The Impact of the Voting Rights Act on American Political Parties

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The weakening of American political parties has been a theme featured in the writings of political scientists for the past several decades. This essay is addressed to developments which may further that decline—developments which have undermined the very purpose which American political parties are said to serve. I refer to legal standards which were established by the Supreme Court in 1964, and which have since been expanded by the Court and then incorporated into the Voting Rights Act of 1965 and its amendment in 1982.[1]

Defense of American Parties

American political scientists have traditionally been strong defenders of American political parties because of the role they have played in the working of American democracy (Epstein 1986, ch. 2). Implicit in that defense has been praise for a two-party system and the single-member district/plurality system of election which supports it. As summarized by Pomper (1980, 1-2), American parties provide

> the means by which . . . various interests can be reconciled and . . . compromised to provide at least partial satisfaction to all contenders. . . . Without unifying mechanisms, campaigns could become, as in nonpartisan elections, divisive controversies between Catholics and Protestants, blacks and whites, Irish and Italian. When they are functioning well, parties submerge these communal classes in a joint search for electoral victory.

After the election, Pomper continues, the cross-district electoral coalitions become legislative coalitions whose cooperative behavior takes the form of "horsetrading, logrolling, and backscratching."

Unfortunately, political parties have not always "functioned well," with the result that a communal group has not always become part of a winning

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coalition but rather has been shut out of the political process. Such has been the case for many years in parts of the South, where state and local elections have not featured competitions between the two major parties or, as in the case of many local elections, have been non-partisan contests. It has been to correct that "shutting out" of a communal group that the Supreme Court through its decisions, and Congress through its enactments, have intervened. The question, then, is whether that intervention may have come to impede the working of the American party system in areas where that system has been functioning reasonably well.

The Concept of Vote Dilution

The problem has its origins in the two "one man, one vote" decisions rendered by the Supreme Court in 1964, *Wesberry v. Sanders* and *Reynolds v. Sims*. Those who defend the role of political parties no doubt welcomed those two decisions since they brought an end to an era when fair aggregation of interests was impeded by the over-representation of rural interests in Congress and state legislatures. However, in those two decisions the Court did more than simply rule that districts had to be essentially equal in population. In justifying that holding the Court in effect held that the representation process, defined as a process which begins with district elections and continues in the legislature, is not important. Nor, by implication, are political parties important. Instead, what is important is the "value" or "effectiveness" of the vote cast by each voter in each district on election day. Each vote must be equally effective in its ability to determine a district election outcome. "Vote dilution" caused by unequal population districts is unconstitutional, a violation of the equal protection clause of the 14th Amendment.

One year after these decisions Congress passed the Voting Rights Act, Section 14 of which stated that one goal of the act was to make a vote "effective." The same emphasis on "effectiveness" and "dilution" continued as the Supreme Court began to deal with the rights of racial minorities who lived in jurisdictions using at-large election systems. Employing the vocabulary of the apportionment decisions, but now in a very different context, black plaintiffs in these systems argued that their votes were being "diluted." In contrast to a single-member district system under which some of the blacks' preferred candidates could be elected, the at-large system deprived them of any victories. In 1971, in a case involving at-large districts in the city of Indianapolis (*Whitcomb v. Chavis*), the Court refused to grant relief to black (and Democratic) plaintiffs making the vote dilution claim. Two years later, however, in a case involving black and Hispanic voters in two

Texas counties, the Court agreed to grant relief and ordered that the at-large system be replaced by a district system containing an appropriate number of so-called "majority-minority" districts—that is, districts in which minority voters were sufficiently numerous that they would be able to elect "legislators of their choice" (*White v. Register* 1973). Finally, in 1992 Congress incorporated into Section 2 of the Voting Rights Act the basic language of that 1973 decision. By this time the coverage of the Act had been expanded to include language minorities, defined as persons of Spanish heritage, Native Americans, Asian Americans, and Alaskan natives.

