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‘A Big New Power’

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Years from now, when the Supreme Court has come to its senses, justices then sitting will look back on the spring of 2013 in bewilderment. On what basis, they will wonder, did five conservative justices, professed believers in judicial restraint, reach out to grab the authority that the framers of the post-Civil War 14th and 15th Amendments had vested in Congress nearly a century and a half earlier “to enforce, by appropriate legislation” the right to equal protection and the right to vote. How on earth did it come to pass that the Supreme Court ruled a major provision of the Voting Rights Act of 1965 unconstitutional?

You will have noticed that I’m making a premature assumption here about the outcome of a case, Shelby County v. Holder, that was argued just last week. Although I’m willing to bet that Chief Justice John G. Roberts Jr. has already drafted his 5-to-4 majority opinion, I’d be nothing but relieved if the court proves me wrong when it issues the decision sometime before the end of June. But except for a few wishful thinkers, everyone who witnessed the argument, read the transcript, or listened to the audio now expects the court to eviscerate the Voting Rights Act – and seriously harm itself in the process.

As I made clear in my most recent column, I wasn’t expecting anything good to come out of this argument. But neither did I anticipate the ugliness that erupted from the bench. While Justice Antonin Scalia’s depiction of the Voting Rights Act as the “perpetuation of racial entitlement” quickly went viral (40 screens of Google hits, by the time I checked earlier this week), that was not even the half of it.

“Even the name of it is wonderful: the Voting Rights Act,” Justice Scalia said, his voice dripping with sarcasm as he suggested that only political correctness, rather than a principled commitment to protect the right to vote, had kept the disputed Section 5 of the act alive through four successive Congressional re-enactments. (And, he might have added and no doubt thought, four successive Supreme Court affirmations of the law’s constitutionality.)

Is it better to be black these days in Mississippi or in Massachusetts? Not being likely to find myself black in either state, I wouldn’t presume to say, but

Chief Justice John G. Roberts Jr. exhibited no such diffidence. Without having asked a single question of Shelby County's lawyer, Bert W. Rein, he taunted Solicitor General Donald B. Verrilli with statistics purporting to show that Mississippi has the better record of African-American voter registration and turnout.

It was a "gotcha" performance beneath the dignity of a chief justice, and it turned out to be based on a – to put it charitably – misunderstanding of the data. The next day, the Massachusetts secretary of state, William F. Galvin, complained publicly that Chief Justice Roberts had used "phony statistics" in a "deceptive" and "truly disturbing" manner. (Mississippi, by the way, signed a brief urging the court to uphold Section 5.)

Section 5 of the act is the "preclearance" provision, covering all or parts of 16 states, most but not all in the South. Before making any change in voting procedures, a "covered jurisdiction" must satisfy the Justice Department or a federal court that the change will have neither the purpose nor effect of "denying or abridging the right to vote on account of race or color." Last year, Section 5 kept Texas from enforcing what would have been the country's most stringent voter ID law. At the same time, Section 5 induced South Carolina to make sufficient changes in a proposed voter ID law to satisfy a federal court, an illustration of how the provision has often served as a deterrent to mischief or as negotiating tool to avoid it.

The goal of Shelby County, Ala., and its friends on the Supreme Court is to depict Section 5 as an anachronism, a needless cudgel held by the big bad federal government over the head of a transformed South. "The Voting Rights Act, Stuck in the Past" was the headline on George F. Will's post-argument column. He bemoans the asserted fact that "progressives are remarkably uninterested in progress," observing that Social Security remains "frozen, like a fly in amber" despite the increase in life expectancy since its creation in 1935 and that "progressives cling to Medicare 'as we know it' " despite advances in medicine.

Acknowledging the overwhelming vote by which Congress renewed Section 5 in 2006 – 98-to-0 in the Senate and 390-to-33 in the House – Mr. Will writes that "obviously, the political class's piety about the act has extinguished thought about its necessity," therefore requiring "active judicial engagement" to accomplish what politics cannot or will not. ("Judicial engagement" is a right-wing neologism, applied to old-fashioned judicial activism that runs in the right direction.)

Because George Will's Washington Post columns on legal matters tend to channel the thinking of his friend Nino Scalia, they are often worth pondering, and this one is no exception. So Social Security, Medicare and the Voting Rights Act are all outdated? How interesting – except that the Supreme Court isn't reaching out to invalidate the first two. Only the Voting Rights Act is in its sights. As they say on Sesame Street, which of these things is not like the others?

Leaving race aside for the moment (did someone mention that the Voting Rights Act has something to do with empowering black voters – who just might, for some strange reason, prefer Democrats?), what the court's conservatives seem to see in Section 5 is a threat to state sovereignty — the "sovereign dignity" of the states, a phrase Justice Anthony M. Kennedy has used in another federalism context. This theme ran throughout the argument. Justice Scalia referred to Section 5 as imposing "these extraordinary procedures that deny the states sovereign powers which the Constitution preserves to them." Justice Kennedy asked whether "if Alabama wants to acknowledge the wrongs of its past, is it better off doing that if it's an independent sovereign or if it's under the trusteeship of the United States government?"

These are astounding comments, bespeaking willful ignorance of the origin (as in "originalism") of the 14th and 15th Amendments, which transformed the constitutional relationship between the federal government and the states. Their very point was to invoke federal power to make sure the states delivered on the amendments' promises: due process, equal protection, the right to vote for all. Recall that the Constitution's first 10 amendments, the Bill of Rights, imposed limitations only on the power of Congress; only through later Supreme Court interpretation were most of them understood to apply to the states as well. But the Reconstruction amendments were aimed directly at the states. As Justice Stephen G. Breyer put it during the argument: "And one thing to say is, of course this is aimed at states. What do you think the Civil War was about?"

Whether Section 5 of the Voting Rights Act covers the wrong jurisdictions, or too many, or too few is a policy judgment, as much for Congress to make as whether to raise the eligibility age for Social Security or Medicare. With mounting frustration, the liberal justices tried to make that point. "Why should we make the judgment, and not Congress, about the types and forms of

discrimination and the need to remedy them?" Justice Sonia Sotomayor asked Mr. Rein, Shelby County's lawyer.

Addressing Mr. Rein, Justice Elena Kagan asked: "You said the problem has been solved. But who gets to make that judgment really? Is it you, or is it the court, or is it Congress?" When the lawyer answered that while Congress can examine a problem, "it is up to the court to determine whether the problem indeed has been solved," Justice Kagan responded: "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."

The Roberts court stands on the brink of making an error of historic proportions. A needless and reckless aggrandizement of power in one case to satisfy the current majority's agenda will erode the court's authority over time.

But there was no sign from the majority last week of an appetite for stepping back this time, as the court did in its last confrontation with Section 5 four years ago. Justice Scalia – he who flaunts his refusal to join any portion of any opinion that cites legislative history – returned repeatedly to his view that manifest Congressional support for the Voting Rights Act was somehow illegitimate, not to be taken at face value. The problem was, he said, that members of Congress "are going to lose votes if they do not re-enact the Voting Rights Act."

Justice Scalia, that's called democracy.

Or it was.