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FOREWORD: DEMOCRACY IN A NEW AMERICA

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One of my earliest memories about voting rights in the United States occurred in 1954, when my father was denied the right to register and vote. I was very upset with the unfairness. Everyone should have the right to vote, and to have that vote count. My father's experience was the beginning of my determination to try to affect change.

Since then, Congress has passed legislation that promised to ensure the right to vote. But the road from the type of disenfranchisement that my father experienced in 1954 to the complete realization of the promise that everyone should have the right to vote has not been straight or smooth. Every congressional effort to improve voting opportunities has brought about some progress, and has been encumbered with limitations. In 1957, Congress passed legislation that created the Civil Rights Division within the Department of Justice and the Commission on Civil Rights.¹ This legislation authorized the Attorney General to intervene in and initiate lawsuits seeking injunctive relief against violators of the Fifteenth Amendment.² Legislation passed in 1960 permitted federal courts to appoint voting referees to conduct voter registration following a judicial finding of voter discrimination.³ The primary obstacle to the effectiveness of these legislative efforts was the necessity of litigation, on a case-by-case basis, to compel compliance in those areas where resistance to minority

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1. Act of Sept. 9, 1957, Pub. L. No. 85-315, pt.1, § 101, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1975 (1994)).

2. *Id.*

3. Act of May 6, 1960, Pub. L. No. 86-449, title VI, § 60, 74 Stat. 96 (codified as amended at 42 U.S.C. § 1971(e) (1994)).

enfranchisement was great.

Since the latter half of the 1800s, an ongoing, systematic campaign to reverse the political gains achieved by African Americans during Reconstruction developed. Violence and intimidation to prevent the enfranchisement of African Americans went largely unpunished and unabated, necessitating the passage of the Ku Klux Klan Act in 1871.⁴ The Act was an “attempt to force acceptance of black suffrage in the South and end intimidation and violence.”⁵ Laws implementing tactics including poll taxes, literacy tests, requirements of vouchers of “good character,” grandfather clauses, and laws imposing disenfranchisement for crimes of “moral turpitude,” were passed by many state legislatures immediately after those who sought the exclusion of African Americans from the political process regained control.⁶ These laws were then applied in a racially discriminatory manner. Through time-consuming and expensive litigation, these laws had to be attacked one by one. As one discriminatory voting practice was declared unconstitutional, or held to violate the federal legislation passed at that point, new practices were devised and implemented to maintain the disenfranchisement of minorities.

Most recently, the Voting Rights Act of 1965⁷ brought about significant advances in the ability of African Americans and other minorities to participate in our democratic government, on both the national and local levels. One of the most effective features of the Voting Rights Act, section 5, prohibited the implementation of new voting practices without prior approval by the Department of Justice or the Federal District Court for the District of Columbia.⁸ Thus, resistant jurisdictions were no longer able to simply replace one obstacle to minority voting with another. Between 1965 and 1969, the Supreme Court upheld the constitutionality of section 5, construed the Voting Rights Act liberally, and supported the Department of

4. Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (1994)).

5. 1 REFERENCE LIBRARY OF BLACK AMERICA, SIGNIFICANT DOCUMENTS IN AMERICAN HISTORY 145 (Harry A. Ploski & James Williams eds., 1990).

6. James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 351, 354-56 (Chandler Davidson & Bernard Grofman eds., 1994).

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1974e (1994 & Supp. V 1999)).

8. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. §§ 1971-1974 (1994 & Supp. V 1999)).

