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Policy Matters: Considering Section 2 of the Voting Rights Act of 1965

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When most of us think of the Voting Rights Act of 1965, we usually are reflecting on either Section 2 of the Act or Section 5, which are the Act's principal sections. In shorthand, Section 2 outlaws all practices or procedures which have the effect of discriminating against the ability of any citizen to exercise the right to vote due to race, color or membership in a protected class.

It was intended to be a restatement of the 15th Amendment, applicable to every voting jurisdiction in the nation. (Section 5, eluded to later and in depth in a subsequent brief, is the section of the Voting Rights Act which requires that some, but not all, electoral jurisdictions must seek Justice Department approval for changes in voting policy and practice.) Section 2 is actually 42 USC 1973, although it is referred to as Section 2 because it was initially legislated via Public Law 89-110, Title I, Section 2, on August 6, 1965.

Section 2 is captioned: "Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation." It is a permanent section of the Act and has no expiration date. The section states as follows:

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973 b (f) (2) of this title, as provided in subsection (b) of this section.
- (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 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.

Some historians suggest that it was the murders of James Chaney, Andrew Goodman and Michael Schwerner during “Freedom Summer” (1964) in Philadelphia, Mississippi, which finally motivated the President and the 89th Congress to overcome the resistance posed by Southern legislators to voting rights legislation. Others suggest this action resulted from the events of “Bloody Sunday”, March 7, 1965 when Alabama State Troopers attacked peaceful marchers who were crossing the Edmund Pettus Bridge in Selma, Alabama, headed toward Montgomery, Alabama’s capital. Whatever the motivation, President Johnson sought a strong voting rights bill and hearings began in the spring of 1965.

It became clear during the hearings that the laws existing in 1965 that were passed to effect enforcement of the 15th Amendment were simply not viable vehicles to overcome resistance of state officials who were anxious to deny African-Americans the suffrage. While the Department of Justice had attempted to eliminate discriminatory practices on a case-by-case basis (e.g., the 24th Amendment was ratified on January 23, 1964, eliminating poll taxes in federal elections). But the case-by-case action was basically ineffective and the nation as a whole perceived that a larger and more pervasive legislative initiative would be required.

The legislators whose opposition had to be overcome for the passage of a voting rights bill were essentially those who had signed the Southern Manifesto in 1956, objecting to *Brown v. Board of Education* and its fall-out. These legislators were Senators Walter F. George, Richard b. Russell, John Stennis, Sam J. Ervin, Jr., Strom Thurmond, Harry F. Byrd, A. Willis Robertson, John L. McClellan, Allen J. Ellender, Russell B. Long, Lister Hill, James O. Eastland, W. Kerr Scott, John Sparkman, Olin D. Johnston, Price Daniel, J. W. Fulbright, George A. Smathers and Spessard L. Holland, joined by various members of the House of Representatives, including Frank W. Boykin, George M. Grant, George W. Andrews, Kenneth A. Roberts, Albert Rains, Armistead I. Selden, Jr., Carl Elliott, Robert E. Jones, George Huddleston, Jr., E. C. Gathings, Wilbur D. Mills, James W. Trimble, Oren Harris, Brooks Hays, W. F. Norrell, Charles E. Bennett, Robert L. F. Sikes, A. S. Herlong, Jr., Paul G. Rogers, James A. Haley, D. R. Matthews, Prince H. Preston, John L. Pilcher, E. L. Forrester, John James Flynt, Jr., James c. Davis, Carl Vinson, Henderson Lanham, Iris F. Blicht, Phil M. Landrum, Paul Brown, F. Edward Hebert, Hale Boggs, Edwin E. Willis, Overton Brooks, Otto E. Passman, James H. Morrison, T. Ashton Thompson, George S. Long, Thomas G. Abernathy, Jaime L. Whitten, Frank E. Smith, John Bell Williams, Arthur Winstead, William M. Colmer, Herbert C. Bonner, L. H. Fountain, Graham A. Barden, Carl T. Durham, F. Ertel Carlyle, Hugh Q. Alexander, Woodrow W. Jones, George A. Shuford, L. Mendel Rivers, John R. Riley, W. J. Bryan Dorn, Robert T. Ashmore, James P. Richards, John L. McMillan, James B. Frazier, Jr., Tom Murray, Jere Cooper and Clifford Davis.

