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The Voting Rights Act

The Supreme Court is expected to rule shortly on two controversial cases that have been the subject of AEI scholarship: Northwest Austin Municipal Utility District Number One v. Holder, *a case revolving around a district's ability to move a polling place without getting prior approval from the U.S. Department of Justice, and* Ricci v. DeStefano, *a challenge to the decision by officials in New Haven, Connecticut, to disregard the results of a promotion exam given to firefighters because not enough minority applicants passed. Abigail Thernstrom, author of the recently released* Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections *(AEI Press, June 2009), has been writing for two decades about the evolution of the Voting Rights Act of 1965, the landmark law designed to eliminate racist barriers to African American enfranchisement in the South. Thernstrom writes that the law has achieved its purpose—integrating American politics—and that today, ironically, it may retard integration and marginalize African Americans in Congress. Both Thernstrom and Edward Blum—under whose direction AEI commissioned scholarship, cited in the Supreme Court arguments, on the state of minority participation in elections—argue that the preclearance provisions of Section 5 should be eliminated. Playing identity politics is an obstacle to our continued progress toward color-blind elections.*

Integration Now

By Abigail Thernstrom

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 the next quarter-century. That provision—Section 5—was originally supposed to expire in 1970. In 1965, it was considered too constitutionally dubious 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 Number One v. Holder*, "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.

Key points in this *On the Issues*:

- Today, Section 5 of the 1965 Voting Rights Act—initially intended to improve racial integration in voting—may actually serve as a barrier to integration and a brake on black political aspirations.

- President Barack Obama's nomination of Judge Sonia Sotomayor and Congress's reauthorization of Section 5 of the Voting Rights Act indicate that identity politics are here to stay.

- Section 5 of the Voting Rights Act only affects specific U.S. jurisdictions selected in 1965, despite remarkable improvements in racial integration in these areas since the law originally passed.

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, the Texas utility district effectively called both the rhetoric and the vote shameful. "As reenacted in 2006, Section 5 . . . [locks] in place the legislative judgments of the 1960s, rather than reflecting any fresh analysis of where Section 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."

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Judge David Tatel, writing for the D.C. district court where the case was first heard, rejected the utility 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 2005–2006 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 (who is representing the utility district) during 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 twelve thousand pages of testimony and other documents filled with stories of alleged discrimination, accompanied by some statistics on voter participation, minorities holding office, and the Department of Justice 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 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. Disenfranchisement 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 nine hundred 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 Section 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 *Northwest Austin Municipal Utility District Number One*, the Court could allow the utility district to "bail out" from Section 5 coverage—relief to which it has argued it is entitled, 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.

Abigail Thernstrom is an adjunct scholar at AEI. She is the author of *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* (AEI Press, June 2009). A version of this article appeared in *National Review* on June 22, 2009.

Identity Politics in the Age of Obama

By Abigail Thernstrom

Some of us thought the election of Barack Obama as president might signal a fading away of the old identity politics.

The assumption that fundamental lines of division in politics are set by race and ethnicity would seem to be a bit passé when 43 percent of white voters cast their ballots for a proudly "postracial" African American.

But the president himself has made identity politics front-page news with his selection of Judge Sonia Sotomayor as his Supreme Court nominee. She played an important role in the New Haven firefighters' case (*Ricci v. DeStefano*) now awaiting decision by the Supreme Court.

Sotomayor and two colleagues simply brushed aside the important constitutional and statutory questions raised by the city's decision to discard the results of a race-neutral test given to applicants for promotions within the department. Too many men of the "wrong" color had passed it—that is, all of those who scored highest were white except for one Hispanic.

Those firefighters had worked hard to get the test results they did; the lead plaintiff, Frank Ricci, is dyslexic, but he had been on the force for eleven years and was determined to become a lieutenant, so he paid an acquaintance more than $1,000 to read textbooks onto audiotapes and make flash cards. Ricci gave up his second job in order to study long hours—and aced the test.

President Obama, in his famous Philadelphia race speech during the campaign, said that when whites hear "that an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed . . . resentment builds over time." Yes. And when firefighters are denied promotions they earned simply because they are white, resentment builds. Discarding that test has struck many as an instance of racial preferences run amok.

Will the real Barack Obama please stand up? Did he mean to imply in that Philadelphia speech that the "empathy" he claims to celebrate extends not only to minority victims of injustice, but also to whites? And is he a man who remains eager to move beyond identity politics, as he suggested numerous times in the course of his campaign—or not?

Questions abound. He has tried to downplay Sotomayor's now infamous declaration that "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life," suggesting that it was nothing more than a poor choice of words.

But in the same speech, Sotomayor wondered "whether by ignoring our differences as women or men of color we do a disservice both to the law and society." And, most remarkably, she stated: "Whether born from experience

or inherent physiological or cultural differences . . . our gender and national origins may and will make a difference in our judging."

Are we condemned to identity politics in choosing firefighters for promotion, in drawing districting maps for legislative bodies, and in a multitude of other spheres into the indefinite future?

"Inherent physiological or cultural differences"? Can the president possibly believe that Latina women—and indeed minority women in general—are born to see questions of law in a different and better light than white men or even men of color? That it is in their physiological and cultural makeup? A fact of nature? If indeed the president believes in such disturbing racial determinism, weep for our nation.

Either the president is a man of many parts, untroubled by his own conflicting views, or he is an immensely skilled and coldly calculating politician who is eager to court the Latino vote and knows that few senators are likely to vote against a "first."

Identity politics is on the line in *Ricci* and also in another forthcoming Supreme Court decision, a key case involving minority voting rights. Later this month, the Supreme Court will decide whether in 2009, black candidates for public office can win running in majority-white settings.

