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Alabama's Appeal of the 1965 Voting Rights Act: States' Rights Over Voting Rights?

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Though the Voting Rights Act was overwhelming reauthorized by Congress in 2006, the five Republican justices on the U.S. Supreme Court may gut the law in the name of "states' rights." Justice Scalia led the way with provocative, offensive and even weird arguments.

Congress's 2006 renewal of the 1965 Voting Rights Act was the subject of 76 minutes of oral argument before the U.S. Supreme Court in February, although Associate Justice Antonin Scalia, 77, gave the impression that he thought the legislation was really called the Voting Entitlement Act.

Early in the hearing on a frequently non-compliant Alabama county's appeal of the Voting Rights Act, Scalia tried leading Alabama's counsel into agreeing to a specious conclusion by citing the 1965 Senate vote of 79-18 to pass the act, compared to the Senate's 2006 unanimous 98-0 vote to renew the act.

"It must have been even clearer in 2006 that these States were violating the Constitution," Scalia said. "Don't you think that's true?"

"No," said the Alabama counsel, "I think the court has to –"

Associate Justice Elena Kagan, 53, interrupted tongue in cheek, "Well that sounds like a good argument to me, Justice Scalia. It was clear to 98 Senators, including *every* Senator from a covered state, who decided that there was a continuing need for this piece of legislation."

"Or decided that perhaps they'd better not vote against it," Scalia answered, "that there's nothing, that there's no – none of their interests in voting against it."

"I don't know what they're thinking," said Associate Justice Stephen Breyer, 75, as he changed the subject from Scalia's speculation based, apparently, on retrospective, paranoid mindreading of those voting Senators in 2006.

U.S. Supreme Court Justice Antonin Scalia.

But Scalia was back a few minutes later, this time trying to lead the government's counsel, Solicitor General Donald Verrilli: "You could always say, oh, there has been improvement, but the only reason there has been improvement are these extraordinary procedures [the Voting Rights Act] that deny the States sovereign powers which the Constitution preserves

to them. So, since the only reason it's [voting non-discrimination] improved is because of these procedures, we must continue those procedures in perpetuity."

Verrilli: "No."

Scalia: "Is that the argument you are making?"

Verrilli: "That is not the argument. We do not think that –"

Scalia: "I thought that was the argument you were just making."

Verrilli: "It is not…."

Chief Justice John Roberts, Jr., 58, jumped in here to state that Massachusetts "has the worst ratio of white voter turnout to African American voter turnout," but the best ratio is in Mississippi. It wasn't clear what point he was making.

Massachusetts Rebuts Roberts's Slur

Roberts's his assertion was apparently false, according to Massasachusetts Secretary of State William Galvin, who commented on WBUR radio on March 1:

"I'm disturbed, first of all, that he is distorting information. You would expect better conduct from the chief justice of the United States. I'm a lawyer, he's a lawyer, lawyers are not supposed to provide disinformation in the course of a case. It's supposed to be based on truth.

"What's really distressing is the deeper we looked into the facts, the more of a distortion his comments are. The only reference that we can find of any kind in any statistical chart is a Census Bureau study from 2010 where, if you included non-citizen blacks, then you would come up with a lower number. That's the only way he could get to even make the bare-face claim that he made."

Roberts later asked Verrilli, "is it the government's submission that the citizens in the South are more racist that citizens in the North?"

"It is not," Verilli said, going on to add something fuzzy about "congruent and proportional" – rather than just pointing out that it's irrelevant how racist your feelings are, constitutionally, as long as you're allowing all citizens an equal opportunity to vote.

Moments later, Scalia was back making the contradictory argument that began: "This Court doesn't like to get involved in – in racial questions such as this one. It's something that can be left — left to Congress."

After reciting a brief legislative history, Scalia returned to his concern that the Voting Rights Act had passed with so little opposition in 2006, leading up to the remarks that have since earned him such widespread, mostly hostile comment:

"Now, I don't think that's [the favorable vote] attributable to the fact that it is so much clearer now that we need this. I think it is attributable, very likely attributable, to **a phenomenon that is called perpetuation of racial entitlement**. It's been written about. **Whenever a society adopts racial entitlements, it is very difficult to get out**

of them through the normal political processes.

