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## High court decision gives Congress a chance to modernize voting rights

**S**igned into law by President Lyndon Johnson in 1965, the Voting Rights Act was enacted to prevent racially discriminatory voting practices. The key part of the act, Section 5, required voting jurisdictions to obtain "pre-clearance" from the Justice Department or a federal court before making any voting law changes. The purpose was to eliminate tactics historically used to veil racial discrimination in the voting process.

When the U.S. Supreme Court decided *Shelby County v. Holder*, 570 U.S., 133 S. Ct. 2612, 186 L.Ed. 651 (2013), this past June, the Obama administration, many academics and civil rights activists condemned it roundly. The court held that the formula that triggers pre-clearance, specified in Section 4, was out-of-date. The result is that, absent any new Section 4 formula from Congress, Section 5 doesn't actually apply anywhere. This is what fanned the rancor.

But was this response justified? In retrospect, I think not. I think that the court's decision was foreseeable and, like it or not, the decision now provides Congress with a splendid opportunity to revisit the entire issue of voting rights, and to do so with the 21st century in mind.

The court had clearly signaled its intentions regarding the Voting Rights Act. After Congress reauthorized the act in 2005, a special district in Texas, the Northwest Austin Municipal Utility District 1, challenged its application. In that case, *NAMUDNO v. Holder*, 557 U.S. 193 (2009), eight members of the court praised the success of the Voting Rights Act, but then they also made it clear that the strongest provision in the act, Section 5, was dependent upon a formula in Section 4 that was out-of-date.

They warned Congress that it should revise Section 4 to reflect

modern conditions. Justice Clarence Thomas, the ninth member and, at that time, the only minority member of the court, even said that Section 5 was invalid because Section 4 used standards based on 1972 data.

Why did Congress continue to rely on 1972 data when it reauthorized the act in 2005? Although Congress compiled a voluminous record of evidence concerning the act, the congressional debates suggest that Congress simply reauthorized the act because it could not agree upon a better plan. In 2005, Congress was polarized on voting rights. Reauthorization may have seemed the safest route to take.

Since 2009, when *NAMUDNO* came down, Congress has had ample opportunity to amend Section 4 to reflect modern circumstances and thereby prevent a challenge of the type raised by *Shelby County*, Ala. Busy with other matters and often paralyzed to the point of gridlock, Congress has done nothing. Therefore, the decision in *Shelby County* should not have come as a surprise.

What can Congress do now? I suggest it must revisit and revise the formula in Section 4 that triggers the pre-clearance mechanism in Section 5, which requires certain jurisdictions to obtain the permission of the United States Justice Department before they make any changes in their elections.

First, Congress should use 21st century data. Instead of relying upon the presidential election of 1964, it could examine the more recent presidential elections. Ideally, Congress could establish the circumstances surrounding the most recent presidential election as the time at which the requirement of pre-clearance in Section 5 would be measured.

Probably many of the states currently covered would still be covered; some states would be



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removed from the list; and other states would be added to the list. For example, some northern and western states not currently covered have passed "voter ID laws" that many observers think hinder voting.

Second, Congress should look at many different factors concerning voting restrictions and the existing provisions of the act to see if they should be changed.

For example, when the "language requirement" was added in 1972, there was an assumption that native speakers of Spanish and some American Indian languages were inhibited from voting because voting materials were only in English. Now, some immigrants from many different countries can also make that claim. A jurisdiction's accommodation of all of these languages should be a factor in deciding whether it should be covered by Section 5.

Congress should also consider whether a state provides ample

opportunity for early voting and absentee voting. If a state has liberalized its absentee voting rules and has provided for "no-excuse" early voting, that state has made it easier for its citizens to vote.

In addition, Congress should consider whether a state has enacted voter ID laws. As even Judge Richard A. Posner has admitted, it is becoming clear that the purpose and effect of these laws is to prevent voting, not to prevent fraud. Passage of a voter ID law should be a factor in deciding whether a state should be subject to the pre-clearance requirement.

Another issue is the ease with which one can register to vote. Congress should consider whether a state facilitates registration. Currently, some states allow voters to register by postcards. Others empower high school principals to register high school seniors as they turn 18.

Finally, Congress should consider whether a state allows an ex-felon to vote upon completion of his sentence. Many "felon disenfranchisement" laws originated during the Jim Crow era when black males were convicted and imprisoned wrongfully and then, upon release, denied the opportunity to vote.

The modern trend is away from felon disenfranchisement. Illinois even makes the reinstatement of an ex-felon's right to vote a constitutional right. The impact of felon disenfranchisement laws upon black and Hispanic males is so great that probably nothing could facilitate voting by minority citizens more than repeal of these laws.

Surely Congress, as it reconsiders the Voting Rights Act, can address these issues. Some states will decry these suggestions as intrusions upon states' rights. But that's what they said when Congress passed the act in 1965.