

Against the Harms of Discrimination

There's a parallel universe out there where I'm a constitutional lawyer. This shouldn't come as a surprise, though – interpreting the Constitution and interpreting the Torah have a lot in common. Indeed, in this week's Torah reading, we see a crucial example of foundational Jewish legal reasoning, which can help us understand the landmark decision handed down by Supreme Court this week.

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As you probably heard, in its decision in *Louisiana v. Chavis*, the Supreme Court voted along ideological lines to dramatically re-interpret the Voting Rights Act. In this third landmark case about the VRA, the Court determined that race-conscious Congressional districts violate the Constitution. So while gerrymandering along political lines is perfectly fine, it's forbidden to draw maps that seek to enfranchise racial minorities. This turns the Voting Rights Act on its head, effectively rendering the entire law unconstitutional. While Samuel Alito wrote in the Court's main opinion that this is just an "update [to] the framework"¹ of the Voting Rights Act, Clarence Thomas's concurrence revels in victory over race-conscious districting: "Today's decision should largely put an end to this 'disastrous misadventure' in voting-rights jurisprudence."²

So if you please, I'd like to welcome a visit from my parallel personality, that Constitutional lawyer lurking somewhere in the multiverse.

To summarize their position: The Court purports to re-align the VRA with the Constitution's Fifteenth Amendment. That amendment has two sections. The first states "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."³ The second section adds, "The Congress shall have power to enforce this article by appropriate legislation."⁴ In 1965, Congress passed the Voting Rights Act as a tool of enforcement, bringing an end to heinously discriminatory laws that had suppressed African Americans' right to vote for generations.

Section 2 of the 1965 act outlawed any "standard, practice, or procedure" enacted to "deny or abridge the right ... to vote on account of race or color."⁵ A generation later, the Supreme Court ruled that this could only apply to practices that *intentionally* sought to discriminate based on race. Therefore, in 1982, Congress amended the Voting Rights

¹ See p. 3 of the opinion at https://www.supremecourt.gov/opinions/25pdf/24-109_21o3.pdf.

² See p. 1 of his concurrence at *ibid*.

³ <https://constitution.congress.gov/constitution/amendment-15/>

⁴ *Ibid*.

⁵ <https://www.archives.gov/milestone-documents/voting-rights-act>

Act expressly to prohibit any practice that “**results in** a denial or abridgement of the right ... to vote on account of race or color.”⁶ In keeping with its Constitutional authority, Congress insisted that a practice is illegal if it discriminates against one race even if you can’t prove that it was designed with that intention.

So the Fifteenth Amendment says the vote cannot be denied based on race, and Congress can legislate to enforce this right. Congress legislated that discriminatory *results* are sufficient to violate the amendment’s protections. But this week, the Supreme Court ruled that the Voting Rights Act prohibits only discriminatory *intent*. By ignoring the relevance of discriminatory *results*, the Court asserts that it’s unconstitutional to design voting districts that seek to prevent discrimination.

Elana Kagan’s brilliant and historic dissent lays bare the majority’s perverse reversal of the Voting Rights Act. She accuses the Court’s majority of inventing an “unprecedented” legal claim that justifies any discriminatory districting practice that could in any way be described as race-neutral. Indeed, she writes that “the majority has conjured [this claim] out of thin air.”⁷ With this ruling, the Court’s conservative supermajority has removed the last line of defense for racial minority voters. They are protected now against only blatant and overt racism, left vulnerable to the far too-common effects of subtle racism masquerading as political partisanship.

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Okay, let’s thank my alter ego and welcome back the rabbi. The rabbi, too, will disagree with the Supreme Court; but rather than appealing to the Constitution, he will look all the way back to the Torah.

In this week’s *parashah*, we encounter the brief but instructive case of the so-called Half-Israelite Blasphemer. The story goes that there came a person “whose mother was Israelite and whose father was Egyptian” (Lev. 24:10). This person gets into a fight and אָת־הַשֵּׁם ... וַיִּקְבּוּ, “he cursed ... the [divine] name” (Lev. 24:11). Immediately, he is brought to Moses “and he was placed in custody until the decision of the Eternal should be made clear to them” (Lev. 24:12). On cue, God tells Moses to have the man executed for cursing the name of God. Indeed, God instructs that anyone – “stranger or citizen” alike – who “curses by the name of the Eternal shall be put to death” (Lev. 24:16). No one is allowed to utter the divine name, and the blasphemer is executed.

The Torah pauses during this story to reiterate the principle of “eye for an eye.” The text reads, in part, “If anyone kills any human being, they shall be put to death. One who kills a beast shall make restitution for it: life for life. If anyone maims their fellow, as they have done so shall it be done to them” (Lev. 24:17-19). And while this law may seem simple on its face, the Torah has taken great pains to locate it in this unusual context. After all, the blasphemer harmed no one, and he certainly didn’t kill anyone. So why is he executed?

⁶ <https://www.law.cornell.edu/uscode/text/52/10301>

⁷ See p. 40 of Kagan’s dissent at https://www.supremecourt.gov/opinions/25pdf/24-109_21o3.pdf. My above analysis of the legal history and interpretation of the VRA draws heavily from Kagan’s dissent.

There are many rich and textured layers to explore here, and we might also pause to recall that the Rabbis effectively eliminate the death penalty in Jewish law. But in the context of the Supreme Court's recent decision, I want to focus on only one aspect of this legal principle, namely, the Torah's focus on results.

The story we are told explicitly states that the half-Israelite was in the middle of a fight. The context must be significant here, and we can assume that he shouted his curse in anger or fear – it was not a premeditated act of blasphemy. Doesn't matter. He cursed God's name, and what's done is done. Moreover, the rule of retribution – the well-known “eye for an eye” formulation – also doesn't care whether you *intended* to cause harm. When you do harm, you have to pay for it, even if it was an accident.

As a side note, I believe the Torah assumes that “eye for an eye” is a monetary payment, not corporal punishment. And the Rabbis are explicit about this. But one way or another, the main concern of the law is: What *effect* did your actions have? And then how can you make it right?

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With this principle in mind, the Supreme Court's reasoning doesn't hold water. They insist that a practice denies the right to vote only if it *intends* to deny the right to vote. The State of Louisiana can make rules that dilute the votes of its Black residents so long as legislator simply *say* they are targeting Democrats, not African Americans. But our foundational values insist that you need to assess the impact of an action, not only its intention; and you bear responsibility for making right the harm you caused even if it was an accident.

I certainly hope that common decency and a commitment to fairness will prevent states like Louisiana from disenfranchising Black voters. I hope that Samuel Alito is right, that race-based vote-suppression is a thing of the past. But we Jews have been around long enough to know that old prejudices die hard, and majorities don't easily let go of power they've assumed. So it's up to all people of good conscience to uphold the American and Jewish values of empowerment, equality, and justice. Living in a multi-racial democracy is hard. But our community must maintain solidarity with other minorities. Only together can we protect one another from levers of power that seek to oppress.

The Torah teaches מִשְׁפָּט אֶחָד יִהְיֶה לָכֶם, “There shall be a single rule for you” (Lev. 24:22). This rule should prevail whether you are rich or poor, urban or rural, white or Black. Political representation is a fundamental right, and our values impel us to defend it. May we invoke all that is good, reflected in the holiness of God's sacred name, to preserve our civic commitment to freedom for all.