Mississippi College Law Review

Volume 18
Issue 1 *Vol. 18 Iss. 1*

Article 6

1998

Motor-Vehicle and the Voting Rights Act in Mississippi

Robert E. Sanders

Follow this and additional works at: https://dc.law.mc.edu/lawreview

 Part of the Law Commons

Custom Citation
18 Miss. C. L. Rev. 47 (1997-1998)

This Article is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

MOTOR-VOTER AND THE VOTING RIGHTS ACT IN MISSISSIPPI

*Robert E. Sanders**

In *Young v. Fordice*[1], the United States Supreme Court may have set the foundation for ending Mississippi's control of voter registration within the state's borders. Mississippi's constitutional authority and duty to establish the regulatory framework for registration of voters within the State may soon be illusory.

The case presented a challenge under section 5 of the Voting Rights Act[2] to the State of Mississippi's implementation of the mandates of the National Voter Registration Act of 1993 (NVRA).[3] By its express terms, the NVRA mandates only that states provide citizens certain opportunities to register to vote in *federal* elections.[4] Nothing in the NVRA has anything to do with voter registration for *state* elections. To implement the NVRA, Mississippi simply did what the NVRA requires. The state made voter registration for federal elections available at locations where citizens apply for drivers' licenses and at various other agencies where citizens apply for government benefits.[5]

The state voter registration statutes establishing eligibility for inclusion on state voter rolls were not changed either by the Mississippi Legislature or by operation of the NVRA. As before implementation of the NVRA, in order to be universally registered to vote in Mississippi, one need only comply with the extremely accommodating requirements of Mississippi law.[6] As contemplated by the NVRA, those registering pursuant to NVRA requirements are registered only for federal elections. The plaintiffs and their *amici*[7] incorrectly asserted that this resulted in an unprecleared dual registration system in spite of the fact that no one is *required* to register twice in order to be universally registered. Both before the implementation of the NVRA and presently, an individual need register only one time, under the provisions of Mississippi law, to be a registered voter for every election—local, state, or federal—conducted in that voter's jurisdiction.[8]

---

* Special Assistant Attorney General for the State of Mississippi since 1978 in the Civil Litigation Division; B.B.A., 1972, University of Mississippi; J.D., 1977, Jackson School of Law at Mississippi College.

1. 117 S. Ct. 1228 (1997). The plaintiffs were individuals represented by the Lawyers' Committee for Civil Rights Under Law. The defendants were Governor Kirk Fordice, Attorney General Mike Moore, Secretary of State Dick Molpus, and Gregg Phillips, Executive Director of the Mississippi Department of Human Services. The defendants were sued in their official capacities only. The United States filed a separate action styled *United States v. State of Mississippi*. The actions were consolidated for trial. Summary judgment was subsequently entered for the defendants in both actions. Only the *Young* plaintiffs prosecuted the appeal. The United States participated as *amicus* for the plaintiffs. The office of the Solicitor General participated at oral argument.

2. 42 U.S.C. § 1973c (1994).

3. 42 U.S.C. §§ 1973gg to 1973gg-10 (1994).

4. 42 U.S.C. § 1973gg-2 (1994).

5. The NVRA also has requirements relating to mail-in registration and purging. The requirements of the NVRA apply to all states which on or after March 11, 1993, required registration, but did not permit election-day registration. 42 U.S.C. § 1973gg-2 (1994). Various state agency heads issued administrative fiats instructing appropriate agency employees to make federal registration forms available to agency patrons.

6. MISS. CODE ANN. §§ 23-15-1 to -151 (1990 and Supp. 1997).

7. The plaintiffs' *amici* were the United States, through the Office of the Solicitor General, the Community Service Society of New York, and the American Association of Retired Persons. The Office of the Solicitor General participated at oral argument. Young v. Fordice, 117 S. Ct. 1228, 1231 (1997).

8. MISS. CODE ANN. §§ 23-15-1 to -151.

I. THE CASE

The plaintiffs' theory of a voting rights violation arose from a confusing set of circumstances surrounding the state's section 5 submission of its administrative plan for NVRA implementation. The confusion was caused in equal parts by the U.S. Department of Justice and by an employee of the Mississippi Secretary of State's office.

The NVRA was adopted into law in 1993.[9] During 1993, Mississippi began planning for its January 1, 1995, implementation of the requirements of the NVRA. On December 15, 1993, Governor Kirk Fordice issued an Executive Order that created a committee to plan for implementation and named the Mississippi Secretary of State as the official responsible for coordinating State efforts.[10] The committee had the responsibility of giving advice and making proposals to the State agencies through which the NVRA would be implemented.[11] The committee also had the responsibility of giving advice and making proposals to the Mississippi Legislature, should the Legislature decide to change the already liberal Mississippi voter registration laws to conform to the requirements of the NVRA.[12] During 1994, the committee held various meetings and generated plans and materials designed to make implementation go smoothly.

As envisioned by the committee, proposed actions to implement the NVRA consisted of two basic types: administrative and legislative. First, the committee proposed that agency administrators could, by administrative fiat, set procedures by which voter registration forms required by the NVRA could be distributed. The head of a particular state agency, such as the Department of Human Services or the Department of Public Safety, could simply decree that employees within that agency would make NVRA voter registration forms available, under certain conditions, to agency patrons. The state had to choose which agencies would provide NVRA registration material, the process those agencies would follow, and the information they would include on the NVRA registration forms. These recommended administrative actions were adopted, and NVRA registration forms were made available to agency patrons.

The plaintiffs took the position that these administrative actions were within the reach of the Voting Rights Act and required section 5 preclearance.[13] The defendants' position was that the State did not have true discretion in making these agency designations or in the other administrative choices associated with NVRA implementation. The provisions of the NVRA mandated that the state's drivers' license bureaus were to be designated as agencies which were to provide NVRA registration services.[14] Similarly, the NVRA mandated that state agencies that provided services to disabled citizens must distribute NVRA registration

9. 42 U.S.C. § 1973gg-2.
10. Exec. Order No. 739 (1993).
11. *Id.*
12. *Id.*
13. Young v. Fordice, 117 S. Ct. 1228, 1234 (1997).
14. *Id.* at 1236. *See also*, 42 U.S.C. § 1973gg-3 (1994).

forms to agency patrons.[15] The state's only discretion was in determining which of its agencies fit the description contained in the NVRA's mandate.[16]

The second type of actions proposed by the committee were legislative changes in state registration law. Legislative changes were those necessary to change anything previously set in place by state statute. Matters controlled by statute included the qualifications for enrollment on state voter rolls, purging requirements, and the form of the State registration application.[17] By custom and practice, and generally by statute, legislative changes affecting voting are submitted for preclearance by the Mississippi Attorney General.[18] The Governor's Executive Order designated that office as the proper submitting authority.[19] Clearly, had the Mississippi Legislature made any changes to state registration law, those changes would have been subject to preclearance, but no such changes were made.

