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NAMUDNO: Right Question, Wrong Case
Testing the constitutionality of section 5 of the Voting Rights Act
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The following is an essay for our Race and the Supreme Court program by Abigail Thernstrom, vice-chair of the U.S. Commission on Civil Rights and adjunct scholar at the American Enterprise Institute. Ms. Thernstrom is the author, most recently, of the book *Voting Rights — and Wrongs: The Elusive Quest for Racially Fair Elections*.

Northwest Austin Municipal Utility District No. 1 v. Holder (NAMUDNO) was one of the most anticipated cases of the 2008-2009 term. Civil rights advocates had been in a state of panic, fearing a majority would declare the most radical provision in the 1965 Voting Rights Act unconstitutional – no longer justified in the context of a racially changed nation. But the Court declined to decide the complex constitutional question hanging over the nation’s most sacred civil rights law. Eight justices agreed: Right question, perhaps, but wrong case.

The issue was the continuing constitutional legitimacy of section 5. The provision had put southern states, long committed to black disfranchisement, under the equivalent of federal receivership in the conduct of their elections. That receivership had several parts, the most well known being the obligation of the “covered” jurisdictions to submit all proposed changes in their methods of election to the Justice Department or the seldom-used D.C. district court for pre-approval—“preclearance.” The provision prevented states from acting to exercise traditional constitutional prerogatives without prior federal permission, and was unique in American law.

Section 5 shifted the burden of proof to the covered jurisdictions themselves. A state that submitted for preclearance new districting lines or a city that proposed to relocate a polling place had to prove a negative, an absence of discrimination. Suspected discrimination was sufficient to sink a proposed change. But in 1965 suspicion of southern racism was usually on the mark.

The unprecedented federal control over state electoral processes quickly put ballots in southern black hands. And yet it also became clear that simple enfranchisement would not integrate southern politics—the ultimate aim of the act.

Counties and other political subdivisions began to engage in racist maneuvers to maintain white supremacy, and in 1969 the Supreme Court expanded the definition of discriminatory voting practices to include devices that “diluted” the impact of the black vote. From then on, section 5 was understood to allow objections to at-large voting, districting lines, and other ways of structuring elections whose impact might be to deprive blacks of expected gains in officeholding.

The enforcement of section 5 was on a proverbial slippery slope. Ensuring that black and Hispanic ballots carried political weight, giving blacks the power to elect the candidates of their choice, emerged as the expanded goal of the provision. And in time, proportional racial representation became the standard by which to measure true electoral opportunity, although that commitment to group proportionality was deeply at odds with traditional American assumptions about representation in a democratic nation.

Proportional racial representation (or its approximation) required race-conscious districting, which sorted voters by race and ethnicity and thus raised important Fourteenth Amendment questions. But most voting rights specialists believed majority-minority districts imposed by courts and the Justice Department upon southern jurisdictions passed the strict scrutiny test – unless, that is, they were so racially gerrymandered as to look like bug-splats. Their imposition by the Justice Department and federal judges in the region of historic disfranchisement were analogous to high tariffs that helped the infant American steel industry get started. They gave the black political “industry” an opportunity to get on its feet. And thus they furthered the aim of the 1965 statute – namely, integrating southern politics.

More than four decades after the passage of the original statute, was there still a need for minority protection from white electoral competition? That was the question posed in *NAMUDNO*. Section 5 was supposed to be an emergency, temporary measure to make sure Southern states could not come up with new ways of keeping blacks from the polls. But such deliberate disfranchisement had long gone the way of segregated water fountains.

The reach of preclearance was initially confined to the South. As a consequence of statutory amendments, however, by 1975 Alaska, Arizona, and Texas in their entireties, as well as counties in a host of other states, had become “covered.” *NAMUDNO* involved a small Texas utility district that was obligated to obtain federal preclearance when it moved a polling place from a private residence to a school, even though the district was not created until the late 1980s and had no record of electoral discrimination.

The utility district argued that preclearance “strikes at the heart of federalism, injecting the federal government directly into the state and local legislative process”—and does so on the basis of obsolete data. By 2004 a stunning 68 percent of the black population in the original five “covered” southern states was registered to vote, which was a rate a few points higher than that in the rest of the country. The plaintiffs hoped the Court would declare the provision outdated—no longer a proper exercise of congressional power under the Fifteenth Amendment.

In his opinion for the Court, Chief Justice Roberts stressed the legitimacy of the constitutional question. “Things have changed in the South,” every member of the Court agreed—a point that Congress had barely acknowledged just three years earlier when it renewed section 5 for another quarter century. The provision is “extraordinary legislation otherwise unfamiliar to our federal system,” Roberts wrote. An “extraordinary” provision demands an extraordinary context, and, at the oral argument, he signaled his own grave

doubts about preclearance four decades after the act's initial passage. But, undoubtedly pleased at the prospect of near unanimity on the Court, he simply said the validity of the act "is a difficult constitutional question we do not answer today."

The Court's "usual practice is to avoid the unnecessary resolution of constitutional questions," Roberts wrote. There was an alternative: The utility district had suggested it should be allowed to "bail out" from section 5 coverage. It was a privilege previously unavailable to small districts that did not even register voters, and the lower court had refused to extend it. Nevertheless, the Court interpreted the bailout provision to apply to the Northwest Austin Municipal Utility District No. 1, thus making the constitutional question moot.

The Court had fine-tuned the bailout provision, which did little to change the law. Extrication from section 5 remains difficult—not only legally, but also politically. The real significance of this case thus lies not in what was held but rather what was foreshadowed.

NAMUDNO invites another case that properly frames the core constitutional issues. Why was Georgia but not Ohio (where serious voter fraud was alleged in 2004) still in federal receivership? The Texas utility district contained no districts that could be gerrymandered to create safe minority legislative seats. Distributing voters on the basis of race and ethnicity to secure minority representation was a necessity when southern whites would not vote for black candidates, but were such suspect classifications still justified? Those are the central constitutional questions that the right section 5 case would raise.

Prior to the decision, the blog of Legal Times reported: "Supporters of the law are bracing for defeat." But from the outset, it was a weak case, given the almost unique profile of the utility district, and the overwhelming congressional vote of support in favor of extending and strengthening section 5 in the summer of 2006.

The right case may reach the Court in a few years. In the meantime, perhaps more aspiring black and Hispanic politicians will run and win in majority-white settings. If that happens, they will create a record of electoral success that will make unmistakably clear whether section 5 is still needed.