

# The Past and Future of Voting Rights<sup>1</sup>

RICHARD H. PILDES

Sudler Family Professor of Constitutional Law  
New York University School of Law

**A**s I was listening to the APS Member induction ceremony it occurred to me that I am going to speak about some of the more irrational features of our democratic system before one of the most rational rooms of people that could be put together. I want to talk to you about the right to vote, as both a constitutional matter and one of policy. To start off, let me explain to you the ways in which those of us in the field talk about the right to vote. The “right to vote” can be a misleading or confusing term because there are at least two quite distinct types of issues that often get lumped together in general discussions about voting.

The first type of issue is the one immediately conjured up in most people’s minds when references are made to “the right to vote.” This type of issue involves access to the ballot box and the various questions that now arise concerning what is appropriate in conditioning or regulating such access: questions or controversies, for example, about voter identification laws or whether there should be early voting and, if so, how much; or issues about the voter registration system, such as whether we should shift to automatic voter registration, permit same-day registration, and the like.

However, today I am not going to concentrate on those issues, which we generally refer to as “first generation” voting rights issues. Instead, I want to focus on the second type of voting rights issue, which has to do with the way in which we design our electoral institutions and, through that design, aggregate individual votes into outcomes. There are many systems of voting and many ways of aggregating individual votes: we can have proportional representation systems, or first-past-the-post elections; we can have at-large elections or elect representatives from single-member districts; we can use an electoral college or a national popular vote to choose a president. In the United States, where representative institutions are constructed on the basis of election from single-member districts, we have ongoing tensions and issues concerning how those districts ought to be designed. That is another form of asking how a democratic system ought to aggregate

---

<sup>1</sup> Read 15 November 2013.

individual votes into collective outcomes—into the overall structure of a state house or senate, as well as the U.S. House of Representatives (the design of the U.S. Senate, of course, is fixed in the Constitution).

This second type of voting rights issue is what we call a “second generation” voting rights issue. Even once we settle on the appropriate rules regarding access to the ballot box, the second generation question remains: How should we aggregate these votes for purposes of constructing our representative institutions? I want to talk about how the effort to realize certain democratic ideals in the abstract—such as the values of political participation or political equality—has had certain troubling consequences on the ground, and perhaps undermined the achievement of the very goals that political reforms have intended to realize.

Let me start by putting these issues about the “second generation” of voting rights questions against the background in which they arise. The issues I will discuss emerge, in significant part, from the pathological institutional structures we use for redesigning our election districts. Since the Supreme Court’s creation of the “one person, one vote” doctrine in the 1960s, virtually all single-member election districts in the United States must be redesigned after each new census, including for the U.S. House of Representatives, state houses and senates, city councils, county commissions, and virtually every entity that uses districted elections. After a new census, the populations across these districts are almost always out of compliance with the population equality standards that the Constitution imposes.

Who has the power to redesign these districts each decade? The Constitution itself does not say whether states are required to elect members of Congress from single-member districts or at-large (which is what many states did before 1842, when Congress enacted a statute requiring the use of single-member districts), nor does the Constitution directly address how districts should be designed. Instead, the Elections Clause (Article I, Section 4) gives states the power to set the “times, places, and manner” of holding elections for the U.S. House and Senate, while giving Congress the power to take over this role should it choose to do so. As a result, in most states, state legislatures redesign election districts each decade, for both Congress and for their own seats in the state legislature. Congress could in theory take over designing election districts for the U.S. House, but other than imposing certain requirements—such as the use of single-member districts—Congress has not done so.

