ARGUMENT

Equal Effects

The Voting Rights Act helps fulfill the promise of democracy. It’s needed today more than ever. By Anita Earls

The core of the 1965 Voting Rights Act is its guarantee that the right of racial minorities to vote will not be abridged by any electoral mechanism or practice—no matter how well-intentioned those implementing the practice may be. The VRA’s mandate is fairness, but fairness is in the eye of the beholder, and it is not surprising that the act has frequently been attacked. As the Stanford law professor Pam Karlan observed, the act is “a battleground on which whites, blacks, Latinos, Asians, Democrats, Republicans, federal and state courts, Congress, and the Department of Justice struggle for political power.” To suggest that the statute has outlived its usefulness, however, is to misunderstand its purpose and function in our democracy.

The VRA has been the most successful means of incorporating racial and ethnic minorities into the political life of this country at the local, state, and federal levels. It is an accomplishment we should be proud of, not a band-aid we should hope to remove when we think the wound has healed. To be sure, elections and politics have changed since the act was amended in 1982. The black voters who remember having to take a literacy test in order to register to vote are now at least 50 years old; anyone with access to the Internet can download a voter registration application. To qualify to vote, no one has to interpret a section of the U.S. Constitution to the satisfaction of a local voter registrar.

When we think of controversy at the polls today, it’s hanging chads, not poll taxes, that come to mind. The racial focus of the act has changed as well: Latinos have become the largest minority group in the country.

But all these changes notwithstanding, it is not time to leave behind Sections 2 and 5 of the VRA or dismiss them as relics of a bygone era. Hanging chads were, after all, just one of the controversies of the 2000 election; the problems went far beyond machine malfunctions and poor ballot design.

In Florida, the NAACP sued the state on behalf of thousands of black voters who were wrongfully removed from the voter registration rolls when that state decided to use various computerized databases to help determine which of its voters, statewide, were no longer qualified to vote because they had been convicted of a felony. Florida election officials were acting in accordance with state law, but they went about it in such a sloppy way—matching names on felon lists with names on the voter rolls even if only part of a name was the same, and deciding they had a match even when the sex or race differed—that thousands of legitimate voters were disenfranchised. A disproportionate number of those wrongly removed from the voter rolls were black.

The VRA was the only basis for a lawsuit to redress the disproportionate impact of the state’s felon purge. Similarly, when it became clear that even punch card machine problems occurred more frequently in black precincts and unduly invalidated the votes of blacks, the VRA was the clearest and most effective basis for redress.

Because of the law, legal liability did not depend on proof that someone intended the purge of felons from the voting list to affect black voters more severely than white voters or that someone knew that the problems with the punch card machines occurred more heavily in black precincts. All that mattered, and all that should have mattered, was that the practices had discriminatory results.

Changes in election practices make the VRA important today in new ways. As the presidential campaign of Howard Dean is demonstrating, the Internet and its linking of virtual communities is changing how America takes part in politics.

In the past, African-American voters were disadvantaged because they disproportionately lacked access to cars that could get them to the polls and lacked telephones that let them call their friends and urge them to vote. Now they may be disadvantaged because of their relative lack of access to e-mail and instant messaging. The VRA is the only law that provides a means of addressing the interplay of election practices with racially disparate social factors that deny a minority group an equal opportunity to participate in elections.

Parts of the VRA are designed to be reevaluated in light of changes over time. There are valid concerns about what Congress should do in 2007 or before, when the preclearance provisions of Section 5, along with several other VRA measures, are
set to expire. The preclearance provisions require covered jurisdictions to submit any changes in election laws or practices to the Justice Department or to the federal district court in Washington, D.C., for review before they can be implemented. All or some jurisdictions within 16 states are currently covered by Section 5. Many covered jurisdictions used literacy tests or similar devices to limit registration of minority voters. Others imposed English-only requirements relating to voting. Any argument in favor of a preclearance requirement must answer why it should still be applied in these particular states and not the country as a whole, since voting problems for minorities increasingly have appeared throughout the nation.

Still, the prophylactic power of Section 5 has never been fully appreciated. Legislators and other policymakers who decide how elections will be run in jurisdictions covered by the section know that any change they seek to implement will be examined with an eye to whether minority voters are made worse off by the change. They frequently adjust their policies and practices accordingly. They also confer with lawyers in the Justice Department’s Civil Rights Division who are experts on election laws and practices on how those practices affect minority voters.

This is bad? If we require environmental impact statements from businesses and developers in order to protect our natural resources, surely we can require that election laws not be put into place until it is clear they will not disadvantage minority groups, in order to protect our democracy.

THE BASIC GUARANTEE OF THE VOTING RIGHTS ACT—that every voter should have an equal opportunity to participate in the political process—is central to the promise of democracy. The law provides this guarantee without requiring racial majorities, traditionally but not necessarily white voters, to change anything about how they vote.

The remedies contemplated by the act don’t disturb any voter’s choice at the ballot box. Every voter can vote his secret ballot, based on any criterion he wishes, whether it’s a candidate’s age, sex, religion, race, or even his positions on the issues. Every voter can vote his preference. As long as the practices used to screen who qualifies as a voter, how votes are cast, and how votes are counted afford all voters an equal opportunity to participate, the VRA is satisfied.

To address housing discrimination, by contrast, civil rights laws may require that a black family gets to rent an apartment rather than a white family who otherwise would have been the choice of an apartment manager operating from racially biased motives. Laws prohibiting employment discrimination may mean that a Latino with a college degree is hired instead of a white high school graduate when employer bias would have otherwise produced an all-white workforce. The Supreme Court recently ruled that the University of Michigan Law School can take race into account in its admissions decisions even if this results in a qualified white applicant’s not being admitted.

What distinguishes the Voting Rights Act is that its remedies do not affect individual outcomes. They don’t require any voter to change how or why he votes. They don’t allow some voters to vote while prohibiting others from exercising that right. The law simply requires that elections be conducted so that every qualified voter has an equal opportunity to register and to vote, and so that the vote of every voter carries equal weight.

We will never grow out of the need for this requirement. Our political process must be free from discrimination, of course, but it must also go beyond being well-intentioned and be fair in its outcome.

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