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Book Review: Whose Votes Count? Affirmative Action and Minority Voting Rights. by Abigail M. Thernstrom.

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WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS. By Abigail M. Thernstrom.[1] A Twentieth Century Fund Study. Cambridge, Ma.: Harvard University Press. 1987. Pp. xii, 316. $25.00.

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For a host of reasons, some identifiable and others elusive, voting rights appear to differ fundamentally from other civil rights. Normatively, Americans somehow sense that voting is a basic right of citizenship. Moreover, our democratic ethos (and perhaps mythos) suggests that voting is a powerful, yet highly legitimate, instrument of social change. In particular, if those citizens who have been traditionally excluded from power have a fair opportunity to vote, so the theory goes, they can effectively yet peacefully force our representative institutions to undo the present effects of past discrimination to the extent consistent with other important societal interests. The concrete civil rights reforms that result may please no one completely, but the process by which they come about legitimates them nonetheless. This basic distinction between fair process and fair outcome, rooted in much conventional American public law theory,[3] is perhaps clearest of all in our attitude toward voting rights.

After judicial efforts failed to undo a century of voting discrimination in the South, Congress passed the Voting Rights Act of 1965. That statute applied two stringent remedies to certain portions of the country—in effect, major regions of the South—where voting discrimination had been rampant. First, it outlawed certain barriers preventing minorities from registering to vote, such as the literacy test. Second, it forbade a covered jurisdiction from chang-

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3. The obvious citation is probably J. ELY, DEMOCRACY AND DISTRUST (1980). Consider also the "principle of institutional settlement" at the core of the approach found in H. HART & A. SACKS, THE LEGAL PROCESS 4-5 (tent. ed. 1958):

> Implicit in every such system of procedures is the central idea of law—an idea which can be described as *the principle of institutional settlement* . . . . The alternative to disintegrating resort to violence is the establishment of regularized and peaceable means of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at as a result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed.

Needless to say, the form/substance dichotomy is controversial in public law scholarship.

ing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless it obtained preclearance from either the Department of Justice or the United States District Court for the District of Columbia. Preclearance was available only if the jurisdiction proved that the electoral change had neither the purpose nor the effect of "denying or abridging the right to vote on account of race or color." Congress originally gave the Act only a five-year lifespan, but it reenacted the statute in 1970, 1975, and 1982.

Although the Voting Rights Act remains a vital component of American civil rights law, it has received relatively little careful scrutiny from scholars and journalists. In large part, this lack of attention may reflect the overriding American complacency about voting rights. Although the dissecting of sacred cows is a familiar type of scholarly endeavor, perhaps voting rights are so central to our civil religion as to be immune to skeptical inquiry.

Abigail M. Thernstrom has now gone where others have largely feared to tread. Her well-researched, thoughtful, and highly readable book presents a thoroughgoing critique of what she views as unthinking and unjustified affirmative action in American electoral politics. She challenges conventional wisdom about enhancing minority officeholding, yet largely avoids simplistic criticisms. That ultimately I remained largely unmoved by her analysis perhaps suggests—aside from my own bias—simply that no single book can be definitive in this field. At a minimum, her book calls for an equally well-researched and thoughtful answer from those who are unpersuaded.

In a nutshell, Thernstrom argues that the Act was designed solely to enfranchise southern blacks. This single purpose has been transformed over time, she contends. For one thing, congressional amendments have brought lingual minorities as well as racial minorities within the statutory protections. Second, the courts have applied the preclearance requirement to all changes in electoral format, not simply to methods of disenfranchisement. In addition, as she sees it, the courts, and particularly the Department of Justice, have interpreted the preclearance requirement as prohibiting even the slightest electoral changes by covered jurisdictions that, while allowing full access to the ballot for minorities, undermine—or perhaps just fail to promote—the ability of minorities to elect minority officeholders, rather than simply candidates worthy of minority support. Finally, in the 1982 amendments, Congress provided a nationwide judicial remedy when electoral structures that have not

been modified since 1964 (and thus have not faced preclearance) have a discriminatory effect upon minority voting strength.

