THE NATIONAL LAW JOURNAL
with D.C. news from LegalTimes

The Voting Rights Act is outmoded, unworkable

Section 5 was a valuable tool against disenfranchisement, but it now facilitates the bias it was designed to prevent.

Ilya Shapiro
The National Law Journal
February 27, 2012

The U.S. Supreme Court was surely correct last month when it unanimously overturned the Texas electoral maps a San Antonio federal district court drew because that court did not use the "appropriate standards" in drawing them. The Court explained that, regardless of the legal ambiguities and other challenges the lower court faced, it still had to use the maps enacted by the state Legislature as a starting point and only depart from them in redrawing districts that could violate the Voting Rights Act or the Constitution.

Fair enough, but this reasonable-sounding decision belies larger issues: The Voting Rights Act has served its purpose but is now outmoded and unworkable — and is thus itself now unconstitutional.

To understand why, let's review the background of this case, *Perry v. Perez*. Not surprisingly, it arises out of the redistricting that all states engage in after every decennial census: People move around, and states gain or lose congressional seats, so election maps need to be redrawn. Some activist groups challenged the Texas Legislature's maps, alleging racial discrimination under Section 2 of the Voting Rights Act. At the same time, Texas sought the Section 5 "preclearance" it needs to implement them.
Originally conceived as a check on states where discrimination was prevalent in the 1960s, Section 5 requires certain jurisdictions — a bizarre list that includes some of the Old Confederacy, plus Alaska, Arizona and certain counties or townships in eight other states, including (only) three New York City boroughs — to get federal approval before changing any election laws. To obtain this preclearance, these jurisdictions may propose only changes that do not result in "retrogression," a reduction in minority voters' ability to elect their "preferred" candidates.

Section 5 was a valuable tool in the fight against systemic disenfranchisement, but it now facilitates the very discrimination it was designed to prevent. Indeed, the prohibition on retrogression effectively requires districting that assures that minority voters are the majority in some districts — an inherently race-conscious mandate. The law, most recently renewed in 2006 for another 25 years, is based on deeply flawed assumptions and outdated statistical triggers, and it flies in the face of the 15th Amendment's requirement that all voters be treated equally.

In any event, because the relevant Washington court here had not yet given preclearance, the San Antonio court felt obligated to draw "interim" maps pending final rulings in the sections 2 and 5 cases. Texas filed an emergency appeal with the Supreme Court, which has now remanded the case with instructions to defer to the Texas Legislature except where the Section 2 plaintiffs have a "likelihood of success on the merits" of their claims or where there is a "reasonable probability" of failing to get Section 5 approval. Unfortunately, the perfect storm that landed this case in the Supreme Court's lap — viable Section 2 claims, no Section 5 preclearance, the need to have maps finalized in time for administering primaries, the undesirability of having courts draw maps and the lack of clear rules for doing so — is not unique.

Section 5's selective applicability precludes the establishment of nationwide districting standards, confounding lower courts and producing different, often contradictory, treatment of voting rights in different states. As the Supreme Court unhelpfully noted, lower courts "should presume neither that a State's effort to preclear its plan will succeed nor that it will fail."

Moreover, sections 2 and 5 conflict with each other. Even as Section 2 requires race-based districting, Section 5, along with the 14th and 15th amendments, prohibit it. These tensions cannot but produce chaotic proceedings like those here, which are replicated every redistricting cycle.

Put simply, the Voting Rights Act's success has undermined its continuing viability; courts and legislatures struggle mightily and often fruitlessly to satisfy both the act's race-based mandate and the 15th Amendment's equal-treatment guarantee.

These difficulties — constitutional, statutory and practical — disadvantage candidates and voters, and undermine the Voting Rights Act's legacy of vindicating the voting rights of all citizens. Although *Perry v. Perez* may not have been the right vehicle for doing so, the Court should reconsider the constitutionality of the modern Voting Rights Act at the next available opportunity — perhaps in *Shelby County v. Holder,* argued in the D.C. Circuit last month. And if the Court fails to act, Congress should, without waiting for the Voting Rights Act's expiration in 2031. As Justice Clarence Thomas wrote the last time the Supreme Court considered such a case, an acknowledgment of the act's unconstitutionality "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA."

*Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute. He filed a brief in*Perry v. Perez *supporting neither party but urging the Court to reconsider the constitutionality of the Voting Rights Act.*