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THE VOTING RIGHTS ACT

INTRODUCTION

The Voting Rights Act of 1965 is the most successful civil rights measure ever enacted by Congress. The Fifteenth Amendment declares that the right to vote shall not be denied or abridged by the United States or any state on account of "race, color, or previous condition of servitude," and it gives Congress the power to enforce this right "by appropriate legislation." The Voting Rights Act, without question, was appropriate legislation. Prior to its adoption, only 6.8 percent of voting-age blacks were registered to vote in one southern state; thanks to the Act, that proportion is now almost 70 percent, and in 1980 almost 60 percent of them actually voted.

The denial of the right to vote is a fact of profound significance. According to the Declaration of Independence, government derives its just powers from the consent of the governed, and the governed give their consent in order to secure the natural rights with which all men are equally endowed. In other words, just or legitimate government arises out of, or depends upon, the consent of those who subject themselves to its laws. "We, the people of the United States" gave our consent when, in 1787-88, we ratified the Constitution; except in a few isolated cases, however, black Americans were not given the opportunity to vote for or against the Constitution. In flat violation of "the laws of nature, and of Nature's God," they were governed without their consent. Consequently, they had no opportunity to exercise their political right to be part of the constitutional majorities that wrote the laws of the United States. And from the denial of that right came the denial of the various civil rights that other Americans enjoyed. The point to be stressed is that voting is the principal security for civil rights, because voting ensures that one's interests must be weighed by those who make the laws.

In order to rectify the wrongs done in the beginning, the Fourteenth Amendment bestowed citizenship on black Americans, making them part of "the people of the United States," and the Fifteenth Amendment sought to guarantee their right to act as citizens; and the Voting Rights Act succeeded in making the exercise of that right a reality for most, but, unfortunately, not yet all of our fellow citizens. There continue to be jurisdictions where the right to vote is being denied, which is why Congress should extend the Voting Rights Act. But the bill that passed the House by the overwhelming margin of 365 votes, and is now before the Senate, is much more than an extension of the 1965 Act. It would authorize a further expansion of the already extravagant powers of the federal judiciary (whose members, we need sometimes to remind ourselves, are dependent on nobody's suffrage); it would be unconstitutional insofar as the powers it bestows on the courts are not among those given to the federal government; and, enforced as we have every reason to believe it will be enforced, it would be destructive of the principle of representative government embodied in the constitutional structure.

The objectionable part of this bill is the amended section 2. In its original form, this section was a mere declaration or statutory restatement of the Fifteenth Amendment. In its amended form, the words to deny or abridge the right to vote have been deleted; in their place have been put the words in a manner which results in a denial or abridgement of the right to vote. This new language will authorize suits against states, counties, and municipalities alleging not that they deny the right to vote but, rather, that the way they apportion seats in a legislature, the way they organize their governing units, the way they count votes, and even the way they define themselves, has the effect of abridging the voting power of groups of voters. Moreover, since, as a restatement of the Fifteenth Amendment, section 2 applies nationally, this new language will affect not merely those jurisdictions with a history of denying minorities their right to vote; it will affect the electoral laws, practices, and arrangements of every political subdivision in the country. If this bill is enacted, all fifty states will be deprived of the authority to decide, for themselves, how to organize themselves.

When, in 1965, this authority was taken from the southern states -- mostly southern states -- and handed over to the Department of Justice and the federal courts, it was understood to be a "Draconian" measure, necessitated only by the discriminatory behavior of those states; and the law enacted to remedy this was understood to be a temporary measure. The offending states and local jurisdictions could "bail out" by demonstrating that they had ceased their discriminatory practices. But there can be no "bail out" from the coverage of section 2. So long as section 2 is in force, the federal judiciary will be authorized to rewrite every state law and every local ordinance affecting the results of every election. And in every state. It will be authorized to do in Boston, Baltimore, and Butte, what the Federal District Court for the Southern District of Alabama did in City of Mobile v. Bolden (100 S.Ct. 1490 [1980]).

The issue in this case was not whether Mobile or Alabama deprived black citizens of their right to vote; it was whether the practice of electing City Commissioners in at-large elections "diluted" the voting strength of black voters. The District Court found "dilution" in the fact that, although Negroes comprised approximately one-third of the city's population, "no Negro had [ever] been elected to the Mobile City Commission." Then, in an exercise of the kind of power we have come to expect from our federal courts, it issued an order disestablishing the commission form of government and the electoral system and decreeing that they be replaced by a mayor-council system with council members to be elected from single-member districts. On appeal, the Court of Appeals affirmed, but a sharply divided Supreme Court reversed. The amended section 2 is intended to reverse the Supreme Court, a fact that the House Report on the bill makes no attempt to conceal.

