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Linda Greenhouse and the Voting Rights Act, Part 1

By: Ammon Simon – March 12, 2013

Left-leaning legal commentators such as Linda Greenhouse are hyperventilating after last week's oral argument on Section 5 of the Voting Rights Amendment, which was unfavorable for the Section's proponents. For Greenhouse, striking down Section 5 of the Voting Rights Act would be a "needless and reckless aggrandizement of power . . . [which would] erode the court's authority over time." Predictably, Greenhouse's conclusion relies upon a number of myths that should be deconstructed.

Myth 1: There are no relevant disparities between "covered" jurisdictions under Section 5, and uncovered jurisdictions.

During oral arguments, Chief Justice Roberts questioned General Verrilli over disparities in voting statistics between Massachusetts, a non-covered state under Section 5, and Mississippi, a "covered" state. Covered states must pre-clear their voting-law changes—no matter how trivial—with either D.C.'s Federal District Court or the DOJ:

> CHIEF JUSTICE ROBERTS: Just to get the — do you know which State has the worst ratio of white voter turnout to African-American voter turnout?
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> GENERAL VERRILLI: I do not.
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> CHIEF JUSTICE ROBERTS: Massachusetts [a non-covered state under Section 5]. Do you know what has the best, where African-American turnout actually exceeds white turnout? Mississippi [a "covered" state].
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> . . .
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> CHIEF JUSTICE ROBERTS: Which State has the greatest disparity in registration between white and African American?
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> GENERAL VERRILLI: I do not know that.
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> CHIEF JUSTICE ROBERTS: Massachusetts. Third is Mississippi, where again the African-American registration rate is higher than the white registration rate.

Greenhouse characterizes Chief Justice Roberts as "taunt[ing] Solicitor General Donald B. Verrilli with statistics purporting to show that Mississippi has the better record of African-American voter registration and turnout." She also calls it a "'gotcha' performance beneath the dignity of a chief justice."

Contrary to Greenhouse, asking about data that could decide a law's constitutionality is hardly a "gotcha" performance. The Supreme Court last took up Section 5 of the Voting Rights Act in *Northwest Austin Municipal Utility District No. 1 v. Holder* (2009). There, the Court avoided the constitutional question, but while nearly invalidating Section 5 on constitutional grounds, it declared, "The [Voting Rights] Act imposes current burdens and must be justified by current needs." In other words, Congress cannot foist a different legal burden on select states without timely justification; a decades-old defense for unequally burdening states' sovereignty is constitutionally insufficient. Accordingly, significant differences in voting statistics between covered states and non-coveted states are a very relevant aspect of the Court's pending decision. If Section 5′s coverage formula targets the wrong areas, the law is in trouble.

This isn't controversial. Even Solicitor General Verrilli had to admit that the Supreme Court would have struck down Section 5 in 1965 if Section 5's eligibility formula had used old evidence. From the transcript:

JUSTICE ALITO: Suppose that Congress in 1965 had based the coverage formula on voting statistics from 1919, 46 years earlier. Do you think *Katzenbach* [which upheld Section 5] would have come out the same way?

GENERAL VERRILLI: No, but what Congress did in 2006 was different than what Congress did in 1965. What Congress did — Congress in 2006 was not writing on a clean slate.

Verrilli's attempt to dodge the question with the "clean slate" formulation does not seem to hold up, especially in light of *Northwest Austin*'s "current needs" requirement.

Unfortunately for the government, as in Justice Alito's hypothetical, Congress's 2006 reauthorization of Section 5 relied upon data that is now over 40 years old. Chief Justice Roberts's questioning also exposed the resulting disparities: Covered states no longer always have the worst voting conditions for minorities.

Greenhouse tries to discredit Roberts's questioning by citing William Galvin, Massachusetts's Secretary of State, who used 2010 statistics to claim that Roberts relied upon "phony statistics," and was "deceptive" and "truly disturbing." Ironically, Greenhouse is the one citing gotcha" statistics, relying upon a "deceptive" criticism of Roberts. As Cato's Ilya Shapiro argues :

But it's Secretary Galvin who has his facts wrong—a mistake he could have avoided simply by reviewing the lower court decision that the Supreme Court is considering. In his dissenting opinion, D.C. Circuit Judge Stephen Williams examined the voter registration and voting statistics from the 2004 presidential election—not the 2010 mid-term elections—because it was the last national election before Congress reenacted Section 5 in 2006. The question the Supreme Court is considering—which seems to be lost on Galvin—is whether Congress acted appropriately in retaining the same coverage formula that has been in place since 1975 despite significant changes in the country. To answer that question, the Court must of course look at the statistics that were in the 2006 legislative record. And those statistics, which are publicly available and come directly from the Census Bureau, fully vindicate the Chief Justice's statement.

Even if Chief Justice Roberts could only argue statistically that there are no meaningful differences between covered states and non-covered states—and Nate Silver suggests as much—that does not justify Section 5 as currently written. Why not apply Section 5 to all the states? Why single out some states and not others if the conditions are the same? Why leave some jurisdictions off the hook because they were better in 1975?

In Part 2, I will address the remaining two myths that Greenhouse relies upon.