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DEFINING RACE: THE OBAMA PHENOMENON AND THE VOTING RIGHTS ACT

*Janai S. Nelson**

I'm delighted to be a part of this exciting symposium exploring the definition of race—one of the most challenging concepts in this country's history, and one that has been made even more challenging by the historic and very promising time in which we find ourselves this November. I thank Professor Farley for inviting me to participate and the *Albany Law Review* and the *Albany Journal of Science and Technology* for organizing this symposium. I'd also like to thank the dean, the faculty, and the students here for supporting such an important topic.

I'd like to relate the topic of today's symposium—defining race—to the recent presidential election and, in particular, to Barack Obama's successful candidacy to become the first black President of the United States. Rather than deconstruct, redefine, or explore the definition of race, I will explore briefly whether race relations in the electoral arena have changed to such a degree that race and race-based remedies are no longer needed, and what evidence from this presidential election would allow us to measure that.

I posit that an appreciable amount of the excitement about Obama's victory and his candidacy overall is fueled by the implicit hope that his election will have far-reaching effects on the state of race relations and inequality in the United States. The results of a Gallup poll that was conducted earlier this year reflect this hope. The poll indicates that an overwhelming number of persons surveyed believe that Obama's election would open up great opportunities for other African-Americans in national politics.¹ A popular tee-shirt emblazoned with the statement "We had a dream and now it's a reality" further underscores the high expectations for

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¹ See Lydia Saad, "Black Spokesman" Title Still up for Grabs, GALLUP, July 14, 2008, <http://www.gallup.com/poll/108805/Black-Spokesman-Title-Still-Grabs.aspx?version=print>.

this election. For others, Obama's win is a unique phenomenon—an aberration—not symbolic of any permanent shift in racial or electoral politics in America. There are even concerns that Obama's success may harm the interests of African-Americans because it will obviate the discourse on race, and we just heard from our previous speaker what some of the implications of such a result might be in the educational arena.

Today, I'd like to explore the somewhat conflicting implications of Obama's electoral success by focusing attention specifically on the growing number of electoral successes of African-American candidates in at-large elections in majority white—or at least not majority black—contests, and focusing on what these successes might mean for challenges to the path-breaking legislation that helped to set that entire trend in motion: the Voting Rights Act of 1965.² So, I'll begin by briefly recounting the modern narrative of Voting Rights Act successes and situating the Obama candidacy along a broader continuum of black elected officials. I'll then explore the predicted impact, if any, of Obama's success on the continued protection and enforcement of the Voting Rights Act by using two recent federal court challenges as a frame.

In 1965, when the Voting Rights Act was first passed, young Barack Obama was just four years old. At the time there were only five black elected officials in Congress and less than 1,400 black elected officials nationwide.³ By the end of the 1970s, when Obama was spending his formative years in Hawaii where certain jurisdictions are protected by the Voting Rights Act provisions that require bilingual voting assistance, the total number of black elected officials nationwide had more than doubled to nearly 5,000.⁴ And by the 1990s, when Obama began his political career in Illinois, black elected officials were experiencing record successes throughout the country, ending the decade at nearly 10,000 in number.⁵ Now there are more than 10,000 black elected officials.⁶

² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (2000)).

³ Marian Wright Edelman, *The Long Hard Road to Race-Free Politics in America*, MISS. LINK, Oct. 2, 2008, at 5.

⁴ U.S. CENSUS BUREAU, BLACK ELECTED OFFICIALS BY OFFICE, 1970-2002, AND STATE (2003), <http://www.census.gov/compendia/statab/tables/09s0398.pdf>.

⁵ DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY (2000), <http://jointcenter.org/publications1/publication-PDFs/BEO-pdfs/BEO-00.pdf>.

⁶ Joseph A. Califano, *The Price of Forgetting a Presidency*, WASH. POST, May 31, 2008, at B4.