City of Mobile was not a Voting Rights Act case; since its governing and electoral laws had been in effect since 1911, the city was not required to pre-clear them with the Justice Department. The case was decided under the Fourteenth and Fifteenth Amendments, and, as the Supreme Court read these Amendments, the plaintiffs had to show discriminatory intent. In a Voting Rights Act case, the state, county, or city bears the burden of showing that its electoral laws, practices, and arrangements do not have a discriminatory effect. According to Voting Rights law, a discriminatory effect is one where the minority group's vote is "diluted," and a vote is "diluted" when the group is deprived of the opportunity to elect one of its own. For example, a vote is "diluted" when the number of blacks in an electoral district is not sufficient "to ensure the opportunity for the election of a black representative." (United Jewish Organizations v. Carey, 97 S.Ct. 996, 1008 [1977].) In this case, New York was required to create districts 65 percent nonwhite (and, in the process, had to distribute the members of what had been a consolidated Hasidic Jewish community among other districts).

To reach the required 65 percent goal, New York had to engage in blatant racial gerrymandering. In fact, in redrawing its district lines, race was the only criterion employed, just as it was some 25 years ago when Alabama redrew the boundaries of the city of Tuskegee and, without removing a single white voter, managed to exclude all but a tiny fraction of Tuskegee's black voters from the city (all but four of a total of 400). The Supreme Court had no difficulty in finding discriminatory intent in this action and struck it down as a blatant violation of the Fifteenth Amendment. (Gomillion v. Lightfoot, 364 U.S. 339 [1960].) What Alabama was forbidden to do, New York was required to do; and if the amended section 2 is adopted, every state will be required to do.

One of Chief Justice Warren's legacies to American politics is the aphorism, "Legislators represent people, not trees or acres," and, that being so, the states were forbidden to apportion seats in either house of their legislatures on any basis other

than population. Now, according to these Voting Rights cases, legislators must represent not undifferentiated people -- people defined only as individuals living in districts of approximately equal size -- but groups of people defined by their race or language preference, and they can be said to represent them only if they are of that race or prefer that language.

What sort of electoral system can, in practice, "ensure the opportunity for the election of a black representative?" There can be no doubt but that an at-large system has the effect of "diluting" the black vote -- wherever there is racial bloc voting and wherever blacks constitute a minority. (Look at the U.S. Senate.) There is also no doubt but that, without blatant gerrymandering, a single-member district system is not likely to overcome vote dilution. (Look at the U.S. House of Representatives.) (The various states are now trying to reapportion their election districts -- state and federal -- in the light of the 1980 census; and one shudders to think of how much more difficult that task will be when, in addition to meeting the equal population requirement, they are required to reapportion with a view to ensuring "the election of a black [American Indian, Asian American, Alaskan Native, or Spanish Origin] representative.") The only system that can meet the new section 2 requirement is proportional representation.

I am not unmindful of the disclaimer in the amended section 2 -- that disproportionality of result "shall not, in and of itself, constitute a violation of this section." All that means is that some factor in addition to disproportionality will have to be present before it can be said that a group's vote has been abridged by being "diluted." What factors? They can be found in the cases already litigated. Despite the disclaimer, the amended section 2 will require proportional representation of blacks and the language minority groups -- in all 50 states.

This will almost surely promote racial bloc voting, on the part of whites as well as nonwhites, and that is not something we should be trying to do in this country. The principle of such voting is that a person's interests are defined by his race, that, for example, a black can be fairly represented only by a black and not, for example, by Peter Rodino; that white can be fairly represented only by a white and not, for example, Edward Brooke or Tom Bradley. If that were true, why bother to hold elections? Why gerrymander districts, why replace at-large systems with single-member districts, or plurality voting with majority, and so on, in order to ensure the proportional representation of nonwhites? Why does the Constitution require elections? The answer to this question turns on the Constitution's understanding of representation and representative government.

Representative government does not imply proportional representation, or any version of it that is likely to enhance bloc voting by discrete groups. The Framers of the Constitution referred to such groups as "factions," and they did their best to

minimize their influence. The idea that a legislative assembly should be a "mirror" or a "reflection" of the people was advanced assiduously by the opponents of the Constitution, the so-called Anti-federalists. As one of them said in the New York ratifying convention, "the idea that naturally suggests itself to our minds, when we speak of representatives, is, that they should resemble those they represent." Such an idea may naturally have suggested itself in 1787-88, as it did earlier, but the Framers emphatically rejected it. Representation, as they understood it, was one of the discoveries made by the new and improved "science of politics," discoveries that would, for the first time in history, make free government possible. To them, representation was a means of refining and enlarging the public views "by passing them through the medium of a chosen body of citizens." Under a proper system of representation, "the public voice, pronounced by representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

Whereas the Anti-federalists called for small districts and, therefore, many representatives, the Framers called for (and got) larger districts and fewer representatives. They did so as a means of encompassing within each district "a greater variety of parties and interests," thus freeing the elected representatives from an excessive dependence on the unrefined and narrow views that are likely to be expressed by particular groups of their constituents.

Prepared at the request of
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