

Section 5 of the Voting Rights Act: A History and Analysis of Relevant Supreme Court Cases

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Even after the passage of the 14th and 15th amendments to the Constitution, states, especially in the South, continued finding ways to bar African Americans from voting. Throughout the years the Supreme Court had struck down various voter suppression tactics such as grandfather clauses, white primaries, racial gerrymandering, and discriminatory application of voting tests.

However, some southern states continued to stay one step ahead of the federal government in creating new ways to limit voting. Congress and the Justice Department had been trying to deal with the problem on a case-by-case basis, but had been ineffective because the process to ban each discriminatory practice required a lot of time, energy and money. Furthermore, even when one of these challenges was successful, it was very narrow in reach.

In response to this problem and to the civil rights movement, Congress passed the Voting Rights Act of 1965 ("VRA"). Grounded in powers granted to Congress under the 15th amendment, the Act represented an important milestone in American democracy. It directly overturned nearly a century of Jim Crow laws and practices that had disenfranchised African Americans in southern states and laid a basis for upholding voting rights for all racial and ethnic minorities across the nation.

Among its immediate impacts, for example, the percentage of African American adults who were registered to vote in Mississippi rose from less than 7% in 1965 to more than 74% in 1988, with most of that increase taking place by 1970.

http://epic.org/privacy/voting/register/intro_c.html

Section 4 of the VRA contained a formula that compared voting turnout in the 1964 Presidential elections in individual jurisdictions to the nationwide voting turnout. Any state or other jurisdiction with minority turnout that was less than half of the national turnout was then covered by Section 5 of the VRA, which required all of these covered jurisdictions to submit any change voting law or practice to the Department of Justice (DOJ) or to a three-judge panel from the District Court for the District of Columbia. The DOJ or District Court has the power to block the law if its analysis shows that the law is "retrogressive" and has a discriminatory purpose or effect that weakens voting rights for a minority group covered by the VRA.

In the years since its original passage, the VRA has been renewed four times in 1970, 1975, 1982, and 2006. The vote to renew the law has never been close. Four times a Republican president has signed the renewals into law: in 1970 the vote in the House was 338-23 with 68 abstaining and in the Senate by a voice vote, with Richard Nixon signing the bill into law; in 1975 the vote in the House was 341-70 and in the Senate was 77-12, with Gerald Ford signing the bill into law; in 1982 the vote in the House was 389-24 and in the Senate was 85-8, with Ronald Reagan signing the bill into law, and in 2006 the vote in the House was 390-33 and in the Senate was 98-0, with George W. Bush signing the bill into law. In

addition to extending the act, the amendments increased the scope of the law to extend among other things, language minorities.

Summary of Supreme Court Cases Relating to Section 5 of Voting Rights Act

From the very beginning of its history the VRA, and Section 5 in particular, has been controversial and the focus of repeated litigation. Below is a summary of some of the landmark Supreme Court decisions regarding Section 5. Cases discussed are:

South Carolina v. Katzenbach (1966) – established the constitutionality of the VRA

Katzenbach v. Morgan (1966) – reaffirmed the VRA’s constitutionality and extended Congress’s power to outlaw discriminatory techniques before courts ruled on the issue

Allen v. State Board of Elections (1969) – established private citizens’ right to sue under the VRA and expanded the type of changes to election law that the VRA covered

Oregon v. Mitchell (1970) – allowed Congress to change the voting age for federal elections but not state level elections (later overturned by 26th amendment to Constitution)

Georgia v. United States (1973) – reaffirmed that the burden of proof was on the jurisdiction to convince the DOJ that there was no discriminatory purpose or effect

City of Rome v. United States (1980) – ruled that a city was not a “political subdivision” under the definition of §5 and therefore not eligible for a bailout (this decision has since been overturned by *NAMUNDO v Holder*)

Miller v. Johnson (1995) – limited the DOJ’s ability to challenge changes to state law for the sole reason that a different law would create more minority-majority districts

City of Boerne v. Flores (1997) – Created the “congruence and proportionality” standard Congress must meet when limiting states’ actions

