the Atlantic

On Voting Rights, Justices Get an Earful From Their 'Friends'

By: Andrew Cohen – February 5, 2013

In a little more than three weeks, the justices of the United States Supreme Court will hear oral argument in a case about the constitutionality of the Voting Rights Act, the venerated federal law that for the past 48 years has helped eased the sting of official discrimination in the exercise of the most important of all civil rights -- the right to vote. It's the Voting Rights Act that has stopped bigoted state and local officials from ginning up new literacy tests or poll taxes. It's the Voting Rights Act that has forced cynical legislators to limit (somewhat, anyway limit the scope of their racial gerrymandering.

In *Shelby County v. Holder*, the court has been asked by an aggrieved Alabama county to strike down Section 5 of the statute, the provision which requires certain jurisdictions (like those in Alabama) with long patterns and practices of discrimination in voting to "pre-clear" with the Justice Department their proposed changes to voting laws. It's a vitally important case for many reasons -- not least of which that the court's conservatives appear poised to strike down the statute just months after it was invoked, successfully and often, in the 2012 election cycle to protect the vote for millions of Americans.

I will have much more to say about the merits of the case later this month. For now, I just want to briefly point out the remarkable array of "friends of the court" briefs which have been filed at the Supreme Court by individuals and organizations who have come to believe that they have a stake in the outcome of the case. So far, the American Bar Association's website lists 26 such briefs, and so does Scotusblog, but there already are many more, and if you have nothing better to do for the next few hours, some of them are worthy of a closer look. If you don't have the time, or the inclination, here are some of the highlights.

1. Remember Representative F. James Sensenbrenner? If you do, it's probably because you either loved or hated him in the role of manager of the House of Representatives during the relentless Republican pursuit of the impeachment of President Bill Clinton. But did you know that Rep. Sensenbrenner, the Wisconsin Republican, has long played a critical role in helping to ensure civil rights for minority voters? I didn't know that until I started studying the history of the Voting Rights. Here's the lead graph from his punchy "friends of the court" brief:

The 2006 authorization of Section 5 of the VRA continues the work of guaranteeing minority citizens the right to participate fully in the electoral process. That reauthorization is a model exercise of Congress' unique ability to legislate in complex areas. The overwhelming, bipartisan decision to reauthorized the VRA, which drew support from covered and non-covered jurisdictions alike, should be upheld by this Court under any standard.

The extensive record before Congress demonstrates the VRA's success in rolling back a century of disenfranchisement. But it also demonstrates the continued need for Section 5 to block covered jurisdictions' implementation of new discriminatory voting rules. Congress responded by tailoring the act to respect states' independence and to ensure that the VRA imposes no unnecessary burdens.

2. To the folks at the Cato Institute, who pride themselves on their devotion to "individual liberty," Section 5 of the Voting Rights Act deprives officials in states like Alabama of the liberty to be free from the yoke of federal judges enforcing the law to protect minority rights. To Cato, the Voting Rights Act is discriminatory against whites, depriving them of their constitutional right to be treated "equally under the law." Citing Justice Clarence Thomas, so far the only current justice to declare the VRA unconstitutional, here's how Cato's brief begins:

"The historic accomplishments of the Voting Right Act are undeniable" (citation omitted). Its modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, the Fourteenth and Fifteenth Amendments, and with the orderly implementation of fair elections. Jurisdictions covered by Section 5 are constantly subject to utterly predictable litigation, the outcome of which is often dependent on judges' views o how to satisfy both Section 5's race-conscious mandates and the Constitution's command to treat people equally under the law. These tensions -- constitutional, statutory and practical -- undermine the VRA's legacy of vindicating the voting rights of all citizens. ...

All of this mess stems from the presumption that election laws in certain places are illegal until proven otherwise, But three generations of federal intrusion have been more than enough to kill Jim Crow.

3. Don't declare ol' Jim dead quite yet, argues the Brennan Center for Justice. Their brief focuses extensively on the history of the racial discrimination in voting practices and how lawmakers sought to address it nearly 150 years ago. It's hard to read the passage below (or the rest of this good brief) without remembering the partisan voter suppression efforts we saw during the last election cycle, and how many of those efforts were blocked by the invocation of the Voting Rights Act. From the brief :

History shows that restricting Congress's Fifteenth Amendment power would pose significant risks, and that gains in voting rights are fragile and tenuous. The Framers of

the Fifteen Amendment "fully realized that enfranchisement required practical safeguards against evasions of the law and retrogression."