White v. Register and the "Totality of Circumstances"

Justice Byron White, who wrote the Supreme Court decisions in both the Indianapolis case and the Texas counties case, was obviously reluctant to order the creation of majority-minority districts. Moreover, he seemed sensitive to the role played by political parties in the American system. In the 1971 Indianapolis case he cautioned that once granted to one group, demands for separate representation by other groups—Democrats, Republicans, ethnic groups, religious groups, union workers—are "not easily contained" (*Whitcomb v. Chavis* 1971, 156). They could be satisfied only by changing the election method to some kind of proportional or cumulative voting system. In contrast to places using such systems,

> typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year (*Whitcomb v. Chavis* 1971, 153).

Two years later, after reviewing the "totality of circumstances" in the two Texas counties, White was willing to put aside his concerns and rule that the 15th Amendment required the Court to order the adoption of a districting system designed to allow black and Hispanic voters to elect their preferred candidates. As he reasoned in the case of *White v. Register*, the plaintiffs had shown that

> the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the [multi-member] district to participate in the political processes and to elect legislators of their choice (*White v. Register* 1973, 776).

Included within the "totality of circumstances" was the fact that minorities lacked access to the slating process; public officials were unresponsive to minorities' concerns; there was a history of racial discrimination in the community; and there were various election rules which made a minority candidate's electoral success less likely (e.g., run-off, anti-single shot voting). These various factors were later conveniently codified by a circuit court into eight so-called "*Zimmer* factors" (named thus after the case in which they were listed)—circumstances which could be cited by plaintiffs and courts to justify court-ordered creation of majority-minority districts.

This "totality of circumstance" test was sufficiently severe that over the next several years minority plaintiffs were successful in less than half of the claims they lodged under the 14th and 15th Amendments against districting schemes.[2] In 1980 the Court made a vote dilution claim even more difficult when in a plurality judgment it modified its standards by ruling that plaintiffs must now show that the districting scheme in question was *intentionally* designed to discriminate against minority voters. It was that decision, *City of Mobile v. Bolden* (1980), that prompted Congress in 1982 to amend Section 2 of the Voting Rights Act (heretofore a mere restatement of the 15th Amendment) to incorporate the language of the 1973 *White v. Register* decision, the wording following almost exactly the above quotation. In explaining the purpose of the amendment the Report of the Senate Judiciary Committee emphasized that the goal was simply to restore the *White v. Register* "result" (rather than intent) standard, as well as that decision's "totality of circumstance" test to determine the Act's application. The difference was that now the language was firmly imbedded in statutory law. As it turned out, the 1982 enactment did more than restore the "result" and "totality of circumstance" standards. And that "more" was important because, like the 15th Amendment it effectively replaced as the basis for plaintiffs' claims, Section 2 applied to the entire country. Until then, the major section of the Voting Rights Act, Section 5, applied only to jurisdictions which had a history of low voter participation and a literacy test registration requirement—in effect, areas of the South.

Majority-Minority Districts and Political Parties

As early as 1975 the Supreme Court ruled that not only at-large voting schemes, but also existing single-member district schemes could be challenged as discriminatory. Interpreting Section 5, the Supreme Court ruled that if there were too few districts containing a majority of black voters, or if the extent of minority dominance in those districts was not sufficiently large to make it probable that blacks could elect their preferred candidate,

the jurisdiction in question would have to redraw the district lines to produce the desired result. A case decided in 1977 (*United Jewish Organizations v. Carey*) mentioned a rough standard of 65 percent minority composition.