These developments, Thernstrom argues, have turned the Voting Rights Act from a method of enfranchisement into an entitlement of meaningful minority voting power, measured by the minority's ability to elect candidates of its own race. As such, she concludes, the statute unduly fractures American politics along racial lines. This exacerbation of racial conflict is all the more objectionable, in her view, because the institution ultimately responsible for it—Congress—has never clearly understood or carefully debated the utility of affirmative action in electoral politics. "The right to vote no longer means simply the right to enter a polling booth and pull the lever. Yet the issue retains a simple Fifteenth Amendment aura—an aura that is pure camouflage."

I do not wish to overstate Thernstrom's argument. She is sensitive to the lingering problems of voting discrimination. She recognizes that in some contexts all-white legislative bodies are subject to question. In her final chapter, in what I found to be her most perceptive discussion, she acknowledges that in many rural southern areas blacks continue to be shut out of electoral politics, and that intrusive relief under the Voting Rights Act is justifiable in those circumstances. In short, she wields a scalpel, not a cleaver.

Although Thernstrom proposes important changes in the interpretation of the Voting Rights Act, she would not eviscerate it. She would construe the preclearance requirement as prohibiting jurisdictions from backsliding on minority voter influence. In her view, the 1982 amendment providing nationwide protection against discriminatory electoral systems should outlaw situations in which the minority community is truly frozen out of the political process. Both of these conclusions are outgrowths of her attempt to respect congressional intent and to limit federal intrusion into local political affairs.

I cannot attempt in this space to present a detailed answer to her analysis. I think she exaggerates when she asserts that the only purpose of the original Voting Rights Act was to enable minorities to cast votes. Moreover, she fails to perceive that statutes, especially civil rights statutes, should have some room to grow as society adapts to them. For example, the employment discrimination prohibition of Title VII of the Civil Rights Act of 1964 had, by 1979, evolved so that it did not bar all affirmative action efforts to promote minority employment.[4] Title VII gradually changed hue

4. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979). Statutory evolution in gen-

without much intermediate congressional reconsideration of the statute. In contrast, the Voting Rights Act has been reenacted, and strengthened, three times in its twenty-three year life. From a formalistic standpoint, at least, the evolving nature of the Voting Rights Act seems unobjectionable.

It is true, I think, that since 1965 Congress as a whole has not carefully deliberated all sides of the issues Thernstrom has raised. It is also true that the civil rights lobby has powerful muscles to flex on the voting rights question and that opponents have proved to be weak and disorganized. Although careful legislative deliberation insulated from lobbying pressures would seem to be the Madisonian ideal, I, for one, find its absence less troubling when those historically disadvantaged end up prevailing. I would not join, without strong evidence, Thernstrom's speculation that civil rights lobbyists may be wrong about what is best for minorities.

At times, Thernstrom's style is rather aloof and bloodless. For example, throughout most of the book she treats *Mobile v. Bolden*,[5] a principal constitutional voting rights case, as an abstract legal problem; only in her final chapter does she present some careful and sensitive insights into the nature of race and politics in Mobile, Alabama.

A more general example of perhaps undue abstraction is her treatment of at-large elections. If there is racial bloc voting and blacks constitute a minority in a city, blacks cannot elect any candidate of their choice to a city council elected at-large; if the minority community is geographically concentrated, in contrast, a ward-election format may well result in the election of one or more candidates supported by the minority community. At-large elections are thus suspect under the Voting Rights Act in some circumstances. Thernstrom counters: "Where white candidates (as well as black and Hispanic) actively seek minority votes and those votes often influence the outcome of every electoral contest, at-large elections may provide fewer [minority] seats but more influence—and by that token more representation." That seems undisputably true, but how relevant is it? Thernstrom frankly admits optimism about whites being willing to vote for black candidates, and about candidates ordinarily profiting from courting minority voters despite potential white voter backlash. Indeed, she tells the reader that "[t]oday there remain almost no jurisdictions in which the preferred candidates of minority voters experience white harassment." To

