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Integration Now
The Supreme Court should scrap an antiquated and unconstitutional rule

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In the summer of 2006, with hardly a dissenting vote, Congress extended and strengthened the most radical provision of the 1965 Voting Rights Act for a quarter century. That provision — Section 5 — was originally supposed to expire in 1970. In 1965, it was considered too constitutionally doubtful to be given a longer life. Forty-four years later, it is still going strong, having been repeatedly extended.

The ink was barely dry on the 2006 amendments when a tiny Texas utility district challenged their constitutionality. Section 5, the district argued in Northwest Austin Municipal Utility District No. 1 v. Holder ("NAMUDNO"), "strikes at the heart of federalism, injecting the federal government directly into the state and local legislative process" — and does so on the basis of obsolete data.

Striking "at the heart of federalism" had been precisely the purpose of Section 5 in 1965. The Voting Rights Act enfranchised southern blacks by intruding on states' traditional right to set their own election procedures. It suspended literacy tests (usually fraudulent) and provided federal registrars and observers, when necessary, in states and counties that statistical criteria had identified as racially suspect. The criteria were reverse-engineered: The framers of the act knew they wanted to target the South and designed a test that would do so.

Section 5 prevented those southern jurisdictions — called "covered" — from instituting any new voting procedure without federal approval (known as "preclearance"). Only changes that were shown to be nondiscriminatory could be "precleared." State and local laws are usually presumed valid until found otherwise by a court, but the statute switched the burden of proving innocence to the defendant — the jurisdiction seeking preclearance of a voting change. It was required to prove a negative — an absence of discriminatory intent or effect.

The preclearance provision thus, in effect, put the conduct of elections in the South under federal receivership. Section 4 of the act banned literacy tests; Section 5, by requiring approval of every change in the method of elections in covered states, made sure the effect of that ban stuck. It was intended as a prophylactic measure — a means of guarding against new efforts to stop blacks from exercising their Fifteenth Amendment rights.

Distrust of southern state and local election processes, in other words, was the foundation upon which Section 5 was built. At the time, the great liberal Supreme Court justice Hugo Black expressed grave constitutional doubts about states' being "compelled to beg federal authorities to approve their policies," but he was from Alabama, and southerners

came to the argument with dirty hands. In the context of the time, nothing short of overwhelming federal power would have destroyed the Jim Crow South. Southern whites feared black enfranchisement; they knew that white supremacy and black subordination could not last once blacks had the ballot — as indeed it turned out.

By now, racist registrars and fraudulent literacy tests have gone the way of segregated water fountains. But the act as subsequently amended betrays no awareness of this remarkable revolution in racial attitudes and laws; indeed, in passing the amendments of 2006, Republicans and Democrats alike accepted the argument offered by civil-rights advocates, and included in a House Judiciary Committee Report, that discrimination has just become "more subtle" than it was in 1965. Minority voters are still prevented from "fully participating in the electoral process."

Rarely in the rich annals of congressional deceit and self-deception have more false and foolish words been written, and in filing its suit in NAMUDNO, the Texas utility district in effect called both the rhetoric and the vote shameful. "As reenacted in 2006, §5 . . . [locks] in place the legislative judgments of the 1960s, rather than reflecting any fresh analysis of where §5's extraordinary remedy might be needed today, if anywhere," a brief for the district argued. "That portrayal unfairly demeans current residents of all races in covered jurisdictions and diminishes both the progress our country has made and the gravity of the evils the civil-rights movement fought to overcome. . . . [Congress has treated] racism as an inheritance that runs with the land rather than a manifestation of attitudes and actions of living individuals."

Judge David Tatel, writing for the D.C. district court where the case was first heard, rejected the district's constitutional argument, concluding "that given the extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend Section 5 for another twenty-five years was rational and therefore constitutional."

The cumulative House record compiled in 2005–06 offered a blizzard of anecdotes as evidence of ongoing voting discrimination and inadequate electoral opportunity in America today. "I don't understand, with a record like that, how you can maintain as a basis for this suit that things have radically changed," Justice David Souter said to Gregory Coleman, representing the district, at the oral argument. The examples, Coleman pointed out, were of problems that could be fixed through the enforcement of the Fourteenth Amendment or Section 2 of the statute — a provision that is not otherwise relevant to the case.

