

2009 Supreme Court Voting Rights Cases

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There are two cases in this term of the United States Supreme Court that may have an important impact on Texas political subdivisions' obligations under the Voting Rights Act. One is heralded as one of the most important cases of the court's term and promises to produce a landmark decision. The other was less closely watched and was decided in March. Although it did not change the current state of the law, it could end up having the greater practical impact because of what it didn't do. Specifically, it failed to change the current interpretation of the Voting Rights Act and thus avoided expanding the opportunity for litigation against governmental bodies.

Northwest Austin Municipal Utility District No. One v. Holder, No. 08-322

Northwest Austin Municipal Utility District No. One [NAMUDNO] poses a direct challenge to the constitutionality of section 5 of the Voting Rights Act. Most commentators consider it one of the most important cases before the Supreme Court this term.

Background

The Voting Rights Act was enacted in 1965. For purposes of this discussion, it is helpful to think of the Act as having two primary components—section 2 and section 5. Section 2 prohibits governmental entities from engaging in electoral practices that discriminate against members of protected minority groups (*e.g.*, African-Americans and Hispanics). Section 2 applies to the entire country and has no expiration date.

The other important part of the Act is section 5. Section 5 requires that all election changes adopted by a covered jurisdiction be precleared by the Department of Justice or a three-judge district court in the District of Columbia before they can be implemented. Section 5, thus, effectively gives the federal government a veto over some state and local enactments. There is no doubt that section 5 represents a significant imposition on state sovereignty, but there is also no doubt that it was designed to respond to an extraordinary problem. When the Voting Rights Act was adopted in 1965, the states of the deep South, especially Mississippi and Alabama, had managed virtually to exclude blacks from the franchise. While the Fifteenth Amendment prohibited denial of the right to vote on account of race, some states had used a variety of ingenious devices to ensure that the franchise was limited to whites. Poll taxes, literacy tests, grandfather clauses¹, and similar devices were racially neutral but were generally designed and

¹While the term has a more expansive meaning today, the original grandfather clauses waived certain voting requirements for descendants of men voting before 1867. This had the effect of waiving the requirement for whites but imposing them on blacks, who were unable to

had the effect of preventing African-Americans from registering. To avoid the use of these types of devices to frustrate the purpose of the Voting Rights Act, section 5 requires that all changes in election practices in covered jurisdictions be precleared in Washington before they can be implemented. As enacted in 1965, section 5 applied only to Alabama, Louisiana, Mississippi, Georgia, South Carolina, and large portions of North Carolina and was designed to lapse in five years. Since 1965, the Congress has amended section 5 several times to keep it from expiring, and it has expanded its reach to include other states. A 1975 amendment brought Texas under section 5 and required election changes adopted after November 1, 1972, to be precleared. The 1982 amendment of the Act extended the operation of section 5 for 25 years so that it would expire in 2007.

Facing the possible expiration of section 5 in 2007, the Congress adopted the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. This extended section 5 for an additional 25 years or until 2031, 66 years after it was originally enacted as a five-year emergency measure.

When the extension was being considered, some voices—primarily law professors—urged that the Congress slow down the process and consider amending the extension to be sure that it met standards of constitutionality that had been announced in more recent Supreme Court cases. Specifically, the concern was that the extension might not be considered a congruent and proportional response to contemporary problems. The solution that was a proportional response to the problem that existed in 1965 might not be proportional to the situation that existed in 2006. The Act, however, had overwhelming bi-partisan support, and neither the Republicans, who controlled both houses of Congress at the time, nor the Democrats, nor the civil rights advocacy groups were willing to amend the Act or delay its consideration.

After the Act was passed, a municipal utility district in Travis County brought a test case in the District Court of the District of Columbia. The three-judge district court upheld the constitutionality of the Act, and the case was appealed to the United States Supreme Court.

What are the issues?

1. Is section 5 constitutional? Specifically, even if section 5 was a necessary response to the situation that existed in 1965, is it a congruent and proportional response to the situation that existed in 2006?
2. Do the “bail-out” provisions of the Act permit the municipal utility district to bring itself out from under the Act? This issue generally relates to the definition of “political subdivision” in the Act. The Act appears to define “political subdivision” in the bail-out provisions of the Act to be limited to those subdivisions who register voters, which in Texas would be counties. To bail out, a jurisdiction must establish that it and all the

vote prior to 1867.

entities within its territory meet a list of substantive criteria including ten years worth of compliance with section 5, including submitting all voting changes during that ten-year period in a timely fashion. In Travis County, for example, there are at least 107 governmental units. Proving that all of them had fully complied with the Act over a ten-year period would be extremely difficult and would make it virtually impossible for the county to bail out. Of course, if the municipal utility district were itself a political subdivision within the meaning of the bail-out provision, then it could rely on its own actions, and bail-out might be a more realistic possibility.

When will the case be decided?

The case was argued on April 29, 2009. It will be the last case to be argued in this term of the Supreme Court and will likely be among the last cases to be decided. The decision will probably be released around the end of June.

What is the likely result?

This is a difficult case to predict. Just as both the Republicans and Democrats in Congress were reluctant to oppose the 2006 extension, there is probably reluctance on the Court to overturn what is probably the most effective civil rights act in the nation's history. On the other hand, a slim majority of the Court has shown discomfort at race-based decision-making even where it is designed to enhance racial equality. What is probable is that Justice Kennedy will be in the majority. He is often the swing vote in closely divided cases, and it is almost impossible to conceive of a situation where he would not be part of the majority. Some commentators, who hope the Court finds section 5 to be a congruent and proportional response to a contemporary problem, and, thus, is constitutional take heart in a passage from Justice Kennedy's opinion in *Bartlett v. Strickland* decided on March 9, 2009. There, Justice Kennedy emphasizes that "racial discrimination and racially polarized voting are not ancient history," perhaps suggesting he might be open to finding section 5 to be a proportional and congruent response to a current problem

What impact will the decision have on Texas counties?

