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Book Review of Give Us The Ballot:

The Modern Struggle For Voting Rights in America by Ari Berman

Reviewed by Marc Alexander

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The title of Ari Berman's riveting book about the Voting Rights Act of 1965 and its aftermath, Give Us The Ballot, comes from words spoken by Martin Luther King Jr. in major civil rights speeches delivered at the Lincoln Memorial in 1957 and later in Selma. Dr. King also famously adopted the precept, "the arc of the moral

universe is long, but it bends toward justice." However, in the case of voting rights for which Dr. King fought, the arc looks more like a sine wave, curving up and down. The history of voting rights in the United States is gnarly and twisted, periodically bending to political forces.

In the beginning, the Declaration of Independence proclaimed, all men are created equal, endowed by their Creator with certain unalienable Rights. However, those unalienable rights did not include universal voting rights. Excluded were slaves, Indians not paying taxes, women, felons, and many persons without property.

In Berman's chronological account of voting rights, the upwards arc begins with Emancipation and the 15th Amendment, granting African American men the right to vote. Following Emancipation, voting rights expanded during Reconstruction, only to be stripped away during the period of "Redemption" by Jim Crow laws, poll taxes, literacy tests, and terror. "The United States is the only advanced democracy," writes Berman, "that has ever enfranchised, disenfranchised, and then reenfranchised an entire segment of the population."

The voting system in the United States had, and has, its peculiarities. As a result of the "Three-Fifths Compromise," the Electoral College ingeniously allowed Southern states to benefit from the slave population, by counting 3/5ths of that population for the purpose of calculating representatives and presidential electors, while disenfranchising African Americans. (U.S. Const., art. I, § 2, cl. 3.) Because each state, no matter what size its population, gets two electoral votes for its senators, the Electoral College has benefited less-populated rural states. It is possible to lose the popular vote and win in the Electoral College. And Governor Elbridge Gerry of Massachusetts lent his name to the manipulation of district boundaries, the process that distorts the voting process, diluting the value of some votes, while enhancing the value of others.

Berman attributes the passage of the Voting Rights Act of 1965—the "Second Emancipation"—to an extraordinary confluence of events: "the clear denial of black voting rights in the South under Jim Crow; profound public outrage about the violence in Selma; a disciplined and compelling civil rights movement; the most liberal Congress since the New Deal; a Republican Party filled with northern moderates, many of them senior figures; and a president in LBJ who specialized in steering complex legislation through the Congress." That the VRA has fallen into desuetude can be largely explained by turning the "extraordinary confluence of events" inside out—by noting the absence today of de jure discrimination, any widespread public outrage with discrimination against minorities, a liberal congress, and a chief executive with legislative skill and a liberal agenda.

Berman illustrates the drama and poignancy of the struggle to vote with numerous examples—citizens confronting the indignity of poll taxes and literacy tests, marchers with skulls cracked by clubs, a rural voter casting a ballot for the first time in her long life after the passage of the VRA, voters standing in long lines in the rain to vote, voters with a dearth of documentation seeking to obtain an ID in order to vote, civil rights leaders sitting in the Supreme Court waiting for a decision, and an attorney asking his opponent, "How can a nice man like you do such awful things?"

Section 5 of the VRA prohibited certain states with histories of voter discrimination from making changes affecting voting with-

out receiving preapproval from the U.S. Attorney General or the U.S. District Court for the District of Columbia. In 1969, the Warren Court gave teeth to Section 5 in

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Allen v. State Board of Elections, 393 U.S. 544, a 7-2 opinion, explaining: "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a state in even a minor way." (*Id.* at p. 566.) Dissenting, Justice Black expressed the states' rights position that the federal control of state election laws was unconstitutional. "This is reminiscent of old Reconstruction days," complained Black, "when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did." (*Id.* at p. 595.) By 1969, Justice Black believed the South should no longer be treated as a "conquered province." (*Ibid.*)

Significant advances in African American voting rights followed the VRA's passage. Increasing numbers of African American voters and African American representatives participated in a "Second Emancipation." However, the evidence Berman cites suggests that there was also an element of "be careful what you ask for" in the push to increase the political representation of African Americans. In Southern states, Republicans allied with African Americans to create majority African American voting districts ("packing"), thereby diluting the African American vote in other districts throughout a state ("cracking"), where black voters had recently allied with white Democrats. Partially as a result of the gerrymandering, outside the districts where the African American vote was packed, some historically Democratic districts lost their voting advantage.

LBJ had predicted that the passage of the VRA would foment a backlash, and that the South would be lost to Democrats for a long time. Of course, it would be shortsighted to attribute Democrats' loss of the South solely to direct or indirect effects of the VRA. President Nixon's "Southern strategy," using Kevin Phillips' The Emerging Republican

Majority as the playbook, also helped shift political affiliations. Berman writes that Nixon read Phillips' book and told his chief of staff, H.R. Haldeman: "Use Phillips as an analyst—study his strategy—don't think in terms of old-line ethnics, go for Poles, Italians, Irish, must learn to understand Silent Majority … don't go for Jews and blacks." While President Nixon was not always guided by "the better angels of our nature," it is worth recalling that Republicans and Democrats voted in favor of passing the VRA, and that the VRA was renewed during Republican administrations.

