

Commentary: Supreme Court's Unexpected 'Judicial Minimalism' in Voting Rights Case

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On June 22, a landmark piece of civil rights legislation somehow just survived Supreme Court review. Voting rights experts had been on edge for months, nervously waiting for the Court to issue its decision in a closely watched case called *Northwest Austin Municipal Utility District Number One v. Holder*. The case, a direct constitutional challenge to Section 5 of the Voting Rights Act, seemed to give an increasingly conservative Supreme Court an opening to do the unthinkable and strike the law down. To the surprise of most observers – the Court stepped back from the precipice.

Widely considered to be the most effective civil rights law ever passed, the Voting Rights Act relies heavily on the “preclearance requirement” of Section 5. Under that provision, jurisdictions with a history of racial discrimination must demonstrate in advance to the Department of Justice that changes to voting arrangements will not harm minority voters. Section 5 was originally passed in 1965, and renewed most recently in 2006, when a Republican-controlled Congress surveyed mountains of evidence, conducted lengthy hearings, and concluded that continuing racial discrimination in voting required Section 5 to remain in place.

Following Section 5's renewal, a small utility district in Texas brought a lawsuit claiming that there was no longer sufficient discrimination to justify the preclearance requirement. The utility district asked the Court either to boldly declare Section 5 unconstitutional or to issue a narrower decision holding that the utility district could “bail out” of the requirement to obtain preclearance.

Voting rights experts, distressed after a barrage of hostile questions at oral argument before the Supreme Court, awaited the decision with dread. When the government attorney argued that Section 5 continues to deter racial discrimination in voting, Chief Justice John Roberts Jr. dismissed that argument by comparing Section 5 to an “elephant whistle”: “I have this whistle to keep away the elephants. ‘You know, well, that’s silly. ‘Well, there are no elephants, so it must work.’” Justice Anthony Kennedy, who often wields the critical swing vote, also repeatedly asked what justification Congress had for subjecting some states to the preclearance requirement but not others.

In the end, the chief justice dropped the “elephant whistle” reasoning, authoring an 8-1 decision that dodged the difficult constitutional question. Instead, the Court stretched the “bailout” provisions of the statute to allow all covered municipalities to apply for relief. Although the statute appeared to make the bailout option available only to jurisdictions that register voters, the Court explained that it would apply “a broader reading of the bailout provision” in light of “underlying constitutional concerns.”

This pragmatic decision was an increasingly rare example of the “judicial minimalism” that Roberts praised during his 2005 confirmation hearings. In recent years, the Court has been quick to nullify federal and state laws, agency rules and presidential actions. It was thus an unexpected – but welcome – development for the Court to rely exclusively on

statutory interpretation and to avoid the hotly contested constitutional question at the heart of the case.

The Court's interpretation of the Voting Rights Act's bailout provisions was also significant. Now that all political subdivisions, including cities, can win exemption from Section 5 if they show that they have no recent history of discrimination, the number of such requests will likely increase. To date, only 17 jurisdictions (all in Virginia) have ever been awarded bailout – far fewer than Congress expected when it created the current bailout mechanism in 1982. If more jurisdictions begin to seek exemption, Congress' intent will be fulfilled and much of the dissatisfaction with Section 5 may dissipate. Cities without records of discrimination, for instance, will be able to try to convince a court that they deserve bailout, and, if successful, will then be free of Section 5's restrictions.

The Court's decision also has important implications for the next round of redistricting, set to occur after the 2010 Census. Since Section 5 remains in place, covered jurisdictions will continue to have a duty to demonstrate in advance that their new district maps do not undermine the voting power of minority voters. In past cycles, that obligation has been crucial to assuring the continued ability of African Americans and Hispanics to elect candidates that they favor.

Lastly, the Court issued several clues as to how it might eventually decide the constitutional question it dodged this time around. Section 5's opponents will undoubtedly cite the Court's statements that the provision “raise[s] serious constitutional questions” and “imposes current burdens and must be justified by current needs.” Section 5's supporters, on the other hand, can take solace in the Court's declaration that “[t]he historic accomplishments of the Voting Rights Act are undeniable,” as well as in the acknowledgement that the provision might be upheld if it is merely a “rational means to effectuate the constitutional prohibition.”

The Court's decision thus pleasantly surprised voting rights advocates. Presented with an opportunity to dismantle one of the centerpieces of modern civil rights legislation, the Court demurred.

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