1966

Voting Rights Act of 1965: Some Dissenting Observations

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THE VOTING RIGHTS ACT OF 1965: SOME DISSENTING OBSERVATIONS

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On March 7, 1966, the Supreme Court of the United States, over the partial dissent of Mr. Justice Black, sustained the Voting Rights Act of 1965.[1] In the mode of its adoption, the reach of its provisions, and the strength of the reactions it aroused, the act was extraordinary. And the decision which sustained it was no less so in its legitimation of expanded administrative power and in its effect upon the balance of federal and state powers. In order to assess the act, and incidentally the ruling which sustained it, it will be helpful to sketch the basic voting structure provided in the United States Constitution.

Article I, Section 2 of the United States Constitution provides that voters for members of the House of Representatives from each state "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The same standard was incorporated into the seventeenth amendment,[2] adopted in 1913, which provides for the election of United States Senators by popular vote rather than by the original method of election by the state legislatures. Thus, the Constitution envisions that each state shall set its own qualifications for those who may vote in elections for the state legislature, and those voters are automatically qualified to vote for Representatives in Congress and Senators.[3] Similarly, article II, section 1, provides that, in presidential elections the members of the electoral college shall be chosen in each state "in such Manner as the Legislature thereof may direct."

The power of the states to fix the qualifications of voters in federal elections is subject to certain limitations. In article I, section 4, Congress is authorized to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives."[4] Article II, section 1, empowers Congress to determine the time of choosing presidential electors and to fix a uniform day on which the electors shall cast their votes. The nineteenth amendment, adopted in 1920, prevents a denial of the right to vote on account of sex; and the twenty-fourth amendment, adopted in 1964, forbids a state to impose a poll tax in elections for federal officers. (By Supreme Court decision, poll taxes are also forbidden in state and local elections.[5])

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[1] State of South Carolina v. Katzenbach, 86 Sup. Ct. 803 (1966). The only sections of the act reviewed were actually §§ 4(a)-(d), 5, 6(b), 7, 9, 13(a), and certain procedural portions of § 14. 79 Stat. 437 (1965), 42 U.S.C. § 1973 (Supp. I, 1965).

[2] The seventeenth amendment provides in part: "[1] . . . The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

[3] See *Ex parte* Yarbrough, 110 U.S. 651, 663 (1884).

[4] Article I, § 4, prohibits Congress from regulating the places of choosing Senators. But this restriction has been rendered obsolete by the seventeenth amendment requirement that Senators be elected by popular vote.

[5] Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

The most important restrictions on the states' power to set qualifications for those who may vote in state elections are found in the fourteenth amendment,[6] adopted in 1868, and the fifteenth amendment, adopted in 1870.[7] Under the fourteenth amendment, it has been held that the right to vote for national officers is one of "the privileges or immunities of citizens of the United States,"[8] and, therefore, it may not be abridged by any state. More importantly, the fourteenth amendment provides that a state may not deny the franchise in any election on any arbitrarily discriminatory basis, for that would be a denial of "the equal protection of the laws."[9] The fifteenth amendment, like the equal protection clause of the fourteenth, has been held to apply to elections for state and local as well as federal officers.[10] Therefore, a state may not restrict the right to vote in any election, on account of any racial or other invidious discrimination.

However, it must be kept in mind, as the Supreme Court of the United States declared in 1937, that the privilege of voting in state elections "is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."[11] The fifteenth amendment's prohibition against racial discrimination; the nineteenth's against discrimination by sex; the prohibition in the twenty-fourth amendment and Court decisions against poll taxes; and the fourteenth amendment, limit the states' power to determine voter qualifications. But neither these nor any other provisions of the Constitution deprive the states of the power to determine voter qualifications. And it is important to note that both the fourteenth and fifteenth amendments (as well as the nineteenth and twenty-fourth) confer upon Congress the power to enforce them "by appropriate legislation." The basic test to measure any congressional enactment, pursuant to these amendments, to protect the right to vote is then

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[6] The fourteenth amendment provides in part:
Section 1—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 2—But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
Section 5—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[7] The fifteenth amendment, provides in full:
Section 1—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—The Congress shall have power to enforce this article by appropriate legislation.

