

Defending *Georgia v. Ashcroft*
(While Supporting Renewal of the Voting Rights Act)

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On the right today, there is some distress over components of the negotiated renewal of the Voting Rights Act, the claim being that the preservation of the "trigger" or the 25 year renewal period are unfair to covered states or lacking in "modernity." Yet both the left and right seem comfortable with the provision effecting a "partial reversal" of the Supreme Court's decision in *Georgia v. Ashcroft*.² On this point, I think progressives are mistaken. For while the renewal overall makes sense, it is better enacted without this additional feature. In fact, *Georgia v. Ashcroft*—not its invalidation, partial or otherwise—fits well within the preserved core of the VRA as contemplated under the negotiated agreement now before the Congress.

Two qualifications or advisories must come first, though.

First, I represent Democratic Party organizations, but not on the views expressed here. My clients were not consulted on this paper; they did not authorize it; and for all I know, some, if they were to read or hear about it, would both disagree with and condemn it.

Second, I am not seeking here to defend the craftsmanship of the case: to lionize it as a model of reasoning, or to pronounce it a fair treatment of the precedent, or to subscribe to the elegance of its reasoning about politics, racial politics or otherwise. In political cases—whether in campaign finance, or Voting Rights Act, or partisan gerrymandering, or other such controversies—the Supreme Court produces political analyses of questionable quality, and worse. There are some subjects, I am sure, which the Court is well-suited to judge and to discuss with assurance. Politics does not seem to be among them. In discussing *Georgia v. Ashcroft*, I will stay away from questions of craftsmanship and deal more the Court's theoretical framework and less with the accuracy with which it hit some jurisprudential target.

What the Court was groping for was some flexibility in political bargaining—some more room for politics, in a world where African-American voters have representatives at the proverbial "table"—to achieve the Voting Rights Act's purposes. It

¹ Prepared for a panel of the American Constitution Society, June 18, 2006. The views here are those of the author only and do not necessarily represent the position of any client of Perkins Coie's Political Law Group.

² 539 U.S. 461 (2003).

assumes that in some circumstances, this bargaining, even where it does not produce safe or coalitional districts but also "influence" districts, might still achieve results on a statewide scale advantageous to minority interests while protecting minority political access and representation at all levels. Of course, there are political trade-offs at work here, but the Court correctly identified them as entirely defensible and consistent with the Act in *these* particular political circumstances, and properly accounted for in retrogression analysis.

Some discerning critics—like Professor Karlan at Stanford—have shown how the Court makes some questionable assumptions and skips over some obvious problems with its analysis. She notes that "influence" is easily abused: in districts where African-Americans vote for the lesser of two evils, they can make up an indispensable part of the winning coalition, but because they have nowhere to go—no real alternative—their influence is not much to speak of. Their votes are counted in the winning column but may not, in practical terms, count for much. With victory may come irrelevance. Karlan also brings out the horror tale of a Democrat who counts on black votes until he decides to become a Republican, at which point black voters have helped to build a Republican career where their prior support counts for worse than nothing.³

Professor Karlan is right: there is an incompleteness—even a political naiveté—to the Court's analysis, which leaves out what can go wrong under cover of this kind of influence analysis. Yet just as Karlan has a point, so does the Court. For while there are costs under this kind of analysis, there are also opportunities, open now in a world transformed by the Voting Rights Act. Since the purpose of the Voting Rights Act when enacted was to remove discriminatory barriers to the exercise of black political power, then some account is fairly taken, in assessing retrogression, of the different ways that black political power can be exercised. *Georgia v. Ashcroft* represents a recognition that minority political power, while never fully secure at the ballot box, has progressed to some extent from the voting booth to the back room, where hard political calculation and bargaining takes place.

Several critics have insisted that the interests of voters and incumbents should not be equated, and that the interests of the former should not be assigned to the protective custody of the latter. Again, this is a fair point, but just as the Court's position is fraught with problems, so, too, is this objection. It may be true that incumbents act in their own self-interest—I am entirely sympathetic to this point, and have said so, in the field of campaign finance, where incumbent self-interest has been applauded by others as a form of authoritative "expertise." But we have to proceed carefully in questioning the very

³ Pamela S. Karlan, "Georgia v. Ashcroft and the Retrogression of Retrogression," 3 *Election L.J.* 21 (2004).

black representation we are seeking under the VRA to defend and advance. The officials in question are elected officials, and while their own self-preservation may be one of their goals, it is not fair to say that this is their only goal, to which they would sacrifice the interests of their constituents.

It is especially unfair to say as much when some elected representatives entered into a bargain against their own individual interests in the interest of the bargain as a whole. After all, in other contexts, we call politicians the "experts" who possess an expertise in matters political; they presumably have some political expertise in bargaining even outside the field of campaign finance, and just as much in local political bargaining as in the construction of sweeping federal statutory schemes.