I called this system pathological, and it is: we give state legislators the power to design their own election districts and those of their partisan allies. We then turn out to be shocked when they use this

power for self-interested reasons, whether it is protecting themselves, other incumbents, or their partisan allies. No other democracy in the world that uses district elections gives self-interested, sitting politicians the exclusive power to design election districts. Other democracies use various forms of independent commissions to design their election districts. Some of these countries had, at earlier points in their history, permitted parliaments to draw districts, but they recognized the defects of that structure and moved to the use of independent commissions (such as the United Kingdom after World War II). In addition, many democracies that formed since World War II built into the very text of their constitutions a role for independent commissions to oversee parts of the electoral process, including the process of designing election districts. As far as I have been able to tell, these commissions generally have been considered to work fairly well in the task of designing districts in appropriate ways and for legitimate, public-regarding reasons. Of course, the correct question to ask about these independent commissions, in any event, is not whether they perform perfectly, according to some ideal standard; the right way to look at it is through a more pragmatic lens of whether commissions are a significant improvement on what currently happens when self-interested legislatures have this power instead.

Some states have indeed adopted independent redistricting commissions in recent years, including some large states like California. But overwhelmingly, most redistricting in the United States is still done by political actors, primarily state legislators. So one question I want to raise is: Why haven't we taken this power out of the hands of the most conflicted actors and, as in other democracies, shifted to using various forms of independent commissions for all our districting? It's very tempting to say, of course, that politically self-interested actors who have this power are the ones who would have to enact the legislation to give up this power and turn it over into independent commission hands, and they are hardly likely to do so. That is of course a barrier, but it was also a barrier in other countries that nonetheless did make the shift to taking this power out of the hands of political actors.

My own view—and this is partly from having talked about this issue around the country over a number of years—is that there's *also* something about American democratic culture that resists taking parts of the electoral process like redistricting and putting them in the hands of independent institutions. I think it reflects a kind of romanticization of the very idea of popular sovereignty. There is such skepticism within the unique democratic culture of the United States about the idea that there could be such things as independent institutions overseeing parts of the political process that the minute you start discussing these

options many Americans express considerable cynicism about the very possibility of independence or neutrality. They fall back onto the view that, if this is done by politicians, the politicians are then somehow democratically accountable to us, that it's far better to keep this power with elected legislatures than to give it to purportedly independent commissions. I hear this quite often and it always surprises me. I fail to see why it follows that, even if there is some concern about precisely how independent these institutions will really be, it is therefore better to give this power to the people we know have the *worst* set of incentives and temptations that will drive their decisions about how to design our election districts. But experience suggests to me that this kind of view—that no matter what, it's better to have officials we vote for in charge of various issues, including how to design their own election districts—is a very powerful part of American democratic culture. In my view, it's a perversely self-defeating aspect of American democratic culture that makes our democracy worse in the name of democratic accountability and popular control, or at least the illusion of popular control.

Let me turn to the question of whether partisan gerrymandering—which is what follows from our system of giving politicians this power—contributes significantly to the polarization and extremism in our current politics. Certainly it's very tempting to think that it does, particularly when we see how many election districts are overwhelmingly safe seats, for one party or the other, and the only electoral fear incumbents have is being defeated in a primary within their own party. Without meaningful general election competition that forces primary winners to tack back toward the center, so this view goes, the rise of more and more safe seats enables more extreme party polarization to be successful. But it's important not to confuse safe seats with gerrymandering as the driving or dominant cause of the safe seats.

Gerrymandering is such an unappealing aspect of our political system that it's easy to want to blame it for all the ills of current American democracy, but another factor driving the emergence of safe seats is the way in which people have sorted themselves out geographically, more and more over time, in ways that end up making geography correlate with partisan political preferences more now than in recent decades. As a result, it has become harder to draw competitive districts, which are likely to be won by small margins for either party, in as many places as could be done in the past. Many of the large urban areas of the United States have become much more predominantly Democratic, even as other parts of the country have become more Republican. This also means that Republicans, because they are more “efficiently” spread out geographically, will tend to fare better under our system of

districted elections, even without any intentional partisan manipulation of election district design.

