American Bar Association Young Lawyers Division
The Young Lawyer

The Voting Rights Act at 45: History and Present Reality

Extended Online Version

By Benjamin E. Griffith

Just what is the right to vote? That question was parsed and dissected in Birmingham, Alabama, last October in a panel presentation at the ABA Young Lawyers Division's Fall Conference that focused on the Voting Rights Act from its initial enactment in 1965 to the present. This article reflects the spirit and thrust of that timely program.

According to civil rights pioneer J. Mason Davis Jr., it is vitally important for today's young lawyers to be reminded of the sacrifices and crushing disenfranchisement experienced by black citizens following post-Civil War reconstruction and continuing through the first half of the twentieth century. Our nation has a sordid history of gerrymandering of election districts, marginalization of black voting strength, and reestablishment of white political supremacy by southern legislatures, a process that reached a crescendo during the 1890s and extended well into the next century.

Through the words and firsthand accounts of such stalwarts as Mason Davis, young lawyers can feel the impact of massive, entrenched resistance to black political participation. The seeds of the civil rights movement were indeed planted in the decades following the Civil War as more and more creative means of denying minority electoral access were devised and implemented. These included poll taxes, literacy tests, white primaries, vouchers of good character, disqualification for crimes of moral turpitude, and an array of "color-blind" laws, procedures, and practices, all designed to exclude blacks from electoral access and meaningful participation in the political process.

World War II marked a watershed in race relations that many are just now beginning to appreciate. As our brave soldiers returned to civilian life following the end of the war in Europe and the Pacific, many had experienced firsthand the strength, reliability, and courage of their black brothers in uniform. Many had served in harm's way, and blacks and whites often shared the same fox hole and stormed the same beaches in the face of hostile enemy fire. Fresh from their experiences in World War II, nonminority soldiers reentered the work force, rose to leadership positions in industry, and seized the reins of political power from the halls of Congress to state legislatures, city halls, and county courthouses. With them, they brought a new and fundamentally changed perception of the need for racial fairness in the societal, social, and governmental processes that for so long had left blacks on the sidelines.

Indeed, the face as well as the attitude of a majority of Americans was undergoing substantial change with respect to racial fairness, equality, and fundamental justice. The quest for racial equality was not an overnight phenomenon, however, and, particularly in southern states, vestiges of systemic voting discrimination remained barely beneath the surface.

During the years that followed the end of World War II, Congress and the courts undertook many efforts to attack this entrenched official and societal discrimination through the vehicle of voting-related legislation passed in 1957, 1960, and 1964.

The reapportionment revolution was triggered by such landmark decisions as *Baker v. Carr* (1962), in which the U.S. Supreme Court embraced the doctrine of vote dilution from malapportionment, and *Reynolds v. Sims* (1964), in which the Court established the one person, one vote principle. These were key steps that led to the first generation of voting rights litigation to redress the unconstitutional dilution of the voting strength of racial minorities.

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What followed in rapid succession was enactment of the Voting Rights Act of 1965, the "Crown Jewel" of the civil rights movement, and a series of landmark decisions that propelled the development of a coherent body of case law as vote dilution, redistricting, and reapportionment litigation evolved during the decades following the decennial censuses of 1970, 1980, 1990, and 2000.

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965 as the VRA prescribed remedies for voting discrimination that went into effect without any need for prior adjudication. Further, Congress found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome the obstructionist tactics encountered in these lawsuits.

As one of the key weapons in the federal government's voting rights enforcement arsenal, the Section 5 preclearance requirement, under which certain "covered jurisdictions" with a history of voting discrimination must first seek approval of election-related changes from the federal Department of Justice or obtain a favorable declaratory judgment from the U.S. District Court for the District of Columbia before implementing those changes, was initially enacted in 1965 as a temporary emergency measure that was deemed essential to compel compliance with the Voting Rights Act's guarantee of equal access and participation in the political process by racial minorities.

The legislative history that led to enactment of the federal Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA) sufficiently demonstrated a continuing need for the VRA's key provisions, including Section 5 preclearance and Section 203 language minority assistance, although there were strong elements of resistance among a vocal minority that perceived enough progress had been made on the racial front to dispense with these legislative enactments. The VRARA included another twenty-five-year extension of the VRA's temporary provisions.

