# Right-Wing Media Flip-Flop And Begin Attack On Entire Voting Rights Act

By Meagan Hatcher-Mays
March 24, 2014

After the conservative justices gutted the Voting Rights Act in *Shelby County v. Holder*, right-wing media complained that criticisms of the legal challenge were overblown because other provisions of the VRA remain intact to fight voter suppression. But now some of those same right-wing media figures have begun to flip-flop on that position, arguing that another crucial component of the VRA is unconstitutional as well.

## Right-Wing Media Attack Remaining Enforcement Of VRA As Unconstitutional

**NRO's Von Spakovsky and Clegg: DOJ Disparate Impact Litigation Under Section 2 Is Based On A "Dubious Legal Theory."** National Review Online contributors Hans von Spakovksy and Roger Clegg argue that Section 2 -- the VRA's surviving method for litigating discriminatory voting practices after they have occurred -- is not an acceptable substitute for the "preclearance" mechanism of Sections 4 and 5 that require elections changes to undergo federal review, which was struck down in *Shelby County*. Clegg and von Spakovsky call Section 2's capacity to strike down voter suppression that has a discriminatory effect "the favored but dubious legal theory of the Obama administration":

As Eric Holder's Justice Department attacks voter-ID laws in Texas and North Carolina, the Heritage Foundation has warned courts that they should be wary of construing Section 2 of the Voting Rights Act to find liability when only a "disparate impact" on the basis of race has been shown.

"Disparate impact" is the favored but dubious legal theory of the Obama administration. It's being used to attack everything from election integrity to the financial industry when DOJ doesn't have any evidence of intentional discrimination. This theory lets DOJ attack completely neutral laws and practices that it doesn't like for policy, not legal, reasons.

We argue that under Section 2, courts should require some evidence of underlying disparate treatment on the basis of race. In addition, the courts should consider the state's legitimate, non-discriminatory interest in a challenged practice, such as preventing voter fraud and maintaining public confidence in the fairness and integrity of the electoral process.

[...]

[C]onstruing Section 2 to create liability whenever there is a mere "disparate impact" with respect to race raises serious constitutional problems -- problems that can be avoided if the statute is given a narrower, and at least equally plausible, interpretation.

Here's why the pure "disparate impact" approach creates a problem: The 14th and 15th Amendments prohibit state actions only where there is "disparate treatment" on the basis of race. The U.S. Supreme Court has made clear that this means actions undertaken with racially discriminatory intent.

Thus, congressional legislation must be aimed at preventing *intentional* racial discrimination, not just actions that may have an effect that disproportionately affects racial minorities. [National Review Online, 3/22/14]

## But Right-Wing Media Earlier Dismissed Criticisms of Conservative Justices' Attack On Section 5, Arguing Section 2 Protections Were Still in Place

**MSNBC: Von Spakovsky Formerly Argued That Because Section 2 "Was So Strong," Section 5 Was Not Needed.** Despite von Spakovsky and Clegg's current argument that Section 2 is only a viable option for plaintiffs who experience intentional racial discrimination in voting, von Spakovsky did not previously make this distinction. As reported by MSNBC's Zachary Roth, not only did von Spakovsky's previous testimony to Congress not mention this constitutional concern about Section 2, he reassured them that its effectiveness was "permanent; it will never expire":

Two leading conservative legal activists argued in a memo published this week by the Heritage Foundation that the provision at issue, Section 2, should be construed so narrowly that it would be able to stop only the most blatant forms of racial discrimination in voting. But the memo, written by Heritage's Hans von Spakovsky and Roger Clegg of the Center for Equal Opportunity, may aim to lay the groundwork for an even more far-reaching claim: The prominent election law scholar Rick Hasen, no alarmist on voting rights, described it as a step "on the road to arguing for the unconstitutionality of Section 2."

"Now that Section 5 is essentially gone, it is time for the attack on Section 2," Hasen added.

Section 2 bars racial discrimination in voting. It's currently being used by the Justice Department to challenge Texas' voter ID law and North Carolina's sweeping and restrictive voting law. It's also being used by civil rights groups to challenge Wisconsin's voter ID law. In a proposed 2015 budget submitted to Congress this week, the Justice Department said it would "place major emphasis going forward on affirmative enforcement of Section 2 of the VRA"--a sign of the provision's crucial role in stopping race bias in voting, now that Section 5 is no longer in force.

Since Congress amended it in 1982, Section 2 has barred not only voting laws that are intended to discriminate against minorities, but also those that have the effect of discriminating. That's

largely because, these days, very few people in power explicitly declare an intention to racially discriminate, so a law that banned only intentional discrimination would be virtually useless.

[...]

The campaign against Section 2 represents a glaring strategic flip-flop for the right -- and perhaps for von Spakovsky himself. In the wake of the Shelby County ruling that invalidated Section 5, he and other conservatives loudly argued that there was no need to revive Section 5's system of federal supervision of certain jurisdictions, because Section 2 still stood, and was so strong.

