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# **Redistricting, Race, and the Voting Rights Act**

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As we have at the beginning of each decade since 1790, Americans this year are participating in a national census. Next year, as has happened after each of those head counts, state legislators around the country will gather to redraw their congressional and state legislative districts. But in the years that follow this redistricting, we will surely be treated to displays of a more recent phenomenon: a slew of controversies over racially gerrymandered districts carefully drawn to ensure that minorities are elected to public office roughly in proportion to their share of the population.

Ironically, these race-conscious districts — and these controversies — are the products not of racism but of the struggle to combat it. They arise from the effort to enforce the Voting Rights Act of 1965: the crowning achievement of the civil-rights movement, and a watershed in the evolution of American democracy.

There can be little doubt that the cause of integrating American politics has triumphed in the years since the act was originally passed. In terms of voter participation and election to local, state, and federal offices, African Americans have made progress that the act's sponsors and champions could barely have imagined. In 2008, a black man was elected president of the United States, garnering 43% of the white vote — roughly the same share secured by his party's white candidates in recent elections — and even winning two former strongholds of southern white racism: Virginia and North Carolina. It seems fair to say that Barack Obama's race was no barrier to (and may even have been an advantage in) securing his election as president.

More broadly, black citizens have made spectacular gains as participants in our civic life, and much of that progress can be traced to the passage of the Voting Rights Act. But today that once-magnificent statute, much changed over four and a half decades, has become a barrier to the political integration that was its original aim.

### **THE ORIGINAL VOTING RIGHTS ACT**

The 15<sup>th</sup> Amendment to the Constitution, ratified in 1870, promised to secure black voting rights. It prohibited the denial or abridgement of the right of any American citizen to vote "on account of race, color, or previous condition of servitude," and empowered Congress to enforce that prohibition by statute. But when the last federal troops pulled out of the South in 1877, blacks were left to fend for themselves in a society dominated by white supremacists. By the 1890s, literacy and "understanding" tests, poll taxes, economic coercion, intimidation, and violence prevented most southern blacks from exercising their right to vote.

By 1965, blacks had made some progress. Whereas an appalling 3% of the 5 million southern blacks of voting age were registered in 1940, by 1964, the figure had climbed to 27% in Georgia and 37% in South Carolina. In fact, in every state except Mississippi, white supremacists were losing ground. But they were far from beaten: Florida and Tennessee were the only southern states in which as many as half of all voting-age blacks were registered.

This constitutional travesty finally became the focus of the civil-rights movement in the early 1960s. And in January 1965, safely elected and eager to pursue an ambitious agenda, President Lyndon Johnson called on Congress to restore to the descendants of slaves their most basic political rights. Both houses passed the Voting Rights Act that summer by comfortable bipartisan margins, and Johnson signed it into law in August.

A number of the act's key provisions were categorical and permanent — restating the basic premise of the 15<sup>th</sup> Amendment, and establishing a system of court-appointed "examiners" (federal election registrars) and observers to oversee racially charged elections around the country. Yet largely overlooked was the original law's most radical provision — a measure that created a temporary, and constitutionally unprecedented, process for keeping state and local authorities from using clever tactics to prevent blacks from voting.

Section 4 of the statute set out an ingenious statistical "trigger" to identify the states clearly deserving of federal intervention (without actually mentioning them). Those who wrote the act knew that literacy tests in the South were utterly fraudulent — illiterate whites could pass them, while black faculty from Tuskegee University often could not — and the act's authors took the well-established correlation between these tests and low voter turnout as evidence of intentional disfranchisement. So states and counties that had employed literacy tests for voting, and that had total (black and white) voter turnouts of less than 50% in the 1964 presidential election, were "covered" by a series of special provisions. The trigger was thus carefully designed to capture Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and some counties in North Carolina.

This "coverage" had several consequences. In the targeted states and counties, literacy tests were prohibited. At the discretion of the attorney general — and without any need for judicial involvement — federal registrars and monitors could be dispatched to these jurisdictions during elections to ensure black access to the polls. In addition, a separate provision, Section 5, forced all covered jurisdictions to submit their proposed changes in election laws and procedures to the Justice Department or the (seldom used) D.C. district court for "preclearance," or pre-approval.