Exactly how many districts should be designed as "majority-minority" at first was not clear. Invariably, however, in evaluating the fairness of districting schemes courts took note of the proportion of minorities in the total population, thereby strongly suggesting that something approaching proportional representation was appropriate.[3]

Legislative districts craftily designed to produce desired outcomes are, of course, nothing new; political parties have been creating them since the days of Elbridge Gerry. Under the new legal standards, however, the goal of such craftsmanship is enhanced representation of a specific group, not greater representation of one political party at the expense of the other. For those who champion the role of political parties in American democracy, that distinction is crucial. Partisan gerrymandering occurs in the context of a representative democracy and inter-party competition. Racial and linguistic minority gerrymandering tends to transform representative democracy into a kind of direct democracy, making it likely that the candidates "of choice" will be candidates who share the racial or linguistic characteristics of the voters (Pitkin 1967, 84 ff). Such gerrymandering removes, or at least lessens, the incentive for the minority group to join in a party-led coalition, either across districts at the time of the election or in the legislature afterwards. Furthermore, if the minority heavily identifies with one political party, as in the case of blacks and the Democratic party, racial gerrymandering destroys intra-district party competition, and thus destroys the incentive to participate in voting; the remedy for vote dilution turns out to make the act of voting inconsequential (*Congressional Quarterly* 1992).

Where there are no effective political parties, as in many Southern areas, such concerns do not arise. Indeed, in view of the fact that at-large elections, like non-partisan elections, were the product of early 20th century "reforms" designed to reduce or eliminate the role of political parties, the reinstatement of single member district systems in many areas of the South, as well as in some northern jurisdictions,[4] is a development which champions of political parties should welcome. Even where elections remain legally "non-partisan," the creation of such districts can result in creating a "politics of inclusion"[5] of the kind a competitive party system is thought to provide. Concern arises, however, when majority-minority districts are forced upon jurisdictions in which the competitive party system is working reasonably well.

The Expansion of the Voting Rights Act: Racially Polarized Voting

The explanation for the expansion of the use of majority-minority legislative districts into areas of two-party competition is to be found in the way the Supreme Court interpreted the amended Section 2 of the Voting Rights Act.[6] Despite that section's reference to the "totality of circumstances" and the Senate Report's elaboration of the nine such circumstances which might trigger court intervention, the plurality decision in the case of *Thornberg v. Gingles* (1986) reduced the circumstances to one on that list—the existence of "racially polarized" voting—blacks voting as a bloc one way, whites voting as a bloc the opposite way, and in sufficient numbers in an at-large system to defeat the black candidates. Provided that the blacks were sufficiently concentrated to enable them to form a separate legislative district, where such polarized voting existed the at-large system would be declared a violation of Section 2 and a single-member district system imposed. The *Gingles* decision also seemed to make clear that the proportion of such districts should, as far as possible, approximate the minority portion of the population.[7] Any doubt that the three-fold *Gingles* test—white, black bloc voting, concentrated minority population—applied to single member district schemes as well as at-large schemes was removed in 1993 when the Court specifically held that it applied to both in *Growe v. Emison* (1993).

Although the Senate Report had included "racially polarized" voting in its list of nine circumstances (it had not been included in the original *Zimmer* list), the report made clear how that circumstance was to be defined. The Judiciary Subcommittee, urging that Section 2 not be amended, argued that "in many cases racial bloc voting is not so monolithic, and that minority voters do receive substantial support from white voters." In reply the full committee acknowledged that such

> was true with respect to most communities, and in those communities it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test. . . . Unfortunately, however, there still are some communities in our Nation where racial politics do dominate the electoral process (United States Judiciary Committee 25 May 1982, 33).

In sharp contrast to that intention of limited application, in its *Gingles* decision the Supreme Court defined racially polarized voting quite simply: where "black voters and white voters vote differently" (*Thornburg v. Gingles* 1986, 53). The reason the Court chose such a simple definition is clear. Defendants both in *Gingles* and in earlier lower court cases had argued that polarized voting patterns could be explained not in terms of race

but in terms of income, education, newspaper endorsements, campaign expenditures, incumbency, and so forth, and that once these several independent variables were controlled in a multivariate regression analysis a voter's race mattered very little in explaining a voter's candidate preference. Confronted with that argument the Court understandably held that what mattered under the Voting Rights Act was whether there was a correlation between race and voting preference, not the cause of that relationship. The ruling was appropriate since most of the election results analyzed in *Gingles* and earlier cases were from Democratic primary or non-partisan elections.

