

## Justices Limit a Key Protection of the Voting Rights Act

By [ADAM LIPTAK](#)

Published: March 9, 2009

WASHINGTON — Only election districts in which minorities make up at least half of the voting age population are entitled to an important protection of the Voting Rights Act, the Supreme Court ruled on Monday.

Officials in North Carolina had argued that the act required them to create a district that included about 39 percent of the black voting-age population, on the theory that this gave black voters the opportunity to join with white “crossover voters” to elect a candidate of the black voters’ choice. The court rejected that argument by a 5-to-4 vote.

**Note: The 5 Justices in the majority are: Justices Kennedy (writing for the majority), Roberts, Alito, Scalia and Thomas. Thomas wrote a concurring opinion in which he was joined by Scalia. The 4 dissenting justices are: Souter, Ginsburg, Stevens and Breyer.**

“The decision turns 50 percent into a magic number,” said Richard L. Hasen, who teaches election law at Loyola Law School in Los Angeles. The decision will, he said, both reduce the number of voting districts in which minorities play a dominant role mandated by the Voting Rights Act and cut back on election litigation.

Richard H. Pildes, a law professor at [New York University](#) whose work the justices cited many times in Monday’s decision, said that current events — including the fact that both major political parties are led by African Americans — have complicated the legal landscape, creating “tremendous pressure on a statute that was primarily structured for an earlier era.”

The decision resolved a question the court had left open in five earlier decisions, and it touched off a sharp debate among the justices about how best to protect minority voting rights without cementing racially polarized voting.

Justice [David H. Souter](#), writing for the four dissenters, said the upshot of Monday’s decision will be more racial polarization. It will require states “to pack black voters into additional majority-minority districts,” he wrote, “contracting the number of districts where racial minorities are having success in transcending racial divisions.”

Nonetheless, some legal experts said the impact of the decision may be relatively minor. “How many districts will not be drawn as a result of this decision?” asked Nathaniel Persily, a law professor at Columbia. “The answer is very few.”

But the justices also provided some hints about how they will approach the term’s more significant Voting Rights Act case, that one concerning whether jurisdictions with a history of racial discrimination must continue to obtain the federal government’s permission before changing voting procedures.

Justice [Anthony M. Kennedy](#), who wrote the controlling opinion on Monday and almost certainly will be in the majority in the next case, signaled that he is alert to the legacy of racial discrimination and in favor of only incremental steps in cutting back on the sweep of voting rights protections.

“Racial discrimination and racially polarized voting are not ancient history,” Justice Kennedy said. But the goal of the Voting Rights Act, he continued, was to “hasten the waning of racism in American politics” rather than to “entrench racial differences.”

In all, said Heather Gerken, a law professor at Yale, Justice Kennedy’s statements “bode well for the constitutionality of the Voting Rights Act” in the case to be argued in April, *Northwest Austin Municipal Utility District v. Holder*, No. 08-322.

The district at issue in Monday’s decision, *Bartlett v. Strickland*, No. 07-689, violated North Carolina’s constitution, which forbids dividing counties when drawing legislative districts. County officials sued, and state officials defended by saying the district was required by the Voting Rights Act. The North Carolina Supreme Court ruled that only districts in which minorities make up 50 percent of the voting age population are covered by the act’s anti-dilution provision.

The act itself does not answer the question. It requires courts to look at “the totality of the circumstances” to decide whether some groups “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

But the Supreme Court suggested that there may be a 50 percent threshold in 1986, and on Monday it made that suggestion into what Justice Kennedy, who wrote the controlling opinion, called “an objective, numerical test” that “draws clean lines for courts and legislatures alike.

“Nothing in Section 2 grants special protection to a minority group’s right to form political coalitions,” Justice Kennedy, writing for himself, Chief Justice [John G. Roberts Jr.](#) and Justice [Samuel A. Alito Jr.](#), added. “There is a difference between a racial minority group’s ‘own choice’ and the choice made by a coalition.”