

Guest Column: Dual vote on consolidation is skewed veto

Segregation-era amendment to Tennessee Constitution gives huge, disproportionate power to a small group, and may clash with federal one man, one vote principle.

By D'Army Bailey and Steve Mulroy, Special to The Commercial Appeal

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This November a majority of Shelby County voters may vote yes on consolidation only to have their vote trumped by a separate vote of county voters living outside the city of Memphis. It is time to address the compelling question of whether this is fair, or even legal under federal law.

A 1953 amendment to the Tennessee Constitution requires that in order for Shelby County to be consolidated, there must be approval by a majority of voters inside Memphis, plus a majority of voters outside Memphis. Since "outside Memphis" is only 27 percent of the county's population, mathematically that means 14 percent of the voters (a majority of 27 percent) can veto consolidation even if 86 percent of the county passionately wants it. This gives huge and disproportionate power to a small group of people.

Any election plan that gives one group of local voters a greater weight and influence than other citizens is ordinarily looked upon as a violation of the 14th Amendment's constitutional principle of "one man, one vote." Under the U.S. Constitution, there is generally no exception for this one-person, one-vote requirement even when you are dealing with different local governments making up a larger government unit.

The Supreme Court so held, for example, in a case involving the makeup of the New York City Board of Estimate representing all the boroughs of the city. The Supreme Court said that giving equal representation by borough violated one man, one vote, because big Manhattan got the same representation as little Staten Island.

Local defenders of Shelby County's minority veto power over the voting majority have sought refuge in the U.S. Supreme Court's 1977 Lockport decision. There, however, the racial and dual school system issues we have in Shelby County were not involved. The Lockport decision was in a case from the Town of Lockport, N.Y., in which the court said it was OK to require separate majorities among all city voters and among all rural voters. The court's reasoning was that there were legitimate and compelling differences of concerns between the city residents and the largely rural non-city

residents.

But deciding whether the separate interest of Memphis voters versus other Shelby County voters can be deemed constitutionally legitimate and compelling under the standards of the Lockport case will involve significantly different current and historical facts.

Tennessee's voting plan divides the vote into Memphians versus the combined voting power of unincorporated Shelby County aligned with Germantown and other suburban cities. Why should Memphians be treated differently from Germantown residents? Why should Germantown residents be lumped together with rural voters in unincorporated Shelby County? What interests do Germantown and the rural areas have that are so different from those Germantown and Memphis share?

Furthermore, the racially charged voting history in Shelby County is very different from what the Supreme Court faced in the Lockport case. Consider the court's language in Lockport: "The constitutional and statutory provision in this case also do not appear to be the sustained product of either an entrenched minority or a willful majority."

Even if we conceded for the sake of argument a constitutionally acceptable separate Germantown-rural voter interest, there's another ominous and fundamental problem. The Tennessee Constitution's dual voting system may well unfairly and illegally dilute the racial voting strength of Tennessee's black minority citizens.

The U.S. Voting Rights Act bans any voting "practice or procedure" that denies minority voters "an equal opportunity to participate in the electoral process and elect candidates of choice."

It does not require discriminatory intent. In the language of the Supreme Court, if the effect of an electoral rule is to "interact with local conditions" to deprive minority voters of an equal ability to affect electoral outcomes, there's a violation.

The population of Memphis is estimated to be about 66 percent black. Shelby County's population as a whole is approximately 52 percent black, while its population outside of Memphis is estimated at only 31 percent black. Giving residents of east Shelby County a disproportionate veto to frustrate the will of the majority-black county arguably dilutes racial minority voting strength.

In any court challenge of this law, the federal courts must look to various factors to help decide this case. Among the most compelling is the repeated racial polarization in Shelby County between the majority black voters of Memphis and the minority of white voters outside of Memphis who have been given veto power over consolidation.

Admittedly, until a court decides this issue, no one can say with certainty that the segregation-era Tennessee constitutional amendment establishing this dual vote system violates federal law. But if we need to decide this question, it is best to do it before the referendum, lest it seem the courts were interfering with the election in

order to change the outcome after a vote has occurred.

In the interest of fundamental fairness, it is worth asking whether the rules we have set for ourselves in this referendum give equal treatment to the voting rights of everyone -- especially African-American voters who too many times have seen, throughout our history, the electoral deck stacked against them.

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