One of the central lessons of the Reconstruction Era is that "revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded or diluted, and abridged in spite of the enormous cost that those advances have made." Declaring Sections 4(b) and 5 of the Voting Rights Act to be beyond Congress's Fifteenth Amendment enforcement powers would ignore the lessons of history and weaken the essential constitutional guarantee that Congress has sought to enforce.

4. Labeling themselves "former government officials," some recognizable conservative activists chime in, too. Three names from this group should raise hairs on your neck: Hans von Spakovsky, the Bush-era official whose claims of voter fraud were eviscerated last fall by Jane Mayer in the *New Yorker*; William Bradford Reynolds, the Reagan-era official with a long history of disrespect for the Voting Rights Act; and Bradley Scholzman, the Bush-era official who avoided criminal charges for lying to Congress about a Justice Department discrimination scandal. *Poor covered states*, they argue:

[R]ampant intervention by private parties and interest groups in recent Section 5 cases has significantly exacerbated the inherent constitutional burdens of the statute. Private intervention is unobjectionable in a normal case in which the plaintiff bears the burden of proof. But it is a staggering intrusion into state sovereignty in the Section 5 context, as intervention allows private parties and interest groups to flip the burden of proof to a covered jurisdiction to justify its duly enacted law.

5. That Congress has continued for decade after decade to place this burden on states makes sense in light of the continuing discrimination minorities face on voting -- and, more than that, it's supported by the language and intent of the so-called "Reconstruction Amendments." That's how Jack Balkin (an *Atlantic* correspondent), Adam Winkler and the folks at the Constitutional Accountability Center put it in a brief that seeks to remind the justices that the modern era of voter suppression still is not too different from the ancient one. They write:

In resisting the force of the Reconstruction Amendments' grants of enforcement authority, Shelby County's argument that the Voting Rights Act offends state sovereignty echoes the same rejected arguments opponents of the Amendments made in challenging their adoption in Congress and their ratification by the states. The County ignores the historical reality that the Amendments ratified at the end of the Civil War were "the result of [a] great constitutional revolution" that "ended with the vindication of individual rights by the national power."

6. As many contemporary moviegoers will tell you, Abraham Lincoln pushed and pulled to get at least one of those "Reconstruction Amendments" passed through Congress. And yet a conservative group which bears his name, the Abraham Lincoln Foundation for

Public Policy Research, along with a handful of religious organizations, have come up with an argument that would likely make Lincoln spin in his grave. The Voting Rights Act, these folks contend, violates Alabama's sovereign right to discriminate against minority voters free from federal interference under sections of the Act. From their brief:

> Additionally, VRA's Section 4(b) has put Alabama on an unequal footing in violation of the statute admitting Alabama to the Union and the Tenth Amendment. At the very heart of the independence and sovereignty of the several States is the State's authority over its own electoral systems. By subjecting Shelby County, Alabama to preclearance by federal authorities in Washington, DC with respect to every change in voting laws, VRA has undermined the efforts of VRA-covered jurisdictions to address voting fraud, concentrating power in unelected bureaucrats that threatens public confidence in the integrity and legitimacy of the American federal republic.

7. The American Bar Association, which has long supported the foundational principles of the Voting Rights Act, which is to say the notion that the rule of law should be used to broaden and not restrict the franchise, also has filed a brief that directly undercuts the argument that conservatives have made about the federal law. The Congressional Record, they tell the justices "contains extensive statistical evidence and first-hand accounts demonstrating that the predicates for Section 5 preclearance continue to exist..." The lawyers continue:

> Voting rights litigation under Section 2, as many ABA members know from front line experience, is extremely complex and costly. During the several years it regularly takes to litigate a Section 2 case, officials who were elected under an improper election regime continue to hold office, implement policies, and make a wide variety of decisions that remain in effect, often long after the election process that brought them to power is found to be discriminatory.
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> Moreover, success in eliminating one discriminatory practice is often followed by the adoption of a new discriminatory practice that must be fought all over again. These effects are real and profound for representative democracy--and they cannot be remediated effectively through the prospective remedies Section 2 litigation characteristically offers.