Congress collected more than 12,000 pages of testimony and other documents filled with stories of alleged discrimination, accompanied by some statistics on voter participation, minority officeholding, and the DOJ preclearance record. But the mountain of evidence fell far short of painting a picture of widespread and egregious discrimination even vaguely reminiscent of the kind that was common in the Jim Crow era. Anecdotal accounts included changes in the location of polling places, "often on short notice"; voters "forced to cast votes outside of the voting booth . . . because there was no room

available"; and so forth. The charges were splattered across the pages of testimony as if they spoke for themselves. Was there no room in the polling place because an unprecedented number of voters showed up, and, if so, how common had that problem been? Was anyone kept from casting a ballot? Most important, was the experience of voters in, say, Alabama notably different from that of voters in Ohio? Were the stories of discrimination qualitatively different from those that were heard in 2000 about Florida counties that were not covered by Section 5?

At the oral argument, Justice Anthony Kennedy questioned the Justice Department's deputy solicitor general: "Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments [in] the other. . . . Does the United States take that position today?"

Kennedy's vote will likely be decisive, and his question sent panic rippling through the civil-rights community. He had pointed out the obvious: Discrimination in the South today was not just "more subtle" than that in 1965.

In 1954, the Supreme Court had signaled the end of Jim Crow in Brown v. Board of Education. Ten years later, in almost every southern state, only a minority of blacks were able to cast a ballot. Disfranchisement was particularly acute in Mississippi and outside of major urban areas. Today, most southern states have higher black registration rates than those outside the region, and more than 900 blacks hold public office in Mississippi alone. Between 1970 and 2002, the number of black elected officials in the seven southern states originally covered by Section 5 jumped from 407 to 4,404, nearly double the rate at which black representation increased nationwide. Covered and noncovered states in the South are almost indistinguishable by the measure of blacks elected to state legislatures.

The utility district, in making its case, focused primarily on the unjustified violation of principles of federalism. "Changed conditions . . . make §5's continuation indefensible. . . . No evidence in the 2006 record justifies keeping long compliant jurisdictions in federal receivership for another quarter-century," its brief argued. There was another constitutional issue, however, that it touched on only very lightly. Section 5, it noted, "is regularly interpreted to require gerrymandering to create or maintain majority-minority voting districts. . . . These practices not infrequently result in unconstitutional racial gerrymanders."

The racial gerrymanders to which the brief referred were remedies for districting maps of which the Justice Department disapproved. The interpretation of Section 5 had morphed over time in an unanticipated direction — a change that had both benefits and costs. The original act had been animated by a vision of racial equality in the American polity: blacks free to form political coalitions and choose candidates in the same manner as other citizens. But it soon became clear that — after centuries of slavery, another century of segregation, ongoing white racism, and persistent resistance to black political power — equality could not be achieved simply by giving blacks the vote.

Thus, Section 5, initially designed as a shield against southern racism, rather quickly turned into a sword to ensure a "racially fair" distribution of political power. "Racially fair" meant representation in proportion to the minority population, which in turn demanded race-conscious maps that often contained districts described as "bug splats."

The 1965 act's ultimate aim was political integration — and it succeeded: Racially gerrymandered districts integrated southern legislative bodies, from school boards to congressional delegations. Over time, however, the costs of such race-consciousness became increasingly apparent, and in the 1990s, the Court began to consider the serious Fourteenth Amendment questions raised by such racial sorting and racial stereotyping. As Justice Sandra Day O'Connor noted in 1993, federally imposed race-based districting was "an effort to 'segregate . . . voters' on the basis of race," which stigmatized "individuals by reason of their membership in a racial group." Segregation marginalizes voters.

Today, therefore, the act may serve as a brake on black political aspirations and a barrier to greater integration. While the country has moved consistently, if unevenly, toward racial integration, the law has arguably created a black legislative class too isolated from mainstream politics. Blacks elected from safe minority districts do not develop the skills necessary to win in a racially mixed setting, and, perhaps as a consequence, few members of the Congressional Black Caucus have run for statewide office and none have moved from the House to the Senate.

In deciding NAMUDNO, the Court could allow the utility district to "bail out" from Section 5 coverage — relief to which it is entitled, it has argued, although the conventional reading of the statute suggests otherwise. But if the Court is inclined to address the large and serious issue of Section 5's constitutionality in a racially transformed America, it should take up the gerrymandering issue. The 2006 amendments actually increased the pressure on covered jurisdictions to engage in race-based districting. Can the Court turn a blind eye to the constitutional damage done by irresponsible congressional action that goes far beyond the renewal of a provision no longer justified by southern racial hostility?

If the Court lets Section 5 stand, it will be rejecting some rare wisdom from Justice David Souter. "Minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics," he wrote in 1994. As the preclearance provision has been interpreted and refashioned, blacks have too little incentive to "pull, haul, and trade." They are treated as politically helpless wards of the federal government.

Surely that is not in the interest of any Americans, whatever their color.

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