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The GOP Dilemma Over the Voting Rights Act

A Supreme Court ruling striking down a major piece of the law could leave the party divided.

By Matthew Cooper – June 19th, 2013

In January, the Supreme Court heard the case of an Alabama county that wanted to change the venerable 1965 Voting Rights Act. On behalf of the government, Solicitor General Donald Verrilli argued that the act has worked well and meets constitutional muster. But swing-voting Justice Anthony Kennedy seemed skeptical about the Voting Rights Act. "Well, the Marshall Plan was very good, too," quipped Kennedy. "But times change."

Congress may be about to find out how much times have changed. The Supreme Court is poised to turn over a key portion of the Voting Rights Act, likely kicking it back to Congress, adding another burden for the log-jammed legislature.

It's particularly heavy baggage for Republicans. While Democrats and civil rights groups stand largely united behind the broadest interpretations of the Voting Rights Act, for Republicans it's a trickier matter. On one hand, they are eager to reach out to minority voters. They eagerly tout their charismatic, high-profile minority officeholders like Sens. Tim Scott or South Carolina and Ted Cruz of Texas, Nikki Haley of South Carolina and Bobby Jindal of Louisiana. If Congressional Republicans seem unwilling to rebuild the Voting Rights Act should the court curtail it, they risk being seen as indifferent or even hostile to minorities. On the other hand, the party's Tea Party wing is likely to revolt if the Republican House they elected tries to re-establish what many see as a federal overreach. Already, Cruz has offered an amendment to address the Supreme Court's decision in an Arizona voting rights case earlier this week that struck down a proof-of-citizenship requirement.

At issue before the Supreme Court in the Alabama case is a key provision of the 1965 Voting Rights Act that requires jurisdictions (mostly in the South but not entirely) to get federal approval (either from the Justice Department or a panel of the D.C. Circuit Court) before it can change any voting procedure. That can be something as big as redistricting a state's Congressional lines or a town moving a polling place to a different location. The idea behind the law was to keep elected officials in the Jim Crow South from implementing ruses to keep blacks from voting.

This preclearance procedure is contained in what's called Section 5 of the act and it faced court challenges immediately when it was enacted. In 1965, the Warren Court upheld emergency provision and said that it had to be regularly renewed. The first period was for five years but Congress has extended the renewals. The 2006 renewal of the Section 5 was for 25 years and passed the House by almost 400 votes and the Senate by 98-0--a testament to the law's enduring popularity and effectiveness.

But the formula for determining who gets covered--a combination of voting practices and patterns-- hasn't changed since the 1960s. It applies to nine states — Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia — plus counties and municipalities in other states. Indeed, some states and cities have fallen under Section 5's sway even though they weren't legally segregated, including such as certain parts of New York City and towns in New Hampshire.

There's reason to think the court is unlikely to allow those discrepancies to stand until 2031 when the act comes up for renewal. In 2009, the Supreme Court used the case of an obscure water utility district in Texas to express doubt about the viability of Section 5 preclearance procedure with Chief Justice John Roberts all but inviting Congress to limit its scope. "Things have changed in the South," Roberts wrote. "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels....The evil that (Section 5) is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," Roberts wrote in the majority 8-1 opinion which suggests even a liberal justice might jump the fence. "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."

When the Supreme Court took up a more formidable challenge to Section 5 this year, *Shelby County, Ala. v. Holder*, Voting Rights Act watchers braced for a seismic shift in how the law is interpreted.

If the court strikes down Section 5 but gives Congress room to recraft it then the matter could create a mess comparable to immigration reform, fracturing the GOP. We don't know yet because Congressional Republicans haven't weighed in on a pending case although many Democrats submitted amicus briefs on behalf of keeping the law just where it is, including Senate Majority Leader Harry Reid.

One figure to watch is Sen. Scott. He was elected to Charleston's City Council in 1995, becoming the first black Republican elected to any office in the State since Reconstruction. A couple of years later the Clinton Justice Department sued the city trying to break it up its council into single-member districts to make it easier for minorities to be elected. At the time, Scott bristled at the move: "I don't like the idea of segregating everyone into smaller districts. Besides, the Justice Department assumes that the only way for African-Americans to have representation is to elect an African-American, and the same for whites. Obviously, my constituents don't think that's true." Scott could provide cover for Republicans who want to argue that times have changed and Section 5 can be safely curtailed.

With the case still pending, Republicans on Capitol Hill are reluctant to talk about a case. That goes for consultants, too. "So much depends on what the court decides," says Whit Ayres, a Republican pollster who has run many races in the South while offering a familiar critique of the act that it "has led to more partisanship on both sides" by creating more homogeneous districts. Indeed, Republicans have benefited from the act over the years because it has fostered the creation of Minority-Majority districts that elect minority candidates but have also created surrounding white districts that are more fertile for Republicans.

It's widely assumed that civil rights groups will draft quickly draft a new Section 5 championed by Democrats. But there are few signs that the conservative legal establishment is similarly motivated. Indeed, most conservative groups stayed out of the *Shelby County* case which shows how volatile this issue is for Republicans. It was brought by a little-known group of libertarian

leaning lawyers who were looking for a test case to challenge the law. A conservative lawyer, Edward Blum, found a willing plaintiff in Shelby County, Ala.--a bedroom community o fBirmingham where officials insisted Justice Department decisions over things like annexation to be not only meddlesome but unconstitutional. Washington lawyer Bert Rein argued the case, his first before the high court.

While some state attorneys general have weighed in with amicus briefs, it's perhaps telling how many did not, including Virginia, where the Republican Attorney General Ken Cuccinelli, is running for governor and has been eager to extinguish the impression that he's out of the mainstream. Democratic Attorneys General in Mississippi and North Carolina weighed in on the side of the Justice Department, joining a brief with attorneys general from California and New York. Louisiana and South Carolina's Republican Attorneys General declined to file amicus briefs on any side while Alabama and Texas attorneys general--both Republicans--weighed in on the side of Shelby County as did Alaska's attorney general. The Cato Institute weighed in for the plaintiffs. The Heritage Foundation didn't.

Abigail Thernstrom, the Republican-appointed vice chair of the U.S. Commission on Civil Rights, thinks the court may not strike down Section 5 or curtail it significantly. "Will Justice Anthony Kennedy (the pivotal vote) want banner headlines in the mainstream media that, however misleadingly, read, 'Court declares VRA [Voting Rights Act] to be unconstitutional'?" A lot of Republicans may be hoping she's right.