8. What would a states' right fight be without a word from Arizona -- the jurisdiction whose radical leaders have brought forth dubious new immigration laws, creative attacks upon the Affordable Care Act, and other legal positions which announce to the world the disdain they have for Obama Administration policies? The argument here: Discriminatory voting measures in states like Ohio and Pennsylvania should serve to ease federal oversight over similar voting measures in places like Arizona, Georgia, South Carolina and South Dakota. They write:

> Section 5 applies arbitrarily to the Covered Jurisdictions. No Covered Jurisdiction uses discriminatory tests or devices, and many have higher voter turnout or lower disparity in

> minority voter turnout, than numerous uncovered jurisdictions. The Covered States therefore are denied the fundamental principles of equal sovereignty and equal footing. Treating States differently no longer serves the Act's purpose of eradicating voter discrimination for *all* United States citizens (emphasis in original).

9. We tend to think of the mission of the Voting Rights Act as focusing exclusively upon the plight of black Americans. But the federal statute has been a grace note to Hispanic organizations and American Indians as well. National Latino groups filed a powerful brief with the justices. And the Navajo Nation filed an *amicus* brief in this case, and it is poignant for its reminder that while white Americans were discriminating against black Americans they also were discriminating against Native Americans. The Navajo Nation writes:

> Indian people have endured a century of discrimination and overcome new obstacles each generation in order to exercise the right to vote in state and federal elections. Nowhere have these struggles been more prevalent than in the Section 5 covered jurisdictions of Apache, Navajo and Coconino Counties in Arizona the home of the Navajo Nation and Todd and Shannon Counties in South Dakota the home of the Rosebud and Oglala Sioux. The *amici curiae*file this brief to elucidate the importance that the Voting Rights Act and, in particular, Section 5 preclearance, has had in overcoming the purposeful efforts to disenfranchise Indian voters.
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> While passage of the Voting Rights Act in 1965 ended certain means of discrimination, Indians continued to be denied the right to vote through a variety of new strategies. As part of the 2006 reauthorization process, Congress obtained evidence that Indians continued to be disenfranchised by voting schemes, polling place discrimination and ineffective language assistance. The 2006 reauthorization was a legitimate Congressional response to the disenfranchisement. Protected by the Section 5 preclearance, voter registration and turnout have increased, but new challenges have arisen that require continued vigilance.

10. The last word for now goes to an organization called the Veterans of the Mississippi Civil Rights Movement, Inc. which declares itself dedicated to the "mission of documenting and telling the stories of Civil Rights veterans to empower the next generation to continue the quest for freedom justice and equality." To these folks, the partisan voter suppression efforts of the 2012 election cycle aren't some diluted cousin of Jim Crow laws -- they are even more sophisticated attempts to achieve the same dubious results. In their brief, they write:

> Ten years after the ratification of the Fifteenth Amendment, the Court made it clear that the Amendment rendered inoperative provisions in any state constitution that explicitly limited the right to votes to whites. Then, little by little, and step by step, but inexorably and relentless, the Court cast aside state policies and practices designed to "thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color." Thus, the court outlawed grandfather clauses and held state officials

civilly liable for enforcing them; it invalidated *de jure* and *de facto* white primaries; and it held racial gerrymandering unconstitutional.

In those years, what the Court learned was that, as soon as it struck down one method of voter suppression, states would quickly respond with "schemes intended to emasculate constitutional provisions or circumvent [the Court's] constitutional decisions." Decisions such as *Neal v. Delaware, Guinn v. United States, Myers v. Anderson, Lane v. Wilson, Nixon v. Herndon, Nixon v. Condon, Smith v. Allwright, Terry v. Adams*, and *Gomillion v. Lightfoot*, show, if nothing else, that this Court's own precedent served as the jurisprudential justification for the Voting Rights Act.

For if, as Chief Justice Roberts explained barely four years ago, the Voting Rights Act is grounded in a judgment by Congress that it needed to have preemptive measures "rather than continuing to depend on case-by-case litigation" it was in no small part the work of this Court between 1915 and 1964 that provided the incontrovertible evidence that nothing short of a permanent federal presence would ever be a sufficient corrective to the "dangerous vice" of political factions.

The justices aren't required to read these briefs. The justices aren't required to read *any* briefs. But in a case that is so rooted in the history of the Supreme Court, and in the history of Congress, and in the history of discrimination in America, the justices would be missing a big piece of the puzzle here if they were to disregard what these groups have to say. The oral argument in Shelby County may turn on the finer points of pre-clearance procedures and statistics about racial intent and effect. But this is a case about the bigger picture in America -- a picture brought into focus by some of the writing you can access above.