From time to time, an Assistant Secretary of State made informational mailings of committee material to officials with the U.S. Department of Justice. Her purpose in making these informational mailings was to keep federal officials apprised of the activities of the committee and of the progress of Mississippi's plan for implementing the NVRA. On December 20, 1994, an official with the Department of Justice suggested in a telephone conversation with an attorney from the Office of the Secretary of State that the matters previously outlined in informational mailings should be submitted for section 5 preclearance.[20] In response, the Assistant Secretary of State wrote the Justice Department on the same day, December 20, and requested simply that the Department consider all the prior informational mailings as one large undifferentiated section 5 submission.[21]

The informational material sent by the Assistant Secretary of State outlined the administrative actions to be taken by the state, such as the proposed designations of state agencies where NVRA applications would be distributed, the process those agencies would follow, and a new voter registration form that would replace the state's old form.[22] The proposed change in the state voter registration form could only have been made if the legislation proposed by the committee had been adopted in the form suggested in the committee's draft legislation.[23] The mailings also included a copy of the proposed legislation itself. The

15. 42 U.S.C. § 1973gg-5 (1994).

16. *Id.*

17. MISS. CODE ANN. §§ 23-15-11 to -21; 23-15-39; 23-15-151 to -161 (1990).

18. Whenever statutory changes are made, the legislature generally includes in the statutory package a requirement that the matter be submitted by the Office of the Attorney General for preclearance.

19. Exec. Order No. 739 (1993).

20. Brief for Appellee at 4, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

21. *Id.*

22. The submission was contained in various informational mailings sent to the Department of Justice over a period of months. Portions of the submission are reproduced in the Joint Appendix at 14-104, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

23. The submission also contained such extraneous material as an NVRA information manual, model office procedures, updates, status reports, summary of legislative efforts, reports of committee hearings, summaries of committee discussions, summaries of community outreach programs, and reports of training programs.

Department of Justice understood that changes to requirements imposed by state law, such as the qualifications for enrollment on state voter rolls and changes to state voter registration forms, could not be accomplished without passage of the proposed legislation that was to be introduced in the January session of the legislature.

In early January, 1995, the Mississippi Legislature convened, and the legislation proposed by the commission was introduced. It died in committee on January 25, 1995.[24] The Department of Justice, with full knowledge that the proposed legislative changes were dead,[25] and with the apparent intention of doing what it could to change Mississippi statutory law by its own administrative fiat, promptly precleared the Assistant Secretary of State's submission on February 1, 1995. In its preclearance letter, the Department listed the matters it considered to have been precleared.[26] Included in the list were the administrative choices of agencies and processes to implement the NVRA.[27] Also included in the Department's listing of "changes" it purported to preclear were the proposed changes to the Mississippi statutory mail-in registration form and changes to the Mississippi statutory purge provision, which had been contained in the failed legislation.[28] In reality, neither the mail-in registration form nor the statutory purge provision was changed at all. After the preclearance, the Department of Justice announced that the proposed legislative changes had, by virtue of the preclearance, been accomplished without legislative approval.

As later found by the district court, the "changes" precleared by the Department of Justice did not truly represent any accomplished changes in Mississippi registration statutes controlling state registration or elections.[29] The State's view was that the only matters which were actually precleared were those matters implemented without legislation, such as the administrative actions which occurred at state agency offices.[30] The plaintiffs contended, however, that officials with the Secretary of State and the Department of Justice believed that the Legislature would enact the proposed reconciling legislation.[31] The plaintiffs also contended that the informational mailings, therefore, implied that the forms and procedures set forth in the submission would eventually apply to state registration as well as federal registration.[32] Since the Department of Justice purported to preclear changes it believed were implied in the submission, or which it expected would occur in state requirements, the plaintiffs and the United States

24. *See* Young v. Fordice, 117 S. Ct. 1228, 1233 (1997).

25. The Department of Justice conceded during this proceeding that it was fully aware the proposed legislation had been rejected at the time it issued its preclearance letter. United States Brief for Appellant at 26, n.14, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

26. Juris. Statement at 15a, *Young*, 117 S. Ct. 1228 (1997) (No. 95-2031).

27. *Id.*

28. *Id.*

29. Young v. Fordice, 117 S. Ct. 1228, 1234 (1997).

30. Brief for Appellee at 7, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

31. United States Brief for Appellant at 26-27, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

32. *Id.*

further contended that those imagined changes in state statutory requirements existed from that point and represented the then extant precleared condition of Mississippi law.[33]

In the latter part of 1994, the Assistant Secretary of State, believing state statutes would be changed, took it upon herself to verbally advise circuit clerks in attendance at a seminar to begin enrolling NVRA registrants on state voter rolls on January 1, 1995, notwithstanding the fact that the legislature would not even have convened by that date. No one with the Mississippi Attorney General's Office was aware that this advice had been given. No one with the Mississippi Attorney General's Office was even aware that the Assistant Secretary of State's submission to the Department of Justice had been made. The plaintiffs contended that on January 1, 1995, Mississippi election officials (circuit clerks) began implementing the NVRA under a unitary system.[34] In fact, for the short time from January 1, 1995, until correct advice was sent them on February 10, 1995, only thirty-one of the eighty-two county circuit clerks followed the Assistant Secretary of State's advice.[35]

After the proposed legislation died on January 25, 1995, concerned circuit clerks began calling the State Attorney General's Office inquiring about the propriety of enrolling NVRA registrants on state voter rolls. On February 10, 1995, an attorney with the office of the Secretary of State and an attorney with the Mississippi Attorney General's Office dispelled the confusion caused by the Assistant Secretary of State's verbal advice.[36] They sent a memorandum to circuit clerks and chairmen of county election commissions across the state advising that the proposed legislation had died in committee and advising that Mississippi law for state and local elections remained unchanged.[37] The memorandum advised the officials that because state requirements were unchanged, they should continue to follow state law as written, without regard to the prior contrary advice from the Assistant Secretary of State.[38]

The plaintiffs misconstrued the nature of the state's existing universal registration system.[39] They argued that prior to the implementation of the NVRA all reg-

33. *Young*, 117 S. Ct. at 1235.

