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Congress's Power to Protect the Vote

EDITORIAL

The voter ID laws and other tactics that sprang up in several states last year to prevent minorities from casting their ballots offer incontestable proof of the need for strict voting rights laws.

Yet at the argument on Wednesday in Shelby County v. Holder, the Supreme Court's conservative justices left the ominous impression that they were willing to deny this reality and repudiate Congress's power to enforce the right to vote by striking down a central provision of the Voting Rights Act of 1965.

Section 5 of the Voting Rights Act requires nine states (seven of them in the South) and parts of seven others with records of extreme discrimination against minority voters to get approval from the Justice Department or a special court in Washington before they can make any changes in how they hold elections. Without this provision, there would be no way to prevent new and devious efforts by local officials to block blacks and Hispanics from voting or to reduce their electoral power. In 2006, Congress overwhelmingly reauthorized the statute. It found that these places should remain "covered" by this "preclearance" requirement because voting discrimination remained both tangible and more concentrated and persistent in them than in other parts of the country. House members from those places strongly supported the renewal: of 110 members from covered jurisdictions, 90 voted for reauthorization.

But critics of Section 5 — like Chief Justice John Roberts Jr. — would rather not consider the real-life effects of voting changes on minority voters in historically discriminatory areas. Instead, they frame the issue in the Shelby case as whether Congress was wrong to renew the section "under the pre-existing coverage formula." Their claim is that Section 5 stigmatizes covered districts, so that any such decision must be based on current data about severe discrimination in that place. The chief justice raised doubts about the section's constitutionality in a 2009 Supreme Court opinion that resolved a Texas voting case on narrower grounds. He focused on the formula used in 1965 to determine which states and other places would be covered — places that had used a forbidden test or device in November 1964, like a literacy test or a poll tax, and had less than 50 percent voter registration or turnout in the 1964 presidential election. The statute's coverage formula, he wrote, "is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."

While the method for identifying the places to be covered is partly based on information from decades ago, that should not render the law's current enforcement unconstitutional. In 2006, Congress did not mechanically accept the pre-existing formula. Instead, it held extensive hearings about discrimination in voting — gathering a mountain of evidence accounting for current political conditions.

F. James Sensenbrenner Jr., the conservative Republican congressman from Wisconsin who introduced the reauthorization bill in the House, addressed the coverage issue then. "The existing formula triggering coverage under the Voting Rights Act is not at all outdated in any meaningful sense of the term, and states covered are not unfairly punished under the coverage formula," he said. The reauthorization was "based on recent and proven instances of discrimination in voting rights compiled in the judiciary committee's 12,000-page record" — not counting the 3,000-page record of the Senate.

Congress found that, in general, the problems of voting discrimination were much worse in the covered areas than elsewhere in the United States. A recent study by Morgan Kousser of the California Institute of Technology confirms that: "five-sixths or more of the cases of proven election discrimination from 1957 through 2013 have taken place in jurisdictions subject to Section 5 oversight." The Justice Department used Section 5 last year to block and change discriminatory voter ID laws in Texas and South Carolina, for example, and to block a discriminatory Florida law that limited early voting.

Nonetheless, the lawyer for Shelby County told the justices the "problem to which the Voting Rights Act was addressed is solved." Justice Antonin Scalia, saying that Section 5 is a "perpetuation of racial entitlement," outrageously suggested that minority voters in covered districts are getting something they do not deserve — protection of their right to vote. Congress exercised its constitutional authority in carefully and deliberately renewing Section 5. If the Supreme Court substitutes its judgment for Congress's, it will enable state and local governments to erode nearly half a century of civil rights gains.