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ARTICLE: BRINGING EQUALITY TO POWER: HOW THE FEDERAL COURTS TRANSFORMED THE ELECTORAL STRUCTURE OF SOUTHERN POLITICS, 1960-1990

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LEXISNEXIS SUMMARY:

... In 1960, African-Americans in the South were substantially disfranchised by racially discriminatory registration procedures. ... In light of subsequent development of the equal protection standard in regard to racial vote dilution, it is worth emphasizing that in the one person, one vote cases the Court did not (and does not) require plaintiffs to prove that there was discriminatory intent directed at residents of metropolitan areas, but merely that the unequal apportionment had a harmful effect on their voting strength. ... " Under those circumstances, at-large elections could - if voting patterns followed racial lines - "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting. ... Applying the constitutional purpose standard, the court observed that the change to at-large elections followed a substantial increase in minority voter registration after the Voting Rights Act. ... Under this approach, plaintiffs in vote dilution cases were often able to win by documenting a history of racial segregation and discrimination in the jurisdiction and by showing that, due to racially polarized voting, the election system operated in such a way that minority voters did not have a reasonable opportunity to elect representatives of their choice. ...

TEXT:

[*665]

Introduction

In 1960, African-Americans in the South were substantially disfranchised by racially discriminatory registration procedures. Fewer than one out of three blacks of voting age were registered, and whites were registered at more than twice that rate. In Alabama, for example, only 14 percent of African-American adults were registered, as compared with 64 percent of white adults. n1 Not surprisingly, state legislatures in the region were all white, although a few local governments had elected a black person to public office from time to time in the years since World War II. n2 State legislatures, which in most cases had not been redistricted in decades, were astonishingly malapportioned. Florida, where 12 percent of the population could elect a majority of the state senate and 15 percent could elect a majority of house members, was the most egregious example; the largest senate [*666] district had 98 times the population of the smallest, and the largest house district was 109 times the smallest. n3

By 1990 this portrait of inequality had been transformed beyond recognition. Formal barriers to registration and voting no longer existed, and in some localities African-American registration and turnout approached parity with whites. Black office holding had become routine and in some jurisdictions approached proportionality, as a result of the elimination of racially discriminatory at-large election procedures. n4 State legislatures and local governing bodies routinely, and uncomplainingly, apportioned themselves according to the one person, one vote principle, with only modest deviation from absolute equality. As political scientist Bernard Grofman puts it, the principle of population equality had become the sine qua non of redistricting. n5

How can we account for this remarkable transformation in Southern electoral politics in a period of only 30 years? One aspect of this change is well understood: the substantial elimination of racial barriers to registration and voting was due primarily to the adoption and implementation of the Voting Rights Act of 1965. n6 The elimination of malapportioned legislatures and of at-large election systems, on the other hand, resulted from a more complex process in which litigation [*667] in the federal courts played the central role. n7 That process is what this essay seeks to explain.

Beginning in 1962, the Supreme Court adopted the view that the Equal Protection Clause of the Fourteenth Amendment required legislative and congressional districts to be substantially equal in population - the one person, one vote standard - to protect against what came to be called quantitative vote dilution. n8 The extraordinary political impact of these decisions was quickly dubbed the "reapportionment revolution," perhaps the only revolution ignored altogether by historians. n9 The Court subsequently expanded the equal protection concept to include a prohibition on racial, that is qualitative, vote dilution, particularly as manifested in the use of at-large elections or its equivalent, multi-member legislative districts. n10 The transformation of the electoral structure of Southern politics between 1960 and 1990 was due essentially to the implementation of these two concepts of vote dilution through hundreds of federal court orders, assisted by administrative actions of the Department of Justice, and reinforced by Congressional decisions to expand and strengthen the Voting [*668] Rights Act in 1970, 1975, and 1982. n11 None of this, of course, could have happened without the willingness of private citizens to assert their rights in court and the ability of public interest lawyers to represent them effectively.

A number of related issues lie beyond the scope of this essay. Despite my focus on litigation in the federal courts, in the interest of space, I largely ignore the internal deliberations of judges and justices and biographical influences on their legal thought. n12 Nor do I explore the partisan consequences of either the one person, one vote decisions or racial vote dilution cases, or join the debate over the trade-offs between descriptive and substantive representation in redistricting plans. n13 I also leave for another time the story of the confusion in voting rights case law that developed in the 1990s, a development that appeared to place the achievements of the preceding quarter century in jeopardy. n14

I. Race, Politics, and the Law, 1960

The federal courts had not made much headway against the Southern system of white supremacy by 1960, with the single exception of eliminating the all-white party primary at the end of World [*669] War II. n15 African-American

citizens in the South were subjected to arbitrary and discriminatory restrictions on their right to register and vote, including literacy tests, constitutional interpretation requirements, and poll taxes. Legal protection for minority voting rights in the South was afforded only by lawsuits brought under the Reconstruction Amendments. Prior to 1957, only private attorneys could file such litigation, but in that year Congress adopted a Civil Rights Act that created the Civil Rights Division in the Department of Justice and gave it authority to bring constitutional challenges to racially discriminatory voting practices. n16 Even so, the Department gained only limited authority to challenge registration procedures jurisdiction by jurisdiction, and, even in these purely local cases, not all federal judges were willing to disturb the status quo. n17 Everywhere in the South, African-American registered and turned out to vote at much lower rates than whites, and in black-majority counties the poll books often included only a handful of blacks. n18

Where African-American did manage to register and vote in significant numbers, Southern legislatures often adopted new electoral procedures designed to dilute minority voting strength. Use of at-large elections - requiring candidates to run city-wide or county-wide rather than from smaller districts or wards - was the cornerstone of the vote dilution structure. n19 Because racial minorities tend to be residentially segregated, they often represent a majority of the prospective voters in one or two election districts or wards and thus have the potential for electing one or two candidates of their choice. Where elections are conducted at large, however, where whites are a [*670] majority of the electorate, and where whites vote as a bloc against candidates preferred by minority voters, the candidate preferences of the minority community are submerged in the larger pool of white voters. n20

Even when voting patterns are racially polarized, in a simple at-large system a cohesive minority group can use single-shot voting to elect one representative if several offices are to be filled. n21 By requiring all voters to cast ballots for a full slate of offices to be filled, single-shot voting becomes impossible. The same result occurs if each candidate is required to qualify for a separate place or post (i.e., Place No. 1, Place No. 2, etc.). Thus, both anti-single shot procedures and numbered-place requirements enhance the discriminatory potential of at-large elections. n22

The widespread use of laws requiring runoff elections where no candidate receives a majority of the votes cast can also have a discriminatory effect in an at-large system where voting is racially polarized. If the candidate receiving a plurality of the votes wins, one minority candidate can defeat several white candidates wherever white voters split their ballots sufficiently. Requiring a runoff in the event that no candidate receives a majority of the votes cast, however, eliminates that possibility by setting up a head-to-head contest between the top two choices, so that white voters can rally behind the white candidate as a bloc. n23

Advocates of white supremacy were like the proverbial lawyer who wears both suspenders and a belt: these dilutive devices served as layers of insurance for the status quo, to be called into play wherever black political participation rose to a level that threatened white monopoly of electoral offices. Nothing better illustrates this principle [*671] than the adoption of a package of so-called "segregation bills" by the Louisiana legislature in 1960. n24

The day after a federal court in New Orleans had ordered the desegregation of the New Orleans public school system, newly elected Governor Jimmie Davis announced to the state legislature that his administration was sponsoring a series of bills "designed to preserve segregation and at the same time maintain law and order in our state." n25 The architects of the administration package included two leaders of the Citizens Council movement in the state, Willie Rainach, a former legislator from northern Louisiana, and Leander Perez, a planter-businessman who was a virtual dictator in Plaquemines Parish, south of New Orleans. Rainach had chaired the Joint Committee on Segregation from 1954 to 1959; under the influence of his committee, the legislature had enacted a host of racially motivated statutes, and at Rainach's urging the citizens' councils carried out systematic purges of black voters from the state's registration rolls. n26 Perez, long the district attorney of his parish but widely known as "Judge" Perez, currently headed the state district attorneys' association. An administration floor leader explained that the district attorneys' association had drafted the entire legislative package. n27

These segregation measures included new restrictions on voting. One bill required that the race of each candidate be designated on the ballot, presumably to allow white voters to target any black candidates. n28 Another sent to the

voters a new constitutional amendment designed to allow registrars greater latitude in keeping blacks off the voter list. Its principal features were a more stringent literacy test, a test of "good moral character," and a list of petty crimes - reportedly the kind most often committed by blacks - that made citizens ineligible [*672] to vote. n29 According to a press account, proponents of these measures believed that "morality qualification for voting will result in the disfranchisement of a large number of Negroes." n30

Other provisions were designed to dilute minority voting strength. Although no longer a member of the legislature, Rainach's influence was so great that he was permitted to explain the administration's segregation measures to the Senate Judiciary Committee. For example, Rainach unabashedly described the racially discriminatory purpose of requiring parish school board members to be elected by majority vote, or face a runoff: the bill "obviously was intended to block any Negro candidates from becoming members of the school board by getting a plurality vote, rather than a majority." n31

The bill also included an anti-single shot (or "full slate") requirement. n32 In light of the fact that school boards were covered by the existing state-wide anti-single shot law, n33 this provision was redundant, except as an insurance policy. n34 As it happens, the full slate requirement created numerous malfunctions in the electronic voting machines they state was using in increasing numbers. The state custodian of voting machines, Douglas Fowler, tried for years to persuade legislators to change the law, only to be told that "if you do this, then a Negro will be elected." n35

The state Constitution had for many years required parish governing bodies, called police juries, to be elected by districts rather than at large. Recognizing the threat that African-American candidates might succeed in winning office under a ward system, the Davis administration [*673] included in its "segregation" package a new law authorizing the creation of charter commissions "to allow voters of any parish to change their form of government to a commission form with members elected parish-wide, if Negro voters became concentrated enough in one or more wards to elect a member of their race to the present police jury." n36 An administration floor leader reassured legislators who initially opposed the idea: "This is a segregation bill. I hated to say it, but this was designed so that, if undesirables get on parish police juries, the people could change their form of government." n37 A year later Plaquemines Parish put this plan into effect, with Judge Perez serving as the leading member of the new Commission Council. n38 The shift to at-large elections was to become the key element in white efforts to minimize the effects of the growing black vote in the South.

II. The Tuskegee Gerrymander

A more complicated version of vote dilution is annexation - or, in some cases, de-annexation - that is, altering the boundaries of a city so that it significantly affects the percentage of minority voters in the city's electorate. n39 In 1957 the Alabama legislature redrew the boundaries of the predominantly black city of Tuskegee in such a way that virtually all its black inhabitants were beyond the municipal limits, turning an 80 percent black city into a virtually all-white city and thus eliminating the threat that African-American might elect a member to the city council. The city was the home of the historic Tuskegee Institute and a veterans' hospital; the black professional staff of both institutions had been fighting mostly hostile registrars to [*674] secure the right to vote since the 1930s. At the time of the de-annexation, black registration in Tuskegee had reached 40 percent of the eligible voters in the city but was significantly lower in rural areas of the county. n40

Sam Engelhardt, Jr., the legislative architect of what came to be known as the "Tuskegee gerrymander," understood the process of vote dilution. Several years earlier in 1951 he had persuaded the legislature to pass a bill outlawing single-shot voting in Alabama municipalities because, as a fellow legislator Senator J. Miller Bonner explained, "there are some who fear that the colored voters might be able to elect one of their own race to the [Tuskegee] city council by 'single-shot' voting." n41 Engelhardt was a leader in the state's White Citizens' Council by 1957. The de-annexation plan for Tuskegee was simply the latest in his efforts to maintain white control of the political process. n42

Civil rights lawyer Fred Gray promptly challenged Engelhardt's handiwork in federal court. n43 The district and appellate courts, seeing the Tuskegee de-annexation as a type of legislative gerrymander, declined to act, in deference to

current Supreme Court precedents. At that time the Supreme Court treated any challenge to apportionment or redistricting plans as non-justiciable because it presented a "political question." As Supreme Court Justice Felix Frankfurter put it in the 1946 decision *Colegrove v. Green*, "courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly." n44 In this instance, of course, there was no chance the Alabama legislature would remedy its racially discriminatory de-annexation of Tuskegee.

[*675] The Supreme Court broke new ground, however, by invalidating the de-annexation in the landmark decision *Gomillion v. Lightfoot*. n45 Justice Frankfurter, the architect of *Colegrove*, wrote the majority opinion. Frankfurter persuaded his colleagues to strike down the Tuskegee de-annexation as a violation of the Fifteenth Amendment - on the ground that it denied blacks the right to vote in municipal elections - rather than as a dilution of their voting strength in violation of the Fourteenth Amendment's Equal Protection Clause. n46 In this way Frankfurter could take action against the infamous gerrymander while still claiming that *Colegrove* was good law. n47 Nevertheless, in subsequent years *Gomillion* has routinely been seen as a districting case. n48 Lawyers interested in challenging malapportioned legislative plans, moreover, saw the Tuskegee decision as a basis for persuading a future Court to enter the redistricting arena. n49

III. The Courts Invade the Political Thicket

In the area of population inequality, the federal courts were part of the problem before they created a solution. Before 1962 the federal courts refused to accept jurisdiction over challenges to malapportioned legislatures under the *Colegrove* doctrine. n50 Because most [*676] state legislatures refused to reform themselves by equalizing the apportionment of seats, that doctrine left malapportionment a wrong without a remedy.