Justice in enforcing its mandate.⁹ Some of the success of the Voting Rights Act was immediate and dramatic, and has continued. In Alabama, the rate of African-American voter registration doubled in three years.¹⁰ In Mississippi, African-American voter registration went from 28,500 in 1964 to 251,000 in 1968.¹¹ The overall percentage of voting-age African Americans registered to vote in the South grew from 43 percent in 1964 to 62 percent in 1968.¹² The number of African-American elected officials in the South went from seventy-two in 1964 to nearly 5,000 by 1995.¹³ Because of redistricting plans that were sensitive to minorities, more African Americans were elected to Congress in 1992 and 1994 than at any other time since Reconstruction.¹⁴ Notwithstanding the degree of success in increasing minority representation, the Voting Rights Act, as others before it, is subject to both internal and external limitations. Perhaps, in part, *because* of its success, it is now a law under siege.

Opponents of the Voting Rights Act raise several criticisms, some valid. One criticism is that the race-conscious drawing of voting district lines—a practice that certainly did not originate with the Voting Rights Act, but has been adopted as a primary means of compliance with its mandate—is in direct violation of previously established constitutional principles.¹⁵ Opponents argue that the Equal Protection Clause prohibits the drawing of district lines primarily on the basis of race, regardless of the motivation for doing so.¹⁶ Whether members of specific minority groups necessarily share the same interests, agendas, and would necessarily prefer the same candidates in office, also remains a contested question.¹⁷ As the

9. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding section 5 of the Voting Rights Act on the basis that case-by-case challenges of discriminatory voting practices had proven inadequate to eliminate them); see also *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (recognizing that gerrymandered district boundaries or at-large elections could be used to dilute minority voting strength).

10. Nancy K. Bannon, *The Voting Rights Act: Over the Hill At Age 30?*, 22 HUM. RTS. Q., Fall 1995, at 10.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Bush v. Vera*, 517 U.S. 952, 969–72 (1996); see Robinson Everett, *Redistricting in North Carolina – A Personal Perspective*, 79 N.C. L. REV. 1301, 1311–12 (2001); Katharine Butler, *A Functional Analysis of Potential Voting Rights Act Liability May Demonstrate that the Intentional Creation of Black Remedial Districts Cannot be Justified*, 79 N.C. L. REV. 1431, 1460 (2001).

16. See Everett, *supra* note 15, at 1301; cf. Butler, *supra* note 15, at 1461–63.

17. See Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Johnson and Farrell*, 79 N.C. L. REV. 1283, 1286 (2001).

number of distinct minority groups increases, identifying which ones are eligible for specific consideration in ensuring their ability to elect "representatives of their choice," becomes difficult and conceptualizing how to provide for each of them, without infringing on the rights of the others becomes even more challenging. The preservation of geographically defined district boundaries that facilitate the promotion of local interests is still held as an important value by many.

As the tenor of much scholarly and political opinion seems to be shifting away from support for the Voting Rights Act, clearly the Act does not seem to enjoy the support it once received from the Supreme Court. At the end of the fifteen-year period (1965–1980) immediately following passage of the Act, during which increases in minority voting and representation continued unabated, the Supreme Court signaled a shift of its own. It held, in *Mobile v. Bolden*,¹⁸ that a constitutional claim of minority vote dilution must include proof of a racially discriminatory purpose.¹⁹ Congress responded to the Court's decision with the 1982 amendment to section 2, clarifying that a discriminatory purpose is not required for a claim under that section.²⁰

Nonetheless, the Court has continued its course of narrowing the reach of the Voting Rights Act. In *Thornburg v. Gingles*²¹ the Supreme Court set out the specific elements for a vote dilution claim.²² Though criticized by proponents of race-neutral, "color-blind" voting practices as creating more difficulty for plaintiffs challenging state affirmative action in voting, *Gingles* might also be viewed as raising the bar for minority plaintiffs to successfully challenge the deliberate dilution of their votes.²³ *Shaw v. Reno*²⁴ established that the use of race as a predominant factor in redrawing district lines is subject to strict scrutiny.²⁵ By basing its holding on the Equal Protection Clause, the Court converted a constitutional

18. 446 U.S. 55 (1980).

19. *Id.* at 72-73.

20. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (1994)).

21. 478 U.S. 30 (1986).

