

FEBRUARY 20, 2013, 9:00 PM

## The More Things Change ...

By [LINDA GREENHOUSE](#)

Despite spending a lot of time reading and thinking about the [Voting Rights Act case](#) the Supreme Court will hear next week, there's a puzzle I'm still trying to crack:

How can it be that one of the crowning achievements of the civil rights movement, a provision upheld on four previous occasions by the Supreme Court and re-enacted in 2006 by overwhelming bipartisan majorities in Congress (98-0 in the Senate, 390-33 in the House), a law that President George W. Bush urged the justices to uphold again four years ago in one of his final acts in office, a law that has demonstrably defeated myriad efforts both flagrant and subtle to suppress or dilute the African-American vote, is now hanging by a thread?

Of the hanging-by-a-thread part, there's little doubt. Four years ago, in [Northwest Austin Municipal Utility District No. One v. Holder](#), a case commonly referred to as *Namudno*, the Supreme Court came within a hair's breadth of declaring the Voting Rights Act's Section 5 unconstitutional. "Things have changed in the South," Chief Justice John G. Roberts Jr. declared in the court's opinion, an oft-quoted line of pithy constitutional analysis that took its place with the chief justice's other profound musings on race in America. (The others, so far, are "It is a sordid business, this divvying us up by race," dissenting in 2006 from a decision awarding a rare victory to Latino plaintiffs who had sued to invalidate a Texas congressional district; and "The way to end racial discrimination is to stop discriminating by race," in a 2007 plurality opinion striking down integration-preserving efforts by public school districts in Louisville, Ky., and Seattle.)

Section 5 is the Voting Rights Act's "pre-clearance" provision, which applies in all or part of 16 states, mostly in the South. These "covered" jurisdictions can't make a change in voting procedures (new voter-ID requirements or sudden limits on early voting, to cite recent examples) without persuading either the Department of Justice or a special three-judge federal court that the change neither has the purpose nor will have the effect of "denying or abridging the

right to vote on account of race or color.” By his paean to Southern progress, Chief Justice Roberts meant that the provision was no longer justified.

The court in *Namudno* nonetheless stopped short of turning that sentiment into a constitutional holding. At the last minute, someone blinked. Maybe it was Justice Anthony M. Kennedy. Maybe it was the chief justice himself. My own unverified theory is that the court’s liberals, looking for a way out of impending disaster, came up with an offer the conservatives couldn’t refuse without exposing the rank judicial activism in which they were poised to engage. The *deus ex machina* was an invitation by the court to the plaintiff, Northwest Austin sewer district, to “bail out” from Section 5 coverage — even though the statute’s plain language made jurisdictions of the sewer district’s sort ineligible for the bail-out option — thus removing the basis for ruling on the section’s constitutionality. The result was to preserve the underlying issue for another day.

That day has now arrived, and there can be no such easy out for Shelby County, Ala. The majority-white suburb of Birmingham was recruited as a new plaintiff by the same Project on Fair Representation that had recruited the Northwest Austin sewer district to bring the first case. Financed by an organization called [Donors Trust](#), a “donor-advised fund” that channels money to a breathtaking array of right-wing groups and causes, the Project on Fair Representation is also responsible [for having found Abigail Fisher](#), the rejected University of Texas applicant who is the plaintiff in the pending challenge to race-conscious university admission policies.

In order to bail out of Section 5, a jurisdiction must have maintained a clean voting-rights record for the previous 10 years, a standard that Shelby County concededly can’t meet. But others can, and have. There has been a flurry of bailouts in the years since the *Namudno* decision. Ten entire counties in Virginia, as well as cities there and in Georgia, North Carolina and Alabama, have been granted bailout authority by the Justice Department since 2010, with the elapsed time between application and exemption as short as six weeks. The option is clearly open to any jurisdiction that has earned it. In fact, since 1984, no jurisdiction seeking a bailout has been refused one.

Those facts take us back to the puzzle I began with. What precisely is the court’s problem with the Voting Rights Act? To the extent that the law can be depicted as an anachronism — a description embraced in much media commentary on the case but one that the [briefs filed by the Obama administration](#) and [leading civil rights organizations](#) persuasively refute — that

would seem to be an ultimate policy judgment for Congress, not the courts. The federal statute books are full of laws based on outdated or discredited premises, and Supreme Court justices don't typically roam the countryside taking a scythe to them.