Although this is characterized as a potential blockbuster case, there is a very good chance that it will have little practical impact.

1. Obviously, if section 5 is upheld, there will be no change.
2. If the extension is found to be unconstitutional, the impact still may be relatively minimal.
 - A. In the immediate redistricting context:

- i. Counties still will have to redistrict in 2011 in order to comply with one person–one vote requirements.
 - ii. While the redistricting plans may not need to be precleared, they still will need to be drawn to comply with section 2. Failure to comply with section 2 will potentially subject the county to a lawsuit for violation of the Voting Rights Act.
 - B. If section 5 is overturned, it is likely that the Congress will re-enact the section with changes designed to address whatever deficiencies the Court noted. Support for the Act was overwhelming from both parties, and it is probable that the Congress would quickly seek to reinstate section 5.
3. One possible outcome is for the Court to interpret the bail-out provision to apply to the municipal utility district. If so, the court might then decide that the bail-out option minimizes the imposition on the local government’s sovereignty, making the statute more congruent and proportional and, thus, constitutional. If so, this might result in a substantial change in the law as it would make it possible for jurisdictions to bail out of coverage. The practical impact, though, would be greater on smaller jurisdictions rather than counties.

Bartlett v. Strickland , No. 07-689

Bartlett relates to the standard for proving a case under section 2 of the Voting Rights Act. There is a three-part threshold test that applies to section 2 challenges with the first prong of the analysis requiring a plaintiff to demonstrate that the minority group can constitute a majority of the citizen-voting-age population in a potential single-member district. This case raises the question whether the 50 percent requirement is a hard-and-fast rule. While, compared to *NAMUDNO*, this case has drawn little attention, it may ultimately have a greater impact on Texas political subdivisions.

Background

The North Carolina legislature adopted a redistricting plan that divided Pender County between two House of Representatives districts. Under the North Carolina Constitution, counties may not be divided between house districts unless necessary to comply with federal law. The proponents of the redistricting plan argued that it was necessary to divide the county to preserve a district that elected an African-American representative although the district had a little less than 40 percent African-American voting-age population. The North Carolina Supreme Court ruled that federal law–specifically section 2 of the Voting Rights Act–did not require the county to be split, since the resulting district would not have 50 percent African-American voting-age population.

What is the issue?

To prove a violation of section 2 of the Voting Rights Act is it necessary to show that the minority group could constitute an absolute majority of the citizen-voting-age population in a potential single-member district?

When is the status of the case?

The case was decided on March 9, 2009.

What was the result?

In a 5-4 decision, with Justice Kennedy writing for a three-justice plurality,² the Court held that a violation of section 2 of the Voting Rights Act is established only where the minority group can show that it can constitute a majority of the voting-age population³ in a potential single-member district.

What impact will the case have on political subdivisions in Texas?

The decision does not change existing law. As Justice Kennedy noted, the opinion of the Court is consistent with that of every federal court of appeals (specifically the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Courts of Appeals) that has considered the question. Basically, what the opinion means is:

- A governmental body does not violate the Voting Rights Act by failing to draw a minority district where the minority group cannot constitute at least 50 percent of the citizen-voting-age population in a potential district.
- The Court, however, reserved the question of whether there would be a violation in those instances where the failure to draw such a district involved intentional discrimination against the minority group.

²Chief Justice Roberts and Justice Alito joined Justice Kennedy's opinion. Justice Thomas filed a concurring opinion that was joined by Justice Scalia expressing their view that the Voting Rights Act does not reach vote dilution claims. Thus, they agreed with the judgment in the case, but for a different reason than the one expressed by Justice Kennedy.

³The Kennedy opinion refers to voting-age population rather than citizen-voting-age population. The issue of whether voting-age population or citizen-voting-age population was not presented in the case, so no inference should be drawn that citizen-voting-age population is not the relevant standard. In states comprising the Fifth Circuit, one of which is Texas, citizen-voting-age population is the relevant standard.

- Existing majority-minority districts may still be protected under section 5 of the Voting Rights Act, since any changes in those districts must be submitted to the Department of Justice for consideration under a retrogression standard—*i.e.*, whether the change to the district reduces the electoral opportunity of minority voters.
- Even if the Voting Rights Act does not *require* governmental jurisdictions to draw predominantly minority districts in circumstances where the minority group cannot constitute at least 50 percent of the citizen-voting-age population, they are certainly free voluntarily to draw such districts.

Retention of the current standard provides benefits to Texas governments since it reduces the likelihood of litigation. The 50 percent rule provides an objective standard by which potential plaintiffs and defendants can analyze their obligations under the Voting Rights Act. If a county is sued under section 2, it can analyze its potential liability by determining if the plaintiff can meet the 50 percent standard. Since it is currently a bright line rule, a governmental body can have high confidence in the analysis of its potential liability. Similarly, potential plaintiffs can determine that certain cases should not be brought.

On the other hand, if the current bright line rule had been eliminated or had become fuzzy, Texas governments could expect to face more section 2 suits. They would have had less certain defenses and a much more difficult time analyzing their potential liability. Whatever one's policy position on the issue is, the Court's opinion means that Texas governmental bodies will be subject to fewer suits and, when they are sued, will be in much better position either to defend themselves or to recognize whether the suit has merit.