Beginning in the late 1990s and increasing steadily into this millennium, we've begun to see a thawing in at-large elections in non-majority black contexts. That is, we've witnessed instances of electoral success for black candidates without the assistance of majority-minority districts, and we've begun to see black officeholders elected to some of the most highly regarded positions of authority at federal, state, and local levels. While most black elected officials still represent predominantly black communities, the number that has been elected by white majority communities is unprecedented. For example, recent reports show that in the 1980s, only a few black state legislators represented predominantly white districts, but by 2001, that number stood at 92, and in 2007, the figure was 189, which translates to about thirty percent of the 622 state legislators representing predominantly white districts.⁷

Again, these types of electoral successes have happened at every level of government. I just mentioned state legislators, but if we talk about mayoral successes, there has been a notable increase in the number of black mayors who represent predominantly white cities in places that we wouldn't necessarily suspect such as Asheville, North Carolina, and Columbus, Ohio. In terms of gubernatorial successes, we've seen the state of Massachusetts, which is seventy-nine percent white, elect Governor Deval Patrick.⁸ Before that, Governor Douglas Wilder was elected in the state of Virginia. And, there have been similar recent gubernatorial successes by Latinos and Asians as well like Governor Gary Locke of Washington State, Governor Bill Richardson of New Mexico, and Governor Bobby Jindal of Louisiana. So we've seen this sort of progress and change across the board in the area of race within the past few decades.

Congressional successes are taking a little bit longer to manifest. From 1965 to the present, there have been about ninety black House representatives and a notable number have been re-elected from non-majority-minority districts.⁹ But on the senatorial side, where statewide at-large elections are determinative, Obama was only the third black Senator since Reconstruction, and as we know, he just formally vacated his Senate seat, and there will be no

⁷ Rachel L. Swarns, *Quiet Political Shifts in U.S. as More Blacks Are Elected*, N.Y. TIMES, Oct. 14, 2008, at A1.

⁸ *Id.*

⁹ See Office of the Clerk, U.S. Capitol, Black Americans in Congress: Representatives and Senators by State and Territory, <http://baic.house.gov> (follow "Historical Data") (last visited June 2, 2009).

African-Americans in the Senate unless one is appointed to his post.¹⁰ In terms of Presidential successes, we can now claim a very significant one in Barack Obama's win. But we know other African-Americans have vied for the Presidential nomination and received a fair amount of support from white voters in doing so. The crossover support for these candidates was not actually enough to secure the position they sought, but certainly enough to make them viable candidates within their particular sectors. On that score, I want to point out Cynthia McKinney, who was a presidential candidate of the Green Party on the first all-woman minority ticket this past election. And, in order to gain the nomination from the Green Party, she necessarily received a fair amount of support from white voters within that party.

But for the first time in American history, we now have a self-identified black man who will represent a white majority country. This is not just historic for the United States; this is historic for the world. Indeed, this is the first time that a black leader will represent a country that is not a majority black country, so this is historic for a whole host of reasons and it is important to note that fact in as many contexts as possible. Both in the primaries and in the general elections, Obama broke racial barriers and voting patterns and, while the hard numbers are still being crunched and analyzed, it is clear that Obama would not have won the democratic nomination or the Presidency without having received meaningful support from white voters. Indeed, according to national exit polls, Obama won 43% of the white vote, 67% of the Latino vote, and 95% of the African-American vote—more support from each of those constituencies than John Kerry had in 2004.¹¹ But what does this tell us about the matter of race?

Prior to the election, the same Gallup poll that I mentioned some moments ago showed that the vast majority of blacks thought that an Obama win would improve race relations to some degree, but still only 23% say that race relations would meaningfully improve, and only 38% of whites felt that race relations would improve at all.¹² On the other side of the spectrum there are those who see the success of Obama, and others like him, as a basis for re-examining

¹⁰ Since these remarks were given, Roland Wallace Burris, who is African-American, was appointed and confirmed as the junior senator for the State of Illinois.

¹¹ Pew Research Center, *Inside Obama's Sweeping Victory*, Nov. 5, 2008, <http://pewresearch.org/pubs> (search "Site Search" for "Sweeping Victory").

