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CLE Presentation: Voting Rights Today and Tomorrow

INTRODUCTION

The 14th and 15th Amendments of the United States Constitution and the Voting Rights Act of 1965 (VRA) provide a solid base for structuring voting rights in this country. The 14th Amendment guarantees basic equality with respect to all exercises of governmental power. The 15th Amendment bars racial discrimination in voting. Enacted in the nearly century-old shadow of the 14th and 15th Amendments, the VRA helps minority citizens exercise voting rights. However, in the wake of the recent Supreme Court decisions, such as *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the future arc of voting rights is unclear. A consideration of where voting rights stand under the three provisions mentioned above and how voting rights may evolve in the near future will be useful to lawyers who attend this CLE presentation.

I. Voting Rights Doctrine

A. The Constitution and Voting Rights

1. Fourteenth Amendment

The Fourteenth Amendment protects voting rights in two ways. Though the Constitution does not guarantee a right to vote, voting is protected as a fundamental right. Consequently, limitations on the right to vote are subject to strict scrutiny pursuant to the Fourteenth Amendment's Equal Protection Clause. Voting is also a right provided and regulated by individual states. Consequently, any race-based denial or abridgment of the right to vote is also subject to strict scrutiny under the Equal Protection Clause.

2. Fifteenth Amendment

The Fifteenth Amendment bars voting restrictions based on race, color or previous condition of servitude. Laws that deny the right to cast a ballot based on race or that limit the effectiveness of a voter's ballot based on race may violate the Fifteenth Amendment. For example, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), a redrawing of a city's boundaries to fence African American voters out of the city in an attempt to deny those voters the ability to vote in a municipal election violated the Fifteenth Amendment.

B. The Voting Rights Act (VRA)

The VRA operationalizes the 15th Amendment. Passed in 1965 in the wake of the Civil Rights Act of 1964 and its tepid protection of voting rights, the VRA was reauthorized in 1970, 1975, 1982 and 2006. It protects against the denial or abridgment of the right to vote on account of race or color.

1. Section 2 of the VRA

Section 2 of the VRA bars laws and procedures that discriminate with respect to the right to vote on the basis of race and other characteristics. A law may violate section 2 either when that law intentionally discriminates in the provision of voting rights on the basis of race or when the law has the effect of discriminating in the provision of voting rights on the basis of race. The 1982 Amendments to the Voting Rights Act broadened section 2's scope to include a quasi-effects test in the wake of *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which appeared to limit voting rights claims under the Fourteenth and Fifteenth Amendments and under section 2 of the VRA to laws passed with discriminatory intent.

2. Section 5 of the VRA, *Shelby County v. Holder*, and Preclearance

Section 5 of the VRA requires that certain jurisdictions have their voting changes approved by the Justice Department or a three-judge panel of the District Court of the District of Columbia before those changes can go into effect. This preclearance process effectively requires that covered jurisdictions ask permission to make voting changes. Historically, jurisdictions covered by section 5 included those defined by the coverage formula contained in section 4 of the VRA and those covered by section 3 of the VRA due to their record of voting rights violations. However, the scope of section 5 has been drastically reduced by the Supreme Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

In *Shelby County*, the Supreme Court invalidated section 4 of the VRA. During the legislative process that preceded the extension of the VRA in 2006, Congress reviewed section 4's preclearance formula, but decided to keep it unchanged. Nonetheless, the *Shelby County* Court argued that section 4's formula was based on decades-old data and unfairly treated some states differently than others. After deeming section 4 a dead letter, the Court suggested that Congress might be able to create a new section 4 formula that would be constitutional if based on more recent data. *Shelby County* left sections 2, 3 and 5 untouched. Nonetheless, in the wake of *Shelby County*, section 4 is inoperative with the number of jurisdictions subject to section 5 significantly smaller. As a result, some states have passed laws that might have stood little chance of being precleared before *Shelby County*.

II. Redistricting, Gerrymandering and the Law

There is a tension between the Fourteenth Amendment's presumed requirement of colorblindness and the race consciousness that may be necessary to guarantee that the voting rights of minority groups – as reflected in the ability of minority groups to elect their representatives of choice when appropriate – are protected under the VRA. That tension has yet to be resolved and may bedevil courts for years to come.

A. Current Law

Shaw v. Reno, 509 U.S. 630 (1993), *Miller v. Johnson*, 515 U.S. 900 (1995), *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), and other cases have attempted to set parameters for the use of race in districting that would recognize that race need not be completely ignored when districting, but that race should not be the predominant factor in any redistricting plan. Redistricting plans must comport with the VRA's command that minority groups be afforded the opportunity to elect their representative of choice consistent with democratic principles and the Constitution's command that racial classification be used sparingly when enacting public policy.