[8] *Cf.* Wiley v. Sinkler, 179 U.S. 58 (1900); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[9] See Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

[10] See United States v. Reese, 92 U.S. 214, 218 (1876).

[11] Breedlove v. Suttles, 302 U.S. 277, 283 (1937). *But cf.* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

as follows: The legislation, to withstand attack, should be "appropriate." It should be appropriate, moreover, as an enforcement of an amendment primarily designed, not to displace state power, but merely to regulate its use.[12]

In 1957, Congress enacted the first civil rights legislation since 1875. The Civil Rights Act of 1957[13] made it unlawful for an individual, whether acting as a public official or privately, to interfere with the right to vote in any election for federal officers.[14] The act authorized the Attorney General to institute civil suits for injunctions in aid of the right to vote as secured by the act; in addition it authorized the Attorney General to institute such suits in aid of the right to vote at elections in any state, territory, district, municipality, or other territorial subdivision.[15]

The Civil Rights Act of 1957 is an example of "appropriate" enforcement legislation. It made no attempt to displace state standards of voter qualification. Rather it forbade their discriminatory use.

The enforcement provisions of the Civil Rights Act of 1957, including principally the authority of the Attorney General to seek injunctions against interferences with the right to vote, were reasonable in their scope and effect. The Civil Rights Act of 1960[16] strengthened these procedures, authorized the appointment of federal voting referees, and provided safeguards for the perservation and inspection of federal election records. The Civil Rights Act of 1964[17] forbade discrimination by state or local officials in the administration of literacy tests as a qualification to vote in any federal election. But it also established "a rebuttable presumption" of literacy from the completion of a sixth grade education in any school where instruction is carried on in the English language.[18] This provision, in effect instituting a federal literacy test, operates as a partial displacement, rather than mere regulation, of state literacy tests.

We now come to the Voting Rights Act of 1965.[19] The Civil Rights Acts of 1957, 1960, and 1964 have not been vigorously enforced. If they were, there is reason to believe that they would provide ample means for the protection of the right to vote. For example, when a voter registration drive was begun in Selma, Alabama, a federal district court issued an order on February 4, 1965, ordering the registrars of Dallas County to permit all applicants who could write sufficiently to fill out a simple application form to register as voters by July 1965. The court further ordered that a federal voting referee, appointed by the court pursuant to the Civil Rights Acts of 1960 and 1964, would register the applicants in the event that the local registrars failed to do so.[20] The truth is that the court order of February 4th offered ample assurance that the inde-

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[12] Katzenbach v. Morgan, 384 U.S. 641 (1966).
[13] 71 Stat. 634 (1957) (codified in scattered sections of 5, 28, 42 U.S.C.).
[14] 71 Stat. 637 (1957), 42 U.S.C. § 1971(b) (1964).
[15] 71 Stat. 637 (1957), 42 U.S.C. § 1971(c) (1964).
[16] 74 Stat. 86 (1960) (codified in scattered sections of 18, 20, 42 U.S.C.).
[17] 78 Stat. 241 (1964) (codified in scattered sections of 5, 28, 42 U.S.C.).
[18] 78 Stat. 241 (1964), 42 U.S.C. § 1971(a)(2)(C), (c) (1964).
[19] 79 Stat. 437 (1965), 42 U.S.C. § 1973 (Supp. I, 1965).
[20] See generally 11 CONG. REC. 8928-29 (daily ed. May 3, 1965) (remarks of Senator Thurmond).

fensible discrimination in voter registration in Selma could be promptly eliminated.[21] But the court order was not vigorously enforced.

Whatever else is said about it, it is fair to say that the Voting Rights Act of 1965 was not proven to be necessary to ensure protection of the right to vote from racial discrimination. For the existing remedies had not been adequately tried.

But the Voting Rights Act of 1965 is objectionable in its terms as well. It provides, in section 4, that no state, or subdivision of a state, may apply any "test or device" as a qualification for voting in any election if: (1) That state or subdivision maintained "any test or device" as a qualification for voting on November 1, 1964; *and* (2) Less than 50 per cent of the persons of voting age were registered to vote there on November 1, 1964, *or* less than 50 per cent of those persons of voting age actually voted in the election November 1964.