In 1982, Congress extended Section 5 for 25 years, without, however, adopting new formulas to identify covered jurisdictions requiring preclearance for voting changes. By the time of the Roberts court, Justice Black's minority view that strict federal oversight was unfair to the South and no longer necessary, would be ascendant. Justice Roberts, who had clerked for Justice Rehnquist (who in turn clerked for Justice Jackson, whom he advised, "I think that *Plessy v. Ferguson* was right and should be affirmed"), and who had worked on voting rights issues in the Department of Justice, saw no need to continue vigorous enforcement of the VRA. He emphasized the success achieved by the VRA in bringing increased voter registration and turnout; and thus, in his view, the very success of the VRA had compromised the need for ongoing enforcement. In 2013, *Shelby County v. Holder*, 133 S.Ct. 2612, struck down the unadjusted coverage formula determining which states were subject to Section 5 preclearance for voting changes, without actually declaring Section 5 to be unconstitutional. As a result, Section 5 enforcement was gutted, but Section 5 was not exactly liquidated.

In Berman's formulation "the revolution of 1965 spawned an equally committed group of counterrevolutionaries." The counterrevolutionaries responded to the call of the VRA with demands for a "colorblind" voting system, an end to "affirmative action" efforts to strengthen voting power of minorities, and a demand for "equal state sovereignty," meaning Southern states would not be treated invidiously, and the federal government would not overpower state legislatures' choices about voting laws, practices, and procedures.

Post-*Shelby*, states' efforts at voter suppression have been empowered. Now, however, the ongoing struggle over voting rights does not involve polling taxes and literacy tests. New tools will make it more difficult for minorities, young people, and old people, to vote, but the tools are not overtly racist. Thus, despite scant evidence of voter fraud, voter ID laws have been approved in many states. Hence, it is possible for a state to allow a gun permit to be used as a voter ID, while not allowing a student ID to be used. Persons with poorly documented personal identification records will need to obtain proper documentation, something opponents have argued can be tantamount to a poll tax if persons at society's margins must pay to unscramble poorly kept records. States will shorten the days during which early votes may be cast. Polling days and hours can be shortened. In poorer neighborhoods, where there is already a shortage of polling places, voting lines will be longer, as opportunities to vote early and outside ordinary work hours will diminish. Census Bureau funding could be cut, requiring that representation be based on old data, rather than on data that reflects population changes. Six states added voter restrictions in time for the 2012 presidential election, and another 14 states put

restrictions in place in time for the 2016 election. (www.brennancenter.org/new-voting-restrictions-america; see also www.aclu.org/ map/voter-suppression-laws-whats-new-2012-presidential-election.) Partisan gerrymandering will continue to entrench the dominant party.

According to Berman, during the presidency of George W. Bush, U.S. Attorneys were urged to vigorously pursue voter fraud cases, and in one well-publicized case, David Iglesias, the U.S. Attorney for New Mexico, was fired for failing to bring voter fraud prosecutions, nor was he alone. Hans von Spakovsky, Carl Rove, and others urged measures to control voter fraud. But according to Professor Richard Hasen, an election law expert at the University of California-Irvine, there is scant evidence of instances of genuine voter fraud. Indeed, Prof. Hasen dubbed Spakovsky and Rove, et al., "The Fraudulent Fraud Squad." Following the 2016 election, and President Trump's allegation that he actually won the popular vote because three to five million votes were fraudulently cast, there are amped-up efforts to institute measures to crack down on voter fraud. Where elections have been lost by small margins, changes in voting laws and procedures will have real impact. If Berman's history of the VRA offers any lesson, it is that an enduring debate continues as to who can participate in our democracy, and that the arc of the moral universe will continue to encounter bends in the road.

Following the publication of Give Us The Ballot in 2015, challenges to laws affecting voting have taken a new direction. By the time this review appears, the Supreme Court should have heard oral argument, scheduled for October 2017, and possibly rendered an opinion, in *Gill v. Whitford*. *Gill* is a partisan gerrymandering case arising out of Wisconsin, where in 2012, Republicans received 49% of the statewide vote, but gained 60% of the State Assembly seats. The plaintiff in *Gill* attacked apportionment plans that minimize the political strength of political groups (i.e., Democrats), rather than the political strength of racial groups (i.e., African Americans and Hispanics). Thus, *Gill* is about Equal Protection, the First Amendment, and the Fourteenth Amendment, and not about the VRA. The theory behind *Gill* is that partisan gerrymandering can be so severe, it entrenches the dominant political party. Legislators choose their voters, rather than the other way around. As a result, the political system ceases to be self-correcting, and the dominant party becomes self-perpetuating. Until now, courts have been loath to tackle severe partisan gerrymandering, because they have lacked a workable standard for measuring unfairness, something *Gill* attempts to address with mathematical tools measuring the amount of "wasted votes" and the size of the so-called voting "efficiency gap."

The complaint in *Gill* was filed in July 2015, and Berman's book, published in 2015, does not mention the case. With its focus on the VRA and racial gerrymandering, Give Us The Ballot has less to say about partisan political gerrymandering. Just as the arc of the VRA has cratered, a new arc may bend in a new direction. Then again, a Supreme Court majority may not feel the urge to undo partisan gerrymandering. Count to five.

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