

http://volokh.com/posts/chain_1250285688.shtml

[Eugene Volokh, August 17, 2009 at 3:15am] Trackbacks
Abigail Thernstrom, Guest-Blogging:

I'm delighted to report that Abigail Thernstrom will be guest-blogging this week about her new book, *Voting Rights — and Wrongs: The Elusive Quest for Racially Fair Elections*. Dr. Thernstrom is the vice-chair of the U.S. Commission on Civil Rights, and an adjunct scholar at the American Enterprise Institute. She and her husband, Stephan Thernstrom, were the recipients of the 2007 Bradley Foundation prize for “Outstanding Intellectual Achievement.” From 1993 to 2009, she was a senior fellow at the Manhattan Institute, and for eleven years served on the Massachusetts Board of Education. She is also a member of the board of advisors of the U.S. Election Assistance Commission.

Dr. Thernstrom's 1987 book on the Voting Rights Act won four awards, including the American Bar Association's Certificate of Merit. With her husband, she also co-authored *America in Black and White: One Nation, Indivisible* (1997) and *No Excuses: Closing the Racial Gap in Learning* (2003). Here's a brief blurb about her new book:

The passage of the 1965 Voting Rights Act marked the death knell of the Jim Crow South; American apartheid could not survive black ballots. But ensuring black electoral equality was more difficult than originally envisioned. For good and ill, the statute became the means by which blacks and Hispanics acquired the right to safe legislative seats. Race-conscious districting to protect minority candidates from white competition both integrated and segregated American politics. By now, however, those safe minority constituencies, in marginalizing black representatives, have become a brake on further racial progress, she argues.

Related Posts (on one page):

1. Looking Forward
2. A Period Piece
3. DOJ: A Law Office Working for Minority Plaintiffs
4. Race-Conscious Districting: Needed and Costly
5. The Messy, Murky Voting Rights Act: A Primer.
6. Abigail Thernstrom, Guest-Blogging:

2 Comments

[Abigail Thernstrom, guest-blogging, August 17, 2009 at 3:15am] Trackbacks
The Messy, Murky Voting Rights Act: A Primer.

First and foremost, much gratitude to Eugene Volokh for creating space for me on his splendid, indispensable blog.

Voting Rights — and Wrongs is my second effort to understand a statute that has become, in the words of Richard Pildes, “one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions.”

Defining that appropriate balance was not the original aim of the 1965 Voting Rights Act. Its initial purpose was simple: enfranchising southern blacks ninety-five years after the passage of the Fifteenth Amendment.

The statute has become such an eye glazing mess that it's easy to forget that in 1965 it was beautifully designed and absolutely essential. Southern blacks were still kept from the polls by fraudulent literacy tests, intimidation, and violence.

Black ballots had been the levers of change that white supremacists most feared, and they were not prepared to go quietly into the night. Enforcing Fifteenth Amendment rights thus required overwhelming federal power — radical legislation that involved an unprecedented intrusion of federal authority into state and local election affairs.

In this first post, I provide a little guide to that radical (and confusing) legislation.

The act put southern states under the equivalent of federal receivership in the conduct of their elections. It suspended literacy tests throughout the region. It provided for the use of federal registrars where necessary. And it demanded that racially suspect jurisdictions submit all proposed changes in their methods of election to the Justice Department (or the seldom-used D.C. district court) for pre-approval — “preclearance.” A statistical trigger that had been reverse-engineered identified the “covered” jurisdictions; the framers of the act knew which states should be covered and arrived at the proper formula.

In states and counties covered by section 5 — initially all in the South — the burden of proving that changes in voting procedure were free of racial animus was placed on them. A city, for instance, that submitted for preclearance a proposed enlargement of its governing council had to prove a negative, an absence of discriminatory purpose or effect. Suspected discrimination was sufficient to sink a proposed change.