Georgia v. Ashcroft (2003) – reiterated the different standards §2 and §5 and loosened the definition of “retrogression” under §5

Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder (2009) – ruled that the 1982 VRA amendments overruled *City of Rome*’s definition of a “political subdivision” and allowed a utility district to bailout from §5 and also hinted constitutional concerns with the current §5

Details of Major Supreme Court Cases Relating to Section 5:

South Carolina v. Katzenbach (1966)

Supreme Court – Chief Justice Warren (8-1 decision with Justice Black dissenting)

Facts

South Carolina had literacy requirements that voters had to pass in order to vote in elections. The Department of Justice (DOJ) objected to these requirements and in response South Carolina challenged Section 5 as an overreaching by the federal government.

Holding

The Court agreed that literacy requirements are unconstitutional so Congress had the right to pass the law. However the Court did not go so far as to say Congress could pass a law banning a voting requirement (i.e. literacy) before the court determined that that requirement was unconstitutional.

Reasoning

The Court said that Congress could do more than forbid violations of the 15th Amendment in general terms. According to the Court, §2 of the 15th Amendment gives Congress the power to enforce §1 of the Amendment by “appropriate legislation,” which means that the framers wanted Congress to have chief responsibility for upholding the law and enlarged its power accordingly. The Court noted that *McCulloch v. Maryland* (1819) established that as long as the end is legitimate, is within the scope of the Constitution and all the means are appropriate and relate to the end, Congress has a right to pass the law.

According to the Court in this case Congress passed the Voting Rights Act in response to consistent discrimination. The Court ruled that the law was limited in scope to those areas where the discrimination existed. Whether the measures that Congress took were constitutional depended on whether the discrimination it was addressing with those measures violated the 15th Amendment. The Court believed that literacy tests were discriminatory, violated the 15th Amendment and therefore, banning them was within the scope of Congress’s power.

Katzenbach v. Morgan (1966)

Supreme Court – Justice Brennan (7-2 decision with justice Harland and Stewart dissenting)

Facts

Section 4(e) of the Voting Rights Act of 1965 said that anyone who completed 6th grade in any public school in the US or in Puerto Rico was eligible to vote. The section was aimed at eliminating voting discrimination against Puerto Ricans in New York City. New York City had a voting law that contradicted 4(e) and a court had not yet ruled that the state law was unconstitutional. New York City challenged 4(e) claiming that since a court had not yet invalidated the law, Congress did not have the authority to prohibit it.

Holding

Section 4(e) is constitutional because the 15th Amendment gives Congress the power to pass a “prophylactic law,” that outlaws a discriminatory tactic even before a court rules that the tactic violates the Constitution.

Reasoning

According to the Court, although the Constitution gives states the authority to set voting qualifications, the voting laws a state passes cannot violate the 14th Amendment or any other part of the Constitution.

The Court ruled that it is unreasonable for Congress to wait for a judicial determination that a state law violates the Constitution; Congress has the power to pass laws to enforce the Constitution and forcing Congress to ask a court would depreciate its resourcefulness and responsibility for implementing the Amendment. Furthermore, according to the Court, it would make Congress subservient to the judicial branch. The Court held that by including the enforcement clause of the 14th Amendment the drafters gave Congress the same power as the Necessary and Proper clause, which is the positive power to pass whatever laws Congress believes is necessary to enforce the 14th Amendment.

Because of Congress’ power in this area all the Court decided is whether the law that Congress passed was constitutional. The Court decided that §4(e)’s purpose was to give equal protection to Puerto Rican immigrants and it was well within Congress’s power to decide that the section was needed to ensure that. The Court held that it was its purview to review Congress’ decision on this topic – as long as the court “is able to perceive a basis upon which the Congress might resolve the conflict as it did” the court should not interfere.