Thus, it requires considerably sophisticated statistical techniques to know whether the outcomes produced by a districting plan—such as a certain number of safe seats, or a seeming advantage for one party in the number of seats they have compared to the statewide vote they receive—are the result of willful partisan manipulation of the maps or the effects of the geographically different patterns of residence of the two parties' voters. In the recent major Supreme Court case involving partisan gerrymandering in Wisconsin, *Gill v. Whitford*, I participated as counsel on an amicus curiae brief on behalf of various political geographers, who are using some of the most reliable and cutting-edge techniques for answering this question: How much of a plan's partisan tilt or use of safe seats is attributable to intentional partisan manipulation versus the geographic concentration and distribution of the two parties' voters?

Due to the sorting of voters over time by geographic location, we have fewer swing states in presidential elections—and fewer competitive counties—even though the states and counties are not redrawn and hence have not been gerrymandered with an eye toward manipulating correct election outcomes. Gerrymandering is indeed a bad practice that we should try to get rid of for many reasons, and taking this power out of the hands of self-interested politicians is the right direction for reform. But I want to urge some caution in thinking that it is the major cause of political polarization and extremism, or all the other various ills that you might think bedevil the current American political process.

I want to turn now to another set of issues concerning the design of election districts and second generation voting rights issues: the rise of modern racial redistricting that is compelled by the Voting Rights Act (VRA). The idea behind this new system, which emerged fully in the 1990s' round of redistricting, was that in areas of the country where African Americans (primarily, at the time these changes were made), Hispanics, and other protected groups were a political minority, and where the majority white community systematically and repeatedly voted against candidates that the African American community preferred, there was a significant failure of the political process. Minority-preferred candidates would never be elected while voting was racially polarized in this way, even if the minority community consisted of 40 percent of the electorate. When Congress amended the VRA in 1982, it determined that, in these circumstances, we should redesign the election system so that minorities could be concentrated and become the majority in some number of election districts, which would enable them to elect their candidates of choice in those districts. As a

paradigmatic example, if a city or county was run by a five-member body that had been elected at-large, where the African American population was 20 percent, and where voting was racially polarized, then the law required that the at-large election system be broken down into five single-member districts, in one of which the African American population would intentionally be made the majority. That would ensure that, if the minority community was politically cohesive, it could elect one candidate of choice, even in the face of racially polarized voting.

When this approach was first adopted—initially in 1982 by Congress—there were certain specific features about the larger context that gave this strategy its logic. First, there were very few black elected officials, despite the enactment of the VRA in 1965, outside of districts that were majority-minority districts. Second, the Democratic Party still had a monopoly on political power in much of the South, a product of the late 19th- and early 20th-century disenfranchisement campaigns. That strategy may have made sense in the early 1990s, when we were coming out of an era of one-party democratic control of the entire South. Not until the mid-1990s, however, did the Republican Party achieve parity in the South with the Democratic Party; in 1994, Republicans won a (bare) majority of House seats in the South for the first time since Reconstruction. Third, nearly all the litigation Congress was focused on when it adopted this approach in 1982 involved challenges to at-large election structures, in which black citizens had been effectively excluded from representation, and which could be changed through the replacement of the at-large structure with single-member districts.

When I discuss these issues, I find that many political liberals see the intentional creation of safe minority election districts as just another context in which the same issues concerning the affirmative use of race in public policy, to remedy historic or recent exclusions, play out. Thus, those who enthusiastically support affirmative action in other contexts, such as academic admissions or government contracting, often see the issue of creating safe minority election districts as just one more variation on a general theme of political inclusion. But the design of election districts has unique features from other areas because the design of one district has effects on other districts. The problem that started to become apparent over the ensuing decades is that the democratic sphere works differently than the sphere of education or employment. The reason is that the system of political representation functions as a system, not as a set of individuals acting in particular positions or getting an education. Democratic politics is about building political coalitions, it's about amassing effective political power, and it's about

ultimately controlling government to have the policies you prefer adopted. We can't think of it in atomistic and individualistic terms. Over time—especially as politics in the South became a two-party, competitive system, and as the regime of racial redistricting under the VRA was extended to the maps drawn to elect members of Congress or a state legislature—it became apparent that there were serious trade-offs generated by this system of VRA-compelled racial redistricting.

