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Not So Inconsistent [Abigail Thernstrom]

In a New York Times column, Ramesh Ponnuru goes after conservatives for their "deep inconsistency" on issues involving race and law.

Criticism of conservatives is often well-deserved. But in this case, I think not.

Ramesh celebrates two much-beloved conservative principles — originalism and judicial restraint — as reasons to eschew Supreme Court review of two key civil-rights cases — Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO) (decided June 21) and the much-discussed case of Frank Ricci (and colleagues), firefighters in New Haven, Conn., who were denied promotions because not enough minorities scored well enough on the qualifying exam. Yet neither originalism nor judicial restraint justify turning a blind eye to serious constitutional violations.

NAMUDNO is Ramesh's exhibit number one, and I confine my remarks to that case.

Not even Justice Clarence Thomas, he writes, discusses "any historical evidence about what the ratifiers of the 15th Amendment intended." He finds it "hard to believe" that framers in 1870 wished "to empower courts to determine which voting rights laws were necessary." Congress is the proper body to make that judgment, and, in Ramesh's view, its overwhelming vote in 2006 finding preclearance to be still necessary should be honored.

Where to begin? Yes, the 15th Amendment explicitly gave Congress enforcement power. But the framers did not write into the Constitution mindless populism. By Ramesh's reasoning, it was wrong for the Court even to have reviewed the constitutionality of the act in 1966 (South Carolina v. Katzenbach). It had no business second-guessing the congressional determination that a deeply radical law to enfranchise southern blacks was necessary.

Let's be clear: From the outset, the 1965 Voting Rights Act was constitutionally daring, unprecedented legislation. It demanded judicial review. The act suspended literacy tests in one region of the country, even though as recently as 1959 the Court had upheld the right of states to screen potential registrants for their ability to read and write. But such tests, as administered in much of the South, were totally fraudulent, and Congress banished them — in one region of the nation only. (The prohibition was subsequently extended to the nation as a whole and made permanent.)

The 1965 legislation also provided for the appointment of federal registrars where necessary. Most important, section 5 stopped all "covered" states and counties from instituting any new voting procedure without prior federal "preclearance." Only changes that were shown to be nondiscriminatory could be approved. State and local laws are usually presumed valid until found otherwise by a court. But whenever a covered

jurisdiction altered a rule or practice affecting enfranchisement, guilt was presumed. The submitting jurisdiction (the defendant) carried the burden of proving its innocence, which meant proving a negative — the absence of discrimination.

Surely, however, it was not "judicial overreaching" (Ramesh's term) to review the statute in 1966. No other law had ever forced states and local jurisdictions to seek federal permission to implement their own laws. Justice Hugo Black complained that, by compelling states "to beg federal authorities to approve their policies," section 5 so distorted "our constitutional structure of government as to render any distinction drawn in the Constitution between State and Federal power almost meaningless." His dispute, however, was not with the Court's decision to review the legislative handiwork, but with Congress itself.

In the context of the time, it was clear that only such a punitive, burden-shifting measure had any hope of forcing the South to let blacks vote. That judgment, built into the 1965 act, was based on a "voluminous legislative history . . . [revealing] unremitting and ingenious defiance of the Constitution," which had been compiled by federal courts, civil rights groups, and the U.S. Commission on Civil Rights.

Let's fast forward to today — and to NAMUDNO. Congress compiled a mountain of evidence (12,000 pages worth!) to justify the renewal and extension of section 5 — the temporary, emergency provision that was supposed to have expired in 1970 — for another 25 years. Most of that "evidence" was merely an accumulation of anecdotes collected at hearings held by civil rights groups; few distinctions were made between covered and non-covered jurisdictions, and no evidence of intentional discrimination was provided — among other problems.

As Ellen Katz, professor of law at the University of Michigan (and a fan of preclearance) admitted in 2007, "the record Congress amassed to support the 2006 reauthorization of section 5 does not appear to document the type of widespread unconstitutional conduct the Justices have said must underlie the passage of new civil rights legislation." Yet, unbelievably, Congress found voting discrimination in the South only "more subtle" than it had been four decades earlier.

So, yes, congressional findings as Ramesh says, are owed considerable deference, but not when they consist of sham facts. And not when the "factual" fantasy Congress has compiled undermines two fundamental constitutional values. Federalism, the right of state and local jurisdiction to run their own electoral affairs, is an old and deeply rooted tradition. And the Fourteenth Amendment establishes right of Americans to be treated as individuals, not classified as members of racial and ethnic groups in our laws.

Conservatives believe in "originalism," Ramesh says. For a lucid and fine discussion of the whole question of the meaning of original intent and judicial restraint, I highly recommend Robert Levy and William (Chip) Mellor's book, The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom. In a splendid "Afterword," they argue that judicial activism is a good thing when it means

“willing engagement in applying the law and the Constitution to scrutinize the acts (or omissions) of the executive and legislative branches. No, if activism means rendering legal judgments based on the judge’s public policy preferences.”

As I said, I leave the Ricci question for others to grapple with, but bottom line: Ramesh, we all love you. And you are usually right, but . . . not in this case.

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