

US Supreme Court hears challenge to Voting Rights Act

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In oral arguments April 29, the right-wing majority of the US Supreme Court indicated that it was prepared to strike down or weaken Section 5 of the landmark Voting Rights Act of 1965. That provision requires a number of Southern states with a history of discrimination against minority voters, and their political subdivisions, to obtain advance clearance from the US Justice Department before making changes to election procedures.

The statute in question arises under the power granted Congress in the Fifteenth Amendment to the US Constitution, one of the Reconstruction era amendments enacted in the wake of the Civil War.

The Fourteenth Amendment, adopted in 1868, prohibited the individual states from abridging the privileges or immunities of citizens, including the newly freed slaves, or violating the principle of equal protection of the law. But congressional attempts to enforce these rights in the context of extending the vote to freed slaves were met with fierce resistance, including violence and intimidation.

The Fifteenth Amendment was ratified in 1870 specifically to remedy this festering problem. It provides that the right to vote shall not be abridged by the US or any state on account of race. It further grants Congress the power to enforce the amendment by appropriate legislation.

The amendment was widely considered to be the centerpiece of Reconstruction. Its more radical supporters viewed political equality as an essential step to social equality. Key to this was the right to vote. As one Republican supporter put it in the debate in Congress on the proposed amendment, that right was “a badge of equality, a schoolmaster for the ignorant, a lifter up of the lowly, and a bond of fraternal union.”

The Fifteenth Amendment radically altered the balance of power between the federal government and the states with respect to regulation of the voting franchise. Objections based on federalism and states’ rights were brushed aside, as Congress was granted the primary role in defending voting rights.

By the 1890s, however, Jim Crow laws in the South widely imposed measures such as literacy tests and poll taxes to impede African-American voting. In 1965, at the height of the civil rights movement, Congress passed the Voting Rights Act in an attempt to end that legacy once and for all. This was one of the most important pieces of civil rights legislation and extensions of democratic rights in US history.

One section of the act permitted court cases to be filed to challenge discriminatory voting practices. Based on a detailed congressional study of the history of such practices, another section of the act, Section 5, required certain jurisdictions, mostly in the Deep South, to

seek federal permission in advance before making changes in voting procedures.

This pre-clearance requirement extends to matters such as how voter registration is conducted, where polling places are situated, how elections are publicized and where the boundaries of voting precincts are drawn. The statute authorizes any state or county that can show that it has not discriminated for 10 years to get permission from a court to be “bailed out” of its pre-clearance obligations.

Congress renewed the Voting Rights Act three times, most recently in 2006, when it extended its coverage for another 25 years in the same jurisdictions originally singled out in 1965.

The pre-clearance requirement of the act was previously challenged four times in the Supreme Court. On each occasion the court upheld the power of Congress in enacting the requirement, and gave special deference to Congress’s judgment, given that it was engaged in enforcing the core protections of the Reconstruction amendments.

This meant the Court declined to second guess Congress’s assessment and weighing of the various conflicting considerations—the risk or pervasiveness of discrimination, the effectiveness of various remedies for voting discrimination, the impact of the legislation on states’ rights, and the like.

In these cases the Supreme Court also explicitly recognized that case-by-case litigation in the courts of questionable practices had proven inadequate to combat widespread patterns of voting discrimination, such that the prophylactic of a pre-clearance mechanism was justified. The requirement was viewed as an effective deterrent to more subtle forms of discrimination, so-called second generation barriers, imposed to undermine or dilute the right to vote of racial and language minorities. Unlike in most discrimination contexts, the court also specifically upheld Congress’s power to reach voting practices that had only a discriminatory effect, as opposed to a proven discriminatory intent.

In reauthorizing the Voting Rights Act in 2006, Congress held 21 separate hearings over 10 months, heard from 86 witnesses, and gathered over 16,000 pages of testimony to discern the extent to which discrimination against minority voters had continued in jurisdictions subject to pre-clearance over the previous 20 years.

That evidence included marked voter registration differences between white and minority voters, over a hundred successful lawsuits challenging discriminatory practices in court, and the Justice Department’s rejection of 600 pre-clearance requests, most of them based on its view that the proposed changes involved attempts at intentional discrimination.

