SCOTUSblog

Online VRA symposium: The Court should reconsider the constitutionality of the VRA's outmoded and unworkable Section 5

This essay for our symposium on the Voting Rights Act at the Supreme Court comes from Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. He filed an amicus brief on Cato's behalf supporting the cert. petitions in Nix v. Holder and Shelby County v. Holder, as well as a brief in last Term's redistricting case, Perry v. Perez, that detailed the constitutional problems in the modern Voting Rights Act.

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"The historic accomplishments of the Voting Rights Act are undeniable," wrote Chief Justice Roberts the last time the Supreme Court took up a challenge to the historic legislation, in the 2009 case of *Northwest Austin Municipal Utility District No. One v. Holder ("NAMUDNO")*. Nobody can dispute this characterization of the legislation, not with the dramatic political strides racial and ethnic minorities have made since Jim Crow necessitated federal intervention in an area traditionally left to the states, election administration.

The law's modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, with the Fourteenth and Fifteenth Amendments, and with the orderly implementation of fair elections. The law, most recently renewed in 2006 for another twenty-five years, is based on deeply flawed assumptions and outdated statistical triggers, and flies in the face of the Fifteenth Amendment's requirement that all voters be treated equally.

That is, Section 5 was a valuable tool in the fight against systemic disenfranchisement, but it now facilitates the very discrimination it was designed to prevent. For example, the prohibition on "retrogression" effectively requires districting that assures that minority voters are the majority in some districts – an inherently race-conscious mandate.

Jurisdictions covered by Section 5 are thus subject to utterly predictable litigation, the outcome of which is often dependent on judges' views of how to satisfy both the VRA's race-conscious mandates and the Fifteenth Amendment's command to treat people of all races equally under law. When added to legislators' partisan interests, this navigation between the VRA's Scylla and the Constitution's Charybdis inevitably crashes the electoral vessel onto judicial shoals.

Moreover, Section 5's preclearance system is an anachronism. As the Court found in *NAMUDNO*:

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.

Indeed, the list of Section 5 jurisdictions is bizarre: six states of the Old Confederacy (and certain counties in three others), plus Alaska, Arizona, and counties or townships in other states ranging from New Hampshire to South Dakota. Curiously, (only) three New York counties are covered, all boroughs in New York City. What's going on in the Bronx, Brooklyn, and Manhattan that is not in Queens or Staten Island? Four members of the Supreme Court famously hail from Gotham, each from a different borough; perhaps they know something the rest of us don't.

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 Court unhelpfully noted in *Perry v. Perez* earlier this year, lower courts "should presume neither that a State's effort to preclear its plan will succeed nor that it will fail."

Given Section 5's burdens, its conflict with Section 2 should be resolved in favor of the latter. In allowing a private right of action, Section 2 provides the appropriate means for enforcing the Fifteenth Amendment and ensuring that any state practice which "results in a denial or abridgment of voting rights" can be effectively remedied. That private right of action is a more targeted remedy, empowering citizens to litigate

specific discriminatory acts – in contrast to Section 5's broad sweep, which ensnares every voting change, no matter how miniscule or banal.

When the Supreme Court originally upheld the VRA in 1966, it found that Section 5's generalized mechanism was necessary because individualized litigation under Section 2 could not effectively fight such "widespread and persistent discrimination in voting." Although Section 5's broad remedial role was once appropriate and necessary in turning the tide against such "systematic resistance to the Fifteenth Amendment" and defeating "obstructionist tactics," modern instances of discrimination are discrete rather than systemic. Facetious tests and sinister devices that eluded private rights of action are now permanently banned – while even Section 2 violations are exceedingly rare and not disproportionate to Section 5 jurisdictions.

And Section 2 provides all the remedies now required. The Justice Department can essentially assume plaintiffs' costs for Section 2 suits, for example, by either initiating the action itself or, as it often does, intervening in support of the plaintiff. Courts may even issue preliminary injunctions where delay would otherwise cause irreparable harm. Nothing in the legislative record of the 2006 VRA amendments suggests that Section 2 private rights of action would be an inadequate remedy.

The Court's conclusion in 1966 that Section 5 is a necessary supplement to Section 2 is thus no longer warranted – which means that Section 5's extraordinary measures are no longer constitutionally justifiable. Yet the provision remains in place due to the presumption that election regulations in certain places are illegal until proven otherwise.

But three generations of federal intrusion on state prerogatives have been more than enough to kill Jim Crow. In the words of President Obama, the Voting Rights Act has exceeded expectations in making this nation "a more perfect union." While celebrating its achievements, we must recognize that this success has obviated its constitutional legitimacy.

Put simply, the VRA's success has undermined its continuing viability; courts and legislatures struggle mightily and often fruitlessly to satisfy both Section 5's race-based mandate and the Fifteenth Amendment's equal treatment guarantee. These difficulties – constitutional, statutory, and practical – disadvantage candidates and voters, and undermine the VRA's legacy of vindicating the voting rights of all citizens.

In sum, the Voting Rights Act has served its purpose but is now outmoded and unworkable. Section 5 in particular causes tremendous federalism and equal protection problems, all while enforcing arbitrary standards that conflict with the Fourteenth and Fifteenth Amendments and with Section 2. As Justice Thomas wrote in *NAMUDNO*, an acknowledgment of Section 5's unconstitutionality "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA."

While *Perry v Perez* may not have been the right vehicle for doing so, the Court now has before it not one but two excellent vehicles to use for a reconsideration of the modern VRA: the cert. petitions in *Nix v. Holder* and *Shelby County v. Holder*. Indeed, the law's incongruities present the prototypical situation of legal problems that are capable of repetition yet evading review – another factor that militates in favor of the Court's taking this Term's Section 5 challenges.