

# Introduction

The Voting Rights Act (VRA) is a sacred symbol of American democracy. The act, the most effective civil rights statute ever enacted in the United States, was the last significant stage in the nearly universal formal inclusion of all adult citizens in American democracy. Yet when laws in a democracy take on the status of sacred icons, the risk arises that they will be viewed as appropriate only for reverence, rather than for the public discussion, analysis, and debate that characterize sound and legitimate policy making. That risk is particularly great with the VRA, because that phrase represents and means dramatically different things to different audiences; when discussion of the act takes place, different minds conjure up distinct features of the act. Yet, like many major laws, the act is comprised of varied provisions, some enacted at different times than others, some justified by distinct policy aims than others.

Although the VRA is among the most important and effective enacted statutes, discussion of it over the last twenty-five years has been confined largely to academic specialists and those who must work with the act, such as judges, lawyers, state and federal officials, as well as politically engaged citizens' groups. But broader public discussion of the act can no longer be avoided. Portions of the act were due to expire in 2007, which has recently forced Congress and the rest of us to consider how to adjust the legislation to the massive demographic, political, and cultural changes of the forty-one years since it was first passed (or the nearly twenty-five years since Congress last revisited it). With a changing Supreme Court, as well as long experience now with implementing the act, this national debate has required, and will continue to require, coming to terms with the experience of various institutional actors, such as the courts and the Department of Justice, in enforcing the act.

This book is titled *The Future of the Voting Rights Act*. To set the stage for considering that future, it is necessary to start with a brief history of the act and its evolution. This history is an important starting point. Consideration of the future of the VRA requires assimilating both the problems to which the act initially responded and the changing context of these issues in the ensuing forty years.

It is startling, in some respects shocking, to recall the nature of American democracy on the eve of the initial Voting Rights Act in 1965. In Mississippi, state laws and manipulative election administration practices had strangled black voter registration to a mere 6.4 percent of eligible voters as late as 1964. In the Alabama county whose county seat is Selma, which became ground zero in the social movement and violent confrontations that helped motivate passage of the act, black residents made up half the voting age population, yet Alabama officials had invented ways to permit only 156 of 15,000 eligible black voters—1 percent—to register to vote. Formal barriers to participation required that those seeking to register pass tests of “good character” or those that required them properly to “understand” and “interpret” various constitutional provisions—tests that election officials could easily manipulate in prac-

## The Future of the Voting Rights Act

tice to exclude particular voters. Poll taxes had to be paid up in full before one could vote in some states. Felon-disfranchisement laws were jury-rigged to include crimes for which blacks were more likely to be prosecuted and convicted than whites, such as wife beating. Literacy tests for voting were required in much of the United States, North as well as South, including states such as New York. These various barriers excluded many poor white and Latino voters as well as African Americans. In some southern states, blacks who tried to register or vote were subject to economic reprisals and intimidation; white employers would fire them or, for those who did not directly depend on white employers, such as black dentists and barbers who serviced only black customers, white employers would seek to destroy these businesses by firing their employees who went to politically active black dentists, barbers, and the like.

In the states of the old Confederacy, these legal barriers had been created in the late nineteenth and early twentieth centuries and remained in place ever since. They had been enacted and enforced despite the Fifteenth Amendment, the constitutional culmination of the Civil War, an amendment designed for the express purpose of barring racially discriminating voting rules and practices. But from 1890 until mid-century, the Fifteenth Amendment was de facto repealed, for all practical purposes, in the South. As Reconstruction faded in the late nineteenth century, white elites successfully “redeemed” their control over southern politics from blacks and poor whites through enactment of massive disfranchisement schemes throughout the region. The Supreme Court, Congress, and various presidents ignored the amendment or lacked the nerve to enforce it; the Amendment became the most willfully ignored one in constitutional history. National legislative efforts to address these issues began to stir only in 1957, when Congress enacted the Civil Rights Act of 1957, the first civil rights statute of the twentieth century, in a process orchestrated by Senate Majority Leader Lyndon Johnson and magisterially described in Robert Caro’s book, *Master of the Senate*. But this 1957 law had had only minimal effect in opening up American democracy by 1965, on the eve of the Voting Rights Act.