Remarkably, the preclearance provision was barely discussed in the congressional hearings prior to the passage of the act. But it was utterly unique in American law. As Loyola University law professor Richard Hasen has written: "Never before or since has a state or local jurisdiction needed permission from the federal government to put its own laws into effect." Over time, Section 5 became the best-known provision of the Voting Rights Act.

Under this provision, the burden of proving that changes in voting procedures were free of racial animus fell upon the jurisdictions proposing them. So a city that submitted for preclearance a proposed enlargement of its governing council, or a change in its districting map, or the relocation of a polling place, had to prove a negative — demonstrating an absence of discriminatory purpose or, even more difficult, future effect. The mere suspicion of discrimination was thus enough to sink a proposed change.

Section 5 was of course not without its adamant critics, including Supreme Court Justice Hugo Black. In a withering dissent in the 1966 case *South Carolina v. Katzenbach*, Black wrote that by compelling states to "beg federal authorities to approve their policies," the provision "so distort[ed] our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless." Nevertheless, in an 8-1 ruling, the Court upheld the law's constitutionality. The majority asserted that the evidence of what Chief Justice Earl Warren called the South's "unremitting and ingenious defiance of the Constitution" required the kind of severe measure embodied by the preclearance provision. Moreover, the constitutional distortion Justice Black had complained about would only be temporary; Sections 4 and 5 were emergency provisions, slated to expire after just five years.

The brilliant design of the Voting Rights Act — and the Court's strong defense of it — yielded swift results. Black registration rates in the covered states soared: In 1964, fewer than 7% of eligible blacks were

registered to vote in Mississippi; by the end of 1966, the figure had risen to nearly 60%. During the same period in Alabama, registration rates climbed from just below 20% to just above 50%.

But it didn't take southern politicians very long to find a loophole. They realized that while it had become nearly impossible to limit black voters' access to the ballot box, it was still possible to limit the power of the votes they cast. And in the years immediately following the enactment of the Voting Rights Act, a growing number of southern jurisdictions replaced geographic districts with at-large voting, eliminated elected positions in favor of appointed ones, and reconfigured state legislative districts — all in an effort to reduce the effect of the newly surging black vote and to maintain white supremacy.

These deliberate attempts to prevent the transfer of political power from whites to blacks were bound to spark legal challenges. They reached the Supreme Court with the 1969 case *Allen v. State Board of Elections*, which forever transformed the meaning of Section 5. The case involved a series of laws, mostly in Mississippi, that replaced single-member districts with county-wide voting in the election of county commissioners. The reasoning went like this: Within a county, some smaller single-member districts would likely have black majorities, and so would elect blacks to represent them. But in the South at the time, if the entire county became one majority-white district, only whites would get elected — and no white was likely to represent black interests. Because African-American voters could still cast ballots, the introduction of at-large voting did not violate the Voting Rights Act (at least as originally conceived). Still, Mississippi and other states were clearly engaging in unacceptable racist mischief that, as the Court put it, could "nullify" the ability of black voters "to elect the candidate of their choice just as would prohibiting some of them from voting."

In proscribing these moves, the Court expanded the definition of discriminatory voting practices under the act to include devices that "diluted" the impact of the black vote. From then on, Section 5 was understood to empower federal officials to object to at-large voting, districting lines, and other methods of structuring elections — any measure that might have the effect of depriving blacks of expected gains in political power.

The act had been irrevocably altered — for better and for worse. Preclearance took on a far broader meaning, one that required the Justice Department to involve itself far more deeply in state and local political judgments. Of these, the most important turned out to be the redrawing of election districts, required after every decennial census — a process that involves what University of California, Los Angeles, law professor Daniel Lowenstein has called "the woof and warp of [a] state's politics and political culture."

The Court's re-reading of the law meant that blacks in areas covered by Section 5 had acquired a new entitlement: the ability "to elect the candidate of their choice." And in response, the Justice Department began to demand electoral districts drawn to ensure that, at every level of government, blacks held office in numbers proportional to the relevant black population. No longer an effort to secure political equality, the act now ensured that blacks would be treated as politically different — entitled to *inequality*, in the form of a unique political privilege. Race-based districting that amounted to legislative quotas became a federal mandate. In such districts, whites would seldom even bother to compete.