Justice White, however, could see the danger of the Court's simple polarized voting test, and in his concurring opinion he gave examples of general elections in which Democrats faced Republicans. He urged that the test be applied only in the context of a black candidate facing a white candidate. A lower court judge had also noted that by that simple definition all presidential elections are racially polarized, since black voters vote for Democratic candidates in much higher proportions than do white voters (*Collins v. City of Norfolk* 1984, 386). The 1992 pattern illustrated his point. Exit polls showed that 82 percent of blacks voted for Democrat Clinton, but only 39 percent of whites did so.

Even where a black candidate opposes a white candidate, party loyalties are likely to remain strong in a state with a competitive two-party system. Thus, in the 1993 New York City mayoral election, when incumbent Mayor Dinkins, a black Democrat, was opposed by a white Republican, the polarization was only an enlargement of the previous year's national pattern: 97 percent of the black voters voted for Dinkins, compared to 21 percent of white voters. In 1974, New York City had provided another illustration of the relative power of racial appeals versus party appeals. In that year the Justice Department, acting under Section 5 of the Voting Rights Act—that section applied to three city boroughs—ordered the creation of five "safe" (65 percent) majority-minority state legislative districts. Not only did four of the five districts proceed to elect a white candidate, but each district provided the Democratic candidate with over 70 percent of the vote.

The ultimate test of the influence of Democratic party loyalty on the behavior of black voters is demonstrated when a Democratic white candidate faces a Republican black candidate. Such an example was seen in the 1993 legislative elections in Suffolk County, New York, in a district which had been deliberately designed to contain a majority of minority (black and Hispanic) voters. The white Democrat easily proved to be the "candidate of choice," prevailing over the black Republican. Yet, by the Court's simple definition, the votes were racially polarized: "black voters and white voters voted differently."

In oral argument before the Supreme Court in the fall of 1993, the following exchange was recorded:

> *Justice Ginsberg*: What does it mean to vote cohesively—for one party rather than the other?
> *Assistant to the Solicitor General*: That's one way of looking at it. The voters may also want to elect Hispanics.[8]

The "one way to look at it" reply is perhaps understandable. It reflects the fact that the overwhelming number of voting rights cases have arisen in the context of non-partisan elections or Democratic primary elections. However, unfortunately for those who champion the role of parties, the case being argued involved the increasingly competitive two-party state of Florida.

Implications for Districting in the 1990s

Divorced from the other "circumstances," the simplified *Gingles* test apparently means that minority plaintiffs who live in areas which display the normal Democrat-Republican voter preferences are able to use Section 2 to force the creation of majority-minority districts for congressional, state legislative, and local legislative elections. Whether that interpretation will, in the long run, prove correct is perhaps less important than the fact that those who designed districts following the 1990 census believed it to be correct, or at least believed that it might be correct, and consciously created a large number of majority-minority districts in order to prevent expensive litigation. As the *Congressional Quarterly* (1992) noted, the 1992 amendment "has been interpreted to mandate creation of the maximum number of [Congressional] districts in which minorities make up a majority of the population." That interpretation also held for the design of state and local districts. Thus, the New York State Task Force on Demographic Research and Reapportionment (1992, 1) reported that it had drawn districts "in strict adherence to the requirements of the Federal Voting Rights Act of 1965, as amended in 1982." Not only did the Task Force construct majority-minority districts in the three New York City boroughs, but also it drew eleven such districts elsewhere in the city, as well as two in the surrounding suburbs of Nassau and Westchester, and one each in Buffalo and Rochester. As part of the oral argument referred to above, the Assistant to the Solicitor General was asked by Justice Kennedy whether a state on its own initiative could create majority-minority districts even if the *Gingles* preconditions are not shown. The reply: "The state can reasonably act to preclude a Section 2 claim."

