



The Voting Rights Act Doesn't Reflect Current Political Conditions

By: Ilya Shapiro – February 27, 2013

Neither minority voting rights nor the ability of the federal government to enforce those rights are at stake at *Shelby County v. Holder*. Both of those are secure regardless of how the Supreme Court rules in the case.

Instead, *Shelby County* considers whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still exist such that an "uncommon exercise of congressional power" is still constitutionally justified—to quote the 1966 Supreme Court that approved Section 5 of the Voting Rights Act as an emergency measure.

That is, while the "historic accomplishments of the Voting Rights Act are undeniable," as the court said 43 years later, the modern use of Section 5—which requires federal "preclearance" of any changes in election law in certain jurisdictions—"raises serious constitutional concerns." Most recently renewed in 2006, the provision adopts flawed assumptions and flies in the face of the 15th Amendment's requirement that all voters be treated equally.

Section 5's preclearance scheme is an anachronism, based on 40-year-old data that doesn't reflect current political conditions. For example, the racial gap in voter registration and turnout is lower in states originally covered by Section 5 than it is nationwide. Blacks in some covered states actually register and vote at higher rates than whites. Facetious tests and sinister devices are now permanently banned—while even individual violations are exceedingly rare and no more likely to occur in Section 5 jurisdictions.

Indeed, the list of Section 5 jurisdictions is bizarre: six states of the Old Confederacy, plus Alaska, Arizona, and parts of states ranging from New Hampshire to South Dakota. Three New York counties are covered, all New York City boroughs. What's going on in the Bronx, Brooklyn, and Manhattan that isn't in Queens or Staten Island? Four justices famously hail from Gotham; maybe they know something we don't.

Moreover, it is Section 2—the nationwide ban on racial discrimination in voting—that is the heart of the Voting Rights Act. Section 5, meanwhile, was a temporary tool that supplemented Section 2 and overcame "widespread and persistent discrimination in voting"—thus eliminating the extraordinary circumstances that originally justified it.

But three generations of federal intrusion have been more than enough to kill Jim Crow. As Justice Thomas wrote in 2009, an acknowledgment of Section 5's unconstitutionality "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA."