Looking back, it is tempting to argue that this was an obviously dangerous decision by the Court. But the South's swift and effective circumvention of the Voting Rights Act in the wake of its passage demonstrated the truth of what many civil-rights activists had argued: that 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. In the Deep South in 1969 (and beyond), the alternative to de facto reserved legislative seats for black candidates would have been the perpetuation of whites-only politics.

The Court made the right decision in *Allen*. And yet its revised reading of the Voting Rights Act set in motion a process that, through reauthorizations and amendments as well as judicial and administrative interpretations, would destroy the legislation's original logic. By 1995, Judge Bruce M. Selya would call

the statute a "Serbonian bog" into which "plaintiffs and defendants, pundits and policymakers, judges and justices" had sunk. Most tragically, this process would cause the legislation to actually hinder racial progress.

### THE ACT TRANSFORMED

Sections 4 and 5 of the original Voting Rights Act were set to expire in 1970, but five years had not been enough time for the political culture of the South to be meaningfully transformed. The case for reauthorizing Sections 4 and 5 was thus an easy one: The Voting Rights Act had made enormous progress toward its goal, but significant hurdles remained. The act was therefore extended for another five years — reauthorized with amendments that seemed modest on the surface, but would ultimately have quite significant effects.

The most important of these amendments revised the formula for identifying racially suspect jurisdictions. The new trigger preserved the old criteria — flagging jurisdictions that had once employed literacy tests and had voter-turnout rates below 50% in the '64 election — but expanded its reach to include those with below-50% turnout in the '68 election as well.

This "updating" of the trigger made a hash of its original purpose. In 1965, the authors of the Voting Rights Act knew which states they wanted to target, and designed their precise statistical test accordingly. But applying the same benchmark to the 1968 election meant that the Justice Department would have to scrutinize jurisdictions that had no history of racist vote-suppression — like random counties in California and New York. Three boroughs in New York City — Manhattan, Brooklyn, and the Bronx — became subject to DOJ oversight (Queens and Staten Island did not), even though blacks throughout the city had been voting freely since the enactment of the 15<sup>th</sup> Amendment and had held municipal offices for 50 years. The city had not changed; the doors of political opportunity had not suddenly been closed to minority voters. It was just that in the 1968 presidential election, reflecting the national trend, more voters had stayed home than in 1964 — pushing those three boroughs below the 50% threshold.

In fact, when the Voting Rights Act first passed in 1965, New York was the implicit standard against which the racism of southern politics had been judged. But by 1970, three New York City boroughs and Neshoba County, Mississippi — where three voting-rights advocates were murdered in 1964 — had come to be equally restricted in their freedom to structure their own electoral arrangements. And these restrictions were not just theoretical: In 1972, the Justice Department used its preclearance power to object to a Brooklyn districting plan. The problem? The plan provided for a state-senate district in which the population was an allegedly insufficient 61% black. The Justice Department demanded that the district be redrawn so that its voting population would be 65% black, in order to better assure the election of a black state senator.

But what necessitated an absolutely secure black legislative seat in a northern state in which blacks had long been political players? And if Section 5 now demanded districts that were 65% black in Brooklyn, why not in the adjacent borough of Queens? The distinction drawn in 1965 between Mississippi and New York had not been arbitrary; that between Brooklyn and Queens in 1970 clearly was. The 1970 amendments destroyed the clean lines and logical construction of the original voting-rights statute.

That process of corruption continued in 1975, when the act was again reauthorized and amended. Ten years after the passage of the original act, the problem of access to the polls had been solved, and it was Section 5 that had come to be seen as the centerpiece of the statute. Civil-rights advocates wanted to build on the concept of the equally effective vote that Section 5 had been interpreted to promise. They argued that the right to vote included the right to representation; that minority representation could be measured only by the number of minority officeholders; and that justice demanded a national commitment to protecting black candidates from white competition. The renewal of the preclearance provision was thus a foregone conclusion in Congress that year.