Further, the Congress that enacted the Voting Rights Act in 1965 invoked its authority under two Reconstruction-era amendments that protect fundamental rights of citizenship: equal protection (the 14th) and the right to vote (the 15th). Both amendments explicitly give Congress the power to enforce their guarantees "by appropriate legislation," and both had the central purpose of giving Congress enforcement power to keep the states in line. That would seem an adequate answer to the complaint that Section 5 tramples on the sovereignty and dignity of the states, a mantra raised by [Texas](#) and [Alabama](#) — but not, interestingly enough, by every covered state. [Mississippi and North Carolina](#) have joined a brief by New York's solicitor general, Barbara D. Underwood (several New York counties are covered), asserting that Section 5 has provided "significant and measurable benefits" in helping covered jurisdictions "move toward their goal of eliminating racial discrimination and inequities in voting." The law "continues to play an important role," the brief says.

By contrast, the Texas brief in support of Shelby County is one long whine. The [state complains](#) that the federal court's refusal last year to pre-clear a new Texas voter-ID law was horribly unfair because the Supreme Court itself, in 2008, had [turned back a constitutional challenge](#) to Indiana's voter-ID law, the first in the country. Why, the state asks, should Texas, a covered jurisdiction, be treated differently from the uncovered Indiana?

What Texas fails to acknowledge is that the federal court that blocked its law found important differences between the Texas and Indiana laws. Not only were the Texas ID requirements more onerous, financially and logistically, for impoverished and minority voters, the court said, but the Texas legislature, presented with a variety of options, chose the strictest requirements, those most likely to discourage voting. The Indiana decision, the court found, couldn't save the Texas law because the two statutes weren't comparable.

The Voting Rights Act contains a formula, based on voter registration, turnout and the existence of language obstacles to voting, that determines which states or portions of states are covered under Section 5. Congress hasn't changed the formula since 1975, and current coverage is based on data from 1972.

As a matter of constitutional argument, the law's opponents maintain that Congress's failure to update the data to take account of improvements in access to and results at the polls means that Section 5 is no longer a "congruent and proportional" remedy for an identified problem. The "congruent and proportional" language dates to the mid-1990s, when the Rehnquist court abandoned the Supreme Court's modern tradition of deference to Congress's exercise of its 14th amendment enforcement authority.

One answer to that argument is that although progress is obvious by many measures, the gap between those states the formula covers and those it doesn't still remains. [A brief](#) filed by a group of political scientists and law professors contains a chart showing that a much higher percentage of covered states currently impose a variety of barriers to voting.

The deeper answer is that even the Rehnquist court at the height of its "federalism revolution," when it unhesitatingly curbed Congress's power along many fronts, never went so far as to invoke the "congruence and proportionality" requirement to supplant Congress's 14th Amendment authority when it came to race. In other words, the fancy jargon in which the constitutional attack is clothed shouldn't be permitted to hide the fact that striking down Section 5 would be a truly radical move, a march off a cliff of the court's own making. Not so long ago, conservatives were attacking the Affordable Care Act's health-insurance mandate as "unprecedented." Invalidating a core federal civil rights law because the Supreme Court views it as outdated would be unprecedented indeed.

When the United States Court of Appeals for the District of Columbia Circuit [rejected Shelby County's challenge](#) and upheld Section 5 last year, the vote was 2 to 1. The dissenting judge, Stephen F. Williams, said the coverage formula had become "irrational" — "as obsolete in practice as one would expect, in a dynamic society, for markers 34-to-59 years old." Judge Williams said it was unnecessary to decide that Section 5 itself was unconstitutional; it was enough to invalidate the formula and tell Congress to come up one better suited to the times.

Chief Justice Roberts and several other justices might well find merit in that approach. They would have to know that the chance that Congress would overcome sectional and partisan tensions in order to produce a new formula is even smaller than the prospect of Congress raising judicial salaries. Section 5 of the Voting Rights Act would effectively be dead in the water — but it would

be Congress's own fault, not the court's. The accusation of "[faux judicial modesty](#)" that a frustrated Justice Antonin Scalia once hurled at John Roberts comes to mind.

Back to the puzzle I began with: how can it be that the Voting Rights Act is in such peril? The trouble isn't really that I don't know the answer. It's that I'm afraid I do.