Balkinization

The Deafening Silence of Conservative Stars on the Constitutionality of the Voting Rights Act

Doug Kendall February 11, 2013

One of the glaring things revealed by a review of the briefs in Shelby County v. Holder is the dearth of serious constitutional scholars in the fray supporting the conservative attack on the Voting Rights Act. On Shelby County's side are the predictable array of political scientists like Abigail Thernstrom, election policy hacks like Hans von Spakovsky, and Reagan-era war horses like John Eastman. But where are the leading conservative constitutional thinkers on this – Mike McConnell, Eugene Volokh, Randy Barnett, Gary Lawson, and Steve Calabresi? None of these bright-light conservative names grace the briefs on behalf of Shelby County and, so far, their silence has been deafening in the public debate. As University of Kentucky law professor Josh Douglas has pointed out over at PrawfsBlawg, it's really hard to find a credible academic to provide "balance" to a panel discussion on Shelby (though Cato's Ilya Shapiro has gamely offered to fill this void).

Perhaps the problem is that many conservative scholars have been harshly critical of the Court's jurisprudence on this topic, especially the "congruence and proportionality" test established in City of Boerne v. Flores for reviewing the constitutionality of congressional action under the Fourteenth (and presumably the Fifteenth) Amendments. Indeed, the scholarship of conservatives such as McConnell, Calabresi, Michael Stokes Paulsen, and Judge John T. Noonan forms a critical anchor of the brief Constitutional Accountability Center filed in Shelby County on behalf of the federal government. Judge Noonan, a Reagan appointee to the Ninth Circuit, wrote a book called Narrowing the Nation's Power that accuses the conservative majority on the Rehnquist Court of issuing "decisions that return the Country to a pre-Civil War understanding of the nation." McConnell penned a deservedly-famous Harvard Law Review article blistering the Court for breaking faith with the Fourteenth Amendment in Boerne, calling the Religious Freedom Restoration Act (RFRA) "precisely the sort of enforcement statute envisioned by the Fourteenth Amendment." And, Calabresi, too, has argued that RFRA was "an appropriate remedial measure to define what constitutes an abridgement of freedom to worship." On the question of what constitutes "appropriate legislation," he argued that "more deference to Congress with its greater fact-finding resources both makes a lot of sense and seems contemplated by the text." Surely, these same constitutional principles apply to the Voting Rights Act, which enforces the Fifteenth Amendment's clear constitutional prohibition on racial discrimination in voting.

There really isn't another side on the constitutional question in Shelby County. If there is a serious, scholarly defense of congruence and proportionality as an original matter, I haven't seen it. Neither has Justice Scalia, who after "reluctantly" joining Boerne and other cases applying the congruence and proportionality tests, dropped off the bandwagon in 2004, with this blistering criticism:

> I yield to the lessons of experience. The congruence and proportionality standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test (congruence and proportionality) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.

Perhaps National Review editor (and prominent conservative) Ramesh Ponnuru put it best in a blistering op-ed in the New York Times that appeared shortly after the most recent Voting Rights Act case, NAMUDNO v Holder, came down:

> [W]hen it comes to the race cases before the Supreme Court, too many conservatives abandon both originalism and judicial restraint. . . . None of the justices — not even Justice Thomas, the most originalist member of the court — discussed any historical evidence about what the ratifiers of the 15th Amendment intended. It is hard to believe that, back in 1870, they wished to empower courts to determine which voting rights laws were necessary. The occasion for the amendment was, after all, the end of a civil war brought about in significant part by judicial overreaching in the Dred Scott case.

Ponnuru's point is a simple and powerful one: if conservatives believe the Voting Rights Act is bad or outdated public policy, they should take these complaints to Congress, not the courts. It appears that the reason we've heard so little from the scholarly right on Shelby County is that the scholarly right itself believes the case against the constitutionality of the Voting Rights Act is exceptionally weak.

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