

ROLL CALL

Pass the VRA Bailout Amendment

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This week the House considers H.R. 9, a bill that renews expiring provisions of the Voting Rights Act. The Senate is expected to take up parallel legislation later this summer, after it emerges from the Senate Judiciary Committee. Members of the House should vote to renew the act, but they also should vote for an amendment to be offered by Rep. Lynn Westmoreland (R-Ga.) to create what I have termed “proactive bailout.” The amendment strengthens the act by helping to insulate the renewed VRA against inevitable constitutional challenge.

Let me begin by stating my full support for renewal of the expiring provisions of the VRA. These provisions have been crucial in protecting the right of U.S. citizens to vote regardless of race, ethnicity or native language. The racism of the past may have dissipated, but it is not gone and its vestiges remain.

For this reason, I strongly oppose the “Norwood” amendment, which basically would gut Section 5 of the VRA, leaving Hawaii as the only state subject to the VRA’s section 5 “preclearance provisions.” (Section 5 requires a number of states, mostly in the South, and parts of other states to submit any changes in voting rules to the Department of Justice for preclearance before they can be enacted. The DOJ makes sure that the changes won’t make minorities worse off.)

But I also recognize that 2006 is not 1965, when the VRA was first passed, or even 1982, when the VRA was strengthened. There are two key differences. First, there is much less racism, particularly overt racism, in state election administration than we have seen in the past.

Second, the new Supreme Court is likely to be skeptical of the constitutionality of race-based laws such as the VRA, absent evidence of continued race discrimination in voting. In the recent Texas gerrymandering case, Chief Justice John Roberts pointedly stated: “It is a sordid business, this divvying us up by race.” Justice Anthony Kennedy, too, expressed some constitutional concerns. The danger is that the court would strike down the renewed VRA provisions as exceeding Congressional power and as an impermissible race-based remedy.

That’s where the proactive bailout amendment comes in. Currently, jurisdictions covered by the preclearance rules have the possibility of “bailing out” from coverage by demonstrating that they have made great progress toward fully including minority voters in the election process. But few have done so, in part because of inertia and in part because of the stigma that could follow an unsuccessful bailout attempt.

The amendment would charge the Justice Department with listing those covered jurisdictions that the department believes are eligible for bailout. Justice would consent to a bailout in those jurisdictions, which a district court would grant automatically unless someone objected. If someone objected, the court would conduct a full trial on whether bail-out was warranted.

Under the amendment, Justice would have three years to compile the original list of eligible covered jurisdictions and would ask every covered jurisdiction to supply relevant information to determine which jurisdictions should be entitled to bailout. After that three-year period, the DOJ annually would review the list.

This proposal does not gut the VRA, as some have suggested. It simply provides a way of ensuring that those jurisdictions that remain covered by Section 5 are the ones where there is still a danger of racial discrimination by the government in voting. That assurance could convince more conservative justices, particularly Kennedy, who could well be the swing vote on the constitutionality of VRA renewal, that Congress has made efforts to make sure that the law does not exceed Congressional power.

I know some Members of Congress, particularly Democrats, might be suspicious of an amendment offered by a conservative Southern Republican such as Westmoreland. I understand the concern. But Members of Congress should look past this concern. Passing H.R. 9 as is, without any attempt by Congress to recognize that 2006 is not 1965, could doom the provisions before the Supreme Court. And if the court strikes down a renewed VRA, other important civil rights laws could follow as well.

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