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eral, and the evolution of Title VII in particular, are discussed in Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

5. 446 U.S. 55 (1980).

her credit, she admits that some will disagree with her sociological generalizations. Where one stands on issues like this, she rightly notes, "determines one's judgment on every concrete issue involving minority voting rights." Unfortunately, Thernstrom does not—in fairness, probably cannot—demonstrate the accuracy of her generalizations in contrast to those of less sanguine observers.[6]

Two jarring, although probably minor, errors in her book exacerbated my sense that Thernstrom sometimes lacked a full measure of the voting rights situation. She quotes with approval language from a Fifth Circuit voting rights decision and attributes it to "Judge Leon Higginbotham." She means Patrick Higginbotham, of course, the thoughtful, conservative—and white—Fifth Circuit judge, not Leon Higginbotham, the thoughtful, liberal—and black—Third Circuit judge. In a footnote, she misidentifies Judge John Minor Wisdom, a pillar of liberal voting rights jurisprudence even in the bad old days in the South, as "Judge Minor Wisdom." Unfortunately, this will remind readers with long memories of the taunting misnomers once applied to Judge Wisdom by those opposed to basic civil rights for southern blacks—names like "Judge Major Ignorance" and "Judge John Minus Wisdom." These errors were no doubt inadvertent, and one trusts they will be corrected in later printings.

In the last analysis, Thernstrom presents a plausible argument that the Voting Rights Act, as interpreted, unduly burdens the "melting pot" phenomenon that, she assumes, characterizes most American politics today, including local politics. She may well be correct. I have always been skeptical of that melting pot, however, for it seems to be an invitation to minorities to jump into the pot at the risk of losing what is unique about them. It may well be that America has advanced so far that the dominant society is now, by and large, asking minorities to join it. It might just be, though, that "they" would just as soon not be homogenized to the point of becoming interchangeable with "us." Moreover, it just might be that minority self-determination will, in the long run, enrich society more than any simple homogenization could ever do. Self-determination and empowerment may simply be valuable in themselves. On these matters too, as Thernstrom recognizes, where one stands will determine how one ultimately evaluates concrete voting rights

6. Her discussion of the question of at-large elections would have been rendered less abstract, and more complete, by a consideration of P. HEILIG & R. MUNDT, YOUR VOICE AT CITY HALL (1984), which presents a balanced empirical perspective on the utility of at-large elections.

problems, and more generally whether one condemns or praises the fostering of minority officeholding under the Voting Rights Act.

Getting beyond racism, as Justice Blackmun recognized in his concurrence in *Bakke*, may require consideration of race in the context of group as well as individual rights. Does the Voting Rights Act, by balkanizing the races in electoral politics, frustrate progress toward the elimination of racism? Or does the Act, by helping empower minorities, promise to contribute to the eventual eradication of racism? In part, at least, these questions turn on short-term versus long-term perspectives. Thernstrom and those who dissent from her views may agree on ultimate ends, but disagree on the means and the time frame involved. Her book is a major contribution that should foster clearer thinking and more careful analysis of these important issues.

ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION. By Richard B. Bernstein,[1] with Kym S. Rice.[2] Cambridge Ma.: Harvard University Press. 1987. Pp. xii, 342. Cloth, $35.00; paper, $14.95.

THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES. By Robert Shnayerson.[3] New York, N.Y.: Harry N. Abrams, Inc., Publishers, in Association with The Supreme Court Historical Society. 1987. Pp. 303. $60.00.

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In the clutter of patriotic and commemorative events that have dominated (and will likely continue to dominate) this Bicentennial, we might well pause to reflect on the sage advice that the mayor of Salina, Kansas gave when asked some years ago how best to celebrate the Declaration of Independence. "[C]ome up with [something]," he pleaded, "that somebody will give a damn about in 50 years."[5] Much of what has transpired so far will probably fail the

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