Mandate

In many contexts, courts, and in particular the Supreme Court, must review legislation for constitutionality. In the rights protection context, this typically rests on a review of the purpose of the legislation in relationship to its means of accomplishing that goal. As others have observed, this inquiry necessarily involves consideration of facts that “transcend the dispute.”¹⁷ It is perhaps neither surprising nor inappropriate that congressional findings—whether embodied in the legislation itself or in various reports, statements, and hearings—are considered by courts when ruling on these matters.

While congressional findings have long had a role in the constitutional review of legislation, it is only relatively recently that the Court began a searching inquiry into the adequacy of this so-called legislative record.¹⁸ In *Board of Trustees v. Garrett*, for instance, the Supreme Court struck down a provision of the Americans with Disabilities Act on the ground that the congressional record did not contain adequate findings of past discrimination in state employment.¹⁹ Importantly, the Court also refused to consider relevant evidence of the type it required if that evidence was not in the congressional record.²⁰ Thus, the review was suddenly limited to the congressional record itself.

Shelby County involved exactly this type of review, in which the Court had to determine if the preclearance measures reauthorized in the VRA were sufficiently tailored to the current problems of voter discrimination. As it has in other recent cases, the justices—both in the majority and in the dissent—were keenly focused on the details of the record. Parts of the majority opinion read like an opinion reviewing an agency action: the Court nitpicks Congress’s statistics on voter registration²¹ and combs through the evidence to conclude that the incidents reported in the covered jurisdictions are

¹⁶ Bryant & Simeone, *supra* note 12, at 384 (suggesting various other reasons Congress may hold hearings).

¹⁷ David L. Faigman, “Normative Constitutional Fact-finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 552-53 (1991).

¹⁸ Buzbee & Schapiro, *supra* note 6 at 99; Bryant & Simeone, *supra* note 12 at 332.

¹⁹ Board of Trustees v. Garrett, 531 U.S. 356, 370 (2001).

²⁰ *Id.* at 370-71 (refusing to consider evidence not submitted directly to Congress).

²¹ Shelby Cnty., 133 S.Ct. at 2626, 2627-28.

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insufficiently pervasive and not meaningfully different from those reported in the non-covered jurisdictions.²² The dissent, likewise, exhaustively details the evidence Congress documented and draws the conclusion that the VRA's reauthorization was amply justified.²³ This type of analysis appears more like administrative "hard look" review where courts review agency rules to ensure the agency has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."²⁴ Yet, this type of review is inappropriate for decisions made by a body of elected representatives who, by their nature, are not simply exercising objective expertise, are not expected to act as neutral decision makers, and are not acting within the confines of an evidentiary record.

Courts should not constrain their review to look only at the congressional record for predicate facts justifying particular legislation, nor should Congress be required to produce a comprehensive record it lacks the institutional capacity to create. Despite these institutional barriers, Congress believed it had learned its lesson from recent cases regarding the need for a robust record: the legislative record it created for the reauthorization of the VRA was more than 15,000 pages long.²⁵

Still, as it has before, the Court ended up requiring even more of Congress than those legislators could have predicted.²⁶ However inappropriate legislative record review is generally, the *Shelby County* Court went a dangerous and unprecedented step further. Amazingly, the majority opinion refused even to consider the record Congress had created. As the majority acknowledged, Congress "compiled thousands of pages of evidence before reauthorizing the Voting Rights Act."²⁷ Nonetheless, after giving virtually no consideration to the actual evidence, the Court recites what it calls the "fundamental problem [that] Congress did not use the record it compiled to shape a coverage formula."²⁸ Indeed, the government itself had

²² *Id.* at 2629.

²³ *Id.* (Ginsburg J., dissenting) at 2640-41.

²⁴ *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁵ *Shelby Cnty.*, (Ginsburg J., dissenting), 133 S.Ct. at 2636.

²⁶ This is not the first time the Court has imposed record creation obligations that Congress could not have anticipated. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85 (2001) ("Under the crystal ball approach, the Court effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated at the moment of legislative deliberation and enactment").

²⁷ *Shelby Cnty.*, 133 S.Ct. at 2629.

²⁸ *Id.*

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candidly argued that the formula was “reverse-engineered” in that Congress came up with the coverage formula first and then later sought to justify it.²⁹ By ignoring the record entirely as having been irrelevantly compiled after a coverage formula had been effectively chosen, though not yet enacted, the Court essentially imposes a *Chenery* principle on review of Congress by refusing to consider any justifications made after the fact.

While it sounds facially reasonable not to accept post hoc justifications, the requirement is absurd when applied to Congress. It is clear why Congress created a record to justify a decision it had already made. Members of Congress had met with constituents, interest groups, lobbyists, experts, and each other informally and formally about reauthorizing the VRA probably thousands of times by the time the matter was formally under consideration. Votes had been counted, political deals had been made, and everyone knew the VRA would be reauthorized. The decision-making had been done. Now all that remained was to create a record, as Congress knew it must for the purpose of surviving a constitutional challenge.

The Court’s idea that Congress should first create a record of evidence to study and only then decide how it wants to act is predicated on a fallacy. The Court’s record review regime fails to account not only for the reality of Congress’s role as a political body, but also the design of the legislative process. In effect, the Court is asking of Congress something it will never be able to deliver.

Conclusion

Shelby County represents the judicial activism Justice Ginsburg so rightly identified. The majority opinion, however, lays the blame at the feet of Congress for having failed to create an adequate record to support its decision and implies that Congress could revisit the matter and correct its mistakes. Not only does *Shelby County* represent the latest and one of the worst examples of inappropriate legislative record review, it inexplicably adds an additional administrative law constraint into the mix by disallowing record evidence gathered after a decision has been effectively reached. As a result of the Court’s trend toward reviewing Congress like it would an administrative agency, Congress, designed not as a neutral expert but as a political decision maker, is not likely to meet the standard the Court has set out for it. In effect, the Court is setting Congress up to fail.³⁰

²⁹ *Id.* at 2628.

³⁰ Other instances have been identified where the Court has set a stringent record requirement that is likely unattainable, thus setting Congress up to fail. See e.g., Colker & Brudney, *supra* note 26, at 86 (noting that the type of evidence the Court said was required in *Board of Trustees v. Garrett* “for practical reasons may be unattainable”).