At issue in *Northwest Austin Municipal Utility District Number One v. Holder* is the constitutionality of a key, temporary provision of the 1965 Voting Rights Act that was renewed for the fourth time in 2006 on the theory that voting discrimination had just become "more subtle" than it was four decades earlier.

The renewal meant that the Justice Department could continue to insist on districting maps that were carefully racially gerrymandered to elect black and Hispanic candidates. Legislative quotas have been the remedy for persistent racial exclusion—seats reserved for candidates who are the choice of minority voters.

But is America still a nation steeped in the muck of old-fashioned racism—the results of the 2008 election notwithstanding? Are we condemned to identity politics in choosing firefighters for promotion, in drawing districting maps for legislative bodies (from school boards all the way up to congressional delegations), and in a multitude of other spheres into the indefinite future?

Sonia Sotomayor's nomination suggests that the answer will be yes. A sad thought.

Abigail Thernstrom is an adjunct scholar at AEI. She is the author of *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* (AEI Press, June 2009). A version of this article appeared on CNN.com on June 4, 2009.

Voting Rights at the High Court

By Edward Blum

The Bronx, New York (population 1,332,650); Pinkham's Grant, New Hampshire (population zero); and Northwest Austin Municipal Utility District Number One (population 3,500) in Travis County, Texas, share a special status under our nation's civil rights laws: all are covered by Section 5 of the landmark 1965 Voting Rights Act, designed to end black disenfranchisement in the Deep South. On April 29, the Supreme Court heard arguments to determine if this provision is still constitutional.

These three, far-flung jurisdictions—and thousands of others—are subject to Section 5 for one reason: when Congress reauthorized the law in 2006, it feared having a serious debate on the need to modernize our civil rights statutes and instead abdicated all political responsibility to the courts.

Shortly after President George W. Bush signed the reauthorization, the Northwest Austin Municipal Utility District sued, arguing that unless it could "bail out" of Section 5, the provision was unconstitutional. If the Supreme Court strikes down Section 5, as it should, it will eventually force Congress to do what it should have done earlier—reassess the racial policies of a nation that has elected its first African American president.

Some background on the Voting Rights Act will be useful. Passed in 1965 as a "temporary" provision, Section 5 requires all jurisdictions in nine states (mostly in

the Deep South and Texas and Arizona) and parts of seven others (from New Hampshire to California) to seek permission from the attorney general or the D.C. district court before making any change in voting procedures. Something as minor as moving a polling place across the street, or as major as implementing a statewide congressional redistricting plan, must be "precleared" by Washington.

When the Voting Rights Act originally passed, this provision made sense—after all, the Jim Crow South had perfected a never-ending game of whack-a-mole to keep blacks from the polls. Preclearance ended that. Nevertheless, the law was unprecedented in our history. First, it applied to only a few parts of the country. Second, no other statute in our history has ever required a state or one of its jurisdictions to ask the federal government for approval before a locally enacted law can go into effect.

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In 1965, Congress recognized that Section 5's preclearance provision was an unusual intrusion into areas constitutionally reserved for the states, so it designed it to expire after five years. However, it is still in effect today after three congressional extensions. It will next expire in 2031, sixty-one years later than originally intended.

The case the Court heard on April 29, *Northwest Austin Municipal Utility District Number One v. Holder*, forces the justices to address some complex questions, the most important of which is whether conditions for minority voters have improved enough in these targeted states and jurisdictions that Section 5 is no longer necessary. Judging from the congressional record, the Court may conclude exactly that.

The data proving remarkable changes in racial conditions in these jurisdictions are irrefutable: criteria such as minority voter registration rates, election turnout, success of minority candidates, and other factors, indicate there is no meaningful and quantifiable difference in the voting rights exercised by minorities in the jurisdictions covered by Section 5 and noncovered jurisdictions. In fact, the evidence suggests that the covered jurisdictions offer greater opportunity for minorities to participate at the polls than noncovered ones. Congress knew this but chose to ignore it. That is why Pinkham's Grant is still covered by Section 5 even though its population is zero.

As some election-law scholars have noted, if Congress had reexamined Section 5's coverage formula (which is based partly on voter turnout in the 1964 contest between Barry Goldwater and Lyndon Johnson), the "coalition behind the law would have collapsed."

But Congress chose to avoid that political can of worms, which is why Northwest Austin Municipal Utility District Number One is still in the Voting Rights Act penalty box. This tiny enclave is a residential subdivision that was little more than bald ranch land until 1988, twenty-three years after the original enactment of the Voting Rights Act. Because it is in Texas, the district had to petition the federal government for permission to move the neighborhood polling place from a resident's garage to an elementary school a few blocks away. By subjecting the district to that burden, the utility district's brief says, Congress treats racism as "an inheritance that runs with the land rather than a manifestation of attitudes and actions of living individuals."

Yet beyond the legal questions of contemporary discrimination and state sovereignty hovers a powerful political question—how are voting districts drawn to comply with Section 5? For the most part, Section 5 covers preclearance of all redistricting, and to the extent a change is retrogressive (dilutive) to the position of minorities, it covers that as well. As New York University law professor Richard Pildes has noted, other than minority officeholders whose districts must be immunized from white competition, "the most significant partisan beneficiaries of the Act are Republicans, who gain from the Act's requirement that safe minority districts be created." With reliable minority Democratic voters clustered in gerrymandered minority districts, Republican challengers prevail as easily as their black and Hispanic Democratic counterparts. This "political apartheid" diminishes electoral competition.

As the municipal utility district argues to the Court, "The America that has elected Barack Obama as its first African American president is far different than when the Voting Rights Act was first enacted in 1965." That Section 5 is stuck in a time warp that will last another two decades—punishing parts of the country for the sins of their grandfathers—ill serves our nation's remarkable racial evolution. Let's hope the Court agrees.

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