To be sure, it was still too early to release the South from the federal receivership into which the region had been placed by the original act. In 1975, the nation was far from the point at which it could be said that southern blacks were equal citizens, free to form political coalitions and choose candidates in the same manner as other Americans. But in further amending the act in 1975, Congress largely ignored the statute's original aim of black enfranchisement and expanded its reach far beyond what its authors had originally intended.

The driving force behind this expansion was the Mexican-American Legal Defense and Education Fund (MALDEF), which wanted for its constituents the same extraordinary protection afforded blacks. They complained that cities in Alabama could not draw new districting maps, move polling places, or even expand their municipal boundaries without federal approval — and yet San Antonio, Texas, was free to adopt at-large voting, redraw the districts from which city council members were elected, and make any other alterations to its electoral arrangements. If blacks were entitled to proportional racial representation, why should Hispanics settle for anything less?

Persuaded by MALDEF, Congress brought four additional "language minority" groups under Section 5 coverage: Asian Americans, American Indians, Alaskan Natives, and "persons of Spanish heritage" (although the record compiled in the hearings before that reauthorization made only a feeble case for the inclusion of these groups, whose experience in the United States was so different from that of southern blacks). Legislators also once again changed the trigger for coverage. Turnout figures for 1972 were added to those of 1964 and 1968, and the literacy test was redefined to include English-only ballots, as if they were equivalent to fraudulent literacy tests in the Jim Crow South. Coverage under the act was thus extended to the entire states of Texas, Arizona, and Alaska, as well as to counties in California, Florida, and South Dakota. These were all jurisdictions in which voting fell short of the 50% mark in 1972, and in which no bilingual ballots were provided for a language-minority group exceeding 5% of the state's or county's population. And all of these changes were set to expire after seven years, rather than five, to ensure that they would influence the redistricting that followed the 1980 census.

By this point, the carefully crafted 1965 statute had become almost unrecognizable. Indisputably, the racial progress that southern blacks had made in the decade since the act's original passage was due in considerable part to the broader definition of disfranchisement adopted by the Supreme Court and subsequently embraced by Congress and the Justice Department. But this definition was very much in line with the act's original intent: to protect southern blacks and allow them to play an equal role in the nation's civic and political life. The extensions of the law beyond that original aim were indefensible.

Yet such extensions continued. When the 1975 reauthorization expired in 1982, a strong case could have been made for another ten-year extension of Section 5 to protect southern blacks in the post-1990 round of redistricting. But important civil-rights spokesmen instead wanted to make Section 5 *permanent* — an idea so constitutionally radical as to be a non-starter. They settled for a still-extraordinary 25-year extension instead.

The 1982 reauthorization also included an even more significant amendment. Section 2 of the original Voting Rights Act had been nothing but a preamble reiterating the nation's commitment to the principles of the 15<sup>th</sup> Amendment. But some activists seized on the provision as a means of repairing the damage (as they saw it) wrought two years earlier by the Supreme Court decision in the case of *City of Mobile v. Bolden*, which had addressed the use of at-large voting to select members of the Mobile, Alabama, city council. In its ruling, the Court had held that the equal protection clause required the same showing of discriminatory *intent* in voting-rights cases as it did in employment, school segregation, and other contexts. Plaintiffs in 14<sup>th</sup> Amendment cases — including those involving alleged electoral inequality between minorities and whites — therefore could not prevail without evidence of discriminatory purpose. In the view of the civil-rights community, that requirement would prove impossible to fulfill (despite much legal precedent to the contrary). So why not avoid the hassle of constitutional litigation in the first place by altering the Voting Rights Act? Section 2 was thus amended to make discriminatory "result," not purpose, the standard by which voting-rights violations would be judged nationwide. Such a "result" would be

apparent wherever minority-group members had relatively less opportunity, in the words of the statute, "to participate in the political process and to elect representatives of their choice."

Unlike Section 5, Section 2 had nationwide reach. And whereas Section 5's preclearance applied only to changes in electoral procedure made after the passage of the 1965 act, the new Section 2 allowed lawsuits attacking longstanding election methods. Moreover, unlike Section 5, it was a permanent provision, meaning it would never come up for renewal. The language of the amended Section 2 was a civil-rights lawyer's dream: a disparate-impact test for discrimination, wrapped in the rhetoric of opportunity. Equal results and equal opportunity had become one and the same.

