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Online VRA symposium: The Section 5 guidelines and their substantial federalism costs

The following contribution to our online VRA symposium comes from Abigail Thernstrom, whose most recent book is Voting Rights — & Wrongs: The Elusive Quest for Racially Fair Elections (2009).

Is Section 5 of the Voting Rights Act on death row – its time as a constitutionally legitimate exercise of federal power running out? Cases currently working their way to the Supreme Court suggest precisely that: the clock is ticking and the life of the preclearance provision is coming to a close. A stay of execution is possible of course. But it seems more likely that at least one of these cases will force Congress to go back to the drawing board and write a revised statute that reflects the reality of a racially transformed nation in which election-related problems do not resemble those in the Jim Crow South to which the 1965 statute was such an effective answer.

The passage of the 1965 act was followed almost immediately with a challenge to its constitutionality. It was a unique law. But as Chief Justice Warren noted, it was emergency legislation passed in the context of "unremitting and ingenious defiance of the Constitution" — massive black disfranchisement in one region of the country. All attempts to secure Fifteenth Amendment rights by more orthodox means had failed, and thus in 1965, a century of Fifteenth Amendment violations demanded what might be called federal wartime powers. The long history of pervasive southern racism justified a temporary abrogation of the traditional right of states to govern their own political processes within constitutional boundaries.

It is Section 5, which demands the "preclearance" (federal preapproval) of all new election laws in the "covered" jurisdictions, that stripped states of their traditional political prerogatives. It was an emergency provision, expected to last only five years. Nevertheless, the constitutional doubts of the great liberal Supreme Court Justice Hugo Black were not assuaged. In an angry dissent from the Court's 1966 decision upholding the law, he argued that Section 5, "by providing that some of the States cannot pass State laws or adopt State constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between State and Federal power almost meaningless."

In fact, at its inception, the entire Voting Rights Act stood on firm constitutional ground. It was pure antidiscrimination legislation designed to enforce basic Fifteenth Amendment rights. A clear principle justified its original enactment: Citizens should not be judged by the color of their skin when states determine eligibility to vote. Moreover, nothing but

radical legislation could have solved the problem of black exclusion from participation in southern political life.

Today, Black's constitutionally serious point, which was basically ignored for four decades, is enjoying a bit of a revival. Federalism concerns run through a number of recent voting rights decisions. In bringing suit against the Justice Department, a small Northwest Austin municipal utility district had hoped to escape the federal receivership into which all "covered" jurisdictions had been placed by the preclearance provision. The Supreme Court, in taking a pass on the constitutional question, nevertheless did note the substantial federalism costs imposed by Section 5. Even the Justice Department, Chief Justice Roberts wrote, had described preclearance as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." This "encroachment," he went on, "is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity."

Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit echoes this point in a number of decisions. In striking down a Texas voter ID law, he noted the Supreme Court's belief that infringement on the "equal sovereignty" of states raises "serious constitutional questions." Shelby County, Alabama, sought a declaratory judgment that both Sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional – Section 4(b) containing the trigger that determines Section 5 coverage of states. In response, Judge Tatel once again noted "section 5's federalism costs,' but found a record of racial discrimination in voting that was "serious and pervasive," from which he concluded that the current burdens imposed by Section 5 were "justified by current needs" and thus constitutional.

Shelby County v. Holder is the Section 5 case the Supreme Court is most likely to accept for argument in the coming Term. The Court will undoubtedly consider whether Section 5's remedy remains congruent and proportional to the problem it seeks to cure. The county will contend that the formula that establishes Section 5 coverage has become irrational and obsolete – an anachronism. It no longer pinpoints jurisdictions with ongoing Fifteenth Amendment violations as it once did.

There is another possible line of argument that the high Court might make – one that Judge Stephen F. Williams, dissenting in Shelby County, touched on but could have greatly expanded. The 2006 amendments, he wrote, make the Section 5 burden even heavier. Congress had broadened the meaning of discriminatory intent to encompass any purpose. It was precisely such a freewheeling definition of purpose that had allowed the Justice Department in the 1980s and 1990s to insist on what the ACLU once called "max-black" districting maps – maps that contained a maximum number of districts drawn to be safe for minority candidates. Congress, Judge Williams wrote, "appears to have . . . restored the Justice Department's implicit command that States engage in presumptively unconstitutional race based districting, and . . . exacerbate[d] the substantial federalism costs that the preclearance procedure already exacts." (Internal quotation marks omitted.)

It was not the 2006 amendments alone that aggravated the burden Section 5 imposed on jurisdictions submitting changes in election procedure for preclearance. The murky Justice Department guidelines issued in April 2011 in fact provided no clear guidance and thus heightened the federalism problem. Not only were jurisdictions forced to go hat in hand "to beg federal authorities to approve their policies" (in Justice Black's words), but they could not even be sure of what they should bring – what sort of districting plan, for instance, the D.C. district court or the DOJ might find acceptable.

The newest guidelines are a submitting jurisdiction's worst nightmare. The statutory language and its accompanying congressional explanations always constituted very bare bones. Regulations written to guide DOJ in its enforcement decisions were needed almost from the outset. The latest version, in their most important section, follows in the footsteps of the House Judiciary Committee report that accompanied the passage of the 2006 amendments, and in so doing spelled out criteria for assessing discriminatory intent that rested on a 1977 housing discrimination decision. Using Arlington Heights v. Metropolitan Housing Development Corp. as a framework, the guidelines contain a checklist with items such as the disparate racial impact of a redrawn electoral map, whether a "reasonable and legitimate justification for the change exists," and the impact of "present or past discrimination" on political participation.

The checklist would seem to cover the waterfront. At first glance, nothing was left out. But nothing of much significance was included. The specificity of the list was deceptive. The items were inadequately defined and no indication of their relative weight was provided. What are "reasonable and legitimate" reasons for a change in voting procedure? When do minority groups have a sufficient "opportunity to participate" in the map drawing process? What is the measure of excessive minority-voter concentration (another item)? And so forth. Perhaps to answer critics (like myself) who have complained that the vision that ran through the two decades of Section 5 enforcement was racial fairness as defined by proportional racial representation, the guidelines do contain a specific disclaimer: "A jurisdiction's failure to adopt the maximum possible number of majority minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose." [Emphasis added.] It is a meaningless statement. In denying preclearance, DOJ attorneys never suggest that one — and only one — reason drove their decision. In fact, the language in objection letters has always been exceedingly vague.

The problem of state and local authorities being at the mercy of federal power in exercising one of their core functions has been compounded by the useless legal standards that are supposed to govern the enforcement of Section 5. Federal intrusion on constitutionally sanctioned local prerogatives should be of special concern when the legal boundaries are not clear and decisions are seemingly made on the basis of administrative whim. If the Supreme Court takes the Shelby County case, this is a point it might consider making.