Lawyers representing established political leaders in Memphis, Nashville, and Knoxville filed a lawsuit challenging the egregiously malapportioned Tennessee legislative districts, which had not been redrawn since 1901 despite a state constitutional requirement. Some were Democrats, some Republicans; some were political conservatives, some were liberals. What united them was the simple desire to obtain a proportional number of seats in the legislature. n51 The largest district in Tennessee had more than 44 times the population of the smallest district. n52 The rural-urban disparities were not as great as in some other states because the apportionment under-represented rural areas in the Republican stronghold of East Tennessee as well as all metropolitan areas. n53

This case presented the Supreme Court with an opportunity in 1962 to confront the *Colegrove* doctrine squarely. Over Justice Frankfurter's adamant opposition, joined by that of Justice John Marshall Harlan, on March 26, 1962, the Supreme Court decided in *Baker v. Carr* that the plaintiffs had standing to challenge a legislative redistricting plan, that the federal courts had jurisdiction to decide such cases, and that the plaintiffs' claims were justiciable under the Equal Protection Clause of the Fourteenth Amendment. n54 Challenges to legislative apportionment do not, the Court found, present a "political question" the federal courts need avoid. n55 Although it remanded the case to the lower courts for trial, the Court's decision that the issue of population inequality was justiciable triggered massive litigation. During the spring and summer of 1962 redistricting lawsuits were filed in 33 states. "The rush through the door unlocked by *Baker v. Carr*," observed one legal scholar at the time, "has been staggering." n56

On the same day in March, 1962, that the Supreme Court decided *Baker v. Carr*, liberal Atlanta attorney Morris Abram filed suit challenging the county unit system by which primary elections for governor [*677] and other state officers were decided. n57 The only meaningful election in Georgia in 1962, as had been true throughout the twentieth century, was the primary election conducted by the Democratic Party. n58 County units were allocated on the basis of malapportioned legislative districts; many of the state's malapportioned congressional districts also used a county unit procedure to decide primary contests. The system of weighting by unit votes meant that on occasion the winner of state-wide contests was the loser in the popular vote. Other plaintiffs filed challenges to the state's malapportioned legislative and congressional districting plans. n59

The dimensions of malapportionment infecting the election of state officers, legislators, and congressmen were

awesome. Many of Georgia's 159 counties were extremely small. Echols County, the smallest, had only 1,876 people in 1960, but it had one state representative (and thus two unit votes). By contrast, Fulton County, which contained the state capital Atlanta, had a population of 556,326, but only three representatives (and thus only six unit votes). Assuming a rough correspondence between population size and the number of voters, the mathematical weight of an individual vote in Echols County was thus 98.9 times that in Fulton County. n60

[*678] Hoping to forestall a hostile court decision, the Georgia legislature enacted a plan that revised the county unit system by creating more unit categories so as to give somewhat greater weight to more populous counties. n61 The day after the legislature adjourned, the three-judge panel struck down the county unit system. Even as modified, the method of apportioning unit votes in primary elections for statewide, congressional, and some judicial offices violated the equal protection clause of the Fourteenth Amendment. n62 A year later the Supreme Court found that such a county unit system in any form was unconstitutional, because the equal protection clause requires a standard of "one person, one vote." n63

The Court's next major apportionment decision, *Wesberry v. Sanders*, n64 also arose in Georgia, where a liberal state senator challenged the malapportionment of congressional districts. The state's fifth district in metropolitan Atlanta, the second most populous in the nation, had 823,680 residents (109 percent over the ideal population), as compared with only 272,154 residents (31 percent under the ideal) in the smallest district. n65 The Court, finding in *Wesberry's* favor, decided that Article I, Section 2, of the Constitution requires that "one man's vote in a congressional election is to be worth as much as another's." n66 Writing for the majority, Justice Hugo Black went through a lengthy historical account of the framing of Article I in 1787 to justify his view that the Constitution requires population equality in congressional districts. n67 Justice John M. Harlan was harsh in dissent, charging that "the constitutional right which the Court creates is manufactured out of whole cloth," but he was right that there is little solid evidence to support the majority's interpretation. n68

[*679] In Alabama, where the legislature had not reapportioned itself since 1901, young liberal lawyers from Birmingham and Mobile, representing business and labor groups disgruntled with the rural stranglehold on state government, initiated lawsuits along the lines of *Baker v. Carr*. n69 A trial court found in their favor, ruling that the existing apportionment scheme constituted "'invidious discrimination' in violation of the Equal Protection Clause." n70 The modest remedy ordered by the court left most of the plaintiffs dissatisfied, but the increasing cost of the litigation prevented them from appealing to the Supreme Court. The state attorney general, moderate Richmond Flowers, also decided not to appeal. As it happened, the major expenses of appeal were borne by probate judges from two black belt counties who, with the encouragement of Governor George Wallace, decided to take the case up for the purpose of urging the justices to reverse *Baker*. n71

In June, 1964, the Supreme Court completed the second phase of the reapportionment revolution by deciding in favor of plaintiffs in state legislative apportionment cases affecting fifteen states in June, 1964, with the key decision coming in the Alabama case *Reynolds v. Sims*. n72 Writing for a majority of six justices, Chief Justice Earl Warren reviewed the Court's earlier decisions protecting the right of black citizens to register and vote, including the elimination of the white primary, but observed that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." n73

In striking down Alabama's malapportioned legislative scheme, the Court found that the Equal Protection Clause requires a state to make "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." n74 Deviations from the ideal-sized district would have to be justified by a "rational state policy," said the Court, without making clear what might satisfy this standard. n75

The Chief Justice did not bother with what would have been a fruitless effort to demonstrate that the intent of the framers of the [*680] Fourteenth Amendment included the goal of guaranteeing population equality among legislative districts. Justice Harlan, as usual in dissent, demonstrated that such an effort would have been to no avail. n76

Opposition to the one person, one vote standard was initially substantial. In the Senate, Everett Dirksen, a conservative Illinois Republican who served as Senate minority leader, liberal New York Republican Jacob Javits, and moderate Democrat Frank Church of Idaho, introduced constitutional amendments that, if adopted, would have permitted a deviation from equipopulous districts in one house of a state legislature, where supported by a majority of voters in a referendum. The Dirksen amendment fell only seven votes short of the required two-thirds majority in a pivotal vote on August 4, 1965, the same day the Senate approved the Voting Rights Act. n77 A stronger proposal by segregationist William M. Tuck of south-side Virginia that would "strip the federal courts of all power over state legislative apportionment" passed the House by a substantial margin but was defeated by liberal opponents in the Senate. After 1966 congressional opposition inexplicably evaporated. n78

The requirements for congressional districting plans came to be rigorous indeed. For three decades any departure from mathematical equality has had to be justified by reference to alternative criteria such as respect for political subdivision borders or natural boundaries. Few districting requirements have, in fact, sufficed to win court approval even where plans have very small deviations. n79 Plans for redistricting state legislatures or local governing bodies, however, are [*681] permitted greater flexibility: total district deviations of 10 percent are of "prima facie constitutional validity." n80

In short, the Supreme Court created a new constitutional right that had not existed previously. It was not justified by the legislative history of the Fourteenth Amendment in the Reconstruction Congress nor by court decisions prior to the Baker decision in 1962. In light of subsequent development of the equal protection standard in regard to racial vote dilution, it is worth emphasizing that in the one person, one vote cases the Court did not (and does not) require plaintiffs to prove that there was discriminatory intent directed at residents of metropolitan areas, but merely that the unequal apportionment had a harmful effect on their voting strength. n81

IV. The Justiciability of Racial Vote Dilution

The case that first established an analytical link between quantitative and racial vote dilution was *Fortson v. Dorsey*. n82 The case arose as a challenge to the constitutionality of multi-member districts for the Georgia state senate following court-ordered redistricting in the fall of 1962. In *Toombs v. Fortson*, the trial court ruled, not long after Baker was decided, that the Fourteenth Amendment required at least one house of the Georgia legislature to be apportioned equally by population. n83 The court agreed to permit the legislature to postpone a remedy until after the September Democratic primary. n84

The architect of senate redistricting in 1962 was the newly elected governor and current president pro tem of the senate, Carl Sanders. Although he cast himself as a racial moderate, like virtually everyone in Georgia politics in those years Sanders actively supported segregation of the races. n85 Sanders pushed successfully for a plan that provided a reasonable degree of population equality, winning over the [*682] rural majority by virtue of the fact that the legislature had little choice. A consequence of this change was that metropolitan counties stood to gain new senate seats. Sanders proposed that counties entitled to more than one senator be required to use at-large elections (also known as multi-member districts) rather than the single-member districts used in rural areas. n86

Despite the fact that the state constitution required single-member senate districts, the Sanders team succeeded in persuading both senate and house to approve the use of at-large elections. Most legislators explained their willingness to overlook the constitutional prohibition by pointing out that at-large elections serve as a way of diluting black voting strength. At least one supporter attributed this motive to the governor-elect: "Sanders wanted the [at-large] provision to avoid the possible election of a Negro senator from Fulton." n87 The most frequently quoted legislator was Frank Twitty, a veteran of almost two decades in the House who was, according to one press account, "generally acknowledged to be the most forceful speaker there." n88 Twitty "stepped in to lead the floor fight for Sanders' reapportionment bill, and spoke for attribution. "As far as I am concerned, I am not going to vote for anything that would automatically put a member of a minority race in the Senate." n89 As Twitty saw it, "without countywide races a Negro would almost certainly be elected to the Senate from Fulton County." n90

White plaintiffs challenged the constitutionality of at-large elections in party primary elections as well as the general election. n91 Fulton County Superior Court Judge Durwood Pye ruled that the state [*683] constitution required senators to be elected by single-member district, and he enjoined party officials from conducting the primary on a countywide basis. n92 As a result of Judge Pye's ruling, Leroy Johnson, a black attorney in Atlanta, won the Democratic nomination and an African-American was the Republican nominee in the 38th senatorial district in Fulton County. n93 Under the single-member district plan, the Democrat Johnson without difficulty won the general election to become the first black elected to the state legislature since Reconstruction. n94

Judge Pye's order was superseded by the ratification on November 6, 1962, of a constitutional amendment authorizing at-large senate elections beginning in 1964. To prevent this outcome, white Republican plaintiffs filed a constitutional challenge in federal court. They contended that voters in Fulton and DeKalb counties, who had to cast their ballots in multi-member districts, were as a result treated differently from voters in other parts of the state who were able to elect their senators from single-member districts. n95

A three-judge federal court agreed: voters in Fulton county as a whole could overcome even the unanimous preference of voters within a single district, which treated voters in that district differently than voters in true single-member districts elsewhere in the state. "This difference is a discrimination as between voters in the two classes," creating what the court called "a dilution of votes on the basis of homesite." n96 This rather abstract - and non-racial - disparity in [*684] treatment, the court ruled, violated the equal protection clause of the Fourteenth Amendment. n97

The state appealed the decision to the U.S. Supreme Court. The original white plaintiffs, now the appellees, argued in their brief that the 1962 legislature adopted at-large elections in metropolitan counties "to minimize the strength of certain urban groups ... predominantly composed of racial and political minorities." n98 At oral argument, Justice Arthur M. Goldberg asked plaintiff's attorney, Edwin F. Hunt, whether the case involved a claim of invidious discrimination on the basis of race or party. According to the account of one observer, "the Bench leaned forward and awaited eagerly the response, as did the courtroom spectators." Hunt replied lamely that the plaintiffs did "not want the Court yet to say" that the right of minority voters to be protected from vote-dilution was "a constitutionally protected right." n99

The Supreme Court reversed the lower court, on the grounds that the harm claimed by the plaintiffs was "only a highly hypothetical assertion." n100 Writing for the majority, Justice William J. Brennan observed that in the last term, when deciding the landmark one-person, one-vote case *Reynolds v. Sims*, n101 "we rejected the notion that equal protection necessarily requires the formation of single-member districts." n102 Reading between the lines, Justice Brennan addressed the racial issue the white Republicans had ducked, borrowing the concept of vote dilution from the population context in *Reynolds*. The Court might have reached a different decision, he wrote, had the record demonstrated that the use of at-large elections, either "designedly or otherwise," would "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." n103 Voting rights lawyers subsequently cited this as the [*685] earliest recognition by the Supreme Court that the Equal Protection Clause might extend to the problem of racial vote dilution. n104 Not until 1973, however, did the Court actually strike down the use of at-large elections on equal protection grounds in a Texas redistricting case, *White v. Regester*. n105

V. The Adoption of the Voting Rights Act

By the time the Supreme Court decided *Fortson v. Dorsey*, both President Lyndon Johnson and supporters of minority voting rights in Congress had decided that litigation by itself would never provide an effective franchise in the South. Even those judges who sought to eliminate discriminatory barriers found that every time the courts struck down one procedure, Southern local officials or state legislators devised newer, more subtle ways of minimizing black voter registration. Frustrated with the slow progress of the jurisdiction-by-jurisdiction campaign before often hostile Southern courts, the President asked the Civil Rights Division to draft a strong voting rights law substantially increasing the Department's enforcement powers. n106

The Voting Rights Act of 1965 departed from precedent by providing for direct federal action to enable African-Americans in the South to register and vote. Section 4 of the Act suspended, initially for only five years, the use of literacy tests in six states and 40 counties in a seventh, North Carolina. To counter the broad discretion previously exercised by local registrars and poll officials, other provisions of the Act authorized the use of federal examiners to register persons in designated counties and federal observers to monitor the conduct of elections. On the other hand, the Act also contemplated continued resort to the federal courts, instructing the Department of Justice to file lawsuits challenging poll tax requirements in states where they appeared to be used as a deterrent to minority voting. n107

[*686] The most novel feature of the Act - and, to those concerned with the operation of our federal system, the most intrusive - was the "preclearance" requirement set forth in Section 5. n108 Here, too, the statute blended judicial enforcement with administrative implementation. Under its terms all changes in voting practices in states covered by the Act's special provisions must be approved by one of two fact-finders before they can be legally enforced; either a three-judge panel in the federal courts of the District of Columbia or the Attorney General of the United States must "preclear" voting changes before they can be legally enforced. n109 Administrative preclearance by the Department of Justice has proved to be far speedier and less costly than judicial preclearance, and has almost always been preferred by covered jurisdictions. n110

In 1966 the Supreme Court ruled that the preclearance requirement, like other challenged provisions of the Act, was constitutional. n111 In the past, whenever the Justice Department had obtained favorable decisions striking down particular tests, Southern states simply enacted new discriminatory devices, said the Court, and "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." n112

In the first three years, implementation of the Act by the Department of Justice and by the federal courts, focused on removal of barriers to registration and voting. The Attorney General dispatched federal examiners to register blacks and federal observers to monitor elections in counties designated because of their record of obstruction [*687] and discrimination. As a result, most blacks were able to register and vote. n113 Initially, however, the Department of Justice had to go to court to prevent state court judges from blocking the work of federal examiners and private voter registration activists. n114 The federal courts also struck down the poll tax in four states that still used it as a prerequisite to voting in state elections. n115 The Justice Department also objected to various changes in state law or local practices that had the potential for restricting access to the ballot. The combination of administrative and judicial implementation brought a dramatic increase in voter registration among both black and white Southerners. n116

VI. The Court Confronts Minority Vote Dilution

Shortly after passage of the Act, the lower courts began to deal with the problem of minority vote dilution at the same time as they struggled to remedy violations of the one person, one vote standard. The first instance in which the use of multi-member districts was found to be unconstitutional, as it happens, was in *Reynolds v. Sims*, n117 subsequently on remand as *Sims v. Baggett*. n118 The court found the [*688] state house redistricting plan unconstitutional on two grounds. First of all, the deviation from population equality was higher than the ten percent acceptable under the one person, one vote principle, and there was no rational basis for the deviation. n119 The court also found that the legislature had combined counties in multi-member house districts so as to minimize the percentage of blacks in any one district "for the sole purpose of preventing the election of a Negro House member." n120 Thus the plan was doubly unconstitutional.