The main trade-off involved the effects of these new districts on the surrounding areas. By concentrating black voters into these districts, the regime enables them to defeat racially polarized voting, but also drains those voters out of surrounding districts. In many areas of the South, this gave the surrounding districts a significantly higher white percentage and indeed flipped some districts from electing Democrats to electing Republicans. These districts succeeded in electing black Democrats, often with very safe margins in the general election, but at the same time enabled the election of more Republicans. From the perspective of a state Democratic Party, which is trying to make itself as effective as possible in the state legislature (or in a congressional delegation), what you would ideally want to do (assuming politicians are left in charge of redistricting) is design districts in such a way as to spread your voters out in the most efficient way possible, across as many districts as possible, to maximize your party's prospects overall.

This strategy does exactly the opposite of that. It concentrates the party's most reliable voters into a few districts. In the first couple of redistricting rounds after this regime went into place, Democrats were frequently winning these safe minority districts with 75 or 80 percent of the votes on general election day; as a result, vast numbers of Democratic votes were therefore wasted. Moderate white Democrats, who had been elected out of districts that were 30 to 40 percent African American, were hit hard by this new system, and many lost their seats; there were no longer enough black voters left in these districts to elect a Democrat, and these moderate Democrats were replaced by conservative Republicans. Indeed, political scientists have debated whether the change in partisan control of the House in 1994, from Democratic to Republican hands, might have been the result of this new VRA regime.

Thus, as time went on, it became clearer that there could be trade-offs between concentrating minority voters into "opportunity to elect" districts, in which they would be the electoral majority, and having representative bodies that are more likely to enact the substantive policies that these minority voters predominantly prefer. This came to be called the trade-off between substantive and descriptive representation: substantive representation means having political bodies that are more likely to enact the substantive policies you prefer while descriptive

representation means having more representatives who share your descriptive characteristics. In its effort to protect second generation voting rights, the VRA regime of safe minority districting can have the perverse effect of increasing the number of conservative legislators—and conservative control of legislative bodies as a whole—who are less likely to enact the substantive policies a substantial majority of minority voters prefer.

When Congress first created the regime of racial redistricting in 1982, it did not have to face these issues about such potential trade-offs, for reasons I identified earlier. The focal point of the cases back then was dismantling at-large election structures and replacing them with single-member districts. Nearly all the litigation focused on the local government level, where politics is less partisan and ideological. And in the South, where the VRA regime had its most significant effect, the Democratic Party was a monopoly power. These issues only became profound once the VRA regime was applied to the design of state legislatures and congressional districts, in the context of single-member districting plans, and where the Democratic Party came to face robust competition from a renewed Republican Party. In these circumstances, the abstract appeal to “political equality,” which was reflected in the idea that safe minority districts should be created where voting was racially polarized, ran up against the political reality that creating such districts could make legislatures more conservative.

To be sure, there are many benefits from descriptive representation, and from having legislatures that are more diverse and reflective of our population demographics. But it is also important to face the reality that being part of winning political coalitions, which are then able to govern and enact policies that most minority voters prefer, is extremely important as well and can be in tension with the desire to ensure more descriptive representation of minority groups. I don’t pretend to think there is an obvious right answer to how this trade-off should be resolved, but I do think it’s important that we not hide our heads in the sand from the reality that this trade-off exists. The underlying question is: When we think seriously about the design of our democratic institutions, what is it we are trying to accomplish? Part of the question is whether our political and legal institutions, as well as our interpretation of abstract democratic values like participation or equality, are able to keep up with demographic, social, political, and cultural changes.