The phrase "test or device" means any requirement that a person, as a prerequisite for registration or voting, demonstrate literacy, educational achievement, knowledge, or good moral character (a later section of the act, section 9, would seem to preserve the right of the state to exclude convicted felons from the ballot), or that he produce registered voters or other persons to vouch for him.

Thus, section 4 contains an automatic triggering device. Once the conditions listed above are found, the state or subdivision in question is automatically disabled from establishing its own standards for voting qualifications, regardless of whether or not those standards are racially discriminatory in their terms or enforcement. Moreover, the conditions listed above, which trigger this disability, have themselves no necessary relation whatever to racial discrimination.[22] They bring to bear the ultimate sanction of suspension of state voter qualifications as a result of the accidental coincidence of numerical circumstances.

Under section 5 of the act, a state or subdivision can recover the ability to fix voter qualifications only by order of a federal district court, sitting in Washington, D.C., if the court finds that no "test or device" had been used during the preceding five years in that state or subdivision for the purpose and with the effect of denying the right to vote on account of race or color. It was on this point that Justice Black dissented forcefully from the majority decision in *South Carolina v. Katzenbach,*[23] which sustained the act. After observing that section 5 confers jurisdiction on federal courts where there is no genuine case or controversy, Justice Black voiced his main objection:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaning-

[21] *Contra,* South Carolina v. Katzenbach, 86 Sup. Ct. 803, 811 (1966); Christopher, *The Constitutionality of the Voting Rights Act of 1965,* 18 STAN. L. REV. 1, 8 (1965).
[22] South Carolina v. Katzenbach, 86 Sup. Ct. 803, 813 (1966).
[23] *Id.* at 832.

less. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments.[24]

A federal law which assumes the power to compel states to submit, in advance, any proposed legislation they have for approval by federal agents approaches dangerously near to destroying the states as useful and effective units in the federal structure of our government.

Another objectionable feature of the act is its substitution, for state voter qualifications, of a federal regime, which in the thoroughness of its control is reminiscent of the Reconstruction era. Under section 6 of the act, the Attorney General, unless overruled by a federal court, can secure the appointment of federal examiners to take over the election machinery in any state or sub-division covered by section 4, if:

1) He has received complaints from 20 or more residents that they have been denied the right to vote on account of race or color, and he believes those complaints to be meritorious; *or*

2) In his judgment, "the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment."[25]

Federal examiners may also be appointed by a federal court in the first instance on request of the Attorney General.[26] In either event, the examiners take complete charge of the electoral machinery in every election from the presidential to a local bond issue contest. The thoroughness of this federal control can be seen from section 12(e). It provides that whenever, within forty-eight hours after any election, any persons who have been placed on the voter lists by the federal examiners claim that "they have not been permitted to vote," a federal district court, on petition of the Attorney General, may direct that the complaining persons be allowed to cast their ballots retroactively before the results of such election shall be valid. This section could operate as an invitation to

[24] *Id.* at 834. (Footnote omitted.)
[25] 79 Stat. 439 (1965), 42 U.S.C. § 1973(d) (Supp. I, 1965).
[26] *Ibid.*

bribery and subornation of perjury. In a closely contested federal, state, or local election, a premium could be placed upon the resourcefulness of defeated partisans in their efforts to procure persons to swear that they were discriminatorily prevented from voting and to swear (without substantial fear of contradiction) that they intended to vote for the apparent loser. By granting to the courts the extraordinary power to count uncast votes retroactively in a post-election investigation, an element of uncertainty could be introduced into the election machinery.