The provision compelled states to “beg federal authorities to approve their policies,” and thus so distorted our constitutional structure as to almost erase the distinction between federal and state power, Justice Hugo Black complained in 1966 when the Supreme Court upheld the constitutionality of the statute.

It was a constitutionally serious point, and should not have been forgotten in later years. At the time, however, all other attempts to secure Fifteenth Amendment rights had failed. That, too, is a point that needs to be remembered.

The act very quickly succeeded in meeting its original aim. Southern black registration skyrocketed. But ensuring black electoral equality was more difficult than originally

understood. In Mississippi and elsewhere, counties and other political subdivisions began to structure elections to minimize the number of blacks likely to win public office.

In the face of racist maneuvers to maintain white supremacy, in 1969 the Supreme Court expanded the definition of discriminatory voting practices to include devices that “diluted” the impact of the black vote. At-large voting, districting lines, and other election procedures whose impact could deprive blacks of expected gains in officeholding became subject to preclearance.

The Court had put the enforcement of the act on a proverbial slippery slope. Ensuring that black ballots carried proper political weight became the expanded goal of the act. From there it was but a short slide to a constitutionally problematic system of reserved seats for minority group members, even in settings with no history of racist exclusion.

And from there, with another short slide, proportional racial and ethnic representation became the only logical standard by which to measure true electoral opportunity. Anything less than proportional officeholding suggested a “diluted” minority vote — one that was less effective than it could be.

In any case, civil rights advocates saw proportional results as the proper measure of opportunity — in employment, education, and contracting, too — and those who wrote, interpreted, and enforced the law consistently took their cues from these advocates.

Thus, when the Justice Department rejected a districting map as racially suspect, the jurisdiction was obligated to go back to the drawing board. New lines had to be drawn, with the understanding that the maximum number of possible safe black legislative seats would be created.

The original statute was altered in other important respects. Section 5 was an emergency provision with an expected life of only five years. It was repeatedly renewed, most recently in 2006 for another quarter century.

Every renewal became an occasion for amendments that strengthened the act; never did Congress stop to consider whether the statute’s unprecedented powers should, in fact, be pared back in recognition of its success. Thus, as black political participation was steadily and dramatically rising, federal power over local and state electoral affairs was paradoxically expanding.

In 1970 and 1975, new groups and new places came under preclearance coverage. An arbitrary, careless change in the statistical trigger, for instance, made section 5 applicable to three boroughs in New York City (although not the other two), even though black New Yorkers had been freely voting since the enactment of the Fifteenth Amendment in 1870, and had held municipal offices for decades.

In 1975, amendments added Hispanics, Asian Americans, American Indians, and Alaskan Natives to the list of those eligible for extraordinary protection, although their experience

with racist exclusion from the polls was not remotely comparable to that of southern blacks.

With more mindless changes to the statistical trigger, preclearance was also extended to Texas, Arizona, Alaska, and scattered counties in California and elsewhere across the nation.

In 1982, Congress rewrote an innocuous preamble, section 2. Preclearance kicked in only when a jurisdiction altered some aspect of electoral procedure. But, as amended, section 2 provided plaintiffs with a powerful tool to attack long-standing methods of election anywhere in the nation that had the “result” of denying the right to vote on account of race or color.

Section 5 had provided a remedy for vote dilution only relative to the electoral strength that blacks and Hispanics enjoyed before a jurisdiction altered a districting map or other voting practices, the Supreme Court held in 1976. It was an interpretation that squared with the structure of the Voting Rights Act, and delegated to Justice Department attorneys and staff remote from the scene a limited, and thus manageable, task: stopping the institution of new electoral arrangements that undermined the force of the 1965 law.

But section 2 guaranteed electoral equality in some absolute sense — undefined and indefinable. The obvious solution, once again, was to resort to proportionality as the standard by which to measure of racial fairness, even though it rests on a profound misconception of the “natural” distribution of racial and ethnic groups across the residential, occupational, and other aspects of the social landscape.

Moreover, racist exclusion, not statistical imbalance, should have been the concern.

