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POLITICS

JOHN ROBERTS'S LONG GAME

Is this the end of the Voting Rights Act?

By Linda Greenhouse

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THE SUPREME COURT delivered appalling decisions in June—on abortion, guns, and environmental regulation—but the conservative supermajority is poised to strike an even greater blow against American democracy. The justices now have the Voting Rights Act of 1965 in their sights. On October 4, the second day of the new term, they will hear Alabama's challenge to a federal district court's finding that the state has to create a new majority-Black congressional district. This is no ordinary case of statutory interpretation. At stake is a crowning achievement of the civil-rights era, and the meaning and measure of racial equality in the hands of a Supreme Court reshaped by Donald Trump.

Back in February, in a 5–4 vote, the Court's conservative majority temporarily blocked the district court's order; the majority didn't even deign to issue an opinion explaining its reasoning. The justices' audacious move freed Alabama to hold November's congressional elections in districts that the lower court had declared invalid. This went too far even for one of the Voting Rights Act's best-known critics, Chief Justice John Roberts, who dissented. To resurrect a pungent phrase, his colleagues out-segged him. But it would be a mistake to read his dissent as a sign that he has abandoned a project that has obsessed him since his days as a young lawyer in the Reagan Justice Department.

The most likely explanation for his dissent was that he flinched at the optics: Alabama's request for a stay had arrived on the Court's "shadow docket." Every court maintains an emergency docket to handle matters that can't wait for a full hearing. But during the Trump years, the Supreme Court exploited this device to hand

victories to the president without a full briefing, public argument, or even advance notice.

Although Alabama is 27 percent Black, only one of its seven congressional districts—the one that includes Birmingham—has a Black majority, despite large Black populations concentrated in Mobile and in the "Black Belt" counties that stretch across the state. It may have struck the chief justice that using the shadow docket to preserve this status quo in defiance of the lower court's decision was an unappealing step, and an unnecessary one at that.

When the justices decide the case, *Merrill v. Milligan*, this term, they will be free not only to overturn the lower court's decision, but to rewrite the rules governing how the Voting Rights Act applies to similar cases anywhere in the country. Roberts conceded in his dissent that the district court had correctly followed precedent. He also made it clear that, in his view, the precedent is overdue for revision. As we saw in June, overturning precedent is no obstacle to a majority ready and willing to use its power to get what it wants.

From the March 2021 issue: American democracy is only 55 years old—and hanging by a thread

The justices have framed the question for this round as "whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act." But the real question, the perilous one underlying that seemingly benign formulation, is this: Is Section 2 itself constitutional? And in the dangerous space forced open by that question, the young John Roberts and the chief justice of the United States meet.

Section 2 of the Voting Rights Act prohibits any electoral practice that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." A violation has occurred if members of a racial or language minority group "have less opportunity than other members of

the electorate to participate in the political process and to elect representatives of their choice." Section 2 is about the allocation of political power. It takes aim at "vote dilution," defined as dispersing a cohesive minority group among several districts or lumping members of the group into one district. "Cracking" and "packing" seem to be what was happening in Alabama.

A 1986 decision, *Thornburg v. Gingles*, laid out a road map for how to prove such a case, requiring plaintiffs to demonstrate that the minority group was "sufficiently large and geographically compact to constitute a majority." That test is central to the Alabama case. Obviously, applying that test requires an awareness of race. How can line-drawers, or courts, know whether a minority group's vote is being diluted without knowing where the members of the group live, and how many of them there are?

Alabama is saying, essentially, that any effort to eradicate racial discrimination is itself racial discrimination.

And yet Alabama argued that, by taking race into account at all, the district court indulged in "the noxious idea that redistricting begins and ends with racial considerations." The creation of a new majority-Black district, the state claimed, was therefore nothing more than a "racial gerrymander," a phrase that Alabama's lawyers used multiple times in the application for a stay. Unless the justices blocked the order, the state warned, "Alabamians will suffer the constitutional harm of being assigned to racially segregated districts, irreconcilable with the Fourteenth Amendment, the Fifteenth Amendment, and the VRA as initially conceived." Section 2 is supposed to be a "shield against racial discrimination," the state's formal brief reads. "It is not a sword to perpetuate it."