Interestingly, the Voting Rights Act did not include a provision which prohibited state poll taxes, but it did direct the United States Attorney General to challenge the authority of states to utilize poll taxes in state elections. *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966) is the United States Supreme Court Cases which held that a state poll tax is unconstitutional under the 14th Amendment. But the Voting Rights Act did include plenty of provisions which angered many Americans; as a result, the constitutionality of the Act was challenged from many directions, including Section 5, which freezes election related practices and procedures in certain, but not all, voting jurisdictions, until newly proposed procedures have been reviewed and approved (pre-cleared) by the U. S. Department of Justice.

With respect to litigation objecting to the constitutionality of the Act during the remainder of the decade of the '60s, the Supreme Court consistently upheld its validity. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) establishes the Court's position:

Congress has found that case-by-case litigation was inadequate to combat wide-spread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariable encountered in these lawsuits. After enduring nearly a century of systematic resistance to the 15th Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. (pp. 327-28)

Congress has amended Section 2 on four occasions. It was amended initially in 1970 to provide a nation-wide, five-year ban on the use of tests and devices as prerequisites to voting, such as "literacy tests". It was amended in 1975 to make the ban on tests permanent and to extend the act to include members of language minority groups. The term language minorities or language minority groups is aimed at persons who are American Indian, Asian American, Alaskan Natives or individuals of Spanish heritage.

The 3rd amendment of Section 2 occurred in 1982. In the case of *Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court, in effect, revised 42 USC 1973 (b), which dictated the burden of proof to establish a Section 2 violation. Finding that the section was a "restatement of the protections afforded by the 15th amendment", the Court obligated the plaintiff to prove that the standard, practice or procedure which effectively withheld or sought to withhold the vote to a protected class was enacted or maintained, *at least in part*, by an invidious purpose. Two years later, in 1982, Congress determined that a plaintiff could pursue a claim for violation of Section 2 if the plaintiff could prove that, "...in the context of the 'totality of the circumstances of the local electoral process' the standard, practice or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process." This amendment established that it was not necessary to prove "intent" in the pursuit of a Section 2 claim. (Civil Rights Division, Department of Justice Opinion Letter) As a result of this legislative endeavor, the Senate Committee on the Judiciary issued an accompanying report, suggesting that courts considering a Section 2 violation consider several factors, including:

- The history of official voting-related discrimination in the state or political subdivision;
- The extent to which voting in the elections of the state or political subdivision is racially polarized;
- The extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
- The exclusion of members of the minority group from candidate slating processes;
- The extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- The use of overt or subtle racial appeals in political campaigns; and

- The extent to which members of the minority group have been elected to public office in the jurisdiction.

(See, S. Rep. No. 97-417, 97th Cong., 2nd Sess. (1982), pp. 28-29.) These factors had been articulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd per curiam sub. nom. East Carroll Parish School Bd. V. Marshall*, 424 U.S. 636 (1976).

The 1982 amendments to Section 2 also brought forth litigation. The first such case to reach the United States Supreme Court, *Thornburg v. Gingles*, 478 U.S. 30 (1986) described the “essence” of a Section 2 claim: that an electoral law or policy “interacts with social and historical condition to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives”. (p.47) Any effort to prove discriminatory intent must recognize the rather strict test established in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) that the practice was adopted *because* it would harm minority voting strength, not just with an *expectation* that it might harm minority voting strength.

The final amendment to the Act was specifically limited to Section 5. This amendment occurred in 2006, again responding to judicial opinions. The amendment sought to make it clear that “intent to discriminate” was grounds for denial of preclearance under Section 5, and that Section 5 was intended to preserve minority voters’ ability to elect candidates of their choice, not merely to influence elections.

Generally speaking, Section 2 cases are cases that claim that the political process is not equally open to certain minorities. Often this claim is a result of the use of multi-member districts, packing minorities into a single district, or fracturing minorities into several districts. Each of these districting policies may affect minority voting strength.

For example, minority voting strength may be diluted by placing the group in a larger multi-member or at-large district in which the majority can elect preferred candidates but the minority cannot. While there have been various challenges to multimember districts, such districts are not unconstitutional *per se*. They may, however, be found to violate Section 2 if the results tend to deny equal opportunity to participate in the electoral process to minorities or protected language groups.