At the same time, race-conscious districting brought real gains in political integration — gains that cannot be easily dismissed. But this is the topic of the next post.

55 Comments

[Abigail Thernstrom, guest-blogging, August 18, 2009 at 3:16am] Trackbacks
Race-Conscious Districting: Needed and Costly

Over time, the Voting Rights Act morphed in an unanticipated direction -- a change that had both benefits and costs. The act's original vision was one that all decent Americans shared: racial equality in the American polity. Blacks would be free to form political coalitions and choose candidates in the same manner as other citizens.

But in the racist South, it soon became clear, that equality could not be achieved -- as originally hoped -- simply by giving blacks the vote. Merely providing access to the ballot was insufficient after centuries of slavery, another century of segregation, ongoing

white racism, and persistent resistance to black political power. More aggressive measures were needed.

In response, Congress, as well as courts and the Justice Department, in effect amended the law to ensure the political equality that the statute promised. Blacks came to be treated as politically different -- entitled to inequality in the form of a unique political privilege. Legislative districts carefully drawn to reserve seats for African Americans became a statutory mandate. Such districts would protect black candidates from white competition; whites would seldom even bother to run in them.

The new power of federal authorities to force jurisdictions to adopt racially "fair" maps was deeply at odds with the commitment to federalism embedded in the Constitution, and the entitlement to legislative seats designed to elect members of designated racial groups was equally at odds with traditional American assumptions about representation in a democratic nation.

In 1965, however, a century of Fifteenth Amendment violations demanded what might be called federal wartime powers, and, as on other occasions when wartime powers were invoked, the consequence was a serious distortion of our constitutional order. It was fully justified in 1965; it is not today.

The history of whites-only legislatures in the South made the presence of blacks both symbolically and substantively important. Racially integrated legislative settings work to change racial attitudes. Most southern whites had little or no experience working with blacks as equals and undoubtedly saw skin color as signifying talent and competence. Their stereotypical views changed when blacks became colleagues.

In addition, southern blacks came to politics after 1965 with almost no experience organizing as a conventional political force. Thus, race-based districts in the region of historic disfranchisement were arguably analogous to high tariffs that helped the infant American steel industry get started: They gave the black political "industry" an opportunity to get on its feet before facing the full force of equal competition.

Most Americans do not like public policies that distribute benefits and burdens on the basis of race and ethnicity. But, while it is relatively easy to take an uncompromising stance against racial classifications in higher education, for instance, it is more difficult when the issue is districting lines drawn to increase black officeholding.

Context matters. Racial preferences at, say, the University of Michigan were not dismantling a dual system. Moreover, the alternative to preferences in education has never been all-white schools, as William G. Bowen and Derek Bok, in their 1998 book, *The Shape of the River*, acknowledged. They calculated that approximately half the black students in the selective schools they studied needed no distinctive treatment to gain admission.

Finally, there is strong evidence that racial preferences in higher education don't even work as advertised. The rich empirical work by UCLA law professor Richard Sander, for instance, has shown that black students preferentially admitted to law schools have disproportionately low rates in passing the bar exam. It is possible, he finds, that racial preferences have reduced, rather than increased, the supply of black attorneys.

The contrast with the realm of politics is marked. There are no objective qualifications for office -- the equivalent of a college or professional degree, a minimum score on the LSATs, a certain grade-point average, or relevant work experience.

Race-based districts also work precisely as intended. They elect blacks and Hispanics to legislative seats. In the South such descriptive representation has had an importance far greater than increasing the number of black and Hispanic students at, say, Duke University.

In suggesting that race-conscious maps were a temporary necessity, I do not defend what are often called bug-splat districts -- constitutionally problematic, racially gerrymandered constituencies. They were the product of an aggressive Justice Department that labeled districting maps as intentionally discriminatory if the ACLU and other civil rights groups had come up with what they regarded as a superior plan.