Section 2 quickly became a powerful tool to attack methods of voting that failed to elect minority representatives in proportion to the minority population in jurisdictions across the nation. As Justice Sandra Day O'Connor pointed out, the new Section 2 could mean only one thing: "a right to usual, roughly proportional representation on the part of sizable, compact, cohesive minority groups." As with Section 5, proportionality was the inevitable standard against which racial fairness would come to be judged — for anything short of proportionality would suggest at least partial dilution of a minority vote.

Section 5 was due to expire again in 2007. But as the date for renewal approached, the prospect of racially charged controversy sent both Democrats and Republicans into a state of panic. Thus, an entire year before the expiration date, a Republican-controlled Congress once again renewed Section 5 — for another 25 years. The temporary, constitutionally extraordinary emergency provision had turned into a near-permanent rule. Other amendments further strengthened the act in a variety of legally complicated ways, but the trigger for coverage remained the 1972 turnout figures — even less relevant to the question of enfranchisement than they had been 25 years earlier, and now in place through 2032.

### **A LEGACY OF PROGRESS**

During the 2006 Voting Rights Act reauthorization process, the House Judiciary Committee argued in its official report that "Discrimination today is more subtle than the visible methods used in 1965. However, the effects and results are the same." Rarely in the rich annals of congressional deceit and self-deception have more false and foolish words been written. No meaningful evidence supported this extraordinary claim, which did a disservice to the nation by refusing to recognize the remarkable revolution in race relations that occurred in the second half of the 20<sup>th</sup> century.

Without question, the Voting Rights Act of 1965 was essential to the demise of the Jim Crow South. It ended whites' exclusive hold on political power, which had made all other forms of southern racial subjugation possible. It was an indispensable and beautifully designed response to a profound moral wrong.

Even the drawing of race-conscious districts in the South was a reasonable way to address a grave problem. And it ultimately proved both effective and justified. The history of whites-only politics in the segregated South had made the emergence of black officeholders both symbolically and substantively important. Moreover, southern blacks came to politics after 1965 with almost no experience of organizing as a conventional political force. Thus, race-based districts in areas that had historically disenfranchised blacks were arguably analogous to the high tariffs that had 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.

Many conservatives have argued that race-driven legislative maps violate the basic color-blind principles to which America should be committed. But context matters. While it is relatively easy to take an uncompromising stance against many racial classifications in higher education, for instance, it is more difficult when the issue is race-conscious districting lines drawn to increase black office-holding.

Racially gerrymandered districts, like preferential admissions, protect black candidates from white competition. But the realm of politics is not the same as higher education. There are few objective

qualifications for political office — the equivalent of a college or professional degree, a minimum score on the SATs, or a certain grade-point average. And the alternative to racially preferential admissions at the University of Michigan, for example, was never an all-white college or law school. The university had had no history of de jure segregation, and blacks had always been a presence on the campus (although one that was too small in the view of civil-rights advocates). Compare this to southern politics before the Voting Rights Act, in which the aim had been to keep black officeholders out entirely. Moreover, strong evidence suggests that racial double standards in higher education do not work as advertised: Rich empirical work by UCLA law professor Richard Sander has shown that black students preferentially admitted to law schools fail the bar exam at disproportionately high rates. It is possible, he finds, that racial preferences have reduced, rather than increased, the supply of black attorneys. Race-based districts, on the other hand, reliably elect blacks and Hispanics to legislative seats.

Consider that in 1964, only five blacks held seats in Congress — none from any southern state — and just 94 blacks served in any of the 50 state legislatures, with only 16 in the southern states that were home to half of the nation's black population. But largely as a consequence of race-conscious districting, the Congressional Black Caucus today has 42 members, 17 of them from the South. And as of 2008, almost 600 blacks held seats in state legislatures; another 8,800 were mayors, sheriffs, school-board members, and other officeholders. Fully 47% of these public officials lived in the seven states originally covered by the Voting Rights Act, even though those states now contain only 30% of the nation's black population. Especially striking is the fact that Mississippi — which once had a well-deserved reputation as the most white-supremacist state in the union — now leads the nation in the number of blacks elected to political office.