"I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless — unless a court can say it does not comport with the Constitution. You have to show, when you are treating different States differently, that there's a good reason for it.

"That's the— that's the concern that those of us who — who have some questions about this statute have. It's — it's a concern that **this is not the kind of a question you can leave to Congress.** There are certain districts in the House that are black districts by law just about now. … Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?" [emphasis added]

Scalia Opens Confrontation

In the space of a minute or two, Scalia argued that (1) racial questions like the Voting Rights Act should be left to Congress and (2) that renewal of the Voting Rights Act "is not the kind of a question you can leave to Congress." But he doesn't acknowledge that inherent contradiction, never mind make an attempt to explain and resolve it.

Why not? Perhaps because: "*There are certain districts in the House that are black districts by law just about now….*" – which is factually false and seems to reveal the kind of irrational fear that rarely comes in the form of concern over "white districts by law," even though "white districts" are far more common and numerous than any other kind of district.

Scalia's concerns are manifestly racial, if not racist. He uses the phrase "racial entitlement" and repeats it, not only for emphasis, but to argue that this racial entitlement to voting is a reality, and that it's "difficult to get out of" – and implying that the country should get out of it, even if that takes the Supreme Court to tell the Congress what it should have been thinking seven years earlier.

And there's a certain specious appeal to Scalia's argument, especially to those who would prefer to see racist politics work without having to think of themselves as racist. What's specious at the core of Scalia's riff is his characterizing voting rights as "entitlements." Voting rights are rights, unless one wants to go down a logical path that would also disenfranchise women because their right to vote is really just a "gender entitlement."

Scalia sketches a legal and political wonderland in which as many as five justices may be wandering untethered to the reality in which most of the country continues to live. In that reality, the Congress made a factual record before voting to renew the Voting Rights Act in 2006. That record included some 20 hearings and 15,000 pages of evidence, all of which supported the conclusion that, while the country has made progress under the Voting Rights Act, voting rights in America remains subject to frequent abridgement or denial.

Responding carefully to Scalia's desire to correct Congress's earlier state of mind, Solicitor General Verrilli said: "I do say, with all due respect, I think it would be extraordinary to – to look behind the judgment of Congress as expressed in statutory findings, and – and evaluate the judgment of Congress on the basis of that sort of motive analysis, as opposed to…"

At which point Scalia interrupted to make a distinction without much difference: "I'm not

talking about dismissing it. I'm – I'm talking about looking into it to see whether it makes any sense."

Shelby County, Alabama, which initiated this challenge to the Voting Rights Act in 2010, is both a recent and chronic offender, where state legislators were caught on tape referring to African-American voters as "illiterates" and "aborigines." Shelby County lost its case in federal district court and lost again on appeal. Even the dissent in the appeals court decision acknowledged that "It goes without saying that racism persists," and later added:

"None of this [dissent] is to suggest that the country need for a minute countenance deliberate voting rule manipulations aimed at reducing the voting impact of any racial group, whether in the form of restrictions on ballot access or of boundary-drawing."

Sotomayor Counterbalances Scalia

Early in the oral argument, Associate Justice Sonia Sotomayor, 59, noting the flawed voting rights record of both Shelby County and the state of Alabama, commented to the Alabama counsel, "You're asking us … to ignore your record and look at everybody else's." She continued, getting little response:

"There's no question that Alabama was rightly included in the original Voting Rights Act. There's no challenge to the reauthorization acts. … It's a real record as to what Alabama has done to earn its place on the list. … Discrimination is discrimination. And what Congress said is it continues, not in terms of voter numbers, but in terms of examples of other ways to disenfranchise voters."