The original VRA was the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction. It permitted the federal government to send federal officials into the South to take over the voter-registration process in recalcitrant areas. For states and local governments that had a history of racially discriminatory voting practices, the act also directly suspended the use of various “tests and devices” as prerequisites to registration and voting. And in its central provision—one that looked to the future and is the focus of much of this book—the act directly put, and continues to put, the election systems in certain parts of the country under what is, essentially, a form of federal receivership. The part of the act that does so is known as section 5.

Section 5 was designed to be limited in time and geographic scope. These limitations reflected the law’s extraordinary structure and justification, a structure unique in the arsenal of federal civil rights policy. For areas of the country that

## Introduction

Congress concluded had used racially discriminatory voting practices, Congress suspended key existing barriers, such as literacy tests, and banned those areas from putting into effect any new provision or change that affects voting, no matter how large (redesigning election districts) or small (keeping polls open 1 hour later), until the jurisdiction seeking to make the change gets permission from the federal government. In what is known as the preclearance review process, that permission must be provided by either the United States Department of Justice (DOJ) or a specially designated three-judge federal court in Washington, D.C. Preclearance is denied unless the federal government or federal court concludes that the change is consistent with the VRA. The structure of section 5 thus expresses an exceptionally proactive regulatory philosophy: it puts the burden on the local jurisdiction to submit its proposed change to the federal government and to demonstrate to federal officials or judges that the change will not violate the VRA. Until precleared, no change in voting practices can be made. Section 5 embodies strong skepticism about the parts of the country it singles out. Although government is normally presumed to act lawfully, section 5 turns the tables; in the covered parts of the country, any change in voting is, in essence, suspect until the jurisdiction convinces the federal government the change will not impair minority voting rights.

Section 5 and its “preclearance review” process was designed to apply, and continues to apply today, only to selected areas of the country. From its inception, the act also included another central provision that, unlike section 5, applies uniformly nationwide. This provision, known as section 2, consists of a permanent, nationwide ban on voting practices that deny or abridge minority voting rights. In the early years of the act, this provision was not particularly important. When Congress previously revisited and amended the act in 1982, however, Congress substantially strengthened section 2. Since then, section 2 has been a major vehicle for attacking at-large election structures, redistrictings that dilute minority voting power, voting fees that operate much like poll taxes, and many other practices.

The current act is therefore divided into two distinct structures for protecting minority voting rights. Congress concluded that there were two distinct problems that required distinct solutions: proactive federal oversight for certain regions, based on their history, and a more general nationwide set of rules. The difference between these two features of the act is that the nationwide rule of section 2 operates through the ordinary legal system, rather than the unusual preclearance review process; a voter must bring a lawsuit to challenge a voting practice, the practice can go into effect immediately unless a court enjoins it, and the voter bears the burden of proving that a law violates the act. (Outside the areas reached by section 5, there is no general presumption that state officials are acting illegally in regulating voting.) Section 2 is therefore more costly, more time consuming, and substantively more difficult for those challenging a voting practice than is section 5.

Since originally enacted in 1965, the VRA has been amended several times. Among the most important amendments are those that extend similar as well

## The Future of the Voting Rights Act

as novel protections against discriminatory voting practices affecting Asian Americans, American Indians, and members of language minorities. These amendments extend the nationwide ban of section 2 to forbid discrimination on the basis of membership in specified language minority groups; require the provision of non-English-language ballot materials (section 203) in certain circumstances; and extend the preclearance regime of section 5 to additional jurisdictions based on the presence or effective exclusion of language minorities (which the act did by redefining test or device to include English-only ballot materials, which brought Texas, Arizona, and parts of California within the coverage of section 5). Over time, the VRA has evolved into one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions.