Blacks who came north, beginning with the Great Migration in 1915, faced nothing like the barriers to political participation evident in the South (indeed, political parties worked hard to mobilize black voters). And yet today, the former Jim Crow states look very much like the more historically open New York, Illinois, and Michigan. The South is back in the union.

### **A LEGACY ENDANGERED**

Race-conscious districting, particularly in the South, was thus defensible and appropriate in the years in which few southern whites would vote for black candidates regardless of their qualifications. But they have come with costs. And these costs have increased in importance as some race-conscious districts have devolved into so-called "bug-splat districts" — so contorted to segregate black and white voters that they raise serious 14<sup>th</sup> Amendment questions — even as racism among white Americans has waned.

Creating safe black districts and safe white ones is plainly an "effort to 'segregate...voters' on the basis of race," Justice O'Connor wrote in 1993. As such, she said, the districts threaten "to stigmatize individuals by reason of their membership in a racial group." As voting-rights scholars T. Alexander Aleinikoff and Samuel Issacharoff have observed, racial sorting of this kind creates advantaged and disadvantaged categories — groups that are privileged and groups that are subordinate. Districts drawn to meet the proportional racial representation standard embedded in the Voting Rights Act are designed to privilege blacks, and in such districts whites are reduced to "filler people" — usually irrelevant to the outcomes of elections.

Harvard law professor Cass Sunstein has observed another pertinent phenomenon. Across the political spectrum, when people talk only to those who are of like mind, they end up with more extreme views than they would hold otherwise. The majority of voters in districts drawn for the sole purpose of maximizing black representation are not likely to talk much to people who don't share their left-leaning, race-conscious values. And aspiring politicians who seek office in such settings are free to confine their appeal to these rigid ideological niches.

Black candidates who run in safe black districts thus tend to be to the left of most white voters. Their isolation from white centrists and conservatives deprives them of the broad experience necessary to win

higher office. Perhaps this explains why so few members of the Congressional Black Caucus have run for statewide office. It is doubtful that anyone can imagine, for instance, South Carolina representative James Clyburn mounting a campaign for the Senate, let alone the presidency, despite the fact that he is a well-respected, long-serving political figure. He is a *black* politician with a majority-*black* constituency. He ran on his racial identity, but having done so has limited his further prospects.

There are exceptions to this rule, of course. This year, congressman Artur Davis is running for the Democratic nomination to be governor of Alabama; it is worth noting, though, that he is one of the few members of the Congressional Black Caucus rated as relatively centrist by the non-partisan *National Journal*. And the most successful black politician in American history, President Barack Obama, actually failed in his one attempt to run for office in a majority-minority district — a 2000 race for the U.S. House of Representatives. As voting-rights lawyer Michael Carvin has said:

[T]he best thing that ever happened to Obama was [that] he ran for a heavily minority black congressional district in Chicago and lost. If he had won, he would have just become another mouthpiece for a group that is ghettoized in Congress and perceived as representing certain interest groups in the legislature.

In still another respect, race-conscious districting may act as a brake on black political advancement. The creation of majority-minority constituencies has not overcome the heritage of political apathy created by the long history of systematic disfranchisement. A number of scholars have shown in recent years that black voters, and therefore black-majority districts, are generally less politically engaged and mobilized. Vanderbilt University law professor Carol Swain has found that turnout in black-majority congressional districts across the country is especially low. She notes, for example, that just 13% of eligible voters showed up at the polls in 1986 in then-congressman Major Owens's 78% black district in New York City. If constituents in Owens's district felt more empowered with a black man representing them in Washington, it certainly did not inspire many of them to bother to vote.