Congress did have a chance to revisit these issues in a more current context when a portion of the VRA was up for reauthorization. This was part of the statute known as Section 5, which singled out certain parts of the country for a special regime of federal oversight concerning



any changes to their voting systems, a regime known as “preclearance.” This Section 5 regime was first enacted for five years in 1965 and was designed to sunset unless Congress reauthorized it; Congress did so several times and then, in 1982, reauthorized it for another 25 years. This regime, which singled out certain areas of the country, mostly in the South, was due to expire in 2007, unless Congress reauthorized it once again—though it’s important to be clear that the nationwide prohibitions on racially discriminatory voting practices remained in effect regardless and remain in effect today. Because Congress had to consider whether to reauthorize Section 5, which it undertook to consider in 2006, many academics studying these issues thought that Congress would decide how best to update this regime to reflect current realities today. When the Section 5 regime was first created, the areas of the country that were put under this special obligation to pre-clear any voting changes with the federal government were identified based on their voting practices as of 1964 (originally) or 1975. But after that, the formula did not change to determine which areas would continue to be subject to this unique regime of federal oversight. And by 2006, the parts of the country that were singled out for this special system of federal control remained largely the same areas that had been first included back in 1965 or the early 1970s.

Thus, when Congress was forced by the looming sunset of Section 5 to reconsider the statute, many of us assumed Congress would also have to consider how to update the statute in ways to reflect current conditions. Indeed, doing so seemed constitutionally prudent because changes in constitutional doctrine since Congress had last revisited the Act, in 1982, made it clear that the Supreme Court was likely to require strong evidence that the areas of the country that remained under this special pre-clearance regime continued to differ systematically from the areas that were not covered, with respect to the prevalence of racially discriminatory voting practices that had justified this regime initially.

When I testified before the Senate Judiciary Committee on these issues, I was surprised to discover that the record that had been compiled before Congress up to that point did not explore in detail what the pattern of contemporary discriminatory voting practices were and whether the existing coverage formula needed to be modified to reflect what those patterns might be. And I warned that Section 5 would be more constitutionally vulnerable before the Supreme Court if Congress did not do so. But the political dynamics of the congressional process led Congress not to make any changes regarding what areas would be included or excluded from pre-clearance review. Section 5 was reauthorized almost unanimously, in part because it was too politically explosive to open up questions about where contemporary

problems of voting rights were most prevalent and whether the coverage formula should be changed to include new areas, or exclude old areas, or both. It was easier for Congress simply to preserve the status quo. That's exactly what Congress did, and it then reauthorized this part of the Act for another 25 years. When the Supreme Court, in the case known as *Shelby County*, confronted the constitutionality of continuing on with this regime and held this system unconstitutional—on the grounds that Congress had not established that the Section 5 regime reflected current conditions and current realities about the Court's constitutional ruling—I found it quite disappointing, if not surprising, that Congress was unable to engage in a policymaking process that carefully considered where problems of racially discriminatory voting practices were systematically taking place today.

Throughout my academic career, informed by own experience litigating cases on these issues as well as working on democratic processes in other contexts, I have tried to force students and audiences to confront the actual institutional settings in which democratic politics takes place. Particularly in law schools, but also in much reform discussion of democracy, there is too much focus on the abstract values of liberal democracy—such as participation, or political equality—without enough appreciation of what it means to institutionalize these ideals in particular settings, and what the consequences of doing so are.

In this brief talk, I have tried to illustrate this more general point by raising questions about how best to understand “the right to vote” when it comes to the second generation voting rights claims I have discussed. In particular, I have tried to raise tough questions for you—which is what much of academic work is all about, in my view—as to whether our admirable pursuit of anti-discrimination and political inclusion has treated the issue of political equality in too abstract a way, without enough attention to how political power is actually organized or the importance of being part of winning political coalitions. “Political equality,” like other democratic values, should not be thought about abstractly, but in the context of the actual world of democratic politics.