Reinforcing this point, Associate Justice Ruth Bader Ginsburg, 80, pointed out that the dissent in the district court decision had said, "If this case were about three States, Mississippi, Louisiana, and Alabama, those states have the worst records, and application of Section 5 [of the Voting Rights Act] to them might be okay."

Near the end of the hearing, Sotomayor directly asked Alabama counsel, "Do you think that the right to vote is a racial entitlement in Section 5?"

Alabama counsel side-stepped, referring to the Fifteenth Amendment to the Constitution, which prohibits states from denying the right to vote based on race or color and gives Congress the specific power to enforce that right. Sotomayor tried again: "I asked a different question. Do you think Section 5 was voted for because it was a racial entitlement?"

When Alabama counsel still gave no direct answer to the question, Sotomayor asked a related question: "Why do you think we [the Supreme Court] should make the judgment, and not the Congress, about the types and forms of discrimination and the need to remedy them."

Again, Alabama counsel had no direct answer, but after a minute or so of meandering, he said: "I think the problem to which the Voting Rights Act was addressed is solved."

Moments later Justice Kagan came back to that: "You said the problem has been solved. But who gets to make that judgment really? Is it you, is it the court, or is it Congress?"

Alabama counsel, after brief banter: "It is up to the Court to determine whether the problem indeed has been solved and whether the new problem, if there is one…"

Kagan, jumping in: “Well, that’s a big, new power that you are giving us, that we have the power now to decide whether racial discrimination has been solved? I did not think that that fell within our bailiwick.”

Alabama counsel immediately denied he’d meant what he’d just said, Justice Breyer spoke up to smooth things over, and the hearing was soon over.

Associate Justice Anthony Kennedy is widely thought to be the swing vote in the case, deciding whether it was constitutional for Congress to extend the Voting Rights Law to address a problem it found still existed, albeit in sometimes new forms. Kennedy was active in the hearing, but his comments were far less pointed than some of his peers, although at one point he asked about applying the law to all the states and not just the ones with an overt record of voting rights discrimination.

(Reflecting a states’-rights view of the issue, Kennedy expressed concern about whether Alabama today is an “independent sovereign” or whether it must live “under the trusteeship of the United States government.”) But Kennedy also inquired, in effect: how is Shelby County hurt by the formula in the law when the county’s record of voting rights discrimination would be caught by almost any rational formula.

Although Associate Justice Clarence Thomas, 65, who as an African-American has benefitted from the Voting Rights Act, as well as actual racial entitlements, perhaps more than any other justice, he had nothing to say during the hearing.

In the midst of initial reaction to Scalia’s comments about the “perpetuation of racial entitlements” and other jibes, MSNBC commentator Rachel Maddow compared the justice to an Internet troll. Maddow, who was in the audience for the Supreme Court’s oral argument on Feb. 27, appeared as a guest on *The Daily Show* with Jon Stewart the following day, where she said: “It’s weird to see Antonin Scalia in person. It’s weird.”

Then she explained with a little mindreading of her own as to what the mindreading justice was up to with his choice of words: “It’s not a real vote. It’s a racial entitlement now. Voting is a racial entitlement, something that you are entitled to on the basis of your race. Wait a second. Do you know how that sounds?

“But I think he does know how that sounds, and that’s the neat thing about being there in person because you can see oh, actually, he’s a troll. He’s saying this for effect. … He knows it’s offensive and he knows he’s going to get a gasp from the courtroom which he got. And he loves it. … He’s that kind of guy.”

Is he that kind of guy? Is he a troll? It’s possible he goes out of his way to offend, given Scalia’s behavior over the years. But if he’s just “saying this for effect,” he’d be likely to end up voting to uphold the constitutionality of the Voting Rights Act. Anything’s possible.

But if he’s not “saying this for effect,” if he’s saying things because he means them, then it’s more likely that he’ll vote to hold that the 1965 law has outlived its constitutional expiration date. That, too, would be consistent with his behavior over the years as something of a racist royalist whose divination of the Constitution’s original meaning might well include the realities that non-whites were mostly slaves, while voters were all white male property-owners.

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