Reviewing (and Reconsidering) the Voting Rights Act

By Abigail Thernstrom *

Race is the third rail of American politics. So perhaps it's no surprise that Congress recently passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 with almost no dissent. In the House of Representatives the vote on July 13 was 390 to 33, with many in the small band of opponents objecting primarily to a bilingual ballot requirement, arguably the least important of the issues on the table. The bill reached the Senate a week later, on the day the President was rushing to the NAACP's annual convention to beg for appreciation. That afternoon, the final vote in the world's greatest deliberative body came down 98-0.

Bush quickly signed the bill into law on July 27—not even waiting for the Voting Rights Act's 41st anniversary, ten days later. It was altogether a rush-job. Of course, the core provisions of the 1965 statute are permanent. At issue were the temporary provisions, which were not due to expire until August 2007. But Congress acted twelve months ahead of the deadline, with the Administration's blessing and scarcely any debate, in a clear political panic.

No one is sure what the new, so-eagerly-embraced statutory language means. But the statute has been a murky mess for decades—and one that has little to do with voting rights in their common-sense meaning. Access to the polls for southern blacks—ninety-five years after the passage of the Fifteenth Amendment—was the original Act's sole purpose. That aim had been easy to understand; the deliberate disfranchisement that pervaded the South was a clear moral wrong. By now, however, the act has become an instrument for the creation of safe, race-driven (and thus almost inevitably contorted) legislative districts for candidates that black and Hispanic voters prefer. How did we get from there to here? And is this really where we want to be?

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The day the Reauthorization Act was signed into law, Wade Henderson, executive director of the Leadership Conference on Civil Rights, offered a toast: "We had the commitment; we had the expertise; we had the drive and we had the optimism of the most wonderful civil rights coalition, men and women right here in this room . . . And it worked, better than we could possibly have imagined."[1] He certainly had reason to be pleased. The coalition had gotten everything it wanted in the statute.

In great part, their complete triumph was due to the protected status of civil rights bills in general. The title of the Act alone—containing the names of Fannie Lou Hamer, Rosa Parks, and Coretta Scott King—was politically intimidating, clearly the inspiration of a marketing genius. But, in addition, the Voting Rights Act is barely understood by most of the public. The issue before Congress was easy to distort and demagogue.

Just a taste of that distortion and demagoguery: "Most people do not know the Voting Rights Act is in jeopardy . . . . It'll be time to go back to the streets and march to alert people and mobilize people before the fact, not after the fact. 2007 will be too late," Jesse Jackson said in an interview reported in August 2005.[2] Georgia Rep. Sanford Bishop spoke of the danger of "Reconstruction revisited" if Congress did the wrong thing—by which he undoubtedly meant the end of Reconstruction.[3] Shortly before the 2004 elections, the NAACP branch in Tacoma, Washington sent out a newsletter that declared: "In the year 2007 we [i.e., black Americans] could lose the right to vote!"[4] That widely circulated rumor forced the Justice Department to post on its web site a "Clarification" to reassure Americans that "[t]he voting rights of African Americans are guaranteed by the United States Constitution and the Voting Rights Act, and those guarantees are permanent and do not expire."[5]

"From the beginning of the reauthorization process . . . critical facts were repeatedly ignored or misunderstood . . . ," Senators Cornyn and Coburn noted in "Additional Views" appended to the Senate Judiciary Committee Report on the bill. "[M]isunderstanding about the nature and timing of the expiration of certain provisions of the Voting Rights Act," they went on, "contributed to an unnecessarily heightened political environment that prohibited the Senate from conducting the kind of thorough debate that would have produced a superior product."

Some of the confusion (but not all) was the consequence of willful deception. Amazingly enough, not even the White House seems to have understood the 2006 statute that it so strongly backed. Its own "Fact Sheet" (available on the White House web site) describes the newly amended legislation as extending "[t]he prohibition against the use of tests or devices to deny the right to vote in any Federal, State, or local election."[6] In fact, "the use of tests or devices" has been permanently banned since 1975. But perhaps the White House can be forgiven; outside a small circle of voting rights scholars and attorneys, almost no one understands the Voting Rights Act. Once simple, it has become absurdly complicated—a fact that, in itself, stifles debate.