34. Brief for Appellant at 4, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

35. Brief for Appellee at 8, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

36. The memorandum is included in the Appendix to the Jurisdictional Statement of Appellants at 20a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

37. *Id.*

38. *Id.*

39. At one time Mississippi did have a true dual registration system, MISS. CODE ANN. § 21-11-1 (1972), whereunder residents of municipalities were *required* to register twice in order to be eligible to vote in local and state elections. The first registration had to be with the county registrar. In order to vote in municipal elections, voters then had to register with the municipal registrar. This condition was described in *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987). After the district court decision in *PUSH*, the state responded legislatively by adopting a unified registration system, MISS. CODE ANN. § 23-15-1 to -151 (1990), whereunder a qualified individual may register one time, pursuant to state requirements, and be eligible for every local, state, or federal election. There is no requirement that anyone register more than one time in order to be fully registered to vote. The legislature then further liberalized the state's voter registration system by passing a mail-in voter registration system. MISS. CODE ANN. § 23-15-47 (Supp. 1997). Accordingly, the state has gone beyond the measures needed to address the concerns set out by the district court in the initial *PUSH* decision, and it has thoroughly revamped its voter registration requirements to expand voter registration opportunities. *See generally* Mississippi State Chapter, Operation PUSH v. Mabus, 788 F. Supp 1406, 1408-12 (N.D. Miss. 1992) (summarizing *PUSH* litigation and expansion of voter registration opportunities).

istrants were universally registered, but that after NVRA implementation this was no longer so.[40] In reality, both before and after NVRA implementation, all persons *registering pursuant to state statutory requirements* were and are universally registered.[41] The implementation of the NVRA caused no change in this system. The state administers the same system of voter registration today that it administered prior to implementation of the NVRA on January 1, 1995. The NVRA merely added an additional method for registration for *federal* elections. There is no dual registration system in Mississippi. There is no *requirement* that anyone register twice in order to be universally registered. With implementation of the NVRA, a separate system of registration for federal elections exists, but it was the United States, not Mississippi, which created the additional method of registration. The defendants' position was that Mississippi made no changes requiring preclearance, with the possible exception of the administrative changes described above, which had already been precleared.[42]

After the complaint was filed, a three-judge district court was promptly convened and cross-motions for partial summary judgment were filed on the section 5 issue.[43] The court granted the defendants' motion, and the section 5 claim was dismissed.[44] The district court ruled that the administrative actions taken by Mississippi in implementing the NVRA had received preclearance from the Attorney General.[45] The court also ruled that no other changes affecting voting had occurred.[46] The district court ruled that the unauthorized actions of the Assistant Secretary of State, and the thirty-one circuit clerks who followed her advice to enroll NVRA registrants on state voter rolls, amounted to nothing more than a "misapplication" of state law.[47] The district court recognized that the errant advice of an Assistant Secretary of State and the temporary actions of some circuit clerks did not in fact represent state choice and did not amount to a state-initiated change affecting voting.[48]

Contrary to arguments made by the plaintiffs, the district court did not rule, and the defendants did not contend, that the state could initiate changes without submitting them for section 5 scrutiny merely because such changes might be part of an NVRA implementation plan.[49] The district court did rule, and the defendants did contend, that conditions initiated and required by *federal* law are not within the scope of section 5 coverage. The district court ruled that the separate federal-only registration system was a condition initiated and required by

40. Brief for Appellant at 4, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
41. MISS. CODE ANN. § 23-15-1 (1990).
42. Young v. Fordice, 117 S. Ct. 1228, 1237 (1997).
43. *Id.* at 1234.
44. *Id.* A separate claim for relief alleging insufficient compliance with the requirements of the NVRA was voluntarily dismissed by the plaintiffs. Young v. Fordice, No. 3:95CV197(L)(N) (S.D. Miss. July 24, 1995), *reproduced in* Juris.Statement at 1a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
45. *Id.*
46. *See id.* at 1235.
47. *Id.* at 1234.
48. Young v. Fordice, No. 3:95CV197(L)(N) (S. D. Miss. July 24, 1995), *reproduced in* Juris. Statement at 1a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
49. *Id.*

federal rather than state law. The court also held that the resulting separate system of federal-only registration did not need to be submitted for preclearance.[50]

II. THE POSITIONS

The plaintiffs had two general theories of liability. The first was designed to force a judicial change in state voter registration requirements. The plaintiffs contended that because the Assistant Secretary of State had purported to submit changes in state registration law for preclearance, and because the Attorney General had precleared those purported changes, the changes were effective on the date the Attorney General granted preclearance—February 1, 1995.[51] The plaintiffs argued that a benchmark was thereby established and that the memorandum dated February 10, 1995, advising election officials that the proposed legislation had been rejected and that they should continue to enforce the old requirements amounted to a second, regressive, and unprecleared change.[52] Had this position been accepted by the court, Mississippi law would have effectively been changed by the actions of the Assistant Secretary of State and employees of the Department of Justice.

The plaintiffs' second theory of liability was designed to require the defendants to resubmit the state's administrative plans for implementing the NVRA. The plaintiffs argued that the Department of Justice's preclearance of the state's administrative actions was invalid.[53] The plaintiffs contended that preclearance was granted on the understanding that those choices were submitted in the context of a unified system, but that the implementation was made in the context of separate systems.[54] The plaintiffs argued the preclearance granted by the Department of Justice was not based on an informed assessment and the choices and policies of the state should be resubmitted for section 5 review so the Department could assess those same choices and policies in the context of a separate registration system.[55] The United States, as *amicus*, argued additionally that the state's choice to implement the NVRA as a separate registration system, rather than change its own registration laws, had to be precleared.[56] In other words, the United States argued that the state's decision to make no change was, itself, within the requirement that voting changes be submitted for preclearance.

The defendants' position was that there were no legislative changes requiring preclearance and that the administrative policies implemented at the agency level were almost entirely non-discretionary matters imposed by the NVRA.[57] Because these administrative actions did not represent changes initiated by the state, the defendants contended that no preclearance was necessary.[58]

50. Young v. Fordice, 117 S. Ct. 1228, 1234 (1997).
51. *Id.* at 1235.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 1237-39.
58. *Id.*. at 1237.