Nor do I deny the serious costs that accompanied race-driven districting -- costs that have increased in importance as racism has waned.

Such districting continues to reinforce old notions that blacks are fungible members of a subjugated group that stands apart in American life, requiring methods of election that recognize their racial distinctiveness. In 1993 Justice Sandra Day O'Connor described race-driven maps as "an effort to 'segregate . . . voters' on the basis of race." As such, she said, they threaten "to stigmatize individuals by reason of their membership in a racial group."

Racially gerrymandered districts flash the message "RACE, RACE, RACE," voting rights scholars T. Alexander Aleinikoff and Samuel Issacharoff have written. Racial sorting creates advantaged and disadvantaged categories -- groups that are privileged and groups that are subordinate, they argued.

The majority-minority districts upon which the DOJ insisted have become safe for black or Hispanic candidates, as intended, but they have also turned white voters into what these two scholars called "filler people." Whites have become irrelevant to the outcome of the elections in districts designed to elect minorities, unless they serve as the swing vote in a black-on-black contest.

America has experienced an amazing racial transformation in the decades since 1965, and race-conscious districts are no longer necessary. Today, their costs outweigh their benefits. Indeed, they have become a brake on the pursuit of political equality -- tending,

as they do, to elect representatives who are generally too isolated from mainstream politics and on the sidelines of American political life.

Black political progress might actually be greater today had race-conscious districting been viewed simply as a temporary remedy for unmistakably racist voting in the region that was only reluctantly accepting blacks as American citizens.

This is a point I will address more fully in my fifth post -- at the end of the week.

102 Comments

[Abigail Thernstrom, guest-blogging, August 19, 2009 at 3:16am] Trackbacks
DOJ: A Law Office Working for Minority Plaintiffs

[Note to readers who have responded so thoughtfully to my previous posts. A number of issues raised will be addressed in this and my subsequent two posts. For instance, I do talk about the collaboration between the Republican Party and the civil rights groups in this post. In fact, I was the first -- in the mid-1980s -- to say that Republicans were laughing all the way to the political bank with racial gerrymandering, and at the time my point was generally dismissed as laughable. As for data, in my Thursday post, I will provide some. But in less than 1200 words a day, of necessity I am barely skimming the surface. Readers interested in my fully developed arguments -- and the evidence upon which I rely -- need to look at the book.]

Changes in the method of voting are usually submitted to the Justice Department for preclearance as my first post noted. The use of the D.C. court quickly became the rare exception. The administrative route is faster and cheaper.

The Justice Department was expected to function as a surrogate court -- with the legal standards articulated in judicial opinions guiding administrative decisions. The reality has been quite different.

That reality was spelled out clearly in a 1995 Supreme Court decision, *Miller v. Johnson*. The issue was Georgia congressional districting, and the case tells a remarkable story of a lawless Republican Department of Justice that forced a state to accept a plan drawn by the American Civil Liberties Union in its capacity as advocate for the black caucus of the state's general assembly.

The enforcement of the Voting Rights Act has long made for strange bedfellows -- although only superficially. In the Georgia case, John Dunne, the assistant attorney general for civil rights from 1990 to 1993, was an unambivalent champion of race-based districting to maximize minority officeholding. His alliance with the ACLU and the state black caucus served the Republican Party's interests, as well: What the ACLU called a "max-black" plan was also "max-white" -- more black voters in some districts meant

fewer in others, and, in the South particularly, districts that had been “bleached” were fertile ground for Republican political aspirations.

Of course, redistricting is not the only area in which Republican have failed to oppose what Chief Justice John Roberts has called the “sordid business . . . [of] divvying us up by race.” But seldom is the magnitude of the gap between alleged principle and a quite different reality so fully on display as it has been in some of the redistricting cases.

The Georgia House and Senate redistricting committees, when they began the map-drawing process following the 1990 census, had no idea of the roadblocks that lay ahead. They drew one map and then another, both of them increasing the number of majority black congressional districts from one to two.