B. Doctrinal Evolution

1. *Georgia v. Ashcroft*, 539 U.S. 461 (2003)

The Court suggested, in the context of a VRA section 5 preclearance challenge, that states could meet the VRA's requirement that minority voting rights and power not be diminished in the wake of redistricting by considering the overall practical influence that minority groups could wield in electing representatives. Rather than solely consider how many majority-minority districts a minority group could control, the Court suggested that a jurisdiction could consider coalition districts and influence districts – districts in which a minority group could not elect its representative of choice on its own but might have a role in electing its preferred representative – when determining whether a minority group's voting power had been diminished as the result of a redistricting plan.

2. 2006 Amendments to the Voting Rights Act

Passed in part to reverse *Georgia v. Ashcroft*, the 2006 Amendments to the VRA appeared to make the measure of voting power for Voting Rights Act purposes to be whether a minority group could elect its preferred candidate of choice on its own. Congress noted that the purpose of section 5 is "to protect the ability of such citizens to elect their preferred candidates of choice."

3. *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015)

The case reviewed Alabama's redistricting of its state legislative districts. Alabama's majority-minority districts had become underpopulated since the redistricting after the prior Census. Consequently, Alabama was required to move voters into those districts to comply with the Constitution's one-person/one-vote standard. The overwhelming majority of voters that Alabama moved into majority-minority districts in the course of redistricting were minority race voters. Those voters were moved into majority-minority districts even though those districts would have remained majority-minority had a more racially mixed set of voters been moved into the districts. Alabama argued that the 2006 Amendments to the Voting Rights Act required it to maintain the same or similar percentage of minority voters in each majority-minority district

after redistricting as the districts had before redistricting, and that explained why Alabama packed so many African American voters into majority-minority districts. Plaintiffs argued that the redistricting was a racial gerrymander that violated the 14th Amendment's equal protection clause because the voters who were moved into the majority-minority districts were moved into the affected districts because of their race. The trial court found that the redistricting was not a racial gerrymander. The Supreme Court reversed and remanded the case for the plaintiffs to present their racial gerrymandering claims anew.

C. The Future of Race and Redistricting in Virginia

Alabama Legislative Black Caucus has direct application to Virginia because the Virginia General Assembly embedded a rule in the post-2010 census congressional and state legislative redistricting that required that each minority-majority district have at least a 55% African American voting age population to ensure that African American voters in the district could elect their candidate of choice. However, evidence suggested that in some of the districts, African American voters could elect their candidate of choice without such a high percentage of African American voters and that therefore the 55% rule was racially discriminatory. The dispute over that rule triggered the litigation over the congressional and state legislative redistricting.

1. *Wittman v. Personhubullah*, 136 S.Ct. 1732 (2016)

This is a challenge to Virginia's 2012 congressional redistricting. The underlying claim asserted that the General Assembly used race as predominant factor in the redistricting, in violation of *Shaw v. Reno*, 509 U.S. 630 (1993). The three judge panel ruled that race was a predominant factor in drawing the 3rd Congressional District, and that the redistricting map had to be redrawn. Litigants challenged the redrawn map, but the Supreme Court dismissed the matter claiming that the congressmen who sued did not have standing to bring the case. However, the redistricting issues will almost certainly return after the post-2020 Census congressional redistricting.

2. *Bethune-Hill v. Virginia State Board of Elections*, 141 F.Supp.3d 505 (E.D. Va. 2015)

The Supreme Court will hear this case this term. The suit challenges state legislative redistricting. The claim tracks the claim from *Wittman* that race was used as a predominant factor in redistricting a number of House of Delegates districts. However, the three-judge panel ruled that use of 55% African American voting-age population floor in majority-minority districts did not necessarily mean that race was the predominant factor in redistricting.

III. Voter Identification Laws

States continue to pass voter identification (voter ID) laws, ostensibly to address the possibility of voter fraud, in spite of claims that such laws discriminate against minority voters, poor voters and young voters. The Fourteenth Amendment limits voter ID laws that unduly burden a voter's

ability to cast a vote. The VRA limits voter ID laws that intentionally discriminate or have the effect of discriminating against voters on the basis of the voter's race.

A. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)

The Court reviewed the constitutionality of Indiana's voter identification law which required that those voting in person produce identification in order to vote. Various parties challenged the law, arguing that it restricted the right to vote. The Court noted that if a law or regulation restricts voting and is unrelated to voter qualifications, the Court must apply an exacting standard akin to strict scrutiny. However, if the law or regulation protects the integrity and reliability of the electoral process while merely having the effect of denying a voter the right to cast a ballot, the requirement need merely be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation. The Court deemed the voter ID law to be of the latter kind that merely triggers a balancing test between the state's interests and the voters' interests to determine its validity.

The Court noted the following possible justifications for Indiana's voter identification laws: voter fraud, safeguarding voter confidence, and election modernization. After conceding that no voter fraud had been proven and that the law only addressed in-person voter fraud and not more problematic absentee voter fraud, the Court suggested that fear of voter fraud is a legitimate state concern. Consequently, the Court determined that Indiana's interests in requiring government issued identification to vote outweighed the limitations on the voters' ability to cast a ballot.

B. Virginia's Voter Photo ID Law

The recent history of Virginia's voter identification laws may be a case study regarding the effect that allowing states to regulate voter identification requirements and invalidating section 4 of the VRA can have on state election law policy and voting rights. In the last five years, Virginia – which had been subject to preclearance before *Shelby County v. Holder* – has narrowed its laws on voter identification. Before 2012, the state allowed an in-person voter without identification to cast a ballot based on a signed affidavit attesting to the voter's identity. In 2012, Virginia amended Va. Code §24.2-643 to require that voters show identification when voting in person. The statute allowed many forms of identification to suffice, including many that did not include photos. That law was precleared by the Department of Justice. In 2013, Virginia amended the statute to require that an in-person voter produce a valid photo identification card before voting. In the wake of *Shelby County*, that law did not have to be precleared.

The voter ID law attempts to determine whether the voter is the person in the pollbook, but limits proof of that to the presentation of one of a specific set of IDs by the putative voter. It does not consider the full range of IDs that could prove the voter's identity. In addition, the statute elides a number of issues, such as, whether an expired ID should count as valid ID and whether an ID without an expiration date should count as a valid ID. Some of these issues have been addressed by the State Board of Elections; others must be addressed by elections officials and poll workers, possibly at the time a voter votes. These issues have led to litigation and may lead to future litigation.

Voter ID laws in other states, including Texas, North Carolina, and Wisconsin are being challenged in federal courts and may require Supreme Court resolution.

IV. Criminal Disfranchisement

Criminal disfranchisement may have a disproportionate effect on communities of color and might seem to be an area in which the Voting Rights Act could regulate. However, thus far, attempts to use the VRA to attack felon disfranchisement have been largely unsuccessful. The Fourteenth Amendment appears to allow the disfranchisement of criminals. Under *Richardson v. Ramirez*, 418 U.S. 24 (1974), laws disfranchising felons are not automatically unconstitutional or even suspect. However, *Hunter v. Underwood*, 471 U.S. 222 (1985), notes that such laws may be unconstitutional if passed with discriminatory intent. Nonetheless, state laws may limit the crimes that will trigger disfranchisement and may hasten the restoration of voting rights for offenders. Attempts like Governor McAuliffe's move to provide a broad restoration of rights for ex-felons may become more common in other states depending on relevant state constitutional and statutory law.

Conclusion

Voting rights may be at a crossroads. In the wake of 50 years of the VRA, court and states continue to fight regarding the content of American voting rights. That guarantees additional litigation and the need for additional hard thinking about the law in this area. How easily and how well the 14th and 15th Amendments and the VRA can fulfill their roles depends on how aggressively those provisions will be enforced. That depends on the Supreme Court, its evolving voting rights doctrine, and the litigation that is brought to test that doctrine.

Materials:

U.S. Constitution, 14th and 15th Amendments

Voting Rights Act, 52 U.S.C. §10301 (section 2), §10304 (section 5)

Va. Code §24.2-643

Crawford v. Marion County Election Board, 553 U.S. 181 (2008)

Shelby County v. Holder, 133 S.Ct. 2612 (2013)

Alabama Legislative Black Caucus v. Alabama, 135 S.Ct. 1257 (2015)

Wittman v. Personhuballah, 136 S.Ct. 1732 (2016)

Henry L. Chambers, Jr., *Colorblindness, Race Neutrality and Voting Rights*, 51 Emory Law Journal 1397 (2002)

Henry L. Chambers, Jr., *State and Local Officials and Voter ID*, 15 Election Law Journal 234 (2016)