

Shelby County v. Holder: What it Means for the Voting Rights Act

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This summer, the U.S. Supreme Court ruled in *Shelby County v. Holder* that Congress had exceeded its Fifteenth Amendment enforcement authority when it reauthorized a part of the Voting Rights Act (a coverage formula) that forced places with a history of discrimination to get federal approval before making changes to their election laws. This preclearance complemented and backstopped the more traditional way of enforcing civil rights, a federal lawsuit, and stopped states from enacting discriminatory changes to their voting laws before they could act. In striking the coverage formula, the Court effectively stripped traditional preclearance from the Voting Rights Act. From this perspective, the Court's ruling wrote out an essential tool for federal enforcement of voting rights, the crown jewel of the civil rights movement.



People wait in line outside the Supreme Court in Washington, D.C., February 27, 2013, to listen to oral arguments in the *Shelby County, Ala., v. Holder* voting rights case. (AP Photo/Evan Vucci)

But at the same time, the Court validated an important new principle, the principle of equal state sovereignty, and defined a critical limit on congressional authority under the Fifteenth Amendment. In other words, the Court drew an important line between states' rights and federal authority in enforcing

civil rights. From this perspective, the Court protected states from an overreaching federal government in an area of traditional state responsibility, the states' election laws.

Whether we see the ruling as a blow to civil rights or as a protection for states' rights, we can agree that the ruling will

have a significant impact. We know this because, already, in the immediate wake of the ruling, states and the federal government took actions that all too clearly illustrate its impact. Those actions suggest something else: *Shelby County* may be just the tip of the iceberg in the Court's foray into congressional authority to enforce voting rights under the Fifteenth Amendment. There is a lot more litigation to come.

But in order to unpack *Shelby County's* significance, it helps to understand how Congress designed the various provisions of the Voting Rights Act, and why.

The Voting Rights Act

Congress enacted the Voting Rights Act of 1965 in order to create a federal antidote to a persisting and insidious disease that especially plagued several states—racial discrimination in the right to vote. Congress knew that the Fifteenth Amendment, ratified after the Civil War, in 1870, prohibited states from discriminating by race in the vote. But Congress also knew that certain states had adopted clever ways to dodge this ban and continue the practice of denying the vote to African Americans. Congress knew, for example, that certain states used tests (like literacy tests or good-moral-character requirements) and other devices (like white primaries) to exclude black Americans from the polls. And Congress knew that even successful federal lawsuits challenging these practices failed to address the underlying problem of voting discrimination. That's because certain states invariably devised new

tests and devices that weren't covered by federal lawsuits and thus continued their discrimination in a different way. In other words, litigation challenging offending state practices could never catch up with the new and crafty ways that states designed to deny the vote to African Americans.

So Congress enacted the Voting Rights Act in 1965. The Act included two key ways to check and prevent states from discriminating in the right to vote. First, Section 2 of the Act authorized individuals and the U.S. Department of Justice to bring federal lawsuits against states for discriminating in the right to vote. The Act allowed plaintiffs to obtain injunctive relief, so that they could stop the offending practices, ideally before the next election would further entrench those practices.

Next, Section 5 of the Act required certain states to get federal permission, or "preclearance," from the U.S. Department of Justice or a three-judge panel of the federal court in Washington, D.C., before making any changes to their voting procedures. The preclearance provision was designed to backstop Section 2 litigation and solve the problem that litigation never really catches up with the new ways that states could devise to deny black Americans the right to vote. The preclearance requirement did this by putting the burden on the states to show that proposed changes to their elections laws had neither the purpose nor effect of denying or abridging the right to vote on account of race. If a state could not meet its burden, the federal authorities would deny preclearance, and the state could not put its proposed law into effect. The preclearance requirement, as a complement to Section 2 litigation, was an essential part of the Voting Rights Act; the requirement, by placing the burden on the states, was a revolutionary way to enforce civil rights.

The preclearance requirement was "strong medicine" for the disease of vote discrimination and so only applied to certain states with a history of particularly wicked practices. Under Section

4(b) of the Act, the preclearance requirement applied to those states or political subdivisions that had maintained a test or device 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. That formula was no accident. Congress devised it by first identifying those particularly offending jurisdictions and then "reverse-engineering" the formula. In 1965, the covered jurisdictions included the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and 39 counties in North Carolina and one county in Arizona.

Still, the coverage formula was flexible. A jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." And a federal court could order a jurisdiction that was not covered by Section 4(b), but that nevertheless engaged in discriminatory conduct, to "bail in" to coverage by retaining jurisdiction over and monitoring it as if it were covered under Section 4(b).

Congress reauthorized the Voting Rights Act four times, in 1970, 1975, 1982, and 2006, and made some alterations to the coverage formula in Section 4(b) along the way. For example, in 1970, Congress extended the coverage formula to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. The change swept in several counties in California, New Hampshire, and New York. In 1975, Congress extended the coverage formula to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Congress also changed the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. These changes swept in Alaska, Arizona, and Texas, and several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota.

