

Decision Overview

Shelby County v. Holder, No. 12-06 (June 25, 2013)

Today, the Supreme Court of the United States, in a 5-4 decision, struck down the preclearance formula used to determine which state and local jurisdictions must pre-clear changes in voting procedures with the U.S. Department of Justice. This is clearly a landmark decision that will have important effects on voting rights in the United States for years to come.

The key part of the ruling invalidates the coverage formula, set forth in section 4 of the Voting Rights Act. The Supreme Court had expressed concerns about this formula several years ago, in 2009, but Congress has not revisited this question. Writing for the *Holder* majority, Chief Justice John G. Roberts, Jr. explains that:

Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance. (Slip op., at 24.)

Thus, because Congress failed to respond to the Supreme Court's call for review of the coverage question, issued in 2009 in its majority opinion in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 203-04 (2009), the majority voted to invalidate this provision of the Voting Rights Act.

As I read the majority opinion, it essentially leaves the preclearance rule under section 5 in place, but without any jurisdictions currently being subject to this process. Consistent with the majority's opinion, Congress could require preclearance of changes in voting rules in jurisdictions that have a pervasive history of discriminating against minority citizens with respect to voting rights, but the assumption that the factual predicates initially used to justify this approach in 1965 are no longer a sufficient predicate in 2013.

The *Holder* majority holds that the coverage formula must address race-based problems in voting rights as they exist in 2013, not 1965. Chief Justice Roberts explains that:

Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. (Slip Op. at 21).

He adds that:

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day. . . . We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress.

Contrary to the dissent's contention, see post, at 23, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today. (Slip op., at 21.)

Thus, according to the *Holder* majority, the record that Congress created incident to the last reauthorization of the Voting Rights Act, in 2006, was simply irrelevant to the specific problem identified by the *Holder* majority – namely, that the 1965 coverage formula set forth in section 4 no longer reflects the facts on the ground in 2013. A new coverage formula, rather than a record providing factual support and justification for the old coverage formula, was requisite to make the law a constitutionally permissible effort to prevent future violations of voting rights.

It is now up to Congress to decide whether it wishes to establish a constitutionally permissible coverage formula to identify jurisdictions subject to the section 5 preclearance procedure. One should also keep in mind that section 2 of the Voting Rights Act remains on the books, is not subject to any credible constitutional objections, and provides a comprehensive cause of action to remediate actual racial discrimination in the voting process. Of course, this is a retrospective, or backward looking, remedy, rather than a means of preventing a future violation from occurring in the first place.

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