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Shelby County v. Holder and the Demise of Section 5: What is Next for Voting Rights in Texas?

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The Historical Context of the Passage of the Voting Rights Act of 1965

- From the end of Reconstruction until 1965, African-Americans were often prevented from registering and voting in the deep South.
- In Lowdes County, Alabama, blacks constituted a majority of the population, but not a single African-American was registered to vote.
- In that county, it had been 60 years since a black had been on the registration rolls and 20 years since one had attempted to register.

Literacy Tests Were a Favored Way of Controlling Who Registered

- Example of a Louisiana literacy test
 - The test had 30 questions
 - One wrong answer would result in failure
 - The decision of the registrar as to whether an individual passed was final



The State of Louisiana

Literacy Test (This test may be given to anyone who cannot prove a fifth grade education.)

Directions:

Do what you are told to do in each statement, nothing more, nothing less. Be careful, as one wrong answer denotes failure of the test. You have ten (10) minutes to complete the test.

20. Spell backwards, forwards.

- **What's the correct answer?**
 - A. "backwards, forwards"**
 - B. "backwards"**
 - C. "sdrawrof"**

Example of a Mississippi Voter Registration Application

[By reason of the provisions of Section 244 of the Constitution of

[By reason of the provisions of Section 244 of the Constitution of Mississippi and House Bill No. 95, approved March 24, 1955, the applicant for registration, if not physically disabled, is required to fill in this form in his own handwriting in the presence of the registrar and without assistance or suggestion of any other person or memorandum.]

INHABITANT OF MISSISSIPPI?

8. FOR HOW LONG HAVE YOU RESIDED IN MISSISSIPPI? _____

9. WHERE IS YOUR PLACE OF RESIDENCE IN THE DISTRICT? _____

18. WRITE AND COPY IN THE SPACE BELOW SECTION _____ OF THE CONSTITUTION OF MISSISSIPPI [Instruction to registrar: You will designate the section of the Constitution and point out same to applicant]:

13. IF THERE IS MORE THAN ONE PERSON OF YOUR SAME NAME IN THE PRECINCT, BY WHAT NAME DO YOU WISH TO BE CALLED? _____

STATE OF MISSISSIPPI

COUNTY OF _____ }

19. WRITE IN THE SPACE BELOW A REASONABLE INTERPRETATION (THE MEANING) OF THE SECTION OF THE CONSTITUTION OF MISSISSIPPI WHICH YOU HAVE JUST COPIED:

18. WRITE AND COPY IN THE SPACE BELOW SECTION _____ OF THE CONSTITUTION OF MISSISSIPPI [Instruction to registrar: You will designate the section of the Constitution and point out same to applicant]:

Example of a Section of the Mississippi Constitution That Might Be Given To a White Applicant

ARTICLE 12 Section 240. All elections by the people shall be by ballot.

Example of a Section of the Mississippi Constitution That Might Be Given To an African-American Applicant

ARTICLE 7 Section 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding ten (10) years on each such enterprise hereafter constructed, and may grant exemptions not exceeding ten (10) years on each addition thereto or expansion thereof, and may grant exemptions not exceeding ten (10) years on future additions to or expansions of existing manufactures and other enterprises of public utility. The time of each exemption shall commence from the date of completion of the new enterprise, and from the date of completion of each addition or expansion, for which an exemption is granted. When the Legislature grants such exemptions for a period of ten (10) years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility, entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined. SOURCES: Laws 1961, ch. 9, 1st Extraordinary Session, effective October 16, 1961. NOTE: The 1961 amendment to Section 182 was proposed by Laws 1961, ch. 9, 1st Extraordinary Session, and upon ratification by the electorate on October 3, 1961, was inserted by proclamation of the Secretary of State on October 16, 1961.

