THE PEW RESEARCH CENTER
FOR THE PEOPLE AND THE PRESS

Supreme Court to weigh states' rights vs. voting rights

By stateline.org February 26, 2013

WASHINGTON -- When the Supreme Court hears arguments today in a direct challenge to a central part of the Voting Rights Act, it will once again wade into a decades-old dispute over voting rights that has its roots in the country's long history of racism.

But in asking whether a key part of the federal law is constitutional, the court also will reopen a debate that long predates the measure's enactment in 1965. It's an argument that was at the heart of the U.S. Civil War, and one that has seen resurgence in recent years as Republicans around the country bristle at what they perceive as meddling from Washington.

That debate is the battle over states' rights.

On its face, the challenge to the Voting Rights Act is about how state and local officials run elections. But states' rights have underpinned much of the opposition to the law since it was first enacted, and today's hearing will feature familiar arguments.

The issue is Section 5 of the law, which requires all or part of 16 states to get any changes to election law pre-approved by either the Justice Department or a federal court. That requirement, based on findings of discrimination and racism years ago, applies to most every aspect of elections, from technical changes to the high-profile issue of photo ID requirements that recently spawned court battles for states such as Texas and South Carolina. The challenge was brought by Shelby County, Ala., and argues that the act's preclearance requirement is unconstitutional on its face, no matter how it's employed.

"Section 5's federalism cost is too great," the county argues plainly in its Supreme Court brief, pointing to a lack of evidence to justify what it sees as federal overreach.

The requirement was controversial from the beginning, in part because it gave the federal government extraordinary power over certain states. The measure was also intended to be temporary, which further motivates critics. Congress renewed it over the years (most recently in 2006) without major changes.

But there's also new life in the case against Section 5 of the Voting Rights Act based on a seemingly simple argument: Times have changed. The Supreme Court acknowledged as much in a 2009 opinion that upheld the preclearance requirement but raised significant questions about its constitutionality.

"Things have changed in the South," Chief Justice John Roberts wrote for the 8-1 majority, listing increasing parity in turnout and diversity among elected officials as evidence of progress -- much of which he attributed to the Voting Rights Act.

"Past success alone, however," he added, "is not adequate justification to retain the preclearance requirements."

So criticisms today will harken to old debates, but whether the discrimination and racism that prompted the requirements in the first place still exist today will play a central role.

For critics, the answer is simple. "Jim Crow was an aberration that took an extraordinary remedy," says Ilya Shapiro, a legal expert at the libertarian Cato Institute. "(This case is) not about denying people the right to vote or allowing states the leeway to do so."

There's evidence to bolster those claims. The blatant discrimination, from poll taxes to literacy tests, that was rampant decades ago is no longer a concern. Parity among white and non-white voters in areas under the preclearance requirement is also a sign of improvement, critics say.

But there are counterweights. Supporters point to the 15,000 pages of evidence Congress compiled showing lingering discrimination, the proportion of non-white officeholders in covered areas and turnout trends to make the case for renewing preclearance as it debated the act in 2006. There's also the practical effect of the preclearance requirement: From 1982 to 2006, one-fourth of proposed voting law changes were withdrawn from covered jurisdictions after the Justice Department simply requested more information, according to a congressional report.

"It gives a sense of how many dogs did not bark as a result of the threat of a denial," Nathaniel Persily, a Columbia Law School professor, wrote in a 2007 paper on the Voting Rights Act.
Still, the progress is undisputed. And for supporters, that's left them with fewer violations to justify the measure and making the case that the requirements still are needed.

"Like any other law," Persily wrote, "Section 5's effectiveness should not be evaluated by the number of times it is broken."

Much of the force behind the renewed push against Section 5, though, comes from those who argue that the federal government -- the Justice Department, in particular -- is overly activist and discriminatory in its own right, because it treats states differently.

"When this law passed in '65 it was a five-year emergency. The Super Bowl didn't even exist when this law passed," says Christian Adams of the Election Law Center. "You have to ask the question: Is this much federal power justified under these circumstances?"

Perhaps aside from the current case, nowhere have those battles gained more attention than in the recent fights over voter ID that landed both South Carolina and Texas in court battling the Justice Department for the right to enact such laws. Those two states are among the 16 states that are entirely or partially covered by the preclearance requirement. Each case shows how the Voting Rights Act works in practice, rather than just on paper.

After months of court battles and back-and-forth with the Justice Department, South Carolina eventually won the right to enact its voter ID requirement. But in the process, it was delayed until 2014, and its strict requirements were significantly loosened, an outcome voting rights activists said illustrated the still-relevant benefits of the law.

Texas, meanwhile, refused to adopt a similarly cooperative tack, and saw its law denied. In its ruling, a three-judge panel in the Washington, D.C., federal court faulted the state for its overly strict law and said it would "almost certainly have retrogressive effect" on minority voters.

Texas officials blasted the ruling as both an encroachment on their state's right to govern its elections and as discrimination, since the Supreme Court has generally upheld voter ID requirements to be constitutional. The state has since issued a brief backing Shelby County's case against the law.

It's those disputes that voting rights advocates have been highlighting in advance of the Supreme Court arguments, sounding the alarm about the potential doom for the provision and calling the entire case an attack on voting rights. They point to typically Republican-backed provisions around the country on voter ID requirements, limiting early voting or other such barriers.

"There are still politicians who, perhaps it's not out of racial animus but perhaps it's because they're afraid certain populations will vote a certain way, look to manipulate voting laws," says Spencer Overton, an election law expert at George Washington University.

The prospect of going on without Section 5's bulwark of federal power worries advocates. Any election law can be challenged, but preclearance is a particularly powerful tool. "Recent developments, and especially these new obstacles to voting, make the Voting Rights Act more important than it might have seemed even a decade ago," Daniel Tokaji, a law professor at Ohio State University. "We've seen pretty blatant attempts in some states to impose new barriers to voting."

And even as the Supreme Court weighs the case before it, there's little sign the dispute is diminishing elsewhere.

Just last week, the Virginia General Assembly approved a strict voter ID requirement that opponents have vowed to fight in court. For the time being, they can take comfort in the fact that it won't take effect until the state proves it wouldn't negatively affect voters. That's because Virginia is one of the states covered by the preclearance requirement of the Voting Rights Act -- at least for now.