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It's not possible to cut through the confusing statutory mess without understanding the Voting Rights Act as it was originally envisioned. The single aim of southern black enfranchisement dictated the entire structure of the Act in 1965. The legislation contained both permanent and

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temporary provisions. Section 2, its permanent opening provision, restated in stronger language the promise of the Fifteenth Amendment, while Section 3, for example, gave federal courts permanent authority to appoint "examiners" (registrars), or observers, wherever necessary to guarantee Fourteenth and Fifteenth Amendment voting rights. Those federal officers could be sent to any jurisdiction in the nation.

The temporary provisions of the Act—which made the statute the effective instrument for racial change that it was—constituted emergency action. Section 4 contained a statistical trigger designed to identify the states and counties targeted for extraordinary federal intervention. No southern state was singled out by name. Instead, jurisdictions that met two criteria—the use of a literacy test and total voter turnout (black and white) below 50% in the 1964 presidential election—were "covered."[7]

The logic of the statistical trigger was clear. Literacy tests were constitutional, the Supreme Court had held in 1959, but the framers of the Act knew the South was using *fraudulent* tests to stop blacks from registering.[8] Blacks were being tested, for instance, on their ability to read the *Beijing Daily*. Thus, those who designed the legislation took the well-established relationship between literacy tests and low voter turnout in the South, and used the carefully chosen 50% figure as circumstantial evidence indicating the use of intentionally fraudulent, disfranchising tests.

Critics complained that the 50% figure was arbitrary. But in 1965, the framers of the statute had worked backwards. Knowing which states were using fraudulent literacy tests and had been turning a blind eye to violence and voter intimidation, they fashioned a statistical trigger that would bring under coverage only those jurisdictions in which blacks would remain disfranchised absent overwhelming federal intervention.

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From the inferred presence of egregious and *intentional* Fifteenth Amendment violations in the states that had both a literacy test and low voter turnout, several consequences followed. Literacy tests in the covered jurisdictions—all in the South—were suspended and, at the discretion of the Attorney General, federal "examiners" and observers could be sent to monitor elections.

In addition, Section 5 stopped covered states and counties (those identified by the statistical trigger in Section 4) from instituting any new voting procedure in the absence of prior federal "preclearance." Only changes that were shown to be nondiscriminatory could be approved—that is, "precleared"—either by the Attorney General or the U.S. District Court of the District of Columbia. The former became the usual route, saving affected jurisdictions both time and money.

It was an extraordinary provision; state and local laws are usually presumed valid until found otherwise by a court. But whenever a covered jurisdiction altered a rule or practice affecting enfranchisement, invalidity was presumed. In the context of the time, however, it was perfectly reasonable to believe that *any* move affecting black enfranchisement in the Deep South was deeply suspect. And only such a punitive measure had any hope of forcing the South to let blacks vote.

The point of preclearance was thus to reinforce the suspension of the literacy tests. Section 4 banned literacy tests in the covered jurisdictions—those southern states identified for emergency intervention. Section 5, preclearance, made sure the effect of that ban stuck. It was a prophylactic measure—a means of guarding against renewed disfranchisement, renewed efforts to stop blacks from registering and voting. In 1965 no one could imagine it would be used to ensure districting that was "racially fair"—by ill-defined and indeed indefinable standards—or to insist on single-member districts drawn (to the greatest extent possible) to ensure proportionate racial and ethnic representation whenever a city annexed suburban territory to enlarge the tax base.

Originally, Section 5 applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Had the scope of the Act been wider and the trigger less accurate—had it hit states outside the South and allowed federal intrusion into traditional state prerogatives to set electoral procedures where there was no evidence of appalling Fifteenth Amendment violations—it would not have survived constitutional scrutiny. The emergency provisions were passed in the context of the "unremitting and ingenious defiance of the Constitution," Chief Justice Earl Warren noted a year later in upholding the constitutionality of the Act.[9] But, in recognition of their extraordinary nature, these special provisions were designed to expire in 1970—thirty-six years ago. Having just been renewed for another twenty-five years, they are now scheduled to sunset in 2031. The emergency of constitutional defiance has evidently become near-permanent.

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I have described the Voting Rights Act as it was first designed in 1965 not because I believe it should have remained untouched. But its internal consistency and logic make it the benchmark that helps illuminate the illegitimacy of subsequent change wrought by Congress, the courts and the Department of Justice.