The state, in fact, had no obligation to draw a map that gave minorities more safe districts than they previously had. The point of preclearance had been to prevent racially suspect states from depriving blacks of the political gains that basic enfranchisement promised, not to ensure a “fair” number of legislative seats, the Supreme Court had held in its controlling 1976 decision, *Beer v. U.S.*

Georgia had clearly met the demands of the law. Nevertheless, the Justice Department found both maps in violation of section 5. John Dunne informed the state that it had not adequately explained its failure to create a third majority-minority district.

Dunne wanted, among other changes, a reshuffling of black and white voters. But his reconfiguration would have created a district (CD 11) that connected black neighborhoods in metropolitan Atlanta and poor black residents on the coast, 260 miles away and “worlds apart in culture,” as the Supreme Court put it in *Miller*.

“In short,” the Court continued, “the social, political and economic makeup of the Eleventh District [told] a tale of disparity, not community.” Dunne’s insistence on heavy-handed racial gerrymandering forced candidates to run in four major media markets, while leaving CD 2 still only minority-black.

Dunne’s communications were entirely guided by ACLU attorney Kathleen Wilde, who had drawn up a “max-black” plan. As the district court noted, “Throughout the preclearance process, from this first objection letter to the final submission, [DOJ] relied on versions of the max-black plan to argue that three majority-minority districts could indeed be squeezed out of the Georgia countryside. Ms. Wilde’s triumph of demographic manipulation became the guiding light.”

Georgia legislators and staff who met with Justice Department attorneys in Washington were “told to subordinate their economic and political concerns to the quest for racial percentages.”

These legislators on the redistricting committee, many of whom were veteran mapmakers, were essentially cut out of the districting process by the Justice Department.

Excluding them raised grave constitutional questions. As the Court stated, rejecting the “max-black” plan as unconstitutional, “Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.” Plainly, judicial or Justice Department review “represents a serious intrusion on the most vital of local functions.”

To make matters worse, DOJ attorneys had cultivated “informants” within the state legislature; “‘whistleblowers’ became ‘secret agents,’” the district court found. One of these informants described one black state senator who had not toed the line as a “quintessential Uncle Tom” and “the worst friend of blacks in Georgia.” By contrast, attorneys from the ACLU and the voting section of the DOJ’s Civil Rights Division were characterized as “peers working together.” They discussed the smallest details of the Wilde plan and its revisions, with the result that “there were countless communications, including notes, maps, and charts, by phone, mail and facsimile.”

In fact, the lower court found, the “DOJ was more accessible -- and amenable -- to the opinions of the ACLU than to those of the Attorney General of the State of Georgia.” The DOJ’s March 1992 objection letter, quoted above, actually arrived at the state attorney general’s office after members of the Georgia black caucus were already discussing it with the press, since the Justice Department attorneys had told the ACLU lawyers of their decision before informing any state official. The court found this “informal and familiar” relationship between federal attorneys and an advocacy group “disturbing” and an “embarrassment.”

The preclearance process was not supposed to work as it did in Georgia in the early 1990s, as well as in countless other jurisdictions, large and small, in the 1980s as well. By 1991, when the Justice Department reviewed the Georgia plan, the initial vision of the department as a more accessible court had completely broken down. The voting section of the Civil Rights Division was operating as a law office for minority plaintiffs, working as partners with civil rights advocacy groups.

As UCLA law professor Daniel Lowenstein has written, “Much is at stake for politicians and the interests they represent in a districting plan, and enacting a plan is typically a difficult and contentious process. Once they strike a deal, they want it to stay struck, and therefore they tend to be risk-averse with respect to possible legal vulnerabilities in a plan.”

A risk-averse plan was one that accepted racial quotas, which the Justice Department believed in as a matter of principle through the 1980s and 1990s. Blacks here, whites there, in just the right numbers to ensure the election of blacks to public office roughly in proportion to their population numbers. In all likelihood, that commitment to proportionality will resurface in the enforcement of the Voting Rights Act under the current administration.