The only Constitutional question about §4(e) was whether Congress denied equal protection by not extending the right to vote to people educated in non-American-flag schools. The Court ruled that this worry was unfounded because §4(e) was taken to reform an existing discrimination and “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind” (quoting *Williamson v. Lee Optical Co.*)

Allen v. State Board of Elections (1969)

Supreme Court – Chief Justice Warren (5-4 decision with justices Harlan, Marshall, Douglas and Black dissenting)

Facts

Following a series of changes to state election laws private citizens filed lawsuits against these changes that were combined into *Allen v. State Board of Elections*. The first change allowed county board of supervisors to modify the county board districts from single member to at-large districts. The second change allowed the Board of Elections to appoint the County Superintendent of Education instead of having that position being decided by an election. The third change established: 1) a new rule that no person who had voted in a primary election could be placed on a ballot as an independent candidate in the general election; 2) extended the deadline for filing a petition as an independent candidate from 60 days to 40 days before the general election; 3) increased the number of signatures of qualified electors needed for the independent qualifying petition; and 4) created a new provision that each qualified elector who signed an independent qualifying petition must personally sign the petition and must include their polling precinct and county. Finally, the fourth change required all write-in candidate ballots to be handwritten.

Mississippi and Virginia argued that §5 did not cover these changes and that the private citizens had no power to bring these lawsuits.

Holding

Private citizens can file suits of this nature and all of these changes are covered by §5 and therefore covered jurisdictions must formally preclear them with the DOJ before implementing them.

Reasoning

The Court observed that the purpose of the VRA is to ensure that no person is denied the right to vote because of their failure to comply with a state law that is covered by the VRA but not yet approved by the federal government. Because the VRA does not prohibit a private citizen suing to challenge a change in election law, the Court ruled that if the DOJ does not review a change, a private citizen could step in and sue to file a challenge. The Court explained that while a state had to sue in the D.C. District Court if it wanted to challenge a DOJ decision, a private citizen could sue to challenge a state law in any district court in which citizen had standing.

After settling that the lawsuits were valid the Court turned to whether the changes the states made were covered by §5. The Court held that because “voting” included “all action necessary to make a vote effective in any primary, special, or general election” all of the changes were within DOJ’s jurisdiction to review. The Court chose to interpret the VRA broadly because it believed the law was “aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.”

Oregon v. Mitchell (1970)

Supreme Court – Justice Black (fractured decision: four justices (Douglas, Brennan, White and Marshall) voted to uphold the law completely; four justices (Burger, Harlan, Stewart and Blackmun) voted to strike it down completely; and Justice Black voted that Congress could change the federal age limit but not the state age limit.)

Facts

Congress passed a law, which lowered the voting age to 18 for all elections (federal and state). The law was passed because of the draft and the argument that people who could not vote were in the army. The law was challenged by the states.

Issues

Whether Congress has the right to control state voting age requirements based on the Reconstruction amendments.

Holdings

Congress can change the voting age for federal elections, but does not have the authority to control state voting age requirements. Furthermore, Congress did not overstep its authority when it renewed the Voting Rights Act for another five years.

Reasoning

The Court noted that the Constitution gave Congress the authority to pass laws regarding federal elections if it was dissatisfied with the laws that states created. The sections of the Voting Rights Act of 1970, which address national elections, are a valid exercise of this power.

However, Congress does not have as much authority to regulate state level elections as it does for federal level ones – the 10th Amendment gives states the power to regulate that level of elections themselves. The states' authority granted to them by the 10th Amendment is only limited by the 14th, 15th, 19th and 24th Amendments. The 14th Amendment's Equal Protection Clause does not qualify all discrimination between groups as a constitutional violation of equal protection. Congress can only nullify state laws if there is a "compelling interest" and discrimination against a "discrete and insular minority." Because people between 18 and 21 are not recognized as a discrete and insular minority, there is no basis for Congress to nullify a state voting age requirement.

Aftermath

In 1971 the requisite number of states ratified the 26th Amendment, which lowered the voting age to 18 for all elections.

