



‘Demeaning insult’ in John Roberts’s Voting Rights Act decision

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One of the enduring mysteries of Chief Justice John Roberts’s opinion striking down part of the Voting Rights Act is which part of the Constitution the landmark civil rights law actually violated.

Roberts argued that the Voting Rights Act violated the “tradition” of “equal sovereignty” of the states. That concept is far more dubious than it might seem at first glance, according to a legal paper published by two longtime voting rights experts.

“The ‘equal sovereignty’ principle is not in the Constitution,” said James Blacksher, an Alabama attorney with a long career in Voting Rights. “It is, as the Chief Justice says, a ‘historical tradition.’” Go straight past the penumbras, hang a right at the emanations.

Blacksher’s paper, co-authored with Harvard law professor Lani Guinier, argues that Roberts’s opinion in the Voting Rights Act case is a descendant of what is widely regarded as the worst Supreme Court decision in American history: The 1857 Dred Scott case, in which the high court held that blacks, slave or free, could never be citizens of the United States. That case is the “origin story” of the “equal sovereignty” principle, the authors argue, because the opinion by Chief Justice Roger Taney held that it would violate the sovereignty of the slave states to recognize blacks as American citizens. By invoking that principle, the authors write in *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, Roberts was reviving “the oldest and most demeaning official insult to African-Americans in American constitutional history.”

“‘Equal sovereignty’ was the basis of the longstanding argument, going all the way back to the founding of the United States, between the slave states and the free states. The slave states claimed that they were equally sovereign with the other states to decide whether to have slavery or not to have slavery,” Blacksher said. “The ‘equal sovereignty’ doctrine that Chief Justice Roberts relied on last year is rooted in the jurisprudence of slavery.”

Last year’s decision struck down Section 4 of the Voting Rights Act, the provision of which calculated which states and jurisdictions, mostly in the former Confederate states, had to submit their voting law changes for pre-approval by the Justice Department. The process was also known as “preclearance.” Roberts wrote that the requirement was a “dramatic departure” from the principle of “equal sovereignty” that was no longer necessary because the tide of racism in America and the South had receded. It was unfair for the feds to discriminate against states to prevent them from discriminating against human beings. Since the decision, Republican-

controlled states have rushed to institute voting restrictions that might otherwise have been blocked.

Supporters of Roberts's decision won't take kindly to the argument. Ilya Shapiro, a legal scholar for the libertarian Cato Institute and a supporter of the high court's ruling in that case, wrote in an email that "states have sovereignty under our system of government (as do the people separate from either state or federal governments) that predates Dred Scott and postdates the post-Civil War Amendments." Blacksher and Guiner's paper, he added, is based on the "laughable and unserious premise" that the decision "removed constitutional protections for the right to vote," and therefore "doesn't merit response."

That's not exactly what the paper says – it argues that Roberts's conception of "equal sovereignty" trumps the federal government's authority to decide how best to protect Americans' voting rights. It also doesn't come out of nowhere.

Prior to last year's ruling, Akhil Reed Amar, a Yale law professor, wrote a Harvard Law Review article arguing that the Voting Rights Act was clearly constitutional. Amar wrote that an "extravagant anti-congressional theory of state equality" drove the Dred Scott decision, and that the court should "take care to avoid the decision's biggest mistakes."

Roberts cited a smattering of cases in justifying his decision and allusion to the "equal sovereignty" principle, none of which were the Dred Scott decision. Some of them were innocuous, like a 1911 ruling stating that the federal government couldn't force a state to decide its capital. But among the precedents Roberts cited was the 2009 Voting Rights Act case, in which the Chief Justice got seven of his colleagues to sign onto the idea of a "fundamental principle of equal sovereignty" among the states. Roberts persuaded his Democratic-appointed justices to go along because the decision temporarily staved off a final decision on the Voting Rights Act's constitutionality. After last year's decision, several observers wrote that Roberts had planted a "time bomb" in the 2009 case disguised as a temporary respite for the Voting Rights Act.

The implication of Blacksher and Guiner's paper is that "time bomb" was assembled with material that otherwise would have been unusable. The optics of relying even partially on Dred Scott to overrule the Voting Rights Act would have been atrocious, especially after Justice Antonin Scalia had referred to the law as a "racial entitlement."

Other famous cases in which the principle is invoked would also raised eyebrows. In an 1873 case, the high court interpreted the 14th Amendment's prohibition on states abridging the "privileges and immunities" of U.S. citizens as not applying to state citizenship, and in 1875 it ruled explicitly that "privileges and immunities" didn't include the right to vote while denying the franchise to a woman who sought to register. Those rulings helped establish the legal foundations of Jim Crow, and legal scholars of all stripes regard them as shameful episodes in American history.

Roberts didn't need them. Instead, thanks to that unanimous 2009 decision, Roberts had another clean precedent to rest his opinion gutting the Voting Rights Act on – one with no immediately

obvious ties to the most disreputable Supreme Court decision ever. Blacksher and Guinier write that “surely” Roberts had to have been “aware” of these precedents, though they are absent from his ruling.

“I don’t know what was in Chief Justice Roberts’s mind,” Blacksher said.

Even absent the connection to Dred Scott, the “equal sovereignty” concept as applied by Roberts is dubious. As Eric Posner, a University of Chicago law professor, pointed out after the ruling, states are treated differently for the purposes of things like disaster relief and pollution control all the time. Aside from “equal sovereignty” not appearing anywhere in the Constitution, the post-Civil War amendments were explicitly designed to empower Congress to prevent black Americans’ fundamental rights from being stripped away.

Congress is currently considering a patch to the Voting Rights Act, with a new formula for deciding which states would be covered by the obligation to submit their election law changes to the Justice Department in advance. It’s much less broad than the provision struck down by the Supreme Court, and Blacksher and Guinier don’t think it does the job. “We sympathize with the efforts, it is deeply flawed,” Blacksher says. “To put it mildly, we’re pretty unhappy with it.”

Instead, they argue Congress should pass legislation establishing that the right to vote is among the “privileges and immunities” described in the 14th Amendment and putting in place “a uniform system for administering elections and protecting the right to vote for all U.S. citizens.” That, the authors write, would eliminate the need to prove discrimination in order for the federal government to set election law standards, or to compel certain states with histories of discrimination in voting to submit to supervision by the Justice Department.

That seems improbable. If anything, conservatives have only grown more overtly hostile to the Voting Rights Act since Justice Roberts’s decision.

As conservatives fought to defeat the nomination of Debo Adebile to run the civil rights division of the Justice Department, they argued that his defense of the Voting Rights Act on behalf of the NAACP Legal Defense Fund was somehow radical, even though it was based on decades of precedent.

Conservatives have already begun to attack the Voting Rights Act fix proposed by Wisconsin Republican Rep. Jim Sensenbrenner as racist against white people. Despite exempting voter ID laws, a significant concession to Republicans, it’s not clear the bill even has the support of the Republican leadership in the House.

Before last year’s Voting Rights Act decision, conservatives argued that invalidating “preclearance” wouldn’t be a big deal because Section 2 of the Voting Rights Act, which bans discrimination in voting on the basis of race, was still in force. Yet the right is already gearing up to get the high court to strike down or narrow Section 2 as well. On Monday, the Heritage Foundation published a legal paper arguing that it would raise “constitutional problems” for Section 2 to be used to strike down “election integrity laws” that curtail minority voting if they’re not clearly intended to do so.

The days of Dred Scott are long gone, but as long as conservatives control the high court “equal sovereignty” has a bright future.