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Commentary on Shelby County v. Holder

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The lawyers have spoken; it is now the Court's turn. What is it likely to say when the decision is finally announced? The oral argument did shed some light on the likely answer – although reading judicial tea leaves is always hazardous.

Before the argument, I would have said that almost all votes on the Court are quite predictable. The views of only two Justices, I thought, are hard to guess: those of Chief Justice John Roberts and Justice Anthony Kennedy. Across the political spectrum, Justice Kennedy has long been viewed as too unpredictable for comfort. And while Roberts was once beloved by conservatives, the love affair ended when he voted with the liberals to uphold the constitutionality of the Affordable Care Act. A darling on the right suddenly didn't look so darling any more.

Conservatives have thus been bracing themselves for another nasty Roberts surprise in Shelby County. He too had fallen in the unpredictable camp. But these nervous conservatives had forgotten some relevant history. In 1982, when Roberts was a young lawyer serving as a special assistant to the Attorney General in the Reagan administration, he wrote an internal memo presciently warning that a House bill to amend the Voting Rights Act would "establish a quota system for electoral politics." And in 2006, he called that quota system — the "divvying us up by race" in racially gerrymandered districts — "a sordid business." His objection was to the racial sorting – the districts carefully drawn to reserve legislative seats for African Americans – that had become a statutory mandate.

The oral argument should calm the jitters of conservatives, although not of liberals. The Chief Justice is clearly in the former camp. And Kennedy may be too; he certainly sounded concerned about the "equal footing" doctrine, arguably violated by Section 4 of the statute, which determines which jurisdictions will be singled out for distinctive treatment. Alabama must submit all changes in voting

procedure, even the relocation of a polling place, to the Justice Department or the D.C. district court for approval, while Ohio – with its recent history of election-day problems – does not. Kennedy wondered, as well, why another powerful provision of the act, Section 2, didn't suffice to protect voting rights, making Section 5 superfluous.

Shelby County is almost always described as a case challenging the constitutionality of Section 5's preclearance requirement. But the Section 4 formula for determining Section 5 coverage was the source of considerable debate in the oral argument. In 2006, why wasn't it "incumbent on Congress under the congruence and proportionality standard to design a new trigger for coverage?" Justice Alito asked. "Maybe," he went on, "the whole country should be covered." Bert Rein, arguing for the County described the Section 4 formula as "antiquated" and raising a serious constitutional question. His view may be adopted by a majority of the Court in its eventual Shelby County holding. In fact, I will go out on a limb: Section 4 is the provision that will not survive, and Section 5 will sink with it.

It's not generally understood in the media, but Sections 4 and 5, as Justice John Marshall Harlan II noted in 1969, were "clearly designed to march in lock-step." With the expiration of Section 4, the protection provided by Section 5 would also end, he said. It remains the case today.

How much will be lost if the Court strikes down Section 4 and thus Section 5? One might think, listening to the voices of alarm, that without federal surveillance, renewed disfranchisement would become a serious threat. Jurisdictions would become free to relocate a polling place from one side or a street to the other. A polling place change is the most frequent type of submission to the Justice Department for preclearance, the Solicitor General, Donald Verrilli Jr., explained to the Court. Last-minute changes before an election "can be source of great mischief."

At the point at which polling place switches had become the big issue, it might seem that the problem of disfranchisement had been solved. Are blacks truly so helpless as to be unable to vote if they must find an address designated as a new polling site? Such an assumption has sometimes been called "liberal racism." Surely, political parties and organizations that work to get out the vote, can tell people whom they already call, that they should go to a new location.

But perhaps the problem is deeper. Justice Sonia Sotomayor questioned the whole notion that the South had become racially unrecognizable over the decades since the 1965 act was passed. Assuming that some portions of the South have changed (an assumption she did not totally accept), "your county pretty much hasn't," she said to Bert Rein, representing the plaintiffs in their

challenge to the constitutionality of Section 5. In the period we're talking about, many southern discriminatory voting laws were blocked by Section 5, she went on. The racial picture had remained pretty much frozen in her view.

