Book Reviews

Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections

By Abigail Thernstrom

*Reviewed by Roger Clegg**

No one has written more or better about the Voting Rights Act than Abigail Thernstrom. Her latest book, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections*, would, in a just world, be the last word on the subject, but alas the problems raised by the Act will continue, and so, Sisyphean, must Dr. Thernstrom's efforts.

The book is a treasure trove of historical information, and it is extraordinarily thorough in its analysis. It provides a sweeping historical narrative, and then a trenchant explanation and examination of the two key sections (2 and 5) of the Act and the jurisprudence relating to them; it ends with Congress reauthorizing the Act in 2006. So excellent and evenhanded is Dr. Thernstrom's scholarship that an admiring foreword to the book is provided by Juan Williams—who is far from being a doctrinaire conservative.

The Text of the Constitution Versus the Voting Rights Act

Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 2 provides: "The Congress shall have power to enforce this article by appropriate legislation."[1]

The right to vote regardless of race was, to put it mildly, not honored for a long time, and the Voting Rights Act of 1965 changed that. But the principal statutes that Congress has passed pursuant to the Fifteenth Amendment—the text and evolution of which are helpfully set out by Dr. Thernstrom in one of her book's appendices—go far beyond enforcing this guarantee. Dr. Thernstrom explains that in many respects the statutes are in fact used to encourage racial segregation of voting districts through racial gerrymandering—a result at odds with the underlying constitutional guarantee, to say nothing of the ideals of the Civil Rights Movement from which the statutes sprang.

This has come about, says Dr. Thernstrom, because Section 2 (which applies nationwide) and Section 5 (which applies only to certain jurisdictions, mostly in the South, and requires them to get any changes in voting practices or procedures "precleared" in Washington) of the Voting Rights Act adopt a "results" and "effects" test, respectively. That is, they ban practices and procedures that have disproportionate results and effects, even if that practice or procedure is racially nondiscriminatory on its face, is applied equally and nondiscriminatorily, and was not adopted with any discriminatory intent. But, in this case, in what sense do we have racial discrimination? Some (like me) argue that this is *not* racial discrimination, and so such laws are not fairly within Congress's enforcement authority under the Fifteenth Amendment.[2]

The Effects/Results Test

Critics of the effects/results test contend that whenever the government uses this approach, two bad outcomes are encouraged that would not be encouraged, or would at least be encouraged less, if the government stuck to banning actual disparate treatment on the basis of race. First, actions that are perfectly legitimate will be abandoned; second, if the action is valuable enough, then surreptitious (or not so surreptitious) racial quotas will be adopted so that the action is no longer racially disparate in its impact.[3]

Thus, for example, some innocuous voting practices (for example, making sure that voters can identify themselves as U.S. citizens who are registered to vote) can be challenged if they have a racially disparate impact. And jurisdictions can be pressed to use racial gerrymandering to ensure racially-proportionate election results through racially-segregated districting, requiring discrimination, which is at odds with the underlying law's ideals.

This latter point is at the heart of Dr. Thernstrom's book: *The key use of Sections 2 and 5 in 2010 is now to coerce state and local jurisdictions into drawing districts with an eye on race, to ensure that there are African-American (and, in some instances, Latino) majorities who will elect representatives of the right color.*

Chief Justice Roberts wrote in a recent Voting Rights Act case involving racial gerrymandering that it is "a sordid business, this divvying us up by race."[4] The Supreme Court has warned about the unconstitutionality of racial gerrymandering in a number of decisions. Critics of the practice maintain that it encourages racial balkanization and identity politics. In addition, they point out that the segregated districts that gerrymandering creates have contributed to a lack of competitiveness in elections, districts that are more polarized (both racially and ideologically), the insulation of Republican candidates and incumbents from minority voters and issues of particular interest to minority communities (to the detriment of both Republicans and minorities), and, conversely, the insulation of minority candidates and incumbents from white voters (making it harder for those politicians to run eventually for statewide or other larger-jurisdiction positions).

If it is agreed that the purpose and result of Sections 2 and 5 is to encourage the use of racial classifications by government entities, the Supreme Court's Fifth Amendment jurisprudence would subject these sections to strict scrutiny. Justice Scalia noted the constitutional problems with the disparate-impact approach in his recent concurrence in *Ricci v. DeStefano*.[5]

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There is good news in Dr. Thernstrom's book: The problem of systematic exclusion of racial minorities from the polls no longer exists. This is not to say that there are not still instances of such discrimination, but they are aberrant. The problem that the Framers of the Fifteenth Amendment undoubtedly had foremost in their minds—and that, unconscionably, had festered until 1965—has been decisively and successfully addressed.