Yet partly because of the scale of this ambition, the Congress that enacted the VRA, as well as the Congresses that have amended it over the subsequent forty years, also recognized that the act had to remain responsive to ever-changing circumstances. That is why, in part, the act was divided into two distinct structures, one designed to be permanent, the other designed to apply to selected regions for a certain period of time. When section 5 was first enacted in 1965, it was designed to be a temporary measure to last five years; in 1970, it was extended for another five years; in 1975, it was extended again until 1982; and in 1982, it was extended for twenty-five years.

That brings us to the present moment. Section 5, due to expire in 2007, was recently reenacted for another twenty-five years. Congress essentially kept much of the same form of section 5 intact while also making a few significant modifications. As we passed the fortieth anniversary of the original VRA, policy makers had to confront the question of how the philosophy and purposes of section 5 should be understood and applied in today's context, as well as in the coming years. Now that Congress has acted, the courts will have to address whether the renewed section 5 is constitutional, given the current context of minorities and voting rights in today's America.

Precisely because the VRA is a sacred symbol of American democracy, that will not be an easy or unfreighted discussion. Given the status and practical effects of the act, any discussion of constitutional challenges to section 5 will create understandable anxieties that hard-fought rights will be whittled away. At the same time, the political, legal, and social changes since section 5 was originally enacted in 1965 have been monumental; even in the twenty-five years since Congress previously revisited the VRA and section 5 in 1982, these changes have been substantial. Over just the last generation, these include the dramatic rise of the Hispanic population, which increases the complexity and polycentric nature of minority voting-rights issues today; the emergence of a substantial cohort of minority legislators who now wield political power in local, state, and national offices throughout the country; the fact that the South, which for nearly a century was the home of a one-party political monopoly of the Democratic Party in state and local elections, is now the site of the traditional two-party competition that has long characterized much of the rest of the country, with substantial but uncer-

## Introduction

tain effects of that competition on minority voters; and the kinds of nuts and bolts problems in running elections and counting votes exposed in the 2000 election cycle and, to a lesser extent, in the 2004 elections.

In the face of these changes, or the even more dramatic changes since the original enactment in 1965, Congress recently confronted the urgent question of whether section 5 should be continued. But the national debate thrust upon the country by the recent reauthorization of section 5 also inevitably triggers more general questions about the nature of voting rights, democracy, and minority participation and representation at the start of the twenty-first century. The questions remain pressing. How are the voting rights of all Americans best protected? What is the relationship between that question and the protection of minority voting rights? How should democratic institutions be designed today to strike the appropriate balance between majorities and minorities in the extraordinary heterogeneity of the modern United States?

This book is designed to address these and related issues. The contributors include the country's leading historians, political scientists, and law professors who work on voting rights and the Voting Rights Act (through both academic scholarship and in practical roles as expert witnesses or lawyers), as well as some of the most experienced practitioners in this field. The approach of this book reflects the much greater complexity surrounding these issues today than in earlier generations when the VRA was before Congress. The views of our contributors range from those who believe section 5 should have been substantially strengthened, to those who believe it should have been extended in largely its current form, to others who argue that it should have been extended but limited and contracted in specific ways, to those who believe that it has outlived its usefulness and should have been allowed to expire. Many contributors suggest, for example, that issues previously treated the same under the act should have now been separated out. A prime example is redistricting, which is more visible and more politically charged than more routine issues affecting voting. Our contributors differ, however, over exactly how redistricting should be treated under the VRA. Some believe that a renewed section 5 should have been limited to issues of major consequence, such as redistricting. Others argue that the very fact that redistricting is so highly visible and contentious means that there are adequate political checks on it (as compared to the relocation of polling places) and that therefore section 5 is no longer needed to constrain practices like redistricting. These differences of view emerging today are particularly revealing because many of our contributors have been influential figures in the evolution of the VRA, either through their scholarship or their direct involvement in prior congressional debates over the act; and at these earlier moments, there was much greater consensus among our contributors about the proper direction the VRA should take. We have not tried to impose any artificial unity on these chapters. The result is a book that accurately captures the range of views among experts today about the future of the VRA.