Alternatively, the defendants argued that if it was determined that the administrative policies in fact required preclearance, such preclearance had been obtained and was granted with full knowledge that the proposed legislative changes might never be adopted.[59] Regarding the United States' argument that implementation as a separate system itself required preclearance, the defendants contended that the state had an absolute right to implement the NVRA as a federal-only registration system as provided by Congress.[60]

The defendants identified two broad precepts that should be considered in the analysis of the plaintiffs' theory of section 5 liability. First, states are free to maintain requirements for voter registration for state elections separate from and different from those requirements imposed by the federal government for federal elections.[61] Second, only state-initiated changes in voting standards, practices, or procedures are required to be submitted for preclearance under Section 5 of the Voting Rights Act.[62]

The NVRA is federal legislation and as such should not require preclearance to be effective. There were no state-initiated choices or changes in standards, practices, or procedures which needed preclearance consideration. The items contained in the submission, including the proposed legislation, were superfluous for section 5 purposes. One of the issues of the case was whether the state's choices for administratively implementing the NVRA amounted to discretionary changes requiring section 5 preclearance, and, if so, whether the preclearance of those matters by the Department of Justice was effective.[63]

The major pretense of the plaintiffs' position was that changes to the state's statutory registration requirements had been accomplished either by virtue of the submission and the preclearance, or by "practice and procedure" when some of the state's circuit clerks temporarily enrolled NVRA registrants on state voter rolls.[64] The Attorney General's preclearance letter provided the basis for the first part of the plaintiffs' position. As noted above, the Attorney General expressed no objection to two "changes" which could only have been accomplished through legislative action.[65] The first item was the elimination of the attesting witness requirement to the state mail-in registration form.[66] The second item dealt with purging requirements.[67] Neither of these items could be changed administratively. Each would have required legislative action.[68] In purporting to preclear these items as part of the *proposed* legislation, the Attorney General violated a Department of Justice regulation which expressly provides that "[t]he

59. *Id.*
60. *Id.* at 1238-39.
61. Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that states are free to maintain different voting age requirement than that required for federal elections by the federal government).
62. *See generally* Beer v. United States, 425 U.S. 130 (1976).
63. *Young*, 117 S. Ct. at 1236-37.
64. *Id.* at 1235.
65. *Id.* at 1237.
66. *Id.* at 1232.
67. *Id.* at 1233.
68. *Id.* at 1237.

Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision . . . ." [69]

The "practice and procedure" portion of the plaintiffs' position stemmed from the erroneous verbal advice given by the Assistant Secretary of State regarding the placing of NVRA registrants on state voter rolls. The plaintiffs argued that since some circuit clerks followed that advice for a period of several weeks, a section 5 benchmark was established, notwithstanding the fact that the mistake was temporary, was contrary to state law, and was rectified by the Mississippi Attorney General as soon as it came to his attention.[70] This contention was built on several false premises.

The plaintiffs began with the mistaken notion that the Governor's Executive Order 739 bestowed the Secretary of State with greater authority than it actually did. The plaintiffs referred to the Secretary of State, variously, as the chief election officer for purposes of *implementing* the NVRA, or the chief election officer for purposes of compliance with the NVRA.[71] The extent of the Secretary of State's responsibility and authority was clearly defined in the Executive Order as "the chief state election official, who shall be responsible for *coordination of state responsibilities* under the Act" (emphasis added).[72]

Clearly, the Executive Order did not designate the Secretary of State as an election czar with the power to supplant the legislature with regard to matters relating to elections, nor did it give the Secretary of State the power to dictate changes in state registration or purging requirements. The plaintiffs did not attempt to explain how such a transfer of power could have been accomplished under state law. They also did not seem concerned that such new authority relating to elections would, itself, have required preclearance before such new authority could have been exercised. The plaintiffs understandably tried to elevate the role of the Secretary of State to bolster the false notion that actions of his assistant represented the actions of the State of Mississippi as a body politic and that the Assistant Secretary of State had authority to submit matters which would change state law.[73]

The plaintiffs and the United States attempted to bolster the argument that the mistakes of the Assistant Secretary of State and the thirty-one circuit clerks were state practices by asserting that the Assistant Secretary of State's advice to the circuit clerks was an instruction or a directive to subordinate officials.[74] The actual communication to the circuit clerks was verbal. No official opinion was

69. *Id.*

70. *Id.* at 1235.

71. Brief for Appellant at 7, 39, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

72. This definition and limitation of responsibility and authority is prescribed and required by 42 U.S.C. § 1973gg-8 (1994).

73. As set forth previously, the notion that the Assistant Secretary of State had authority to submit proposed changes to state law is refuted by the proposed legislation itself. Section 22 of the proposed legislation expressly directs that the Mississippi Attorney General would have made the necessary submission if the legislation had been adopted. The Senate bill which contained the proposed language is included in the Joint Appendix at 103, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

74. Brief for Appellant at 39, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

delivered by the Office of the Secretary of State, and no formal regulation was adopted and filed. No transcription or other reproduction of the actual communication was ever made. Whatever the text of the communication, the Assistant Secretary of State simply did not have the authority to dictate anything to the circuit clerks. She could offer her opinion, but no more. Her mistaken verbal advice did not rise to the level of "an administrative agency issu[ing] a policy directive" as contemplated by Justice Thomas' dissent in *Morse v. Republican Party of Virginia*.[75]

In any event, circuit clerks are not "subordinate officials" to the Secretary of State or the Assistant Secretary of State. Pursuant to article 6, section 168 of the Mississippi Constitution and section 9-7-121 and consecutive sections of Mississippi Code Annotated, circuit clerks are independent constitutional county officials who answer only to county voters.[76] The fact that only thirty-one of the State's eighty-two circuit clerks followed the advice demonstrates clearly that the circuit clerks were not subordinate officials given their marching orders verbally by an Assistant Secretary of State.

The plaintiffs contended that a benchmark was established, notwithstanding the temporary, illegal, and sporadic nature of the "practice" of placing NVRA registrants on state voter rolls.[77] The plaintiffs relied primarily on *Perkins v. Matthews*[78] in support of this position. In *Perkins*, the City of Canton chose, by normal city council practice, to elect its aldermen by wards.[79] State law at the time required at-large elections and did not allow the ward selection method adopted by the city.[80] The city operated under its ward system for a number of years.[81] Later the city attempted to return to at-large elections, citing state law as the reason.[82] In a resulting section 5 challenge it was determined that use of the ward system established a benchmark regardless of the requirements of state law and that a return to an at-large system would be retrogressive.[83]

Perkins does not control here. In *Perkins*, the City of Canton acted *qua* City of Canton. The body politic made its choice and implemented it as the choice of the city without first submitting the proposed changes to the Attorney General of the United States or to the District Court for the District of Columbia.[84] There was no question of whether the original change to a ward system resulted from the actions of an errant or rogue official. The action may have been insupportable under Mississippi law, but it was clearly the conscious choice of the city

75. 517 U.S. 186 (1996).

