

Section 5 of the Voting Rights Act– Still Fighting the Civil War?

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In 2006 Congress reauthorized the Voting Rights Act of 1965 (VRA) for another 25 years. Section 5 of the VRA requires that "covered" jurisdictions obtain federal preclearance before altering any election laws. Shelby County, Alabama, joined by many other jurisdictions, argues that Congress no longer has the power to extend Section 5 of the VRA under the Tenth Amendment and Article IV of the Constitution.

BACKGROUND: In the wake of the Civil War, Congress passed sweeping legislation known as the Reconstruction Amendments to right wrongs which had been part of American life for more than two centuries. The Thirteenth Amendment abolished slavery in 1865: "Neither slavery nor involuntary servitude...shall exist within the United States." The Fourteenth Amendment passed three years later and prohibited states from abridging the "privileges or immunities of citizens of the United States," or depriving any person of "life, liberty or property without due process of law," or "the equal protection of the laws." It also gave Congress the "power to enforce" its provisions by "appropriate legislation."

The Fifteenth Amendment, passed in 1870, protected the right of newly-enfranchised citizens to vote: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Although slavery may have officially ended shortly after Appomatox, the promises of the Fourteenth and Fifteenth Amendments took much longer to materialize. Race discrimination continued to shackle Southern voting rights until long after World War Two, in the color of literacy tests, poll taxes, property requirements, gerrymandering, annexation and de-annexation, bond requirements for candidates and outright intimidation. Congress sought to remedy these injustices with a number of acts beginning in 1950, but many states still evaded the law. Each time a particular discriminatory practice was identified and stamped out by federal statute, jurisdictions would modify their voting criteria, continuing a cat and mouse game with Washington D.C.

THE VOTING RIGHTS ACT: One hundred years after the Civil War ended, Congress finally took extreme action, passing the Voting Rights Act of 1965 (VRA). Unlike prior legislation, the VRA combined a permanent case-by-case enforcement mechanism with more stringent temporary remedies targeting specific areas of the country where discrimination still flourished. Section 2 of the VRA restated the essence of the Fifteenth Amendment, prohibiting "any standard, practice or procedure" which resulted in "the denial or abridgement of any citizen of the United States to vote on account of race of color."

Section 5 provided a more nimble remedy. It required States which had maintained a voting "test or device" in 1964 and had less than 50% turnout or registration for the 1964 Presidential election would henceforth be required to obtain federal "preclearance" for *all* changes regarding voting. In order to obtain approval for a voting change, the jurisdiction would have to demonstrate that the change was not discriminatory in purpose or effect. Not surprisingly, most of the States covered in their entirety were southern, including Texas, Alabama, Georgia, South Carolina, Mississippi, Virginia and Louisiana. Alaska and Arizona were also covered, as was most of North Carolina and many other political subdivisions—counties, cities and towns in five additional states—were covered individually.

The VRA was renewed in 1970, 1975 and in 1982 for 25 years. In 2006, supported by 15,000 pages of testimony and an extensive review of voting conditions around the nation, it was extended for another 25 years in a bill passed overwhelmingly in the House and by a 98-0 vote in the Senate. It was signed into law by President Bush.

CHALLENGES: The 2006 VRA extension is now at the heart of various legal challenges. Over the decades, allegations of race discrimination at the ballot box have greatly subsided across the country. Federal voting investigations are becoming infrequent. In many "covered" jurisdictions, participation by minority voters now approximates levels of the population at large. And minority voter participation in some Southern states exceeds that in Northern states. Section 5 and its preclearance policies are increasingly questioned as an unnecessary and unwarranted intrusion into state sovereignty.

In *Northwest Austin Municipal Utility District No. One v. Holder* 557 U.S 193 (2009), (*Namundo*) a Texas municipal water district wished to elect new board members and wanted to change the polling place from a private home to a public school. Because Texas was covered by Section 5 of the VRA, the water district was required to seek federal preclearance authority to make such a move. It brought suit, which made its

way to the Supreme Court. The Court expressed concern that Section 5 might have outlived its purpose but avoided a declaration that preclearance was unconstitutional. Instead, *Namundo* simply redefined the terms by which a political subdivision covered by Section 5 could request an exemption from federal review—the so-called "bailout" process. The petitioner in *Namundo* was shown a clear path to bailing out of Section 5, essentially mooting its larger constitutional challenge. Justice Roberts wrote for the 8-1 majority, with Justice Thomas in dissent declaring outright that Section 5 was unconstitutional.

Bailouts increased dramatically after *Namundo*. Jurisdictions were only required to demonstrate a lack of voting discrimination suits during the prior ten years and pay filing costs and associated legal fees, estimated to be between $2,500 and $5,000 per bailout request.

Against this backdrop, Shelby County Alabama brought suit, challenging the 2006 extension of Section 5 of the VRA. The County was unsuccessful at the U.S. District Court for the District of Columbia, and it appealed. The D.C. Circuit again rebuffed the County, in a 100-page decision which noted that the VRA and Section 5 was still required given significant continued voting abuses, including new voter ID requirements and changes to early voting parameters. The County petitioned for certiorari, which was granted late last year. *Shelby County v. Holder*, No. 12-96 (cert. granted Nov. 9, 2012).

QUESTION PRESENTED: The question presented is: "Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution."

The County argues that coverage formulas based on 1964 voting patterns can no longer be defended as reasonably tailored and in fact irrationally discriminate against numerous jurisdictions nearly 50 years later. It asserts that the generalized provisions of Section 2 of the VRA are now sufficient to police continued adherence to the Fifteenth Amendment.

The Attorney General points out that the 2006 extension was based on extensive testimony pointing to a continued need for special vigilance against voting abuses; the fact that fewer discrimination cases are now being brought against covered jurisdictions provides evidence that the VRA's Section 5 is functioning, not that it is an unconstitutional anachronism.

Oral argument was heard on February 27, 2013, with some 50 amicus briefs having been filed.

Justice Sotomayor immediately challenged counsel for petitioner, noting that since 2009, more than 240 Shelby County voting changes had been rejected as discriminatory under Section 5 review. She asked "And why would we vote in favor of a county whose record is the epitome of what caused the passage of this law to being with?" Justices Kagan and Ginsburg asked similarly pointed questions.

Justices Scalia and Roberts were far more hospitable to the petitioner. They questioned the Government as to why VRA's generalized Section 2 protections were not adequate today, and why the distinctions between "covered" and non-covered states continued to be valid. As if to illustrate the tenuous basis for the current list of "covered" states under the VRA, Roberts asked Solicitor General Verrilli if he could identify which state had the worst imbalance of white voter turnout to African American turnout. Verrilli did not know, so Roberts supplied the answer: the Commonwealth of Massachusetts. Roberts also pointed out that the state with the highest African- American voter turnout nationwide is Mississippi. He then asked whether it was the Government's argument that "the citizens in the South are more racist than the citizens in the North?"

Justice Scalia was unimpressed that the 2006 VRA extension had been approved by a 98-0 margin in the Senate. Referring to a phenomenon he called "the perpetuation of racial entitlement," Scalia said he could not imagine any Senator who would find benefit in voting against the VRA. "Even the name of it is wonderful: the Voting Rights Act. Who is going to vote against that in the future?"

On rebuttal, counsel for Shelby County argued that the evils that Section 5 was intended to remedy have been largely solved. A majority of the justices appeared to think that Congress, and not the Supreme Court, was in the best position to make that determination.

Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012), No. 12-96 (cert. granted Nov. 9, 2012).

IMLA's 78th Annual Conference
San Francisco, California
September 29-October 2, 2013