These sentences merit parsing with care. The words invite a dramatic conclusion: that the heart of the Voting Rights Act, as interpreted by the Supreme Court a generation ago and as applied many times since, is unconstitutional.

WHAT ALABAMA is saying, essentially, is that any effort to eradicate racial discrimination is itself racial discrimination. But how can that be? How can we know when a Voting Rights Act remedy is called for unless we can take account of race? Alabama is trying to turn the statute inside out and upside down. The district court, in rejecting the state's argument, observed that it was "obvious" that its logic would "preclude any plaintiff from ever stating a Section Two claim."

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That conundrum will be obvious to the Supreme Court as well. But for the conservative justices, the problem is not how to satisfy the *Gingles* test but rather the test itself. Roberts made that point in his dissent from the stay. "While the District

Court cannot be faulted for its application of *Gingles*," he wrote, "it is fair to say that *Gingles* and its progeny have engendered considerable disagreement and uncertainty." He then quoted Justice Anthony Kennedy, who warned in a 1994 vote-dilution case that "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act."

Proportionality is a loaded word. Section 2 explicitly disclaims the goal of proportional representation: "Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." But the justices who decided *Thornburg v. Gingles* remained worried about the specter of proportionality. While nominally unanimous, they produced four separate opinions. They were clearly grappling with whether the decision would hardwire a proportionality standard—in effect, a quota—into a statute that purported to reject it.

Read: The Supreme Court needs to show its work

That concern has never fully been put to rest. The statute remains unfinished business, like the fight over affirmative action, which the conservatives on the Court have been trying to finish off for decades. It's not by chance that voting rights and race-conscious university admissions have both ended up on the docket this term. Why wouldn't they, when their final unraveling is within reach?

The same law firm—Consovoy McCarthy—is representing Alabama and the plaintiffs in two cases the Court will soon hear challenging any consideration of race in admission to Harvard and the University of North Carolina. The firm's founding partner William Consovoy, a former clerk to Justice Clarence Thomas, is one of the right wing's go-to lawyers; he defended President Donald Trump in his efforts to shield various records from disclosure in 2019. The firm's two lawyers on the Alabama brief represent the rising generation: One clerked for Thomas and the other for Roberts.

Consovoy's case against Harvard failed in two lower federal courts, but those defeats were a warm-up act. Now comes the real show. The first line of his petition to the Court is breathtaking for its brash confidence—and its cheekiness: "It is a sordid business, this divvying us up by race." Instantly recognizable, this is a quotation from one of Roberts's earliest Supreme Court opinions, in which he dissented from the majority's finding of vote dilution in Texas, in a Section 2 case.

Although the court decided *Gingles* 19 years before Roberts became chief justice, the case was no abstraction to him. Early in his career, he was deeply involved in a monumental political battle that ultimately led to the decision.

In 1980, the Supreme Court decided *City of Mobile v. Bolden*. At issue was the validity of a common form of municipal government in the South, a commission consisting of three members who were elected at large rather than from individual districts. At-large systems all but guaranteed that even cities with sizable Black populations would have no Black members in elected positions. And indeed, no Black candidate had ever been elected to the city government in Mobile, Alabama, where racial polarization ran so deep that even a white candidate viewed as sympathetic to the interests of the Black community was doomed to lose.