76. In the district court, the plaintiffs and the United States also argued that different circuit clerks made different decisions about whether and how to contact NVRA registrants to advise them of their federal-only status. They argued that these decisions represented changes that had not been precleared. Regardless of the merit of this contention, the circuit clerks were local officials not under the control of the defendants. To the extent, if any, that those activities needed preclearance, any submissions should have been made by the local officials involved. The section 5 status of those local matters does not affect *Young*.

77. Young v. Fordice, 117 S. Ct. 1228, 1235 (1997).

78. 400 U.S. 379 (1971).

79. *Id.* at 394.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 382.

itself. The Supreme Court correctly found that the political entity had consciously established a practice that served as a benchmark to determine the applicability of section 5 to the voting changes at issue.[85]

In *Young*, the body politic was the State of Mississippi. The state never adopted or implemented a practice of placing NVRA registrants on state voter rolls. The political entity, the state, consciously rejected the proposition through its legislative process when the legislature rejected the proposed legislation. Neither the mistaken advice of the Assistant Secretary of State nor the temporary following of that advice by thirty-one of the state's eighty-two circuit clerks represented a policy choice of the state.[86]

The defendants argued that a much more analogous case is *United States v. Saint Landry Parish School Board*.[87] There, three poll commissioners engaged in a pattern of buying votes.[88] The poll commissioners would enter the polling booths with voters and cast the voters' ballots in the manner of the poll commissioners' choosing.[89] The voters would then receive payment.[90] The United States filed suit claiming this practice was "an unapproved change in the state's procedure for assisting voters." [91] The court found the practice did not constitute the action of a political entity, but, rather, was merely the action of errant officials.[92] The Court stated clearly

> [a]lthough the actions of these poll commissioners could possibly be viewed as a change in voting procedures within the meaning of § 5, we conclude that these actions do not constitute a change that the *state* has enacted or sought to administer within the meaning of that section. . . . We do not dispute that the actions of the three poll commissioners constitute actions of the state for certain purposes. (reference omitted) But one would not normally conclude that a state "enacts or administers" a new voting procedure every time a state official deviates from the state's required procedures. The common sense meaning of "shall enact" indicates that action of a state, as a body, is envisioned, and we think "shall seek to . . . administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the *state governing authority*. (emphasis added).[93]

In *Young*, neither the state nor any state governing body enacted, administered, or implicitly approved the errant advice given by the Assistant Secretary of State. The factual scenario in *Saint Landry Parish* is clearly closer to the facts of

85. *Id.* at 394-95.

86. The plaintiffs in *Young* also cited *City of Lockhart v. United States*, 460 U.S. 125 (1983), in support of their theory that a benchmark was established between January 1, and February 10, and that the February 10 memorandum changed state law and amounted to retrogression. *Lockhart* presents a circumstance which, in principle, is indistinguishable from *Perkins*, 400 U.S. 379.

87. 601 F.2d 859 (5th Cir. 1979).

88. *Id.* at 863.

89. *Id.*

90. *Id.*

91. *Id.* at 861.

92. *Id.* at 864.

93. *Id.*

Young. While the Office of the Secretary of State has a role to play in administering the state's election machinery, the particular statutory provisions at issue were not ambiguous and left no room for discretionary interpretation by the Secretary of State. The verbal advice given by the Assistant Secretary of State was simply wrong and did not represent any state policy.

The actions of the Assistant Secretary of State were those of a mid-level functionary who incorrectly anticipated that the Mississippi Legislature would adopt legislative changes in the state's voting requirements. Here, the body politic has not made a change with regard to state registration procedures. No benchmark was established by the erroneous and temporary enrolling of NVRA registrants on state voter rolls in thirty-one of the eighty-two counties. The February 10, 1995 memorandum did not change state procedure regarding state registration.[94] It was not a "change" within the meaning of section 5 and did not constitute retrogression. As stated in *Saint Landry Parish*, "[s]urely Congress did not intend the Attorney General and the [D]istrict [C]ourt for the District of Columbia to waste their time considering voting procedures that a state does not wish to enact or administer."[95]

The defendants recognized that it was probably futile to attempt to formulate a test that would apply in all scenarios for determining whether activities of a state employee represent actions of a state for purposes of section 5 coverage.[96] The Supreme Court had not before heard a case that squarely presented the issue. The reasoning of the Fifth Circuit in *Saint Landry Parish* is clearly correct and should control in *Young*. This is especially so where, as here, the actions were clearly contrary to established law, were not widely followed, and were promptly corrected when brought to the attention of more responsible state officials. Actions of errant or rogue officials, even in conjunction with actions of officials in the Justice Department, cannot operate to change state law or set section 5 benchmarks. Any other determination would be an open invitation to collusion and would be contrary to the accepted procedures of seeking and obtaining section 5 preclearance.

There are other policy reasons for refusing to assign benchmark status to acts of errant or rogue officials. Garden variety election challenges, prosecuted by disappointed office seekers, routinely contain section 5 counts alleging that some irregularity in the election represented a "change" for which preclearance had not been obtained. The courts which consider these challenges generally discount the section 5 component of such challenges on the basis that such irregularities represent errors rather than chosen policy.[97]

---

94. Juris. Statement at 20a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

95. *Saint Landry Parish*, 601 F.2d at 864.

96. Brief for Appellee at 24, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

97. *See generally* Citizens' Right To Vote v. Morgan, 916 F. Supp. 601 (S.D. Miss. 1996) (holding election activities by officials in their individual capacities are not covered activities); Montgomery v. Leflore County Republican Executive Comm., 776 F. Supp. 1142, 1145 (N.D. Miss. 1991) (holding illegal acts of officials do not implicate section 5); Miller v. Daniels, 509 F. Supp. 400, 406-07 (S.D.N.Y. 1981) (holding actions of officials contrary to precleared law are not changes the jurisdiction "seeks to administer"); Beatty v. Esposito, 439 F. Supp. 830, 832 (E.D.N.Y. 1977) (holding episodic removal of election inspector by county official is not an "enactment" covered by section 5).

