Slate

Amy Coney Barrett Could Bring Down Decades of Anti-Discrimination Law

The court is poised to take away one of the most important tools for combating systemic racism.

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During her confirmation hearing, Judge Amy Coney Barrett was asked if she agreed with the late Justice Antonin Scalia that the Voting Rights Act was a "racial entitlement." Barrett, who has said, "His judicial philosophy is mine too," declined to answer. If she indeed shares Scalia's view of the Voting Rights Act, the Supreme Court is likely to embrace an idea that would destroy much of anti-discrimination law: that race-conscious countermeasures against discrimination are themselves discriminatory.

Scalia made his infamous "racial entitlement" statement during oral argument in *Shelby County v. Holder*, the 2013 case that eviscerated the Voting Rights Act. Section 5 of the VRA required states and localities with a history of discriminatory voting practices to submit any changes to the federal government for preclearance before implementing them. Practices that were "retrogressive"—meaning, that would put voters of color in a worse position than in the past—were prohibited. This mechanism was affirmatively anti-racist: It stopped discrimination before it could start, making the VRA the most effective civil rights law the country has ever known.

Conservatives, however, assailed the preclearance regime as providing special treatment to Black voters and other people of color. In 1987, the Reagan Justice Department lamented that Section 5 was being used to provide "a guaranteed minimum floor for minority electoral success." In *Shelby County*, before the case reached the Supreme Court, a judge on the D.C. Circuit Court of Appeals argued that Section 5 "mandates race-conscious decision-making" inconsistent with "the Reconstruction Amendments' commitment to nondiscrimination"—referring without irony to the 13th, 14th, and 15th amendments, which were ratified to guarantee Black freedom and equality. A number of groups made this argument in front of the Supreme Court. The libertarian Cato Institute, for example, claimed that Section 5 "denies equal protection of the laws by providing legal guarantees to some racial groups that it denies to others."

The Supreme Court ultimately ended federal preclearance, 5–4, by striking down the coverage formula that determined which jurisdictions were subject to review. Chief Justice John Roberts concluded the formula no longer spoke to "current conditions." "Our country has changed," he wrote.

The notion that America is essentially post-racial—and that focusing on race will take us backward not forward—is central to conservative legal ideology. This commitment goes far beyond *Shelby County*. It undergirds a comprehensive legal strategy aimed at dismantling the most significant pieces of anti-discrimination law won during the civil rights movement.

Take the still-standing Section 2 of the Voting Rights Act, which allows plaintiffs to sue over discriminatory voting procedures. It prohibits intentional discrimination but also any voting practice that "results in a denial or abridgement" of the right to vote on account of race. Congress added that language to the VRA in 1982 as a rebuke to the Supreme Court, which two years prior had held the act applicable only to intentional discrimination. The legislative report accompanying the 1982 amendment explained that Congress felt disparate impact liability—the results test—was necessary to get at the key question of whether voters "have an equal opportunity to participate in the political processes and to elect candidates of their choice."

Disparate impact liability is a critical tool in the struggle to root out racism and create equal opportunity. First, most people who discriminate on the basis of race have learned to hide it. Disparate impact law allows victims of such covert discrimination to seek justice without having to prove what was hidden in the perpetrator's mind. Second, everyone harbors some amount of implicit bias that can affect decision-making. Third, disparate impact liability can redress structural discrimination—systems and standards that may seem unbiased but that bake in disadvantage based on past societal discrimination.

And it works. Civil rights lawyers have used Section 2's results test to work a revolution in Black and brown political representation. In particular, they attacked districting schemes that diluted the voting power of communities of color—the "packing" of these voters into as few districts as possible to limit their influence, the "cracking" of communities so voters were dispersed and unable to exercise collective strength, and the use of at-large elections that privileged white majorities who voted against candidates preferred by voters of color. These lawsuits won maps that created majority-minority "opportunity districts" where these communities finally had a shot at electing their candidates of choice. Thousands of Black and brown candidates have been able to win office as a result.

These revised maps were race-conscious remedies for discrimination. Critics quickly moved to cast them as racial quotas. In the 1990s, the Supreme Court repeatedly struck down opportunity districts as unconstitutional racial gerrymanders, applying the 14th Amendment (again without irony) to reduce Black political power. In a 2006 case, Roberts wrote about the creation of Latinx opportunity districts, "It is a sordid business, this divvying us up by race." In a 1994 case, Justice Clarence Thomas decried the involvement of the federal courts in "dividing the Nation into racially segregated electoral districts," objecting that they contribute to the "racial 'balkanization' of the Nation," and concluded that the Voting Rights Act shouldn't apply to redistricting at all. Justice Neil Gorsuch indicated in 2018 that he agrees.

The results test still stands, but it is in the crosshairs. Critics say the test gives race too much consideration in the crafting of election rules, even as people of color continue to face blatant voter suppression and are disproportionately unregistered to vote, subject to voter purges, and more likely to have their mail-in ballots rejected. They argue Congress lacked constitutional authority to enact the results test. This term, the Supreme Court will consider a case from Arizona that presents an opportunity to limit or even invalidate the results test.

And this is just one front in the battle against disparate impact. In 2009, Scalia wrote a concurrence that made a frontal assault on Title VII of the 1964 Civil Rights Act, which prohibits non–job related employment standards that have a disparate impact based on race or another protected characteristic. He wrote that the constitutional guarantee of equal protection prohibits the federal government from requiring employers, as he put it, "to evaluate the racial

outcomes of their policies and make decisions based on (because of) those racial outcomes." In 2015, the Supreme Court narrowly upheld the existence of disparate impact liability in the Fair Housing Act, 5–4. Two of the justices in the majority, Anthony Kennedy and Ruth Bader Ginsburg, are no longer on the court, and the Trump Administration has just released new regulations that could give it a reason to overrule that case.

Trump's Justice Department is also pushing lawsuits against Harvard and Yale to overturn a 2016 ruling that preserved affirmative action in college admissions. Trump's Labor Department is investigating Microsoft for its pledge to double the number of Black senior employees. Last month, President Donald Trump issued an executive order banning diversity training that he says teaches "divisive concepts" for government employees and federal contractors. At the vice presidential debate, Mike Pence denied the existence of systemic racism in America and implicit bias in law enforcement.

We should not be surprised by this legal and cultural attack on race-conscious remedies for discrimination. Many people would rather not talk about racism. Frequently in our history, when we have made progress toward racial equity, particularly Black empowerment, much of our nation has turned to so-called colorblindness and portrayed remedial measures as racial favoritism.

A 6–3 Supreme Court that embraces this ideology could wipe out disparate impact liability and affirmative action. Worse, it could weaponize the Constitution to destroy the racial justice priorities of a new Congress: the Voting Rights Advancement Act, a bill aimed at reviving Section 5; the Green New Deal, with its targeted public investments in front-line communities of color; and federal funding for historically black colleges and universities.

But closing our eyes to racial inequity will not make it go away. We must tackle it head on. And that means being willing to employ race-conscious policies and legal remedies to achieve true opportunity for all people. We need a judiciary that understands this.