Case at a Glance

Since 1965, Section 5 of the Voting Rights Act has required that designated regions of the country obtain approval, or "preclearance," from the federal government before changing local voting rules. Reauthorized most recently in 2006, this provision assumes changes to voting rules in these regions are discriminatory until local officials are able to prove otherwise. The Supreme Court is now being asked to consider whether placing this burden of proof on local officials remains constitutionally justified.

Is Section 5 of the Voting Rights Act Still Constitutional?

by Ellen Katz

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ISSUES

Is a municipal utility district eligible for release—known as "bailout"—from the preclearance obligations set forth in Section 5 of the Voting Rights Act?

Did Congress have constitutional authority to reauthorize Section 5 in 2006?

FACTS

Congress enacted the Voting Rights Act in 1965 to "banish the blight of racial discrimination in voting … [that] infected the electoral process in parts of our country for nearly a century." Section 5 is the Act's most effective and notorious provision. It mandates that "covered" jurisdictions—defined as those that used a voting "test or device" and had extremely low levels of voter registration and turnout measured on various dates beginning in 1964—obtain federal approval prior to changing any aspect of their voting laws. By requiring such approval, known as "preclearance," Section 5 rejects the presumption of validity that typically attaches to state and local government action and instead presumes voting changes in covered regions are discriminatory until local officials can prove otherwise.

Congress enacted Section 5 as a temporary measure, and reauthorized the provision four times, in 1970, 1975, 1982, and most recently for an additional 25 years in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act and Reauthorization and Amendments Act of 2006 ("the 2006 Reauthorization"). Prior to the most recent reauthorization, congressional committees held 21 hearings, received testimony from dozens of witnesses, and amassed a record "of over 15,000" pages addressing the need to retain Section 5. Congress found that this evidence showed that "significant progress" has been made in reducing barriers to minority political participation, but that "vestiges of discrimination in voting continue to exist" and hence that the preclearance regime remains necessary. The Senate voted unanimously to reauthorize Section 5 and the House of

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FROM: DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Representatives voted in favor by a vote of 390-33. On July 27, 2006, President Bush signed the 2006 Reauthorization into law.

Eight days later, appellant Northwest Austin Municipal Utility District No. 1 ("the District") filed the present suit against the Attorney General of the United States (now Eric Holder). Travis County (the county in which Austin is located), several Texas residents, and three civil rights organizations intervened as defendants.

The District is subject to the preclearance requirement because it is located in a covered jurisdiction, namely the State of Texas. The District's lawsuit presents two claims. First, it maintains that the District satisfies the statutory criteria to terminate—or, as it is commonly known, to "bailout" from—its obligations under Section 5. Second, and more consequential, is the District's claim that Section 5 as reauthorized is not a constitutional exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments.

Last spring, a three-judge panel of the district court unanimously rejected both of the District's claims. As to bailout, the court noted that the Voting Rights Act permits states and their "political subdivisions" to seek bailout, but that the term "political subdivision" encompasses only counties and the governmental bodies that conduct voter registration when counties do not. The court held that the District is not such "a political subdivision" and hence ineligible to petition for release from the statute.

On the constitutional question, the district court identified what it saw as two distinct standards for evaluating congressional legislation enacted to enforce the Fourteenth and Fifteenth Amendments. The first is the deferential standard employed by the Supreme Court in 1966 when it first upheld the Section 5 regime in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). The second, more rigorous standard is the one that emerged in the Court's 1997 decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997), which required "congruence and proportionality between the injury to prevented or remedied and the means adopted to that end." The district court believed *Katzenbach*'s more deferential standard controlled, but regardless, found that the 2006 Reauthorization also survived scrutiny under *Boerne*'s more demanding standard.

The District appealed. The Supreme Court noted probable jurisdiction and set the case for argument on April 29, 2009. Among the many amicus briefs now filed, several covered jurisdictions have offered competing views of the regime, some describing preclearance as unduly burdensome and unconstitutional, and others arguing that compliance is relatively simple and yields tangible benefits.

Case Analysis

The Bailout Question

When Congress first enacted preclearance, it restricted bailout to covered states and to those "political subdivisions" subject to Section 5 but located in states that were not. Section 14(c)(2) of the statute defines political subdivision to be "any county or parish," or "any other subdivision of State which conducts registration for voting" where the county or parish does not. The 1982 amendments expanded the entities eligible to seek bailout to include "political subdivisions" within covered states.