Errors can never be anticipated and submitted for preclearance, but if benchmark status had been accorded the Assistant Secretary of State's actions, covered jurisdictions would be forced to make after-the-fact submissions of such errors and irregularities in an effort to defend against ordinary election challenges. Routine elections would be plagued with disruptions, uncertainty, and unnecessary costs. There is no justification for extending section 5 beyond its intended scope. As explained in *Saint Landry Parish*, section 5 does not apply to "every artifact of political manipulation. Section 5 has its own political cosmos, but it does not possess a universality with respect to every electoral aberration."[98]

The position taken by the United States as *amicus* had an additional argument not pressed by the plaintiffs. The United States began its *amicus* brief with a dramatically incorrect and unsupported proposition. The United States admitted that the NVRA applies to federal elections only, and the Act does not require the states to reconcile their state requirements with the NVRA. Accordingly, a state could fulfill its NVRA responsibilities simply by having its agencies make proper registration forms available under proper circumstances and by including NVRA registrants on voter rolls as eligible to vote in federal elections. These actions, along with purging requirements peculiar to those registrants, are all that the NVRA requires.[99] The United States contended, however, that simply doing what federal law requires amounted to a "choice" that required preclearance. The United States asserted that by doing the things required by the NVRA, the state had "chosen" not to do more. Specifically, the state had "chosen" not to reconcile state requirements with the NVRA. The United States contended this "choice" was one which required approval by federal authority before it could be effective.

In contrast, the defendants argued that it is changes, not choices, that are within the scope of section 5 and require preclearance.[100] Choices may amount to a decision to make a change, but choices may also amount to a decision to make no change. If implemented, the plaintiffs' theory of section 5 coverage would enable the Department of Justice to require any existing voting practice to be submitted for preclearance on the proposition that the "choice" to maintain the practice amounts to a section 5 violation. The Constitutional guarantee, as explained in *Oregon v. Mitchell*,[101] that states have the power to establish voting requirements different from those set by the federal government would cease to exist for states covered by section 5. The legality of *existing* laws or practices relating to voting can be tested by section 2 of the Voting Rights Act[102] or by other challenges based on other state or federal authority. It is not the purpose of section 5 to serve as a mechanism to challenge existing practices which have not been changed. *Young* did not present a challenge based on section 2 or any authority other than section 5. The plaintiffs set forth no principled reason, or authority, to expand section 5 coverage in the manner sought.

98. *Saint Landry Parish*, 601 F.2d at 865.
99. 42 U.S.C. § 1973gg-6 (1994).
100. Brief for Appellee at 26, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
101. 400 U.S. 112 (1971).
102. 42 U.S.C. § 1973 (1994).

Assuming the United States would consider Mississippi's "choice" not to amend state voter requirements tantamount to a state-implemented retrogressive dual registration system,[103] it is a virtual certainty that a covered jurisdiction such as Mississippi could never "choose" to do less than conform its state laws to the NVRA. The effect of this would be, of course, to cede complete authority over state registration laws to the federal government. Covered jurisdictions could not "opt out" and decouple state registration requirements from NVRA requirements without getting preclearance. Succeeding Congresses could amend and enlarge covered jurisdictions' NVRA requirements without regard to local concerns or needs. The United States offered no hint of authority contained in the NVRA, the Voting Rights Act, or elsewhere to support this extreme position.

This approach of bootstrapping section 5 and the NVRA in order to advance a policy of forcing changes to state registration was implicitly rejected in *Miller v. Johnson*.[104] In *Miller*, the Supreme Court held squarely that the purpose of section 5 is only to prevent retrogression in black voting strength.[105] The court held the United States' policy of using section 5 to advance a black-maximization agenda with regard to redistricting was contrary to the true purpose of section 5 which is only to prevent retrogression.[106] The ruling in *Miller* cast considerable additional doubt on the legitimacy of the United States' effort in *Young*. Implementation of the NVRA as a separate method of registration, to exist side by side with existing state methods of registration, is contemplated by the NVRA.[107] Section 5, as construed in *Miller*, cannot be used to expand or maximize the dictates of the NVRA so as to force states covered by section 5 to amend their registration statutes to conform to the requirements of the NVRA.

In *Young*, both the United States and the plaintiffs asserted that the Attorney General was somehow misled regarding what was or was not being submitted for preclearance. This assertion bordered on bad faith and was totally unsupported in the record. The United States simply could not make a good faith assertion that it did not understand that changes in state laws regarding state registration were dependent on passage of the proposed legislative package. The material submitted by the Assistant Secretary of State included a July, 1994, Status Report which expressly pointed out that the purpose of the proposed legislation was to establish a unitary system and to avoid a dual registration system.

Accordingly, the plaintiffs' contention that the Department of Justice was never expressly put on notice that proposed changes in state registration procedures were dependent on passage of the proposed legislation was demonstrably

103. Implementation of the NVRA as a federal-only system should not be found to amount to retrogression. The effect of the implementation will be to cause a net increase in the total number of people registered to vote. The number registered to vote in federal elections will increase. The number of people registered to vote in state elections will not be decreased. This is not a condition of retrogression under any definition. *Cf.* Miller v. Johnson, 515 U.S. 900 (1995) (ameliorative change, even if less than optimum, cannot constitute retrogression); Beer v. United States, 425 U.S. 130, 141 (1976) (holding the same).

104. 515 U.S. 900 (1995).

105. *Id.* at 925.

106. *Id.*

107. *See* Association of Community Org. for Reform Now (ACORN) v. Edgar, 880 F. Supp. 1215, 1220 (N.D. Ill. 1995) (holding states free to implement NVRA on federal-only basis).

incorrect. If the Department truly needed a picture drawn, it was drawn by the language of the Status Report and the inclusion of the proposed legislation itself. The Department made a knowing choice to preclear administrative changes after it knew the proposed legislation had been defeated. That choice was made in order to construct the argument advanced in *Young* that a benchmark was established by virtue of the action of the Department.

The plaintiffs also contended that the failure of the proposed legislation rendered the submission inadequate since the submission did not indicate what would happen should the legislation be defeated.[108] The plaintiffs argued that the submission was ambiguous on the question and that such ambiguity should be resolved against the state.[109] The plaintiffs cited *Clark v. Roemer*[110] for this general proposition.[111] In reality, there is nothing ambiguous about what happens when proposed legislation designed to make statutory changes fails. The changes simply, and unambiguously, do not occur. Here, the Department of Justice made a conscious decision to participate in the creation of a pretended ambiguity and then attempted to use this pretended ambiguity as a tool to help implement its policy choice. Nothing in *Clark* supports the notion that such "ambiguity" should be resolved against the state. The reality is the Department liked what it saw in the amalgamated mass of materials proffered to it as a submission. The Department seized what it considered to be an opportunity to force a change in the state's registration laws and issued the preclearance letter. The Department's decision to preclear was clearly calculated. It should not have been allowed to disavow that decision.

