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COMMENTARY

Disabling the Voting Rights Act

By Gary S. Stein

Like many Americans, my initial reaction was indignation to the news that on June 25, by a 5-4 decision, the U.S. Supreme Court had nullified the Voting Rights Act's critical preclearance provision — §5 — by invalidating the coverage provision Congress had readopted in 2006.

My first thoughts were of the voting-rights activists crossing the Edmund Pettis Bridge on the outskirts of Selma, Ala., on March 7, 1965, only to be attacked and savagely beaten by Alabama state police, local police and vigilantes. The sordid details of that event, captured for the nation by television cameras, provoked President Lyndon Johnson and Congress to enact the act, the most successful civil rights law in our history.

The heart of that law, §5, prevents the covered jurisdictions from implementing *any* election law changes without preclearance by the Justice Department or the U.S. District Court for the District of Columbia.

No other law enacted by Congress applies only to designated jurisdictions that are required to obtain advance permission before they can revise their election laws. Literally thousands of attempted discriminatory election law changes enacted by jurisdictions subject to §5 during the past five decades never took effect because of its formidable preclearance requirements.

The Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. __ (2013), effectively does away with preclearance and opens the floodgates for new, discriminatory or repressive election laws that will take effect immediately and face only after-the-fact review under §2's option to challenge such laws through traditional litigation techniques.

Strong disagreement with the majority opinion's result, however, cannot excuse the absence, in Justice Ruth Bader Ginsburg's dissenting opinion, of any acknowledgement that Congress, in reauthorizing the VRA in 2006, could have done better work in developing a record and adopting amendments designed to address the constitutional issues about which they were forewarned. In fact, during the hearings on the 2006 renewal legislation, law professors and political scientists expressed concern that retention of the 1972 coverage formula ran a significant risk of constitutional challenge.

Among other concerns, Congress was warned that the Supreme Court's current jurisprudence might require not only proof of continuing discrimination in the covered jurisdictions, but also evidence that discrimination in voting in the covered jurisdictions was currently worse than in the noncovered jurisdictions, and that the lack of such contemporary evidence jeopardized the constitutionality of the renewal of §5.

The context for those concerns was that in the original VRA passed in 1965, "covered" jurisdictions subject to preclearance were those states or political subdivisions that had maintained a "test or device" — such as literacy tests or moral character requirements — as a prerequisite to voting as of Nov. 1, 1964, *and* had less than 50 percent voter turnout or registration in the 1964 presidential election.

Because §5 expired in five years, Congress reauthorized the act in 1970 for five more years and updated the benchmark for coverage from 1964 to 1968. In 1975, Congress reauthorized the act for seven more years, updating the benchmark for coverage from 1968 to 1972, and expanding "test or device" to include the provision of English-only voting materials in places where more than 5 percent of voting-age citizens spoke a single language other than English.

In 1982, Congress reauthorized the act for 25 years, but did not change 1972 as the benchmark year for coverage. Congress did expand the provision in the VRA that authorized a covered jurisdiction to "bail out" of coverage. The 1982 amendment permitted covered jurisdictions *and* their political subdivisions to bail out of coverage if they had not used a test or device, failed to receive preclearance or lost a §2 claim in the 10 years prior to seeking bailout.

In 2006, Congress reauthorized the VRA for 25 more years but retained 1972 as the benchmark year for coverage. Congress also expanded §5 to prohibit voting changes with a discriminatory purpose *or* effect, as well as voting changes that diminish the ability of citizens, on account of race, color or language minor-

Justice Stein served on the New Jersey Supreme Court from 1985-2002 and is counsel to Pashman Stein in Hackensack. He teaches Election Law at Rutgers Law School-Newark.

ity, "to elect their preferred candidates of choice."

In 2009, the Supreme Court decided *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, in which a Texas utility district sought to bail out of the act's coverage and, alternatively, challenged the VRA's constitutionality. Avoiding the constitutional issue, the court reversed the lower court's determination that bailout was restricted to political subdivisions. In an 8-1 decision, the court noted the "substantial federalism costs" imposed by §5 and questioned whether the problems addressed by it were still "concentrated in the jurisdictions singled out for preclearance." Dissenting, Justice Clarence Thomas concluded that §5 no longer was constitutional.

As previously noted, Justice Ginsburg's dissent criticized the majority opinion's failure to defer to Congress' judgment on the coverage formula without ever acknowledging that Congress had known about but declined to confront possible constitutional problems with the formula.

But the dissent's disregard of Congress' shortcomings is overshadowed by Chief Justice John Roberts Jr.'s disdainful refusal to engage in any evaluation of the extensive record developed during the congressional hearings: "[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today." Had Chief Justice Roberts not avoided the record that Congress developed in 2006, he would have had to overcome the strong evidence of continuing discrimination against minorities in the covered districts that appeared to exceed comparable conduct in noncovered districts:

• Abundant case studies of voting-rights violations, including intimidation and violence against minority voters; discriminatory administration of elections; disparate treatment in registration and voting and racial gerrymandering.

• A study by Professor Ellen Katz of the University of Michigan Law School that the rate of success for plaintiffs in suits alleging §2 violations was significantly higher in covered than in noncovered jurisdictions even though covered jurisdictions were constrained by §5.

• Congress also determined that in cases that found significant racial bloc voting — whites voting for whites and blacks voting for blacks — the existence of white racial bloc voting at the 80 percent level was twice as high in covered than in noncovered jurisdictions.

The bottom line is that the record before Congress was sufficient to uphold this historic and profoundly important legislation. The majority and dissenting opinions disagreed on whether Congress properly renewed the VRA based on its finding that discrimination in voting rights persisted in the covered jurisdictions. On that crucial issue, Congress' judgment should have been respected. Congressional enactments enforcing the Fourteenth and Fifteenth amendments deserve the highest degree of deference from the judiciary.

The Voting Rights Act was no ordinary law. After a century of exclusion and discrimination, it restored the right to vote to thousands of African-Americans throughout the South and, through preclearance, blocked new and creative efforts to restrict minority voting. Although a contemporary coverage formula and a shorter renewal period — or an inclusive national law focused on all types of voting restrictions — might have been preferable, those choices were Congress' to make. The Roberts Court should have controlled its impatience to disable the Voting Rights Act. ■