Statutory change was inevitable. As early as 1969, the Supreme Court recognized that the list of electoral changes that required preclearance could not be confined to new rules governing voting registration procedures, absentee ballots, the format of ballots, and other such obvious disfranchising devices. Mississippi had tried to stop blacks from getting elected to local office by allowing counties to replace single-member districts with county-wide voting in the election of local supervisors (commissioners). Where whites were a majority of voters in the county as a whole, at-large voting ensured the election of white-preferred candidates. And in response, the Court held (picking up from the reapportionment decisions) "that the right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot."[10]

Faced with such an obvious effort to suppress the power of the new black vote, the Court could hardly refuse to act as it did. Moreover, for civil rights advocates, black ballots were only the first step on the road to political equality; they rightly saw blacks holding public office as critical to their larger goal. Nevertheless, the Voting Rights Act was structured to deal with one kind of question. After 1969 quite another kind was raised.

Preclearance—a provision, remarkably, barely noticed in 1965—permitted the Justice Department to halt renewed efforts to proscribe the exercise of basic Fifteenth Amendment rights; it allowed swift administrative relief for obvious constitutional violations. Attorneys in the Civil Rights Division were expected to confront a straightforward question: Will the proposed change in voting procedure keep blacks from the polls? But after the decision in *Allen*, the questions were no longer so simple. The statute had placed in federal administrative hands (paralegals and equal opportunity specialists as well as attorneys) the insurmountable task of resolving basic questions of electoral equality, determining when ballots "fully" count.

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It should be no surprise that the Justice Department has not been up to the task. Nor has the D.C. district court or the Supreme Court, when called upon to weigh in. Other federal courts deciding other types of cases have also lost their way. If jurisdictions seeking preclearance of a change in election procedure prefer not to use the administrative route, or decide to begin anew (their prerogative) after an adverse ruling by the DOJ, they are confined to the D.C. court. But the doors of all federal courts are open to those seeking redress under another, permanent provision of the Act—Section 2.

Judicial decisions in Section 2 cases have been equally troubling. Section 2 was amended in 1982 to prohibit a method of voting in any jurisdiction (not just those covered by Section 5) that "results in a denial or abridgment of the right to vote." Courts were directed to look at the "totality of circumstances" to determine whether the political process was "not equally open to participation" by members of protected groups. "Not equally open" was defined as meaning that minority citizens had "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

But what was the "totality" that judges had been directed to assess? And against what standard was the absence of proper "opportunity" to be measured? The fill-in-the-blanks statutory language was an invitation to judicial mischief which quite quickly took the form of an insistence on maps that contained the maximum possible number of majority-minority districts. The right to vote, nationwide, had become an entitlement to proportional racial and ethnic representation—to the degree that such proportionality can be created through the crude mechanism of single-member districts. But the assumption that only minority officeholders can properly represent minority voters had never been embraced by Congress—much less, the American public. And indeed it was a notion that other Section 2 language seemed to explicitly reject, although that was immediately (and conveniently) ignored.

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Other problematic amendments preceded that of Section 2. In 1970 the trigger was updated to rest on turnout in the 1968 presidential election. But the formula that determined coverage—a literacy test combined with turnout below 50%—had only made sense in 1965. Turnout in the 1968 presidential election had been low across the nation. Reflecting the national trend, participation in three boroughs in New York City, for instance, had dropped slightly to fall just under the determining 50% mark. Blacks had been freely voting in the city since the enactment of the Fifteenth Amendment in 1870 and had held public office for decades. The doors of political opportunity had not suddenly closed. Rather, faced with a choice between Nixon and Humphrey, more New Yorkers than before had stayed home.

In 1970, assorted counties in such disparate states as Wyoming, Arizona, California, and Massachusetts with no history of black disfranchisement were also put under federal receivership. None of these counties were in the South, and no other evidence suggested that these were jurisdictions in which minority voters were at a distinctive disadvantage. In 1965 the 50% mark (combined with the use of a literacy test) was carefully chosen to make sure the right localities were affected. That same cut-off point was arbitrary when applied to the 1968 turnout data. There was another problem: Two New York City boroughs escaped coverage, and yet what was the logical distinction between Manhattan and Queens? In fact, why not cover Chicago or Cleveland? Once minorities in Brooklyn qualified for the extraordinary benefits of Section 5, there was no logical place to stop.