Georgia v. United States (1973)

Supreme Court – Justice Stewart (5-3-1 decision with C.J. Burger concurring and Justices White, Powell and Rehnquist dissenting)

Facts

After the 1970 Census, the Georgia legislature drafted a redistricting plan to reflect its changes in population. This plan lowered the number of districts and increased the number of multimember districts while also dividing more county lines than the previous plan. This plan was submitted to the DOJ and, after the Attorney General requested and received more information, the DOJ rejected the plan. The Georgia legislature then created a new plan, which was also rejected because the Attorney General could not determine that there was not a discriminatory purpose or effect. Georgia then sued claiming that redistricting changes of the nature it made were not within the purview of §5 and that the DOJ had to find the presence of a discriminatory purpose or effect in order to challenge a law.

Holding

The Court ruled that the changes were reviewable under §5 and that the burden of proof is on the jurisdiction to prove a lack of discriminatory purpose and effect rather than on the Attorney General to prove the existence of one.

Reasoning

The Court began by reaffirming its belief that §5 was very broad in what type of changes it gave the federal government review power over. According to the Court, this broad scope included changes that not only prevented voting but also diluted the value of a vote. The Court relied on the fact that Congress did not take any actions to amend the VRA despite numerous rulings in which the Court expanded the scope of the act.

The Court also relied on the general goal of the VRA to conclude that there was an assumption against preclearance. Because of this assumption the jurisdiction has the burden of proof to show a lack of discriminatory purpose or effect and if it does not do so to the DOJ's satisfaction the law is not valid. According to the Court, the DOJ's rejection is justified if it is not convinced that there is an absence of discrimination.

City of Rome v. United States (1980)

Supreme Court – Justice Marshall (6-3 decision with Justices Blackmun and Stevens concurring and Justices Powell, Rehnquist and Stewart dissenting)

Facts

Rome, GA sued to be taken off of the list of covered jurisdictions that require Attorney General's permission to change its voting laws. It claimed that it had not engaged in discrimination in 17 years.

Issue

Whether a city that is located in a state that is covered by §5 can get “bailed out” from coverage if it shows a lack of discrimination. Also, whether §5 of the VRA is still constitutional.

Holding

A city does not meet the “political subdivision” criteria required by §4(b) and is therefore not eligible for bailout. Section 5 is still constitutional – Congress has not exceeded its power to enforce the 14th Amendment.

Reasoning

According to the Court, Rome was covered as part of a covered state, not as an independent “political subdivision.” Because of this the city could not petition for bailout by itself – only independently covered jurisdictions are allowed to bailout of Section 5.

The Court also ruled that the Attorney General could reject a change in the law if it found either a discriminatory purpose or effect. According to the Court, the Attorney General's determination that the city's proposed changes would have the effect of diluting the minority vote was enough to reject the changes.

Aftermath

The Court ruled in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder* (2009) that 1982 amendments to the VRA nullified this ruling by changing the definition of what constitutes a “political subdivision.”

Miller v. Johnson (1995)

Supreme Court – Justice Kennedy (5-4 decision with Justice O'Connor concurring and justices Stevens, Ginsburg, Breyer and Souter dissenting)

Facts

After the 1990 Census, Georgia's legislature submitted a redistricting plan to the DOJ for its approval under §5. The DOJ rejected the plan because it put some racial minority groups in districts that had a majority African American population and therefore did not give the different groups separate representation. Georgia's legislature then created a second plan, which shifted the African American population from one of the two majority-minority districts to the other and therefore gave the other minority groups a majority in one district. The DOJ rejected this proposal as well because it kept the two majority-minority districts instead of creating a third one.

Georgia finally created a plan with three majority-minority districts that the DOJ accepted despite one of the districts being very oddly shaped due to its need to connect distant minority communities. Citizens filed suit to challenge the precleared plan on equal protection grounds.

Holding

The DOJ cannot reject plans because they do not conform to its desire to create as many majority-minority districts as possible.

Reasoning

The Court ruled that there was enough evidence to show that the third plan was drawn with racial considerations in mind. However, the Court noted that the third plan was obviously a response to the DOJ's insistence that the legislature create as many minority-majority districts as possible. Applying strict scrutiny because the case involved race, the Court held that the DOJ's policy was unconstitutional because the DOJ failed to show that the policy was necessary to satisfy a compelling government interest.