¹² Gary Langer, *Obama's Candidacy Underscores Crosscurrents of Race and Politics*, ABC NEWS, June 22, 2008, <http://abcnews.go.com/PollingUnit/Politics/Story?id=5202366>.

certain race-based remedies, like majority-minority districts. Perhaps the most revealing testament to that notion is an op-ed by Abigail and Stephan Thernstrom, two conservative scholars, that appeared in the *Wall Street Journal* earlier this week—a week to the day of Obama’s victory.¹³ The article is entitled “Racial Gerrymandering is Unnecessary,” and you can read some of the excerpts from the article on the screen. But, in a few short paragraphs, the Thernstroms attempt to make the case that, while we don’t live in a colorblind society, racism in voting does not disenfranchise blacks, and the doors of opportunity are open to all.¹⁴

So the question is, what does Obama’s victory, and America’s attempt at prevailing over its history of discrimination really mean? A narrower inquiry is what is the practical impact of Obama’s victory on the continued enforcement, constitutionality, and promise of the Voting Rights Act? So, let me switch gears a bit and talk very briefly about two cases that raise this issue. I won’t give much of a background on the Voting Rights Act in the interest of time, but there are two provisions in particular that are important to understand, Section 2¹⁵ and Section 5,¹⁶ and I’ll leave them on the screen for you to digest as I continue.

There are two cases that raise challenges regarding each of these provisions, respectively. One is *NAMUDNO v. Mukasey*.¹⁷ Almost

¹³ Abigail Thernstrom & Stephan Thernstrom, Op-Ed., *Racial Gerrymandering is Unnecessary*, WALL ST J., Nov. 11, 2008, available at http://online.wsj.com/article/SB122637373937516543.html?mod=googlenews_wsj.

¹⁴ *Id.*

¹⁵ Section 2 of the Voting Rights Act contains the following prohibition:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. § 1973(a) (2000). Other provisions of the statute strengthen the equitable powers of federal courts, authorize civil and criminal penalties, and outlaw poll taxes. See 42 U.S.C. §§ 1973a(c), 1973h, 1973i(d), 1973j.

¹⁶ Section 5 states that whenever a covered jurisdiction seeks to change its laws regarding voting procedures or election administration:

[S]uch State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure. . . .

42 U.S.C. § 1973c.

¹⁷ The Northwest Austin Municipal Utility District No. One (“NAMUDNO”) filed its action in the United States District Court for the District of Columbia, seeking permission to bail out

immediately after the special provisions of the Voting Rights Act were renewed in 2006, a small municipal district in Texas raised a direct challenge under Section 5.¹⁸ Section 5 prohibits any voting change that will have a retrogressive effect—that is, any change in election administration or voting that will put minorities in a worse position than they were previously.¹⁹ Section 5 has served to transform the face of government in America, and this challenge to its constitutionality is very concerning. The evidence that the court would need to rely on in order to uphold the constitutionality has a direct relationship to Obama's success in this past Presidential election. One material question is how much weight should that evidence hold?

In another case, *Bartlett v. Strickland*,²⁰ there's a challenge out of North Carolina, under Section 2 of the Voting Rights Act, which is the provision that, among other things, provides the legal support for the creation of majority-minority districts for purposes of enabling minority communities to elect candidates of their choice.²¹ The question in that case is whether districts whose minority population falls below a majority, for example, whether forty percent black or Latino or Asian districts, are viable under the Voting Rights Act?²² Can they be protected when they won't necessarily guarantee that a candidate of choice can be elected?²³ These questions have broad implications concerning coalition districts, also known as influence districts or crossover districts.

The impact of the Obama victory on these two cases has to do with several areas of evidence that the court may look to in deciding these Voting Rights Act challenges. I'll just touch on four main ones in brief. The first area of evidence involves registration and turnout

of coverage under Section 5, or a declaration that Section 5 is unconstitutional. 573 F. Supp. 2d 221, 223 (D.D.C. 2008). Since these remarks were given, the Supreme Court decided the case on narrow statutory grounds, avoiding the question of Section 5's constitutionality. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 U.S. 2504 (2009).

¹⁸ *NAMUDNO*, 573 F. Supp. 2d at 229–30.

¹⁹ *Id.* at 225.

²⁰ Since these remarks were given, the Supreme Court decided the case holding that the Voting Rights Act does not require creation of a new legislative district when that would include a racial minority group that has less than fifty percent of the population, as a remedy when minority voters' rights have been diluted. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

²¹ *Id.* at 1231.