Despite progress made in eliminating first-generation barriers such as polling taxes and literacy tests, Congress determined that 40 years

had not been a sufficient amount of time to eliminate the vestiges of discrimination, following nearly 100 years of disregard of the Fifteenth Amendment. The 2006 Act passed the Senate by a vote of 98-0 and the House with only 33 voting against.

The challenge to the Voting Rights Act that the court heard on Wednesday was brought by a utility district in Texas that did not register voters and had no record of discrimination, but was subject to pre-clearance because it was in Texas, a state which, in the 1970s, Congress determined should be covered.

Much of the oral argument on Wednesday dealt with whether the utility district plaintiff was the kind of political subdivision entitled to seek a “bailout” in court. But the real significance of the case lay in the plaintiff’s challenge to the constitutionality of Congress’s finding that the evidence it amassed of continuing discrimination justified continuation of the pre-clearance requirements for another 25 years.

The plaintiff argued that the court should not defer to Congress, that the evidence of continued discrimination was skimpy, that it did not show more discrimination in covered jurisdictions than in others not selected by Congress for coverage, and that the election of Barack Obama showed how much progress had been made on the problem.

Many right-wing interest groups that have been in the forefront of undermining the right to vote filed briefs in the case in support of the plaintiff’s challenge, such as the Mountain States Legal Foundation and the Pacific Legal Foundation. Despite the historic fact that the Fifteenth Amendment represented the high point of federal imposition on states’ rights, these parties asserted that the impact of the act on the prerogatives of the states justified invalidating the Voting Rights Act’s key Section 5.

In oral argument, four of the justices in the Court’s right-wing bloc echoed these arguments. The evidence relied on by Congress was met skeptically, and deference to Congress and its judgment on these matters appeared to go by the wayside.

These justices particularly harped on the argument that it was unfair for Congress to single out Southern jurisdictions without also examining the extent of discriminatory practices in other jurisdictions. “Are Southerners more likely to discriminate than Northerners?” asked Chief Justice John Roberts. “Why didn’t [Congress] extend Section 5 to the entire country?” queried Justice Samuel Alito, Jr.

Particularly significant was the focus given to this point by the justice considered the swing vote on the court, Justice Anthony Kennedy. Kennedy said, “Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Michigan.” He continued, “That’s part of the showing, it seems to me, that Congress has to make, that these states that are now covered and that were covered are markedly different from the non-covered jurisdictions.”

Coming from justices who have decried for years supposed “judicial activism,” this amounts to the height of result-oriented jurisprudence and disregard of the will of elected bodies.

Nothing in the Constitution, in prior Supreme Court jurisprudence, or in logic, for that matter, requires Congress to forego action to remedy discrimination it knows about until it exhaustively examines the possibility of such practices existing nationwide and takes steps to eradicate them. States engaged in unlawful conduct have no right to be free from selective enforcement in that respect.

Such arguments blithely ignore the legacy of past discriminatory practices, and the historic context of the Fifteenth Amendment.

Whatever the actual outcome in the case heard on Wednesday, the arguments reflect a pattern of increasingly flagrant attacks on the right

to vote. Such attacks have been politically directed primarily by the Republican Party, not only against voters because of their ethnicity or language, but against poor and working class voters more generally.

The theft of the 2000 presidential election involved widespread attempts to suppress African-American voting in Florida. Other attempts to purge voting rolls to exclude likely Democratic voters have continued in subsequent elections, including the 2004 presidential election.

Efforts to impose requirements such as photo identification in order to vote, which have been enacted in a number of states, including Georgia, Arizona and Indiana, serve the same discriminatory purpose. In April of 2008, the Supreme Court ruled in a case brought against Indiana that states have the right to enact such laws.

To a considerable extent, the scandal that arose over the firing of US Attorneys during President Bush’s last term was bound up with the drive by Bush’s Justice Department to trump up court cases alleging voting irregularities in order to suppress voting for Democrats.

For its part, the Democratic Party has refused to seriously oppose these attacks. Its cowardice and lack of a principled defense of the right to vote found a definitive expression in its capitulation to the installation of George W. Bush in 2000 on the basis of the suppression of votes, ordered by a right-wing majority of the Supreme Court in the court’s *Bush v. Gore* decision of December 12, 2000.

Such attacks have a very definite and reactionary political significance. What cannot be doubted is that despite the election of an African-American president, the attack on the right to vote and on other democratic rights is being intensified, under conditions where there is no serious commitment to the defense of democratic rights within either party or any section of the political establishment.



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