But Dr. Thernstrom delivers the bad news, too: There is no longer any rhyme or reason to the jurisdictions that are covered by Section 5. Given the intrusiveness of the statute, this problem is not simply an aesthetic one: It raises serious federalism concerns. What's more, because Sections 2 and 5 incorporate the "results" and "effects" test, state laws that many would consider proper are discouraged or struck down (anti-voter-fraud measures that might have a disparate impact, for example), and state practices that many would consider improper are now required (racial segregation of voting districts through racial gerrymandering, for example).

The Kinston Case

When the Supreme Court heard a constitutional challenge to Section 5 of the Voting Rights Act last year—in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*),[6] decided after Dr. Thernstrom's book was published—the Justices did not decide the constitutional issue, instead ruling for the district on statutory grounds. But a new lawsuit filed on April 7 this year by the Center for Individual Rights, arising out of a Justice Department decision in the small town of Kinston, North Carolina, is likely to bring the constitutional issue back to the Supreme Court.

As Dr. Thernstrom explains, Section 5 was passed in 1965 as an emergency, "temporary" measure that was supposed to expire in five years. But Congress has kept renewing it, most recently in 2006, when it was extended until 2031. Section 5 essentially puts covered states in "federal receivership," she says: They cannot implement *any* changes, no matter how small, in their voting-related procedures until they are approved by the Department of Justice or a federal court in Washington.

Section 5 was an unprecedented and extraordinary incursion into the traditional sovereignty of local governments, but Dr. Thernstrom's book makes clear that something like it was needed in 1965. Chief Justice Roberts wrote in *NAMUDNO* that discrimination was "rampant" in the South, where local officials engaged in systematic, widespread actions to prevent black Americans from registering and voting. Although this was illegal, many jurisdictions would simply pass new laws or switch to new discriminatory procedures if they lost a lawsuit. Section 5's preapproval process was intended to prevent that widespread evasion of the law and court-ordered remedies.

Of course, we are a much different nation today, and Dr. Thernstrom masterfully marshals the data that demonstrate why. No one claims that discrimination has completely disappeared, but there is no longer systematic, intentional discrimination by state and local governments in large parts of the country. "Things have changed in the South," the Court said in *NAMUDNO*. "Blatantly discriminatory evasions of federal [court] decrees are rare. And minority candidates hold office at unprecedented levels."

Local governments in Virginia and Arizona, for example, which are covered by Section 5, are currently no different from local governments in, say, Arkansas and New Mexico, which are not covered, and thus some legitimately question why they should be singled out and why the federal government is still given the extraordinary power to veto legislative changes in those states. And so, last year, the Supreme Court warned that Section 5 now raises serious constitutional concerns. These concerns are heightened when one considers the fact that states like Georgia and Mississippi are covered based on evidence and election data that are more than forty years old. By the time Section 5 is up for renewal in 2031, counties like those in North Carolina will have been covered based on seventy-year-old election returns.

The Kinston Specifics

Finally, Dr. Thernstrom argues that, over the years, the Justice Department's Civil Rights Division has engaged in extremely partisan, ideological administration of Section 5. For opponents, Kinston, North Carolina provides an example of the irrationality of the continued application of Section 5 and the ideological partisanship in the Division's administration of it. Blacks make up sixty-four percent of the registered voters in Kinston, and there has been no finding that the town has engaged in any discriminatory voting practices. There are no barriers to blacks registering and voting in Kinston. In 2008, Kinston residents voted two to one to change their town elections from partisan to nonpartisan; there were only eight out of 551 localities in North Carolina that held partisan local elections. A majority of the voters in five of the seven majority-black precincts in Kinston voted in favor of the change.

The Obama Administration's Justice Department objected to the reform, claiming that the black citizens of Kinston did not have the right to make this change and declaring that it would reduce the ability of black candidates to be elected since they would no longer be affiliated with the Democratic Party. Thus, critics have claimed that the Justice Department was using federal law to promote the interests of the Democratic Party rather than black voters.

Using federal law to set aside the decision made by voters to change to nonpartisan elections, based on the assumptions of federal bureaucrats about future elections, demonstrates the problems of administering Section 5. So does its application to a jurisdiction in which black voters are not a minority, but are in fact a majority that can completely control election outcomes. Other Voting Rights Act partisanship problems have also been on display in the controversy caused by the Obama Administration's decision not to prosecute members of the New Black Panther Party for intimidating voters at a Philadelphia polling place.

Conclusion

Many hope that, when the Kinston case reaches the Supreme Court, the Justices will acknowledge that we are a different country today than we were in 1965, and that the extraordinary displacement of traditional local sovereignty represented by Section 5 is not only no longer needed, but

violates the most fundamental federalism and colorblind principles of the Constitution.