Congress did not change the coverage formula in 1982 or 2006. But in 1982, Congress tightened the requirements for bail out, and in 2006 Congress expanded Section 5 to require preclearance for any voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, because of race, color, or language minority status, "to elect their preferred candidates of choice."

The Voting Rights Act faced legal challenges when Congress first enacted it and upon each reauthorization. Opponents of the Act, covered jurisdictions under Section 4(b), argued that Congress exceeded its authority under the Fifteenth Amendment and violated states' rights principles by subjecting them to different treatment than non-covered jurisdictions in a core area of traditional state responsibility, voting procedures. The Supreme Court consistently rejected the challenges, however, and upheld the Act, ruling that Congress acted within its authority. That is, until *Shelby County*.

The *Shelby County* Case

Shelby County sits within Alabama, a fully covered jurisdiction, and was therefore subject to the preclearance requirement of the Voting Rights Act. In April 2010, the county sued the U.S. attorney general in federal court seeking a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act were facially unconstitutional and further seeking a permanent injunction against their enforcement. The county argued that Sections 4(b) and 5, as reauthorized by Congress in 2006, exceeded congressional authority "to enforce" the Fifteenth Amendment "by appropriate legislation." In particular, the county claimed that Congress did not build a sufficient legislative record of voting discrimination as of 2006 to justify the preclearance requirement and the different treatment of covered and non-covered states.

(*Shelby County* was not the only covered jurisdiction to sue to stop the 2006 reauthorization. Most importantly, a municipal utility district in Texas sued

soon after Congress reauthorized the Act, arguing that the preclearance requirement was unconstitutional. That case, *Northwest Austin Municipal Utility District Number One v. Holder*, went all the way to the Supreme Court. The Court dodged the constitutional question, however, and ruled that the utility district could bail out of coverage. But the Court also wrote, in an opinion penned by Chief Justice Roberts and joined by seven other members of the Court, that “[t]he Act’s preclearance requirements and its coverage formula raise serious constitutional questions . . .” The Court also wrote that “[t]he Act differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’”

The district court ruled in favor of the attorney general. It said that Congress’s extensive, 15,000-page legislative record supporting reauthorization of the Act in 2006 provided ample evidence of a history and ongoing pattern of voting discrimination in covered jurisdictions. The court also credited Congress’s finding that Section 2 was an insufficient remedy for voting discrimination in covered jurisdictions.

The court of appeals affirmed. Like the district court, it held that in reauthorizing the Act in 2006 Congress found ample evidence of widespread and persistent racial discrimination in voting in covered jurisdictions, justifying the preclearance requirement. It also said that the different treatment of states under the coverage formula in Section 4(b) was justified by the different degrees of voting discrimination in covered and non-covered jurisdictions, again, as identified by Congress. (Judge Williams dissented, explaining that he would find Section 4(b)’s coverage formula unconstitutional even if Congress might be justified in requiring preclearance in some covered jurisdictions.)

The Supreme Court reversed. In a sharply divided, 5–4 ruling, along conventional ideological lines, the Court held that Congress exceeded its enforcement authority under the

Fifteenth Amendment in reauthorizing the coverage formula in Section 4(b). Chief Justice Roberts, writing for the majority that included Justices Scalia, Kennedy, Thomas, and Alito, said that the coverage formula started against a headwind. That’s because the coverage formula treated covered jurisdictions differently than non-covered jurisdictions: it required covered jurisdictions to bear the burdens of preclearance before enacting changes to their election laws, while allowing non-covered jurisdictions to make changes free and clear of federal oversight. In this way, he wrote, the coverage formula intruded on the “fundamental principle of *equal sovereignty*” among the States.

Chief Justice Roberts said that the coverage formula as reauthorized in 2006 could not overcome that headwind. He wrote that despite the voluminous congressional record on voting discrimination, things had changed in covered jurisdictions. He wrote that today voter turnout and registration rates between blacks and whites “approach parity,” “[b]latantly discriminatory evasions of federal decrees are rare,” “minority candidates hold office at unprecedented levels,” and tests and devices that historically blocked access to the ballot have been banned for over 40 years. Chief Justice Roberts said that Congress itself found that “[s]ignificant progress has been made” in eliminating voting discrimination and its effects. He wrote that this evidence of improvement today is at odds with a stale coverage formula in Section 4(b) that was based on voting discrimination problems over 50 years ago. As a result, the Court held that Section 4(b) exceeded congressional authority under the Fifteenth Amendment and was unconstitutional.

Justice Thomas concurred. He argued that Section 5, too, was unconstitutional. But no other Justice joined his opinion.