One of the three judges who decided *Sims* was Frank M. Johnson, the Chief District Judge in the Middle District of Alabama, who played a role in most of the important civil rights decisions in the state for a quarter century. He also decided the first lawsuit filed to challenge local at-large elections as discriminatory vote dilution. In 1966, Fred Gray, the veteran black civil rights lawyer who six years earlier had successfully attacked the racial gerrymandering of municipal boundaries in Tuskegee, Alabama, n121 filed *Smith v. Paris*. n122 In this case Gray attacked the adoption of at-large elections for the Democratic executive committee of Barbour County, Alabama (George Wallace's home

county). n123 The party committee's defense was that they shifted to at-large elections because their old districts violated the one person, one vote principle. n124 Dismissing this claim as "nothing more than a sham," Judge Johnson pointed out that the committee could simply have reapportioned its districts. n125

The "clear effect" of the change, as demonstrated in the 1966 elections, was that, because black voters comprised a majority of those registered in some districts but not in the county as a whole, minority voting strength would be diluted by the bloc votes of the white majority in a county-wide election. The court also relied on the long history of racial discrimination in Barbour County and the fact that the change followed the rapid enfranchisement of the county's African-American citizens by the Voting Rights Act. In light of this factual pattern, Judge Johnson ruled that the change was motivated by an unconstitutional racial purpose. n126

[*689] Not all federal judges were as sympathetic to the interests of minority voters as Alabama's Frank Johnson. For this reason African-American plaintiffs sought to persuade the courts that the pre-clearance requirements set forth in Section 5 of the Voting Rights Act, not just the Reconstruction amendments, covered changes with the potential of diluting minority voting strength. The focus of this effort was Mississippi legislation authorizing a shift from single-member districts to at-large elections for county boards of supervisors and boards of education because, as one state senator put it, "countywide balloting will safeguard "a white board" [of supervisors] and preserve our way of doing business." n127 The African-American plaintiffs contended that under the Voting Rights Act such voting changes were not legally enforceable without federal preclearance. n128

In 1969 the Supreme Court agreed, ruling in *Allen v. State Board of Elections* n129 that this Mississippi law, like all other voting changes adopted in covered jurisdictions, must be submitted either to the Attorney General or to a three-judge district court in the District of Columbia, for preclearance. n130 A change from district to at-large voting for county supervisors could have a discriminatory impact, noted the Court: "voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." n131 Under those circumstances, at-large elections could - if voting patterns followed racial lines - "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." n132 The decision in *Allen* fundamentally altered enforcement of the Voting Rights Act.

Even conservative commentator Abigail Thernstrom, who is sharply critical of the preclearance requirement on theoretical grounds, concedes that the state laws at issue in *Allen* were racially [*690] discriminatory in both intent and effect. n133 Yet she argues that the *Allen* decision improperly extended the preclearance requirements of the Voting Rights Act beyond the intent of the framers in 1965, which was merely to protect the right of minority voters to enter a polling booth and pull the lever. n134

It is true that the primary concern of the framers of the Voting Rights Act in 1965 was, understandably, to protect the right of black voters to register and cast a ballot. During the hearings, however, both Attorney General Nicholas Katzenbach and House members explicitly referred to the racial gerrymander struck down by the Supreme Court a few years earlier in *Gomillion* as one sort of voting change the preclearance requirement was designed to foil. n135 When Congress voted to extend the Voting Rights Act in 1970 and to expand its coverage to include language minorities in 1975, it confirmed its intent to cover efforts to dilute minority voting strength. n136 As the Supreme Court later put it, "had Congress disagreed with the interpretation of [Section] 5 in *Allen*, it had ample opportunity to amend the statute." n137

VII. Development of the Preclearance Process

The effects of *Allen* were profound. Mississippi, for example, had to submit the 1966 at-large election statute for preclearance and the Department of Justice refused to preclear the change. n138 Fourteen [*691] Mississippi counties nevertheless tried to switch to at-large supervisor elections, and another 17 counties to at-large school board elections, but the Department and, in some cases the federal courts, blocked all of these efforts. n139 The task of winning constitutional challenges on a case-by-case basis would have been formidable, and Mississippi was just one of the

covered states.

Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights. Prodded by liberal critics in Congress, the new Voting Section developed detailed guidelines for enforcing Section 5 that were, in turn, endorsed by the Supreme Court. n140 The Department's procedures for enforcing Section 5 were also the subject of numerous unsuccessful court challenges during the 1970s. n141

In 1971 the Supreme Court ruled that municipal annexations were among the voting changes covered by the Act. n142 The Court subsequently [*692] decided that municipalities facing Departmental objections to annexations which had the discriminatory effect of reducing the black or Hispanic percentage within the city could overcome that objection by adopting an election plan that fairly reflected minority voting strength for the enlarged city, normally a single member district system. n143 Otherwise such cities would likely be condemned to declining tax revenues, as well-off whites moved to nearby suburbs to escape racial integration. As a result, departmental objections to annexations played a significant role in persuading Southern municipalities to give up at-large elections. n144

The Court's first major restriction on the scope of the Act was announced in its 1976 decision, *Beer v. United States*, n145 in which the city of New Orleans sought a declaratory judgment preclearing its redistricting plan. The three-judge trial court refused, on the grounds that under current Supreme Court doctrine the plan diluted minority voting strength. n146 The majority in *Beer* reversed the trial court, however, ruling that the term "effect" has a different meaning under Section 5 than under the Constitution. n147 The Court determined that, in the context of a preclearance review, "effect" is to be defined as "retrogression," a newly minted term to describe changes that place minority voters in a worse position than under the status quo. n148 Ameliorative changes that do not make matters worse for minority voters are, under *Beer*, not discriminatory in effect. n149

[*693] On the other hand, *Beer* did not affect the purpose prong of Section 5. n150 "Even without retrogression, a covered jurisdiction will violate Section 5 if an impermissible racial purpose is behind an electoral change," explains conservative legal scholar James F. Blumstein. n151 As the *Beer* majority put it in a key passage: "We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate [Section] 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." n152 This wording appears understandable only as a reference to the purpose test in Fourteenth or Fifteenth Amendment cases. n153 The reference to a constitutional violation could not refer to a dilutive effects test because, in endorsing the retrogression concept the *Beer* majority had rejected a dilutive effects test as inapplicable in the Section 5 context. n154 As a result, federal courts interpreted this wording in *Beer* as referring to a constitutional "purpose" test for the next quarter-century. n155

Both the complexity involved in measuring retrogression and, by contrast, the straightforwardness of applying the purpose standard are exemplified by the decision in a Section 5 declaratory judgment action filed by a Georgia county, *Wilkes County v. United States*. n156 The case involved a change from single-member districts to an at-large plan in the early 1970s for both county commission and school [*694] board. The evidence showed that voting patterns were racially polarized and that, as a result, no black candidates had been elected to either governing body despite the fact that African-Americans made up 47 percent of the county's population. n157 The county claimed that under the retrogression standard the at-large system had no discriminatory effect because blacks did not form a majority of the registered voters in any of the old districts, which, it admitted, were badly malapportioned. n158

The court, noting that the low level of black voter registration was itself a function of historical discrimination, found that even under the old districts minority voters had more influence on the outcome of the elections than under the at-large system. n159 Moreover, in the court's view the correct benchmark was a properly apportioned - and "fairly drawn" - system of single member districts, and such a plan could have been drawn to include a 71 percent black district (which would have given black voters an equal opportunity to elect a candidate of their choice). n160 In either event, the court decided, the change was retrogressive. n161

Applying the constitutional purpose standard, the court observed that the change to at-large elections followed a substantial increase in minority voter registration after the Voting Rights Act. n162 No African-Americans had either served as Democratic party officials in this one-party county or been appointed to fill vacancies for elected offices. n163 Nor had any black citizens been consulted about the decision to adopt an at-large plan. n164 The county claimed that the purpose of the change was solely to satisfy the one person, one vote requirement, but the court found that argument a mere pretext; the districts could simply have been equalized in population after the 1970 census. In light of these circumstances, the county failed both purpose and retrogression tests and was not entitled to preclearance. n165

The Department's implementation of Section 5 evolved in direct response to federal court orders and statutory requirements. In deciding whether to preclear or object to voting changes, the Department acts as a surrogate for three-judge district courts in the District [*695] of Columbia, to which the Voting Rights Act also assigns preclearance responsibility. n166 Contrary to the claim of earlier studies, the Department's attorneys do not "bargain" or "negotiate" with submitting jurisdictions when conducting preclearance reviews. n167 Both public officials and minority citizens have an opportunity to present comments regarding voting changes, but the decision-making is designed to follow the dictates of current Section 5 case law. n168 Thus the Department's administrative review under Section 5 can properly be characterized as a quasi-judicial process of implementation.

VIII. Voting Rights Under the Reconstruction Amendments

In the 1970s vote-dilution lawsuits were decided under a constitutional standard set forth by a unanimous Supreme Court in a legislative redistricting case from Texas, *White v. Regester*. n169 The decision struck down the use of multi-member districts to elect members of the state house of representatives in Dallas and Bexar counties. n170 The Court's opinion relied on evidence of a history of official discrimination against blacks in Dallas and Hispanics in Bexar; cultural and language barriers in Bexar and a discriminatory slating group in Dallas; a lack of responsiveness by elected officials to the needs of the minority community; and the use of numbered place and runoff requirements which enhance the discriminatory potential of at-large [*696] elections. n171 Based on what it called "the totality of the circumstances," n172 the Court found that minority voters in these two counties had "less opportunity than did other residents ... to participate in the [electoral] processes and to elect [candidates] of their choice." n173

Although in later decisions the Supreme Court interpreted *White* as incorporating an intent requirement, the majority opinion in the case did not state explicitly that proof of discriminatory intent was required under the totality of circumstances test. n174 The Fifth Circuit Court of Appeals, which handled by far the largest number of vote-dilution cases in the 1970s, initially treated the test as requiring proof of either purpose or effect, but not both, in deciding a Louisiana challenge to at-large elections in East Carroll Parish, Louisiana, *Zimmer v. McKeithen*. n175

Under this approach, plaintiffs in vote dilution cases were often able to win by documenting a history of racial segregation and discrimination in the jurisdiction and by showing that, due to racially polarized voting, the election system operated in such a way that minority voters did not have a reasonable opportunity to elect representatives of their choice. n176 The lower courts understood how to apply the standard because it was, as one commentator describes it, "flexible, fact-specific, precise, and workable." n177 Veteran Fifth Circuit [*697] Judge Irving Goldberg later characterized the standard as "a jurisprudence produced by ten years of struggle and compromise between judges of varying political and jurisprudential backgrounds." n178

These cases were brought by a new generation of voting rights lawyers, mostly white and many of them Southerners, who devoted a significant part of their careers to litigation on behalf of African-American voters. The Lawyers' Committee for Civil Rights Under Law maintained an office in Jackson, Mississippi, and under the leadership of Frank R. Parker brought most of the cases in that state; in the 1980s Parker, then based in the national office, litigated a number of important Virginia cases. The American Civil Liberties Union maintained an office in Atlanta where Laughlin McDonald, Neil Bradley, and Christopher Coates focused on problems in Georgia and South Carolina. Armand Derfner, working with the Lawyers' Constitutional Defense Committee and the national office of the Lawyers' Committee, tried Mississippi and Virginia cases and, as a private attorney in Charleston, litigated a number of South

Carolina lawsuits. James U. Blacksher, Larry Menefee, and Edward Still brought most of the Alabama cases, and a few Florida lawsuits, as cooperating attorneys of the NAACP Legal Defense and Educational Fund. Stanley Halpin, usually as a cooperating attorney of the Lawyers' Committee, brought most of the Louisiana cases. A private law firm headed by Julius Chambers and Adam Stein, usually cooperating with the Legal Defense Fund, handled many of the North Carolina lawsuits. In the 1980s Lani Guinier from the Legal Defense Fund's national office litigated vote dilution cases in Louisiana, Alabama, North Carolina, and Arkansas. Justice Department lawyers brought cases throughout the South; the Voting Section's most productive litigator over the years was J. Gerald Hebert. This new voting rights bar developed expertise in voting rights case law that gave minority plaintiffs a valuable edge over defendants at trial. n179

In 1980, the Supreme Court ruled in *City of Mobile v. Bolden*, a challenge to that city's use of at-large elections, that plaintiffs must prove not only that the at-large system has a discriminatory effect due to racially polarized voting but also that it was adopted or maintained for the purpose of diluting minority voting strength. n180 The Court [*698] remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs prevailed under the intent standard, after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911, but at great cost. n181

In the view of many observers, the Mobile decision was inconsistent with the intent of Congress when it adopted and expanded the Voting Rights Act in 1965, 1970, and 1975. A substantial majority in both houses revised Section 2 of the Voting Rights Act in 1982 to outlaw election methods that result in diluting minority voting strength, without requiring proof of discriminatory intent. n182 In creating a new statutory means of attacking minority vote dilution, Congress cited the "totality of circumstances" test of *White and Zimmer* as the evidentiary standard to be used in applying the Section 2 results test. Vote-dilution cases previously decided under the Fourteenth Amendment would henceforth be tried under the new statutory standard. n183