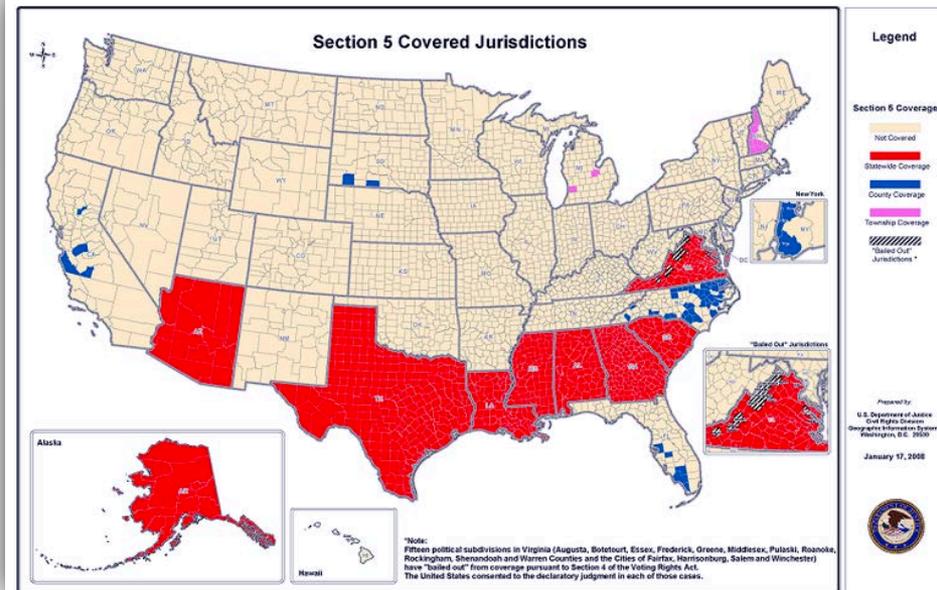
The 1965 Voting Rights Act Addressed Discrimination in Voting On The Basis of Race

- Section 2 of the Act applies **nationwide** and essentially prohibits voting practices that discriminate on the basis of race or language minority status.



The 1965 Voting Rights Act Addressed Discrimination in Voting On The Basis of Race

- Section 5 applied only to certain areas—originally only in the deep South—and freezes election practices in place unless and until any change in the election practice has been approved either by a three-judge U. S. District Court in the District of Columbia or the Attorney General of the United States.



- Section 5, which is obviously a significant limitation on state sovereignty—was a temporary provision designed to last only five years.
- The section (and section 4, which provided the formula for determining what jurisdictions were covered by section 5) was extended four times—1970, 1975, 1982, and 2006—with the most recent extension being for 25 years.
- Texas came under the formula after the 1975 extension, which applied the section 5 review process to changes made after November 1, 1972.

- The Supreme Court on at least two occasions had held section 5 to be constitutional.
- In 2009, in *Northwest Austin Municipal Utility District No. One v. Holder*, in an opinion by Chief Justice Roberts, indicated that there were constitutional concerns about the constitutionality of section 5.
- In June 2013, the Supreme Court in a 5-4 decision, decided *Shelby County v. Holder*, which found section 4 of the Voting Rights Act (the coverage formula) unconstitutional and thus made section 5 ineffective.

What Now with Voting Rights?

- Jurisdictions previously covered by section 5 no longer need to submit election changes to the Department of Justice or the D.C. District Court for preclearance.
- Prior objections under section 5 almost certainly remain in place.
 - There may be an argument that post-2007 objections would be invalid but there were no objections to submissions made by a Texas city in that time frame.

What Now with Voting Rights?

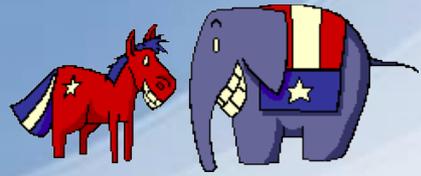
- Enforcement of the Act is likely to shift to increasing reliance on section 2.
 - DOJ has announced it will increase its presence in section 2 cases.
 - There are efforts in the private sector to train lawyers in voting rights law so that they can use section 2.



Will Section 5 Be Reenacted by Congress?

- The 2006 Reauthorization, which the Supreme Court overturned, passed the Senate 98-0 and the House 390-33.
- Few legislators wanted to go on record opposing voting rights.

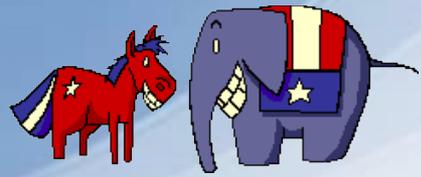




The Two Parties' Positions

- Republicans

- Ideologically may have had problems with the bill because of their views on federalism and colorblindness of the Constitution.
- The Voting Rights Act tends to produce districts that have heavily concentrations of the most dependable Democratic voters, thus making it possible to draw more Republican districts.
- There are political benefits of not opposing equal voting rights for African-Americans and other minorities.