Included in the VRA's temporary provisions were Section 5 and its related bailout provision under which covered jurisdictions could seek an exemption from Section 5 coverage. At the time the Voting Rights Act's provisions were up for renewal in 2006, only seventeen of the approximately 12,000 covered jurisdictions had successfully applied for and obtained bailout.

In 2009, the Supreme Court greatly expanded the availability of Section 5 bailout in *NAMUDNO v. Holder*. By the time the Court handed down its decision, it was apparent to many that the political reality of 1965 now stood in sharp contrast to the political reality that prevailed when the VRARA was enacted in 2006. The evil that Section 5 was intended to address no longer appeared to be concentrated in those covered jurisdictions that had been singled out for preclearance. The racial gap in voter turnout and registration was lower in jurisdictions covered under Section 5 than it was nationwide. *NAMUDNO* not only dealt with Section 5 bailout but was primarily a frontal attack upon the continued need for and constitutionality of this key provision of the Voting Rights Act.

As Chief Justice Roberts noted in his carefully crafted majority opinion *NAMUDNO*, joined in by seven other justices, the issue of Section 5's constitutionality did not have to be addressed and was pretermitted under the doctrine of constitutional avoidance. The fact remained, however, that eight justices were now on record as agreeing that the VRARA of 2006 must be justified by current needs to the extent that it imposed current burdens, that the registration gap between black and white voters was in the "single digits" in covered jurisdictions, and in some of those jurisdictions blacks now register and vote at higher rates than whites.

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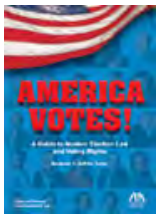
The common theme and implicit message of *NAMUDNO*—that racial discrimination in voting and in other areas of the public and private sector is no longer as big a problem as we once thought—was echoed in the Court's later decision of *Ricci v. DeStefano*. The Court held in *Ricci,* the New Haven firefighters reverse discrimination case, that employers may use race-conscious policies to avoid disparate impact discrimination only where there is a strong basis in evidence that the policies are necessary to avoid disparate impact liability.

Ricci was the Title VII equivalent to a crash test between disparate-treatment liability and disparate impact liability. In its implicit restriction of the availability of race-conscious remedies, *Ricci* revealed a vital link with the Court's earlier ruling in *NAMUDNO*: namely the assumption that our society has largely healed itself and may no longer need the race-conscious remedies that the previous generations of politicians deemed necessary.

The United States has turned the corner over the past four decades since the Voting Rights Act of 1965 was signed into law by President Lyndon B. Johnson. The VRA as originally enacted was grounded on a clear and firm—and factually supported— intent by Congress to rid this nation of racial discrimination in voting. Due largely to aggressive enforcement of the VRA's key provisions, including Section 5 preclearance in covered jurisdictions and Section 2 vote dilution actions nationwide, progress in race relations has resulted from an increasingly accessible electoral process. Subsequent revisions and extensions of the VRA in 1970, 1975, 1982, and 2006 have enhanced that progress. It remains as a vital component of our nation's guarantee that minority voting rights will not be diluted, marginalized, or denied. Even to the most pessimistic of observers of the modern American electoral process, however, the glass of equal political access and electoral opportunity is now largely perceived as more than half full. Indeed, it is arguably filled to the brim. We are a better nation for it.



***NEXT*STEPS**

Order America Votes! A Guide to Modern Election Law and Voting Rights by Benjamin E. Griffith (ABA Section of Administrative Law and Regulatory Practice, Government and Public Sector Lawyers Division, Section of Individual Rights and Responsibilities, and Section of State and Local Government Law 2008. PC # 53302000) today.

Ben Griffith is a member of the ABA House of Delegates, past-Chair of the ABA Section of State & Local Government Law, editor and chapter author of America Votes! A Guide to Modern Election Law and Voting Rights (2008 and Supp. 2009), member of the ABA Advisory Commission to the Standing Committee on Election Law, World Jurist Association's National President for the United States, and past president of the National Association of County Civil Attorneys. He is a partner in the Cleveland, Mississippi, firm of Griffith & Griffith and can be contacted at bgriff@griffithlaw.net.