Even so, in a few complex lawsuits in the 1980s evidence of discriminatory intent proved critical to the court's decision, most dramatically in one Alabama case, *Dillard v. Crenshaw County*, which led to the elimination of at-large elections in more than 180 counties, municipalities, and school boards. n184 The plaintiffs presented historical evidence showing that whenever black voting strength was substantial state and local officials had a policy of using at-large rather than district elections, and that in the 1950s and 1960s the state, motivated explicitly by the goal of preventing the election of blacks to [*699] office, adopted laws requiring the use of anti-single shot devices in all jurisdictions to enhance the dilutive power of at-large elections. n185

IX. The Impact of the Section 2 Results Test

In the decade following the revision of Section 2, voting rights lawyers successfully brought numerous lawsuits under the new results standard. The Supreme Court made clear in *Thornburg v. Gingles*, that minority plaintiffs could win by showing that: 1) the minority group is sufficiently numerous and geographically concentrated so that a majority-minority district can be drawn; 2) minority citizens vote cohesively; and 3) that the racial majority votes as a bloc to the degree that minority candidates usually lose. n186 Once this pattern was clear, many defendants settled before trial and went to single-member districts. n187

Scholarly research on the impact of the Voting Rights Act in the South demonstrates that the substantial increases in minority representation since 1970 are due primarily to the elimination of at-large elections and other devices that can dilute minority voting strength. n188 [*700] Fairly drawn single-member district plans have provided an opportunity for African-American or Hispanic voters to elect candidates of their choice in districts where they constitute a majority of the voting population. The trend was almost as dramatic in jurisdictions that switched from at-large elections to mixed plans including a few at-large seats. In many localities the level of black representation by 1990 approached the black percentage of the population in the jurisdiction. n189 Very few African-Americans were elected to council seats from white-majority districts. On the other hand, virtually all black-majority districts elected black council members. n190

Nor are these results surprising to those familiar with the evidence of racial polarization produced in the hundreds of vote-dilution lawsuits tried or settled in the last quarter century. No court has ever found a violation in a voting rights case absent proof, typically presented through expert statistical analysis, that white or Anglo voters routinely defeat the candidates of choice of minority voters. n191 As a [*701] result, the only way to provide minority voters with a fair opportunity to elect their preferred representatives was to order a change to district elections or some alternative remedy. By 1990 the few at-large systems left in the South were primarily located in jurisdictions where white cross-over voting had resulted in a pattern of significant minority representation, thus making litigation unnecessary. n192 Increasingly, therefore, the focus of voting rights activists would be on the degree to which districting plans adopted earlier fairly reflected minority voting strength.

X. Assessing the Viability of Districting Plans

Before 1990, only a handful of vote dilution challenges were filed against single-member district plans. n193 The use of racial gerrymandering in redistricting was most often found in the context of preclearance reviews under Section 5. In the first 30 years after adoption of the Voting Rights Act in 1965, the Department of Justice reviewed around 270,000 changes in voting and precleared all but about one percent. n194 Among the most controversial types of change is redistricting. Over the years the Department has objected to less than seven percent of all the redistricting plans submitted for review. Quite naturally, the rate of objections was greater in the early years of enforcement. For the years 1971-1974, the Attorney General refused to preclear roughly 14 percent of the plans; from 1981-1984 the rate was approximately eight percent; for the most recent period, 1991-1994, [*702] the Department objected to only around seven percent. n195 In order to overcome these objections, states and localities necessarily adopted fair single-member district plans under which minority voters have gained a reasonable opportunity to elect candidates of their choice.

In evaluating a redistricting plan, there are two distinct quantitative issues. First, do the districts identified by the submitting authority as majority-minority districts actually afford minority voters a reasonable or fair opportunity to elect candidates of their choice; are they electorally viable? Second, does the plan minimize the number of effective majority-minority districts? A redistricting plan may minimize the number of majority-minority districts either by "packing" an unnecessarily high percentage of minority citizens (say 80 or 90 percent) into a single district or by fragmenting minority population concentrations so that the group's members are dispersed among several majority-white districts. n196

Because black and Hispanic populations typically contain a high percentage of persons under the age of 18, the proportion of a district's voting-age population belonging to that group is usually lower than its percentage of the total population. Because minority citizens are typically registered at a lower rate than those of the majority community, the group normally forms a smaller proportion of the registered voters than of the voting-age population. Because minority voters, who are often significantly lower in socio-economic status and educational background, frequently turn out a lower rate than in the majority community, they often make up a smaller percentage of the turnout than of the registered voters. n197

Recognizing those facts, the federal courts in the 1970s came up with a rule of thumb often dubbed "the 65 percent rule." n198 As minority registration and turnout rates have increased, often to a point approaching parity with whites, experts often recommend districts with a smaller percentage of minority population. And where a substantial percentage of white voters have demonstrated a regular tendency to [*703] support minority candidates, the minority threshold can be lowered accordingly. n199 For these reasons the Department of Justice and the courts assess district composition on a case-by-case basis. n200

Both before and after the Beer decision, discriminatory purpose as defined in constitutional cases played a significant role in the Department's review of redistricting plans. In assessing the issue of racially discriminatory purpose, a major issue is whether authorities have rejected alternative districting plans that would provide minority voters a better opportunity to elect candidates of their choice. The courts and the Justice Department also focus on whether minority citizens were excluded from the redistricting process, or if their requests for alternative plans are

rejected without substantial justification, and whether there is a departure from usual redistricting practices or criteria. n201

The Assistant Attorney General whose Section 5 objections played a key role in advancing minority representation during the 1980s was, ironically, W. Bradford Reynolds, the conservative Republican whom Ronald Reagan had named to lead the Civil Rights Division away from the policies of the 1970s. Legal theorist Abigail Thernstrom has criticized Reynolds for objecting to changes that were not retrogressive merely because they failed to maximize minority voting strength, using proportional representation as his standard. "Indeed," she writes, "it is hard to imagine a Civil Rights Division more responsive to the demands of minority and civil rights spokesmen with respect to districting than that headed by William Bradford Reynolds." n202

Raymond Wolters, a conservative historian whose views on most civil rights issues are consistent with those of Thernstrom, has defended Reynolds emphatically against this charge. Reynolds, he points out correctly, was just "a lawyer who recognized that when it came to electoral districting, both Congress and the Supreme Court had rejected the argument that race-conscious districting was per se unconstitutional" in favor of the view that it was necessary to take race into account in districting in order "to facilitate the election of members of unrepresented racial groups." n203 In short, in the numerous instances [*704] where Reynolds objected to voting changes, usually under the intent prong of Section 5, he was simply following the dictates of relevant case law as set forth by the federal courts.

In broad quantitative terms, the administration of Section 5 under Reynolds appears comparable to both predecessors and successors. The Department objected to approximately eight percent of all redistricting plans submitted from 1981 through 1984, a bit over half the percentage in the 1970s but slightly more than the seven percent of redistricting plans to which objections were interposed in the 1990s. Looked at in terms of absolute numbers, there were almost twice as many objections in the 1980s round of redistricting, because far more plans were submitted for preclearance review than in the 1970s (and the number of objections in the 1990s was correspondingly greater than in the 1980s). n204

On the other hand, there were also instances in which Reynolds precleared voting changes to which staff attorneys had recommended objections. n205 The best known example is his decision to preclear a congressional redistricting plan in Louisiana later found by a federal court to violate the Section 2 results test, despite strong evidence in a staff memorandum that the plan was adopted with a racially discriminatory purpose as well. n206 The number of affirmative Section 2 lawsuits filed by the Voting Section was also unimpressive by comparison to the dockets of private voting rights organizations. And when *Thornburg v. Gingles* went to the Supreme Court, the Department filed an amicus curiae brief siding with the state of North Carolina against the African-American plaintiffs. n207 Yet on balance the protections afforded minority voters by federal voting rights law in the 1980s effectively constrained Reynolds' conservative instincts.

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XI. The Role of the Courts in Policy Implementation

We have examined the role of the federal courts in the implementation of two extraordinarily successful public policies, the one person, one vote principle and the prevention of minority vote dilution. The impact of these two policies on electoral politics in the South has been profound. n208 How can we account for this success?

Political scientist Richard Cortner attributes the successful implementation of the one person, one vote policy to six factors. First, the Court was clear about what its orders require: compliance entails only the use of simple arithmetic to design districts of equal population. Second, the lower courts readily implemented the standard, in contrast to their reluctance in the area of school desegregation. A third factor was the availability of litigants willing and able to serve as plaintiffs, since courts themselves cannot file lawsuits. Fourth, the courts had the means to implement their orders: legislatures and local governing bodies routinely complied with the equal population requirement. Fifth, implementation

of the policy did not, again in contrast to school desegregation, require supporting action by the President or Congress. Finally, those adversely affected by the reapportionment decisions, primarily legislators from rural areas, had little power to block enforcement of the policy. n209 By the 1980s, the one person, one vote requirement had become sacrosanct.

The reasons for the success of the Voting Rights Act are similar. n210 First, the statute explicitly gave great authority to the federal courts - and to the Department of Justice acting as a surrogate for the courts - to enforce its provisions. Second, these provisions, especially Sections 2 and 5, were straightforward and rather easily implemented; they required only changes in voter registration procedures, the conduct of balloting, or the method of election in the affected jurisdictions (all already precisely regulated by state law or local ordinance). Third, for the most part the courts enforced the Act vigorously along the lines defined by a supportive Supreme Court, even [*706] though these complex, fact-intensive lawsuits came to require great quantities of time and effort. Fourth, the Congress proved consistently supportive of expanding minority voting rights, endorsing the prohibition on minority vote dilution in 1970, expanding coverage to language minorities in 1975, and establishing a clear statutory results test in 1982. Congressional support reflected the general public acceptance of minority voting rights, where remedies did not require whites (except perhaps incumbent officeholders) to give up individual benefits. Fifth, the development of an effective voting rights bar and continued availability of willing minority plaintiffs kept the issue of vote dilution before the federal courts. Finally, once remedies were in place - typically single-member district plans that gave minority voters a reasonably good chance of electing candidates of their choice (usually at less than their proportion of the voting-age population) - no further monitoring by the court was required.

The impact of judicial implementation depends, of course, on the efficacy of the remedies typically ordered by the courts. In the case of voting rights, the success of the Act in the South is usually measured in increased black voter participation and representation. Because racially polarized voting has consistently been the norm in the South, black voters were rarely elected at large or in white-majority districts, but they were typically able to win in black-majority districts drawn to satisfy the Voting Rights Act. n211

There is remarkable similarity between the factors leading to successful implementation of these two court-directed policies. It seems plausible that these factors would be applicable to policy implementation in other areas. If so, then the effectiveness of judicial implementation might be expected to vary with the degree to which the following factors are present:

1) general public acceptance of the goals of the policy, and the absence of potential litigants who can demonstrate that they have suffered harm from the policy;

[*707] 2) relative consensus within the court system concerning the interpretation of the statute, and related case law;

3) the ability of the courts to put easily enforced remedies into effect; and

4) the durability of court-ordered remedies without routine monitoring by the courts.

Ultimately the continued effectiveness of any court-driven policy depends upon the degree to which the case law supports vigorous enforcement. The one person, one vote standard is considered sacrosanct; every redistricting plan displays unquestioning obedience to the principle of population equality. Where there is no consensus in the courts about the legal standard to be enforced, on the other hand, the courts will necessarily be less effective as an instrument of policy implementation. That is what happened in the 1990s, when a 5-4 conservative majority on the Supreme Court reinterpreted the guarantees of the Fourteenth Amendment in a way that made it a barrier to full equality for minority voters. n212

The enormous increase in minority electoral participation and representation in the South between 1965 and 1990 is directly attributable to the effective implementation of the Voting Rights Act and, between 1965 and 1982, to the Fourteenth Amendment. Its success stems from the power given to the courts and to the Department of Justice to conduct searching inquiries into the relationship between race and voter choice at the local and state level, and to assure through legally enforceable decisions that minority voters compete with the majority on a level playing field. Those critics who lament the Act as an unwarrantable intrusion into the political process are now beginning to be quoted approvingly in court decisions hostile to minority voting rights.ⁿ²¹³ They are right in saying that the Act is intrusive. Alas, in light of the continued level of racially polarized voting [*708] in most areas of the South, the historical record fails to indicate that fair elections could have been achieved in the South without it.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Voting Rights Vote Dilution Governments Federal Government Elections Governments Local Governments Elections

FOOTNOTES:

n1. See U.S. Commission on Civil Rights, *Voting* 252-55 tbl. 1, 255-58 tbl.2, 260-63 tbl.4, 266-69 tbl.6, 278-82 tbl.9, 302-307 tbl.14 (1961); David J. Garrow, *Protest at Selma* 11 (1978). The Commission's data for certain states is incomplete.

n2. See U.S. Commission on Civil Rights, *Political Participation* app. VI, at 214-21 (1968); Numan V. Bartley, *The New South, 1945-1980*, at 175 (1995); Everett Carl Ladd, Jr., *Negro Political Leadership in the South* 29-30 (1966); Donald R. Matthews & James W. Prothro, *Negroes and the New Southern Politics* 52, 176-77 (1966).

n3. See Richard C. Cortner, *The Apportionment Cases* 30, 162, 166, 182 (1970); Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 8-9, 84, 174, 209 (1968); Richard L. Engstrom, *Post-Census Representational Districting: The Supreme Court, "One Person, One Vote," and the Gerrymandering Issue*, 7 *S.U. L. Rev.* 173, 176-77 (1981). See also Gordon E. Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, in *Electoral Laws and Their Political Consequences* 257, 258 (Bernard Grofman & Arend Lijphart eds., 1986); see also generally Robert B. McKay, *Reapportionment* (1965); *Reapportionment in the 1970s* (Nelson W. Polsby ed., 1971).

n4. See generally *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994). This is not to say, however, that all jurisdictions had proportionality in representation or that all discriminatory electoral rules had been eliminated.

n5. Bernard Grofman, Criteria for Districting: A Social Science Perspective, 33 *UCLA L. Rev.* 77, 80 (1985). See J. Gerald Hebert, Redistricting in the Post-2000 Era, 8 *Geo. Mason L. Rev.* 431, 471 (2000) (calling population equality "the most fundamental requirement the law imposes on redistricters"). See also NCCSL Reapportionment Task Force, Nat'l Conference of State Legislatures, Reapportionment Law: The 1990s, at 17-40 (1989); Steve Bickerstaff, Reapportionment by State Legislatures: A Guide for the 1980s, 34 *Sw. L.J.* 607, 635-43 (1980) (arguing that state enacted reapportionment plans are constitutional unless invidiously discriminatory).

