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ARTICLES & COMMENTARY

Voting Rights Verdict

By Abigail Thernstrom | Los Angeles Times

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Reading tea leaves is a favorite game played by Supreme Court watchers, despite the fact that it's never going to reveal much. Government institutions regularly leak information -- but not the high court. It is tight as a drum.

Thus those who are trying to create some buzz about the upcoming decision in the Voting Rights Act case now in front of the justices are reduced to reporting such tidbits as Justice Ruth Bader Ginsberg's dropping the hint that more 5-4 decisions may be coming before the end of the term.

That's pretty thin in news or predictive power. After all, the court has yet to announce a number of decisions, and it would surprise no one if the finding in Northwest Austin Municipal Utility District No. 1 vs. Holder -- widely known by the acronym NAMUDNO -- is 5 to 4. The solid conservatives on the court are likely to find in favor of the utility district, and the liberals will be against any change in the Voting Rights Act. Only Justice Anthony Kennedy is an unknown quantity on the issue, most believe.
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The case involves a tiny Texas utility district that has challenged the constitutionality of a key provision, Section 5, in the statute. Section 5 was supposed to be an emergency, temporary measure to make sure Southern states couldn't again disenfranchise Southern blacks, couldn't find ways to get around the ban on literacy tests and other safeguards to stop racist voter registrars from keeping blacks from the polls.

It is a constitutionally unique provision: it identifies racially suspect jurisdictions (mostly whole states but also some counties) and prevents them from altering any aspect of their electoral system without a thumbs-up from the feds. The Justice Department (or the D.C. District Court) must "pre-clear" a change before it goes into effect. And the burden is on the jurisdiction to prove that what it wants to do is racially beyond suspicion. If the Justice Department thinks the intent or effect of the new voting procedure is racially tainted, it's a no-go.

Section 5 was a fine and necessary provision in the Southern context in the mid-1960s, but it didn't turn out to be very temporary or confined to the South, as originally envisioned. In 2006, Congress renewed and actually strengthened the provision for the

fourth time; its new expiration date is 2031. Despite a remarkable transformation in the status of African Americans and white racial attitudes over the last four decades, Congress concluded that electoral discrimination was just "more subtle" than it was when, throughout the South, only a minority of black voters were allowed to register to vote. Congress did this even though the record fell far short of painting a picture of discrimination even vaguely reminiscent of the kind that was common in the Jim Crow era.

Immediately following that 2006 congressional vote, the little Texas utility district sued. It had moved a polling place from a private residence to a public school. Why shouldn't that have been its decision? Why should the feds have had any say?

For the supporters of Section 5, the reason is that the utility district is part of a state that has had minority voting problems in the past and should still be subjected to special oversight. For them, what's at stake is Section 5's broad (and best known) power to insist on racially gerrymandered voting districts in order to ensure minority representation on legislative bodies from school boards all the way up to congressional delegations for blacks and Latinos (the latter became a protected group under the act in 1975). Section 5 supporters see the Texas case as a test that could dilute or possibly destroy that power.

For those who think that Section 5 has done its work and should be retired, the absurdities of the Texas case speak for themselves. The little utility district wasn't even established until the 1980s, and it has no racist voting history to overcome. On top of that, as long as racial and ethnic discrimination remains against the law, gerrymandered "minority-majority" districts are neither desirable nor necessary. Further, the hand-over of election decisions from states or counties to the federal government violates principles of federalism and states' rights embedded in the Constitution.

At the oral argument before the Supreme Court on April 29, all eyes were on Kennedy, whose vote is likely to be decisive. He questioned the Justice Department's deputy solicitor general, the advocate for keeping the feds involved in the utility district's elections: By passing and renewing the Voting Rights Act, "Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. . . . Does the United States take that position today?"

Panic rippled through the civil rights community, which strongly believes in Section 5. As Yale law professor Heather K. Gerken admitted on the day of the oral argument: "Supporters of the VRA have few reasons to be cheerful." Adam Cox, a member of the Illinois ACLU board of directors, subsequently wrote: "The NAMUDNO argument did not go well for defenders of the act." The blog of Legal Times reported: "Supporters of the law are bracing for defeat."

Questions during oral argument are one thing; actual opinions are another matter. Three scholars, comparing queries from justices during oral arguments and court outcomes, have concluded that (in academic lingo): "None of [Kennedy's] question variables

produces a statistically significant coefficient." In other words, his questions aren't telling; based on past patterns, they can't predict his position.

The court has a number of choices. Among them: It could allow the utility district and other racially squeaky clean jurisdictions to "bail out" of Section 5 coverage (although the language of the statute does not seem to provide for the release of jurisdictions below the county level). It could demand some sort of broader modification of pre-clearance, or possibly overturn it. And, of course, it could simply declare that Section 5 is good as it is, and yes, that Austin polling place shift had to be cleared by the feds.

Despite the silliness of Supreme Court tea leaf reading, there is one prediction relating to NAMUDNO that we can evaluate right now. There are those who say that if Section 5 is struck down or diluted, with it will go more than 40 years of protections for minority voters. Columnist Colbert King, in the Washington Post on June 16, expressed concern that the court would tear "the heart out of the Voting Rights Act." In fact, the "heart" of the statute is its permanent provisions.

Whatever the NAMUDNO decision, we should not share King's fear. Section 5, an emergency measure to deal with a Jim Crow South, is no longer needed. Today, blacks and Latinos are a powerful force in American politics. They do not need federal protection designed for a very different era.

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