

Abstract

The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote

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Congress is now considering whether to renew the Voting Rights Act. Though critical issues concerning American democracy are at stake, and the renewal process is the moment at which the nation should focus on voting rights, there is no constituency, inside Congress or outside, to raise the serious policy issues that should be addressed. Instead, Congress appears to prefer to re-new the relevant provisions largely in their current form, as quietly as possible, while avoiding all the hard questions inevitably present. Doing so not only abdicates policymaking responsibility, it increases the likelihood that the Supreme Court will later find the renewed Act to be unconstitutional.

This essay raises the questions that Congress should address. There are two distinct models for national legislation to protect voting rights. The model of the VRA selectively targets certain areas of the country (9 states, several counties and towns), for a unique form of unusually intensive federal oversight. In essence, these areas are put into a form of federal receivership regarding any changes they might make in anything related to voting, ranging from the design of their congressional districts to the hours these areas keep their polls open. Congress can tinker at the margins with this model, but the more fundamental question is whether this selective-targeting approach continues to be the best way to protect voting rights, including minority voting rights, in today's context. An alternative model for doing so would directly protect the right to vote as such, through uniform, national legislation, rather than singling out particular areas of the country for unique protections. This alternative is reflected in laws that post-date the Voting Rights Act, such as the Help America Vote Act and the National Motor Voter Registration Act. This essay suggests that this alternative model -- national, uniform laws to protect the right to vote as such -- is better suited to the problems of voting rights today than the model of Section 5 of the Voting Rights Act, which was well designed for the era in which it was created but is less well suited to the problems of today. Yet Congress will likely simply renew the Act, perhaps with modifications at the margins, but essentially in its present form. Difficult questions will be hushed over. The voting rights community will proclaim victory, but this victory will be largely symbolic: the preservation of a past that is increasingly irrelevant and tangential to the main issues. Possibly, that is the only sort of victory available. But the policymaking process will generate no serious discussion of whether the philosophy of Section 5 of the VRA continues to make sense today, more than 40 years after the Act's original creation, or, even more importantly, of what philosophy and approach to voting rights might now be more effective.