Justice Ginsburg wrote a scathing dissent, joined by Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg argued that the voluminous congressional record of the 2006 reauthorization supported the

coverage formula in Section 4(b). She said that while there were some improvements since 1965 in voting discrimination, Congress was particularly concerned in 2006 with lingering “second generation” barriers to the right to vote. These include practices like racial gerrymandering, at-large voting systems (instead of single-member-district voting systems), discriminatory annexation, and other practices that effectively dilute racial minorities’ votes. Moreover, she wrote that the congressional record in 2006 was rife with evidence of “flagrant racial discrimination” in covered jurisdictions. She said that this evidence supported Congress’s conclusion that the preclearance requirement had a prophylactic effect on voting discrimination—that is, preclearance stopped voting discrimination before it started. She argued that without preclearance, previously covered jurisdictions could run roughshod over the voting rights of racial minorities, and that Section 2 litigation alone could never catch up.

In all, the Court’s ruling only struck Section 4(b). Section 5 preclearance remains on the books. (As does Section 2 and the “bail in” provision under Section 3(c).) But without a coverage formula, Section 5 preclearance is a dead letter.

The Court’s ruling allows Congress to rewrite Section 4(b) and thus to reinstate preclearance, at least in theory. For example, the Court’s opinion might allow Congress to design a new coverage formula that is better tailored to jurisdictions that continue to have the most serious problems with vote discrimination.

But it seems unlikely in this political climate that Congress could agree on a new formula. (Congress may have had an easier time reauthorizing Section 4(b) in 2006, because at that time the long-standing coverage formula, stated in neutral terms, had both merit and political inertia. A new Section 4(b), starting from scratch, would not have that same inertia, even if it had merit.) Even if a future Congress could overcome the politics, the task of rewriting the coverage formula would be daunting. At the very

Discussion Questions

1. What prompted Congress to enact the Voting Rights Act in 1965? Why was it subsequently reauthorized?
2. What is the preclearance requirement of the Voting Rights Act? What was its coverage formula? How was it determined? How was it modified since the original legislation in 1965?
3. Do you think the coverage formula and the preclearance requirement of the Voting Rights Act are still needed and appropriate? Why or why not?
4. What is “equal state sovereignty”? How does the principle of federalism, power shared “vertically” between the national and state governments, come into play in this case?
5. How did the principle of checks and balances, “horizontal” power relations among the legislative, executive, and judicial branches, apply to this case? How might it come into play in the future? Do you think Congress will pass new provisions of the Voting Rights Act in response to the Court’s ruling?

least, Congress would have to reengage in significant legislative fact-finding and write a formula that targets, with laser-like precision, only those jurisdictions with the worst practices of vote discrimination, where only preclearance would eradicate that discrimination. Even then, it is not at all clear from *Shelby County* that the Court would uphold any formula that treats states differently. (Congress could not write a formula that covers the entire country, and thus treat the states the same, because much of the country does not have the kinds of problems with vote discrimination that would justify preclearance.)

The ruling does not mean that the Voting Rights Act is defunct. But for previously covered jurisdictions, the ruling does declare open season for election law changes that will dilute the vote of racial minorities. The resulting cases will reveal just how much muscle is left in the Voting Rights Act.

Shelby County's Aftermath

Just two days after it issued its ruling in *Shelby County*, the Court vacated two lower court decisions denying preclearance for election law changes in Texas. In the first case, *State of Texas v. Holder*, a three-judge panel of the U.S. District Court for the District of Columbia denied preclearance to Texas’s stringent voter-ID law because it found that the scheme would likely have a retrogressive effect on Hispanic and black voters. In the second case, *State of Texas v. United States*, the three-judge district court denied preclearance to Texas’s redistricting plans for its congressional districts and state legislative districts because it found that the plans would have a retrogressive effect and, importantly, because *they were enacted with a discriminatory purpose*. The Supreme Court’s action vacating these rulings means that these schemes can now go into effect. Indeed, the Texas attorney general wasted no time in announcing that he would move to put them into effect immediately.

In response, the U.S. attorney general announced that the Department of

Justice would sue the state to block these schemes under Section 2 of the Act. He also announced that the Department of Justice would ask the court to monitor the state under the “bail in” provision in Section 3(c). As of this writing, the Department of Justice has filed its lawsuits, but the state of Texas has not formally responded. The Texas attorney general, however, issued a press release deftly picking up on themes in the *Shelby County* ruling and presaging the state’s legal defense. He said that the state did not discriminate in enacting these schemes, and that the Department of Justice’s action violates core principles of state sovereignty by interfering with the state’s right to set its own election laws.

While the Texas cases may be the most immediate and highest profile reactions to *Shelby County*, they are certainly not alone. Other previously covered jurisdictions have also moved to enact laws that would have required—and may have failed—preclearance before *Shelby County*. And plaintiffs have already filed suit to stop some of them.

The states’ actions, and these suits, represent the dramatic impact of *Shelby County*. But more, they tee up the next round of cases almost certain to go to the Supreme Court—challenges to congressional authority to enact the Section 3(c) “bail in” provision and even to enact Section 2, insofar as it prohibits voting practices that fall outside of the four corners of the prohibitions in the Fifteenth Amendment, as strictly construed. As dramatic a ruling as *Shelby County* was, it may well be just the tip of the iceberg. 🌊

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