Scalia, Section 5 of the Voting Rights Act of 2006

BY ADRIENNE JONES
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This month, the U.S. Supreme Court will issue its decision in Shelby v. Holder, on the constitutionality of Section 5 of the Voting Rights Act, the section that forces certain “covered” states to have voting law changes reviewed by the Department of Justice for approval or “pre-clearance.” Section 5 is considered the heart of the legislation and has been vigorously opposed by conservatives.

At oral argument, I was surprised to find that the remark I agreed with most came from Justice Antonin Scalia. He said, speaking of Section 5, “Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political process.” Unfortunately, Scalia was mistaken about which “racial entitlements” this country is working to extract itself from.

Section 5 is not the origin of this country’s tradition of “racial entitlements.” Rather, it is the unusual solution that has worked to include all races in the U.S. franchise.

When our country was founded, the right to vote was limited to white men with property. By 1850, the property requirement was dropped. Blacks were denied the right to vote until after the Civil War when the 15th Amendment opened the franchise to black men. But, after the 1876 Hayes-Tilden election, Jim Crow denied blacks the vote a second time.

In states currently covered by Section 5 of the Voting Rights Act, literacy tests, grandfather clauses, poll taxes, economic reprisals and violence were used to maintain racial entitlements to vote. When challenged by federal law, these states refused to abide by the 15th Amendment’s mandate. And, since 1965, states have used various tactics to resist Voting Rights Act coverage.

In 1965, President Johnson proposed the Voting Rights Act. Section 5 of the Act provided a unique method of compelling state compliance with the 15th Amendment. States covered by Section 5 were forbidden from using literacy tests and other similar devices to prevent registration and the casting of ballots, could be subject to oversight by federal examiners and observers and, required “pre-clearance,” review of all voting changes by the Department of Justice, before enactment.

In the 1960s, the Supreme Court supported the Act and through case law clarified that Section 5 included all voting law changes, including annexations, redistricting and the changing of polling places.

Congress overwhelmingly reauthorized Section 5 in 2006. Three months of hearings were held during which Congress decided that Section 5 was still needed. The record shows that Section 5 prevented many changes that would have resulted in voter discrimination and that most and the worst of the nation’s voting rights violations still occur in covered states.

Scalia argues that the overwhelming vote in Congress occurred because politically, Congressional representatives are unable to vote against “the most important of the civil rights laws.” He’s right. Representatives are supposed to vote for what constituents think should be the law, and that is what Congress did in 2006.

Since 2006, covered jurisdictions did not submit all voting changes for pre-clearance, gerrymandered district lines based on race, proposed and passed voter identification laws to limit votes, purged voting rolls discriminatorily and tried to intimidate and dissuade minority voters at or before they got to the polls.

Scalia is correct: Racial entitlements are difficult to undo. The work of Section 5 is not complete. I am really hoping that Scalia will apply his own logic to the Shelby deliberations, and vote accordingly.

Jones is a lawyer, a resident of Dubuque and a faculty fellow in political science at the University of Wisconsin-Platteville. Jones is a Ph.D candidate from City University of New York in the process of completing her dissertation, “The Voting Rights Act Under Siege.”