There are other provisions of the act which deserve a searching criticism beyond the limitations of these comments. Section 4(e),[27] for instance, forbids states to deny the vote to persons who are illiterate in English if they have been educated to the sixth grade (or such higher grade as may be presumptive of literacy in the state in question) in a foreign-language school in Puerto Rico or other American territory. While Puerto Ricans are citizens, the only official language of the United States is English and this section will hardly promote a widely-informed electorate. When the Supreme Court upheld section 4(e) as "appropriate legislation" to enforce the fourteenth amendment, Justices Harlan and Stewart protested in dissent against what they regarded as an overextension of federal power:

> To hold, on this record, that § 4(e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere *ipse dixit* can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.[28]

Let us, however, recur to the basic issue: Is the Voting Rights Act of 1965 "appropriate" as a means to enforce the fourteenth and fifteenth amendments' prohibitions against the discriminatory use of state voter qualifications? By accepted judicial standards, it is not appropriate if it is arbitrary, capricious, or unreasonable.[29] It is fair to say that, in its wholesale displacement of state supervision over elections and in its substitution of a thoroughgoing federal control, the act falls short of what can be called appropriate. It may fairly be described, for example, as arbitrary in hinging the operation of its awesome sanctions upon the coincidence of statistical circumstances bearing no necessary relation to racial discrimination. It is capricious in that it applies in states and counties (in Idaho, Alaska, Arizona, and Maine)[30] where there probably is not a pattern of racial discrimination, and subjects them to sanctions "appropriate" to prevent a racial discrimination which does not exist there. It is unreasonable in the pervasive character of its federal regulation and in the degrading complexity and uncertainty of the procedures by which a state can regain its constitutional power over voting qualifications. And it is not wholly irrelevant

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[27] Katzenbach v. Morgan, 86 Sup. Ct. 1717 (1966), upheld the constitutionality of section 4(e).
[28] *Id.* at 1738.
[29] See Champion v. Ames, 188 U.S. 321 (1903).
[30] South Carolina v. Katzenbach, 86 Sup. Ct. 803, 813 (1966).

that the act is unnecessary in that the unused existing legislation was adequate for the job.

Moreover, the Voting Rights Act of 1965 tends to introduce into the law the concept of the universal franchise. Where the act applies, mental capacity and understanding will practically cease to be relevant considerations in determining access to the franchise. Such a parody of the democratic form could entail serious harm to the cause of representative government. In the interest of promoting that cause, it needs to be said that, in terms of qualification to exercise the solemn privilege of voting, there cannot be, in law or in policy, equal protection for idiots and illiterates without compromising the integrity of the electoral process.

This writer suggests a constitutional amendment to restore a proper balance between state and federal powers in the area of voting rights while ensuring that no one can be deprived of the right to vote in any election on account of racial discrimination or any other invidious reason:

1. Nothing in this Constitution shall restrict or limit any state in the enactment or administration of any voting qualification or prerequisite to voting or any practice or procedure governing the registration of voters or the casting or counting of votes, in any primary or other election, provided that any such qualification, prerequisite, practice, or procedure shall apply equally and impartially to all to whom it applies, and provided that the right to vote shall not be denied or abridged on account of race, color, previous condition of servitude, sex, or failure to pay any poll tax or other tax.

2. Congress shall not enact or administer any voter qualification or prerequisite to voting or any practice or procedure governing the registration of voters or the casting or counting of votes, in any primary or other election, and Congress shall not prohibit or suspend the enactment or administration by any state, acting pursuant to Section 1, hereof, of any such qualification, prerequisite, practice, or procedure.

3. Congress shall have power to enforce this article by appropriate legislation; to regulate the times, places, and manner of holding elections for President, Vice-President, electors for President or Vice-President, Senator or Representative in Congress; and to regulate the procedure by which the ballots of the Electors for President and Vice-President shall be cast and counted.

This amendment is not offered with any illusion that its phrasing is infallible. Rather, it is presented here merely to stimulate discussion and an awareness that something should be done to restore the proper division of powers between the states and the federal government. The language is tentative, but the idea is not. An amendment of this sort would restore to the states their rightful control over the eligibility of voters and the casting and counting of votes while reserving to Congress its power to regulate in other respects the times, places, and manner of conducting elections for federal officers. The amendment would confirm the elimination of poll taxes in any elections and would also preserve the existing congressional control over the formal procedures by which the votes of the electoral college are cast and counted in presidential elections. And, most importantly, this amendment would prohibit racial and other invidious restrictions upon the right to vote, while maintaining a proper balance of governmental powers.