22. The plaintiff minority group must be 1) sufficiently large and geographically compact to constitute a majority in a single-member district; 2) "politically cohesive," and 3) able to show that majority bloc voting consistently defeats its efforts to elect a representative of its choice. *See id.* at 50.

23. *See generally id.* (holding that new criteria must be met before a plaintiff minority group could win a voter dilution claim).

24. 509 U.S. 630 (1993).

25. *Id.* at 644.

amendment that had as its original purpose the protection of African Americans into an effective weapon, now employed by those who seek to reverse the political gains achieved by minorities under the Voting Rights Act. *Johnson v. DeGrandy*²⁶ held that section 2 is not violated by a failure to maximize majority-minority voting districts,²⁷ but in *Miller v. Johnson*,²⁸ the Court preserved the Voting Rights Act by invalidating a “max black” districting plan the state believed had been encouraged by the Department of Justice.²⁹ The Court stated that traditional, race-neutral districting principles could not be subordinated to race without a compelling interest.³⁰ Furthermore, compliance with the Justice Department and the Voting Rights Acts, in *Miller*, did not constitute a compelling interest.³¹ In *Bush v. Vera*,³² the Court invalidated three majority-minority districts in areas of Texas that were predominantly African-American and Hispanic.³³ And, in what some view as a stunning defeat for minority voting interests, the Court held last year in *Reno v. Bossier Parish School Board*³⁴ that the “purpose” and “effect” of voting practices, which are prohibited by section 5 is limited to retrogressive purpose and retrogressive effect.³⁵ Even where the presence of a racially discriminatory purpose or effect of some other, non-retrogressive nature, is clearly present, the Justice Department has no authority to deny preclearance. Such plans or practices must be challenged *de novo*, and after adoption, under section 2.³⁶

The sponsors of, and participants in, this Symposium are to be commended for promoting the discussion, and the debate that follow. Herein, we have a wide range of ideas that cover the spectrum of possibilities for addressing the issue of minority voting rights.

26. 512 U.S. 997 (1994).

27. *Id.* at 1000.

28. 515 U.S. 900 (1995).

29. *Id.* at 926–27.

30. *Id.* at 916.

31. *Id.* at 921.

32. 517 U.S. 952 (1996).

33. See *id.* at 982. District 18, in the Houston area, had a population which was 51% African-American and 15% Hispanic. See *id.* at 973. District 29, adjacent to District 18, had a population which was 61% Hispanic and 10% African-American. See *id.* District 30, in the Dallas area, had a population which was 50% African-American and 17.1% Hispanic. See *id.* at 965. The districts were invalidated because they were irregularly shaped, and the Court found no other explanation for that than race. See *id.* at 972–73, 976.

34. 528 U.S. 320 (2000).

35. See *id.* at 333.

36. See *id.* at 338.

In *A Personal Perspective on North Carolina Gerrymandering*,³⁷ Robinson Everett proposes the establishment of an independent redistricting commission to redraw voting district lines when required. The commission would act according to race-neutral, traditional guidelines, except to the extent that *Gingles* might require some consideration of race as a factor. At the opposite end of the spectrum, Bernard Grofman, Lisa Handley, and David Lublin contend, in *Drawing Effective Minority Districts: A Model and Some Empirical Evidence*,³⁸ that the Voting Rights Act, properly interpreted and applied, should go beyond the provision of deliberately-created majority-minority districts, defined by the relative percentages of their minority and white voter populations. They advocate the case-by-case analysis of individual voting jurisdictions to determine exactly what percentage of minority voters is required to enable the minority to elect representatives of their choice, and the race-conscious creation of districts to ensure that result.