Further amendments in 1975 compounded the problem of increasing incoherence. The trigger for coverage was once again senselessly updated to rest, as well, on 1972 turnout data. Henceforth, English-only ballots (and other election materials) considered equivalent to a literacy test when used in jurisdictions in which more than five percent of voting age citizens were members of a "language minority"—defined as citizens who were "American Indian, Asian American, Alaskan Natives or of Spanish heritage."

The analogy between fraudulent literacy tests keeping ballots from blacks with Ph.D.s in Alabama and the use of English-only ballots should not have withstood the laugh test. But the end of providing Texas with preclearance coverage—enabling the Justice Department to attack districting plans seemingly unfavorable to Hispanic political power—was regarded as justifying any and all means. And yet, if minority voters in Texas and Arizona were entitled to the extraordinary federal protection that Section 5 provided, why not those in nearby New Mexico, where Hispanics were already above 35% of the population, twice the percentage in Arizona. New Mexico, however, escaped coverage because the state already provided bilingual ballots.

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Concern about electoral arrangements instituted with the unmistakable intention of undermining the power of black ballots was legitimate. That concern, however, need not have led to the picture drawn in *Miller v. Johnson*, for instance, of federal attorneys on an ideological crusade, which produced egregious racially gerrymandered districts designed by the ACLU and forced on Georgia over the objection of a black state attorney general, as well as important black leaders in the state legislature.[11] Nor need it have led to Justice Department attorneys equating the failure to draw the maximum possible number of safe minority districts with discriminatory purpose, as it did in the 1980s and 1990s.[12] In shaping and enforcing the Voting Rights Act, Congress, the courts, and the Justice Department very quickly lost their bearings, and the 2006 amendments continue that unhappy tradition. Moreover, as indicated at the outset, in important respects the statute has become a Rorschach test; who knows how the ink blot will be read by courts and Justice Department attorneys in the future?

This is not a benign story. In a 1994 decision on the legal standards governing minority vote dilution, Justice Clarence Thomas charged his colleagues with having "immersed the federal courts in a hopeless project of weighing questions of political theory." Even worse, he went on, by segregating voters "into racially designated districts . . . [they had] collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation."[13]

The Voting Rights Act cannot be administered like a highway bill. Enforcement depends on unacknowledged normative assumptions, which, when embedded in law, affect the racial fabric of American society. At a minimum, those normative assumptions and the record of administrative and judicial enforcement deserved robust debate before Congress signed on the dotted line this past July.

Footnotes

[1] Hazel Trice Edney, *Leaders Toast Voting Rights Victory But Worry About Getting Toasted*, Atlanta Daily World, Aug. 04, 2006.

[2] Hazel Trice Edney, *Rally Planned for Reauthorizing the Voting Rights Act*, Philadelphia New Observer, Aug. 2, 2005.

[3] Bob Kemper, *Voting Rights Act Under Scrutiny: Georgians in D.C. Oppose Provision*, The Atlanta Journal-Constitution, Oct. 28, 2005.

[4] Quoted in John J. Miller, *Every Man's Burden: Will the Voting Rights Act Be Necessary . . . Forever?*, National Review, Apr. 10, 2006.

[5] U.S. Department of Justice, Civil Rights Division Voting Section, *Voting Rights Act Clarification*, www.usdoj.gov/voting/misc/clarify3.htm.

[6] White House, *Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006*, http://www.whitehouse.gov/news/releases/2006/07/20060727-1.html.

[7] The statutory language refers to both registration and turnout, but the registration figure was, in fact, irrelevant. If any southern state had had registration of, say 51%, but turnout of only 30%, that under 50% turnout would trigger coverage.

[8] The constitutionality of literacy tests was upheld in *Lassiter v. Northampton County Board of Elections*, 306 U.S. 45 (1959).

[9] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[10] Allen v. State Board of Elections, 393 U.S. 544 (1969)

[11] 515 U.S. 900 (1995).

[12] *See* Abigail Thernstrom, Whose Votes Count?, ch. 8 (1988) and Maurice T. Cunningham, Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice (2001).

[13] Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).