Corey Brettschneider, Brown University
Powers and Rights in Shelby County v. Holder

What is the right level of review that the Court should apply when examining congressional actions under section two of the Fifteenth Amendment, which gives Congress the power to enforce the right to vote for citizens of all races? In her dissent in *Shelby County v. Holder*, Justice Ginsberg argues that the appropriate level of scrutiny is rational review.[1] She defends deference to Congress in executing the means to realize the rights guaranteed in 15.1. The decision resembles how the Court's more liberal justices have approached the Commerce Clause, where they also stress the importance of deference to Congress and the requirement of rational review.

Despite Ginsberg's attempt to frame the debate over *Shelby County* as one of Congressional power and judicial deference, I argue that a close reading of the opinions in this case demonstrates that the issue must fundamentally be one about the meaning of civil rights, not about congressional power. Ginsberg's dissent relies on a procedural view of judicial deference that is divorced from substantive questions of what civil rights are at stake. By contrast, I argue that *Shelby County* ultimately concerns a color conscious versus a color-blind understanding of the Constitution. By avoiding the substantive issue of civil rights, Ginsberg, abandons the metaphor of the "ratchet test" proposed by Justice Brennan in *Katzenbach v. Morgan.*[2] Brennan wrote that when Congress is expanding the scope of rights, it is entitled to judicial deference, but when it is regressing on rights that have already been recognized by courts, it is not entitled to judicial deference. Congress should have the power to "ratchet up" or increase the protection of rights above what courts have secured, but it should not be allowed to "ratchet down" or roll back the protection of rights below the level of the courts. I show that the ratchet test should be revived, and that it requires a substantive view about what rights ought to be protected.

In contemporary decisions about Congress' power to act relative to the states, liberals have sought to turn the debate to the level of scrutiny that is appropriate. Before turning to the interpretation of the 15th amendment and in particular 15.2 in *Shelby County*, it is helpful to at least briefly mention a similar debate in jurisprudence about the Commerce Clause jurisprudence. In Commerce Clause cases, Justice Breyer has emphasized the connection between rational review, which he regards as the appropriate level of scrutiny, and the requirement of judicial deference to the legislature. Breyer argues that the question is not whether interstate commerce exists in any one instance, but whether Congress has a rational basis for believing that interstate commerce exists. The standard suggests that the Court should defer to Congress on whether there is interstate commerce, which Congress would then have the power to regulate under the Commerce Clause. The conservatives on the Robert's Court have not responded to this challenge. They have arguably invoked a higher level of scrutiny for Commerce Clauses cases without admitting it and without explaining why these cases need greater scrutiny. The

[1] *Shelby County v. Holder*, 570 U.S. ___ (2013
[2] *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

unanswered implication is that the conservative justices are arbitrarily increasing the level of scrutiny in these cases.

This debate is echoed in *Shelby County*. Justice Ginsberg argues that rational basis review is appropriate in examining whether Congress has acted appropriately in reauthorizing the pre-clearance provisions of section V of the Voting Rights Act. Her argument for rational review, as I understand it, hinges on the assumption that the 15.1 claim about the right to vote is not at issue here. This case is instead about the procedure or means that Congress used to secure those rights. The issue is one of power; on her view Congress has suitably proposed means to secure the right that meet the appropriate standard of rational basis review.

The argument is importantly distinct from the argument given by the Court in *South Carolina v. Katzenbach* as well as *Katzenbach v. Morgan*, the decision that grounded the so-called ratchet test.[3] Justice Brennan famously argued in *Morgan* that the Court should defer to legislatures when they are "ratching up" the level of protection of rights but not when they are ratcheting down that protection. Brennan proposes the ratchet test to respond to worries that judicial deference to Congress might fail to protect the rights of citizens. The Court clarifies in both cases that Congress' actions are not only rational but are matters of constitutional obligation. The Congress had a constitutional obligation to pass the Voting Rights Act of 1965 to correct violations of the Fourteenth Amendment's guarantee of equal protection of the law and the Fifteenth Amendment's guarantee of voting rights.

Although Ginsburg cites both cases, she is careful to avoid using the ratchet metaphor. Her argument appeals to deference to Congressional authority; it is not an argument for why Congress has a constitutional obligation to protect the voting rights of the Fifteenth Amendment. She gives evidence about the importance and effectiveness of the legislation, and she stresses that it is working. But this is a somewhat lukewarm endorsement of the legislation. Notably, she does not recognize that Congress is "ratcheting up" rights protection to fulfill its constitutional obligations to prevent violations of civil rights under 14.1 and 15.1 of the Constitution.

There may be good reasons for Ginsburg to focus on the question of congressional power under 15.2, rather than the meaning of voting rights in 15.1. One reason might be that the Court might have been seen as having abandoned the ratchet test *Boerne v. Flores*.[4] But that worry might be misplaced, since the case concerned an attempt to reverse the Court's reasoning in *Employment Division v. Smith*.[5] *Bourne* did not address whether Congress could expand rights protections beyond what was recognized by the Court.