The principal question to be asked of *Georgia v. Ashcroft* is not whether its execution as jurisprudence is flawless, but whether it was gesturing in a promising direction. I understand the critics to be making two arguments:

1. That in practical application, *Georgia v. Ashcroft* sets out a standard so vague and uncertain in scope that it might, for all intents and purposes, doom any meaningful retrogression analysis; and
2. That it sets out a theory of fair representation at odds with the choice that Congress, in otherwise renewing section 5, has made. That is to say, Congress has concluded that there is a difference between the right to "participate," even as part of a winning coalition, and the right to "elect," and it has chosen, in this instance, the latter, which cannot be reconciled with the "influence-district" analysis adopted in *Georgia v. Ashcroft*.

To the first objection, I would reply: we cannot say for sure where this case will lead, because we have not given it the time to lead anywhere. Opposition arose immediately and furiously and now the Congress is poised to reject the Court's analysis. But time and a little patience here could only be helpful: helpful to judging the effectiveness of more scope for political bargaining, and helpful to shoring up, in the light of experience, both the constitutional standing of the VRA and its effectiveness in changed political conditions. After all, the more strenuous attacks on the VRA suggest that it is simply out of date, unresponsive to contemporary politics and therefore potentially counter-productive if forcibly maintained without change in its current form. *Georgia v. Ashcroft* answers this concern from *within* the Voting Rights Act, not outside

and hostile to it, and it does not seem a very good answer that we can't know how it will come out.⁴

No we can't, anymore than we could know that the Republican Party would embrace the Voting Rights Act as a vehicle for advancing their partisan interests, often profoundly inimical to the aspirations and interests of the minority community. And I can't help point out that many of these same Republicans, for the same reasons, have thrown their support to the proposed reversal of *Georgia v. Ashcroft*. Some have taken this position less out of fidelity to a fully preserved Voting Rights Act, and more because they fear the effects of the sort of political bargaining and calculation on their partisan political program in the South. Anyone concerned about progressive politics in the South would have to give this some close thought before rejecting *Georgia v. Ashcroft* in the manner proposed.

Someone might say at this point that the argument here sounds much like the one by Republican critics of the VRA renewal, a sly crowd of Republicans who insist that they are indeed concerned that the VRA is out of date. They call for changes in the trigger and a tight limit on the renewal term, and some also have set their sights on eliminating or gutting the minority language assistance provision. This is not really a concern with "modernizing" the VRA: it is labeled that way, but sooner or later, their true intentions come into view, as did those of Representative Lynn Westmoreland of Georgia when he recently referred to section 5 as merely an outlet for the "whims of federal bureaucrats."

Retaining, rather than reversing, *Georgia v. Ashcroft* serves by contrast a program of renewing the VRA at this time while building into it new possibilities for advancing its fundamental goals. Progress toward the achievement of these goals is never a sure thing. Politics intrude, as we have seen when Republicans embrace, for their own political purposes, majority-minority districts; or when the Department of Justice is revealed in this Administration to have adopted a fully partisan agenda in the discharge of its pre-clearance responsibilities. Yet not all politics works against the purposes of the Act. Adjusting retrogression analysis to accommodate creative, flexible political action favorable to minority political interests—in which minority political leadership is actively, centrally involved—cannot be judged a threat to the purposes of the Voting Rights Act. There is ample opportunity in the future to judge its long-term effects and no

⁴ It also unclear, to say the least, how the revised standard contemplated by the proposed "reversal" will be interpreted: there is little legislative history on the point, not particularly useful, and experience with the Voting Rights Act should prepare us for unpredictable, unexpected results. We are certainly not choosing here between ambiguity and gleaming clarity.

reason to assume the worse. We may find that it strengthened, not weakened, the Act's practical impact on the political world of today.

Finally, and this is where I do not bear some bias, or put less alarmingly, predisposition: and that is a deep respect for politics and an awareness that while we need to regulate how it is conducted in some important particulars, we should always honor its legitimate claims and make way for some of its creative pressures. John Dunn, an impressive and clear-headed theorist of politics, has offered this picture of politics as it "really is":

*...a ceaseless and overwhelmingly muddled struggle: not a simple well-defined-tug-of-war between two distinct teams of consciously opposed contenders, but a seething melee of superimposed teams, of constantly changing membership, profoundly undependable commitment and often blatantly faltering grasp of what is going on.*⁵

And maybe because we cannot always know what is going on, then we should, as progressives, allow a free politics to take its course, understanding that in the farrago of bargaining and trading and compromise, there are real possibilities for something good to happen.

⁵ John Dunn, *The Cunning of Unreason: Making Sense of Politics* (2000) at 192-193.