*The Future of the Voting Rights Act* is immediately relevant to the renewal debates over the VRA just completed in Congress, but its importance also transcends those issues. The book contains some of the most detailed and comprehensive empirical

## The Future of the Voting Rights Act

material ever published on the administration of the VRA. The analyses presented here will be of enduring value in understanding the VRA's ambitious effort to regulate the relationship between majorities and minorities in American democracy. As the renewed section 5 goes into effect, its operation will have to be tested against the considerations and concerns described in this volume. More broadly, the insight, information, and analyses in these chapters inevitably flow beyond the particulars of section 5 to voting rights and the VRA as a whole. It is impossible to separate the questions section 5 itself forcefully raises—how have conditions concerning politics, demographics, and voting rights changed in the United States in the last generation—from questions about the future of the VRA itself. The renewal debates are, inevitably, a catalyst for assessment of the state of voting rights today and for charting the direction the VRA ought to take in coming years.

The opening chapter of this book, by Richard Pildes, frames those that follow by suggesting that all democracies face the general problem of how to build flexibility into the design of their democratic institutions that enables those institutions to adapt original goals of fair representation to changing configurations of political power over time. Presenting the VRA as America's effort to manage this tension, Pildes then applies this insight to the balance between political equality and credible commitments to minorities against majoritarian domination reflected in the VRA. He suggests that the political dynamics in Congress are unlikely to lead it to engage these issues deeply and concludes by speculating whether courts, paradoxically, are the only institutions (in the United States and elsewhere) capable of adapting existing political institutions to changing circumstances.

For historical perspective, the chapter by Peyton McCrary, Christopher Seaman, and Richard Valelly then provides the most comprehensive analysis to date of the way the DOJ has administered section 5 from 1965 to the present. This chapter reflects analysis of all the objections the DOJ has lodged over the years under section 5 to proposed voting changes, and what the overall pattern of these objections tells us about the decade-by-decade evolution of the VRA.

The chapter by Guy Charles and Luis Fuentes-Rohwer applies a similar approach to the state of South Carolina, which was the first state to challenge the constitutionality of the original section 5, in 1965, and which remains a focal point of continuing voting-rights issues.

David Epstein and Sharyn O'Halloran explore the changing political context in which the VRA has operated. This chapter provides data, from 1974 to 2004, on the extent to which white voters have been prepared to vote for African American candidates, in different regions of the country, and whether white-black coalitions can be put together that successfully elect African American candidates. The critical finding of this work—that white voters are now more willing to vote for black candidates, with implications for how election districts can be designed that will elect such candidates—has been the focus of much scholarly debate and judicial decisionmaking.

Richard Hasen's chapter focuses on the constitutional hurdles that the recently renewed section 5 will have to surmount, given the Supreme Court's more aggressive scrutiny that emerged in the 1990s of Congress's powers to legislate.

## Introduction

Samuel Issacharoff, who raises the strongest doubts in this book about whether section 5 should have been renewed at all, focuses on two elements of change since Congress last considered the act in 1982. First, in his view, the DOJ now acts in more partisan ways than in the past, which calls into question the earlier legal strategy of placing primary enforcement responsibility with DOJ. Second, the VRA itself has succeeded in ensuring that black legislators have substantial presence in many legislative bodies and greater ability to protect their interests and those of their constituents than in prior decades of virtually all-white legislative bodies. As a result of these two developments, Issacharoff questions whether section 5 might not only have outlived its usefulness, but become counterproductive.