The Two Parties' Positions

- Democrats

- Ideologically are likely to support the Act.
- Although it may have an adverse impact on the ability to draw additional Democratic districts, Democratic members are unlikely to vote against the interests of their most loyal constituency.

Legislation to Resurrect Section 5

- Legislation to provide a new section 4 formula and resuscitate section 5 in some areas including Texas was introduced in January 2014.
- It had bipartisan support.
- It had a Senate hearing but advanced no further.

Prospects For Passage Are Questionable

- While most, if not all, Democrats can be expected to support a bill reinstating section 5, Republicans in the House are much more likely to take an ideological rather than a political position than they were in 2006.
- Enacting a bill that picks and chooses among states to be covered is harder to support than one that merely continues the status quo as the 2006 bill did.

Prospects For Passage Are Questionable

- For example, the *Dallas Morning News* reported that Sen. Cornyn opposed the proposal because **“it discriminates against Texas.”**
- Prospects for passage of a bill in 2015 seem dim since the chair of the House Judiciary Committee indicated that changes to the Act are unnecessary because current voting rights protections are sufficient.



Section 3 of the Voting Rights Act

- Section 3 of the Voting Rights Act was unaffected by *Shelby County*.
- In cases to enforce the 14th or 15th Amendments, it permits a court to order that a jurisdiction submit future election changes to the court or to the Attorney General of the United States for preclearance.
- This would effectively reinstate the same sort of requirement found in section 5, although a court might limit it to certain types of changes and the judicial option for preclearance would be with the local court rather than a three-judge court in D.C.

Section 3 of the Voting Rights Act

- Before section 3 relief could be granted, it would require a finding of purposeful discrimination—a requirement that exists under the Constitution but not under section 2.
- The State of Texas is currently defending at least two suits (the 2011/2013 state redistricting suit and the voter ID suit) where section 3 coverage is sought.
- If granted, such relief would almost certainly extend only to the State but not to local jurisdictions.



Very Basic Tenets for Defending Section 2 Suits



Differences between Sections 2 and 5

- While section 5 prohibited retrogression, section 2 prohibits discrimination in voting practices.
- Section 5 applies to changes in election practices and procedures, while section 2 applies to election practices generally.
- In section 5, the burden of proof is on the government; in section 2 the burden is on the plaintiff.

The Standard for Proving a Section 2 Claim

- In order to maintain a section 2 suit a plaintiff must meet a three-part threshold standard. Specifically, the plaintiff must prove:
 - That the minority group is sufficiently large and geographically compact to be able to constitute a majority of the citizen-voting-age population in a potential single-member district
 - That the minority group is politically cohesive
 - That the white majority votes a bloc to enable it—in the absence of special circumstances—usually to defeat the minority’s preferred candidate

The Standard for Proving a Section 2 Claim

- If the plaintiff satisfies all three parts of the threshold test, then the court must examine the totality of the circumstances to determine if “it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Characteristics of and Issues in Section 2 Suits

- Most section 2 suits in Texas are brought by Hispanic plaintiffs
 - A. There are more Hispanics in Texas than African-Americans, the other main group protected under the Voting Rights Act.
 - B. Due to residential segregation patterns, it is generally easier to draw African-American districts, which means that ones required by the Act to be drawn have often already been adopted.
 - C. There is a strong Hispanic voting rights infrastructure.

- Because the first prong of the threshold test is determined by **citizen-voting-age population**, it is sometimes more difficult for Hispanic plaintiffs to satisfy that prong of the test.
- Citizenship rates among Hispanics vary greatly from city to city and within parts of a city.

Texas City	Percent of Hispanic Adults Who Are Citizens
Lubbock	92.44%
San Angelo	89.35%
San Antonio	85.57%
El Paso	79.96%
Amarillo	76.20%
McAllen	71.28%
Austin	64.83%
Fort Worth	55.85%
Houston	51.89%
Dallas	45.92%

*2012 ACS 1-Year Survey Data
U.S. Census Bureau*

Demographic Data Issues in Section 2 Cases

- Citizenship data comes from the American Community Survey (ACS), not the decennial census.
- Generally it is necessary to use data from a special tabulation of the ACS five-year sample.
- The data typically must be integrated with decennial census data and manipulated to produce useful information in a section 2 case
- Complex issues are raised by the data.

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