According to the Court the VRA did not require that the third majority-minority district to be added – the Act merely required that there not a regression in minority representation; a requirement that was satisfied by two districts. With the original two plans satisfying this requirement the DOJ did not have a basis on which to challenge them and certainly did not have a compelling interest to force Georgia to comply with its "policy" of creating as many majority districts as possible.

City of Boerne v. Flores (1997)

Supreme Court – Justice Kennedy (6-3 decision with Justices and Scalia concurring and Justices O'Connor, Breyer and Souter dissenting)

Facts

Although not involving the Voting Rights Act directly, City of Boerne provided limits on congressional authority to enforce the 14th Amendment. In *Emp't Div. Dep. Of Human Res. of Oregon v. Smith* (1990) the Court had ruled that absent special circumstances, the Free Exercise Clause (of religion) was not violated by a facially neutral and secular law drafted without legislative animus that had the effect, but not the intent, of interfering with a given religious practice. In response to *Emp't Div. Dep. Of Human Res.* Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which conflicted with the City of Boerne's local zoning authorities' decision to deny a church a building permit. Boerne challenged the RFRA on the basis that the law was beyond the scope of Congress's authority to regulate state action.

Holdings

Congress did not have a right to pass the RFRA under its 14th Amendment authority to guarantee that a person's life, liberty or property is not deprived without due process of law and that all people receive equal protection of the law. The Court required the remedy to have "congruence and proportionality" compared to the harm.

Reasoning

The Court rejected the government's argument that it has the power to dispense with proof of deliberate or overt discrimination in order to prohibit an action by §5 of the 14th Amendment. The government tried to argue that legislation could prohibit actions, which are not unconstitutional if the goal is to enforce constitutional rights i.e. literacy tests. The Court agreed that the government has some leeway in this but held that Congress's power to do this is not unlimited – legislation that alters the meaning of the Free Exercise Clause cannot be considered as enforcing the Clause. According to the Court, although Congress has wide discretion to determine the line between enforcing a constitutional right and altering what that right is there is a distinction and the court has final say.

The Court looked to the amendment's drafting debate and early cases such as *The Civil Rights Cases* to determine how much authority Congress has and noted the strong opposition to Congress having broad powers. It also referred to its decision in *Oregon v. Mitchell* that limited Congress's enforcement power by requiring a constitutional amendment, and not a law, to lower the voting age. The Court refused to accept the government's interpretation of *Katzenbach v. Morgan* ruling that giving Congress the power to interpret the Constitution would require an enormous extension of that decision's rationale.

Finally, the Court disagreed with the government that the RFRA was a proper exercise of Congress' remedial or preventive power similar to the laws Congress passed to prohibit racial discrimination in violation of the Equal Protection Clause. According to the Court, in order for a measure like this to be valid there has to be "congruence and proportionality"

between the means used and the ends achieved. Justice Kennedy commented that there had not been evidence of pronounced religious discrimination in the US in a long time so the RFRA was too extreme to be addressing the supposed harms taking place. According to Justice Kennedy the RFRA was broader and further reaching than needed by reaching all federal, state and local decisions, and attempted to make a substantive change in constitutional protections. Justice Kennedy said that if the RFRA was meant to be remedial it would have focused only on areas that have discrimination and would have stopped controlling once discrimination had ceased (like the Voting Rights Acts).

Georgia v. Ashcroft (2003)

Supreme Court – Justice O'Connor (5-4 decision with Justices Kennedy and Thomas concurring and justices Souter, Stevens, Ginsburg and Breyer dissenting)

Facts

After the 2000 Census, Georgia's legislature completed a new round of redistricting. In its plan for the Georgia state senate, it "unpacked" three majority-minority state legislative districts in order to create additional minority "influence" districts likely to elect Democrats, including African American-supported candidates. These districts had between 30-50% African American voters instead of the 60%+ African American population in the districts reliably able to elect the candidate of choice of African American voters.