The District maintains that it is such a political subdivision. While it does not conduct voter registration (Travis County, in which the District is located, performs this task), the District argues that Congress never meant to limit bailout eligibility to entities with this responsibility. The District argues that Section 14(c)(2)'s definition of "political subdivision" does not define the "political subdivisions" made eligible to seek bailout in 1982. As support, the District invokes the statutory purpose to make bailout widely available and language from *United States v. Bd. of Comm'rs of Sheffield,* 435 U.S. 110 (1978), and *Dougherty County Bd. of Educ. v. White,* 439 U.S. 32 (1978). These cases held that the preclearance obligation attaches to every governmental entity within a covered jurisdiction, regardless of whether it registers voters.

The Department of Justice (DOJ) responds that the District's argument on bailout runs counter to the statutory text and structure, the legislature history to the 1982 amendments, and applicable agency regulations. DOJ adds that the District is misreading both *Dougherty* and *Sheffield,* and that *City of Rome v. United States* held that not all governmental units subject to the preclearance requirement are eligible for bailout.

Congressional Power to Reauthorize Section 5

The Supreme Court has affirmed the constitutionality of Section 5 four times. The 1966 Katzenbach decision upheld the original enactment; *Georgia v. United States,* 411 U.S. 526 (1973), sustained the 1970 extension; *City of Rome* confirmed the validity of the 1975 reauthorization, and most recently, the 1999 decision *Lopez v. Monterey County,* 525 U.S. 266 (1999), affirmed Section 5 as reauthorized in 1982. The 2006 Reauthorization nevertheless presents an unresolved consti-

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tutional question. The uncertainty lies in the disputed significance of changed circumstances and legal developments since the 1982 reauthorization.

A major unsettled question concerns the rigor with which the Court will review Congress's determination that the preclearance requirement is still needed. Precedent upholding earlier versions of Section 5 shows the justices being extremely deferential to Congress, a stance the district court thought applicable to the 2006 Reauthorization as well. The District, however, argues for more stringent review. It cites the Court's 1997 decision *City of Boerne v. Flores* and five subsequent decisions that struck down various statutory provisions Congress enacted pursuant to its Fourteenth Amendment enforcement power. Applying rigorous review, the *Boerne* decisions deemed the linkages between statutory proscriptions and constitutional injuries too attenuated and the underlying congressional findings too skimpy to support the remedies imposed.

In so holding, the *Boerne* decisions said that the preclearance regime differed from the statutes in dispute, but the Court never fully explained why. In fact, *Boerne* held explicitly that the most distinctive aspects of Section 5—"termination dates, geographic restrictions, or egregious predicates"— were not essential traits of a permissible enforcement regime. The Court, moreover, has never expressly said that the preclearance was or should be subject to more deferential review.

The argument in favor of such deference posits that Congress's power to legislate in the realm of suspect classes and fundamental rights is far greater than its power over other subjects to which the enforcement power extends. Support for this view is found in post-*Boerne* precedent upholding the Family Medical Leave Act (FMLA) and provisions of the Americans with Disabilities Act (ADA) protecting access to courts. These decisions, however, are not easily reconciled with the earlier *Boerne* precedent, some of which also implicated fundamental rights and suspect classes. The FMLA and ADA decisions, moreover, were fractured opinions in which deciding votes were cast by justices no longer on the Court.

A second unresolved issue, closely related to the standard of review, is whether the Court will find the record Congress amassed to support the 2006 Reauthorization adequate. This record, unsurprisingly, is quite different from the one underlying the original enactment of Section 5. That original record documented what the *Katzenbach* Court described as an "insidious and pervasive evil" perpetuated by "unremitting and ingenious defiance of the Constitution." Evidence supporting this characterization was found in dozens of judicial opinions adjudicating constitutional violations and reports "of recent voting discrimination" presented by various federal authorities. By contrast, the record underlying the 2006 Reauthorization shows that systematic state-sponsored discrimination openly directed at minority voters is no longer the norm and has not been for a long time.

