The New York Times

Voting Law Decision Could Sharply Limit Scrutiny of Rules

By Charlie Savage February 28, 2013

WASHINGTON — If the Supreme Court strikes down or otherwise guts a centerpiece of the Voting Rights Act, there will be far less scrutiny of thousands of decisions each year about redrawing district lines, moving or closing polling places, changing voting hours or imposing voter identification requirements in areas that have a history of disenfranchising minority voters, voting law experts say.

A close look at the law demonstrates how a series of seemingly technical details amount to what is essentially a safeguard against violations in those states and regions covered by the law — most of which are in the South.

It also shows how that very bulwark comes at the cost of sharply tilting the playing field against those areas in ways that several conservative-leaning Supreme Court justices expressed alarm about during arguments on Wednesday.

The legal issue turns on two main parts of the act: Section Five, which covers jurisdictions with a history of discrimination, and Section Two, which covers the entire country. Both sections outlaw rules that intentionally discriminate against or otherwise disproportionately harm minority voters. Section Two would remain in effect even if the court strikes down Section Five.

But reliance only on Section Two would mean a crucial difference in how hard it may be to block a change in voting rules in an area that is currently covered by Section Five. Those jurisdictions, because of their history of discrimination, must prove that any proposed change would not make minority voters worse off.

By contrast, under Section Two, the burden of proof is on a plaintiff to demonstrate in court that a change would prevent minorities from having a fair opportunity to elect representatives of their choice.

“Getting rid of Section Five is not getting rid of voting rights; it would just make voting rights litigation look like normal lawsuits,” said Ilya Shapiro, a legal scholar at the Cato Institute, which filed a friend-of-the-court brief urging the court to strike down Section Five. “It would mean that if the federal government claims people have been harmed, it would have to prove it.”

But J. Gerald Hebert, who formerly handled voting rights litigation for the Justice Department and is now in private practice, said that losing Section Five would be “devastating to protecting voting rights” because the costs of a lawsuit are so steep. Jon Greenbaum, the legal director for the Lawyers’ Committee for Civil Rights Under Law, said it would mean that the bulk of changes that now receive automatic scrutiny by the federal government could take effect without any review, eliminating a deterrent against mischief.

“Section Five makes all the voting changes public and transparent, because when they are submitted for preclearance, the Justice Department will call local folks in the community and get their take on it,” Mr. Greenbaum said. “If you have no Section Five, a lot of stuff will just go under the radar.”

One reason for the difference is that in places covered under Section Five, changes are automatically blocked until the proposal is reviewed and approved by the Justice Department or a panel of judges. In the interim, the old rules still apply.

By contrast, a plaintiff in a Section Two lawsuit must convince a court to issue a preliminary injunction to stop a change from taking effect.

Moreover, it is a “huge,” difference, Mr. Hebert said, that under Section Five, the starting premise is that the covered state or locality’s change may be discriminatory, and the state or locality bears the burden of proving otherwise. Under Section Two, a plaintiff must prove wrongdoing.

Since states or other places covered under Section Five must prove that their proposed changes are acceptable, they have a strong incentive to provide the data — voter rolls, driver’s license database and other demographic data — that is often necessary ton analyze the impact of a change, but can be costly and cumbersome to produce. In a Section Two case, the challenger must fight in court to obtain such data.

The decision-maker, too, is different. Places covered under Section Five must persuade people who live in or near Washington — either officials in the Justice Department’s Civil Rights Division, or federal judges whose chambers are in the District of Columbia.

Lawsuits under Section Two are heard by local Federal District Court judges, like any other federal lawsuit.

Finally, there is a subtle but important difference in what counts as a discriminatory effect. Under Section Five, the baseline for analyzing the consequence of a proposed change is whether the jurisdiction can prove the change will not make minorities worse off than they were under the current rules.

Under Section Two, by contrast, the analysis starts fresh without any reference to the previous situation.

This difference can be significant in redistricting cases, where the Section Five standard makes it far simpler to argue that any map that reduces the number of districts where minority voters constitute a majority should be rejected.

Roger Clegg, the president of the Center for Equal Opportunity, a nonprofit group that opposes affirmative action and joined another friend-of-the-court brief urging the court to overturn Section Five, argued that eliminating the Section Five standard in considering legislative district lines could be a good thing. He argued that its effect now is to coerce “racial gerrymandering” in drawing districts, which he said promoted polarization and was “inconsistent with the ideals of the civil rights movement.”

Richard Hasen, an election law specialist at the University of California, Irvine, law school, said he hoped the court upheld Section Five but believed that it would be struck down. Its mere existence, he said, has had a deterrent effect and “gives minority voters in covered jurisdictions a seat at the bargaining table” when election rules changes are proposed.

"If that seat is gone, the only thing minority voters will have to hang over elected officials’ heads is Section Two liability and constitutional liability, which are much tougher standards to win under,” he said. “But the most egregious things can still be challenged.”