Packing districts may also minimize the ability of minorities to elect candidates of their choice. Packing occurs when the effect of electoral district lines concentrates a minority group into one or more districts so that the minority constitutes an overwhelming majority in the packed districts, but creates other districts where the population of minorities is so minimal that minority candidates could not be elected. An oft recognized packing pattern is that of drawing electoral district lines to follow racially segregated housing patterns. While the consideration of racial housing patterns is not unconstitutional *per se* when drawing electoral district lines, *Rybicki v. State Board of Elections (Rybicki II)*, 574 F. Supp. 1147 (N.D. Ill. 1983) teaches that any rigid adherence to well-defined lines of racial division over time may result in minority voter dilution and constitute packing. In *dicta*, the *Rybicki* court encouraged those involved in electoral districting to move away from black-white boundaries, because something which might be

considered to be the “tracing” of racial divisions, subdivisions or projects, raises a suspect circumstance reflecting packing.

Fracturing minority voters by splitting a group of them off from another concentration of minority voters and adding them to a large majority district often creates a voting polarity which minimizes the ability of the fractured group to elect a candidate of its choice. The seminal fracture case is *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C.1984), *aff’d in part, rev’d in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). The *Gingles* court reminds us that when there is evidence of lingering effects of official discrimination and substantial polarization in voting, creating multimember district fractures and unlawfully dilutes minority voting strength. In seeming never-ending court rendered instruction, the *Gingles* court opined that there was a three-part test to develop a voter dilution claim under Section 2, which included objective proof that:

- The minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;
- That the minority group is politically cohesive; and
- In absence of special circumstances, bloc voting by the white majority usually defeats the minority’s preferred candidate.

Gingles v. Thornburg, 478 U.S. at 50-51.

In concluding our examination of Section 2, we must look to two post-*Gingles* opinions. In *Grove v. Emison*, 507 U.S. 25 (1993), the Supreme Court ruled that the *Gingles* preconditions for a voter dilution claim apply to single-member districts, multi-member districts and at-large districts. *Grove* also addressed “super-majority minority Senate districts” giving preference to the voting age population. Later, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), the Supreme Court held that for the particular Hispanic district in issue, only voting age population of U. S. citizens was precise enough.

An opinion released only a week after *Grove*, the case of *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Supreme Court rejected the contention that Section 2 of the Voting Rights Act required “influence” districts to be created whenever possible. An influence district is a district that has a sufficient number of minorities interspersed so that, although they would not constitute a majority, they could, with the assistance of white crossover votes, elect a candidate of their choice. The most significant holding of this case was that states are free to draw districts so long as the state, in doing so, does not violate the U. S. Constitution or the Voting Rights Act.

Obviously, Section 2 and its application are complicated. But thinking through these issues will aid in the later decisions about redistricting resulting from the 2010 census.

Works Cited

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About the Author

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Lydia Quarles is a Senior Policy Analyst at the John C. Stennis Institute of Government, Mississippi State University. She received her Juris Doctorate from Cumberland School of Law, Samford University, and her MA and BA from Mississippi University for Women, in 1972 and 1971 in political science and communication. After over a dozen years in the private practice of law in Alabama and Mississippi, she joined the Mississippi Workers' Compensation Commission as an Administrative Judge in 1993. Eight years later, in 2001, she was appointed Commissioner of the agency. In 2006, she resigned to join the Stennis Institute. Quarles remains active in bar work, and currently chairs the Women in the Profession Committee, a standing committee of the Mississippi Bar. She is a fellow of the Mississippi Bar Foundation, a recipient of the Mississippi Bar's Distinguished Service Award, and was recently honored by the American Bar Association for her lifetime contribution to Administrative Law and Regulatory Practice by receipt of the Mary C. Lawton Award which recognized her contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic labor. Quarles serves as a member of the Mississippi School for Math and Science Foundation Board and parliamentarian of Mississippi's First Alumnae Association. Quarles has been named one of Mississippi's 50 Leading Business Women by the Mississippi Business Journal; the Journal recognized her service to the State as a Commissioner as well as entrepreneurial skills developed in her property management business in Starkville, Spruill Property Management, LLC. Quarles, who is not a full-time employee of the Institute, also engages in the private practice of law and owns and directs a consulting business, WPF, LLC. She may be contacted at lydia@wpf-adr.com.

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