Is the Voting Rights Act's Mission Accomplished?

By Donald Scarinci

For almost 50 years, the Voting Rights Act of 1965 has protected the right to vote in the face of discriminatory election practices. Its most controversial provision requires states and municipalities with a history of voter discrimination to obtain federal approval before changing their voting laws. In *Shelby v. Holder*, the U.S. Supreme Court held that Section 4 of the Act, which outlines the process for determining which states must obtain preclearance, is unconstitutional.

In many respects, it is amazing that the voting law remained intact for so long. Section 2 of the Voting Rights Act was enacted to forbid any "standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." It applied to all 50 states and was intended to be permanent.

However, other provisions targeting areas of the country where the potential for discrimination was perceived to be the greatest were designed to expire after five years. Section 4 initially defined "covered" jurisdictions as those States or political subdivisions that had maintained a test or device (i.e. literacy and knowledge tests and good moral character requirements) as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. They included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.

Under Section 5, these jurisdiction could not change their voting procedures unless approved by federal authorities in Washington, D.C. Such "preclearance" required a showing that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color."

The extreme remedy was first challenged before the U.S. Supreme Court in *South Carolina v. Katzenbach*, one year after the law was passed. The Court confirmed that Congress was authorized to pass the Voting Rights Act under the Fifteenth Amendment, which authorizes it to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting.

The Warren Court further held that the Voting Rights Act was an appropriate means for carrying out Congress' "firm intention to rid the country of racial discrimination in voting," specifically noting that previous measures had failed. With respect to Section 5, the Court acknowledged that singling out several states might have been an uncommon exercise of congressional power, but that the Court had previously recognized that "exceptional conditions can justify legislative measures not otherwise appropriate."

In the years that followed, Congress reauthorized the Voting Rights Act several times, including 1970, 1975 and 1982. The Supreme Court upheld all three extensions. In 2006, Congress again reauthorized the Act for 25 years, without change to its coverage formula. It did, however, amend Section 5 to prohibit voting changes with "any discriminatory purpose" as well as voting changes

that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice."

Shelby v. Holder challenged this latest reauthorization. Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General, seeking a declaratory judgment that Sections 4(b) and 5 are facially unconstitutional. In a controversial 5-4 decision, a majority of the Supreme Court agreed, finding that the formula set forth in Section 4 is unconstitutional in light of current conditions.

Writing for the majority, Chief Justice John Roberts essentially declared that the mission of the Voting Rights Act has been accomplished.

“Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were,” the Chief Justice wrote.

Dissenting Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan remained less convinced that the Voting Rights Act is no longer needed.

While states no longer require literacy tests for voter registration, they noted that less obvious forms of voter discrimination still exist, including racial gerrymandering and at-large voting laws. In her dissenting opinion, Justice Ginsberg argued that the Court should not second-guess Congress’ finding that the Voting Rights Act is necessary to prevent backsliding. “The court errs egregiously,” Justice Ginsberg concluded, “by overriding Congress’s decision.”

While the implications of the decision may not be known for several election cycles, it is interesting to note that some states previously covered by the preclearance requirements are already moving forward to enact new laws. Texas, for example, is moving forward with redistricting plans and voter identification requirements that were previously held invalid under Section 5.

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