The plaintiffs also argued the district court erroneously ruled that the Department of Justice "implicitly precleared" a federal-only NVRA implementation plan. The plaintiffs cited *McCain v. Lybrand*[112] and *Clark*[113] for the proposition that preclearance by implication is disallowed.[114] In the first place, *McCain* and *Clark* deal with changes made but not identified, not changes imagined but not made. In any event, the district court did not rule that anything was precleared on the basis of an implication.[115] It merely noted the Department of Justice would have had to violate its own regulation[116] to preclear legislative

108. *Id.*
109. *Id.*
110. 500 U.S. 646 (1991).
111. Brief for Appellant at 28, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
112. 465 U.S. 236, 249 (1984).
113. 500 U.S. 646 (1991).
114. Brief for Appellant at 32-33, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
115. Young v. Fordice, No 3:95CV197(L)(N) (S.D. Miss. July 24, 1995), *reproduced in* Juris. Statement at 1a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).
116. 28 C.F.R. § 51.22 (1997).

changes that had not yet occurred.[117] The district court concluded the department did not violate this regulation and did not intend to preclear legislative changes.[118] It also concluded that all the Department meant to preclear were the administrative policies that had been submitted to it as changes.[119] By contrast, it was the United States which later argued the preclearance was granted on the basis of an implication.[120] It argued that it perceived that state statutes were somehow going to be changed solely by reason of the submission and the act of preclearance.[121] If anything in *Young* was contrary to *McCain* and *Clark,* it was the United States' theory, not the district court's ruling.

Further, the plaintiffs and *amici* misconstrued the district court's ruling regarding the necessity of seeking section 5 preclearance for changes caused by federal law. The plaintiffs and amici contended that the district court ruled that changes in state law are excused the necessity of preclearance, as long as those changes are part of a plan to implement a federal directive.[122] This is simply not what the court held. The district court held, correctly, that no changes in state registration requirements occurred.[123] Because of this ruling, the district court never addressed the issue stated by the plaintiffs.

In fact, the district court ruled that a separate system for registering federal voters was not, itself, a condition that needed preclearance.[124] This condition was brought about by federal law. The State of Mississippi is the covered jurisdiction, not the United States. Changes made by the United States are not subject to preclearance. If the state had adopted changes in its state voting requirements, those changes would have been subject to preclearance, even though any such changes would have been designed as part of an overall package to implement federal legislation. The district court did not hold otherwise, and the defendants did not contend otherwise.

In conclusion, the defendants argued the total of all that transpired was that there were no changes in state law, and the NVRA was implemented precisely as

117. In her eagerness to attempt to establish a benchmark by issuing the preclearance letter, the Attorney General disregarded almost every regulation governing the content of section 5 submissions. The Attorney General simply read into the material sent to her inferences that suited her. A regulation titled "Required Contents," 28 C.F.R. § 51.27 (1996), lists certain requirements for the contents of proper submissions. None of these requirements was enforced. Some of the requirements, such as subparts (c) and (h), require specific statements regarding changes between the prior law and the newly enacted law and statements regarding the jurisdictional basis and procedures for the change. A regulation titled "Obtaining information from the submitting authority," 28 C.F.R. § 51.37 (1996), provides that the Attorney General may request additional information regarding the actual effect of any submitted change. If there was truly any doubt, the Attorney General should simply have asked the Assistant Secretary of State what the effect of the defeat of the legislative package was. If the Justice Department had required a proper submission restricted only to *completed* changes as required by 28 C.F.R. § 51.22, it could not have pretended that ambiguities existed.

118. Young v. Fordice, 117 S. Ct. 1228, 1234 (1997).

119. *Id.*

120. United States Brief for Appellant at 6, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

121. *Id.* at 26.

122. Brief for Appellant at 41, United States Brief for Appellant at 23, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

123. *Young,* 117 S. Ct. at 1234.

124. Young v. Fordice, No. 3:95CV197(L)(N) (S.D. Miss. July 24, 1995), *reproduced in* Juris. Statement at 1a, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

contemplated by Congress.[125] The simple fact that the poor judgment of a mid-level state employee caused some confusion in the process was meaningless. The principles of federalism are tested severely enough by the requirement that changes which a state genuinely wants to implement must be submitted to federal authority for approval. The notion that the device of preclearance could be utilized to impose unwanted changes on a state should have been emphatically rejected by the Supreme Court.

III. ORAL ARGUMENT

Oral argument was January 6, 1997. From the moment arguing counsel entered the Supreme Court building they encountered a process which has been successfully designed to instill a sense of awe. After passing through security, the lawyer's membership in the Supreme Court Bar is confirmed. From there he is escorted to the Lawyer's Lounge where he is greeted by the Clerk of the Court, who is attired in a morning coat. The Clerk explains the protocol to be followed, including the seating arrangement. Identification cards are distributed, and after another security check, counsel enter the courtroom.

I was never truly nervous until oral argument began on the case before *Young*. In that case, the Justices focused on minute fact details and asked intricate questions relating to Supreme Court precedent. In *Young*, the parties and the district court had focused on the larger issues and had virtually ignored the minutiae contained in the submissions made by the Assistant Secretary of State. All concerned had considered those details unimportant. Also, for *Young* there was very little in the way of precedent, at least of which I was aware. While listening to the questioning in the case before *Young*, I went from a state of relative calm to a state of near panic. If the Justices intended to reach the same level of detail in *Young*, I was in imminent danger of humiliation. During the lunch break before arguments began, I was unable to eat, and I was just about ready to settle the case and go home.

As appellants, the other side had to argue first. Once the actual argument began, it quickly became obvious the Justices were focused on the same big picture questions that the parties and the district court had focused on before. I quickly relaxed and began to enjoy breathing once again. It became apparent the Justices had a thorough understanding of the important facts of the case, and of course, the applicable law. It also was apparent that the Justices had relatively fixed positions on the issues, and their questions were calculated to elicit answers which the Justices hoped might help their respective positions in the decisional conference to be held later. Many of the questions were clearly tailored to gain concessions from counsel on particular points. I found myself arguing with, rather than to, several of the Justices. It was clear, though, this was expected from counsel. Despite the fact that the Justices had very different points of view, they were invariably gracious during questioning.