James Campbell, a political scientist at the University of Buffalo, has supported Swain's findings. Campbell found that, in 1994, more than 60% of congressional districts in which racial minorities were the majority ranked in the bottom quintile in terms of voter turnout. The most recently published review of the scholarly literature on this subject is a 2007 article by Harvard political scientist Claudine Gay; summing up what we have learned from previous investigations, Gay observed: "Limited electoral competition and low voter turnout are widely viewed as defining features of districts with black or Latino majorities." The "lack of competition" serves to "discourage participation" and reduces "the incentive for candidates or parties to mobilize voters." In the districts from which members of the California Assembly were elected in 1996, Gay found, voter turnout exceeded 60% of registered voters in only *one-quarter* of the majority-minority districts — compared to 90% of the white-majority districts.

Racial gerrymandering also contributes to the larger problem of political polarization. By concentrating black voters in safe black constituencies, it tends to "bleach" adjoining districts. In the more conservative South, those whiter surrounding districts tend to be safely Republican while black districts are safely Democratic. In this and other ways, the Voting Rights Act has had important partisan as well as racial consequences.

Race-driven majority-minority districts are more or less carved in stone as long as the current interpretation of Section 5 endures. The preclearance provision prohibits so-called "retrogression" — districting after a decennial census that reduces the number of safe minority legislative seats. Thus, when new maps are drawn after 2010, safe black districts will remain safe. The Voting Rights Act has made them sacrosanct. As a consequence, to a substantial degree it is race, not politics, that drives the legislative districting process. And when it comes time for elections in these districts, the non-racial agendas of parties, incumbents, and challengers are recklessly ignored.



## GETTING BEYOND RACE

In its current incarnation, the Voting Rights Act rests on the assumption that, even today, black voters would be helpless victims of racism without extraordinary federal protection. Everyone knows, however, that this notion is absurd. Black officeholders and black voters have become politically powerful, but it is not their power alone that protects them. American racial attitudes have changed dramatically, even in the South. And in those places where racial exclusion is alleged, an army of federal attorneys and civil-rights activists stands ready to intervene.

Black voters today are largely ready and able to take full part in American political life. Fifteen years ago, one of the most liberal members of the Supreme Court put the matter plainly: "Minority voters," Justice David Souter wrote, "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."

Pulling, hauling, and trading to find common ground describes the post-racial American polity the Voting Rights Act was intended to create. But it is not the direction in which the contemporary enforcement of the act is taking us. The statute compels us to keep race at the center of our political process, suggests to aspiring black politicians that they should confine themselves to racially safe ground, and encourages black voters to retain a deep pessimism about white racial attitudes that no longer seems justified by the realities of American life.

In February 2008, voters in an Alabama county that is more than 96% white sent a black man, James Fields, as their representative to the state House of Representatives. "Really, I never realize he's black," a white woman told a *New York Times* reporter. America has changed, the South has changed, 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 — bear no relationship to those that plagued the South in 1965. As New York University law professor Richard Pildes wrote in 2006, the statute has become "a model from earlier decades that is increasingly irrelevant and not designed for the voting problems of today." At the congressional hearings preceding that year's reauthorization of the act, he and other liberal voting-rights scholars urged Congress to pass a different statute for a new era.

Of course, no one should doubt the importance of the 1965 statute in making America a nation very different from the one in which I grew up not so many years ago. Race-conscious districting was legitimate as a temporary measure to give blacks what Daniel Lowenstein has called "a jumpstart in electoral politics." But Lowenstein makes a further important point: "A jumpstart is one thing, but the guy who comes and charges up your car when the battery's dead, he doesn't stay there trailing behind you with the cable stuck as you drive down the freeway. He lets it go."

It is time to let race-driven districting go. Congress is undoubtedly too timid to act anytime soon, but the Supreme Court should strike down Section 5 in its current form as unconstitutional. The Court had a chance to do so in 2008 and took a pass, but another, stronger case is bound to end up on the docket before long. The result would likely be a substitute statute — one surely still far from perfect, but perhaps better suited to today's cultural and electoral landscape. And if the Court hears a case regarding Section 2, it should at least require that the statute be interpreted as those who pushed for its passage in 1982 originally insisted it would be: as a means to protect against genuine racism.

America is much better off with the increase in the number of black elected officials made possible in large part by the deliberate drawing of majority-minority districts. But black politics has come of age, and black politicians can protect their turf, fight for their interests, and successfully compete — even for the presidency. America should celebrate, and move on.

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