Bruce Cain and Karin MacDonald examine the mechanism by which the VRA to date has been as effective as it has. They conclude that legislators are extremely risk averse when it comes to losing their control over voting regulations and election-district design to the courts; as a result, legislators strongly internalize the commands of the VRA (indeed, perhaps over-internalize them beyond what the act actually commands) to avoid the risk of litigation and judicial invalidation. Going forward, the fact of legislative risk aversion suggests, in their view, that Congress should have been more accepting of recent Court decisions that incorporate more flexibility for legislative choice into the way the VRA is implemented.

Rodolfo de la Garza and Louis DeSipio explore the limited focus the VRA has given to date to the situation of Hispanic residents and citizens, whose interests with respect to voting rights differ in insufficiently appreciated ways from those of African Americans. They argue, for example, that to maximize Latino voting rights, naturalization procedures should be examined to determine the extent to which they slow naturalization rates, which diminishes Latino voting rights, and that the voting rights of Puerto Ricans who reside on the island should be extended to presidential elections.

Laughlin McDonald, who has litigated voting rights cases for many years, addresses the largely unexplored but disturbing issues facing American Indian voters in areas, such as South Dakota, where those voters are present in significant numbers.

Steve Ansolabehere illuminates the problems with the nuts and bolts of election administration that reached widespread public attention only with the disputed 2000 presidential election—problems with voting technology and election oversight. He collects and analyzes data on whether these problems differentially affect minority voting rights and suggests ways reforms might best address these problems.

Nathaniel Persily suggests approaches that both would have changed section 5 from within, by keeping its essential structure but reshaping it to fit current circumstances, and approaches that would have abandoned section 5's regionally targeted philosophy for more aggressive, nationwide protections of voting rights. Congress's failure to incorporate such changes raises questions about how effective the future of voting rights law will be.

Spencer Overton argues that the factors used in previous decades to identify the parts of the country to which the special, federal oversight of voting should apply

## The Future of the Voting Rights Act

are now obsolete. Both to enhance the likelihood that section 5 will be upheld as constitutional, and to craft a coverage formula that identifies those areas that still remain exceptionally suspect with respect to their treatment of minority voters, Overton constructs new criteria that, in his analysis, will appropriately do so today. Overton then applies these criteria and shows which states they would, in practice, cover. Again, the failure of Congress in the recent renewal process to attend to the considerations Overton raises will generate issues about how effective voting rights enforcement will be going forward.

Michael McDonald pursues a similar problem: how should policy identify today the jurisdictions that warrant the exceptional regulatory oversight that section 5 entails? McDonald demonstrates just how difficult that task is.

Heather Gerken proposes an entirely different, “third way,” for implementing the VRA in the future. She seeks to deal with the uncertainty about how the VRA should develop in coming years by enlisting greater citizen participation on that very question. Her aim is to deemphasize the role of the DOJ, and perhaps the courts, by creating a new structure for the VRA that gives community groups representing voters a more central role in determining how the VRA is implemented in different jurisdictions.

Bernard Grofman and Thomas Brunell argue that the congressional process took place in the shadow of the constitutional issues about the act that Richard Hasen’s chapter identifies; as a result, Congress was required not just to settle on what the majority considers ideal policy, but on which policies will also survive inevitable Supreme Court constitutional review. They then suggest a restructured VRA that would have come closest, in their analysis, to meeting both of these constraints.

The future of voting rights and the VRA have just come to the fore as Congress and the country have recently had the first policy discussion in twenty-five years of how the VRA ought to be designed. Even with that initial policy issue resolved, the relationship between majorities and minorities in American democracy will remain an ongoing, essential issue. So too will questions about how the law, through statutes like the VRA and others, can best protect the right to vote. No more distinguished group of scholars and practitioners has been assembled to address these questions concerning the future of American democracy. The diverse perspectives represented here offer no solace of consensus thinking. But by reflecting the genuine complexity of these issues in the twenty-first century, this book should foster discussion and policy debate about these most vital of issues.

Richard H. Pildes, for the editors