



TPM: Would Anthony Kennedy Uphold The Voting Rights Act?

By Sam Hall February 28, 2013

From Talking Points Memo:

In his questioning, Kennedy expressed profound skepticism of the validity and fairness of Section 5, sounding far from convinced that the preclearance requirement for specific state and local governments passed constitutional muster under the equal protection clause. He even compared it to antiquated programs like the Marshall Plan and said “times change.”

But other times, he wrestled with a central question in the case: whether the jurisdictions covered under Section 5 are in fact the most likely to pass discriminatory voter laws, and whether other provisions of the Voting Rights Act provide enough tools to snuff them out.

Kennedy also asked the challenger’s lawyer Bert Rein whether the “reverse engineering” approach Congress used to ensure coverage of certain states was “appropriate under the test of congruence and proportionality.” If so, he wondered, “What is wrong with that?”

Later in the argument, he asked whether it would be an “effective remedy” to simply “bail in” jurisdictions to the preclearance requirement rather than use a formula to determine which state and local governments are covered. His follow-ups were limited.

Someone asked me the other day how I thought it would fall. I said 5-4 to strike down pre-clearance requirements. But the more I’ve thought about it, the more uncertain I am.

I still think the vote will be 5-4, and I think the end result will be a change in Section 5. But I’m not sure what that change will be. Here’s the options:

Section 5 is struck down.

The Section 4 formula is changed, with some states falling under Section 5 and others not.

All states will fall under Section 5.

The last is the least likely, according to most court watchers.

Again, from TPM:

“If I had to put down money,” said Ilya Shapiro, a senior fellow at the Cato Institute, “I would say it’ll be 5-4 for striking down either Section 5 altogether or at least the Section 4 coverage formula. I have maybe a 60 percent confidence level in that. Kennedy is indeed the most likely swing vote — but of course that’s what the conventional wisdom also said about [the health care case].”