n6. 42 *U.S.C.* 1973 (2000) (as amended). National policy is explained in Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 (1976) [hereinafter Lawson, Black Ballots], and Steven F. Lawson, In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982 (1985) [hereinafter Lawson, In Pursuit of Power]. For the quantitative evidence, see James E. Alt, The Impact of the Voting Rights Act on Black and White Voter Registration in the South, in *Quiet Revolution in the South*, 351-77, 452-59 (Chandler Davidson & Bernard Grofman eds., 1994).

n7. This process was not always linear. At the outset, the implementation of court orders striking down malapportioned legislative bodies sometimes conflicted with protection of minority voting strength. See, e.g., Peyton McCrary & Steven F. Lawson, Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting, 12 *J. Pol'y Hist.* 293 (2000). As legal scholar Robert Dixon reminds us, "frequently in the course of constitutional development one problem is solved or at least ameliorated only at the cost of creating or worsening another problem." Dixon, *supra* note 3, at 456. Dixon argues that simple-minded focus on mathematical equality by the Supreme Court can make matters worse to the degree that multi-member districts are used to dilute minority voting strength, and he defines the term gerrymandering to include the use of at-large elections. *Id.* at 460-64.

n8. See especially *Reynolds v. Sims*, 377 *U.S.* 533 (1964); *Baker v. Carr*, 369 *U.S.* 186 (1962). My understanding of the relationship between quantitative and qualitative (especially racial) vote dilution stems from reading, and discussing with its authors, James U. Blacksher & Larry T. Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?, 34 *Hastings L.J.* 1 (1982). See also Bickerstaff, *supra* note 5, at 646; James F. Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act, 69 *Va. L. Rev.* 633, 661-63 (1983).

n9. See the absence of references to studies of reapportionment in *Interpreting Southern History* (John B. Boles & Evelyn Thomas Nolen eds., 1987); *The Past Before Us: Contemporary Historical Writing in the United States* (Michael Kammen ed., 1980). Studies by respected historians whose subject matter make a discussion of reapportionment relevant (but which ignore the subject) include Bartley, *supra* note 2, and Allen J. Matusow, *The Unraveling of America: A History of Liberalism in the 1960s* (1984), and only perfunctory references are to be found in Dewey W. Grantham, *The South in Modern America: A Region at Odds* 308 (1994), and James T. Patterson, *Grand Expectations: The United States, 1945-1974*, 565 (1996).

n10. See *Burns v. Richardson*, 384 U.S. 73 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 436-37 (1965). As one trial court put it some years later, "it is settled law that apportionment schemes employing multi-member districts will constitute an invidious discrimination" where they "minimize or cancel out the voting strength of racial or political elements of the voting population." *Graves v. Barnes*, 343 F. Supp. 704, 724 (W.D. Tex. 1972) (quoting *Fortson*, 379 U.S. at 439 (1965)).

n11. The role of the federal courts in implementing protections against minority vote dilution has not been investigated systematically. See Howard Ball et al., *Compromised Compliance: Implementation of the 1965 Voting Rights Act* (1982) (focusing on the enforcement of the pre-clearance requirements of Section 5 of the Act by the Department of Justice). Ball's analysis is quite different from the approach taken here and is discussed below; see also Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (1990) (dealing with policies other than voting rights); Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987) (attacking many of the voting rights decisions of the federal courts and the enforcement of Section 5 by the Department of Justice, but without focusing on the implementation process itself); Hugh Davis Graham, *Race, History, and Policy: African Americans and Civil Rights Policy Since 1964*, 6 J. Pol'y Hist. 12 (1994) (dealing with policies other than voting rights); Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *Controversies in Minority Voting: The Voting Rights Act in Perspective 177-96* (Bernard Grofman & Chandler Davidson eds., 1992) (focusing on Justice Department implementation).

n12. The classic study of the civil rights decisions of the Fifth Circuit Court of Appeals, Jack Bass, *Unlikely Heroes* (1981), provides an example of this genre.

n13. See, e.g., Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (2002); Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?* 49 J. Pol. 169 (1987). See also David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* (1997); Richard H. Pildes, *The Politics of Race*, 108 *Harv. L. Rev.* 1359 (1995) (assessing the literature on descriptive vs. substantive representation).

n14. See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 *Cumb. L. Rev.* 287 (1996); Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 *Miss. L.J.* 271 (1995).

n15. See *Smith v. Allwright*, 321 U.S. 649 (1944). See also Darlene Clark Hine, *Black Victory: The Rise and Fall of the White Primary in Texas* (1979). Earlier decisions eliminating the "grandfather clause," *Guinn v.*

United States, 238 U.S. 347 (1915), and *Lane v. Wilson*, 307 U.S. 268 (1939), had little practical effect on the electoral rights of minority voters. Nor was there much effect to later decisions, such as *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), aff'd, 336 U.S. 933 (1949), which struck down restrictive registration procedures in Alabama. See also Lawson, *In Pursuit of Power*, supra note 6, at 19, 44-54, 90-91, 96-97.

n16. See Lawson, *In Pursuit of Power*, supra note 6, at 86-89, 93, 109-10, 115, 134-39; Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 *Stan. L. Rev.* 1, 3-4 (1965).

n17. See generally Charles V. Hamilton, *The Bench and the Ballot: Southern Federal Judges and Black Voters* (1973); Donald S. Strong, *Negroes, Ballots, and Judges: National Voting Rights Legislation in the Federal Courts* (1968).

n18. See U.S. Commission on Civil Rights, supra note 2, app. VII, at 222-56; Garrow, supra note 1, at 6-11, 241-45.

n19. See Garrow, supra note 1, at 179-236; J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 139, 163-80, 184-93, 224-26 (1999); Ladd, supra note 2, at 29-30, 102-03, 307; Matthews & Prothro, supra note 2, at 4-5, 143-44, 208, 220-21; Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 *Vand. L. Rev.* 523, 553-55, 572-74; Peyton McCrary, *The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1945-1986*, 25 *J. Urb. Hist.* 199 (1999); McCrary & Lawson, supra note 7, at 302-04, 315-18.

n20. See Edward C. Banfield & James Q. Wilson, *City Politics* 87-96 (1963); Chandler Davidson, *Minority Vote Dilution: An Overview*, in *Minority Vote Dilution* 4-5 (Chandler Davidson ed., 1984); Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 *Soc. Sci. Hist.* 507 (1990).

n21. See U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 206-07 (1975):

Consider again the town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes.

n22. See Katherine I. Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, *42 La. L. Rev.* 851, 863-67 (1982). See also Roy E. Young, The Place System in Texas Elections (Inst. of Pub. Aff. ed., 1965), for a pioneering study on the use of the place system by municipal governments in Texas.

n23. See Chandler Davidson, Biracial Politics: Conflict and Coalition in the Metropolitan South 63-67 (1972); Butler, *supra* note 22, at 866-67.

n24. At the time the major disfranchising device was a requirement that prospective registrants read and interpret to the satisfaction of local registrars any portion of the Louisiana or United States Constitutions. This device was struck down in *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd sub nom. Louisiana v. United States*, 380 U.S. 145 (1965).

n25. James H. Giles, "Hold Line' on Spending, Davis Urges Legislature: Asks for Enactment of Segregation Laws, New Orleans Times-Picayune, May 17, 1960, 1, at 1.

n26. Numan V. Bartley, The Rise of Massive Resistance: Race and Politics in the South During the 1950s, at 74-75, 90-91, 135, 200-01, 235-36 (1969); Michael L. Kurtz & Morgan D. Peoples, Earl K. Long: The Saga of Uncle Earl and Louisiana Politics 203 (1990).

n27. See Anti-Mix Bill Ok'd in House: Measure Designed to Alter Parish Set-Up, New Orleans Times-Picayune, June 28, 1960, 1, at 16 [hereinafter Anti-Mix Bill Ok'd in House].

n28. See La. Rev. Stat. Ann. 18:1174.1 (West 1960). The Supreme Court found this law unconstitutional in *Anderson v. Martin*, 375 U.S. 399, 402 (1964), because "by placing a racial label on a candidate at the most crucial stage of the electoral process - the instant before the vote is cast - the State furnishes a vehicle by which racial prejudice may be so aroused," as Justice Tom Clark stated for a unanimous Court, that it "may decisively influence the citizen to cast his ballot along racial lines." *Id.*

n29. 1960 La. Acts 1166 ch. 613 (amending La. Const. art. VIII, 1(d)). These 1960 provisions were not

affected by the Supreme Court decision striking down the constitutional interpretation test set forth in the 1921 state Constitution, which, the Court found, "as written and as applied, was part of a successful plan to deprive Louisiana Negroes of their right to vote." *Louisiana v. United States*, 380 U.S. 145, 151 (1965).

n30. Vote Qualification Bill Passes House, *Plaquemines Gazette*, June 24, 1960, at 6.

n31. 25 Segregation Moves Okayed: Rainach Talks; Senate Committee Acts, *New Orleans Times-Picayune*, June 28, 1960, at 5; 1960 La. Acts 999. The same day, July 9, 1960, the legislature also adopted a runoff requirement for party committees. 1960 La. Acts 928 ch. 486 (revising 18:297).

n32. 1960 La. Acts 999, ch. 539, 1001 (Sec. 1) ("Whenever there are two members of the School Board to be elected, each elector shall vote for two candidates. Whenever an elector shall vote for a lesser number of candidates than there are places to be filled, the ballot shall not be counted for any of the plural candidates.").

n33. 1940 La. Acts 201, ch. 46 (Sec. 72) (codified as 18:351).

n34. Such full slate laws were in use in several Southern states, and, because racial or ethnic minorities often used single shot voting as a means of electing candidates of their choice, were widely understood as devices to dilute minority voting strength. See *City of Rome v. United States*, 446 U.S. 156, 184 n.19 (1980); *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 1361 (M.D. Ala. 1986).

n35. *Dep. of Douglas Fowler, Jan. 30, 1967, at 6-11, Amadee v. Fowler*, 275 F. Supp. 659 (E.D. La. 1967) (Civ. A. No. 3400), reprinted in John E. Rousseau, "Single Shot' Vote Law Aim Was to Halt Negro Election: Charge is Supported in Deposition, *La. Weekly*, Nov. 11, 1967, at 1.

n36. Anti-Mix Bill Ok'd in House, *supra* note 27, 1, at 16 ("The Louisiana House Monday passed 76-15 its newest and hitherto undisclosed segregation bill to keep Negroes from getting on parish governing bodies."). For the bill's text, see 1960 La. Acts 1202, ch. 631. See also Senate Passes Group of Bills on Segregation, *New Orleans Times-Picayune*, July 1, 1960, at 1, 3.

n37. Anti-Mix Bill Ok'd in House, *supra* note 27, 1, at 16 (comments to Rep. T.T. Fields). Another

legislator complained that the proposal had been introduced precipitously without careful study and discussion, but agreed to support the bill because of its racial purpose. *Id.* ("I will vote with the administration, since it is a segregation bill, and the older members say it is all right.") (comments of Rep. Lloyd Himel).

n38. Commission Council Seated; Council Officers Elected, *Plaquemines Gazette*, Sept. 8, 1961, at 1, 4.

n39. See J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in *Minority Vote Dilution* 31-32 (Chandler Davidson ed., 1984); Derfner, *supra* note 19, at 553, 580; Davidson, *supra* note 20, at 8; Lawson, *In Pursuit of Power*, *supra* note 6, at 212-15. Most challenges to annexation or de-annexation have arisen in the context of enforcing Section 5 of the Voting Rights Act. See, e.g., *Perkins v. Matthews*, 400 U.S. 379 (1971); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *City of Richmond v. United States*, 376 F. Supp. 1344 (D.D.C. 1974), vacated by 422 U.S. 358 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973).

n40. Robert J. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* 89 (1985). See also *id.* at 60-78, 91-92, 95; Kousser, *supra* note 19, at 332.

n41. Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 *S.U. L. Rev.* 101, 120 (1989) (quoting State Senator J. Miller Bonner).

n42. See Norrell, *supra* note 40, at 91-92.

n43. See *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958), *aff'd*, 270 F.2d 594 (5th Cir. 1959), *rev'd*, 365 U.S. 339 (1960). Those precedents included disapproval of judicial inquiry into legislative intent or motive. See also Bass, *supra* note 12, at 99-100, 106-109; Tinsley E. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* 73-74 (1981). A memo by Chief Justice Earl Warren's law clerk, initialed MHB, regarding *Gomillion*, mentioned that the court below "held that the judiciary may not look behind the face of the statute to ascertain the motivation of the legislature," and added "if a statute, constitutional on its face, has the effect of creating a discriminatory classification, then the statute is bad, even if it can be demonstrated that the motives of the legislature were non-discriminatory." Memorandum from Law Clerk to Justice Earl Warren, in *Earl Warren Papers* 14-15 (Library of Congress 1985) [hereinafter "MHB Memo"].

n44. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

n45. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). See also Cortner, *supra* note 3, at 71-72, 84-88.

n46. It may be that some felt that *Gomillion* was simply not the right case to address the "political question" doctrine. See MHB Memo, *supra* note 43, at 6:

Of course, the Ct [sic] could write [a] very sweeping decision overruling cases such as *Colegrove v. Green* and casting considerable doubt upon the continuing efficacy of the political question doctrine. However, I seriously doubt that a majority would consent to such an opinion, and this is probably not the proper case for such a drastic departure

In a footnote, he observed that "a better vehicle for overruling *Colegrove* would be *Baker v. Carr*, No. 103, 1960 Term, which involves a Tenn. Reapportionment statute and which is being held for the instant case." *Id.*

n47. *Gomillion*, 364 U.S. at 347 ("The inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*."). Justice Frankfurter's opinion relied on evidence of discriminatory effect to infer racial purpose, a departure from common practice. *Id.* at 341. See Yarbrough, *supra* note 43, at 74 (describing how the federal courts were reluctant at that time to inquire into legislative motive). But see *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (concurring in the result, Justice Whitaker would have found the de-annexation a violation of the Equal Protection Clause). See also *Shaw v. Reno*, 509 U.S. 630, 645 (1993) (adopting Justice Whitaker's view by treating *Gomillion* as a redistricting case).