Rather than getting preclearance from the DOJ, Georgia sought a declaratory judgment from a three judge panel of the District Court of the District of Columbia. The DOJ argued that the plan was retrogressive because it lowered the likelihood that African American voters could elect representatives of their choice from the three majority-minority state senate districts that they had been able to elect in the past. Georgia argued that the plan that it had created would satisfy §2 of the VRA, was not retrogressive and therefore should be precleared. The District Court ruled that the state had not proved a lack of retrogression and Georgia appealed to the Supreme Court.

Holding

The standard for §5 preclearance is different, and higher, than the standard set by §2. However, even under the §5 standard, the plan Georgia initially proposed is not retrogressive.

Reasoning

According to a divided Court, §2's goals, and therefore its restrictions, are different than those of §5. For example, §2 automatically affects all states and focuses on minority vote dilution, while §5 aims to prevent retrogression, and only covers those states that qualify. Because of these differences the analysis, and the standard of review which courts use, is also different. The Court noted that having the same standard for both sections would make a challenge under §5 contingent on a violation of §2, which was not the goal of the VRA.

The Court then turned to an analysis of what is considered retrogression of the position racial minorities to exercise their electoral franchise. The Court held that looking only at the percentage of minority voters in the "safe" districts, and therefore at their ability to elect a candidate of their choice, is not adequate. Instead the Court ruled that courts had to consider the effect a redistricting plan had on all of the districts.

The Court stressed that §5 does not mandate states to act in one particular way but merely says that states cannot act in a way that harms minority representation. According to the Court, Georgia's plan, which created more "influence" districts at the expense of making the "safe" districts less safe, was not a retrogression because it created the possibility that African American voters could elect more, instead of less, candidates and gave them influence in more areas than they had before.

Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder (2009)
Supreme Court – Chief Justice Roberts (9-0 decision with Justice Thomas concurring in part and dissenting in part)

Facts

Northwest Austin Municipal Utility District Number One was covered by §5 because it is located in the covered state of Texas. The district had no history of discrimination and sought relief under §5's bailout provision. It also challenged the constitutionality of §5 under the "congruence and proportionality" standard of *Boerne v. Flores* claiming that the coverage formula that was set in 1972 was out of date.

Holdings

The Court discussed constitutional concerns, but used the "constitutional avoidance theory" to avoid ruling on the constitutional question and instead determined that the district could use the "bailout" provision of the VRA.

Reasoning

Writing for the Court, Chief Justice Roberts stated that while §5 had had undeniable accomplishments in eliminating discrimination in the covered jurisdictions, some of the discriminatory conditions that formed the basis of previous §5 cases, such as voter turnout and registration rates, had improved and were no longer serious issues. Roberts then wrote that relying on the past success of the law alone was not sufficient to warrant the restrictions imposed by §5. According to the Chief Justice §5 may still be needed, but the burdens that it currently imposes on states "must be justified by current needs."

Roberts pointed to the fact that coverage is determined not by current standards, but by a formula based on the 1972 elections, as evidence that the burdens do not reflect current needs. Roberts then focused on the fact the "evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance[]" and commented that the current formula creates constitutional problems both under the "congruence and proportionality" test from *Boerne v. Flores* and the "rational basis" standard originally used in *South Carolina v. Katzenbach*.

After going through this reasoning, the Court nonetheless left the constitutional issue for another day, ruling that it was unnecessary to address it in the present case. Instead, the Court held that after the 1982 amendments to the VRA, §4(b) allowed a bailout for any state or political subdivision and that the district was a political subdivision because the ordinary meaning combined with the structure of the VRA as a whole and the underlying constitutional concerns, overrule the statutory definition of the term.

Aftermath

There has been conjecture that Chief Justice Roberts was ready to rule on the constitutional issue in this case, either striking down or sharply limiting §5 authority, but did not have the votes on the Court necessary to get a majority for that part of the decision. The Court's decision in this case has led to much debate about the future of §5, but no further action in Congress.



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