The plaintiffs in the class-action lawsuit, representing all Black citizens of Mobile, claimed that the at-large system violated Section 2 and the equal-protection guarantee of the Fourteenth Amendment. In a 6–3 decision, the Supreme Court made short work of both claims. Section 2, Justice Potter Stewart wrote for the majority, was no more than a statutory mirror of the Fifteenth Amendment, which bars racial discrimination in voting and which the Court interpreted as applying only to intentional discrimination. The Fifteenth Amendment "does not entail the right to have Negro candidates elected," Stewart observed gratuitously. The Fourteenth Amendment was also a lost cause; four years earlier, in *Washington v. Davis*, the Court had ruled for the first time that proof of intentional discrimination was necessary to establish a violation of the equal-protection clause. The fact that a policy disproportionately harmed or disempowered one racial group, in other words, was not enough.

After this devastating ruling, civil-rights activists turned to Congress. The Supreme Court had administered something close to a death blow to Section 2, and only an amendment making clear that the law covered discriminatory outcomes as well as discriminatory purpose could save it. The Democratic-controlled House of Representatives responded quickly and produced such a bill. John Roberts, 26 years old and having recently completed a clerkship for then-Justice William Rehnquist, was working as a special assistant to President Ronald Reagan's attorney general. His portfolio included voting rights, and in a series of memos that came to light soon after his 2005 Supreme Court nomination, Roberts argued vigorously against the passage of the proposed amendment.

In one memo, he wrote: "Violations of Section 2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes." The proposed "effects test," he wrote, "would establish essentially a quota system for electoral politics" that was "inconsistent with this Nation's history of popular sovereignty."

Ultimately, the Senate passed the bill and Reagan signed it. But the fight wasn't over. To the contrary—first under Chief Justice Warren Burger, then under Rehnquist, and finally under Roberts himself, the Supreme Court went assiduously about disengaging the federal government from the civil-rights revolution. Busing for integration ended at the school-district line. White contractors were deemed the victims of city policies aimed at guaranteeing minority-owned businesses a share of the work. The Court weakened the part of the Fourteenth Amendment that gives Congress the power to enforce its guarantees.

No one in a position of power has done more for this cause than John Roberts. One of his first major opinions, the *Parents Involved* school-integration case in 2007, declared his determination to get government out of the business of counting people by race. (Roberts actually borrowed the most famous line of that opinion—"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"—from another federal judge, without attribution.)

David Litt: A court without precedent

In *Shelby County v. Holder*, Roberts's majority opinion essentially killed Section 5 of the Voting Rights Act, the highly successful "preclearance" rule under which jurisdictions with a history of racial discrimination in voting had to get permission from the Justice Department or a federal court before making any change in voting procedures. The South had done so well in correcting the sins of its past, Roberts wrote, that the law as applied could no longer be justified.

The impact of the *Shelby County* decision was stunning. Within hours, Greg Abbott, then the attorney general of Texas and now the state's governor, announced that a stringent voter-ID law that had been blocked under Section 5 the previous summer would go into effect "immediately." That was just the beginning. States across the South and the Southwest have been quick to exploit their new freedom from the federal scrutiny that once would have deterred changes in voting hours, ID requirements, and other seemingly neutral moves with disproportionate effects on minority voters.

The end of Section 2 could be even more damaging because, in many respects, it is the more powerful provision. It applies nationwide, and does not require, as Section 5 did, proof that the challenged policy has made things worse for minority voters, only that such voters have been deprived of an opportunity that should have been theirs. The prospect that Section 2 may now follow Section 5 into oblivion feels at once scarcely believable and sadly inevitable. If this comes to pass, it will be almost impossible to prove that a state has gerrymandered its electoral districts to disempower minority voters, or for a court to order that its map be redrawn.

Look again at that curious phrase from Alabama's lawyers, the one describing the district-court order as "irreconcilable with the Fourteenth Amendment, the Fifteenth Amendment, and the VRA as initially conceived." What is "initially conceived" supposed to mean? It can only be a reference to that 1981 fight over the meaning of Section 2, when the young John Roberts argued that it should not be "too easy to

prove" that a state had violated the voting rights of its citizens. The Alabama lawyers are speaking directly to Chief Justice Roberts, telling him that the law has been constitutionally problematic for decades, and that now, in this very case, in this very year, he finally has the chance to make it right.

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