125. Brief for Appellee at 33, Young v. Fordice, 117 S. Ct. 1228 (1997) (No. 95-2031).

It also became clear early in the argument that answers to questions had to be concise. Counsel rarely got more than two or three sentences into an answer before the next question was posed. Every Justice, except Justice Thomas, asked questions during the argument. I do not believe any of the three arguing counsel ever once referred to prepared notes. The pace of the questioning did not permit it. I began my argument by addressing a question Justice O'Connor had asked counsel opposite. From that moment on, the entirety of my argument consisted of answering a rapid sequence of questions from the bench.

The Justices' questions gave a fairly accurate preview of the decision. The Justices immediately seemed to discount the notion that the state could be said to have changed its state registration laws. Justice Scalia referred to the fact that various circuit clerks had temporarily placed NVRA registrants on state voter rolls as simply a "false start" in the NVRA implementation process. None of the Justices seemed to defend the plaintiffs' contention that the state had effectively changed its requirements for state registration. Several of the Justices seemed skeptical of the defendants' argument that the preclearance of the state's administrative choices was legally sufficient. Those Justices seemed strongly inclined to give the Department of Justice the benefit of any doubt on that point.

The most crucial issue of the proceeding was whether the state could maintain its original registration requirements and implement the requirements of the NVRA as a separate system. This point seemed to provoke the greatest disagreement among the Justices. Justices Ginsburg, Breyer, Souter, and Stevens seemed eager to adopt the plaintiffs' position and hold that separate systems were unacceptable. Justices Scalia, Rehnquist, Kennedy, and O'Connor seemed more inclined to accept the defendants' position that separate systems were contemplated under the NVRA and that the Voting Rights Act would not prevent the state from narrowly following the mandates of the NVRA.

Apart from the legal calculations that were constantly being made during the oral argument, I realized something quite unexpected was happening—I was having a great deal of fun. During all of the research, briefing, and preparation for the argument, the concept of having fun had never occurred to me. As it happened, however, the argument was easily the most fun I have ever had in any courtroom. Immediately after the argument, the sense of enjoyment was augmented by a strong sense of fulfillment. The quill pen given by the Court to counsel as a memento is now in a shadow box beside my desk. Whenever I see the quill, I get a pleasant feeling of satisfaction that I suspect will never diminish.

IV. THE DECISION

The decision was handed down on March 31, 1997, and came as something of a blow. The decision essentially was divided into three parts. First, the Court held the preclearance given by the Department of Justice regarding the agency implementation of the NVRA was ineffective.[126] The Court accepted the plaintiffs' argument that, because the original submission incorrectly contemplated a

126. *Young*, 117 S. Ct. at 1235.

unified system of registration, the preclearance was not knowingly made.[127] Though disappointing, this result was not totally unexpected from the questioning during oral argument. The defendants did not, after all, consider this issue particularly important. At worst, the defendants felt that if the Court should reverse on this issue, the defendants would modify the NVRA registration form to include a statement informing the registrant that the registration was only for federal elections. The defendants would then resubmit the same agency choices and other material for preclearance as part of a system of separate registrations. The defendants reasoned that if certain agencies and processes were not objectionable in the context of a unified system, those same agencies and processes should not be objectionable in the context of separate systems.

The second portion of the decision rejected the plaintiffs' contention that state registration requirements had been changed by virtue of the submission and preclearance.[128] Again, given the questioning at oral argument, this was expected.

The third portion of the ruling amounts technically to a split decision, but it portends the forced amendment of Mississippi registration law. The plaintiffs had contended the state could not lawfully administer separate registration systems and had to amend its registration laws to enroll NVRA registrants on state voter rolls.[129] The defendants had contended the NVRA and the Voting Rights Act could not be bootstrapped together so as to force the state to amend its existing registration system.[130] The parties and the *amici* took absolute positions. The Court did not agree with either absolute.[131]

The Court held the NVRA applies only to federal elections.[132] At the same time, the Court held there is no absolute right to implement the NVRA as a separate system, even though such an implementation would comply with the requirements of the NVRA.[133] The Court held that in considering the resubmission of the NVRA implementation process, the Department of Justice may properly consider Mississippi's history together with the "purpose" and "practical effect" of implementing the NVRA as a separate system.[134]

By this ruling, the Court gave the Department of Justice the authority to object to the very selection of agencies and processes which the Department had previously found unobjectionable. A secondary effect of this ruling is to ratify the position taken by the Department of Justice that every matter submitted for section 5 preclearance by the state, or any political subdivision, is subject to scrutiny in the context of the existence of a separate registration system. Accordingly, neither the state nor any political subdivision will be able to get section 5 preclearance for any voting change without first satisfying the Department of Justice that the existence of separate systems does not have the purpose and will

127. *Id.* at 1237.
128. *Id.* at 1235.
129. *Id.* at 1238-39.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

not have the effect of abridging anyone's right to vote on account of race. The Department has, of course, already demonstrated its firm contrary position. The ruling in *Young* means, for all practical purposes, that Attorney General preclearance is not available to Mississippi and its political subdivisions unless and until the registration systems are merged. The only alternative method for preclearing changes relating to voting is for the state, and each subjurisdiction in the state, to prosecute separate actions for declaratory judgment in the district court for the District of Columbia each time any voting change is attempted. This is, of course, an unworkable proposition.

The practical result of *Young* is that until either preclearance is obtained in the District of Columbia, or the separate registration systems are merged or reconciled, no special elections requiring preclearance, such as school bond referenda or office vacancy elections, will be conducted anywhere in the state. As a practical matter, the Court's ruling legitimizes the leverage the Department of Justice has wielded against the state throughout this process. The prospect of winning an action against the Attorney General in district court in the District of Columbia is remote. The prospect of protecting any such victory on appeal to the Supreme Court is even more remote. The state is faced with the choice of placing NVRA registrants on state voter rolls or having its electoral processes suffer a total section 5 paralysis.

The legacy of *Young* is that the predisposition of the federal government to diminish Mississippi's control of voting within the state has come full circle. With the Voting Rights Act, the federal government gained the right to veto proposed changes to the state's elections structure. With *Young*, the federal government has effectively ensured that Mississippi will be forced to change its state voter registration statutes to incorporate NVRA registrants. If that is done, Congress will be able to control access to the state's registration rolls by legislatively changing the requirements of the NVRA. Unlike states not covered by the Voting Rights Act, Mississippi will never be able to decouple from the NVRA without section 5 preclearance. The guarantee of electoral independence for states set forth in *Oregon v. Mitchell* [135] can no longer be said to exist in Mississippi or in the other states covered by the Voting Rights Act.

---

135. 400 U.S. 112 (1970).