Instead, the 2006 record shows that in some, but not all, covered jurisdictions, rates of minority voter registration and turnout continued to lag behind white voters and minority candidates had yet to be elected to statewide office. The record documents hundreds of instances in which Section 5 actually blocked covered jurisdictions from implementing proposed electoral changes, as well as considerable anecdotal evidence suggesting Section 5 operated prophylactically to block others. The record further documents that hundreds of federal election monitors and observers have been sent to covered jurisdictions, and outlines scores of adjudicated violations of Section 2 of the Voting Rights Act and consent decrees resolving other Section 2 claims. The record also shows the persistence of racially polarized voting, a practice the district court found renders minority voters vulnerable to continued discrimination.

None of this, however, establishes what the District says is required to justify the 2006 Reauthorization. The District argues that the record fails to show that unconstitutional conduct remains pervasive in covered jurisdictions. The District claims that the record instead shows that voting problems in these regions are neither more severe nor even distinct from those prevalent in non-covered ones. The District again invokes the *Boerne* decisions, in which the Court cited Congress's failure to document pervasive unconstitutional conduct as evidence that the statutory remedies were unwarranted.

The Department of Justice and other appellees respond that the record shows all that is necessary to justify the 2006 Reauthorization. They emphasize that Section 5 is not a new statute, but rather an operational regime that has long blocked the type of pervasive discrimination the *Boerne* decisions required as justification for new legislation. Appellees argue that the 2006 record documents that many obstacles to full minority political participation persist in covered jurisdictions, and that these obstacles would be far more severe but for the efficacy of the preclearance requirement in screening out discriminato-

ry practices. They add that, even with this powerful screening device, covered jurisdictions continue to look worse along some measures than non-covered ones.

Whether the Court will agree remains to be seen. The signals to date are mixed. Just three years ago, Justice Scalia wrote that compliance with Section 5 constituted a compelling state interest; that same case prompted Chief Justice Roberts to lament as a "sordid business, this divvying us up by race." Last spring, Justice Stevens queried whether the preclearance requirements remained "as necessary or appropriate as they once were"; on the other hand, just last month Justice Kennedy said explicitly that "racial discrimination and racially polarized voting are not ancient history."

Curiously, an event wholly outside the record may shape how the justices view the future of preclearance. In both the briefs and commentary on the case, lawyers on all sides are invoking President Obama's election as an event that critically informs the validity of Section 5. Opponents say the election of the first African American president proves that the requirement is obsolete; supporters say mixed support for President Obama in covered jurisdictions confirms the provision's continued importance.

The Court is unlikely to engage in a debate about events outside the congressional record. To do so would recast the legal question presented from one that asks whether Congress had good reason to think Section 5 was still needed when it reauthorized the Voting Rights Act to one that inquires whether reauthorization remains a good idea today. Still, the citations to President Obama in the briefs and commentary on the case suggest that his presidency shapes the lens through which Section 5 is now widely understood. It remains to be seen whether the Court will be able to examine the 2006 record without taking into account the events that followed.

Significance

Section 5 of the Voting Rights Act is arguably the most successful civil rights statute in American history. It brought to an end the massive disenfranchisement of African American citizens in the South; it has allowed minority candidates to win elective office in nontrivial numbers for the first time since Reconstruction; and it continues today to structure minority political participation in covered regions in various ways.

A decision by the Court to strike down preclearance would be a landmark decision. It would eliminate this salient and resonant remedial regime to uncertain practical effect. Absent constitutional replacement, the demise of Section 5 would test whether the statute's efficacy in suppressing acts of racial discrimination has brought about lasting changes in behavior and attitude, or whether instead the progress we have made to date is in fact fragile and dependent on Section 5's operational status. As important, a decision to invalidate the preclearance regime would unavoidably narrow congressional power to frame civil rights legislation and craft race-based remedies more generally. Such a holding might even call into question other existing statutory provisions, including Section 2 of the Voting Rights Act and Title VII as it is applied to states as employers.

A decision to affirm the district court and uphold the 2006 Reauthorization would be no less consequential. Absent successful bailout, covered jurisdictions would remain subject to the statutory regime for another quarter century and thus would need federal approval each time they seek to change their voting practices. A decision upholding Section 5 would stand as an important affirmation of congressional power by a Court long skeptical of the preclearance regime and the race-based decisionmaking it promotes. So holding would acknowledge as legitimate Congress's belief that serious problems resulting from racial discrimination in voting persist, and would recognize broad congressional power to legislate based on this belief.

A far narrower holding would result, were the Court to hold that the District is eligible to seek bailout from Section 5. Doing so would avoid resolving the constitutional question in the present case and leave the statutory regime intact, at least for now.

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