"The 'heart' of the VRA today is Section 2, not Section 5" von Spakovsky assured lawmakers in testimony last July. "Section 2 applies nationwide, not just in a limited number of states and counties, and it is permanent; it will never expire." [MSNBC.com, 3/19/14]

***Wall Street Journal* Op-Ed: Effort To Restore VRA Not Necessary Because "There is Section 2."** In a *Wall Street Journal* op-ed he co-wrote with conservative lawyer Michael Carvin, von Spakovsky argued that the Court's decision was sound because "we simply don't need Section 5 anymore." The *WSJ* piece explicitly promoted the disparate impact component of Section 2, the "permanent, nationwide ban on racial discrimination in voting" von Spakovsky is now arguing is unconstitutional:

The Supreme Court's ruling did not affect other provisions of the Voting Rights Act that protect voters, and the Justice Department and civil-rights groups have been aggressively using them since *Shelby County*. All that's different now is that they must prove their case -- as they must under any other civil-rights law.

In particular there is Section 2, a permanent, nationwide ban on racial discrimination in voting. Section 2 bans not just intentional discrimination: It was expanded in 1982 to prohibit discriminatory "results" as well.

Further, Section 3 of the act allows a court to impose a preclearance requirement in a particular jurisdiction where a court determines that there is intentional misconduct, a much more reasonable and fair provision than the blanket requirements of Section 5. [*The Wall Street Journal*, 2/10/14]

**Forbes' Shapiro: Gutting The VRA Shows The Supreme Court's "Wisdom" Because "Plenty Of Laws Exist To Combat Racial Discrimination In Voting."** In response to a post-*Shelby County* congressional effort to restore Section 5's efficacy, Forbes contributor and Cato Institute senior fellow Ilya Shapiro complained that such an effort was unnecessary. According to Shapiro, "there's no indication that" Section 2 "is inadequate to address racial discrimination in voting wherever they may be found":

The Justice Department's recent lawsuits against Texas and North Carolina's electoral changes prove the Supreme Court's wisdom [in *Shelby County*]. They show that plenty of laws exist to

combat racial discrimination in voting, and it's the effectiveness of those laws that have obviated Section 5 (and its coverage formula).

For example, the Voting Rights Act's Section 2 grants both private parties and the federal government the right to go after state practices that constitute "a denial or abridgment of voting rights." It empowers citizens to challenge specific instances of discrimination and allows them to recover from defendants the costs of their lawsuits. Section 3, meanwhile, gives courts the power to order federal supervision -- including Section 5-style preclearance -- over jurisdictions that have engaged in deliberate discrimination that violates voting rights and are likely to continue this conduct in the absence of that extreme remedy. Shelby County didn't touch Sections 2 or 3, and there's no indication that these provision are inadequate to address racial discrimination in voting wherever they may be found. [*Forbes*, 1/22/14]

**Fox's Megyn Kelly: "There Are Other Remedies. It's Not Like You're Remediless. You Can Sue."** In a June 2013 segment immediately after *Shelby County*, both Megyn Kelly and NRO columnist Andrew McCarthy rejected criticisms from civil rights leaders about the decision. Kelly and McCarthy instead argued that the condemnation was overblown by "race hucksters" because "there are other remedies":

MEGYN KELLY: Now let me ask you about what we've seen here on the left. I mean, this outrage, because you have a great column up today at *National Review* that talks about how you believe the left has -- that they are race-obsessed in their narrative and that they need to perpetuate this narrative that this is racist and that this is the right trying to ignore the rights of blacks and others.

ANDREW MCCARTHY: Right. This is a great success story. You'd have to be a progressive to hate this kind of progress. It's the only way that you could explain it. And the people who seem to hate it are the movement progressives and the race hucksters, because this is a moment, I think appropriately, that the Supreme Court took to recognize the achievement of American society in overcoming this form of institutional racism. And instead of celebrating it, the people who depend on this kind of demagoguery are screaming bloody murder. Predictably.

KELLY: You talk about how, in your column that, for example, in Mississippi in 1965, the black registration rate was less than 7 percent, 70 percent for whites. In 2004 in Mississippi, the black registration rate was 76 percent, which is higher than the white registration rate, which is why the Supreme Court said it doesn't make sense to just carte blanche be subjecting Mississippi to Eric Holder and the DOJ before they try to mess with their Voting Rights Act.

MCCARTHY: Exactly right. And also, what the Court recognizes and what I think the rest of us should recognize if we could put all this noise from the left aside, is what does it say about the American people? What the left is basically saying is, if this law is not on the books, the people in those states and in other states throughout the country want to have literacy tests back and want to have --

KELLY: They're going to do it again.

MCCARTHY: Yeah. I mean, how crazy is that? That would be political suicide.

KELLY: The truth is, if they do do it again, there are other remedies. It's not like you're remediless. You can sue. This isn't taking away your remedy. [Fox News, *America Live*, 6/26/13]