n48. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966) (characterizing *Gomillion* as forbidding racial gerrymandering); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Gray v. Sanders*, 372 U.S. 368, 376 (1963). See also Butler, *supra* note 22, at 877-78; Katherine I. Butler, Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?, 56 *U. Colo. L. Rev.* 12 (1984).

n49. See Cortner, *supra* note 3, at 88.

n50. The Court also refused at that time to hear numerous challenges to Georgia's county unit system for electing candidates to public office. See, e.g., *Cox v. Peters*, 342 U.S. 936 (1952) (per curiam); *South v. Peters*, 339 U.S. 276 (1950); *Turman v. Duckworth*, 329 U.S. 675 (1946); *Cook v. Fortson*, 329 U.S. 675 (1946).

n51. See generally Cortner, *supra* note 3, at 35-44, 53-58, 89-91 (discussing common concerns that motivate the push to reapportionment).

n52. Grofman, *supra* note 5, at 80.

n53. Engstrom, *supra* note 3, at 184.

n54. *Baker v. Carr*, 369 U.S. 186, 197-98 (1962).

n55. *Id.* at 209.

n56. Cortner, *supra* note 3, at 158-59 (quoting Arthur L. Goldberg) (internal citations omitted).

n57. See *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962), vacated sub nom. *Gray v. Sanders*, 372 U.S. 368 (1963).

n58. Under rules established by state law in 1917, a gubernatorial candidate had to win a majority of "unit votes" to receive the Democratic nomination. Whoever won a plurality of the votes cast in a particular county received all of its unit vote, defined as twice the number of seats allotted the county in the state house of representatives. Emmet J. Bondurant, A Stream Polluted at Its Source: The Georgia County Unit System, 12 *J. Pub. L.* 86, 86-89 (1963).

n59. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962) (challenging legislative malapportionment). The House had not been reapportioned in decades despite the command of the state constitution. The Senate was also malapportioned and in multi-county districts throughout the state, counties rotated the right to elect the state senator for a single term. For this reason counties that were already under-represented on a population basis found themselves unable to elect a resident senator for two terms out of three. See *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962), rev'd sub nom. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (striking down a

malapportioned districting scheme).

n60. Joseph L. Bernd, Georgia: Static and Dynamic, in *The Changing Politics of the South* 294, 297-99, 315-23 (William C. Havard ed., 1972) (demonstrating that there was also a racial dimension to the county unit system); Bondurant, *supra* note 58, at 89-91. The dominant faction in Georgia politics, led by Eugene Talmadge and his son Herman, long depended upon putting together the votes of enough "two-unit" counties in southern Georgia to overcome opposition strength in metropolitan areas. In Atlanta and other cities, African-Americans had begun to register and vote in larger numbers after the federal courts outlawed the white primary in 1946. Because the allocation of county unit votes greatly underrepresented the urban counties where black voting strength was concentrated, the Talmadges saw the system as a barrier against "the anti-segregation pro-civil rights crowd who seek to destroy the County Unit System so they can control elections to state offices by manipulating the bloc vote centered in Atlanta." McCrary & Lawson, *supra* note 7, at 296, 313. On the racial implications of the term "bloc vote," see V.O. Key, Jr., *Southern Politics in State and Nation* 636, 648 (1949); Matthews & Prothro, *supra* note 2, at 224-29. See also *South v. Peters*, 339 U.S. 276, 277-78 (1950) (Douglas, J., dissenting) (calling the County Unit System "the 'last loophole' around our decisions holding that there must be no discrimination because of race in primary as well as general elections").

n61. Fulton County would have 40 unit votes, for example, instead of six, meaning that the mathematical weight of individual votes in Echols County would be only 14 times greater than those in Fulton. See McCrary & Lawson, *supra* note 7, at 298.

n62. *Sanders*, 203 F. Supp. 158.

n63. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

n64. 376 U.S. 1 (1964).

n65. Engstrom, *supra* note 3, at 188.

n66. *Wesberry*, 376 U.S. at 8. The requirement of population was to be met "as nearly as practicable," said the Court, but in time the standard in congressional redistricting cases came to be virtually zero deviation. *Id.* at 7-8. See *Karcher v. Daggett*, 462 U.S. 725 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). Deviations up to ten percent have routinely been permitted in state legislative and local redistricting plans.

n67. *Wesberry*, 376 U.S. at 7-18.

n68. *Id.* at 42. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Sup. Ct. Rev.* 119, 135 (Philip B. Kurland ed., 1965) ("Mr. Justice Harlan, in dissent, had all the better of the historical argument.").

n69. 369 U.S. 186 (1962). See Cortner, *supra* note 3, at 160-91 (exploring differences between the positions of Charles Morgan, David Vann, and John McConnell).

n70. *Sims v. Frink*, 208 F. Supp. 431, 435 (M.D. Ala. 1962).

n71. Cortner, *supra* note 3, at 189-90, 2001.

n72. 377 U.S. 533 (1964). See Dixon, *supra* note 3, at 261-67, 288-89 (referring to *Reynolds v. Sims* as the "vehicle for the principled opinion in the "Reapportionment Decision"). *Id.* at 263.

n73. *Reynolds*, 377 U.S. at 555 (citing *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

n74. *Id.* at 577.

n75. *Id.* at 579. Factors mentioned as potentially valid reasons for departure from population equality included respect for political subdivision boundaries and "natural or historical boundary lines." *Id.* at 578-81.

n76. See *id.* at 590-608 (Harlan, J., dissenting) ("I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or require this Court to do so."). Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 286 (2000) (writing of the one person, one vote decisions that "Justices Frankfurter and Harlan were surely correct that neither the founding fathers nor the

authors of the Fourteenth Amendment believed that an arithmetic equality of votes had to underlie all schemes of representation."). On the other hand, in practice most state legislatures at the time roughly approximated the one man, one vote principle. See Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 *Soc. Sci. Hist.* 159 (1998).

n77. See generally Cortner, *supra* note 3, at 236-40, 243-45; Dixon, *supra* note 3, at 374-76, 404; Garrow, *supra* note 1, at 132 (discussing the rise and fall of the Dirksen amendment and the passage of the Voting Rights Act).

n78. Also defeated by strong liberal opposition in the Senate was a proposed moratorium on further apportionment litigation sponsored by Dirksen and majority leader Mike Mansfield of Montana. The American Bar Association proposed similar amendments. See Cortner *supra* note 3, at 245-46; Dixon, *supra* note 3, at 385-86, 396-97.

n79. See, e.g., *Kirkpatrick v. Preisler*, 394 *U.S.* 526 (1969) (rejecting Missouri's argument that a fixed numerical variance should be considered *de minimis* and satisfy the "as nearly as practicable standard"). In *Karcher v. Daggett*, the Court struck down New Jersey's congressional redistricting plan even though it had less than one percent deviation. 462 *U.S.* 725 (1983).

n80. *Connor v. Finch*, 431 *U.S.* 407, 418 (1977). See also Grofman, *supra* note 5, at 82 n.19 (internal citations omitted) ("Total deviation is the sum in absolute value of the deviations from ideal (average) district size of the largest district and of the smallest district.").

n81. But see *Blacksher & Menefee*, *supra* note 8, at 4, 34-37 (noting that in more recent cases, the court has required plaintiffs to prove a racially invidious purpose in order to prevail); Kousser, *supra* note 19, at 332-33 (noting that following *Gomillion*, the court took two paths, one that did not require discriminatory intent and one that did).

n82. 379 *U.S.* 433 (1965).

n83. 205 *F. Supp.* 248, 256-57 (*N.D. Ga.* 1962). The court also struck down the existing policy of rotating senators in multi-county districts after each two-year term, so that voters in only one of the counties were permitted to vote in each election. *Id.* at 257.

n84. *Id.* at 258-59. See also McCrary & Lawson, *supra* note 7, at 298, 314 n.36 (providing a chronology of the events surrounding the decision).

n85. James F. Cook, *Carl Sanders: Spokesman of The New South* 92-93 (1993) (describing that although Sanders professed a belief in segregation, "he seemed to understand that the system was eroding and someday would collapse"); McCrary & Lawson, *supra* note 7, at 299-301, 315 nn.43-54 (comparing Sanders' views to those of his contemporaries).

n86. In order to comply with court-ordered redistricting, the legislature had to reapportion at least one of its two houses. McCrary & Lawson, *supra* note 7, at 302-03, 315-16 nn.58-73.

n87. Ed Rogers, *Showdown Nears on Revised Bill*, *Cordele Dispatch*, Oct. 4, 1962, at 1; McCrary & Lawson, *supra* note 7, at 302-03, 316. Sanders was aware of the discriminatory potential of at-large elections because in his home town, Augusta, had adopted at-large elections in 1953 for the specific purpose of keeping the city council all white. McCrary, *supra* note 19, at 208-11, 222-23 nn.55-69.

n88. Rep. Twitty *Ending 20 Years in House*, *Atlanta Constitution*, Apr. 1, 1964, at 1.

n89. McCrary & Lawson, *supra* note 7, at 304, 317 n.80; Reg Murphy, *House Votes, 177-15, to Give Cities the Big Voice in New Senate*, *Atlanta Constitution*, Oct. 3, 1962, at 1, 12. Although the principal focus was on events in Atlanta, some rural legislators expressed concern about the threat of black office-holding closer to home. According to one press account, "the prospect of being in a district with counties having a heavy Negro population is causing some uneasiness among the legislators who foresee a time when a Negro senator may represent their district." Celestine Sibley, *House Gets Going on Districting*, *Atlanta Constitution*, Oct. 2, 1962, at 1, 10.

n90. McCrary & Lawson, *supra* note 7, at 304, 316 nn.79-80; *House Passes Senate Amendment*, 178-6, *Rome News-Tribune*, Oct. 8, 1962, at 1.

n91. In state court the plaintiffs argued that the Georgia Constitution required single-member districts. In

federal court they argued that conducting some senate contests at-large and some by districts was a per se violation of the Fourteenth Amendment. The federal court declined to enjoin the use of at-large elections because it did not have sufficient time to consider the merits of the plaintiffs' novel federal claim. McCrary & Lawson, *supra* note 7, at 305, 318 nn.86-87.

n92. Pye, an ardent segregationist, undoubtedly understood the racial implications of single-member districts but he also believed in upholding the state constitutional requirements. The defendants appealed Pye's ruling to the Georgia Supreme Court but also sought and won a temporary stay of Pye's injunction from the three-judge federal court, which sought to preserve the electoral opportunity for both sides in the controversy pending a final resolution of the issue in the courts. The federal stay permitted Fulton County party officials to conduct the primary on a countywide basis, and also to tabulate them on a district basis. Pye subsequently extended his prohibition on at-large voting to cover the general election. McCrary & Lawson, *supra* note 7, at 305-06, 318-19 nn.88-95.

n93. In an at-large system, Johnson would have been forced into a runoff against white candidate Ed Barfield, who came in second in the countywide tabulation and last in a field of four in the district tabulation. The Constitution editorial speculated that due to racial bloc voting, Johnson "will be hard pressed to defeat No. 2 man Ed Barfield in the runoff, according to the fat overall vote cast for Barfield and for the other candidates now eliminated." Editorial, *It Was a Confusing Primary ...*, Atlanta Constitution, Oct. 17, 1962, at 4.

n94. McCrary & Lawson, *supra* note 7, at 306, 319 n.96.

n95. See Complaint, Jan. 24, 1964, and Def.'s Mot. for Summ. J. with *Attachments*, *Dorsey v. Fortson* (N.D. Ga. 1964) (C.A. No. 8756), in the *Record of Fortson v. Dorsey*, 379 U.S. 433 (1965) [hereinafter *Record*, *Fortson v. Dorsey*].

n96. *Dorsey v. Fortson*, 228 F. Supp. 259, 263 (N.D. Ga. 1964), rev'd sub nom. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

n97. *Id.* at 264. The parties agreed as to the facts of the case, which the court decided on motions for summary judgment. The racial dimension of the controversy over at-large elections was not raised at this stage of the proceedings.

n98. Br. for Appellees at 7-9, in Record, *Fortson v. Dorsey* (citing a Pennsylvania reapportionment decision, *Drew v. Scranton*, 229 F. Supp. 310, 327 (M.D. Pa. 1964)). Although this was a plausible argument, noted the law clerk assigned to the case by Chief Justice Earl Warren, "some evidence of the alleged discrimination would, I think, be necessary." JCG, Bench Mem. at 9-10, *Fortson v. Dorsey*, No. 178 (Oct. Term 1964), Dec. 1, 1964, in *Earl Warren Papers* (Library of Congress 1985).

n99. Dixon, *supra* note 3, at 477.

n100. *Fortson v. Dorsey*, 379 U.S. 433, 436-38 (1965). The city's leading paper expressed surprise at the reversal. See Editorial, *More Confusion, But More Flexibility*, *Atlanta Constitution*, Jan. 19, 1965, at 4.

n101. 377 U.S. 533 (1964).

n102. *Fortson*, 379 U.S. at 436.

n103. *Id.* at 439. Justice Brennan continued, "when this is demonstrated it will be time enough to consider whether the system still passes constitutional muster." *Id.*; see also Dixon, *supra* note 3, at 477 (characterizing this statement as a "tantalizing invitation for further litigation").

n104. See Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 *Vand. L. Rev.* 1249, 1259 (1989) (detailing the relationship of *Fortson* to other civil rights cases).

n105. 412 U.S. 755 (1973).

n106. See, e.g., Garrow, *supra* note 1, at 36-39, 41-42 (describing the political climate and the President's reaction to Southern states' obstructionist ways); Christopher, *supra* note 16, at 5-9 (providing summaries and examples of the battle between of the Department of Justice and the states over the voting rights enforcement); Derfner, *supra* note 19, at 546-50 (describing the federal government's increasing frustration with the states leading up to the Voting Rights Act of 1965).

n107. 42 U.S.C. 1971, 1973 (2003). See also Chandler Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting*, supra note 11, at 7, 17-21 (describing the critical provisions of the Act).

n108. The work most critical of the intrusive nature of the preclearance provisions of the Act is Thernstrom, supra note 11, at 26, 38, 157-58, 162, 170, 178.