²² *Id.*

²³ For a related analysis of the potential failure of majority-minority districts when majority-minority populations divide across candidates, see Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L. J. 1287 (2007).

data.²⁴ Because of Obama's candidacy, black voter registration has climbed significantly in some key Section 5 states like South Carolina, Alabama, and Georgia. Turnout was unprecedented and phenomenal in many of these areas. This increased turnout certainly changes the analysis when we look at black registration and turnout vis-a-vis the registration and turnout rates of other populations. While black voter registration still lags significantly behind that of white voters, the gap has narrowed in unprecedented ways because of this election. This evidence will undoubtedly influence the outcome of, if not these cases, others that may be brought under the Act.

The other issue involves evidence of racial appeals. Courts deciding Section 2 claims, in particular, typically consider whether racial appeals influenced an election, or whether they have been a feature of the campaigning in any election within the relevant jurisdiction.²⁵ What's very complicated and tricky about the Obama candidacy is that many of the racial appeals, as I would identify them, had other undertones and were blurred by appeals to nativism, patriotism, jingoism, nationalism, and anti-Muslim and anti-Islamic sentiments. So it's unclear how the courts will treat some of these issues that might otherwise qualify as racial appeals, absent this more nuanced context, and whether the euphoria of Obama's substantial win will make an in-depth analysis of such appeals irrelevant in the larger scheme of things.

The other evidence that courts look to is the success of minority elected officials.²⁶ I've already provided some of the data on the successes of black elected officials. While the number of successes has increased significantly over time, there is still a significant gap between the number of African-American elected representatives and their political influence and the proportion of the black population to the general population in the U.S. On this front, I think the most significant impact of Obama's success will be its effect on increasing the pool of and the prospects of a new generation of black elected officials.

Finally, and probably most importantly, is the issue of racially polarized voting. A crucial piece of the Section 2 analysis and the overall perception of whether the Voting Rights Act is still viable as

²⁴ *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986).

²⁵ *Id.*

²⁶ *Id.*

a whole will be whether racially polarized voting still exists.²⁷ We do know that Obama received significant white support, sizeable Latino support, and overwhelming African-American support.²⁸ And, while he won Iowa, Georgia, Alabama, Louisiana, and South Carolina in the primaries and later won states like Virginia, Indiana, Colorado, Nevada, and Florida in the general elections,²⁹ entrenched bastions of racially polarized voting remain. In the primary elections an analysis of Georgia, Louisiana, Mississippi, Alabama, Arkansas, Texas, Tennessee, and South Carolina showed that white voter support for Obama was under 40% and as little as 10%, while black voter support was from 73 to 90%.³⁰ In the general elections, evidence of racially polarized voting exists where white voters support for Obama in three deep south states—Louisiana, Mississippi, and Georgia—dropped significantly below their 2004 support for Kerry,³¹ defying any plausible partisan justification. So while Obama would not have won without a substantial white vote, as a whole, more whites voted against Obama (or for McCain) than for Obama.

I'll close by saying that Obama's impact on each of the items of evidence and proof that I mentioned remains to be seen in terms of what weight the court will place on this particular Presidential election, especially considering the number of elections that the Voting Rights Act is aimed to protect. But I think that much of the long-term and less tangible influence of Obama's success on the electoral arena and the matter of race will result from actions of the Obama administration itself. For example, the President's judicial appointments will have a direct impact on how the Voting Rights Act will be interpreted and whether it will be actively enforced by federal judges. The administration will also have an impact on Voting Rights Act enforcement in terms of influencing whether the Department of Justice will prioritize enforcement of the Voting Rights Act. Also, Obama's election can serve to fulfill the promise of the Voting Rights Act not only by virtue of its own success but also by a more racially diverse set of candidates to seek elected office which will further integrate local, state, and federal governments.

²⁷ *Id.*

²⁸ See Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Litigation*, 212 n.38, 213–15 (Feb. 12, 2009), available at <http://ssrn.com/abstract=1341502>.

²⁹ See, e.g., *id.* at 213–17.

³⁰ See, e.g., *id.* at 216–17.

³¹ See, e.g., *id.* at 217–18.

So the suggestion here is not that I believe Obama's success does not herald a monumental change in this country, because it unequivocally does. Rather, the suggestion here is that we should not consider Obama's success probative of a permanent and widespread sea change without sufficient data and analysis and an opportunity to test our theories and findings over time. In a nutshell, before we define race as a thing of the past, let's wait and see how the future of this country is defined by this prodigious moment in our history.