[Abigail Thernstrom, guest-blogging, August 20, 2009 at 3:15am] Trackbacks
A Period Piece

[Note to my lively, thoughtful readers: Your remarks deserve longer responses than I have room for. Very briefly, I agree with the comment: “Since the political makeup tends to correlate at least somewhat with the racial makeup, it is frequently difficult to distinguish these two things,” and I do talk about the issue in my book.

[And I also believe that Obama probably performed worse than John Kerry in the South for reasons other than race. To the more conservative southern white ear, Obama must have sounded weak on national defense, and far to the left on domestic policies such as health care. He was not a decorated war veteran. Etc. (More on this point in the book.)]

[And to clear up a confusion: Yes, I do say in Tuesday’s post that the preclearance requirements are exceedingly vague, and then asserted yesterday that Georgia’s original plan had met the demands of the law. It is the DoJ regs that provide no guidance to the states, but the Supreme Court’s standard in *Beer v. U.S.* (1976) was clear, and it remains the controlling decision. DoJ has created detours around that decision.]

In 2006 the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act” (VRARA) was passed with almost no dissent. It amended and renewed section 5 for another quarter century. By the new expiration date, electoral arrangements in the South, the Southwest, Alaska, and a collection of arbitrarily selected counties elsewhere will have been under federal receivership, in effect, for a total of sixty-six years.

Congress had been persuaded that at least until 2031 minority voters in the covered jurisdictions (covered by a formula last updated in 1975) would remain unable to participate in American political life without the benefit of electoral set-asides. Such pessimism is not benign; it distorts public discussions and the formulation of policies involving race.

A serious disconnection from reality surrounds the Voting Rights Act today. By every measure, American politics has been transformed since the 1960s. Blacks hold office at all levels of government, and have reached the pinnacles of virtually every field of private endeavor. Racial prejudice has fallen to historic lows. Yet the passage of the 2006 VRARA was preceded by a sustained, meticulously organized campaign by civil rights groups to persuade Congress that race relations remain frozen in the past, and that America is still plagued by persistent disfranchisement.

Activists were determined to garner such overwhelming support for the act’s renewal that no one would dare stop to consider whether these provisions were still appropriate in the twenty-first century.

In passing the VRARA, Congress signed on to a picture that reflected conventional wisdom in the civil rights community and the media. “Discrimination [in voting] today is more subtle than the visible methods used in 1965. However, the effects and results are the same,” the House Judiciary Committee reported. “Vestiges of discrimination continue to exist . . . [preventing] minority voters from fully participating in the electoral process,” the statute itself read.

Surely, rarely in the rich annals of congressional deceit and self-deception have more false and foolish words been uttered. No meaningful evidence supported such an extraordinary claim.

It cannot be said too strongly or too often: The skepticism of those, like Georgia representative John Lewis, who cannot forget the brutality of those years is understandable. But the South they remember is gone. Today, most southern states have higher black registration rates than those outside the region, and over 900 blacks hold public office in Mississippi alone.

Massive disfranchisement is ancient history—as unlikely to return as segregated water fountains. America is no longer a land in which whites hold the levers of power and black and Hispanic political representation depends on the exercise of extraordinary federal intervention, constitutionally sanctioned only as an emergency measure.

In the presidential election of 2004, a stunning 68.2 percent of the black population in original section 5 states was registered to vote, a rate a few points higher than that in the rest of the country. Black turnout rates, as well, have been impressive.

Whether candidates preferred by the group are able to win elections is another test of electoral progress. By 2008, there were forty-one members of the Congressional Black Caucus. Almost 600 African Americans held seats in state legislatures, and another 8,800 were mayors, sheriffs, school board members, and the like. Forty-seven percent of these black public officials lived in the seven covered states, though those states contained only 30 percent of the nation’s black population. The rate of black progress in winning election to state legislatures is also striking.