In Alabama, the number of blacks in the state legislature is proportionate to the black population, Rein replied. There is also very high black registration and turn-out. The point could have been put more strongly. For many years, those political participation rates have not been especially low in the Deep South. The disparity between black and white registration rates, the Chief Justice pointed out, is greatest in Massachusetts, with Mississippi, where (remarkably) the black registration rate is higher than that for whites, having the third-best rate in the country.

In addition, blacks in the covered jurisdictions have had greater success in winning public office than outside the Deep South. "But think about this State that you're representing, it's about a quarter black, but Alabama has no black statewide elected officials," Justice Elena Kagan argued. In reply, Rein might have pointed a finger at the Voting Rights Act. The insistence on race-conscious districting to maximize the number of safe black legislative seats — built into the enforcement of the Voting Rights Act — is a brake on minority political aspirations. In majority-black districts, minority candidates tend to consolidate the black vote by making the sort of overt racial appeals that are the staple of invidious identity politics. Very few have any experience building biracial coalitions; they do not acquire the skills to venture into the world of competitive politics in statewide majority-white settings. As a result, max-black districts (the ACLU's term) seem to have worked to keep most black legislators clustered together and on the sidelines of American political life – precisely the opposite of what the statute intended.

Whatever the rates of political participation in a covered jurisdiction, however many blacks are elected to legislative office, those who generally described as liberals on the Court are not likely to be satisfied. Justice Stephen Breyer drew an analogy between the problem of voting discrimination and a state that had a plant disease in 1965. By now, the state "has evolved . . . But we know one thing: The disease is still there." Perhaps a better analogy would have been a heart problem for which medicine has been prescribed. It helps, but starts to wreck the patient's kidneys. The insistence on racially gerrymandered districts in enforcing Section 5 has arguably stalled racial progress, as suggested above. They reliably elect black candidates, which was important when southern politics was still reserved for whites, but by now too many of those legislators sit on the periphery of American politics.

It was somewhat surprising and certainly a pity that the Court did not discuss the costs and benefits of race-driven districting in the oral argument. Only Scalia, in a

rather oblique statement hinted at the question, referring to the perpetuation of a racial entitlement. The media seems a bit flabbergasted and bewildered by his point, but the reference to what Justice Sandra Day O'Connor in 1993 called "an effort to segregate . . . voters on the basis of race" should have been clear. "Segregated" districts have become an entitlement, which will never disappear as long as Section 5 is alive and well. Today, not even black politicians are solidly behind race-conscious districting; Rep. Melvin Watt, for instance, in 1995 complained that the Voting Rights Act "was not designed to create racial ghettos." Yet very few white politicians are willing to risk the roar of condemnation that would follow a vote against renewing or strengthening a civil rights statute.

However the Court decides Shelby County, Section 5 is not likely to last until its current expiration date of 2031, at which time the temporary, emergency provision will have had a life of sixty-six years. By then, demographic change will have eroded the power of the Justice Department and courts to draw race-conscious districts as a remedy for voter discrimination.

In the oral argument, all eyes on the Court were focused on the question of changes in black political participation rates and black officeholding. But it was too small a window through which to look at the question of racial progress.

More fundamental demographic change is occurring in the South that is relevant to the enforcement of Section 5. Majority-minority constituencies will become increasingly hard to create. Black voters are scattering; residential levels of residential segregation in the South are now lower than in the Northeast or Midwest. Blacks who have moved to the suburbs live in what are sometimes called "global neighborhoods" – one in which all minority groups are well-represented. That is equally true of central cities. As a result, it will become extraordinarily hard to piece together "ability to elect" districts that create safe legislative seats for minority candidates. Thus, without any judicial help, Section 5 is likely to become a relic from our racial past.

Wouldn't that be nice: Voting rights secure (most of the statute is permanent), but both the Court and Congress out of the picture.

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