Poised, as we are, at the beginning of a new year, of a new century, and of a new millennium, the question, "Where do we go from here?" takes on an even deeper profundity than usual. Perhaps the past can provide us with insight, given the cyclical nature of race and politics in the United States. We began with the complete exclusion of African Americans from the political process. The next stage in the cycle was the struggle for African Americans to enjoy the same right to vote as white citizen counterparts. Eventually, with the support of Congress and the Supreme Court, the right was secured in the letter of the law. Having obtained that right, we entered a period of tenacious attempts to block its exercise, and where exercised, to dilute its effect. Concurrently, in response to the apparent futility of attempting to share in the promise of a democratic society, we saw consistently low African-American voter registration and virtually no African-American elected officials, prompting widespread apathy or anger. But still some refused to give up the struggle.

Enter, again, a sympathetic Congress and a sympathetic Court, passing legislation, supporting its enforcement, and authorizing remedial action and preventive measures intended to ensure that African Americans, and other minorities, would be able to participate fully and meaningfully in the electoral process. And *immediately*, we saw again, that when racially discriminatory voting practices and

37. Everett, *supra* note 15, at 1328–31.

38. Bernard Grofman et al., *Drawing Effective Minority Districts: A Model and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1423 (2001).

procedures are removed as obstacles, minorities can and will take their rightful place as participatory members of our democracy. And the cycle continues, as it historically has, with current reactionary efforts to curb recent progress. The attack on minority voter equality is more sophisticated now than before. The weapons used against minorities are the ones originally created to protect them, primarily, the Equal Protection Clause, and the application of strict scrutiny to race-conscious state action.

Speaking from my own perspective, as a long-time participant in the struggle to secure equal and meaningful enfranchisement for African Americans, the Supreme Court's current retreat from its earlier support of the Voting Rights Act is a threat, not only to African Americans and other minorities, but to our entire system of democratic government. When one is denied the right to vote, or when one's vote is rendered an exercise in futility, the entire nation suffers. The shock waves sent throughout this country and around the world by the impact of the disenfranchisement of thousands of Florida voters in the presidential election of 2000 illustrates this point. In particular, I was distressed to hear the disillusionment expressed by many African-American young people, some of whom had just voted for the first time in that election. The question most often asked by young blacks disillusioned by the American political process is, "Why bother?" That was the immediate impact. The ultimate impact is yet to be fully appreciated. In fact, the ultimate impact is yet to be determined because it will depend, in large part, on the signals sent in the next few years. Cases are pending that will send a signal, one way or the other, to all American citizens about the extent to which each of our votes are valued, protected, and guaranteed to be counted.³⁹

39. The Supreme Court ruled that a trial will be held in the ongoing legal battle over the 12th Congressional District in North Carolina. In spite of the minority population in that district having been reduced from approximately 55%, originally, to 47% in 1997, opponents continue to seek its invalidation as a racially gerrymandered district. One might view it as a hopeful indicator that the Supreme Court declined to simply affirm the district court's holding in favor of the plaintiffs. On the other hand, the defeats the State suffered in *Shaw I* and *Shaw II* do not bode well for the coming litigation. *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

On January 10, 2001, the NAACP Legal Defense and Education Fund, Inc., filed a lawsuit alleging that several voting practices and procedures employed by the State of Florida, in the general election of November 2000, violated the Voting Rights Act, and the Fourteenth and Fifteenth Amendments. *NAACP v. Harris*, No. 01-CIV-120-GOLD (S.D. Fla. filed Jan., 10, 2001). The plaintiffs ask that the state of Florida be ordered to stop those practices immediately, and to implement fair and non-discriminatory procedures. *Id.* The court's disposition of these cases, among others, will send a signal to Americans about the value of our votes.

Disillusionment resulting from the perception that the votes of some individuals or groups may be wasted efforts is likely to result in diminished participation in the political process by those who feel disenfranchised, functionally, if not literally. An often overlooked, but equally compelling ramification, is that when the ultimate outcome of an election seems predetermined, majority voters have as much reason to ask, "Why bother?" as the disenfranchised. The legitimacy of our democracy depends upon ensuring that each individual, regardless of race, has an equal opportunity to participate in the political process in a meaningful way.