My book contains much more data -- not all of which paint quite the same rosy picture. But the bottom line is indisputable: black officeholders today have political power. In fact, black voters are the Democratic Party’s most reliable constituency. Their unwavering loyalty makes them indispensable to the party’s fortunes.

Voting rights advocates argue that elections are still racially polarized. But the highly questionable definition of white bloc voting most commonly used -- whites and blacks generally preferring different candidates -- means it can be found wherever black candidates run campaigns unlikely to attract a majority of whites. By definition, then, all districts in which whites tend to be more politically conservative than blacks are racially polarized.

Without the threat of federal interference, would southern state legislatures feel free to engage in all sorts of disfranchising mischief? It seems wildly improbable. Not even Mississippi -- the state that Martin Luther King, Jr. in 1963 described as “sweltering with the heat of injustice, sweltering with the heat of oppression” -- can peddle backward. Blacks are today embedded in its political culture.

As a Clarksdale, Mississippi, newspaper editorial noted in June 2008, “There’s probably less chance today of election discrimination against minorities occurring in Mississippi—given the high number of African-Americans in elected office, including as county election commissioners—than in many parts of the country not covered by the Voting Rights Act.” Yet, section 5 “presumes that minorities are powerless to protect their own election interests in places where they actually have the most clout.”

Racial progress rapidly outpaced the law, and the voting rights problems that are now of greatest concern—hanging chads, provisional ballots, glitches in electronic voting, registration hassles, voter identification, and fraud prevention measures -- bear no relationship to those that plagued the South in 1965. Nevertheless, the most radical provisions of the statute live on, addressing yesterday’s problems.

Fifteen years ago, one of the most liberal members of the Court came close to describing blacks and Hispanics as members of normal political interest groups. “Minority voters,” Justice David Souter said, “are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.”

America has changed; the South has changed, and it’s time to revise the Voting Rights Act as well.

51 Comments

[Abigail Thernstrom, guest-blogging, August 21, 2009 at 3:16am] Trackbacks
Looking Forward

[Starting again with some brief responses to my engaged and engaging audience. Many thanks to the reader who said, correctly, I did not mean to imply race played no part in voter preferences in the South -- or anywhere else. But, again, I would urge readers to take care in charging racism. Obama ran eleven points behind Kerry among gay voters; are we to conclude that racism is a significant presence in the gay community?

[As to the charge that “Thernstrom and her husband have long been declaring that there is no more racism towards blacks,” find me a single sentence (in the thousands of pages on race that we have written) in which either of us make such a ludicrous statement.

[Last point: Preclearance is a provisions whose time has passed, I clearly believe. But of course I am not for repealing the VRA in its entirety. Most of the statute is permanent and

should remain so. I wish only to see the Court revisit one of those permanent provisions - - section 2 -- and insist that it be read as originally intended. This is an argument I did not have the space to make in these posts.]

At its inception, the Voting Rights Act stood on very firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic Fifteenth Amendment rights. A clear principle justified its original enactment: Citizens should not be judged by the color of their skin when states determine eligibility to vote.

That clarity could not be sustained over time. As a result, more than four decades later, the law has become what Judge Bruce Selya has described as a “Serbonian bog.” The legal land looks solid but is, in fact, a quagmire, into which “plaintiffs and defendants, pundits and policymakers, judges and justices” have sunk.

This past term, the Supreme Court had a chance to extricate itself in good measure by declaring preclearance -- intended to be very temporary -- a relic from a previous era.

It took a pass.

Northwest Austin Municipal Utility District Number One v. Holder involved a tiny Texas utility district that was formed in 1987 mainly to provide water to unincorporated areas. Because the Voting Rights Act treats all Texas localities as racially suspect, the Justice Department had to “preclear” the district’s decision to move a polling place out of a private garage and into a public school -- a move “calculated to increase public access to the ballot.”

Preclearance, in the plaintiff’s view, was an irrational and “burdensome imposition” on the district’s “sovereign rights” to manage its own electoral affairs. It had no history of electoral discrimination.