One explanation for states taking such an initiative is suggested by the example of Ohio. Following the 1992 census, the Ohio reapportionment board deliberately created eight majority-minority districts with the apparent approval of the Ohio NAACP. Now, however, it was a group of Democrats who asked the courts to intervene under Section 2, arguing that too many black voters had been "packed" into the eight districts rather than having some of their number distributed in surrounding districts where they might exercise "influence." Since the plaintiffs did not bother to provide evidence to comply with the *Gingles* test, the Supreme Court held that Section 2 did not apply. Thus, the question of whether or not the simplified *Gingles* test will be sufficient to trigger court intervention in a state with an established two-party system was left unanswered (*Voinovich v. Quilter* 1993). What the case did demonstrate, however, was the perverse result that the Voting Rights Act can produce when it is applied to a jurisdiction with a functioning two-party system.

The one hopeful aspect of that 1993 decision was that the Court left open the possibility that in the future it might hold that Section 2 allows for the creation of "influence" districts as a proper way for allowing minorities to exercise their influence in the political process. Such districts are the kind which allow the two-party system to function at its best, encouraging rather than discouraging cross-district coalitions and intra-district competition. One favorable outcome of the recent New York apportionment was the deliberate creation of such influence districts in the Albany area, Syracuse, Staten Island, Suffolk County, and some of the areas adjacent to majority-minority districts.

Conclusion

It may be an indication of their standing in Americans' hierarchy of concerns that the subject of political parties has been mentioned hardly at all in the often intense debate which has surrounded the Voting Rights Act. Not that the functions performed by parties have been ignored in that debate. Quite the contrary. Senator Hatch warned that the amended Section 2 would lead in the direction of conceding to minorities their "share" of office-holders, but would detract from "the more difficult (but ultimately more fruitful) task of attempting to integrate them into the mainstream . . . by requiring them to engage in negotiation and compromise, and enter into electoral coalitions . . ." (U.S. Senate Judiciary Committee 1982). At the opposite end of the political spectrum, law professor Lani Guinier (1992) likewise has seen the danger inherent in majority-minority districts which "may undermine the prospect of achieving policies responsive to minority

needs by isolating black constituencies from the white majority, from other blacks who do not reside in the black district, and from potential legislative allies."

However, such recognition of the pluralistic nature of American politics has been offered without any thought as to what institutional mechanism other than legal mandates might accomplish the desired goals. What both of these observers should have pondered is the fact that virtually all of the voting rights cases have arisen in areas where there has been no competitive party system in operation—in non-partisan elections or Democratic primary elections. Had they done so, they and their allies might have attempted to make sure that they did nothing to impede the working of such systems where they are working reasonably well.

NOTES

[1]The most extensive account of the two 1964 apportionment decisions is Dixon (1968). The Voting Rights Act is the focus of discussion from a variety of perspectives in Grofman and Davidson (1992).

[2]See the testimony by Frank Parker in the 1982 Senate Hearings.

[3]See, for example, *Moore v. LeFlore* (1974) and *City of Richmond v.United States* (1975). In the latter case the Court established the retrogression standard: jurisdictions governed by Section 5 could not change their districting to provide for any fewer majority-minority districts than existed previously. However, the 1982 amendment raised that standard to approximate proportionality (see below).

[4]See *McNeil v. Springfield Park District* (1987), *Gomez v. City of Watsonville* (1988), and *Romero v. City of Pomona* (1989).

[5]The phrase is used by McDonald (1992), 79.

[6]A case decided three years before the Court interpreted the amended Section 2 shows that a variety of the *Zimmer* factors could be shown to be present in a two-party area in the north—in this case, Chicago—and thus lead a court to find a violation of Section 2 and order the creation of additional majority-minority districts (*Rybicki v. Board of Elections* 1983).

[7]The last sentences in Section 2 are: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

[8]*United States Law Week* (1993, 3263). The cases being argued were *Johnson v. De Grandy*, *De Grandy v. Johnson*, and *U.S. v. Florida*.

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