Nix v. Holder and Shelby County v. Holder

Brief of Amicus Curiae Cato Institute In Support of Petitioners in Both Cases

These two cases involve similar challenges to the Voting Rights Act of 1965, specifically the requirement under Section 5 that certain jurisdictions (as determined by a 35-year-old formula in Section 4(b)) receive approval ("preclearance") from the Department of Justice or a special federal court in Washington before implementing any change to election regulations, no matter how modest. In Nix, the Department of Justice rejected the decision by voters in Kinston, North Carolina, to make local elections nonpartisan — as is the case in most of the state — on the basis that "the elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice." In Shelby County, an Alabama county sued to attain preemptive resolution of the "serious constitutional questions" noted by the Supreme Court in the last significant VRA challenge in 2009. Both lawsuits hinge on the modern validity of Section 5, and both were turned back by the U.S. Court of Appeals for the D.C. Circuit (Shelby County over a heated dissent by Judge Stephen Williams). Both now seek Supreme Court review, and Cato's amicus brief urges the Court to hear either case, or both. The Fifteenth Amendment gave Congress the power to craft "appropriate" enforcement legislation to secure the rights of all citizens to vote, regardless of race or color. Congress's initial attempts to enforce those rights, however, were frustrated by tactics designed to evade federal authority. Congress thus enacted Section 5, meant to apply to jurisdictions with a history of disenfranchising black voters. The Supreme Court, in upholding Section 5 against constitutional challenge in the 1960s, recognized that the measure is extraordinary, exacting perverse and substantial costs on federalism and equal protection principles — but as long as Congress's electoral concerns were substantiated, Section 5 remained constitutionally justified. Enforcement of the VRA went on to successfully defeat the systemic discrimination that had once justified Section 5. In 2006, however, Congress reauthorized the VRA for another 25 years, without explaining why certain jurisdictions had to be subject to such an intrusive process on the basis of an obsolete formula, particularly when all of the evidence showed that the goal of minority representation and access to voting in the South was achieved (and indeed that black registration and voting rates were higher in covered jurisdictions than elsewhere in the country). Indeed, the 2006 revisions made matters worse, authorizing the federal government to reject

any electoral changes in a covered jurisdiction, no matter how small or insignificant, whenever they are believed to evince "any discriminatory purpose" or "diminish[] the ability of minority citizens ... to elect their preferred candidate of choice." Thus, in addition to the infringement on state sovereignty, the modern Section 5 creates a serious equal protection dilemma, mandating that covered jurisdictions factor race into their election laws even as the Fourteenth and Fifteenth Amendment's non-discrimination principles forbid it. In addition to these problems, Section 5 cannot coexist with Section 2 (a provision aimed at discrete instances of discrimination in voting). The Court should excise Section 5, leaving Section 2 private rights of action as the proper remedy for voter disenfranchisement. Because Section 5's burdens are no longer justified by "current needs," they fail to satisfy the Court's requirements for "appropriate" enforcement legislation. In other words, Section 5's early success quickly obviated its legitimacy. Accepting that point is not an admission of defeat, but a declaration that the VRA has achieved its promise.

Please see full brief below for more information

http://www.jdsupra.com/post/fileServer.aspx?fName=77d78f08-d81d-42a1-8faa-87d646862099.pdf