Declaring section 5 unconstitutional was not the Court’s only option. With an interpretive stretch, it could read a “bailout” provision to allow relief from preclearance, and did so. However, Chief Justice John Roberts, writing for the majority, did explicitly say, “The Act’s preclearance requirements and its coverage formula raise serious constitutional questions.” And he spelled those questions out at considerable length.

Another case, another day, a different decision, he implied.

But surely, long before section 5 expires in 2031, the Court will be asked once again to review the constitutionality of preclearance, perhaps in a case that will raise the central question: the racial sorting of voters in a legislative quota system.

The picture that Congress accepted in 2006 of an America still spinning its wheels in the racist muck of its Jim Crow past is absurd, I argued in my previous post. Blacks are enfranchised. And thus the federalism concerns that Justice Black raised in 1966 (see my first post) are legitimate today.

African Americans and Hispanics have become politically powerful. In addition, an army of activists and lawyers monitor American elections closely. Most important, how many Americans would even want to return to the days of old? Today, the question is how best to arrive at the point at which politics are truly racially integrated.

By now, the Voting Rights Act arguably serves as a barrier to greater racial integration. Race-based districts have worked to keep most black legislators clustered together and on the sidelines of American political life -- precisely the opposite of what the statute intended, and precisely the opposite of what is needed now.

Majority-minority districts appear to reward political actors who consolidate the minority vote by making the sort of overt racial appeals that are the staple of invidious identity politics. Harvard law professor Cass Sunstein describes a larger phenomenon that is pertinent: People across the political spectrum end up with more extreme views than they would otherwise hold when they talk only to those who are similarly minded.

Districts drawn for the sole purpose of maximizing the voting power of a racial group surely encourage voters to talk only to the similarly minded. Arguably, elected representatives are left insufficiently tutored in the skills necessary to win competitive contests in majority-white settings. It is a self-fulfilling prophecy: Very few black candidates risk running in majority-white constituencies; majority-minority districts thus become the settings in which blacks are most frequently elected.

In safe minority constituencies, aspiring politicians are under no pressure to run as centrists, and are most often pulled to the left. Their politics, along with a reluctance to risk elections in majority-white settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office

As of 2006, the entire CBC was more liberal than the average white Democrat, limiting the appeal of its members to white voters, particularly in the South.

Politicians outside the mainstream can play an important role in shaping legislative debate. But when a group that has been historically marginalized as a consequence of deliberate exclusion subsequently chooses the political periphery, it risks perpetuating its outsider status. Reinforcing the sense of difference compromises the goal of the Voting Rights Act.

Not all black politicians have been trapped in safe minority districts; the point should not be overstated. President Obama's political career actually began with his successful bid for the Illinois state senate, running from a majority-black district. But Obama was a uniquely gifted political entrepreneur with the skills to reach across racial lines. Thus, he created, saw, and seized opportunity where others have not.

Other black politicians have succeeded in majority-white settings. Journalist Gwen Ifill has described a number of such candidates in her recent book, *The Breakthrough: Politics*

and Race in the Age of Obama. Mike Coleman was elected in 1999 as the first black mayor of Columbus, Ohio. She describes his strategy: “Woo the white voters first . . . then come home to the base later.”

Nevertheless, such candidates remain the exception. The Voting Rights Act was meant to level the political playing field, so that blacks would become a political faction with the ability to enter and exit coalitions as other citizens do -- that is, if they chose to define themselves as members of a likeminded political interest group. Its ultimate goal was full political assimilation.

Instead, the law -- with its continuing stress on the urgent need for maximizing the number of safe black constituencies -- implies that most black politicians need majority-black settings in order to win.

In other respects, as well, the law today serves as a brake on black political progress, as I discuss in more detail in my book.

Thanks for listening. Thanks for responding. And much gratitude to Eugene; I was honored to be his guest for the week.