n109. See *id.* at 15-17 (observing correctly that Justice Department attorneys drafted the preclearance provisions as a way of institutionalizing the "freezing principle" recently adopted by the federal courts as a way of coping with the constantly changing discriminatory devices used by Southern registrars and election officials). See also Strong, supra note 17, at 44, 48-52, 93 (explicating the use of the "freezing theory" by the courts); L. Thorne McCarty & Russell B. Stevenson, *The Voting Rights Act of 1965: An Evaluation*, 3 *Harv. C.R.-C.L. L. Rev.* 357, 361 n.18 (1968) (providing the history of the "freezing" doctrine). Applications of the freezing principle began with *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1961), *aff'd*, 371 U.S. 37 (1962); *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962); and *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964), and was adopted by the Supreme Court in *Louisiana v. United States*, 380 U.S. 145 (1965).

n110. *Morris v. Gressette*, 432 U.S. 491, 503 (1977); *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301, 315-18, 334-35 (1966). See also generally Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *Minority Vote Dilution* 167-80 (Chandler Davidson ed., 1984) (discussing the role of preclearance in voting rights enforcement).

n111. See *Katzenbach*, 383 U.S. at 309 ("Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures ...").

n112. *Id.* at 335.

n113. Although examiners were used in only sixty counties, the threat that they might be dispatched, coupled with the fact that other provisions of the Act provided criminal penalties for officials who interfered with voters' efforts to cast their ballots, brought substantial compliance throughout the region. See U.S. Commission on Civil Rights, supra note 2, at 153-62 (providing a relatively contemporaneous description of the policy of enforcement and its results); Garrow, supra note 1, at 179-86, 190 (detailing the history of the use of examiners and the resulting effects); *Lawson, Black Ballots*, supra note 6, at 329-35 (analyzing the policy rationale for using examiners as a means of enforcement); Richard Scher & James Button, *Voting Rights Act: Implementation and Impact*, in *Implementation of Civil Rights Policy* 30-33 (Charles S. Bullock III & Charles

M. Lamb eds., 1984) (describing the role of federal examiners in enforcement);

n114. Peyton McCrary et al., Alabama, in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* 38-39, 398 n.8 (Chandler Davidson & Bernard Grofman eds., 1994) (citing *United States v. Bruce*, 353 F.2d 474 (5th Cir. 1965); *Reynolds v. Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965)); see also U.S. Commission on Civil Rights, *The Voting Rights Act ... The First Months* app. E (1965) (listing the litigation brought under the Voting Rights Act); U.S. Commission on Civil Rights, *supra* note 2, at 162-65 (describing litigation to secure voting rights, implementing the Act, and removing burdens from franchise).

n115. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding use of a poll tax unconstitutional because it was not rationally related to voting); U.S. Commission on Civil Rights, *supra* note 2, at 166-67 (describing lawsuits invalidating poll taxes in Alabama, Mississippi, Texas, and Virginia). Payment of the poll tax as a prerequisite for voting in federal elections had previously been struck down by the 24th Amendment.

n116. See Harold W. Stanley, *Voter Mobilization and the Politics of Race: The South and Universal Suffrage, 1952-1984*, 27, 94-99, 101-02 nn.26-34 (1987) (noting, however, the difficulty of identifying a precise statistical measure of the impact of the Act on voter registration or turnout).

n117. 377 U.S. 533 (1964).

n118. 247 F. Supp. 96 (M.D. Ala. 1965).

n119. *Id.* at 107-09.

n120. The court relied on both *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Fortson v. Dorsey*, 379 U.S. 433 (1965).

n121. *Gomillion v. Lightfoot*, 364 U.S. at 340-42.

n122. 257 F. Supp. 901 (M.D. Ala. 1966), modified and aff'd, 386 F.2d 979 (5th Cir. 1967).

n123. 257 F. Supp. at 902.

n124. *Id.* at 904-05.

n125. *Id.* at 905.

n126. The change, wrote Judge Johnson, was "born of an effort to frustrate and discriminate against Negroes in the exercise of their right to vote, in violation of the Fifteenth Amendment." *Id.* at 904. Judge Johnson applied the same methodology for determining intent set forth a decade later by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). For a fuller account, see McCrary, et al., *supra* note 114, at 39-41, 399 nn.16-34.

n127. Jackson Clarion-Ledger, May 18, 1966, at 1, 16.

n128. Plaintiffs' legal strategy is discussed in a letter from Denison Ray to Frank R. Parker, Oct. 22, 1967, cited in U.S. Commission on Civil Rights, *supra* note 2, at 23 n.18. Ray was, in 1967, Chief Counsel for the Lawyers' Committee for Civil Rights Under Law (representing some of the plaintiffs). Parker was the staff counsel for the U.S. Commission on Civil Rights who wrote much of Political Participation. For a full discussion of the efforts of the 1966 Mississippi legislature to minimize the effects of the Act, see Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965*, at 34-66, 214-17 (1990).

n129. 393 U.S. 544 (1969).

n130. *Id.* at 544. Four cases were consolidated in Allen, three from Mississippi. The case involving at-large elections was styled *Fairley v. Patterson*; *Bunton v. Patterson* dealt with a change from elected to appointed county school superintendents in certain counties; *Whitley v. Williams* concerned new restrictions on independent candidates. Allen involved restrictions on providing assistance to illiterate voters. *Id.* at 550-53.

n131. *Id. at 569.*

n132. *Id.*

n133. "Clearly, the Court could not stand by while southern whites in covered states - states with dirty hands on questions of race - altered electoral rules to buttress white hegemony." Thernstrom, *supra* note 11, at 4. Indeed, she characterizes the decision as "correct." *Id.* at 29-30. Yet she also charges that, once the Court "enlarged the definition of enfranchisement" to include protection against vote dilution, it was on a slippery slope leading to "entitlement" to proportional representation, "the power, that is, to elect blacks." *Id.* at 4. This view is reiterated in Stephan Thernstrom & Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 465-66 (1997).

n134. Thernstrom, *supra* note 11. In this view Thernstrom follows the reasoning in Justice John M. Harlan's dissent in *Allen*, which she believes "incontrovertible." *Id.* at 24.

n135. Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 *Harv. C.R.-C.L. L. Rev.* 393, 401 n.38 (1989); Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 *J.L. & Pol.* 751, 755-57 (1988) (book review). In the simultaneous debate over the Dirksen amendment, moreover, Senator Robert F. Kennedy of New York referred to use of at-large elections as part of the effort of Southern white legislators "to keep the Negro a political cripple indefinitely." Dixon, *supra* note 3, at 408 (quoting 111 Cong. Rec. 18616 (daily ed. Aug. 4, 1965)).

n136. The Nixon administration made a substantial effort to eliminate the preclearance provisions altogether, but was unsuccessful. See Thomas Byrne Edsall & Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* 84 (1991); Lawson, *In Pursuit of Power*, *supra* note 6, at 130-51, 154-57.

n137. *Georgia v. United States*, 411 U.S. 526, 533 (1973).

n138. Mississippi chose to seek preclearance from the Attorney General, rather than from a three-judge panel in the District of Columbia. In addition to the fact that the administrative route was faster than litigating the issue, the state may have believed that President Nixon's "Southern strategy" had spawned a climate more sympathetic to the state's racial views than the more liberal D.C. Circuit. See Lawson, *In Pursuit of Power*, *supra*

note 6, at 162 (explaining that the District court "Could be expected to guard vigilantly against threats to disenfranchisement."). Two years later the state attempted to re-enact the authorization for county-wide supervisor elections struck down in *Allen*, and the Attorney General again objected. See also Frank R. Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering, 44 *Miss. L.J.* 391, 396 n.32 (1973).

n139. Extension of the Voting Rights Act: Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. 149 (1975) (testimony of Frank R. Parker); U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, 271-72. See also Washington Research Project, *The Shameful Blight: The Survival of Racial Discrimination in Voting in the South* 149-50, 209 (1972); Comment, Mississippi and the Voting Rights Act: 1965-1982, 52 *Miss. L.J.* 803, 835-37 (1982).

n140. The guidelines are found at 28 C.F.R. 51. Ball et al., *supra* note 11, at 64-86; Days & Guinier, *supra* note 110, at 167-80.

n141. See two articles by former Voting Section attorneys: John P. MacCoon, The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965, 29 *Cath. U. L. Rev.* 107 (1979) (looking at the development of Section 5 litigation and its growing impact); John J. Roman, Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy, 22 *Am. U. L. Rev.* 111 (1972) (discussing the evolution of the remedies provided by Section 5).

n142. *Perkins v. Matthews*, 400 U.S. 379 (1971). In a startling passage, Thernstrom and Thernstrom claim that

the High Court's few Section 5 decisions are not easy to decipher, and the incoherence of its rulings released both the Department of Justice and the D.C. court from the confines of principled decision-making. The annexation cases, particularly, left the lower court and the DOJ free to pick and choose among its disparate elements in muddled majority opinions.

Thernstrom & Thernstrom, *supra* note 133, at 468. The authority Thernstrom and Thernstrom cite for this claim is Thernstrom, *supra* note 11, at ch.7. Perhaps court decisions in general are "not easy to decipher," but it is the job of lawyers, and those who write about the law, to decipher them anyway. Section 5 case law is no harder to decipher than any other body of court opinions. See Hiroshi Motomura, Preclearance Under Section Five of the Voting Rights Act, 61 *N.C. L. Rev.* 189, 221-32 (1983) (reviewing the case law regarding preclearance review of annexations and consolidations, as well as the effort of the Department to act as a surrogate for the D.C. court).

n143. *City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 354 F.

Supp. 1021, 1023-24 (D.D.C. 1972), aff'd, *410 U.S. 962 (1973)*. City of Richmond's dissenting Justices - Brennan, Marshall, and Douglas - would not have precleared the Richmond annexation because

the record is replete with statements by Richmond officials which prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a black population majority.

422 U.S. at 382. For ample evidence of this racial purpose, see John V. Moeser & Rutledge M. Dennis, *The Politics of Annexation: Oligarchic Power in a Southern City* 88-93, 98-102, 107-09 (1982). Newly appointed Justice Lewis F. Powell, Jr. abstained from the City of Richmond decision because he had earlier sought to persuade the Attorney General to preclear the annexation. Letter from Justice Powell to John N. Mitchell (Aug. 9, 1971) (on file with U. S. Dep't of Justice).

n144. During the years 1975-80, for example, annexations accounted for the largest single type of voting change to which the Department of Justice objected, and most were withdrawn only when the municipality switched from at-large to single-member district elections. U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 65, 69 tbl.6.4 (1981).

n145. *425 U.S. 130 (1976)*.

n146. The trial court, throughout its opinion, *374 F. Supp. 363 (D.D.C. 1974)*, relied on *White v. Regester*, *412 U.S. 755 (1973)*, and other vote dilution cases decided on constitutional grounds.

n147. *Beer*, *425 U.S. 130*.

n148. *Id. at 141*.

n149. *Id. at 141-42*.

n150. Because the trial court decided the case on the grounds that the redistricting plan had a dilutive effect,

it did not reach the issue of whether the change had a discriminatory intent. *374 F. Supp. at 387*. Thus the only issue before the Supreme Court was whether the lower court's ruling under the Section 5 effect standard was correct.

n151. Blumstein, *supra* note 8, at 685. In contrast, Thernstrom claims that "the Justice Department all but ignored Beer," not recognizing that Beer left the Section 5 purpose prong intact. Thernstrom, *supra* note 11, at 169.

n152. *Beer*, 425 U.S. at 141 (emphasis added).

n153. In a landmark decision effectively eliminating the purpose prong of Section 5, Justice Antonin Scalia, writing for the Court, rejects this assessment of the above wording from Beer: "We think that a most implausible interpretation. At the time Beer was decided, it had not been established that discriminatory purpose as well as discriminatory effect was necessary for a constitutional violation." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 337 (2000) [hereinafter Bossier II]. It is true that it was three months after deciding Beer before the Supreme Court ruled in *Washington v. Davis*, 426 U.S. 229 (1976), that evidence of discriminatory intent was necessary to proving a Fourteenth Amendment violation. But according to the Supreme Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Rogers v. Lodge*, 458 U.S. 613 (1982), the test set forth in *White v. Regester*, 412 U.S. 755 (1973) did, in fact, require proof of discriminatory intent. As noted below, the evidence on this point is ambiguous - too ambiguous to support Justice Scalia's interpretation of this key issue.

n154. In my view, Justice Scalia's analysis in Bossier II ignores this critical fact. See *supra* note 153 and accompanying text.

n155. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462, 471-72 (1987); *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982).

n156. *450 F. Supp. 1171 (D.C. 1978)*, *aff'd*, 439 U.S. 999 (1978). A covered jurisdiction may seek preclearance by filing a declaratory judgement action before a three-judge panel in the District of Columbia district court.

n157. *Id. at 1174-75*.

n158. See *id. at 1176* (discussing claims made by Wilkes County).

n159. *Id. at 1177*.

n160. *Id. at 1175*.

n161. See *id. at 1175-76*. The Supreme Court's affirmation indicates that this view was consistent with Beer's understanding of retrogression.

n162. *Id. at 1176*.

n163. *Id. at 1174-75*.

n164. *Id. at 1175*.

n165. See *id. at 1174-76* (holding that the county's scheme could not be maintained). See also *Hale County v. United States*, 496 F. Supp. 1206 (D.D.C. 1980) (holding that at-large elections for county commissioners had purpose and effect of abridging right to vote on basis of race).

n166. See Supplementary Submissions Rule, 28 C.F.R. 1.39 (2003) (stating that the responsibility to act as a surrogate for the D.C. court is set forth in the Department's Section 5 guidelines at 28 C.F.R. 51.39).

n167. See Ball et al., *supra* note 11, at 25, 100, 111, 116, 130, 136-37, 140, 145-46, 199 (describing that negotiation and compromise with jurisdiction officials often served to weaken the Department's voting rights enforcement); Lorn S. Foster, Section 5 of the Voting Rights Act: Implementation of an Administrative Remedy, *Publius*, Fall 1986, at 17, 22, 26-27 (indicating that no one is advocating for interest of minorities and the

process is not working in their best interest).

n168. This view is contradicted by Graham who pictures enforcement of Section 5 as a form of what he calls "the new social regulation," in which Voting Section attorneys are "captured" by a civil rights clientele much as economic regulators are typically captured by business, farmer, or labor groups. See Graham, *supra* note 11, at 179-80, 185, 187, 192. Similarly, Thernstrom characterizes Justice Department attorneys as civil rights activists who "invent law as they enforce it." See Thernstrom, *supra* note 11, at 236.