When the Supreme Court does decide its next Voting Rights Act case, here's hoping that the Justices, or at least a majority of them, or at least someone writing a brief in the case, will have read Abigail Thernstrom's wonderful book.

Endnotes

1 Useful histories of the passage of the Fifteenth Amendment can be found in Alexander Keyssar, The Right to Vote 93-104 (2000), and The Heritage Guide to the Constitution 409-11 (Edwin Meese III et al. eds., 2005). Neither suggests, however, that the amendment means or was intended to mean anything more or less than what its text actually says.

2 For an argument that Section 203 of the Voting Rights Act, which requires some jurisdictions to print ballots and other election materials in foreign languages, is likewise objectionable and unconstitutional, see Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol'y 561, 575-80 (2007).

3 My criticisms of the disparate-impact approach in civil-rights enforcement generally are set out in Disparate Impact in the Private Sector: A Theory Going Haywire (National Legal Center for the Public Interest 2001), *available at* http://www.aei.org/paper/100116, which elaborates on *The Bad Law of "Disparate Impact,"* Pub. Int. 79 (Winter 2009), *available at* http://www.nationalaffairs.com/public_interest/detail/the-bad-law-of-disparate-impact.

Let me add that, even under a disparate impact/effects/results approach, the defendant can prevail if it can show a sufficiently strong reason for the challenged practice. Thus, for example, I've argued that the disenfranchisement of felons ought to be lawful under Section 2 of the Voting Rights Act, even if Section 2 applies and even if it has racially disproportionate results. *See, e.g.,* Roger Clegg et al., *The Case Against Felon Voting*, 2 U. St. Thomas J.L. & Pub. Pol'y 1, 12 (2008). But the pressure to abandon criteria with racially disproportionate results, or to overlay them with quotas, remains.

4 League of United Latin American Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part). Among the Supreme Court's anti-racial-gerrymandering pronouncements, see especially *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 300 (1995). Regarding the bad side-effects of racial gerrymandering, see generally Roger Clegg & Linda Chavez, *supra* note 2 (citing, inter alia, Christopher M. Burke, The Appearance of Equality: Racial Gerrymandering, Redistricting, and the Supreme Court 32-33 (1999); and Katharine Inglis Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. Rev. 749, 780-81 (2006)). *See also* Jim Sleeper, Liberal Racism 43-66 (1997); Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 Wash. U. J.L. & Pol'y 71, 90 (2006).

5 129 S. Ct. 2658 (2009).

6 129 S. Ct. 2504 (2009).

We're Not Dead Yet.[1] Book Review: The Vanishing American Lawyer

By Thomas D. Morgan

*Reviewed by Allison R. Hayward**

Is the practice of law a profession? For most practicing lawyers, the last time they heard that question was from the podium of their ABA-mandated Professional Responsibility class. But this is but one of many fundamental questions asked by Thomas Morgan, Oppenheim Professor of Antitrust and Trade Regulations at the George Washington University Law School and leading light of legal ethics scholarship. In *The Vanishing American Lawyer*, Morgan takes a fresh and markedly heterodox posture on questions regarding professionalism, practice, and legal education.

The hallmarks of a profession include the mastery of knowledge beyond a client's ability to grasp, a duty to serve public as well as private interests, and discipline by one's peers. But as Morgan observes, changes in the practice of law have transformed many lawyers into scriveners, whose conduct is best regulated under principal-agent standards. Pause for a moment—what's professional about lawyering a real estate closing? Morgan criticizes the establishment Bar for clinging to "professionalism" and failing to face reality.

Reality is this: most lawyers perform tasks to fulfill narrow specific client demands, without regard to whatever other interests there may be. Lawyers are thus more akin to business consultants than to professionals. Lawyers for the most part do not function above the fray and do not exercise independent judgment about the merits of a client's goals. In fact, given the disaggregation and specialization of modern private law practice, it would be hard to imagine it otherwise. Today's successful lawyer is not the generalist of yesterday, but an expert who has mastered an especially thorny area of practice. That specialist can tell you everything about the taxation of international pharmaceuticals, or the ins and outs of reinsurance contracts. But it will be the in-house counsel—an employee—who oversees the company's legal portfolio.

While the reality of law practice today demands specialization and mastery of the arcane, legal education hasn't responded. Morgan calls for experimentation and variety in legal education. But Morgan also notes that with the ABA standing at each law school's door, enforcing blanket standards, few law schools would care to innovate. Similarly, the outsized influence of the U.S. News rankings discourages any dean from trying something novel, for fear of a hit in the rankings.

Morgan argues that law schools need to do a better job of training specialists. This means crafting a curriculum that focuses on skills and offers substantive experience in a field. But Morgan does not endorse the recommendations of what he

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