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A Wise Punt?
Court Demurs on Election Law

By ABIGAIL THERNSTROM

THE Supreme Court on Monday punted on the most anticipated case of the year -- but perhaps that was the wisest move.

In what had been billed as the most important election-law case since *Bush v. Gore*, the court declined to decide the complex constitutional questions hanging over the nation's most sacred civil-rights law.

The chief question in *Northwest Austin Municipal Utility District No. 1 v. Holder* concerned the continuing legitimacy of the most radical provision of the 1965 Voting Rights Act. But eight justices agreed: Right *time*, perhaps, to consider that question -- but wrong *case*.

States and counties that are "covered" by Section 5 must get federal approval ("preclearance") before changing any aspect of their method of election. Thus, the small Texas utility district that brought the case needed (and received) Justice Department permission to move a polling place from a private residence to a school.

The district argued that preclearance "strikes at the heart of federalism, injecting the federal government directly into the state and local legislative process." Perhaps more important, it charged that the law's justification is obsolete: Such legislation, targeting the Deep South, was absolutely necessary four decades ago; today, it is not.

The plaintiffs hoped the high court would declare the provision no longer a legitimate exercise of congressional power under the Fifteenth Amendment. And the court is prepared to address the questions raised by Section 5, Chief Justice John Roberts made clear.

But this case, he declared, could easily be resolved on a narrow, technical matter -- so the justices simply granted the Texas district's request for the right to petition to "bail out" from Section 5's coverage.

This fine-tuning of the bailout provision will do little to change the law. The real significance of this case lies in what was foreshadowed.

"Things have changed in the South," every justice agreed -- a point that Congress barely acknowledged just three years ago when it renewed Section 5 for another quarter century. The provision is "extraordinary legislation otherwise unfamiliar to our federal system," the chief justice wrote. Can it be justified in a racially transformed nation?

At the oral argument, Roberts clearly indicated that his own answer would be, no. But he had the court's liberal bloc joining him in Monday's opinion -- so, in a spirit of accommodation, he simply said, it "is a difficult constitutional question we do not answer today."

The decision clearly invites another case that properly frames the core constitutional issues. Should Georgia but not Ohio still be singled out for extraordinary federal oversight? Why Brooklyn, but not Queens? By what logic?

Equally important: When the Justice Department uses its preclearance powers to insist on racially gerrymandered districts, will Section 5 withstand constitutional scrutiny? Safe black districts were arguably a necessity when not even southern white Democrats would vote for black candidates. That is no longer the case.

These are the core constitutional questions that the right Section 5 case would raise.

Monday's ruling means that the utility district will surely be freed from federal oversight via the bailout provision; it would be hard to deny its petition, given its record. But the decision won't open the floodgates of relief from Section 5. So far, only 17 counties, all in Virginia, have successfully bailed out from Section 5's coverage -- and all the high court really did was marginally expand eligibility for bailout.

In short, the decision had almost nothing -- save for encouraging signs from the court -- for those who see Section 5 as an antiquated provision.

In this light, we should remember that Congress (while still Republican, no less) voted overwhelmingly in the summer of 2006 to extend and strengthen Section 5. A broad decision striking down Section 5 would have driven today's Congress to "fix" the provision so as to undo the high court action.

Moreover, lawmakers would likely embark on a range of fresh voting-law innovations. A new statute might well prohibit felon disfranchisement and state voter-identification laws, for instance.

Perhaps the right case will reach the court in a few years. In the meantime, we might hope for a better alternative: more aspiring black politicians running and winning in majority-white settings. If that happens, they will create a record of electoral success that will make unmistakably clear how obsolete Section 5 has become.

Abigail Thernstrom is an adjunct scholar at the American Enterprise Institute and vice-chair of the US Commission on Civil Rights. Her latest book is "Voting Rights -- and Wrongs: The Elusive Quest for Racially Fair Elections." thernstr@fas.harvard.edu

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