n169. *412 U.S. 755 (1973)*.

n170. See *id. at 765-70*. The case involved both malapportionment and racial vote dilution. See *id. at 756* (discussing the questions before the court). The trial court had ruled that the redistricting plan, with a total deviation of 9.9 percent, violated the one person, one vote standard. See *Graves v. Barnes*, 343 F. Supp. 704, 713, 717, 723-24 (W.D. Tex., 1972) (holding there was no justification for the deviation). The Supreme Court reversed in part, on the grounds that, except for congressional districts, where different constitutional provisions were at stake, deviations of less than 10 percent were acceptable - a ruling from which three liberal justices dissented. See *White*, 412 U.S. at 763-64, 772-82 (holding the district court's ruling of a prima facie violation was in error).

n171. *Id. at 766-69*.

n172. *Id. at 769*.

n173. *Id. at 766*. Previously, African-American plaintiffs had lost a challenge to the use of at-large elections for the Indiana legislature because that state lacked the history of racial discrimination or discriminatory slating present in Texas, leading the Court to conclude that, unlike in Texas, minority candidates lost because they ran as Democrats and not because they were black. See *Whitcomb v. Chavis*, 403 U.S. 124, 153-55 (1971). In addition, the plaintiffs conceded there was no evidence of racially discriminatory intent. See *id. at 153-54*.

n174. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court subsequently found that *White* required proof of discriminatory intent. Blumstein observes that the wording in *White* supports both the view that proof of discriminatory intent is necessary and that it is not. See Blumstein, *supra* note 8, at 669-70.

n175. *485 F.2d 1297 (5th Cir. 1973)* (en banc), aff'd sub nom. *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). As the majority opinion stated, plaintiffs must maintain the burden of showing that a plan was either "a racially motivated gerrymander" or that it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id. at 1304* (citing *Howard v. Adams County Bd. of Supervisors*, 453 F.2d 455, 457-58 (5th Cir. 1972)). Because plaintiffs here met the second standard, it was not necessary for the court to rule on the initial purpose prong of the test. See *Zimmer*, 485 F.2d at 1304.

n176. See *Zimmer*, 485 F.2d at 1308-09. See also *Blacksher & Menefee*, supra note 8, at 18-26 (describing the development of a standard for plaintiffs in vote dilution cases); McCrary, supra note 20, at 510-14 (explaining the statistical procedures used in these cases to measure the degree of racial bloc voting); Timothy G. O'Rourke, Constitutional and Statutory Challenges to Local At-Large Elections, 17 U. Rich. L. Rev. 39, 51-57, 78-81 (Fall 1982) (discussing the move from an intent standard to a "results" standard).

n177. Frank R. Parker, The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va. L. Rev. 715, 725 (1983) (detailing the shift from an intent to a results based standard for Section 2 violations).

n178. *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981).

n179. See Gregory A. Caldeira, Litigation, Lobbying, and the Voting Rights Bar, in Grofman & Davidson, Controversies in Minority Voting, supra note 11, at 230-35. The names of all attorneys on a case are listed in each published court opinion; this is the principal basis for my knowledge of the careers of attorneys discussed in the text above.

n180. See *City of Mobile*, 446 U.S. at 66 (requiring proof of intent as well as a more difficult standard for inferring racial purpose through circumstantial evidence). Although supported by only a plurality, Justice Potter Stewart's opinion was the prevailing view on the Court. See also O'Rourke, supra note 176, at 56-57 (describing how the Fifth Circuit Court of Appeals had anticipated the intent requirement in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), and *Thomasville Branch of NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978)).

n181. See *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982) (holding at-large plan violated

Fourteenth and Fifteenth Amendments and finding discriminatory intent and effects); *Brown v. Board of Sch. Comm'rs of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982). See also Peyton McCrary, History in the Courts: The Significance of *City of Mobile v. Bolden*, in Davidson ed., *Minority Vote Dilution*, supra note 20, at 47-63.

n182. See Thomas M. Boyd & Stephen J. Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 *Wash. & Lee L. Rev.* 1347 (1983) (describing how the 1982 amendments changed the Voting Rights Act); Armand Derfner, Vote Dilution and the Voting Rights Act Amendments of 1982, in Davidson ed., *Minority Vote Dilution*, supra note 20, at 145-63 (reviewing the struggle to pass the new amendments to the Voting Rights Act); Parker, supra note 177, at 725. See also Thernstrom, supra note 11, at 79-136 (arguing that Congress was misguided in adopting a results test because she favors an intent standard).

n183. See *Blacksher & Menefee*, supra note 8, at 31-32; McDonald, supra note 104, at 1265.

n184. See *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986). See also McCrary et al., supra note 114, at 54-64 (describing the effects of the court's decision in changing from at-large district elections to district elections in Alabama).

n185. See McCrary & Hebert, supra note 41, at 118-21 (summarizing the evidence). The most colorful evidence was a speech by a member of the State Democratic Executive Committee explaining that without an anti-single shot law or a numbered place requirement, "it would be easy under the single shot voting for all of them to come in, to put a scalawag or put a negro [sic] in there." He complained about "increasing Federal pressure to ... register negroes [sic] en masse, regardless of ... their criminal records." In one black belt county "where there were very few darkies [sic] registered, there has probably increased 4 or 5 hundred percent already," he claimed. In such a context "it has occurred to a great many people, including the legislature of Alabama, that there should be numbered places." See also Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits*, 28 *How. L.J.* 463 (1985) (discussing other cases where intent evidence was important during the 1980s).

n186. *Thornburg v. Gingles*, 478 U.S. 30 (1986), aff'g in part, rev'g in part *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984). These three criteria provide a threshold test. Once satisfied, plaintiffs still have to satisfy the "totality of the circumstances" test of *White v. Regester*.

n187. See generally Davidson & Grofman, *Quiet Revolution in the South*, supra note 4, at 35-36, 84, 120-21, 143, 171-73, 210-12, 247, 256, 284-87 (documenting the numerous redistricting plans resulting from

settlements of Section 2 claims).

n188. See Pildes, *supra* note 13, at 1362-76 (summarizing the findings of Davidson & Grofman, *Quiet Revolution in the South*, *supra* note 4, and relating them to voting rights case law as of the mid-1990s). As Pildes observes, these findings provide more definitive proof of the conventional view among political scientists that at-large elections serve as a significant barrier to minority representation). See generally Albert K. Karnig & Susan Welch, *Black Representation and Urban Policy* (1980); Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 *J. Pol.* 982 (1981); Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 *Am. Pol. Sci. Rev.* 344 (1981); Clinton B. Jones, *The Impact of Local Election Systems on Black Political Participation*, 11 *Urb. Aff. Q.* 345 (1976) (examining research on the impact of at-large systems on black political participation); Albert K. Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors*, 12 *Urb. Aff. Q.* 223-42 (1976) (considering the determinants of black political representation); Margaret B. Latimer, *Black Political Representation in Southern Cities: Election Systems and Other Causal Variables*, 15 *Urb. Aff. Q.* 65, 65-86 (1979) (studying how black representation in city government is influenced by election systems and socioeconomic variables).

n189. But see Grofman, *supra* note 5, at 145 (pointing out that, as political scientists and political geographers have long understood, single member district plans imperfectly optimize minority voting strength and are often quite far from proportionality). See also Peggy Heilig & Robert J. Mundt, *Your Voice at City Hall: The Politics, Procedures, and Policies of District Representation* (1984); Theodore S. Arrington & Thomas G. Watts, *The Election of Blacks to School Boards in North Carolina*, *W. Pol. Q.* 1099, 1099-1105 (1991); Charles S. Bullock, *Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans*, 56 *J. Pol.* 1098 (1994), 1098-1105 (all showing that single member districts usually provide far greater representation for minority voters than do at-large elections). Two recent longitudinal studies by economists using advanced regression models confirm a continuing, though diminished, discriminatory effect to the use of at-large elections. Tim R. Sass & S.L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 *J.L. & Econ.* 367 (1995); Tim R. Sass & Bobby J. Pittman, Jr., *The Changing Impact of Electoral Structure on Black Representation in the South, 1970-1996*, 102 *Pub. Choice* 369 (2000).

n190. See Davidson & Grofman, *Quiet Revolution in the South*, *supra* note 4, at tbls.2.3, 2.7, 3.3, 3.7, 4.3, 4.3A, 4.7A, 5.3, 5.7, 6.3, 6.3A, 6.7, 6.7A, 7.3, 7.3A, 8.3, 8.7, 9.3, 9.7, 10.4, and 10.5 (showing black representation in heavily black districts).

n191. Abigail Thernstrom ignores this fundamental fact, claiming incorrectly that "the majority-white county, city, or district in which whites vote as a solid bloc against any minority candidate is now unusual." Thernstrom, *supra* note 11, at 243. She also believes that blacks should in many cases be willing to settle for the fact that they "become a powerful swing vote when white candidates begin to compete." *Id.* at 23. When

Thernstrom discusses specific evidence of racially polarized voting presented in vote-dilution lawsuits (as in her discussion of the findings in Thornburg, at 207-08, 216), she often gets the facts wrong. See e.g. Karlan & McCrary, *supra* note 135, at 759 n.53 (critiquing Thernstrom's discussion of the findings in Thornburg v. Gingles in Thernstrom, *supra* note 11, at 207-08, 216). Pildes contends that, because of Thernstrom's indifference to the empirical evidence of racially polarized voting, judges and justices who rely on her for evidence on this subject are misguided. See Pildes, *supra* note 13, at 1365-67.

n192. At first glance, Susan Welch appears to show that at-large elections no longer have a racially discriminatory effect. See Susan Welch, *The Impact of At-Large Elections on the Representation of Blacks and Hispanics*, 52 J. Pol. 1050 (1990). Welch's sample of cities seems, however, to reflect what is known in statistics as a "selection bias." Particularly in the South, many at-large systems that had diluted minority voting strength in the past have, in many cases as a result of litigation, now shifted to single-member districts or mixed plans, leaving only a few at-large systems in jurisdictions where racially polarized voting may have been less pronounced than usual. See Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in Davidson & Grofman, *Quiet Revolution in the South*, *supra* note 4, at 320-21 (arguing for the continuing importance of the Voting Rights Act to protect minority rights of representation).

n193. But see *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982); *Kirksey v. Bd. of Supervisors of Hinds County*, 402 F. Supp. 658 (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd*, 554 F.2d 139 (5th Cir. 1977) (en banc).

n194. Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act - A Perspective from the Justice Department*, in Wayne Arden et al., *Race and Redistricting in the 1990s* 80, 88-89 (Mark A. Posner ed., 1998). These numbers were calculated as of July 1, 1995; Posner was then an attorney with the Voting Section.

n195. *Id.* Posner's numbers and percentages are approximate, but they are the best available data.

n196. Motomura, *supra* note 142, at 233-36; Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment in Minority Vote Dilution*, *supra* note 20, at 85-117.

n197. Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 116-21 (1992).

n198. See generally *Kirksey v. Bd. of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 968 (1977); *Moore v. Leflore County Bd. of Election Comm'rs*, 502 F.2d 621 (5th Cir. 1974); *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979), aff'd, 444 U.S. 1050 (1980).

n199. Allan J. Lichtman & J. Gerald Hebert, A General Theory of Vote Dilution, 6 *La Raza L.J.* 1, 10-19 (1993).

n200. Grofman et al., supra note 197, at 120.

n201. Days & Guinier, supra note 110, at 170-71; Grofman, supra note 5, at 78 n.5; Motomura, supra note 142, at 238-39, 241.

n202. Thernstrom, supra note 11, at 170.

n203. Raymond Wolters, Right Turn: William Bradford Reynolds, the Reagan Administration, and Black Civil Rights 131-35 (1996). Reynolds' own views are reflected in his congressional testimony in 1982 against the creation of a Section 2 results test. See Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992 and H.R. 3112 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1655-1850 (1982).

n204. Posner, supra note 194, at 88-89.

n205. I base this assertion on publicly available documents, especially those contained in the Nomination of William Bradford Reynolds to be Associate Attorney General of the United States, and on the work of legal commentators, but not on review of internal documents. See Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearings Before the Senate Comm. On the Judiciary, 99th Cong., 1st Sess. (1985) [hereinafter Reynolds Nomination Hearings]; Guinier, supra note 135, at 407. A revised and abridged version of this article is available in Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in a Representative Democracy* 21-40 (1994).

n206. See *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983); Reynolds Nomination Hearings, supra note

205, at 410-39 (reporting the memorandum of Robert N. Kwan).

n207. Guinier, *supra* note 135, at 403, 405-06.

n208. My use of the terms implementation and impact is consistent with the conventional meaning of these terms. See, e.g., Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law* 36-37 (1977); Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 *Pol. Stud. J.* 541 (Special Issue No. 2, 1980); Donald S. Van Meter & Carl E. Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 *Admin. & Soc'y* 447 (1975).

n209. Cortner, *supra* note 3, at 257-61.

n210. The following discussion is taken from Peyton McCrary, *Why the Voting Rights Act Worked: A Judicial Model of Policy Implementation*, Paper Presented to the Association for Public Policy Analysis and Management, Washington, D.C. (Nov. 1997) (on file with author).

n211. Once serving on the governing body or in the legislature, however, minority officeholders were successful only to the degree that they were able to participate in winning coalitions and reshape the agenda to better meet the needs of their constituents. In my view, these goals are beyond the scope of the remedies possible under the Act. But see Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 *Va. L. Rev.* 1413 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 *Mich. L. Rev.* 1077 (1991). Revised and abridged versions of these two articles are found in Guinier, *supra* note 205, at 41-70, 71-118.

n212. See Karlan, *supra* note 14, at 288; McDonald, *supra* note 14, at 273-74.

n213. Supreme Court decisions in which conservative justices have approvingly cited conservative legal commentator Abigail Thernstrom include *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); and *Shaw v. Reno*, 509 U.S. 630 (1993). For trial court discussions citing Thernstrom's work, see *France v. Pataki*, 71 F. Supp. 2d 317 (S.D.N.Y. 1999); *Reed v. Town of Babylon*, 914 F. Supp. 843, 885 (E.D.N.Y. 1996); *Johnson v. Miller*, 864 F. Supp. 1354, 1384 (S.D. Ga. 1994); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); and *Turner v. Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991).