Another reason why Ginsburg focused on Congressional power in *Shelby County* might be that she was trying to avoid a confrontation between the liberal and conservative wings of the Court. That disagreement centers whether the Constitution should be

[3] ***Supra*** note 2 and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)
[4] *Boerne v. Flores*, 521 U.S. 507 (1997).
[5] *Employment Division v. Smith*, 494 U.S. 872 (1990)

colorblind or color conscious. The conservatives on the Court believe that the Constitution should be color blind, and that it prohibits taking account of race. Public policy and constitutional interpretation should not acknowledge race. But for liberals on the Court, color blindness ignores the history of civil rights violations. To enforce civil rights today, the government needs to rectify past injustices that still affect the way that politics, including voting rights, are shaped. In short, there is no way to correct the legacy of racism without taking race into account.

Ginsberg may be seeking to avoid this battle. Perhaps the reason is strategic. She might think that she can ultimately win an argument over Congress' power to act in a way that passes rational review. This would sidestep the more difficult task of convincing the conservatives on the Court about the need for color conscious rectifications of past civil rights violations.

On my view, however, there is no avoiding this battle over the color conscious versus the colorblind constitution. Ginsburg's dissent ignores the core logic of the majority opinion. The majority opinion, as I interpret it, is motivated by a concern that Congress is acting to contrive a basic right or that it is on the verge of doing so. Justice Roberts is clear that some of Congress' provisions might violate the Court's equal protection jurisprudence regarding racial redistricting. Clearly, if Congress is violating core equal protection rights, the right level of scrutiny is not rational review but the more demanding standard of strict scrutiny. Yet Roberts never fully makes that point. Instead, he seems to assume that heightened scrutiny is required. But why? Perhaps he is assuming that heightened scrutiny is required because Congress is violating or risks violating the penumbra of equal protection. Ultimately, it seems that the majority's requirement of heightened scrutiny is motivated by objections to the race conscious requirements of the Voting Rights Act's pre-clearance provisions and the Act's attempt to recognize the existence of past racism. Ginsburg should criticize the majority's attack on the race conscious aspects of the Voting Rights Act. She should say what critics of the Court's *Seattle* decision have said quite clearly.[6] It is impossible to do any of the work of enforcement of the Fifteenth Amendment in a color blind way. A colorblind interpretation just cannot make sense of the history of attempts to disenfranchise African-American voters. A race conscious analysis of changes to voting requirements is necessary because of the history of racial discrimination in voting.

This argument would enter into a substantive discussion of the meaning of the Civil Rights Amendments as race conscious attempts to rectify the subordination of African-Americans. It would not be a procedural argument about judicial deference to the legislature. In other words, it would be an argument about the meaning of civil rights under our post-Civil War Constitution.

Central to the majority decision is a principle of "equal sovereignty" between the states. I am not sure what to make of this principle. It seems to attribute an entitlement to states against "discrimination" that is analogous to the entitlement of individuals to equal protection of the laws. In particular it is the fact of different treatment between States that

[6] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

is part of the pre-clearance formula that constitutes an analogous form of discrimination to individuals distinctions based on race. But why should we believe that states have an equivalent entitlement to non-discrimination to individuals? Here I am at a loss. The majority simply seems to be engaging in an **anthropomorphism** of States. This argument has echoes of the rhetoric of the "dignity" of states prominent in Rehnquist's' Sovereign Immunity decisions, which I criticize in a forthcoming law review article. Perhaps what is really at stake here is again a view about color-blind constitutionalism. The Court seems to assume that in addition to discrimination based on race against individuals, equally troubling is color-conscious policies that discriminate between States. Despite the puzzling claim about equal sovereignty, what really might be going on is an objection to race conscious policies because they accuse the State's of racism, a double sin of invoking race and unequal treatment. On my view, however, even if there are concerns about such unequal treatment, the simple fact that the States are not actual people but government entities suggest that this concern is not as weighty as the majority claims.

Traditional federalism also has a kind of flight from substance. One worry about deferring to Congress on matters of 15.2 jurisprudence is that deference will reduce the powers of the states. But I take it that states that engaged in non-colorblind polices would also be infringing on these rights. The actions of those states should be struck down under 15.2. This suggests that states' rights is not the relevant issue. The Fourteenth and Fifteenth Amendments create individual rights that constrain all levels of government power. The real issue is the color-blind or color-conscious meaning of those rights, including voting rights and rights to equal protection of the law.

This attempt by liberals to flee from substance to a procedural realm of judicial deference and rational review is present not just in the dissent in *Shelby County* but in the liberal attempts to criticize the Roberts Court's Commerce Clause jurisprudence. The liberal justices have repeatedly argued that the right level of analysis in regard to congressional power over commerce is also rational review. But this misses what could be an even more direct criticism of the Roberts Court's jurisprudence. The conservative justices are assuming that heightened scrutiny is required for both the Commerce Clause and 15.1, because Congress risks encroaching on a basic right. In *Shelby* Roberts' allies are wrongly assuming that race-conscious policies violate civil rights. In *Sebilius*, they are assuming that commercial rights, including the right not to purchase, are substantively protected by the Constitution.[7] Ginsberg and the liberal justices should not respond merely with a procedural argument about congressional power. They must articulate a substantive view of what are rights are required by the Constitution. Liberals cannot and should not avoid the battle over between the color-conscious and color-blind understandings of civil rights by focusing on issues of procedural power rather than the substance of rights. And liberals should not avoid the battle of progressive as opposed to libertarian understandings of economic rights by focusing on issues of judicial deference to Congress powers under the Commerce Clause.

[7] *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012)/